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Guiguo Wang

Priscilla M F Leung

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ONE COUNTRY, TWO SYSTEMS: THEORY INTO PRACTICE

Guiguo Wang [†]
Priscilla M F Leung [‡]

Abstract: The Hong Kong Special Administrative Region was established on July 1, 1997, when the former colony was handed over by Britain to China. Thereafter the policy of “One Country, Two Systems” began as dictated by the Basic Law. This article examines the evolution of the “One Country, Two Systems” policy and discusses how this policy has been reflected in the Basic Law. As any change in the Basic Law may affect the implementation of this policy, and perhaps the stability and prosperity of Hong Kong, this article also analyses the scheme, policies and rules in relation to interpreting and amending the Basic Law. It advocates for learning from the experience of other common law jurisdictions and recommends adopting the principles of consistency, progressiveness and foreseeability in interpreting the Basic Law.

I. INTRODUCTION

On July 1, 1997, China resumed exercise of its sovereignty over Hong Kong and began to implement the policy of “one country, two systems” by establishing the Hong Kong Special Administrative Region (“SAR”). The laws of the Hong Kong SAR were incorporated into the Chinese legal system¹ with the coming into force of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (“Basic Law”).² How the Basic Law is to be implemented and interpreted while maintaining Hong Kong’s current social system is unclear. The transition has

[†] J.S.D., Yale Law School; Woo Po Shing Professor (Chair) of Chinese and Comparative Law, City University of Hong Kong; Visiting Professor of Law, the People’s University of China, Beijing, China; Arbitrator, China International Economic and Trade Arbitration Commission (CIETAC), Beijing, China.

[‡] Associate Professor of Law, City University of Hong Kong; BSSC (Chinese University of Hong Kong); CPE (Manchester Metropolitan University of London); PCLL (University of Hong Kong); LL.M (People’s University of China); Barrister (Supreme Court of Hong Kong).

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¹ Chinese scholars argue that there will be four different legal systems in China including that of the Mainland, Hong Kong, Macao and Taiwan. See HUANG JIN, A STUDY OF INTERREGIONAL CONFLICTS OF LAW 317-66 (1996).

² Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa [The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China], translated in 29 I.L.M. 1511 (1990) [hereinafter Basic Law].

been beset by early difficulties. Less than two weeks after the SAR was established, the Courts in Hong Kong were called upon to decide whether the establishment of the Provisional Legislative Council was valid under the Basic Law.

To have a proper law is important for the Hong Kong SAR, and the Basic Law may be such a vehicle. How the Law is to be implemented and interpreted is at least as important. In order to establish the principles for interpreting the Basic Law, one must examine the legislative history of the Law and the policies that gave it shape. Consistent interpretation of the law is important since no matter how good a law is, if it can be reinterpreted easily, it does not offer much help to the society, for both foreseeability and stability of law will be defeated. Keeping these issues in mind, this Article examines the evolution and essence of the "one country, two systems" policy, and highlights its difficulties. It then discusses the scheme, policies, and rules in relation to interpreting and amending the Basic Law.

II. EVOLUTION OF THE "ONE COUNTRY, TWO SYSTEMS" POLICY

China's long history is full of glories and glooms. In the past, China suffered humiliation by foreign powers through a series of "unequal treaties" which undermined its sovereignty.³ Following the Opium War (1839-1842) for example, China was forced to sign treaties ceding land to the UK, Japan, Portugal, and Russia.⁴ China ceded Hong Kong to the UK under such a

³ China raised the issue of unequal treaty for the first time in the 1920s and in particular the Kuomintang government demanded to abrogate all treaties imposed on China by the foreign powers. According to the Kuomintang government, treaties must be "based on mutual benefit and equality of states" and as all those treaties imposed on China by the foreign powers were not based on mutual benefit, it was demanded to be abrogated. The same approach was adopted by the government of the People's Republic of China which denounced those unequal treaties as being in violation of state sovereignty and demanded equal treatment among states. See YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 9 (1997).

⁴ The Opium War ended by signing the Treaty of Nanking in 1842 between China and the UK. Under that treaty (art. III) it was thought necessary and desirable for the British subject to have some port where they may careen and refit their ships, and keep stores for that purpose. In order to satisfy that need, the Chinese Government ceded the Island of Hong Kong to the UK, to be possessed in perpetuity and to be governed by such laws or regulations as deem fit or directed by the UK government. Later when the Convention of Peking, 1860 was signed, the township of Cowloon [Kowloon] was ceded to the UK by the Chinese Government with a view to the maintenance of law and order in and about the harbour of Hong Kong. The New Territories was leased to the UK by China according to the Convention of Peking, 1898 as it was necessary for the proper defense and protection of the colony. The cession of land, which started on the grounds of necessity and desirability of maintaining ships, became a main feature of the following conventions or treaties. However, in 1898 the secession of land was stopped and it changed into leasing of lands. Treaty Between China and Great Britain, August 29, 1842, 93 CONSOL. T.S. 464 (for cessation of

treaty.⁵ Toleration of the foreign presence on former Chinese territory continued until 1949, when the Kuomintang Government was ousted and the People's Republic of China was established. The Chinese government and Chinese scholars consider the period from 1842 to 1949 a "century of humiliation" during which China was demoted to a semi-colony of Western countries.⁶ After the current government was established in 1949, China was isolated from the rest of the world for almost three decades due to ideological and political differences. Its window was only open to countries with the same ideologies.⁷ China's economy remained fragile during its isolation, but began to improve in 1980, when the government began to implement economic reform policies.⁸ As a result of such economic, political, and historical reasons, China has always treated sovereignty as a matter of principle which cannot be compromised. Those who conceded territories to foreign powers in the past have always been condemned by the Chinese.⁹

To resume sovereign control over the lost territories and to maintain territorial integrity have always been the highest political objectives of the PRC government. After the People's Republic was established, reuniting Taiwan, Hong Kong, and Macao was naturally stated to be one of the main

Hong Kong).

⁵ See Treaty Between China and Great Britain, *supra* note 4; Convention of Friendship Between Great Britain and China, October 24, 1860, 123 CONSOL. T.S. 71 (for lease of Kowloon); Convention Between Great Britain and China Respecting an Extension of Hong Kong Territory, June, 9 1898, 186 CONSOL. T.S. 310 (for lease of the New Territories).

⁶ It was reported that about 18 countries imposed unequal treaties on China before 1949. For a detailed discussion on unequal treaties, see generally Zhang Zhen, *Discussion on Unequal Treaties, in PEACE, JUSTICE AND LAW 111* (Zhou Zhonghai ed., 1993). See also JEROME ALAN COHEN & HUANGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 3-22* (1974).

⁷ The then Soviet Union was the favorite partner of China in the area of trade and other cooperation in the early 1950's. See Declaration of the USSR on the Foundation for the Development and Further Strengthening of Friendship and Cooperation between the Soviet Union and Other Socialist States, October 30, 1956, Soviet News, no. 3502:1-2 (Oct. 31, 1956). The declaration of the USSR was well supported by the Chinese government. See Statement by the Government of People's Republic of China on the Declaration by the Government of the Soviet Union on October 31, 1956, WCC 1956-57, IV Nov. 1, 1956, at 148-50; PC no.2, Supp. 1-2 (November 16, 1956). Starting from the late 1950s, China and the former Soviet Union became hostile to each other. This relationship did not normalize until after the Cold War ended.

⁸ In China, economic reforms started after the Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, adopted on 22 December 1978. See GUIGUO WANG, *WANG'S BUSINESS LAW OF CHINA I-143* (1997) [hereinafter WANG, BUSINESS LAW]. Prior to the economic reforms, China was among the poorest countries in the world.

⁹ In the movies, plays, operas, novels as well as textbooks of history, those who conceded territories have always been treated as negative figures who were guilty persons condemned by history. At the same time, those who recovered territories were regarded as national heroes.

tasks of the new Chinese government.¹⁰ Internal and external pressures, however, prevented this reunification.¹¹

After the Cultural Revolution,¹² the Chinese government adopted a pragmatic attitude toward reuniting Taiwan, Hong Kong, and Macao with the motherland.¹³ As early as 1981, the Chairman of the National People's Congress, the late Mr. Ye Jian Ying, made a statement on the eve of National Day that "after peaceful reunification, Taiwan may become a special administrative region with a high degree of autonomy which means that the existing social system, economic system and life-style of Taiwan will remain unchanged, and so will Taiwan's economic and cultural relationship with foreign countries."¹⁴

Mr. Ye's statement was preceded by the *Report on the Amendment of the Constitution of the People's Republic of China* by the late Mr. Peng Zheng, Chairman of the National People's Congress. The report emphasized the importance of the reunification of the motherland and recommended that the government establish special administrative regions, if necessary to achieve that goal.¹⁵ It was understood that the special administrative regions'

¹⁰ In the Preamble of the Constitution of the People's Republic of China, with regard to reunification of Taiwan to the motherland, it is stated: "Taiwan is part of the sacred territory of the People's Republic of China. It is the lofty duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland." ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], preamble (1982).

The Constitution, which was adopted at the 5th Session of the 5th National People's Congress and came into force on December 5, 1982, only mentioned Taiwan for the reunification of the motherland and not Hong Kong or Macao. This omission is because Hong Kong and Macao were under the control of foreign countries according to international treaties, whilst Taiwan is not. Long before 1982 the Chinese Government had already started discussing the future of Hong Kong with the British Government. The question of Hong Kong had always been on the agenda of the Chinese Government. The reason behind the introduction of Article 31 in the Chinese Constitution was to accommodate Hong Kong as a Special Administrative Region under the policy of "one country, two systems" ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 31 (1982).

The Chinese Constitution was promulgated three times since 1954 but the task of reunification has always been the prime task of the Chinese Government and Chinese people. For a brief historical survey of the Chinese Constitution see ALBERT HUNG-YEE CHEN, AN INTRODUCTION OF THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 42-45 (1992).

¹¹ In history, China had two other opportunities to re-acquire Hong Kong. The first was in 1945 when Japan surrendered. The second was in 1949 when the Liberation Army reached Shenzhen boarder. Due to internal and external considerations, China could not take steps to take Hong Kong back.

¹² The Cultural Revolution started in 1966 and ended in 1976 during which veteran revolutionaries and scholars suffered tremendously and the entire country was in disorder.

¹³ With internal struggle going on, China was not able to adopt such a policy during the Cultural Revolution. This policy also reflected China's realization of its political, economic and military weaknesses.

¹⁴ See SPECIAL GROUP ON THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR, FINAL REPORT ON THE RELATIONSHIP BETWEEN THE BASIC LAW AND THE CONSTITUTION 2 (Feb. 10, 1987).

¹⁵ This recommendation was later adopted as Article 31 of the constitution which stipulates: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions." ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 31 (1982).

social, economic, and legal systems might be different from those of the rest of China. That is, within the same country, different systems could co-exist. In September 1982, in his meeting with then British Prime Minister Margaret Thatcher, Deng Xiaoping said that reintegrating Hong Kong into China could be resolved through a policy of "one country, two systems."¹⁶

When the policy of "one country, two systems" was first announced, not even the Chinese government was certain of its content.¹⁷ The negotiation and signing of the *Joint Declaration on the Question of Hong Kong between China and Britain*¹⁸ (the "Joint Declaration") provided an opportunity to define the policy.¹⁹ Soon after the Joint Declaration was initialed, the People's Daily published an article intended as a blueprint for the special administration regions. It states:

First of all, to safeguard China's sovereignty, unity and territorial integrity is a basic principle we should adhere to in establishing special administrative regions. Our country should be a unified country. There is only one China in the world, and that is the People's Republic of China. It exercises sovereignty over its special administrative regions. Ours is a socialist country with a unitary system. It is not a federal country. [The National People's Congress ("NPC")] is the supreme power organ of the state and its permanent body is the NPC Standing Committee. Both exercise the legislative power of the state. The State Council, that is, the Central People's Government, is the executive body of the supreme power organ of the state and the

¹⁶ See IEONG WAN CHONG, "ONE COUNTRY TWO SYSTEMS" AND THE MODERN CONSTITUTIONAL SCIENCE 93 (1996). When this phrase was first used, there were eight Chinese characters, that is, Yi Guo Jia, Liang Zhong Zhi Du. Later, they were simplified to four characters—Yi Guo Liang Zhi.

¹⁷ Although the content of the policy of "one country, two systems" was not clear, the underlining theme was very clear. Regarding the question of the reunification of Taiwan, whether China should achieve reunification of the two sides of the Taiwan Strait under the socialism which China pursues and gobbles up Taiwan, or under the capitalist system of Taiwan to gobble up mainland China, the Chinese government rejected both ideas as they were undesirable. See Qian Qichen, *Looking to the Future with Optimism*, S. CHINA MORNING POST, June 18, 1997, at 11.

¹⁸ 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, 23 I.L.M. 1366 (1984), available in LEXIS, Intlaw Library, Hlmtly File [hereinafter Joint Declaration]. The Joint Declaration was signed in Beijing on December 19, 1984 and came into force from May 27, 1985 when the instruments of ratification were exchanged. *Id.*

¹⁹ It was also the first time that this policy was stated in an international agreement. For discussion on the history of the negotiation and significance of the Joint Declaration, see TEACHERS KNOWING THE BASIC LAW 4-11 (Li Changdao ed., 1997).

highest organ of state administration. The special administrative regions are local administrative regions under the unified central leadership. They are not member states. The relationship between the special administrative regions and the central authorities is one between localities and central authorities. They must exercise their powers within the limits of their authority as prescribed by the laws enacted by the NPC.²⁰

Clearly, in the view of the Chinese government, despite their "high degree of autonomy," special administrative regions should not be considered states of a federal nation. Rather, they are local governments.²¹ Accordingly, their powers and autonomy must be delegated by the central government, and the policy's two branches—"one country" and "two systems"—should be balanced.²² That there will be "two systems" is necessary as a means to reunite China, but it is not the objective.²³ For the Chinese government, sovereignty and unity of the country is the most important objective. This was reinforced by Deng Xiaoping:

"One country, two systems" must be discussed on two levels. On one level is the fact that within a socialist country we will be

²⁰ *Remin Ribao on Special Administrative Regions*, translated in FOREIGN BROADCAST INFORMATION SERVICE-CHINA REPORT, Oct. 2, 1984, at K 19, quoted in Huangdah Chiu, *Legal Problems with the Hong Kong Model for Unification of China and Their Implications for Taiwan*, 2 J. CHINESE L. 83, 87 (1988).

²¹ See XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS AND THE BASIC LEGAL SYSTEM OF HONG KONG 124-33, (1990) [hereinafter XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS].

²² One Chinese scholar pointed out that the proper functioning of "one country, two systems" depends on the balance on both "one country" and "two systems". Over emphasis on one part would undermine the other part. However, as a precondition there should be firm insistence of "one country," then the co-existence of "two systems" could be maintained. On the other hand, without maintaining a high-degree of autonomy for Hong Kong, it cannot be said that the concept of "two systems" has been applied. See Xiao Weiyun, *The Hong Kong Basic Law: A Masterpiece of Creative Legislation*, CHINA L., Sept. 15, 1995, at 87 [hereinafter Xiao Weiyun, *The Hong Kong Basic Law*].

²³ According to the theoretical journal of the Communist Party, Hongqi:

The concept of "one country, two systems" recognizes both the abuses of capitalism and its positive role in a certain historical stage, considers both the history of Hong Kong and its current state, uphold[s] the socialist principles, the unity of the motherland, the interest of the state and the people, and the adherence of China's main part of socialism, while advocating the flexibility of seeking truth from facts, and on the basis of following the socialist principles, gives attention to Hong Kong's special conditions and the interests of all sides, and permits it to preserve capitalism for an extended period and remain independent to a certain extent.

A Reliable Guarantee for Hong Kong's Long-Term Stability and Prosperity, HONGQI, Oct. 21, 1984, at 21-22 [hereinafter *Reliable Guarantee*], quoted in Denis Chang, *Towards a Jurisprudence of a Third Kind "One Country, Two Systems"*, 20 CASE W. RES. J. INT'L L. 94 103-04 (1988); see also IOENG WAN CHONG, *supra* note 16, at 89-90.

permitting a specially privileged area to be capitalist not just for a short period of time, but for decades or a full century. On another level, we must affirm that the principal system throughout the country is socialist That we uphold the socialist system and the “four cardinal principles”²⁴ was determined long ago, and is inscribed in our Constitution. The policies we formulate, including our policies toward Hong Kong, Macao and Taiwan, are also determined on the basis of upholding the four cardinal principles. Without the Chinese Communist Party, and without China’s socialism, who could formulate this type of policy?²⁵

Deng’s statement affirms that the special administrative regions are autonomous only to the extent authorized by the central government.²⁶ Matters which are not delegated to the special administrative regions will be dealt with by the central government. In addition, the central government may intervene in the management of the special administrative regions whenever the principle of “one country” is affected.²⁷ The Chinese government has never excluded the possibility of intervention by the central government. In its view, since the special administrative regions are part of China, the central government has an obligation to ensure the smooth operation of the special administrative regions when the circumstances require. This belief was reflected in Deng Xiaoping’s speech to the members of the Basic Law Drafting Committee of Hong Kong Special Administrative Region (the “Basic Law Drafting Committee”):

²⁴ The “four cardinal principles” refer to upholding the pursuit of the socialist road, the proletarian dictatorship, communist party leadership and adherence to Marxist-Leninism-Mao Zedong thought. For further discussion, see Zhang, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 9 (1988).

²⁵ See *No Change in Hong Kong Policy*, BEIJING REV., Apr. 27, 1987, at 5.

²⁶ As Deng Xiaoping stated, China considers the practice of capitalism in any part of the country as a privilege, for such parts have a high degree of autonomy. Nevertheless, when a relevant law is adopted to guarantee the autonomy, the privilege is converted into a right. See *id.*

²⁷ The importance of the “one country” principle has always been emphasized by China. During the drafting process of the Hong Kong Basic Law, the division of power between the central government and the Hong Kong Special Administrative Region was hotly debated. Mr. Kenneth C.K. Chow, Barrister and former member of the Basic Law Drafting Committee, discussed this and other issues of the Basic Law with the Authors. Interview with Kenneth C.K. Chow (July 7, 1997). It is now widely supported that the “one country” is pre-condition of the “two systems.” See IOENG WAN CHONG, *supra* note 16, at 89-90.

Don't think that all of Hong Kong's affairs will be managed by Hong Kong, with the central government sitting by idly, and everything will be just fine. This is not acceptable. This type of attitude is not practical. The central government indeed will not meddle in the SAR's specific affairs; it will not need to meddle. However, what if something occurring within the SAR threatens the nation's basic interests? Can you say that such a situation could not arise? At that time, shouldn't Beijing concern itself with the matter? Can you say that no events will arise in Hong Kong which may be harmful to Hong Kong's own basic interests? Can you imagine that there will be no obstructions or destructive forces in Hong Kong? I see no grounds for such self consolation. If the central government abdicates all power over Hong Kong, then chaos may ensue, damaging Hong Kong's interests. Therefore, preserving certain powers for the central government is beneficial, not harmful, to Hong Kong.

For instance, after 1997 if someone in Hong Kong condemns the Communist Party and condemns China, we will still allow him to speak; but if the words become actions and he wants to turn Hong Kong into a "democracy" and set up a base to oppose the mainland, what then? If we cannot intervene at that time, it would not be acceptable. Intervention would first be by Hong Kong administrative organs; it is not at all certain that mainland troops stationed in Hong Kong would take any actions. If there is a disturbance or great turmoil, only then will the forces stationed in Hong Kong act; but in such circumstances they must always be able to intervene!²⁸

Apparently, the circumstances which require intervention by the central government are those affecting the sovereignty and unity of China,²⁹ such as

²⁸ See *No Change in Hong Kong Policy*, *supra* note 25.

²⁹ A commentator stated:

On the other hand, like other local autonomous areas in China, the Hong Kong SAR has to be directly under the Central People's Government whose sovereignty over the Hong Kong SAR is not just symbolic but manifested in the legal framework of the Basic Law, as a Chinese legal specialist, who was also a Basic Law drafter, said, "The Hong Kong SAR enjoys a high degree of autonomy." But this is only to say that its level of autonomy is high relative to "ordinary" autonomy. It is still autonomy and not independence. Therefore, there should be no doubt that the Central Government should have supervisory power over the manner in which the Hong Kong SAR exercises its autonomy.

attempts to convert Hong Kong into an independent democracy or any action aimed at overthrowing the leadership of the Communist Party.

Deng also hinted that the mainland would intervene whenever "Hong Kong's own basic interests" are endangered. The logic behind this tenet seems to be that so long as Hong Kong does nothing to affect the sovereignty and unity of China (the "one country" aspect), the "two systems" policy will be observed and therefore Hong Kong's own basic interest will not be harmed.³⁰ The condition for continuation of the "two systems" policy is that Hong Kong would not interfere in the affairs of the central government and that the SAR's security is not in danger. In the worst scenario, if Hong Kong's autonomy is in danger the central government may have to intervene. In such circumstances, taking into consideration the scheme stipulated in the Basic Law, consent of the Special Administrative Region may be needed.

Tung Chee-Hwa, the Chief Executive of the Hong Kong Special Administrative Region, confirmed on the eve of the handover of Hong Kong from Britain to China that the Chinese troops would not take any action without his orders.³¹ To what extent and under what circumstances is order of the Chief Executive required? Obviously, when the security of the mainland is endangered by an action in Hong Kong and the Chief Executive refuses to take any measure to stop it, the central government may order the troops to stop such action. Thus, consent of the Chief Executive for the central government's intervention must be rather limited.³²

Chinese scholars, especially those who actively participated in drafting the Basic Law, have taken a similar view. For instance, Professor Xiao Weiyun,³³ an authority in constitutional law from Peking University, believes that the concepts of "one country" and "two systems" must be taken together and that one branch should not be overemphasized while the other is

Lau Hon Chuen Ambrose, *The Basic Law and the Success of "One Country, Two Systems"*, CHINA L., July, 1997, at 76-77(Supplement for Hong Kong Return).

³⁰ The essential interest of the Hong Kong SAR should be its high degree of autonomy, for all other powers and rights have been derived from this policy. Like member states under federalism, in many aspects, the Hong Kong SAR's scope of autonomy is as large as, and even larger than, what a local federal state supposedly possesses. But unlike local federal states which had always possessed sovereignty before the federation was formed, Hong Kong had never been a full sovereign state or a separately governed entity before its status was settled under "one country, two systems;" after all, Hong Kong has been part of China since ancient times. *See id.*

³¹ *See Tung Tries to Ease Fears Over PLA*, S. CHINA MORNING POST, June 29, 1997, at 1.

³² In practice, intervention by the central government is unlikely in the foreseeable future. The retention of this power is more coercive in nature and is a demonstration of sovereignty.

³³ Professor Xiao Weiyun was a member of the Hong Kong Basic Law Drafting Committee and the Macao Basic Law Drafting Committee. When the Hong Kong Basic Law was being drafted, Professor Xiao served as convener of the political affairs sub-group of the Drafting Committee.

ignored.³⁴ In other words, the “two systems” depends on the “one country,” or the “one country” is the pre-condition for the “two systems.”³⁵ A prominent Chinese legal scholar, Zhang Youyu, agrees:

In short, in formulating the Basic Law, we must uphold the principle of “one country, two systems.” There are those who merely stress “two systems,” without stressing “one country.” There are even some who do not want “one country, two systems.” They desire, instead, “two countries, one system”—that is, they want Hong Kong to be an independent capitalist country, while at the same time they demand that all of China institute a capitalist system. This is completely absurd . . . the preservation of Hong Kong’s prosperity and stability is not only a goal for Hong Kong itself, but will also benefit China’s national socialist economic construction and the implementation of the “open policy.”³⁶

The “one country, two systems” policy is a practical solution under the current circumstance. On the one hand, Chinese leaders wanted to extend China’s sovereign control to Hong Kong. On the other hand, they were aware that foreign investors and others living outside mainland China feared the socialist system.³⁷ In order to win the support of international investors and the peoples of Hong Kong, Macao, and Taiwan, adopting the “one country, two systems” policy was a logical and practical solution.³⁸

³⁴ See Xiao Weiyun, *The Hong Kong Basic Law*, *supra* note 22, at 87.

³⁵ *Id.* at 90-91.

³⁶ Zhang Youyu, *The Reasons for Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 11-12 (1988).

³⁷ Initially foreign investors were not sure if China was a secure place for investment because they were not confident that their investment would be protected by the Chinese government. After 1980, when China rejoined the International Monetary Fund (“IMF”), the International Bank for Reconstruction and Development (“World Bank”), the International Development Association (“IDA”) and the International Finance Corporation (“IFC”) as well as successfully implemented the policy of absorbing foreign capital and technology, foreign investors became comfortable investing in China. For a detailed discussion on China’s participation in international organizations and its consequential effect on domestic legal system see Guiguo Wang, *Economic Integration in Quest of Law—The Chinese Experience*, J. WORLD TRADE, Apr. 1995, 5-28.

³⁸ In China’s efforts to build a socialism with Chinese characteristics which includes many elements, one of the important elements is that the mainland will remain socialist but certain parts (Hong Kong) of China will be allowed to continue with the capitalist system. The concept of “one country, two systems” as admitted by the Chinese Foreign Minister Qian Qichen, is part and parcel of the Chinese effort to build a socialism with Chinese characteristics. Ever since China started the policy of reform and opening up, China’s economic growth benefited from Hong Kong which served as a bridge and window linking China with the rest of the world. As

When the Joint Declaration was signed in 1984, China's policy of economic reforms and opening to the outside world was only six years old. Many Chinese, particularly conservative officials, were still suspicious of the policy.³⁹ Such people did not understand the importance of carrying out the reform policy and challenged the establishment of special economic zones within China. These people compared the special economic zones with the leased territories in old China and argued such zones were inconsistent with socialism.⁴⁰ Against this background, the grant of a high degree of autonomy to Hong Kong and the preservation of the Hong Kong economic structure was bound to engender controversy. To help allay these fears, a theoretical journal of the Communist Party of China published an article soon after the Joint Declaration was announced to point out that in resolving Hong Kong and Taiwan issues, historical facts and reality must be taken into account and that the "one country, two systems" policy is a strategic measure:

The implementation of the concept of "one country, two systems" and the adopting of special policies towards Hong Kong is not an expedient measure, but a major strategic policy decision, which has gradually taken shape since the restoration of the ideological line of seeking truth from facts at the 3rd Plenary Session of the 11th CPC Central Committee and in the process of the CPC Central Committee considering the problems of solving the Taiwan and Hong Kong issues to achieve the reunification of the motherland on the basis of the attitude of taking account of historical facts and respecting reality.⁴¹ Concerning Hong Kong, this concept starts from the basic principle that when our country resumes sovereignty over Hong

China is committed to continue the development and economic reform and to opening up, it still needs Hong Kong as a bridge and window. See Qichen, *supra* note 17.

³⁹ See Chen An, *Special Economic Zones and Coastal Port-Cities: Their Development and Legal Framework*, in CHINESE FOREIGN ECONOMIC LAW: ANALYSIS AND COMMENTARY 1 (Rui Mu and Wang Guiguo eds., 1994).

⁴⁰ *Id.*

⁴¹ Resolving historic problems by taking into consideration historical facts and current realities is a Chinese tradition. In the past, China adopted a similar attitude towards the territories acquired by Russia under other unequal treaties. After the Bolshevik Revolution in Russia (1917), the Communist Government of Russia abrogated a number of treaties which were forced on China by the previous government on the grounds that they were coercive and predatory. Nevertheless, no territory was returned to China. The Chinese government's view was, regardless of whether those territories should be returned to China, historical facts and present reality—that the people might be used to living under the former Soviet Union—must be considered.

Kong, it should at the same time maintain Hong Kong's long-term stability and prosperity. This principle conforms to the fundamental interests of the people of the whole country, including Hong Kong compatriots.

At the same time, a stable and prosperous Hong Kong also plays an important supplementary role in the four modernizations⁴² of the motherland Utilizing Hong Kong's special position and conditions will facilitate drawing in funds and introducing advanced technology and administrative and managerial experience for us and facilitate the smooth implementation of the policy of "enlivening the economy at home and opening to the external world." On the other hand, the development of the economic infrastructure in our country's interior will provide more abundant resources and a broader market for Hong Kong.⁴³

As discussed earlier, when the Joint Declaration was signed, China was closed to western capitalist countries and its experience with domestic economic reforms was very limited. At the time, no one dared to advocate for the establishment of a market economy in China.⁴⁴ Integrating Hong Kong's capitalist economy into China, therefore, has caused hesitation and concern. The Chinese government went out of its way to analyze how the two systems would interact.⁴⁵

Some people wonder whether permitting Hong Kong, after its return, to retain its capitalist system will not affect China's

⁴² The "four modernizations" is a national development policy started in the late 1970s that aimed to achieve advancement in science and technology, industry, agriculture, and defense. The prime objectives of this policy was to raise per capita income to US\$1000 and to increase the GNP four folds by the year 2000.

⁴³ *Reliable Guarantee*, *supra* note 23. See also J.Q. Yan, *The Scientific Meaning and Characteristics of "One Country, Two Systems"*, HONGQI, Mar. 16, 1985, at 18-20, reprinted in FOREIGN BROADCAST INFORMATION SERVICE-CHINA REPORT, June 6, 1985, at 26, cited in Chang, *supra* note 23.

⁴⁴ The Joint Declaration was signed in September 1984, and China announced the open policy in late 1979. During the intervening five years, the market economy was not very developed and the Chinese government had not decided on this issue either. In late 1992 China decided to establish a socialist market economy. See WANG, *BUSINESS LAW*, *supra* note 8, at I-148.

⁴⁵ Similarly, when the special economic zones were first established in China, Chinese leaders, official newspapers and journals all tried very hard to explain that the special economic zones were different from the territories which China was forced to lease to foreign powers, and that such zones would help the socialist constitution, but would not change the nature of socialism in China. The reason behind such justification is to ensure that the political enemies of the advocates will not take advantage of such moves. For historical background of the establishment of the special economic zones, see Chen An, *supra* note 39, at 1.

socialist essence. The question must be concretely analyzed according to materialist dialectics. As Hong Kong's capitalism and the mainland's materialist socialism are two basically opposits [sic] systems, when integrated into one country, is it possible for them not to conflict with each other? Undeniably, Hong Kong's capitalism cannot but affect the mainland's socialism, and refusing to admit this point is incompatible with reality. However, we must also realize that China's main part is socialism In a unified large socialist country, the presence of the capitalist system in individual areas will not change China's socialist essence⁴⁶

An important aspect of "one country, two systems" is that the people of capitalist Hong Kong govern their own affairs.⁴⁷ The Chinese government's position is that the "people" referred to are those who are loyal to mainland China; in other words, the pre-condition of Hong Kong autonomy is patriotism. So long as the people in the Special Administrative Region do not threaten the sovereignty and the unity of China, they may run their own affairs freely.⁴⁸ This principle was made clear by Deng Xiaoping, the initiator of the policy:

There is the question of a demarcation line and criterion for the Hong Kong people to administer the region. The criteria for determining who is to rule Hong Kong under the principle of "Hong Kong people administering Hong Kong" must be that patriotic people are the specific Hong Kong people to rule Hong Kong. In the future, the Hong Kong government's key personnel will be patriots; of course, the government may also contain other types of people, and may even take on foreigners as advisors. Who are "patriots"? The touchstone of a patriot is respect for his own nation, earnest and sincere support for the motherland's resumption of its sovereignty over Hong Kong and restraint from harming the stability and prosperity of Hong

⁴⁶ *Reliable Guarantee*, *supra* note 23, at 21-22.

⁴⁷ See XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 190-91; TEACHERS KNOWING THE BASIC LAW 50-54 (Li Changdao ed. 1997).

⁴⁸ A well known Chinese proverb used widely during the handover. In 1996, the Party General Secretary, Jiang Zemin, linked this point as "[w]ell water does not intrude into river water" [I will mind my own business, you mind yours]. See MING PAO DAILY, July 1, 1997, at A5.

Kong. So long as they meet these requirements, they are patriots, no matter whether they believe in capitalism or feudalism or even the slave-owning system. We don't require them all to favor China's socialist system, but only ask them to love the motherland and Hong Kong.⁴⁹

To state that only patriotic people may govern the Hong Kong Special Administrative Region is not an empty slogan. It is one of the criteria for selection of the leaders of the Special Administrative Region.⁵⁰ Chinese leaders were suspicious of the loyalties of Hong Kong's citizenry, particularly since the Hong Kong people had strongly supported the student movement in 1989, and in the last stage of drafting the Basic Law, a condition was introduced for becoming members of the first Legislative Council which stated:

[T]hose of its members [of the last colonial Legislature] who uphold the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China . . . become members of the first Legislative Council of the Region.⁵¹

While the term "Hong Kong people administering Hong Kong"⁵² does not appear in the Basic Law, the Joint Declaration specifically spells out that the government of the Hong Kong Special Administrative Region will be composed of local inhabitants.⁵³ The spirit of Hong Kong people ruling Hong

⁴⁹ Deng Xiaoping on the Hong Kong Issue, BEIJING REV., July 23, 1984, at 16, cited in Zhang, *supra* note 24, at 14-15.

⁵⁰ For example, article 44 of the Basic Law stipulates the condition for selecting the Chief Executive of Hong Kong. A Chinese citizen of not less than 40 years of age who is a permanent resident of Hong Kong with no right to abode in any foreign country and who has ordinarily resided in Hong Kong for a continuous period of not less than 20 years will be qualified for this post. Basic Law, art. 44. Obviously, these conditions will only be met by those who love Hong Kong and therefore the "patriotic people" of Hong Kong.

⁵¹ See Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted at the Third Session of the Seventh National People's Congress, April 4, 1990, ¶ 6, translated in YASH GHAI, *supra* note 3, at 572.

⁵² In addition to the policy of "one country, two systems," three other propositions lie at the heart of the Joint Declaration, namely "Hong Kong People Ruling Hong Kong" (*gangren zhigang*), "High Degree of Autonomy" (*gaodu zizhi*) and "No Change in Systems" (*zhidu bubian*). See Chang, *supra* note 23, at 103-05.

⁵³ See Joint Declaration, *supra* note 18, ¶ 3(4).

Kong has been incorporated into various provisions of the Basic Law. The requirement that the Chief Executive, the Chief Justice, and other main officials must be permanent residents who have lived in Hong Kong for a fixed number of years, and the resident requirement of the members of the Legislative Council are such examples.⁵⁴

III. ONE COUNTRY, TWO SYSTEMS UNDER THE BASIC LAW

The Basic Law implements the "one country, two systems" policy.⁵⁵ Unlike other laws in China, the Basic Law was drafted by a committee which included members from both the mainland of China and Hong Kong (the "Basic Law Drafting Committee").⁵⁶ In addition, during the drafting and negotiations among the members of the Committee, outside consultation was sought both in China and Hong Kong.⁵⁷ Since members of the Basic Law Drafting Committee were from China, a civil law jurisdiction, and Hong Kong, a common law jurisdiction, the final version of the Basic Law represents the compromise and co-operation of both legal systems.⁵⁸ In its preamble, the Basic Law lays the framework for the Special Administrative Region:

⁵⁴ The Basic Law stipulates specifically that the Chief Executive of Hong Kong must be a Chinese citizen who is a permanent resident of Hong Kong with no right to abode in any foreign country and has ordinarily resided in Hong Kong for at least 20 years. See Basic Law art. 44. The condition is the same for the President of the Legislative Council. See *id.* art. 71. For members of the Legislative Council the only condition is that they must be Chinese citizens who are permanent residents of Hong Kong with no right to abode in any foreign country. However, permanent residents of the Region who are not of Chinese nationality or who have the right to abode in the foreign countries may also be elected members of the Legislative Council. See *id.* art. 67. The qualification for the Chief Justice of the Court of Final Appeal as well as for the Chief Judge of the High Court is that they must be Chinese citizens who are permanent residents of Hong Kong with no right to abode in any foreign country. *Id.* art. 90. It is, however, noted that other judges of the Court of Final Appeal and members of judiciaries may be appointed from other common law jurisdictions. See *id.* arts. 82, 92.

⁵⁵ See XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 89-90.

⁵⁶ Out of 59 members (the original number was 60), 36 were from China and 23 from Hong Kong. It is to be noted that there were 15 lawyers in the drafting group (11 from China and 4 from Hong Kong). See YASH GHAI, *supra* note 3, at 57.

⁵⁷ During the drafting of the Basic Law, a draft was publicized and distributed among the people of Hong Kong to solicit their opinion. The collected opinions were then forwarded to the various committees of the drafting group for consideration. After analyzing those comments, "a series of major revisions" were made to the Draft of the Basic Law which was then submitted to the NPC Standing Committee in January 1989. A month later, the Standing Committee promulgated a revised draft to start another round of public consultation. See Lau, *supra* note 29, at 78.

⁵⁸ A commentator points out: "the drafting [of the Basic Law] allowed pragmatism, the rationale of seeking commonalities and accommodating differences, to be assimilated into the convergence of national and local interests, eliminating the possible clashes of social values arising out of the long time separation between Hong Kong and China." *Id.*

Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems," the socialist system and policies will not be practiced in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.⁵⁹

Some people have argued that since the preamble of the Basic Law references the Joint Declaration, it derives its authority from the laws of the United Kingdom.⁶⁰ The Basic Law's reference to the Joint Declaration, however, only reflects China's recognition of its international obligation.⁶¹ The validity of the Basic Law depends entirely on the authorization of the Chinese legislature, the National People's Congress, and the Chinese Constitution.⁶² The Joint Declaration obliges China to implement the "one

⁵⁹ See Basic Law, preamble. The legal background of the Basic Law is Article 31 of the Constitution of China which provides: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions." ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 31 (1982).

⁶⁰ For instance J.W. Harris said;

The reason why the Basic Law is valid is that it was authorised [sic], ultimately, by legislation of the United Kingdom parliament. Immediately prior to the enactment of the Hong Kong Act 1985, that parliament derived ultimate legislative power over the territory of Hong Kong from a norm of the customary United Kingdom constitution regarding competence to legislate for British colonies. The validity of our laws may thus be traced back to that customary constitution, beyond which we cannot go.

J.W. Harris, *The Basic Norm and the Basic Law*, 24 HONG KONG L.J. 207, 213 (1994).

⁶¹ Under the Constitution, the Chinese government is authorized to enter into international treaties and agreements. Article 89, Section 9 authorizes the State Council to conduct foreign affairs and conclude treaties and agreements with foreign states. ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 89, § 9 (1982). Article 67, Section 14 provides that the Standing Committee of the NPC has power to decide on the ratification or abrogation of treaties and important agreements with foreign countries. The validity of any international agreement, including the Joint Declaration, therefore depends on the operation of the Constitution of China. ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 67, § 14 (1982).

⁶² A very reputed Chinese jurist who actively participated in the drafting of the Basic Law once said "Hong Kong will enjoy a high level of autonomy, but only by virtue of the exceptional status conferred on it by the PRC Constitution." Zhang, *supra* note 24, at 7.

country, two systems” policy in the Hong Kong Special Administrative Region, but it does not add anything to the legislative power of China and therefore has little to do with the validity of the Basic Law.

Another concern is that Article 31 of the Basic Law conflicts with Article 5 of the Chinese Constitution, which stipulates:

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

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

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

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

Some argue that since “no laws . . . may contravene the Constitution” and the Constitution provides for the preservation of socialism, the Basic Law cannot guarantee the practice of capitalism in the Special Administrative Region.⁶³ Chinese constitutional scholars appear to agree, however, that the two articles can be resolved. Article 5 of the Constitution is a general provision and Article 31 is a special provision; according to the rules of interpretation, special provisions should prevail over general provisions.⁶⁴ Surprisingly, scholars from China seem to pay less attention to the potential conflict between Article 5 and Article 31 than legal scholars and lawyers from

⁶³ Interview with Xu Chung De, professor at People’s University of China and former member of the Basic Law Drafting Committee, in Hong Kong (Nov. 1996) [hereinafter Discussion with Professor Xu]. Professor Xu confirmed that this point was much debated in the drafting process of the Basic Law. He also stated this was a major concern of Hong Kong. *Id.*

⁶⁴ *See id.* Professor Xu and his colleagues hold the view that Article 31 should be considered as a special provision and therefore should prevail over other provisions of the Constitution. *Id.* Others argue that Article 31 should be read together with other provisions of the Constitution, but that there is no inconsistency or conflict because laws always provide exceptions and the Constitution should be understood in its entirety. *See* XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 92-95.

outside China.⁶⁵ This dichotomy reflects the differences among people from different jurisdictions in understanding legal concepts and laws.

Another issue is whether the Basic Law is the constitution of Hong Kong.⁶⁶ The Basic Law is often referred to as a "mini-constitution" of Hong Kong by both jurists and politicians.⁶⁷ However, the Basic Law should not be considered Hong Kong's Constitution, although it serves certain functions of a constitution for the territory.⁶⁸ The status of the Basic Law was raised during its drafting and debated in length. Professor Zhang Youyu reflects the Chinese Government's view:

At this juncture it is necessary to understand that the Hong Kong Basic Law will be a legislation enacted pursuant to the PRC Constitution, and the Basic Law is not in and of itself a "constitution." Although the Basic Law will have the highest legal effect among Hong Kong's laws, it will neither be constitutional in character, nor, in any way, be placed on an equal plane with the PRC Constitution. Hong Kong's status—that of a highly autonomous SAR—will be conferred upon it by the national Constitution. It could not be otherwise, for China is a unitary country, not a union or a federation. Hong Kong, therefore, cannot be a component of a federal republic as in the German Federal system, nor a constituent republic of a larger union as in the Soviet system, nor a federal state as in the American system.⁶⁹

Professor Zhang also referred to the drafting process of the Basic Law to support this point. He argued that since the Basic Law Drafting Committee

⁶⁵ See Discussion with Professor Xu, *supra* note 63.

⁶⁶ Chinese scholars consider the Basic Law to be a socialist law adopted according to the Chinese Constitution and that its status is the same as other basic laws adopted by the National People's Congress. See XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 103.

⁶⁷ One lawyer states that "the term 'mini-constitution' has a nice aura to it, suggesting a large degree of autonomy." David Ling, The Basic Law: A Practical Perspective, Address delivered at the 1977 Law Lectures for Practitioners 7 (Apr. 10, 1997).

⁶⁸ The Basic Law contains some common characteristics of the modern written constitution such as it stands above all laws of the land and all people in the territory including head of the government, the legislature, and the judiciary; secondly, it can be amended only by following a special procedure laid down in the document. See *id.* Others regard the Basic Law as "the foundation of the laws of the Hong Kong SAR." See Lau, *supra* note 29, at 76.

⁶⁹ Zhang, *supra* note 24, at 7 (this article was published when the Basic Law was at the drafting stage and was not promulgated by the NPC).

was established by and was responsible to the National People's Congress, the Basic Law could only be a statutory law and not a constitution.⁷⁰ Although the Chinese Government's position on the status of the Basic Law is clear, it could be argued that because the National People's Congress is also fully empowered to amend and re-enact the Constitution, its approval of the Basic Law gives the Law constitutional authority.⁷¹

One commentator opines that the Basic Law is also a political document designed by the Chinese Government to achieve specific goals:

The Basic Law is a deliberate human construct which sets out in one document the intention, purpose and vision of the PRC for the future Hong Kong as a SAR, through the drafting committee appointed by the PRC. The Basic Law, therefore, contains the principles and rules delineating a perimeter and shape. Also, unlike many other constitutional documents, the Basic Law was essentially "bestowed" upon the Hong Kong Chinese. It can therefore be said that the Basic Law is also a political document designed by the PRC for specific purposes. . . . It contains provisions looking like a contract of social arrangement between the Beijing Central Government and Hong Kong residents."⁷²

The importance of the discussion on the nature of the Basic Law is that if the Basic Law were considered the constitution of Hong Kong, Hong Kong would in effect become a state of a federal nation.⁷³ Accordingly, whatever powers and rights not addressed in the Basic Law would remain with Hong Kong, not China, including.⁷⁴

⁷⁰ *Id.*

⁷¹ See ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 62 (1982).

⁷² Ling, *supra* note 67, at 8.

⁷³ In a federal country, each state originally enjoyed its own sovereignty. But, when it joins other states to form a federal country, it hands over some of its powers to the federal government through the making of a constitution. The constitution then expressly provides that apart from the powers handed over to the federal government, the remaining powers are retained by the state and such remaining powers are called the "residual power." The concept of "residual power" presupposes that a state in a federal country is an entity enjoying sovereignty and the federal government is vested with powers by the states. See XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 150-51.

⁷⁴ See SPECIAL GROUP ON THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR, FINAL REPORT ON RESIDUAL POWER 3 (Feb. 14, 1987) [hereinafter FINAL REPORT ON RESIDUAL POWER].

- 1) The powers other than those clearly divided between the Central Government and the SAR (residual powers);⁷⁵
- 2) The powers between the Central Government and the SAR which defy any clear division (gray area);⁷⁶
- 3) The powers which will require division in the light of future conditions (undefined powers/unspecified powers).⁷⁷

The Chinese government resisted reserving the residual powers to Hong Kong early in the drafting process. The Chinese government's view is that whatever rights and powers the Hong Kong Special Administrative Region may have must be authorized by the Central Government; Hong Kong has no residual powers.⁷⁸ Rather, authority not specifically delegated remains with the Central Government.⁷⁹

⁷⁵ See Wu Jianfan, *Several Issues Concerning the Relationship Between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65, 73 (1988).

⁷⁶ This concept is based on the provisions under Annex I of the Joint Declaration which stipulates: "except for foreign and defense affairs which are 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." Joint Declaration, *supra* note 18, annex I. The two jurisdictions' powers are considered to be a "gray area" because it is hard to draw a dividing line between the jurisdiction of the central government and the scope of the high degree of autonomy exercised by the Hong Kong SAR. For a detailed discussion on this point, see Wu Jianfan, *supra* note 75.

⁷⁷ Undefined or unspecified powers mean powers which will require division in light of future conditions. The legal background for the establishment of the Provisional Legislature was arguably based on the ground of "unspecified power." It was contended that when the Basic Law was enacted it was not foreseen that the electoral system for the last Legislative Council of Hong Kong would be changed by the Hong Kong government and also that the Basic Law contains no provisions related to the Provisional Legislature. Hence, the power to establish the Provisional Legislature was derived from the residuary power which is vested in the Chinese Central Government. For the argument in favor of the Provisional Legislature, see PEOPLE'S DAILY (Beijing) May 9, 1996, reported in S. CHINA MORNING POST, May 10, 1996. For a critical examination of this argument, see YASH GHAI, *supra* note 3, at 147.

⁷⁸ The implication of residual powers is that since Hong Kong SAR's powers are delegated by the Central Government, those powers may theoretically be taken away by the grantor of the powers. If the residual powers were vested with Hong Kong, it would mean that Hong Kong did not need any authorization of the Central Government in order to enjoy the high degree of autonomy.

⁷⁹ The same approach had been taken under the Indian Constitution. India got her independence from the British empire in 1947. At that time there were many princely states ruled by independent rulers. The newly established Indian government united those states under the leadership of the central government. This made India an "union of states." The Constitution provides for the legislative powers of the states and the central government separately but specifically mentions that the residual power shall be vested with the central government. For further discussion see, M.P. SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA 664-69 (9th ed. 1994).

According to the Basic Law, the Chinese central government and the Hong Kong SAR do not have a state/federal relationship.⁸⁰ China has a unitary system in which the highest power is vested with the central government. Although the Hong Kong SAR is a highly autonomous administrative region of China, it has no independent sovereignty. The SAR belongs to China.⁸¹ Thus, China has plenary power over Hong Kong and the powers not delegated to the Hong Kong SAR remain vested with the central government.⁸²

Although the issue of residual power is resolved, the Basic Law's place in the Chinese legal hierarchy and, the principles to be applied in interpreting the Basic Law remain unclear.

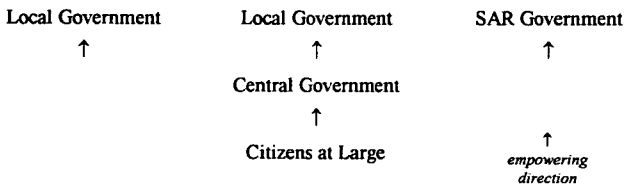
The Basic Law of Hong Kong, adopted by the National People's Congress of China in accordance with the Constitution, is a law of China. Strictly speaking, Chinese legal hierarchy can be classified into four different

⁸⁰ Article 1 of the Basic Law provides that the "Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China." Article 12 stipulates that the Hong Kong Special Administrative Region "shall be a local administrative region" of China.

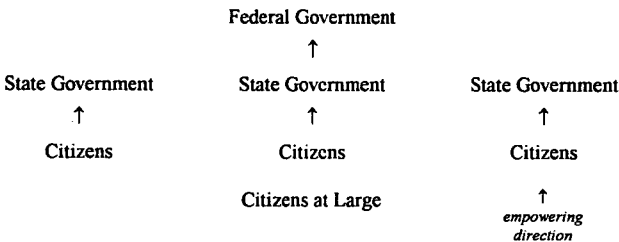
⁸¹ According to the Joint Declaration, the sovereignty of Hong Kong did not pass into the hands of Hong Kong from the United Kingdom, nor was Hong Kong in a position to hand over any part of its sovereignty to China. See FINAL REPORT ON RESIDUAL POWER, *supra* note 74, at 4. See also Lau, *supra* note 29, at 76.

⁸² The difference between China's delegation of powers to the Hong Kong SAR and delegation of powers within a federal country can be compared in the following diagram:

In the case of China:



In the case of a federal government:



levels of law, namely, the Constitution, the national laws, the administrative regulations and the provincial or local regulations. The legal authority of these legal prescriptions descends accordingly.⁸³

Generally, when a law of lower level conflicts with a statute of higher authority, the provisions of the latter prevail. There have been debates as to whether conformity of lower levels of law with those of higher levels should

⁸³ Priscilla M F Leung, *Introduction to CHINA LAW REPORT* xvi-xvii (Priscilla M F Leung & Mei-Fun eds., 1996). The Constitution is considered the highest and fundamental law of China and is, therefore, supreme of all other laws. *Id.* Thus, it constitutes the first level of the hierarchy of laws in China.

The second level of the legal hierarchy is:

[T]he national law or legislation which includes laws, regulations, decisions, etc, adopted by the NPC and its Standing Committee such as the Criminal Law, Criminal Procedure Law, the General Principles of the Civil Law, Civil Procedure Law, Administrative Procedure Law, Foreign Economic Contract Law and the Law of Succession, as well as the Hong Kong Special Administrative Region's Basic Law.

Id. It should be pointed out that among the laws adopted by the NPC and its Standing Committee, some of them are general in nature, which are sometimes referred to as the basic statutes, whilst some other laws are more specific in nature and, therefore, are referred to as specific laws. For this reason, some scholars argue that among the laws adopted by the NPC and its Standing Committee, they should be divided into general and specific laws and the latter should constitute a separate level of the legal hierarchy.

The third level of the Chinese legal hierarchy is administrative regulations. They are usually passed or amended by the State Council, the highest administrative organ of the PRC. They may also be enacted and promulgated by the ministries and commissions after having secured approval of the State Council. In China's practice, when ministries and commissions under the State Council enact administrative rules within the scope of their authorization, they must report to the State Council. Rules concerning important matters or having far-reaching effects must be approved by the State Council. Once such rules are approved by the State Council, they are considered as administrative regulations with same effects as the regulations adopted by the State Council itself. In practice, administrative regulations had been adopted and implemented prior to the adopting of the national law on the same subject. In such cases, the administrative regulations served as the law for trial purpose. The administrative regulations are applicable nationwide. In general, administrative regulations are more detailed in nature to specify the measures for the implementation of the national law. Usually the national laws stipulate the general principles while the administrative regulations provide for the detailed rules on the same or similar matters. If administrative regulations contravene the national law, the latter prevails.

The fourth level of the Chinese legal hierarchy consists of local regulations passed by the local people's congresses and provincial level governments as well as municipalities authorized by the NPC such as Shenzhen and Xiamen. Local regulations are effective within the jurisdiction of the local people's congress or local people's government which passed them. Autonomous regulations passed by the various autonomous regions also fall into this category.

The importance of the classification of law is that only the national laws, administrative regulations and local regulations may be referred to by the court. In addition to the above four levels of law, administrative rules passed by the ministries and commissions under the State Council or by the departments of the local governments are considered by some to constitute another level. Such administrative rules are applicable in a relatively restrictive scope and may not be referred to by a court. Although in theory, administrative rules may not be invoked by the court, in practice, courts may find it necessary to refer to such rules, for national laws and administrative regulations may not contain detailed enough provisions. As discussed earlier, administrative rules sometimes are approved by the State Council prior to their promulgation. After such approval, the status of these administrative rules is raised to the level of administrative regulations.

be judged in accordance with the plain meaning of words or spirit of the law. The predominant view is that lower level laws may go beyond the scope of those at the higher levels so long as the former are in conformity with the spirit of and principles laid down by the latter. This view appears to be adopted by the Chinese as well.⁸⁴

The Basic Law should be considered a national law that establishes and regulates the operation of the Hong Kong Special Administrative Region. As such, it should have the status of other basic statutes under the Constitution.⁸⁵ Some commentators, however, contend that the Basic Law is only lower than the Constitution in the hierarchy of Chinese law.⁸⁶

IV. INTERPRETATION OF THE BASIC LAW

China is a civil law country. Following the tradition of civil law countries, laws in China are interpreted by the legislature, while courts may only enforce the law.⁸⁷ In practice, however, the Supreme Court of China does issue judicial interpretations which are binding on lower courts.⁸⁸ The legislature's power of interpretation derives from the Constitution, which empowers the Standing Committee of the NPC to interpret the Constitution and statutes.⁸⁹

As discussed earlier, the Basic Law reflects both civil law and common law traditions. The issue of whether Hong Kong courts or the NPC should be

⁸⁴ See WANG, BUSINESS LAW, *supra* note 8, at 1-220.

⁸⁵ Under the Chinese system, all laws, both basic laws and other statutes, are of equal status. The Basic Law is one of the basic statutes with binding force on the entire country. XIAO WEIYUN, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 90.

⁸⁶ See Lin Feng, Possible Impact of the Basic Law on Judicial Review in Hong Kong after 1997, at 9 (Paper presented at the Conference on Trends in Contemporary Constitutional Law, Dec. 13-14, 1996) (on file with the author).

⁸⁷ See ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 67, §§ 1, 4 (1982).

⁸⁸ Resolution of the Standing Committee of the NPC on Providing an Improved Interpretation of the Law, June 10, 1981, translated in Chinalaw, file no. 96, available in LEXIS, Inlaw library, Chinal file. The resolution authorized the Supreme People's Court and the Supreme People's Procuratorate to give interpretations of questions involving specific application of laws and decrees in court trials and in the procuratorial work of the Procuratorate respectively. Such interpretations have binding force on the lower courts and procuratorates respectively. Interpretations of specific applications of laws and decrees in areas unrelated to judicial and procuratorial work must be provided by the State Council and its competent departments. Therefore, administrative interpretations may also be given under the Chinese legal system.

⁸⁹ Article 67 of the Constitution of China stipulates: "The Standing Committee of the National People's Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement; . . . (4) to interpret laws . . ." ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 67, §§ 1, 4 (1982).

responsible for interpreting the Basic Law was hotly contested at the initial drafting stage:

There was a view that since China's Constitution had stipulated that the Standing Committee of the National People's Congress (NPC) had the right to interpret laws, therefore the NPC's Standing Committee must have the unquestionable right to interpret the Basic Law; and that since the Basic Law was a law enacted by the NPC, therefore only the NPC itself should have the right of amendment over the Basic Law. On the other hand, there was another view that since the Hong Kong SAR Courts had the right to interpret laws, therefore the right of interpretation of the Basic Law ought to belong to the Hong Kong SAR Courts; and that since the Hong Kong Basic Law was a law in relation to Hong Kong, therefore the right of amendment of the Basic Law ought to belong to the Legislative Council of the Hong Kong SAR.⁹⁰

As a result of debate and consultation, Article 158 of the Basic Law stipulates that the Standing Committee of the NPC shall authorize the courts of the SAR "to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region."⁹¹ This provision represents a compromise of the drafters of the Basic Law. It also represents a challenge to the "one country, two systems" policy. On the one hand, the provision observes the constitutional requirement that only the Standing Committee of the NPC has the power to interpret the laws of China. On the other hand, it requires the Standing Committee of the NPC to delegate, in so far as the Basic Law is concerned, the interpretation powers to the courts of Hong Kong in adjudicating cases. Thus, many of the existing interpretive powers of the Hong Kong courts are preserved.⁹²

In practice, the power of interpretation by the courts in Hong Kong may go beyond what is stipulated by the Basic Law.⁹³ According to Article

⁹⁰ Xiao Weiyun, *The Hong Kong Basic Law*, *supra* note 22, at 89.

⁹¹ Basic Law, art. 158.

⁹² As Hong Kong follows the common law system, its courts are empowered to interpret any laws and regulations of the territory, including most provisions of the Basic Law. See Chen Ke, *Interpretation of the Basic Law from a Comparative Point of View*, in *COLLECTION OF ARTICLES ON COMPARATIVE CONSTITUTIONAL LAW STUDIES* 479 (Jin Mei ed., 1993).

⁹³ The judges of the Hong Kong SAR will have a greater role in interpreting the Basic Law in common law style. They will also have more opportunity to interpret the Basic Law, as very few cases

158, the courts in Hong Kong may interpret any provisions of the Basic Law in adjudicating cases except those provisions relating to the responsibilities of the Central People's Government or to the relationship between the central government and the SAR Government. Essentially, the responsibilities of the central government include foreign affairs, defense, and other matters which may be considered "acts of state."⁹⁴ Whenever the Hong Kong courts must interpret the Basic Law to reach a judgment, the court "shall, before their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region."⁹⁵ The importance of this provision is twofold: the courts in Hong Kong may interpret any provisions of the Basic Law; whenever courts interpret provisions concerning the relationship between the central and the SAR government or matters which are of exclusive responsibility of the central government, before a final judgment is made, the Court of Final Appeal must request an interpretation from the Standing Committee of the NPC.

Article 158 of the Basic Law does not establish whether a lower SAR court that interprets the Basic Law while adjudicating a case must report its interpretation to the Court of Final Appeal, which would then request an interpretation from the NPC Standing Committee. Under Article 158, a lower court is obliged to seek, through the Court of Final Appeal, an NPC interpretation only when an unappealable judgment is made and when the interpretation will affect the outcome of the case.⁹⁶ In a case where the parties do not wish to exercise their right of appeal to the Court of Final Appeals, the judgment would become final as far as the parties are concerned. Under such a circumstance, does the lower court handling the case have an obligation to ask the Court of Final Appeal for an interpretation from the Standing Committee of the NPC? What if the court honestly believes either that the case does not involve any of the qualified situations prescribed by Article 158 or that the final judgement of the case will not be affected by such an interpretation? Does the Court of Final Appeal have an obligation to ensure that in such cases an interpretation by the NPC Standing Committee will be sought? If the answer to this latter question is yes, then the Court of Final Appeal would have to check every case decided by the lower courts in

will actually go all the way to the NPC for interpretation. See Raymond Wacks, *Waxing Legal*, HONG KONG LAW., June 1997, at 34.

⁹⁴ Basic Law, arts. 13, 14, 19.

⁹⁵ *Id.* art. 158.

⁹⁶ *Id.*

order to ensure that the NPC Standing Committee's power under Article 158 will not be affected. This would be a practically impossible task for the Court of Final Appeal and it is therefore unlikely that the Court would assume this responsibility. It is possible, then, that Article 158 procedures may be avoided so long as a case does not reach the Court of Final Appeal.⁹⁷ Another issue might arise when the Court of Final Appeal and the NPC Standing Committee hold different views as to whether interpretation by the latter is required. In such circumstances, the NPC Standing Committee's view should arguably prevail.⁹⁸ In practice, however, a lower court may interpret the Basic Law even though one of the parties to the case argues that resolving the dispute requires an NPC Standing Committee's interpretation.⁹⁹

Whether the lower court or the Court of Final Appeal has the obligation to request an NPC Standing Committee interpretation is unanswered by the Basic Law. Nor is it clear what happens when the courts disagree about whether an interpretation is necessary. Chinese scholars seem to agree that in adjudicating cases that require an interpretation of the provisions concerning the responsibility of the central government or the relationship between the central government and the SAR government, "the court of the region should seek, through the Court of Final Appeal of the Region, an interpretation of the relevant provisions from the Standing Committee of the National People's Congress."¹⁰⁰ If an unappealable judgment has been made, this view is indisputable. Several scholars, however, consider the requirement that the courts in Hong Kong seek an interpretation by the Standing Committee of the NPC to be a general obligation.¹⁰¹ In any event, such an obligation could only exist when a court is aware that the case involves the relations of the central and the SAR governments or matters within the authority of the central government. Even under such circumstance, it is not clear at what point in the case the lower courts must request an interpretation.¹⁰²

⁹⁷ For instance, if a lower court fails to realize the need of an interpretation by the NPC Standing Committee and the parties concerned decide not to bring the judgment by the lower court to the Court of Final Appeal, the appealable judgment will become final.

⁹⁸ As discussed earlier, the NPC Standing Committee is the highest body for interpreting Chinese laws. Since the Basic Law is Chinese law, the Standing Committee should have a final say.

⁹⁹ See *HKSAR v. Ma Wai Kwan David & Ors*, 1997-2 HKC 315; 1997 HKC LEXIS 57 (H.K. C.A. 1977) [hereinafter Ma, Chan and Tam case]. In this case, the HKSAR argued among others that the establishment of the Provisional Legislative Council was an act of a sovereign state and that the court should not deal with such issues.

¹⁰⁰ See Xiao Weiyun, *The Hong Kong Basic Law*, *supra* note 22, at 89.

¹⁰¹ See Discussion with Professor Xu, *supra* note 63.

¹⁰² Article 158 only requires that before an unappealable judgment is made, the courts in the Special

A close examination of Article 158 suggests a narrow application. Paragraph 3 of the Article states that "when the Standing Committee makes the interpretation of the provisions concerned, the Court of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgment previously rendered shall not be affected."¹⁰³ Hence, the Standing Committee's interpretation binds only future courts. The interpretation does not affect the validity of prior judgments. The "judgments" referred to in this provision should include judgments of the Court of Final Appeal, even though such judgments are unappealable.¹⁰⁴ Hong Kong courts must request, through the Court of Final Appeal, an interpretation by the Standing Committee of the NPC whenever they know that they are dealing with provisions of the Basic Law which concern either the relation between the central and SAR government or matters within the authority of the central government.¹⁰⁵

Empowering the Standing Committee of the NPC with the authority of final interpretation of the Basic Law complies with the Chinese system of legislative interpretation. With regard to the Basic Law, the Standing Committee's power of interpretation is limited, however. First, it may only interpret the qualified provisions concerning defense, foreign affairs and the relationship between the central and the SAR governments. Second, before giving an interpretation, the Standing Committee is required to consult the Committee for the Basic Law of Hong Kong Special Administrative Region ("Basic Law Committee").¹⁰⁶ As prescribed in a resolution adopted by the National People's Congress on April 4, 1990, the Basic Law Committee is a working committee responsible to the Standing Committee of the National People's Congress.¹⁰⁷ The Basic Law Committee is composed of twelve

Administrative Region must seek an interpretation by the NPC Standing Committee. Needless to say, the time frame between the start of a lawsuit and the making of final judgment can be very long.

¹⁰³ See Basic Law, art. 158.

¹⁰⁴ Under the Basic Law, if the matters involved fall into any of the qualified categories, interpretation of the Standing Committee must be sought before an unappealable judgment is made. If the Court of Final Appeal does make a judgment in such cases, the judgment should not be affected by an interpretation given by the NPC Standing Committee. However, the Standing Committee may reverse the Court of Final Appeal. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Decision of the National People's Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People's Congress, translated in YASH GHAI *supra* note 3, at 572, adopted at the Third session of the Seventh People's Congress on April 4, 1990.

members, six of whom must be from Hong Kong.¹⁰⁸ The function of the Committee is to study the matters arising from the implementation of Articles 17, 18, 158, and 159 of the Basic Law and to give its opinion to the Standing Committee of the NPC.¹⁰⁹

The interpretation system created by Article 158 is unfamiliar both to China's civil law tradition and to Hong Kong's common law tradition. Chinese constitutional scholars praised Article 158's innovative interpretive system:

Article 158 of the Basic Law represents a combination of the adherence to principles and the exercise of flexibility; on the one hand, it stipulates that the right to interpret the Basic Law belongs to the Standing Committee of the NPC and that cases concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region shall be interpreted by the Standing Committee of the NPC, thus maintaining the unity and sovereignty of the state; on the other hand, it provides for the Courts of the Hong Kong Special Administrative Region to interpret provision in the Basic Law which concerns matters within the scope of autonomy of the Region, thus maintaining a high degree of autonomy for the Hong Kong Special Administrative Region.¹¹⁰

Article 158 divides the authority to interpret the Basic Law between the Standing Committee of the NPC and the courts of Hong Kong. The former is responsible for interpreting those provisions relating to matters that are the responsibility of the central government and the relationship between the central government and the SAR government, while the latter is

¹⁰⁸ *Id.*

¹⁰⁹ Under the Basic Law, the Basic Law Committee has an advisory role, but the Standing Committee of the NPC is required to consult the Basic Law Committee before it takes certain actions. The Standing Committee must consult with the Basic Law Committee before invalidating a law legislated by the Hong Kong SAR that it finds to be in contravention of the provisions of the Basic Law. Basic Law, art. 17. The Standing Committee must seek consultation before adding or deleting laws listed in Annex III of the Basic Law. Basic Law, art. 18. The Standing Committee must also consult the Basic Law Committee when it gives any interpretation of the Basic Law. Basic Law, art. 158.

One should note that the Basic Law does not require the NPC or its Standing Committee to follow the opinion of the Basic Law Committee, but once a conclusion is reached by the Basic Law Committee, it would be politically unwise for the Standing Committee of the National People's Congress not to follow.

¹¹⁰ Xiao Weiyun, *The Hong Kong Basic Law*, *supra* note 22, at 89.

authorized to interpret all other provisions. This arrangement should help ease concerns expressed by the people of Hong Kong that the courts of the SAR will not have power to interpret the Basic Law at all.¹¹¹

V. PRINCIPLES OF INTERPRETATION

Although Article 158 has created a system for interpreting the Basic Law, it has not set out the principles for interpretation. What rules and principles should be adopted by the court and the Standing Committee of the NPC for interpreting the Basic Law are still unknown. The Basic Law's status in Chinese Law and its effect in Hong Kong, however, help illuminate how it should be interpreted.

The Basic Law derives its authority from, and was passed in accordance with, the Chinese Constitution. It also reflects China's obligation to implement the Joint Declaration. The legal authority of the PRC Constitution extended to Hong Kong upon its reunification with the mainland. The Basic Law cannot, therefore, be considered Hong Kong's constitution. Nevertheless, from Hong Kong's perspective, the broad delegation of powers and the comprehensive legal system prescribed in the Basic Law create certain characteristics of a constitution,¹¹² no matter what name it may be given.¹¹³ Therefore, the experiences of other constitutional systems, and the

¹¹¹ For instance, one lawyer said:

Another enigma arises from the fact that while the Hong Kong SAR will be vested with the final power of adjudication, the Standing Committee of the N.P.C. will, unless the P.R.C. Constitution is amended, have power to interpret the Basic Law, notwithstanding the fact that the Joint Declaration fully recognizes the need to keep the Hong Kong judicial system separate from that of the Chinese mainland.

Chang, *supra* note 23, at 109.

¹¹² Some scholars, in fact, consider the Basic Law a constitutional law of Hong Kong. For instance, one Chinese scholar is of the view that: "It should be pointed out that although the Basic Law is not a constitution according to Chinese legal concepts, it is a fundamental law prescribing guiding principles and in common law jurisprudence, has the characteristics of a constitutional law." Chen, *supra* note 92, at 474.

¹¹³ For discussion on the nature of the political and legal systems the Basic Law provides, see XIAO, ONE COUNTRY TWO SYSTEMS, *supra* note 21, at 86-123. The Basic Law of Hong Kong has been quoted using different names by the media and scholars. It has been named "mini-constitution," "political document," and "constitutional document." See Ling, *supra* note 67, at 7-8.

The Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China does mention that "the Basic Law of Hong Kong Special Administrative Region is constitutional as it is enacted in accordance with the Constitution of the People's Republic of China and in the light of the specific conditions of Hong Kong." Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on April 4, 1990 [hereinafter Decision on the Basic Law], translated in YASH GHAI, *supra* note 3, at 137.

way in which the interpretive rules and principles of these systems have developed may be appropriately referenced in interpreting the Basic Law. Unfortunately, Hong Kong's experience under British rule offers little aid to SAR courts. As a prominent lawyer and former Basic Law Drafting Committee member commented:

[T]he original legal sector of Hong Kong, including the judiciary, were hitherto endowed with little experience over the process of constitutional vetoing [sic]. This is not surprising, since Britain has no written constitution itself, and therefore prior to the accession of England to the European Community and England's ratification of the Treaty of Rome and other EEC treaties, there was no such thing as an "unconstitutional Act of Parliament" in the legal tradition of England. Indeed, the constitutional system of England recognizes the doctrine of "sovereignty of Parliament", whereby the English parliament embodies the functions of both the executive and the legislature in one single body in exercise of the sovereignty of the state, and therefore the Acts passed by the English Parliament are virtually unchallengeable before the courts of England unless EEC considerations or other exceptional circumstances are involved. The jurisprudential creed which has dominated the English system throughout the ages therefore primarily follows the Anglo-American doctrine of "strict interpretation of statutes" as advocated by the theory of "positivism", which is significantly different from the Continental doctrine of "fundamental birthrights" as advocated by the theory of "naturalism" which has been prevalent in many of the European countries.¹¹⁴

Although China has a written constitution, the Chinese courts have never interpreted it. The experience of the Standing Committee of the NPC in interpreting the Constitution is also very limited. It is therefore appropriate that both the Standing Committee of the NPC and the courts of the SAR consider the principles and rules pertinent to interpretation of constitutions

The use of the word "constitution" might have led to the naming of the Basic Law as "mini-constitution" or constitutional document, however, the use of word "constitution" with respect to the Basic Law has been doubted by several scholars. *See id.*

¹¹⁴ Kenneth C.K. Chow, *The Organization, Jurisdiction and Constituents of the Judiciary of HKSAR, Supplement for Hong Kong Return*, CHINA L., July 1997, at 93.

and other basic laws in other countries.¹¹⁵ Since the Basic Law is an amalgam of China's civil law and Hong Kong's common law systems,¹¹⁶ the practices of both common law and civil law countries may be drawn upon for reference.¹¹⁷ Jurists in both these legal traditions have accepted the view that a constitution should be interpreted in accordance with the principles of consistency, progressiveness, and foreseeability.¹¹⁸ The principle of foreseeability is necessary for members of the society to plan for themselves. Unless the interpretation of a law is foreseeable, the confidence of rule of law and the community cannot be established. With the application of the principle of consistency, progressiveness and foreseeability, the Basic Law

¹¹⁵ Those farsighted in the legal profession also realize the need to improve the current system. For instance, according to one commentator:

Old habits die hard, and the original legal sector of Hong Kong, which were trained in the inescapable tradition of the English legal system, invariably places overwhelming importance to the actual wording which appears on the face of the statute, and substantially less attention to the values of the moral policy which have underlined the enactment of the statute in the first place. The merits of this tradition are that it ensures certainty and predictability, whereas its demerits are that it tends to stick legalistically to outdated laws which thereby lead to harsh results, and hard cases make bad law. But just as water assumes no definite shape, the prevalent circumstances of the society will also vary from time to time, and the laws of the SAR must also be flexible and sensible enough to accommodate the ever-changing needs of the local community.

Chow, *supra* note 114, at 93.

¹¹⁶ One commentator is of the view that:

[I]t can be seen that, in terms of legal procedures and strictness, the drafting process of the Basic Law, compared with that of many domestic laws, required much more work. It was also usual in world constitutional history that a country spent so much human effort, material resources, time and energy to formulate a constitution for one of its regions through so many procedures.

Fang Da, *Basic Law and Democracy, in Selections from Beijing Review (March-May 1990)*, CHINESE L. & GOV'T, Fall 1990, at 80, cited in Lau, *supra* note 29.

¹¹⁷ In this regard, the experience of Germany, Japan and the United States would be useful in interpreting the Basic Law. In Japan, the principle of interpretation of constitution is very rigid while the other laws are interpreted very liberally. Interview with Professor Yasitomo Morigiwa of Nagoya University, Japan (July 4, 1997). The Japanese position is understandable as the Japanese Constitution was prepared under the strong supervision of the allied countries and adopted after the World War II.

¹¹⁸ Some commentators are of the view that the most important characteristic of interpreting a constitution is the principle of consistency and foreseeability. They also point out that consistency does not mean non-change. When major changes take place in a society, and such changes could not have been foreseen by the constitution makers, the principle of progressiveness should come into play. See Zhang Qingfu & Zhou Hanhua, *Models and Main Principles Regarding Interpretation of Constitutions*, in COLLECTION OF ARTICLES ON COMPARATIVE CONSTITUTIONAL LAW STUDIES 457, 460. (Jin Mei ed., 1993). A suitable approach to the interpretation of the Basic Law should suggest ways to (a) balance the sovereignty of the PRC with autonomy of the HKSAR, (b) bring coherence to the various powers and function of the HKSAR, and (c) allow for the capacity to respond to changing conditions and circumstances in Hong Kong. See YASH GHAI, *supra* note 3, at 215.

will be given life in the future. The Chinese government has promised that the "one country, two systems" policy should continue for 50 years at least. It is unthinkable that the existing Basic Law will be adequate to govern Hong Kong for the next 50 years unless the above principles are employed. Courts should try to give life to the Basic Law while giving further assurance to the society by adopting the principle of foreseeability in interpreting the Basic Law. When interpreting a provision of a constitution, a court must be creative in giving life to the provision. In this regard, the Supreme Court of the United States has set good examples.¹¹⁹

The Basic Law's main goal is to implement the "one country, two systems" policy while maintaining the prosperity and stability of Hong Kong.¹²⁰ To achieve these dual aims it is necessary to maintain the existing legal, social, and economic systems of Hong Kong.¹²¹ Interpretations of the Basic Law should take these factors into consideration, and should also consider the developmental needs of the SAR.¹²²

Unless and until consensus is reached on the principles of interpreting the Basic Law, inconsistent rulings on, and confusion about, specific matters in Hong Kong will follow. After the Provisional Legislature was established and began legislating, for example, its legal basis became an issue.¹²³ Some interpreted the Basic Law narrowly, arguing that the establishment of the Provisional Legislature violated the Basic Law and the Decision of the National People's Congress adopted on the April 4, 1990.¹²⁴ This issue is

¹¹⁹ It is to be noted that the U.S. Supreme Court justices would decide what they thought was most appropriate for America according to their Constitution and within the four corners of constitutional jurisprudence. See David Ling, *Hong Kong Basic Law—A Lawyer's Reflections*, 6 (Paper presented at the Conference on Trends in Contemporary Constitutional Law, Dec. 13-14, 1996 (Paper on file with the author)). While deciding cases, emphasis is placed on America's own national conditions, values, aspirations, and political and economic systems. *Id.* The Court adopts a relatively "narrow" literal approach in relation to precedent when adjudicating private law cases, whilst approaching public law with a different attitude, philosophy and set of values. *Id.* Wherever the US Constitution was silent or unclear, the Supreme Court filled the gaps according to the needs of the society. For example, in *Brown v. Board of Education*, 374 U.S. 483, 74 S.Ct. 686 (1954), it was held that African-Americans had a right to admission to public schools on the ground of equal protection of the law under the Constitution. This decision reversed the earlier practice of "equal segregation" in America which had been held legal under the Constitution.

¹²⁰ See Basic Law, preamble.

¹²¹ *Id.*

¹²² This view is shared by other scholars. See Chen, *supra* note 92, at 482-85. Professor Chen also recommended some more detailed rules for interpreting the Basic Law. *Id.*

¹²³ The Preparatory Committee for the Hong Kong Special Administrative Region decided to establish the Provisional Legislature on March 24, 1996, which triggered much debate on the legal basis of the decision and whether the decision would be in compliance with the Basic Law. See *FACTS ON FILE WORLD NEWS DIG.*, July 3, 1997, at 471, available in LEXIS, World library, Allwld file.

¹²⁴ Decision of the National People's Congress on the Method for the Formation of the First

still debated, even though the Court of Appeal of Hong Kong confirmed the legality of the Provisional Legislative Council.¹²⁵

The issue of the Provisional Legislature arose in 1990 when the National People's Congress adopted the *Decision on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*. At that time, it was assumed that most of the members of the last Legislative Council of the colony would be transferred automatically to the first Legislative Council of the SAR after 1997.¹²⁶

Between the years 1984 and 1990, the two Governments reached a compromise through many tough and sometimes unhappy sessions in the Sino-British Joint Liaison Group that the British Government would devise its electoral reforms in Legco in such a manner that it would Converge with the Basic Law. In return the P.R.C. Government allows the last Legco members to serve as the first H.K.S.A.R. Legislative Council members on a 2-year term (called the "Legco through train"), provided that the composition of the last Legco conforms with certain requirements which were later specified in an N.P.C. decision dated 4th of April 1990.¹²⁷

Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted at the 3rd Session of the 7th National People's Congress on April 4, 1990 [hereinafter *Decision on the Method*]. The criticism was mainly based on the ground that first, the method adopted in the *Decision on the Method* was not in conformity with the Basic Law and this change in the Basic Law would amount to an amendment which could not be done by the NPC without a motion of amendment proposed by the Standing Committee. Second, the *Decision on the Method* itself mentioned that:

[I]f the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong Special Administrative Region is in conformity with the relevant provisions of this *Decision* and the Basic Law of the Hong Kong Special Administrative Region, those of its members who uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, and who meet the requirements set forth in the Basic Law of the Region may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region.

Decision on the Method. Some argued that by establishing the Provisional Legislature China had breached its own *Decision*. For further discussion on this issue, see YASH GHAI, *supra* note 3, at 270-80.

¹²⁵ In the Ma, Chan and Tam case, the Court of Appeal held that the HKSAR Courts cannot challenge the decisions of the NPC, although they may examine the existence (as opposed to the validity) of the acts of prescribed under those decisions. Ma, Chan and Tam case, *supra* note 99.

¹²⁶ See Discussion with Professor Xu, *supra* note 63.

¹²⁷ Tam Wai Chu, *A Brief Introduction to the Provisional Legislative Council of HKSAR, Supplement for H.K. Return*, CHINA L., July 1997, at 89.

Thereafter, however, former Governor Chris Patten introduced the much disputed political reform package and changed the election system which existed when the *Decision of the NPC* was adopted.¹²⁸ The Chinese government and the British government attempted to resolve the issues raised by the new election system without success.¹²⁹ The Chinese government then declared that members of the last Legislative Council of the colony would not automatically become members of the first Legislative Council of the SAR.¹³⁰ Establishing a Provisional Legislature was proposed.¹³¹

The legal ground for the Provisional Legislature is found in Article 2 of the *Decision of the NPC*, which stipulates:

[W]ithin the year 1996, the National People's Congress shall establish a Preparatory Committee for the Hong Kong Special Administrative Region which shall be responsible for preparing the establishment of the Hong Kong Special Administrative Region and shall prescribe the specific method for the formation of the first Government and the first Legislative Council in accordance with this Decision.¹³²

At dispute is whether the words "prescribe the specific method for the formation of the first Government and the first Legislative Council" should

¹²⁸ See Guiguo Wang, *On Interpretation of the Basic Law*, WEN WEI PAO (HK), Feb. 3, 1997, at C4 [hereinafter Wang, *On Interpretation of the Basic Law*]. According to Ms. Tam Wai Chu, member of the Basic Law Committee and former member of the Basic Law Drafting Committee:

In January and February 1990 i.e. 2 months before the N.P.C. decision, the British and P.R.C. Governments exchanged 7 letters which, in effect, showed that an understanding was reached between them that the method of deciding on and electing the last 9 functional constituencies and the Election Committee, and the formation of an electoral college to deliver 10 members, need to be agreed upon by the two Governments.

Tam Wai Chu, *supra* note 127, at 89.

¹²⁹ On this issue 17 rounds of negotiations were held between China and Britain. In the end, the two countries failed to reach a solution. Tam Wai Chu, *supra* note 127, at 89.

¹³⁰ See Wang, *On Interpretation of the Basic Law*, *supra* note 128.

¹³¹ The Court of Appeal of Hong Kong held:

To decide whether the Provisional Legislative Council is valid, it would be necessary to look at the events leading to its existence. It is quite clear that it was unrealistic to have the election for a Legislative Council in accordance with the BL before July 1997. The Preparatory Committee was then entrusted to set up the Provisional Legislative Council.

Rulings per P Chan, Chief Judge of the Ma, Chan and Tam case, *supra* note 99.

¹³² In the first draft of the Decision, the words "first Legislative Council" were not mentioned. They were added at the suggestion of the Hong Kong members of the Basic Law Drafting Committee. See XIAO WEIYUN, *ONE COUNTRY TWO SYSTEMS*, *supra* note 21, at 365.

include the establishment of the Provisional Legislature. As a result of Patten's political reform package, the original election system was changed; the Preparatory Committee could not recommend a "through train"¹³³ for colonial Legislative Council members because of how they were elected.¹³⁴ The Preparatory Committee could not call for an election under the old system because the Patten reforms had changed the functional and geographical constituencies of Hong Kong.¹³⁵ Accordingly, a Provisional Legislature to deal with matters necessary to establish the first Legislative Council became unavoidable.¹³⁶ Creation of a Provisional Legislature also accorded with Hong Kong's developmental needs, for Hong Kong's prosperity and social needs would be impossible without a Legislative body.¹³⁷ Critics of the Provisional Legislature, however, argue that it is unlawful because it is not provided for by the Basic Law. This view was refuted by those who supported the establishment of the Provisional Legislative Council:

¹³³ The Decision of 1990 prescribed that, upon satisfaction of certain conditions, members of the last Legislative Council of Hong Kong may become members of the first Legislative Council of the Hong Kong Special Administrative Region. This arrangement was called by the media as the "through train" arrangement. The conditions for success of the "through train" arrangement were laid down in the Decision and these are: The composition of the last Legislative Council must be in conformity with this Decision and the relevant provisions of the Basic Law, members must uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region, and they must meet the requirements set forth in the Basic Law. Moreover, confirmation of the Preparatory Committee was required for the passage of the "through train."

¹³⁴ According to Tam Wai Chu:

[I]n 1992, the British Government broke off negotiation with the P.R.C. Government on these outstanding issues and unilaterally decided on the method of election for the 9 functional constituencies and the formation of the electoral college. Also, the Legco elected in 1995 had no restrictions on nationality or right of abode. The British Government changed the former election of institutions of different functions, that were agreed by both the Chinese and British governments, into a direct election in accordance with different industries; it made a one-side decision to change the Election Committee composed of the figures from four major circles (industry and commerce, profession, labour and social service and religion and the former politics) into such a committee that comprised all or most members from geographic constituencies through direct elections. Meanwhile, the Basic Law only allows 12 members (i.e. 20%), who are foreign nationalities or granted the right of permanent residence in foreign countries, to hold such status in the S.A.R. Legislative Council. However, the British Hong Kong Government increased the members of such kind to 14 in the Provincial Legislative Council through elections in 1995. The "Legco through train" was wrecked.

Tam Wai Chu, *supra* note 127, at 89.

¹³⁵ The political reform package by Patten and the relevant Ordinances adopted thereafter changed the functional constituencies and geographical constituencies of Hong Kong. Therefore, the original system was no longer in existence. See Wang, *On Interpretation of the Basic Law*, *supra* note 128.

¹³⁶ Necessity was one of the bases for the establishment of the Provisional Legislature. See MING PAO DAILY, Dec.20, 1996, at C7.

¹³⁷ *Id.*

This argument is fallacious because the mere absence of the mentioning of the Provisional Legislative Council and its formation in the Basic Law does not render the setting up of the same to be a violation of the Basic Law. The formation of the first-term of the Legislative Council is never mentioned in the Basic Law but only appears in paragraph 6 of the "Decision of the National People's Congress on the method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region," which is a document relevant to the formation of Hong Kong SAR but separate and distinct from the Basic Law. Though the formation of the first term of the Legislative Council is never mentioned in the Basic Law, it is never suggested by the critics that the same is illegal because one would readily accept that the authority of forming the first term of the Legislative Council is derived from the NPC. Following the same logic, the legality of the Provisional Legislative Council would not depend on whether it is mentioned in the Basic Law, but on whether its authority is derived from the NPC. The answer is clear. First, the formation of Provisional Legislative Council is set up by the Preparatory Committee which derives its authority from the NPC, and second, the formation is necessary as well as appropriate, as it is in response to the failure of implementing the through-train arrangement for the formation of the first term of the Legislative Council as contemplated in the decision on the setting up of the first Hong Kong SAR government. Moreover, the NPC has accepted and confirmed a report by the Preparatory Committee, which specifically refers to its setting up of the Provisional Legislative Council. As such, the legal basis for the establishment of the Provisional Legislative Council is without doubt.¹³⁸

The Provisional Legislature is temporary and has limited functions; its establishment constitutes part of the method for forming the first Legislative Council, which is authorized by the *Decision of the NPC*.¹³⁹ The 1990

¹³⁸ Lau, *supra* note 29, at 79.

¹³⁹ The terms of the first Legislative Council members will only be for two years. *Decision on the Method*, art. 6.

Decision of the NPC helps implement the Basic Law and should therefore be considered an integrated part of the Law.¹⁴⁰ Like the Basic Law, the *Decision of the NPC* should be interpreted broadly according to the principles and rules applicable to constitutions.

The Provisional Legislative Council was created to fill the gap left after the handover of Hong Kong by Britain to China. It was established to meet the needs of the SAR before the first legislature was created and to provide that necessary laws would be implemented before the first legislature was created. The need for the Provisional Legislative Council was not foreseeable at the time the Basic Law was drafted. Whether the Preparatory Committee had the power to create the Provisional Legislature should be judged in light of the developmental needs of Hong Kong society.

Whether the *Legislative Council (Powers and Privileges) Ordinance*, passed near the end of 1996, complies with the Basic Law raises another interpretive problem.¹⁴¹ In analyzing this apparent conflict, some authors compare the specific wordings and provisions of the Basic Law with those of the *Ordinance*.¹⁴² Such a literal comparison is dangerous.¹⁴³ As a constitutional document, the Basic Law is general, while the *Ordinance* contains specific provisions. A rigid and literal analysis will reveal many discrepancies between the two. It is more appropriate to judge whether the *Ordinance* is valid according to the broad principles applicable to constitutional interpretation;¹⁴⁴ the key question is whether or not the

¹⁴⁰ The Decision of the National People's Congress was adopted to implement Annex II of the Basic Law dealing with the method for formation of the Legislative Council of the Hong Kong Special Administrative Region and its voting procedures. *Decision on the Basic Law*, at 116.

¹⁴¹ The bone of contention was the issue of public servants or government officials testifying or giving evidence. According to the *Legislative Council (Powers and Privileges) Ordinance* [hereinafter *Ordinance*], a public officer might, with the consent of Governor, give evidence and produce confidential papers related to defense and security. *Ordinance*, § 14(2). The Basic Law requires the consent of the Chief Executive for government officials to give evidence or to produce any confidential papers. *Basic Law*, art. 48, §11. Under the Basic Law, the Chief Executive may, on ground of "security and vital public interest," refuse to give such consent which is in contrast with the subjective test of the Governor.

¹⁴² See WEN WEI PAO (HK), Jan. 18, 1997, at A8 (on file with author).

¹⁴³ Apparently, these people have been influenced by the traditional English approach of interpretation. With the Basic Law being enforced, other issues will arise.

As regards the common law rules against the introduction of new evidence or new points of argument on appeal, or the requirement that all administrative litigation should be conducted by way of judicial review, or the restriction that judicial review might not be suitable for a court of final adjudication because of the "filtering" nature of the process, it still remains to be seen how these principles could affect the workings of Article 158 in practice. It also still remains to be seen as regards how court proceedings which straddle 1997 should be handled.

CHOW, *supra* note 114, at 93-94.

¹⁴⁴ Some Chinese constitutional law experts argue that the most important principle for interpreting

Ordinance advances the policy of "one country, two systems" by maintaining Hong Kong's prosperity, stability, and development.

The apparent conflict between the Basic Law and the *Ordinance* arose in the context of the Chief Executive's authority to prohibit government officials from testifying before the legislature. Because of the importance of government accountability to Hong Kong's development, the Chief Executive's decision to withhold consent may only be based on two grounds—security or vital public interest—and his decision is judicially reviewable under the Basic Law.¹⁴⁵ The Basic Law should be interpreted to limit the power of the Chief Executive to withhold consent. This interpretation conforms with the principle of progressiveness. If the Basic Law is interpreted consistently and in accordance with the developmental needs of the society the principle of foreseeability is met.

Also at the end of 1996, the Legal Affairs Group of the Preparatory Committee¹⁴⁶ suggested that some statutes and provisions would have to be repealed because they conflicted with the Basic Law.¹⁴⁷ No criteria for

constitution is an accurate understanding of the aims and spirit of the constitution. At the same time, the principle of creativity should be applied when faced with new issues. See Xin Chunying & Zhang Wenxian, *Xian Fa bi jiao yan jiu wen ji [On Interpretation of Constitution]*, in COLLECTION OF ARTICLES ON COMPARATIVE CONSTITUTIONAL LAW STUDIES 59, 59 (Ai Chi Lai ed., 1993).

¹⁴⁵ This is compared with the power of the former governor to withhold consent under the old *Ordinance* which could not be reviewed. Under Section 14(2) of the *Ordinance*, the Governor was authorized to prohibit any person other than a public officer acting with the consent of the Governor, from giving evidence before the Legislative Council or a Committee of the Council. *Ordinance*, § 14(2).

¹⁴⁶ On January 26, 1996, the NPC established the Preparatory Committee for the Hong Kong Special Administrative Region in accordance with the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Government of Hong Kong Special Administrative Region, adopted at the Third Session of the Seventh National People's Congress on April 4, 1990. It consisted of an equal number of members from the mainland and from Hong Kong. The responsibility and tasks of the Preparatory Committee was to prepare for the establishment of the Hong Kong Special Administrative Region. The Legal Affairs Group was in charge of examining which laws in Hong Kong were not in compliance with the Basic Law. See Qian, *supra* note 17, at 11. The Preparatory Committee came to an end when its mission of establishing the SAR Government was accomplished after July 1, 1997. It held its last meeting on July 11, 1997, and announced the abolishment of the Committee. See LEGAL DAILY, July 12, 1997, at 1.

¹⁴⁷ See Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance With Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the Standing Committee of the Eighth National People's Congress at its 24th Session on 23 February 1997, translated in YASH GHAI *supra* note 3, at 499-503. A number of laws are in contravention with the Basic Law, Article 160 and hence are not adopted as the laws of the Hong Kong Special Administrative Region. Annex I lists out 14 laws which are not adopted at all, such as Chinese Extradition Ordinance (Cap. 235) and Electoral Provisions Ordinance (Cap. 367). Annex II lists out 10 laws which are partly repealed as some of the provisions of those laws are in contravention with various provision of the Basic Law, such as the provisions relating to the application in Section 2(3), the effect on pre-existing legislation in Section 3, and interpretation of subsequent legislation in Section 4 of the Hong Kong Bill of Rights Ordinance (Cap.383). *Id.*

assessing whether local ordinances violated the Basic Law was given, however, except that the Legal Affairs Group seemed to suggest that local laws be upheld whenever possible.¹⁴⁸ Because of the ostensible lack of criteria, there has been public discontent and criticism.

These three examples show that no consensus has been reached in Hong Kong or China regarding the principles pertinent to the interpretation of the Basic Law. The continuation of this situation exacerbates the uncertainty surrounding the enforcement of the Basic Law and, in turn, hinders implementation of the "one country, two systems" policy, which will adversely affect Hong Kong's prosperity and stability.

If the goal of maintaining the existing Hong Kong system is balanced against the needs for the development of the society, if the principles of consistency, progressiveness, and foreseeability are followed, and if consideration is given to the "one country, two systems" policy, many disputes may be avoided.

VI. AMENDMENTS OF THE BASIC LAW

Modern society cannot function without a stable legal system. In order to guarantee that the Basic Law and the policy of "one country, two systems" will be maintained, the process of amending the Basic Law is as important as its interpretation. As a constitutional document, the Basic Law drafters designed a special system for its amendment. Under the Chinese Constitution, the general power to amend laws is vested with the National People's Congress.¹⁴⁹ The Constitution also provides that the National People's Congress may "decide on the establishment of special administrative regions"¹⁵⁰ When the Basic Law was being drafted, consensus was easily reached that the National People's Congress should have the power to amend the Law. At the same time, most people agreed that the policy of "one country, two systems," should be reflected in the scheme of amendment of the Basic Law.¹⁵¹ In other words, the amendment of the Basic Law may not

¹⁴⁸ See Zeng Yuwen, *The Preparative Committee Adopted a Tolerable Attitude Towards the Existing Law*, TA KUNG PAO (HK), Feb. 5, 1997, at A4.

¹⁴⁹ Article 62 of the Constitution prescribes the functions and powers of the National People's Congress to include enactment and amendment of the "basic laws governing criminal offences, civil affairs, the state organs and other matters." ZHONGHUA RENMIN GONGHEGUO XIANFA [P.R.C. CONST.], art. 62, §. 3 (1982).

¹⁵⁰ *Id.*

¹⁵¹ See SPECIAL GROUP ON THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR, FINAL REPORT ON THE RIGHT TO PROPOSE ANY BILL OF AMENDMENT TO THE BASIC LAW I (June 12, 1987)

follow the procedures for amending other laws. The most important questions were (1) to what extent Hong Kong might control the amendment and (2) would China be able to amend the Basic Law at will.¹⁵²

To accommodate the above situation, Article 159 envisages a system of amendment with the following characteristics. In the first place, the power of amendment is vested with the National People's Congress.¹⁵³

Secondly, no amendment may contravene the established basic policies embodied in the Basic Law¹⁵⁴ which presumably must include those stated in the preamble of the Basic Law and the Joint Declaration such as "high degree of autonomy," "Hong Kong people govern Hong Kong," "maintaining the existing system of Hong Kong," etc. The importance of this provision is to invalidate any amendment which contravenes the fundamental policies of the Basic Law. For instance, the Basic Law provides that the capitalist system will be practiced in Hong Kong for fifty years starting from 1 July 1997.¹⁵⁵ If an amendment aims at introducing a socialist system into Hong Kong within the fifty year period, would it be considered to be in keeping with the basic policies of the Basic Law and therefore as valid? The answer should be "no."

Thirdly, the procedure for recommending amendments of the Basic Law differs from those applicable to revisions of the laws in the mainland of China.¹⁵⁶ According to the *Organic Law of the National People's Congress*, a delegation or group of thirty deputies may submit a bill to the National People's Congress.¹⁵⁷ In addition, the Presidium,¹⁵⁸ the Standing Committee and special committees of the National People's Congress,¹⁵⁹ the State Council, the Central Military Commission, the Supreme People's Court and

[hereinafter FINAL REPORT TO PROPOSE].

¹⁵² *Id.*

¹⁵³ Basic Law, art. 159.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* art. 5.

¹⁵⁶ In mainland China, amendment of laws is governed by the Organic Law of the National People's Congress of the People's Republic of China. Organic Law of the National People's Congress of the People's Republic of China, art. 10. available in LEXIS, Inlaw Library, Chinal File [hereinafter Organic Law].

¹⁵⁷ The National People's Congress holds annual meetings. At each meeting, deputies from each province, autonomous region or a city directly under the leadership of the Central Government form one delegation. The deputies from the military also form a delegation. Under Article 10 of the Organic Law, bills submitted by the delegations and deputies must fall into the functions and powers of the proposers. Hence it is unlikely for the delegation from Beijing to deal with a matter in Shanghai unless it can prove that it is an interested party. *Id.*

¹⁵⁸ At each session of the National People's Congress, a presidium which is comprised of the key persons is formed. *Id.*

¹⁵⁹ Currently there are eight special committees dealing with special matters, e.g., foreign affairs, minority nationalities, legal affairs, etc. *Id.*

the Supreme People's Procuratorate are authorized to propose bills.¹⁶⁰ Article 159 of the Basic Law limits the power to propose amendments to the Standing Committee of the NPC, the State Council and the Hong Kong Special Administrative Region.¹⁶¹ The effect of this arrangement is to deprive the delegations from provinces, autonomous regions and cities under the direct leadership of the central government of the power to recommend amendments. This procedural limitation is important because the deputies from Hong Kong will be a minority in the NPC and other delegations may claim an interest in matters concerning Hong Kong, and wish to amend the Basic Law.

The purpose of the provision limiting the power to propose amendments to the Hong Kong delegation, the Standing Committee of the NPC and the State Council is to ensure that the people in Hong Kong will have a say in such matters.¹⁶² This guarantee can also be inferred from another provision of Article 159 of the Basic Law which stipulates that before a bill is put on the agenda of the NPC, the Basic Law Committee must study it and cast its views on it.¹⁶³ As discussed earlier, the Basic Law Committee is comprised of an equal number of members from Hong Kong and China. Whilst the legal effect of the views of the Basic Law Committee and its internal working procedures are not yet known, the majority view is that the Committee may be able to block any proposal to be put on the agenda of the NPC. This does not mean that Hong Kong members may have a veto power; rather from a moral and political point of view, under such circumstance, it would be unwise for the NPC to place the item on its agenda.

It should also be pointed out that appointing a permanent committee to look after the interpretation and amendment of a statute is unprecedented in China. In general practice, informal working groups may be formed for the drafting and revising of laws. The only time that a formal committee was set up was when the Constitution was rewritten in 1980.¹⁶⁴ In this regard, the Basic Law is being treated very differently.

¹⁶⁰ *Id.* art. 159.

¹⁶¹ Basic Law, art. 159.

¹⁶² FINAL REPORT TO PROPOSE, *supra* note 151, at 3-4.

¹⁶³ Basic Law, art. 159.

¹⁶⁴ Resolution of the Third Session of the Fifth National People's Congress on the Revision of the Constitution and the Establishment of a Constitution Revision Commission, adopted September 10, 1980, translated in THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, at 207 (1987).

With regard to the procedures for Hong Kong to submit bills to amend the Basic Law, consent of two-thirds of Hong Kong's deputies of the NPC, two-thirds of the Hong Kong Legislative Council and the Chief Executive is required.¹⁶⁵ Although consultation with voters is not required, since Legislative Councillors have to go through an election one way or the other, they must be accountable to their constituencies when casting a vote.¹⁶⁶ Currently, the deputies of the NPC from the SAR are appointed by the central government, but it is foreseeable that they will be elected in the near future.¹⁶⁷ If so, the view of the people in Hong Kong will be reflected in the proposals to amend the Basic Law.

In any event, it is fair to say that the scheme for the amendment of the Basic Law, like that for interpretation, reflects the policy of "one country, two systems." The intention of these provisions is to ensure stability of the Basic Law. At the same time, it foresees and permits necessary amendments to the Law so long as the fundamental policies thereof are not affected.¹⁶⁸

VII. CONCLUSION

The Basic Law is the vehicle that carries China's "one country, two systems" policy. Since the Basic Law regulates the establishment and operation of the Hong Kong Special Administrative Region, it functions as a

¹⁶⁵ Basic Law, art. 159.

¹⁶⁶ The Basic Law stipulates that the Legislative Council of the Hong Kong SAR will be constituted by election. Considering the peculiar circumstances of Hong Kong, it was agreed that the method of the formation of the Legislative Council would be introduced according to the actual situation and the principle of gradual and orderly progress. It is reflected from the Basic Law that the ultimate aim is the election of all members of the legislative Council of Hong Kong SAR by universal suffrage. Basic Law, art. 68. Annex II of the Basic Law provides for the "Methods for the Formation of the Legislative Council of the Hong Kong SAR and its Voting Procedures." It stipulates that for the second term of the Legislative Council, out of 60 members, 24 will come from geographical constituencies through direct election whilst 30 members will represent functional constituencies and six members will represent the Election Committee. For the third term of the Legislative Council of the Hong Kong SAR, there will be no representation from the Election Committee and 30 members will come from geographical constituencies through direct elections and the other 30 members will represent functional constituencies. After year 2007, if there is any need to change this method of election, that may be done according to the procedures laid down in Annex II of the Basic Law. Basic Law, Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures.

¹⁶⁷ As Hong Kong was under the British rule before the handover of sovereignty on July 1, 1997, it was not possible for China to conduct an election of NPC deputies. After the handover, taking into consideration the fact that NPC deputies from other parts of China are all elected, it will be logical for those from the Hong Kong SAR to be elected as well.

¹⁶⁸ When the Basic Law was drafted, it was agreed that it should not be easily amended because, once adopted, it would be the supreme law of the Hong Kong SAR. See, Chow, *supra* note 27.

constitution for the region and is subordinate only to the Chinese Constitution in China's legal hierarchy.

The effectiveness of the Basic Law depends on how it is interpreted. Article 158 of the Basic Law provides for a mechanism for interpretation. At the same time, it reiterates that, as with any other Chinese law, the power to interpret the Basic Law vests with the Standing Committee of the National People's Congress. As part of the "two systems" branch of China's policy, the courts of Hong Kong are authorized to interpret the Basic Law whenever their adjudications do not involve qualified issues such as defense, foreign affairs, or the relationship between the Central Government and the Special Administrative Region Government. If a qualified issue is involved, the Courts of Hong Kong have an obligation to seek, through the Court of Final Appeal, an interpretation of the Standing Committee of the NPC before making an unappealable judgment.

The Basic Law is in infancy. The success of the system prescribed by the Basic Law will depend on efforts by, and mutual understanding of, the Chinese and Hong Kong governments. The Government of mainland China must respect and implement the "two systems" concept. At the same time, people in Hong Kong must understand the importance of the "one country" principle. Only by respecting both prongs of the "one country, two systems" policy can the legal systems of Hong Kong be maintained and the laws of Hong Kong, including the Basic Law, be effectively implemented.

