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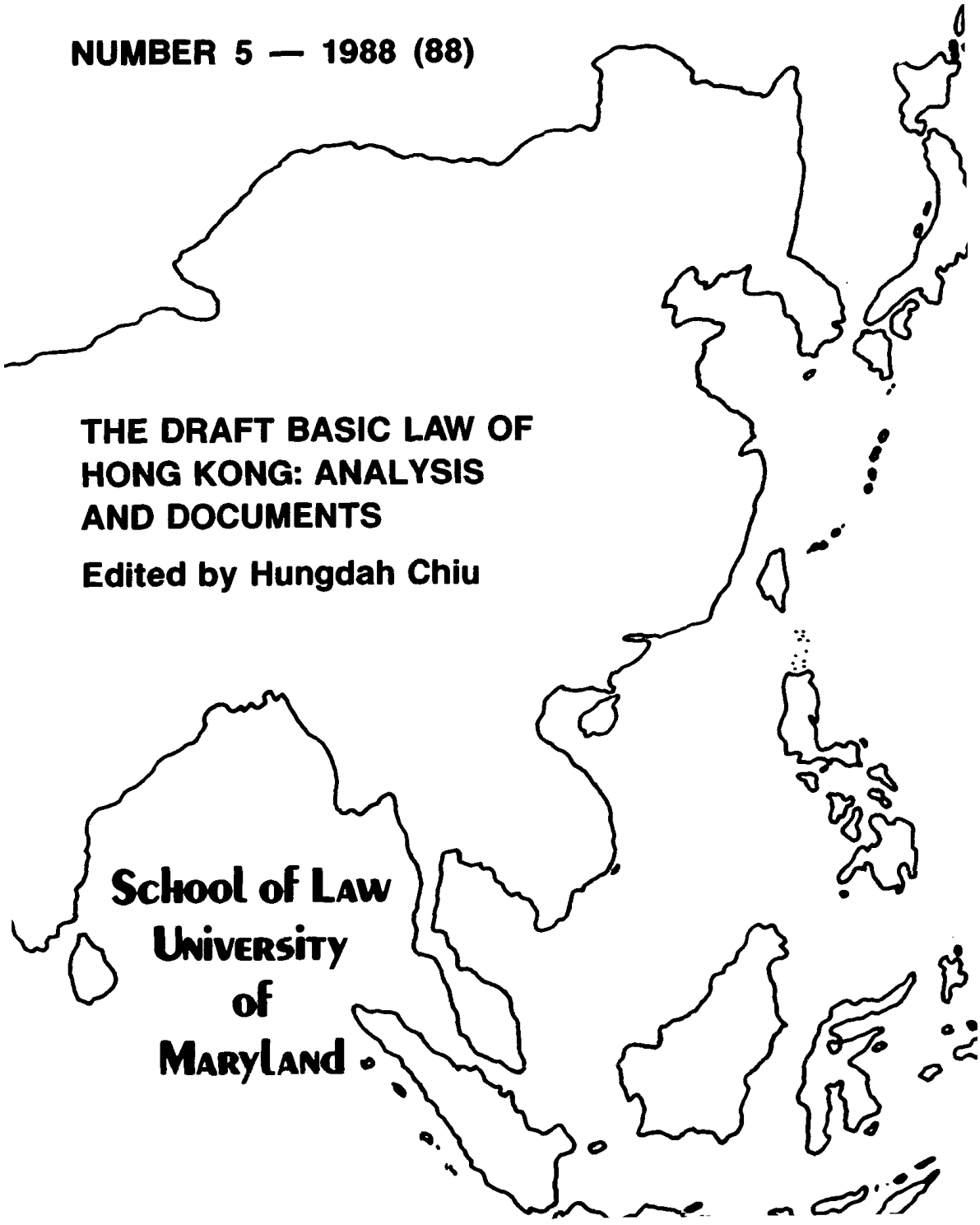

# THE DRAFT BASIC LAW OF HONG KONG: ANALYSIS AND DOCUMENTS

Edited by Hungdah Chiu

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The Law Society of Hong Kong, for permission to reprint Sir William Wade's Opinion on the Draft Basic Law of Hong Kong.

The Amnesty International, for permission to reprint its Memorandum on the Draft Basic Law of Hong Kong's Special Administrative Region.

Martin Lee and Szeto Wah, for permission to reprint Chapter II of *The Basic Law, some basic flaws.*

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*Hungdah Chiu*
*December 1, 1988*

# CHAPTER I

## INTRODUCTION

*Hungdah Chiu*

On September 26, 1984, the United Kingdom and the People's Republic of China (PRC) initialed a Joint Declaration on the Question of Hong Kong (hereafter referred to as the Declaration), which was signed formally on December 19, 1984. The instruments of ratification were exchanged on May 27, 1985. Under the Declaration, the PRC is "to resume the exercise of sovereignty over Hong Kong [including Hong Kong Island, Kowloon Peninsula, and the New Territories] with effect from 1 July 1997," and Hong Kong itself is to become a Special Administrative Region (SAR) of China that will be allowed a "high degree of autonomy," and its social and economic systems and life-style will remain unchanged for 50 years after 1997. The Declaration contains more than 8000 words and spells out in detail the PRC's policy toward Hong Kong, the post-1997 Hong Kong Regime, and its international relations. This policy and its elaboration in Annex I of the Joint Declaration "will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the Peoples's Republic of China, and they will remain unchanged for 50 years." The Declaration further points out that the PRC's decision to establish a Hong Kong SAR was in "accordance with the provisions of Article 31 of the [1982] Constitution of the People's Republic of China." Article 31 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 special conditions." Article 62, paragraph 13 of the PRC Constitution grants the National People's Congress the power "to decide on the establishment of special administrative regions and the systems to be instituted there."

On April 10, 1985, at the Third Meeting of the Sixth National People's Congress, the Basic Law Drafting Committee (BLDC) was established. On June 18, 1985, the Eleventh Meeting of the Standing Committee of the Sixth National People's Congress approved the membership of the BLDC. Among the 59 members, 23 were from

Hong Kong, most of them prominent businessmen and leading professionals. On December 18, 1985, the BLDC established a Basic Law Consultative Committee (BLCC) in Hong Kong, comprised of 180 members. Its members were not elected. On April 28, 1988, the BLDC published its Draft Basic Law.

The purpose of this book is to analyze some important legal and political issues raised by the Draft Basic Law, such as the relationship between the Central Government and the Hong Kong SAR, the legislative and judicial power of the SAR, the interpretation of the Basic Law, rights and duties of citizens under the SAR and the guarantee, if any, of the implementation of the Basic Law.

In Chapter II, Joseph Y. S. Cheng discusses the political system of the Hong Kong SAR as provided in the Draft Basic Law. He begins his analysis by briefly describing the process leading to the adoption of the Draft Basic Law, especially the role of the Hong Kong Members of the BLDC. According to him, the most important function of the Hong Kong members in the BLDC is to provide legitimacy to the Basic Law. Their involvement in the drafting process and their endorsement of the final document will provide the claim that it is acceptable to the Hong Kong community. However, their participation is minimal. Since the BLDC holds only two or three sessions a year, Cheng points out that he believes the actual drafting work has been performed largely by a secretariat composed of experts from the PRC State Council's Hong Kong and Macau Affairs Office and the relevant sections of the Ministry of Foreign Affairs. The role of the Hong Kong members is mainly advisory. With respect to the BLCC, a supposedly unofficial, voluntary organization, it was in fact controlled by the PRC.

In the course of drafting the Basic Law, it has become clear that the PRC Central Government wants to retain final control, especially in matters relating to the autonomy of the Hong Kong SAR's political system, Cheng observed. Thus, the residual powers, i.e., those powers not delegated to the Hong Kong SAR by the Basic Law, are to be reserved for the Central Government, and the amendment and interpretation of the Basic Law are to be entrusted to the PRC's National Peoples's Congress and its Standing Committee respectively. Therefore, the Basic Law will offer very limited guarantees for political autonomy of the Hong Kong SAR. Moreover, an attempt to analyze the Draft Basic Law has serious limitations without the development of a good understanding of the future role of the Chinese Communist Party (CCP) in the Hong Kong SAR, which, Cheng notes, is unfortunately at the moment a matter of sheer speculation at best.

In conclusion, Cheng considers that the Hong Kong community may have to count not so much on the Basic Law but on domestic and international factors to ensure the observance by PRC leaders of promises made to the Hong Kong people and the international community in the 1984 Sino-British Joint Declaration and the Basic Law. Any violation of the spirit of these documents and the promises made by the PRC regarding Hong Kong likely would hurt the capitalist world's confidence in the PRC and be detrimental to the PRC's modernization program and open-door policy.

Analyzing the Draft Basic Law from a political and comparative approach, Ting Wai, in Chapter III, tries to answer the question of what the Basic Law will guarantee. At the conclusion of the Sino-British Joint Declaration, the parties generally hoped that the Basic Law would be a logical, legal and full implementation of the political principles laid down by the Joint Declaration. It is doubtful, Ting observed, that this is the case. Some provisions of the Joint Declaration are controversial. This is because, as the negotiation deadline unilaterally imposed by the PRC approached, the United Kingdom refused to agree to all PRC demands. As a result, the Joint Declaration itself contains some provisions that reflect "Agreement to Disagree." These, in turn, have led to some controversial articles that are subject to different interpretations. An example is the appointment of the Chief Executive by the Central People's Government "on the basis of elections or consultations to be held locally." Election in a democratic way is absolutely different from "democratic consultation," which is the Chinese Communist method of selecting executives or making decisions. Moreover, after 1997, the capitalist society in Hong Kong will be placed under the control of the socialist state of China, which is dominated by the CCP. The CCP is accustomed to the traditional way of "directing" society through state intervention. It is inevitable, therefore, that such a leadership style would be reflected in the Draft Basic Law. Ting's paper attempts to use the Joint Declaration to check and study whether the provisions of the Draft Basic Law contradict the basic principles agreed upon in the Sino-British Joint Declaration, and to answer the questions of what the relationship between the Chinese central authorities and the Hong Kong SAR will be and what kind of "autonomy" Hong Kong will enjoy in the future.

Ting is skeptical of the view that the Draft Basic Law is a guarantee of a high degree of autonomy for the Hong Kong SAR because the power of the Standing Committee of the National People's Congress in relation to the Hong Kong SAR are not carefully restricted. Moreover, the Draft Basic Law enables the Central People's Government to

exercise its supreme power over the Hong Kong SAR in case of necessity. It limits the scope of powers enjoyed by the Hong Kong SAR, but no provisions are available in the Chinese Constitution to check the exercise of power by the Central People's Government over the Hong Kong SAR. China's socialist state institutions operate under the principle of a "combination of legislature and executive power" and there is no need to have any "check and balance" mechanism. The judicial organs are not independent, but are accountable to the National People's Congress, a political body. On the other hand, capitalist Hong Kong practices a common law system in which judicial independence is emphasized. The Draft Basic Law, which is to be subordinate to the Chinese Constitution enacted by the National People's Congress, must seek to harmonize the contradiction between the two legal systems. How this will be done remains to be seen.

At the request of the Law Society Council of Hong Kong, Sir William Wade delivered an opinion on the Draft Basic Law. This opinion is reported in Chapter IV. According to him, the intention of the 1984 Sino-British Joint Declaration is that the Hong Kong SAR is to enjoy genuine legal autonomy, with effective judicial protection. Autonomy of the political kind, depending merely on international convention and international good faith, would be entirely insufficient in the circumstances of the transfer of sovereignty over Hong Kong from the United Kingdom to the PRC. Political autonomy, as provided in international conventions, can operate only where there is an established political and legal framework within which conventions can be establised and implemented reliably, as they have done so often within the British Commonwealth. These necessary circumstances are

administrative or local rules may contravene the Constitution. While Article 17 of the Draft Basic Law provides that laws enacted by the National People's Congress or its Standing Committee will not be applied in the Hong Kong SAR, except in stipulated cases, it represents an attempt to restrict the legislative power of the National People's Congress. Most British constitutional lawyers would consider this arrangement ineffective. The Basic Law will therefore need to be enacted as a constitutional amendment under Article 64 of the Chinese Constitution.

As for granting power to the Standing Committee of the National People's Congress to decide whether future legislation of the Hong Kong SAR is in conflict with the Basic Law (Article 16) and to interpret the Basic Law (Article 169), Sir William considers it inappropriate. In his view, these are legal questions and, therefore, should be entrusted to a judicial body rather than a political body. Article 17 of the Basic Law provides that the State Council shall direct the Hong Kong SAR to promulgate Chinese laws "which give expression to national unity and territorial integrity." According to Sir William, such a provision is far from precise, and there is a danger that it could be stretched to cover wide areas of political legislation. Article 18 provides that the courts of the Hong Kong SAR shall have no jurisdiction over "cases relating to the executive acts of the Central People's Government" and when questions concerning executive acts arise in any legal proceedings, the Hong Kong courts shall seek the advice of the Chief Executive, who has to "obtain a certificate from the Standing Committee of the National People's Congress or the State Council," before issuing a statement that is binding on the courts. He is of the opinion that this arrangement is fundamentally objectionable because the Central People's Government would be placed above the law and could take whatever steps it believed were appropriate. This provision is also contrary to the assurance of "a high degree of autonomy," since the Central People's Government presumably could not be prevented from infringing on the Hong Kong SAR's authority, thereby obliterating any autonomy.

Finally, Sir William suggests that if agreement cannot be reached for resolving future disputes as stated above a solution might be to set up a constitutional court with three British and three Chinese judges and a President from some third country appointed by agreement of both sides.

The appendixes contain reprints of two studies on the Basic Law already published as well as the text of the Draft Basic Law. Appendix I contains the opinions of two Hong Kong members of the BLDC,

Martin Lee and Szeto Wah, on the relationship between the central authorities and the Hong Kong SAR. They suggest that the power to decide whether any laws of the Hong Kong SAR is not in conformity with the Basic Law should be given to the court of final appeal in Hong Kong, rather than to the Standing Committee of the National People's Congress, a political body, as currently is provided in Article 16, paragraphs 3 of the Draft Basic Law. They also suggest that Article 18 of the Basic Law, which provides the Hong Kong SAR's courts from retaining jurisdiction over executive acts of the Central People's Government, to be replaced by the following provision: "The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system and principles shall be maintained."

Appendix II is Amnesty International's memorandum on provisions of the Draft Basic Law that relates to the protection of fundamental human rights. According to this study, the Draft Basic Law does not adequately ensure the continued effectiveness of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights after 1997, despite the fact that the PRC has assured Hong Kong residents, in the 1984 Sino-British Joint Declaration, that these two documents, now in force in Hong Kong, will continue after July 1, 1997.

On the human rights provisions in the Draft Basic Law, this memorandum observes that the Law does not have provisions pertaining to: protection against torture and other cruel, inhuman or degrading treatment or punishment; protection of the right to life; and protection of the right to prompt and fair trial and others. All these shortcomings may be overcome by redrafting, by incorporating by reference the two covenants on human rights in the Basic Law, or by providing explicitly that the Covenants are part of the law of the Hong Kong SAR.

Appendix III is the English translation of the Draft Basic Law from Beijing's *China Daily*. A selected bibliography also was prepared for those who wish to do further research on the subject.

# CHAPTER II

## THE DRAFT BASIC LAW: MESSAGES FOR HONG KONG PEOPLE

*Joseph Y.S. Cheng**

## I. INTRODUCTION

After the initialling of the Sino-British Joint Declaration in September 1984, the focus of the question of Hong Kong's future has shifted to the drafting of the Basic Law.[1] The people of Hong Kong could not take part in the Sino-British negotiations leading to the Joint Declaration, because Beijing considered such negotiations to be a bilateral effort to resolve a historical problem between the two countries; the colonial administration in Hong Kong obviously had no part in them. By the same token, the British Government could not claim to have any moral obligation toward the people of Hong Kong, who are Chinese. Beijing viewed itself as solely responsible for the welfare of the local population, and consultation with the Hong Kong community by the government of the People's Republic of China (PRC) was considered to be strictly a domestic matter.[2]

The Sino-British Joint Declaration indicated that the PRC's basic policies regarding Hong Kong, as stated in the Joint Declaration and elaborated in Annex I to the Joint Declaration, "will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China, by the National People's Congress (NPC) of the People's Republic of China, and they will remain unchanged for 50 years."[3] The Joint Declaration further pointed out that the PRC's decision to establish a HKSAR was "in accordance with the provisions of Article 31 of the Constitution of the People's

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* Senior Lecturer, Department of Government and Public Administration, The Chinese University of Hong Kong.

1. *See A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong*, Hong Kong: Government Printer, September 26, 1984 (hereinafter "*The Sino-British Joint Declaration*").

2. *See* the author's "Introduction" and "The Position of the Chinese Government" in his edited work *Hong Kong In Search of a Future*, Hong Kong: Oxford University Press, 1984, pp. 1-27 and 45-74.

3. *The Sino-British Joint Declaration*, *supra* note 1, Article 3(12), p. 13.

Republic of China."[4]

Article 31 of the PRC Constitution states: "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."[5] In line with this, the Constitution grants the NPC the power "to decide on the establishment of special administrative regions and the systems to be instituted there."[6]

The drafting of the Basic Law is therefore the PRC's domestic affair. It will be a "mini-constitution," defining the respective authorities of the Central Government in Beijing and the HKSAR government. The political system of the HKSAR and the rights and obligations of Chinese citizens in the HKSAR. Naturally, the people of Hong Kong were concerned as to whether their representatives would be involved in the drafting process and in which ways they would be consulted to make sure that the Basic Law would be acceptable to them before its formal promulgation.

As the PRC government could not hold elections in Hong Kong, it had to appoint representatives of the Hong Kong people to the Basic Law Drafting Committee (BLDC). The difficulty was how to select a respectable sample that would be trusted by the Hong Kong community and acceptable to the PRC authorities. The choice had to enhance the PRC's united front work in Hong Kong, too. This select group, however, had to avoid being perceived as a new center of authority challenging the British administration in Hong Kong.

When membership of the BLDC was announced in July 1985, it was clear that the PRC government placed top priority on the stability and prosperity of the territory and that radical political reforms would be unlikely. There were 23 members from Hong Kong in the 59-member committee, most of them prominent businessmen and leading professionals. The interests of the establishment in Hong Kong apparently were assured, as the PRC authorities were keen to retain Hong Kong's attraction to investors.[7]

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4. *Ibid.*, Article 3(1), p. 11.

5. *The Constitution of the People's Republic of China* (Adopted on December 4, 1982 by the Fifth National People's Congress of the People's Republic of China at its Fifth Session), Beijing: Foreign Languages Press, 1983 (hereinafter "*The Constitution*"), p. 27.

6. *Ibid.*, Article 62(13), p. 49.

7. For an account of the formation of the BLDC and the BLCC, *see* Albert H.Y. Chen, *Xianggang Fazhi yu Jibenfa (Hong Kong's Legal System and the Basic Law)*, Hong Kong: Wide Angle Press Ltd., 1986, pp. 233-263. Regarding the background of the BLDC members from Hong Kong and the key BLCC members, *see* Margret Scott and

The most important function of the Hong Kong members in the BLDC is to provide legitimacy to the Basic Law. Their involvement in the drafting work and their endorsement of the final document will provide the claim that it is acceptable to the Hong Kong community. As the BLDC holds only two or three plenary sessions a year, it is believed that the actual drafting work has largely been performed by a secretariat composed of experts from the PRC State Council's Hong Kong and Macau Affairs Office and the relevant sections of the Ministry of Foreign Affairs. The role of the Hong Kong members is mainly advisory. After all, they are a minority in the BLDC, and the Basic Law will have to go through the NPC.

Though the Hong Kong members of the BLDC had been contacted and consulted by local New China News Agency officials, they were quite ignorant until their departure for Beijing of what their respective appointments were based on, to whom they were accountable, their terms of office, their powers and responsibilities and even the agenda of their first meeting. Nor did they appear to be very concerned about these issues. According to the speech of the chairman of the BLDC, Ji Pengfei (also director of the PRC State Council's Hong Kong and Macau Affairs Office), at the opening ceremony of the BLDC's first meeting:

> The Basic Law Drafting Committee is the working organ established by the National People's Congress for drafting the Basic Law of the Hong Kong Special Administrative Region; it is responsible to the National People's Congress, and when the National People's Congress is not in session, it is responsible to the Standing Committee of the National People's Congress.[8]

In response to a small number of Hong Kong members of the BLDC, who articulated the local community's interests, the PRC authorities were forced to consider the moral responsibility that those members bore to the people of Hong Kong. Later, in a sub-group meeting, Ji Pengfei indicated that the Hong Kong members of the BLDC might consider issues from the point of view of "two systems"—yet they also should try to consider issues more from the point of view of "one country." In Ji's view, the Hong Kong members must

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Emily Lau, "Who's What" and "Brokers of the Future," *Far Eastern Economic Review*, Vol. 136, No. 16, April 16, 1987, pp. 41 and 43-5.

8. For an analysis of the ambiguity and controversy concerning the accountability of the BLDC members from Hong Kong and the control of the BLCC by the BLDC, *see* the author's "Hong Kong: the Pressure to Converge", *International Affairs* (London), Vol. 63, No. 2, Spring 1987, pp. 275-6.

be accountable not only to their Hong Kong compatriots, but also to the entire Chinese people, because they had been appointed by the Standing Committee of the NPC. Ji's explanation reflected the moral and political identity crisis of the Hong Kong members of the BLDC.

The first task of the Hong Kong members (who included Xu Jiatun and Mao Junnian, director and deputy secretary-general, respectively, of the Hong Kong branch of the New China New's Agency) was to form a Basic Law Consultative Committee (BLCC). According to the constitution of the BLCC, its objective was "to engage in consultative activities in Hong Kong for the purpose of drafting the Basic Law of the Hong Kong Special Administrative Region in accordance with the will of the entire Chinese people including the Hong Kong compatriots". If the BLCC had to act "in accordance with the will of the entire Chinese people," then that weight should be attached to the will of the Hong Kong people?

In short, the organization and membership of the BLCC, the drafting of its constitution and the associated controversy over the phrase "domestic consultations" in its draft constitution, and the authority of its executive committee and the procedures governing the revision of its constitution all demonstrated the PRC authorities' intention to control this supposedly unofficial, voluntary organization. The subsequent election of the chairman, vice-chairman and secretary-general of the BLCC executive committee (based on a slate presented by a BLDC vice-chairman) caused an uproar, and Hong Kong became deeply suspicious of the PRC authorities' intentions.

While the BLCC was being formed, some political groups and commentators indicated that the Hong Kong BLDC members should refrain from joining the BLCC, so as to ensure the independence of this unofficial and voluntary organization. Later, it also was suggested that, at the very least, the Hong Kong BLDC members should not serve on the BLCC's executive committee. The result, however, was that seven Hong Kong members of the BLDC (including Mao Junnian) joined the BLCC, and that six of them served on the BLCC's executive committee. Further, a BLDC vice-chairman served as the chairman of the BLCC's executive committee and the deputy secretary-general of the BLDC served as secretary-general of the BLCC's executive committee (this man was also concurrently deputy secretary-general of the Hong Kong branch of the New China News Agency). The control of the BLCC by the BLDC was unequivocal, despite the stipulation in its constitution that "the Consultative Committee and the Drafting Committee shall be independent of and not subordinate to each other".

The above was only part of the cause of the decline of political expectations and confidence in Hong Kong since 1985.[9] A survey conducted in that year by Kuan Hsin Chi and Lau Siu Kai of the Chinese University of Hong Kong revealed that 61.7 percent of the respondents believed in the ability of Hong Kong people to run Hong Kong well, while 16.9 percent thought otherwise and 21.4 percent had no opinion. On the other hand, however, only 22.3 percent of the respondents believed the PRC authorities would truly let Hong Kong people rule Hong Kong as against 44 percent (43.9 percent) who proclaimed no confidence in the PRC leadership's promise and 33.8 percent had not made up their mind. In addition, 62.3 percent of the respondents agreed or strongly agreed with the general statement that the political fate of Hong Kong people was beyond their control.[10]

It appears that traditional political apathy has returned to Hong Kong. Survey results released in mid-May 1988 indicated that 56.7 percent of the respondents who had picked up copies of the draft Basic Law had not read the document, while 35 percent had read a small part of it. Among those who knew of the draft Basic Law, only 6.9 percent said they would comment on various articles of the draft, while 34.7 percent indicated that they had not yet decided and 58 percent were not prepared to give their views. Of those who were prepared to give their views, they did not seem to be aware of the channels offered by the BLCC. Ironically, 30.8 percent of them chose to rely on the district boards and the District Offices of the Hong Kong government.[11] Another survey conducted in early May 1988 reflected that 24 percent of the respondents wanted to emigrate, and the percentage went up to 45.5 percent among those who had at least a tertiary education.[12]

The release of the Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions) (hereinafter the "draft Basic Law") on April 28, 1988

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9. *See* The author's "Hong Kong: The Decline of Political Expectations and Confidence", to be published by *The Australian Journal of Chinese Affairs*.

10. *See* Kuan Hsin Chi and Lau Siu-kai, "The Civil Self In a Changing Polity: The Case of Hong Kong", article to be published by *The Asian Journal of Public Administration*, p. 21.

11. "*Ziweihui Shouji Yijian Gongneng, Diaocha Xianshi Shimin Bu Liaojie* (BLCC's Function of Collecting Opinions Has Not Been Understood by the People, Revealed by Survey Results)," *Ming Pao* (Hong Kong), May 16, 1988, p. 2; and "Survey Finds 70 Per Cent 'Have Not Read Draft'," *South China Morning Post* (Hong Kong), May 16, 1988, p. 6.

12. "*Xiwang Yimin Gangren Zengjia* (Increase in Hong Kong People Who Hope to Emigrate)," *Ming Pao*, May 16, 1988, p. 2.

and the consultation process associated with it ideally should offer an important opportunity for inculcating a sense of belonging to the community. Further, they should consolidate support for the implementation of the ideal of "one country, two systems" through the establishment of the HKSAR.[13] To arrest the decline of political expectations and confidence, and to reverse the return of political apathy and the tide of emigration, the PRC authorities must demonstrate once again their willingness to listen and respond to the community's demands as they did during the Sino-British negotiations on Hong Kong's future in 1982-84. Otherwise, the present prosperity only may be perceived by those with the required assets and qualifications as a final opportunity to make more money before emigration. At the same time, a strong consensus has to be reached soon within the Hong Kong community through extensive consultation and discussions. A serious danger at present is that the PRC authorities are giving indications that they have received a broad spectrum of views, and that they may use this to gain a relatively free hand to shape the political future of Hong Kong, thus reinforcing political apathy and a decline in confidence.

## II. THE CONSTITUTIONAL AND LEGAL STATUS OF THE BASIC LAW AND THE HKSAR

In terms of the hierarchy of laws in the PRC, the Constitution "is the fundamental law of the state and has supreme legal authority".[14] The basic laws, ordinary statutes, administrative rules and regulations enacted by the State Council[15] stand next in line. They are followed by the local regulations adopted by the people's congresses of provinces and municipalities directly under the central government and their standing committees.[16] This hierarchy is strictly defined, and laws of a lower level cannot contravene those of a higher level.[17] The

13. The draft Basic Law was issued by the BLDC, while the Introduction and Summary were compiled by the BLCC. The whole set of documents, appearing in pamphlet form with separate Chinese and English versions, have been distributed free since April 29, 1988 in Hong Kong. The Chinese version is the official version, while all quotations of the draft Basic Law in this chapter are from the English version (hereinafter "*The Draft Basic Law*").

14. *The Constitution*, *supra* note 5, Preamble, p. 8.

15. *Ibid.*, Article 89(1), p. 65.

16. *Ibid.*, Article 100, pp. 73-74.

17. *See Zuihou Baogao: Jibenfa yu Xianfa de Guanxi (Final Report: The Relationship Between the Basic Law and the Constitution)* of the Special Group on the Relationship Between the Central Government and the SAR of the BLCC, p. 3; the Final Report was adopted by the Executive Committee of the BLCC on February 14, 1987.

Basic Law of the HKSAR belongs to the category of "basic laws," since it will be promulgated by the NPC. A law similar to it in status is the Law on Regional Autonomy for Minority Nationalities of the PRC, which was adopted on May 31, 1984 by the NPC.[18]

Ever since the ideas of "one country, two systems" and a Basic Law for the HKSAR were first raised by the PRC leaders,[19] the relationship between the Basic Law and the PRC Constitution has been a serious concern of the Hong Kong community. The idea of "one country, two systems" is to allow Hong Kong's current social and economic systems to remain unchanged. This promise by the PRC leadership was embodied in Article 3(5) of the Sino-British Joint Declaration and will be stipulated in the Basic Law.[20] The PRC Constitution, however, clearly states that "the Chinese people of all nationalities will continue to . . . follow the socialist road".[21] A careful examination of the following articles of the Constitution obviously casts doubt on the ability of the Basic Law to provide for the continuance of the capitalist system in Hong Kong for fifty years after its return to the PRC in 1997. These constitutional provisions are:

> Article 1: "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."[22]
>
> Article 5: "The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution.[23]
>
> Article 6: "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole

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18. Full text of the law, "*Zhonghua Renmin Gongheguo Minzu Quyu Zizhifa*", may be found in *Renmin Ribao (People's Daily)*, June 4, 1984, p. 1.

19. For a brief account of the background materials on the birth of the ideas of "one country, two systems" and the Basic Law, *see Zuihou Baogao: Jibenfa yu Xianfa de Guangxi (Final Report: The Relationship Between the Basic Law and the Constitution)*, *supra* note 17, p. 1. *See also* Deng Xiaoping's statements to Mrs. Margaret Thatcher on the same subjects during their meeting on December 19, 1984 in Beijing, collected in Li Da (ed.), *Yiguo Liangzhi yu Taiwan (One Country, Two Systems and Taiwan)*, Hong Kong: Wide Angle Press Ltd., 1987, pp. 22-25.

20. Article 3(5) states: "The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style . . . ." *The Sino-British Joint Declaration*, *supra* note 1, p. 12.

21. *The Constitution*, *supra* note 5, Preamble, p. 5.

22. *Ibid.*, p. 11.

23. *Ibid.*, pp. 13-14.

people and collective ownership by the working people."[24]

Even before the initialling of the Sino-British Joint Declaration, various groups in Hong Kong indicated to the PRC officials responsible for Hong Kong affairs that the guarantee of a capitalist system in Hong Kong might be in violation of the PRC Constitution; and revision of article 31 of the Constitution was suggested.[25] The PRC authorities apparently were reluctant to discuss revision of the Constitution,[26] but they were aware that some form of assurance was necessary.

The issue was raised repeatedly in the initial phase of the drafting of the Basic Law. Finally, Shao Tianren, co-convener of the Sub-group on the Relationship between the Central Government and the SAR of the BLDC and a legal expert of the PRC Ministry of Foreign Affairs, indicated after a May-June 1986 meeting of the sub-group that the proposal to rewrite Article 31 of the PRC Constitution would not be accepted.[27] Shao felt that the Constitution should not be altered too easily, and that the problem with previous Constitutions was that there had been too many changes. He, therefore, would like to solve the problem without having to amend the Constitution. Nonetheless, it was acknowledged that a consensus existed in the sub-group on the need to clarify the relationship between the basic law and the PRC Constitution in order to assure the Hong Kong community that socialism as prescribed by the Constitution would not be practiced in the territory. It was suggested that the PRC authorities' reluctance to

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24. *Ibid.*, p. 14.

25. In December 1983, the Hong Kong Observers (a local political group) were invited to send a delegation (of which the author was a member) to visit the Hong Kong and Macau Affairs Office of the State Council in Beijing to discuss the issue of Hong Kong's future. The issue was raised to officials of the Hong Kong and Macau Affairs Office, including Li Hou and Lu Ping, deputy director and secretary-general, respectively, of the office. Another political group, Meeting Point, also raised the issue in its visit to Beijing in 1984, and it released its position paper *Xianfa Xiugai Tiyi ji Jibenfa Dagang (Cao'an) (Proposal on the Revision of the Constitution and A Draft Outline of the Basic Law)* in May 1984; collected in Ye Jianyuan (ed.), *Jibenfa Mianmianguan (Perspectives on the Basic Law)*, Hong Kong: Genius Publishing Co., 1984, pp. 63-78.

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

27. "*Shao Tianren Shuo, Weimian Xianggang Tuixing Shehuizhuyi, Jibenfa yu Zhongguo Xianfa Guangxi Xu Nong Qingchu, Caishi Gangren Fangxin* (Shao Tianren Stated, To Avoid Enforcing Socialism in Hong Kong, The Relationship Between the Basic Law and the Chinese Constitution Must Be Clarified so as to Put the Hearts of the Hong Kong People at Ease)", *Ming Pao*, June 2, 1986, p. —.

amend the Constitution was related largely to the concept of "saving face" and the consideration that any amendment of Article 31 of the Constitution might imply that the very provisions of the Sino-British Joint Declaration were in violation of the Constitution as it stood in 1984.

The Hong Kong community's reaction has been that these considerations should not be put above the rule of law. It also sensed a resentment against such a demand from PRC officials responsible for Hong Kong and Macau affairs, who may have felt that such a small area as Hong Kong should not be involved with the highest level of state affairs like the revision of the Constitution. Critics within the community argued that the demand had been raised not merely for the sake of Hong Kong, but also out of respect for the rule of law in the PRC. The fact that few people raise the issue again after the release of the draft Basic Law demonstrates the decline in political expectation in Hong Kong; and the entire episode is highly illustrative of future problems in the relationship between the Central Government and the HKSAR. Incidentally, in April 1988, the Seventh NPC amended Article 10 of the Constitution, deleting the prohibition against leasing land and added the sentence: "Land-use rights according to legal regulation can be transferred."[28]

In contrast to the PRC's national autonomous regions, the power of autonomy of the SAR is not guaranteed by the Constitution, but stipulated by basic laws promulgated by the NPC. (In the case of the HKSAR, the Sino-British Joint Declaration provides a further guarantee in its form as an international agreement.)[29] However, as the content of the HKSAR's power of autonomy is to be defined by a Basic Law promulgated by the NPC, this power of autonomy, from a constitutional point of view, is of a lower order than that of the national autonomous regions embodied in the Constitution. In terms of the actual powers enjoyed by the HKSAR, as outlined by Annex I of the Sino-British Joint Declaration and the draft Basic Law, the HKSAR will enjoy a much higher degree of actual autonomy than the present national autonomous regions of the PRC.[30]

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28. Stephen Morgan, "Ideology on the Block", *Far Eastern Economic Review*, Vol. 141, No. 28, July 14, 1988, p. 22.

29. For the rather limited power of autonomy of the PRC's national autonomous regions, *see The Constitution*, Section VI: The Organs of Self-Government of National Autonomous Areas, pp. 80-85.

30. *See The Sino-British Joint Declaration*, Annex I, pp. 14-25; and *The Draft Basic Law*, Chapter II: Relationship between the Central Authorities and the Hong Kong Special Administrative Region, pp. 32-36.

As a SAR under the sovereignty of the PRC, Hong Kong has been warned against the tendencies of becoming an "independent political entity".[31] The Sino-British Joint Declaration states: "The Hong Kong Special Administrative Region will enjoy a high degree of autonomy . . . ."[32] However, a high degree of autonomy also means limited autonomy. The PRC government obviously will not change the existing unitary system into a federal one just for the reunification of Taiwan, Hong Kong and Macau. The idea of granting Hong Kong "residual power" which allows the HKSAR full authority to handle its own affairs, except in foreign and defense affairs which are the responsibilities of the Central Government in Beijing, has been raised by some groups in the Hong Kong community.[33] The suggestion, if accepted, certainly will affect the absolute authority of the Central Government.

In a unitary system, the authority of a local government comes entirely from the central government, and this authority, at least theoretically, may be changed or withdrawn at will by the central government. In contrast, the central government and the local governments in a federal system have their respective authorities well defined in a constitution which cannot be amended without the consent of a majority of the constituent units of the federation. Thus, when the PRC government promises in the Sino-British Joint Declaration that it will enact a Basic Law "in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region . . . Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years",[34] it implies that in these fifty years, a federal relationship will exist to a certain extent. Since the Sino-British Joint Declaration and the Basic

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31. On September 9, 1984, Xu Jiatun, director of the Hong Kong branch of New China News Agency, addressed the University Graduates' Association. Xu stated: "Hong Kong after 1997 will not be a dependent territory of Britain, and will not be any 'independent political entity.' Instead it will become a highly autonomous SAR under the Chinese Government, a part of the great motherland." Answering questions afterwards, Xu explained: "Being 'highly autonomous,' Hong Kong still remains a part of the Chinese government, while an 'independent political entity' is independent of China. On this question, there is a view and a tendency that is worthy of your attention." *See* all major newspapers in Hong Kong on September 10, 1984.

32. *The Sino-British Joint Declaration, supra* note 1, Article 3(2), p. 11.

33. *See, e.g.*, The Legal System Group of the Hong Kong Affairs Society, "*Women dui Jibenfa de Yixie Kanfa* (Some of Our Views on the Basic Law)", released on June 3, 1984 and collected in Ye Jianyuan (ed.), *supra* note 25, pp. 79-90; the Hong Kong Observers delegation to Beijing on December 1983 also raised the same demand. See Note 25.

34. *The Sino-British Joint Declaration, supra* note 1, Article 1 of Annex 1, p. 14.

Law have to be approved by the NPC,[35] and the Basic Law also has a limited time span of fifty years, the arrangement should not be considered an infringement of the PRC's unitary system of government. The arrangement certainly has implications for Taiwan too. It is on this premise that Hong Kong people have raised the legitimate demand that the Basic Law should stipulate clearly that, except in foreign and defense affairs, the HKSAR has the sole authority to handle its domestic affairs.

This demand was not accepted by PRC authorities. According to Wu Jianfan, member of the BLDC and director of the China Law Society, the BLDC in its Second Plenary session adopted the view that there was no question of residual power as to the HKSAR, and the Basic Law should not include any provisions on this point. Wu justified the decision as follows:

> It [the question of residual powers] implicates China's state system, especially the nature and status of special administrative regions, and the origins of power, as well as a whole series of other critical issues. Therefore, we must adopt a prudent attitude toward this issue. The question of residual powers usually exists in countries with a federal system. . . . China's situation is different. China does not have a federal system, but has a unitary system. A locality's powers are not inherent in themselves, but are conferred by the state. Neither before nor after the establishment of the HKSAR does it possess independent sovereignty. The HKSAR's high degree of autonomy is conferred by the state through the Basic Law, and it cannot enjoy powers that were never conferred. So how can there be any residual powers? If one insists that there are residual powers, then these powers can only belong to the Central Government and not to the HKSAR.[36]

The "high degree of autonomy" to be enjoyed by the HKSAR as interpreted by Zhang Youyu, member of the BLDC, deputy chairman

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35. *See The Constitution, supra* note 5, Article 67(14), p. 54. It states that the Standing Committee of the NPC exercises the power "to decide on the ratification and abrogation of treaties and important agreements concluded with foreign states." The Sino-British Joint Declaration was ratified by the NPC on April 10, 1985. *See Xinhuashe* (New China News Agency), "*Diliujie Quanguo Renmin Daibiao Dahui Disanci Huiyi Bimu* (The Third Session of the Sixth NPC Closes)", *Renmin Ribao*, April 11, 1985, p. 1.

36. 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", *Journal of Chinese Law*, Vol. 2, No. 1, Spring 1988, pp. 73-74.

of the NPC Legal Committee and a leading legal expert of the PRC, is even more threatening. Zhang stated that:

> The high level of autonomy it [the HKSAR] will enjoy is conferred on it by the central organs of state power, and this high level of autonomy is not without limits. When exercising its high level of autonomy, Hong Kong will not proceed entirely without guidance, and even necessary intervention, from the central government. However, China's national sovereignty may not be damaged by Hong Kong's enjoyment of its high level of autonomy.[37]

In line with the demand for "residual power" for the HKSAR, various groups in Hong Kong also demanded that the power to propose to amend the Basic Law be vested in the HKSAR government. A local political group, Meeting Point, suggested that the power to propose to amend the Basic Law should be vested in the HKSAR legislature; proposals of amendments should first be adopted by a two-thirds majority of the legislature, and then approved by the Standing Committee of the NPC.[38] Since the Central Government cannot formally initiate amendments, this proposal would be in accord with the promise that "Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years."[39] The arrangement would provide for the necessary revision of the Basic Law. In addition, since all amendments would have to be approved by the Standing Committee of the NPC, the PRC's sovereignty would not be compromised and Hong Kong would be prevented from becoming an "independent political entity."

Article 170 of the draft Basic Law, however, states:

> The power of amendment of this Law is vested with the National People's Congress. The right to propose amendments to this Law rests with the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. . . . Before a proposal for an amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall

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37. Zhang Youyu, "The Reasons for the Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression", *ibid.*, p. 9.

38. *See* Meeting Point's position paper *Xianfa Xiugai Tiyi ji Jibenfa Dagang (Cao'an) (Proposal on the Revision of the Constitution and A Draft Outline of the Basic Law)*, *supra* note 25, p. 72.

39. *The Sino-British Joint Declaration*, *supra* note 1, Article 1 of Annex 1, p. 14.

> first study it and submit its views. No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.[40]

According to Article 170, the Central Government of the PRC would have full control of the amendment process. Similar to the issue of revising the Constitution, the controversies concerning "residual power" and the amendment of the Basic Law have receded into the background and apparently the Hong Kong community has conceded quietly to the position of the PRC authorities.

After the release of the Basic Law, critics in Hong Kong, especially the legal profession, have largely concentrated on Articles 16, 17, 18 and 169 regarding the relationship between the Central Government and the HKSAR. Article 16 states:

> The Hong Kong Special Administrative Region is vested with legislative power.
>
> Laws enacted by the legislature of the Hong Kong Special Administrative Region shall be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws.
>
> If the Standing Committee of the National People's Congress, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region, considers that any laws of the Region is [sic] not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. The cessation shall not have retroactive effect.[41]

As section II of Annex I to the Sino-British Joint Declaration already stipulates that "the legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region,"[42] it has been suggested that the first paragraph of Article 16 should be amended as follows: "The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Ad-

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40. *The Draft Basic Law, supra* note 13, pp. 75-76.

41. *Ibid.*, p. 33.

42. *The Sino-British Joint Declaration, supra* note 1, p. 15.

ministrative Region."[43]

More important still, the Hong Kong community is concerned that the power conferred on the Standing Committee of the NPC by Article 16 will compromise the autonomy of the HKSAR and the legislative power of the HKSAR legislature. Therefore, some groups have suggested that the third paragraph of Article 16 should be amended as follows: [T]he Standing Committee . . . may return the law in question for reconsideration by the legislature of the Hong Kong Special Administrative Region."[44] The legal profession in Hong Kong, on the other hand, has argued that, in a common law system, all the laws passed by the legislature are to be construed by the courts and not by the executive or the legislature, whereas in the PRC, the Standing Committee of the NPC has the power to interpret all the laws and the Constitution. It therefore proposes that the constitutionality of the laws passed by the HKSAR legislature should be left to the Court of Final Appeal of the HKSAR, following the example of the United States Supreme Court in construing the United States Constitution.[45]

Note 2 of the draft Basic Law provides an outline of the affiliation duties and composition of the Committee for the Basic Law of the HKSAR. It has to be understood, however, that this committee has only an advisory function and matters relating to this committee are to be decided by the Standing Committee of the NPC.[46]

Article 17 similarly has caused considerable concern. It states:

> Laws, enacted by the National People's Congress or its Standing Committee, which relate to defense and foreign affairs as well as other laws which give expression to national unity and territorial integrity and which, in accordance with the provisions of this Law, are outside the limits of the high degree of autonomy of Hong Kong Special Administrative Region, shall be applied logically by the government of the Hong Kong Special Administrative Region by way of promulgation or legislation on the directives of the State Coun-

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43. Martin Lee and Szeto Wah, *The Basic Law—Some Basic Flaws*, Hong Kong: Martin Lee and Szeto Wah, 1988, p. 13.

44. Some groups within the Joint Committee for the Promotion of Democratic Political Systems hold this view. The Joint Committee is an umbrella group involving almost all political groups demanding democracy in Hong Kong; it will state its position in a publication to be released in September 1988.

45. *See, e.g.*, Martin Lee and Szeto Wah, *supra* note 43, pp. 13-14.

46. *The Draft Basic Law, supra* note 13, p. 89.

> cil, whenever there is the need to apply any of such laws in the Region.
>
> Except in cases of emergency, the State Council shall consult the Committee for the Basic Law of the Hong Kong Special Administrative Region before issuing the above-mentioned directives.
>
> If the government of the Hong Kong Special Administrative Region fails to act in compliance with the directives given by the State Council, the State Council may decree the application of the above-mentioned law in the Hong Kong Special Administrative Region.[47]

The possibility that laws enacted by the NPC or its Standing Committee may be applied locally by way of promulgation on the directives of the State Council is quite threatening. The scope of "other laws which give expression to national unity and territorial integrity and which, in accordance with the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region" is equally disturbing. Most comments centering on this article after the release of the draft Basic Law tend to support the view that the laws concerning defense and foreign affairs should be applied by way of legislation by the HKSAR legislature at the request of the Standing Committee of the NPC. Further, apart from the laws concerning defense and foreign affairs, the nation-wide laws which give expression to national unity and territorial integrity and which shall be applicable to the HKSAR should be listed in an annex to the Basic Law.

Paragraphs 3 and 4 of Article 18, which have caused considerable controversy, are as follows:

> Courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases relating to defense and foreign affairs, which are the responsibility of the Central People's Government, and cases relating to the executive acts of the Central People's Government. Courts of the Hong Kong Special Administrative Region shall seek the advice of the Chief Executive whenever questions concerning defense, foreign affairs or the executive acts of the Central People's Government arise in any legal proceeding. A statement issued by the Chief Executive regarding such questions shall be binding on the courts.
>
> Before issuing such a statement, the Chief Executive

47. *Ibid.*, pp. 33-34.

> shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council.[48]

The community's concern is mainly with the broad definition of "the executive acts of the Central People's Government."[49] Because the efficiency and authority of the HKSAR courts will be considerably hampered in any legal proceeding, a party who wants to adopt delaying tactics may try to claim that the case in dispute involves questions concerning defense, foreign affairs or the executive acts of the Central People's Government. Hence, it has been suggested that the above two paragraphs should be deleted and that the retention of paragraph 2 of Article 18 should be sufficient to safeguard the sovereignty of the PRC. Paragraph 2 states: "Courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system shall be maintained."[50]

Finally, Article 169, which deals with the interpretation of the Basic Law, is criticized by the local legal profession as paralyzing the whole judicial system of the HKSAR. It states:

> The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress.
>
> When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.
>
> The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provision of this Law concerning defense, foreign affairs and other affairs which are the responsibility of the Central People's Government, the courts of the Region, before mak-

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48. *Ibid.*, p. 34.

49. Xiao Weiyun, member of the BLDC and Professor of Law at Beijing University, commented in this connection: "It has further been suggested that courts of the Hong Kong SAR should have no jurisdiction over the administrative behaviour of the Central People's Government, acts of a purely political nature, or over acts committed in the name of the state. These views are all proper, and this demarcation of jurisdictional competence does not affect the court's power of final judgement." *See* Xiao Weiyun, "A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law," *Journal of Chinese Law*, Vol. 2, No. 1, Spring 1988, p. 112.

50. *The Draft Basic Law*, *supra* note 13, p. 34.

> ing their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.
>
> The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.[51]

The concerned public in Hong Kong hopes that the Standing Committee of the NPC will delegate irrevocably to the HKSAR courts its power to interpret those articles of the Basic Law which are within the scope of the HKSAR's autonomy in adjudicating cases. Regarding the other articles which fall outside the scope of the HKSAR's autonomy, the Standing Committee of the NPC may, if necessary, interpret such articles, provided that its interpretation shall not affect cases that are being adjudicated, or that already have been decided by the HKSAR courts.[52]

These controversies largely demonstrate the inevitable difficulties encountered in the actual implementation of "one country, two systems." They also reflect the PRC authorities' intention to retain the final say in almost every significant area so much so that the Hong Kong community feels that the promise of "a high degree of autonomy" has been eroded considerably. This, in turn, has led to a serious decline of political expectations and confidence. The community already largely has acceded to the PRC authorities' position on the revision of the Constitution and the amendment of the Basic Law, while the concerned public, the political groups of the "democratic camp" and the legal profession are not concentrating on the preservation of the independence of the HKSAR's judicial system. Even this task does not appear to be easy.

In discussing the relationship between the Central Government and the HKSAR, Wu Jianfan refuted the claim originally held by many in the Hong Kong community that the affairs managed by the Central People's Government would be limited strictly to foreign affairs and national defense and that all other affairs would be within the scope of the HKSAR's high degree of autonomy. He referred to such a claim as a "misinterpretation of the [Sino-British] Joint Declaration."[53] The claim was based previously on ARticle 3(2) of the Joint Declaration. That provision stipulates: "The Hong Kong Special Ad-

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51. *Ibid.*, p. 75.

52. *See. e.g.*, Martin Lee and Szeto Wah, *supra* note 43, pp. 61-63.

53. Wu Jianfan, *supra* note 36, p. 67.

ministrative Region will enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People's Government."[54] This claim also was based on numerous verbal assurances to that effect made by PRC officials responsible for Hong Kong and Macau affairs to various groups in Hong Kong during the Sino-British negotiations in 1982-84. Wu Jianfan, however, pointed out the Article 3(2) of the Sino-British Joint Declaration only states that foreign and defense affairs will be the responsibilities of the Central People's Government. Article 3(2) does not say that the affairs managed by the Central People's Government will be limited to foreign and defense affairs. After all, Article 3(4) of Joint Declaration clearly provide for the appointments of the Chief Executive and the principal officials of the HKSAR by the Central People's Government.[55]

## III. THE POLITICAL SYSTEM OF THE HKSAR

The political system is probably the most controversial issue in the drafting of the Basic Law, partly because, while the Sino-British Joint Declaration promises that Hong Kong's "capitalist system and life-style shall remain unchanged for 50 years,"[56] the colonial political system obviously has to be replaced. Moreover, the Sino-British Joint Declaration and its annexes do ont provide for a political system for the HKSAR.

Article 3(4) of the Sino-British Joint Declaration states:

> The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The Chief Executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointments by the Central People's Government.[57]

The third paragraph of Section I of Annex I further elaborates: "The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature."[58] As Beijing and

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54. *The Sino-British Joint Declaration, supra* note 1, p. 11.

55. Wu Jianfan, *supra* note 36, p. —. *See also The Sino-British Joint Declaration, supra* note 1, Article 3(2) and 3(4),pp. 11-12.

56. *The Sino-British Joint Declaration, supra* note 1, Article 1 of Annex 1, p. 14.

57. *Ibid.*, p. 12.

58. *Ibid.*, p. 15.

London have never informed the Hong Kong community in a formal manner their interpretations of the above key paragraphs, controversies regarding the meaning of the executive authorities' accountability to the legislature and other issues often have emerged.

While the issue of direct elections, political parties, and the like remained controversial in Hong Kong, a consensus on certain basic principles nevertheless existed soon after the initialling of the Sino-British Joint Declaration. In the first place, almost everyone agreed that the political system of the HKSAR should be designed to achieve a high degree of stability. A presidential system, for example, gives the chief executive security of tenure and is therefore a relatively stable political system. An electoral system based on proportional representation, however, encourages a multi-party system; if this was combined with a parliamentary system, Hong Kong might well encounter the situation in Italy and some Western European countries were shifting coalitions of political parties result in frequent falls of government and general elections. Hong Kong can ill afford such a scenario, and it might well lead to an early termination of whatever autonomy the territory might have been enjoying.

Second, the future HKSAR government was intended to be an efficient one. Over-emphasis on separation of powers as well as checks and balances might lead to deadlock and confrontation between different branches of the government, resulting in political crisis and the paralysis of the government. Nevertheless, the HKSAR government must be subject to effective democratic supervision to prevent any abuse of power. "Power corrupts, absolute power corrupts absolutely." Effective democratic supervision guarantees liberty and the rule of law and also provides opportunities for political participation.

On the basis of this concensus, a modified presidential system appears to suit Hong Kong's needs best. To ensure the stability of the HKSAR government, security of tenure for the Chief Executive, whose term may be limited to four or five years, is an important condition. Hence, as long as the Chief Executive does not violate the law and abuse his power, his tenure should not be threatened.

The legislature's ability to check and balance the executive mainly lies in its authority to appropriate money, to legislate and to approve government appointments. To ensure the effective supervision of the executive by the legislature, the Basic Law should provide the legislature with the power to question, investigate and impeach the principal officials of the executive, including the Chief Executive. In the event of a violation of the law or serious neglect of duty, the Central Government might remove any principal official or the Chief exec-

utive from office, acting on an impeachment resolution passed by the local legislature.

Article 45 of the draft Basic Law reaffirms what is stipulated in the Sino-British Joint Declaration: "The Chief Executive of the HKSAR shall be selected by the elections or through consultations held locally and be appointed by the Central People's Government."[59] It had been anticipated that this appointment would be a mere formality to demonstrate China's sovereignty over Hong Kong; however, Chinese officials responsible for Hong Kong affairs indicated that the appointment should be a "substantial" one, implying a veto power in the hands of the Central Government.

To be in line with the above method of selection, the Chief Executive "shall be accountable to the Central People's Government and the HKSAR in accordance with the provisions of this Law" (Article 43).[60] The entire section on the Chief Executive does not mention that the Chief Executive has to be accountable or responsible to the Legislative Council.[61] On the other hand, Article 64 of the following section on the executive authorities stipulates: "The executive authorities of the HKSAR must abide by the law and shall be accountable to the Legislative Council of the HKSAR . . ."[62] It appears therefore that the Chief Executive does not have to be accountable to the Legislative Council, while only the executive authorities (treated in a separate section of Chapter IV Political Structure of the draft Basic Law) have to be accountable to the Legislative Council.[63] This certainly is not in accord with the general understanding of the Hong Kong community concerning the promise in the Sino-British Joint Declaration that "the executive authorities shall abide by the law and shall be accountable to the legislature."[64] On the other hand, Article 59 states that the government of the HKSAR is the executive authorities of the Region, and Article 60 states that the Chief Executive of the HKSAR is the head of the government of the Region.[65] This may be interpreted to mean that the Chief Executive is part of the executive authorities and therefore has to be accountable to the Legislative Council.

Obviously, ambiguity has to be removed. In fact, Li Hou, deputy

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59. *The Draft Basic Law, supra* note 13, p. 41.

60. *Ibid.*

61. *Ibid.*, Chapter IV: Political Structure, Section 1: The Chief Executive, pp. 41-46.

62. *Ibid.*, p. 47.

63. *Ibid.*, Chapter IV: Political Structure, Section 2: The Executive Authorities, pp. 46-47.

64. *The Sino-British Joint Declaration, supra* note 1, Article 1 of Annex 1, p. 15.

65. *The Draft Basic Law, supra* note 13, p. 46.

director of the PRC State Council's Hong Kong and Macau Affairs Office, told a visiting delegation of the Hong Kong Christian Industrial Committee in Beijing on July 6, 1988 that it would be more appropriate for the Chief Executive to be accountable to the HKSAR than to the Legislative Council, as "this accountability is much broader than the scope of the legislature."[66]

Article 43 also raises the following issue: although the Chief Executive's accountability to the Central People's Government can be well-defined, since the Central People's Government is a concrete entity and controls his appointment, the Chief Executive's accountability to the HKSAR is largely symbolic and has not been defined by the Basic Law. Article 48.8 further states that the Chief Executive has "to implement the directives issued by the Central People's Government in respect to the relevant matters provided for in this Law."[67] The PRC Constitution promulgated in 1982 clearly stipulates that the State Council is "the highest organ of state administration" and it has the power

> to exercise unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions and municipalities directly under the Central Government.[68]

It is not sufficiently clear in what way and to what extent the HKSAR differs from the provinces, autonomous regions and municipalities in its accountability to the Central Government. Is the HKSAR government also one of the "local organs of state administration" as defined by the PRC Constitution? Moreover, the State Council is one of the three parties that have been empowered by the Basic Law to propose amendments to the Basic Law. With the consent of the National People's Congress, it can seek to expand its power *vis-à-vis* the HKSAR government (Article 170).[69] Article 1 of Annex 1 of the Sino-British Joint Declaration is equally unclear. On the other hand, it states that the "HKSAR shall be directly under the authority of the Central People's Government" and on the other, it stipulates that "the executive authorities shall abide by the law and

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66. Stanley Leung, "Chief Executive 'Should Answer to the People,' " *South China Morning Post*, July 8, 1988, p. 7.

67. *The Draft Basic Law*, *supra* note 13, p. 43.

68. *The Constitution*, *supra* note 5, Article 85 and 89.4, p. 63 and 66.

69. *The Draft Basic Law*, *supra* note 13, pp. 75-76.

shall be accountable to the legislature."[70]

It is significant to note that the Chief Executive's power of appointing and dismissing the principal officials of the HKSAR government is quite limited. He may nominate them and report such nominations to the Central Government for appointment and may propose to the central Government the removal of the principal officials (Article 48.5).[71] The draft Basic Law does not specify the criteria according to which the Central People's Government will approve the Chief Executive's nominations and his proposals for dismissing the principal officials. If the Central People's Government refuses to approve the Chief Executive's proposal to remove some of the principal officials, it would cause substantial difficulties within the HKSAR government. The lack of well-defined power of dismissal of the principal officials also will affect the Chief Executive's status as head of Government.

According to the Constitution of the PRC, local people's congresses, at their respective levels "elect, and have the power to recall, governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns."[72] The Constitution further provides that "the standing committee of a local people's congress at and above the county level . . . decides on the appointment and removal of functionaries of state organs within the limits of its authority as prescribed by law."[73] According to article 9 of the Organic Law of the Local People's Congresses and the Local People's Governments of the PRC, revised by the Fifth Session of the Fifth NPC in 1982, the local people's congresses have the power to remove members of the local people's governments at their respective levels.[74] Article 28.8 further provides the standing committee of a local people's congress at or above the county level with the power to decide on the appointment and removal of the secretary-general, agency heads, bureau directors, and the like, of its corresponding local people's government. Such appointments and dismissals have to be

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70. *The Sino-British Joint Declaration, supra* note 1, pp. 14-15.

71. *The Draft Basic Law, supra* note 13, pp. 42-43.

72. *The Constitution, supra* note 5, Article 101, p. 74.

73. *Ibid.*, Article 104, p. 76.

74. "The Organic Law of the Local People's Congresses and the Local People's Governments of the PRC" was adopted by the Second Session of the Fifth NPC in 1979. It was revised according to the "Resolution on Certain Revisions of 'The Organic Law of the Local People's Congresses and the Local People's Governments of the PRC" adopted by the Fifth Session of the Fifth NPC. *See "Zhonghua Renmin Gongheguo Difang Geji Renmin Daibiao Dahui he Difang Geji Renmin Zhengfu Zuzhifa", Renmin Ribao*, December 16, 1982, p. 2.

reported only to the local people's government at a higher level for recording purpose.[75] Similar provisions exist for the organs of self-government of national autonomous areas.

In the PRC's history, the appointment of the chief executive and the principal officials of a local government by the Central Government only occurred under extraordinary circumstances. In 1950, the Political Council (*Zhengwuyuan*, the predecessor of the State Council) adopted the "General Principles on the Organization of Provincial People's Governments."[76] Article 2 of the document stipulated that appointees to provincial governments would be nominated by the Political Council and approved by the Central People's Government Committee; the article explained that the purpose of the arrangement was to establish rapidly the revolutionary order during the early stage of the liberation. The document was superseded by the formal promulgation of the first Constitution of the PRC in 1954; it therefore remained valid only before the Constitution came into existence. The second example is the "Brief Outline of the Organization of the Preparatory Committee for the Tibetan Autonomous Region."[77] The preparatory committee was equivalent to a temporary local people's government. Article 5 of the outline stipulated that the appointment, removal and replacement of committee members were to be based on nominations through consultations of the parties concerned, which would then be approved by the State Council. The state council formally would appoint the chairman, deputy chairman and members of the preparatory committee. The outline further stipulated that the heads and deputy heads of the various agencies and bureaus under the preparatory committee similarly be based on nominations through consultations to be approved by the State Council. It is believed that the validity of the document lasted until the rebellion broke out in Tibet in 1959.

In these two examples, the Central Government had an even larger measure of control over the local governments' personnel than is stipulated by the Sino-British Joint Declaration. But Hong Kong is certainly far more stable than either the various provinces immediately

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75. *Ibid.*

76. "*Sheng Renmin Zhengfu Zuzhi Tongze* (General Principles on the Organization of Provincial People's Governments)" adopted by the Political Council in 1950, collected in Personnel Systems Bureau of the MInistry of Labour and Personnel (ed.), *Zhonghua Renmin Gongheguo Zuzhi Fagui Xuanbian* (Selected Edition of Organic Laws and Regulations of the PRC), Beijing: Jingji Kexue Chubanshe, 1985, pp. 216-217.

77. *Xizang Zizhiqu Choubei Weiyuanhui Zuzhi Jianze* (Brief Outline of the Organization of the Preparatory Committee for the Tibetan Autonomous Region)" adopted in 1956, collected in *ibid.*, pp. 318-320.

after liberation in 1949 or Tibet in 1956. The situation in Tibet in 1956, nonetheless, has some relevance for Hong Kong; and the appointment of local government personnel in Tibet by the Central Government has two important implications for Hong Kong. First, the Central Government might, if necessary, help to establish a concensus among the diverse local interests, while allowing a certain measure of autonomy for such interests. This occurred in Tibet. Second, the autonomy promised Tibet was not yet constitutional, and the Central Government was eager to retain ultimate control. Appointment in this context also symbolized such control and PRC sovereignty over the territory.

Above all, in actual practice, the Communist Party of China controls the appointment of local government personnel at all levels, without regard for the constitutional powers granted to the local people's congresses. When control of the local Party organs is not yet secure as in the three aforementioned cases, then the Central Government will have to assume that ultimate control.

The HKSAR political system as outlined in the draft Basic Law enables the Chief Executive to be a very strong leader. The Chief Executive has powers and functions similar to the United States President, though the former probably has even larger powers *vis-à vis* the legislature. According to articles 48 to 52, bills passed by the Legislative Council have to be signed by the Chief Executive before being promulgated as laws (Article 48.3).[78] If the Chief Executive considers that a bill passed by the Legislative Council is not compatible with the overall interests of the HKSAR, he may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by no less than a two-thirds majority, the Chief Executive must sign and promulgate it within one month (Article 49).[79] The Chief Executive, however, has one further option that is not available to a U.S. President: he may still refuse to sign it and can dissolve the Legislative Council instead. He may also dissolve the Legislative Council when the latter refuses to pass the budget or other important bills and consensus cannot be reached after consultations (Article 50).[80]

The strength of the Chief Executive and the weakness of the Legislative Council are further demonstrated by the Chief Executive's power to approve the introduction of motions regarding revenues or expenditure to the Legislative Council (Article 48.10) and to decide, in

78. *The Draft Basic Law, supra* note 13, p. 42.
79. *Ibid.*, p. 43.
80. *Ibid.*, p. 44.

light of security and public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council (Article 48.11).[81] If the Chief Executive can, without having to give reasons, reject any motion presented to the Legislative Council regarding revenues and expenditures, then basically the Legislative Council can only respond to the Chief Executive's proposals regarding revenues and expenditures. It is not sufficiently clear whether the Legislative Council can reject certain items of the budget, though it does not appear likely. If the Legislative Council can only accept or reject the budget as a whole and the refusal to pass the budget will lead to its dissolution, the Legislative Council's power over government revenues and expenditures will be very limited indeed. Under such circumstances, the Legislative Council may have to rely largely on the pressure of public opinion to persuade the Chief Executive and the executive authorities in the process of consultation between the two branches of government. This is the actual situation today.

The Chief Executive's power to exempt government officials or other personnel responsible for government affairs from testifying or giving evidence before the Legislative Council will severely hamper the latter's function as a watch-dog of the Chief Executive and the executive authorities. Considerations of security and public interest are not sufficient reasons for preventing the Legislative Council from calling government officials or other personnel in charge of government affairs to testify or give evidence. Certainly the testimony or the giving of evidence can take place in closed sessions. In the United States, the chairman of the Joint Chiefs of Staff and the Director of Central Intelligence also testify and give evidence before the Congress. The provision in the draft Basic Law assumes that the Chief Executive has a greater concern for security and public interest than members of the Legislative Council. Such an assumption is obviously subject to dispute.

Further, regarding bills relating to government policies (or public policies), members of the Legislative Council may only introduce them with the prior written consent of the Chief Executive (Article 73).[82] There obviously will be a danger that "government policies" or "public policies" may be defined so broadly as to render members of the Legislative Council almost powerless to introduce bills.

The section on the legislature in the draft Basic Law has not

81. *Ibid.*, p. 43.

82. *Ibid.*, pp. 50-51.

touched upon the power of the legislature to impeach members of the executive authorities and the Executive Council. Neither has it any power over the appointment of the principal officials and members of the Executive Council of the HKSAR.[83]

In sum, the political system outlined in Chapter IV of the draft Basic Law presents an "executive dominant" system in which the Chief Executive will have powers similar to those of the present British Governor. The Legislative Council constituted by a combination of direct and indirect elections will have only limited powers.[84] As the Chief Executive has to be accountable to the Central People's Government but not to the Legislative Council of the HKSAR, and the appointment as well as removal of the Chief Executive and principal officials have to be approved by the Central People's Government, the autonomy of the HKSAR certainly will be affected.

A careful study of Article 56 of the draft Basic Law may provide a hint. It states:

> Except for the appointment, removal and disciplining of public officers and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important decisions, introducing a bill to the Legislative Council, enacting subsidiary legislation, or dissolving the Legislative Council. If the Chief Executive does not adopt a majority opinion of the Executive Council, he must put his specific reasons on record.[85]

This is a superficial and largely meaningless replication of the existing colonial system. In the present British administration, appointments to the Executive Council are to be made by the British Crown, *i.e.*, the Secretary of State for Foreign and Commonwealth Affairs; and the Commander of the British Forces, the Chief Secretary, the Financial Secretary and the Attorney General are ex-officio members of the Executive Council.[86] The appointments of these senior government officials also have to be approved by the Secretary of State according to the *Civil Service Regulations*. In this way, the need for the Governor to consult the Executive Council on all important matters of policy constitutes a means of check and balance, which is especially significant in view of the almost dictatorial powers of the Governor. In the case of the Chief Executive of the HKSAR, he has full authority to

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83. *Ibid.*, Chapter IV: Political Structure, Section 3: The Legislature, pp. 48-52.

84. *Ibid.*, Article 67, p. 48.

85. *Ibid.*, pp. 45-46.

86. *See* Norman Miners, *The Government and Politics of Hong Kong*, Hong Kong: Oxford University Press, 1981 (3rd ed.), pp. 81-91.

appoint and dismiss members of the Executive Council, and it is difficult to see how the need to consult the Executive Council similarly will constitute a means of check and balance. It should be noted, however, that an earlier draft of the Basic Law stipulated that members of the Executive Council should be nominated by the Chief Executive and appointed by the Central People's Government and that if the Chief Executive did not adopt a majority opinion of the Executive Council, he should register his specific reasons and report them to the Central People's Government for record purposes.[87]

There is obviously an attempt to retain the political structure of the existing colonial government as both Beijing and the conservative business community accept it as part of the foundation of Hong Kong's economic success and political stability. A statement by the former chairman of the Hong Kong Stock Exchange, Ronald Li, at an international investment conference, perhaps reflects the conservative business community's attitude. Li declared: "Hong Kong is a colony. It is a dictatorship, although a benevolent one. It is and has been a British colony, and as such it will prosper. We do not need free elections here."[88] The colonial government in Hong Kong is certainly a benevolent one; there is ample liberty in the territory and the rule of law is observed. This colonial government, however, has to be accountable ultimately to a democratic government willing to defend freedom and the rule of law. This is the guarantee of its benevolence.

## IV. THE ELECTORAL SYSTEM AND THE FORMATION OF THE FIRST GOVERNMENT OF THE HKSAR

The method for selecting the Chief Executive and the method for constituting the Legislative Council of the HKSAR are the bones of contention between the "democratic camp" and the "conservative camp" in the territory. In 1987, there was already an intense debate on the introduction of direct elections to the Legislative Council in 1988. The issue at stake is the extent of democracy in the HKSAR.

Though there are five alternative listed in Annex 1 of the draft Basic Law which deals with the selection of the Chief Executive, the

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87. Article 9 and Article 10 of Section 1: The Chief Executive of Chapter 4: The Political Structure of the HKSAR in the draft articles presented by the Sub-group on the Political Structure of the HKSAR to the BLDC meeting in August 1987. For the text of these draft articles, *see* "*Zhengzhi Tizhi Zhuanti Xiaozu de Gongzuo Baogao* (Work Report of the Sub-group on Political Structure)", dated August 22, 1987 and released by the Secretariat of the BLDC, pp. 8-9.

88. Howard Winn, "Ronald Li on Politics, Prosperity, 1997", *South China Morning Post*, June 17, 1987, *Business Post*, p. 3.

real contest is between Alternative 1 and Alternative 2.[89] The latter was presented by the advocates for democracy in the declaration issued by the Joint Committee for the Promotion of Democratic Political System on November 2, 1986.[90] According to this proposal, the Chief Executive shall be nominated by no less than one-tenth of the members of the legislature, and directly elected by a territory-wide general election with universal franchise. Direct election by universal franchise is obviously the most democratic method. It also is more in accord with the spirit of the modified presidential system of government analyzed above, which bestows on the Chief Executive a large degree of independence relatively free from any major checks and balance, except the threat of impeachment. Direct election of the Chief Executive, however, involves substantial mobilization and might bring about serious divisions and even confrontation within the community. If there were too many candidates, there would be confusion. To guarantee the legitimacy of the Chief Executive, he would have to receive an absolute majority of the votes cast. It is therefore likely that two rounds of elections would be required, following the French system of presidential election: that is, if no candidate receives an absolute majority of votes cast in the first round, then the two candidates securing the most votes in the first round enter the second round.

If the Chief Executive is selected in this way, then the appointment of the Chief Executive by the Central People's Government (Article 45) can be only a matter of formality demonstrating the PRC's sovereignty over Hong Kong.[91] If the Central People's Government refuses to appoint the Chief Executive elected by universal franchise, there certainly will be a constitutional crisis with a serious adverse impact on the stability and prosperity of the HKSAR.

One reasonably may speculate that both Beijing and the local conservative business community would like to have a considerable measure of control over the choice of the Chief Executive of the HKSAR government, so as to make sure that the selected Chief Executive would be acceptable from their point of view. The conservative business community also wants to avoid the possibility of having a directly elected Chief Executive being a political figure unacceptable to Beijing. Based on such considerations, the business and professional group of

89. *The Draft Basic Law*, *supra* note 13, Annex I: Method for Selecting the Chief Executive of the Hong Kong Special Administrative Region, pp. 78-82.

90. *See* the declaration issued by the Joint Committee for the Promotion of Democratic Political System in pamphlet form on November 2, 1986; a summary of the declaration appeared in all major newspapers in Hong Kong on November 3, 1986.

91. *The Draft Basic Law*, *supra* note 13, p. 41.

members of the BLCC offered a proposal that has become Alternative 1 in Annex 1 of the draft Basic Law.[92]

The gist of this alternative is that the Chief Executive shall be elected by an electoral college. Members of the electoral college shall include: members of the legislature, representatives of district organizations, representatives of corporate bodies and non-corporate permanent organizations and representatives of various functional constituencies (including industry, commerce, finance, professions, education, labour, religious communities, social services and the public servants), totaling about 6000 in number. Communities and organizations with seats in the electoral college may elect their representatives in accordance with their own rules. Each elected representatives shall vote in an individual capacity. Then the electoral college shall elect a nominating committee of 20 members from its own midst. The nominating committee shall nominate three candidates for the office of the Chief Executive. Members of the nominating committee cannot run for the office of, nor vote in the election of, the Chief Executive. Finally, the electoral college shall vote on the nominations by the nominating committee. A candidate must win over half of the votes in order to be elected the Chief Executive; if necessary, a second round of voting shall be conducted for the two leading candidates.

Advocates for democracy criticize this proposal as an attempt to ensure that the conservative business community will control a majority in the electoral college given its composition. Moreover, such an electoral method does not involve ordinary people and offers no chances for their participation.

Alternative 3 basically is a repetition of Alternative 2. It is less specific on the procedure for selecting the Chief Executive, but it has a more detailed plan on the composition of the electoral college, which again shall have no more than 600 members.[93]

Alternative 4 is the conservative proposal that suggests that the Chief Executive shall be selected by an advisory group through consultation.[94] The advisory group shall be composed of 50-100 advisors who shall be selected by the Executive Council presumably on the basis of open nominations. Members of the advisory group will be ap-

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92. *Ibid.*, p. 78. *See also* the Business and Professional Group of Members of the BLCC, *A Proposal for the Future Structure of the Hong Kong SAR Government*, published in Hong Kong in September 1987, pp. 18-20. Though the pamphlet was published in September 1987, the main points of the proposal had been reported by the major newspapers in Hong Kong intermittently in 1986.

93. *The Draft Basic Law*, *supra* note 13, pp. 79-80.

94. *Ibid.*, pp. 80-81.

pointed by the Chief Executive after approval by the Central People's Government. Each advisory group must be formed six months before the expiration of the term of office of the incumbent Chief Executive. However, if both the advisory group and the Central People's Government agree that the incumbent Chief Executive should serve another term, there is no need to form a new advisory group.

The final alternative was proposed by Louis Cha, the Hong Kong co-convener of the Sub-group on the Political Structure of the HKSAR of the BLDC.[95] This was supposed to be an attempt to forge a consensus. According to this alternative, the Chief Executive shall be elected by all the voters of Hong Kong on a one-person-one-vote basis. The three candidates for the office of the Chief Executive, however, shall be nominated by the "Nominating Committee for the Election of the Chief Executive of the HKSAR" through consultation or by ballot after consultation.

The Nominating Committee, which is in fact some kind of electoral college, shall have the following composition: representatives of business and financial circles comprise up 25 percent of the membership; representatives of professional bodies, 25 percent; representatives of labour, grassroots and religious organizations, 25 percent; members of the legislature, 12 percent; members of district organizations 8 percent; and deputies to the NPC and members of the Chinese People's Political Consultative Conference from Hong Kong, 5 percent. Members of the Nominating Committee shall not run for the office of the Chief Executive, and they shall be elected, recommended or selected through consultation by corporate bodies or non-corporate permanent organizations in various fields.

Louis Cha's proposal supports the direct election of the Chief Executive on a one-person-one-vote basis, and allows the advocates for democracy to secure a slightly larger slice of the membership of the Nominating Committee than that of the electoral college in Alternative 3. The proposal, however, satisfies the conservative business community by apparently offering it the control of the nomination process with an absolute majority in the Nominating Committee. The composition of the Nominating Committee also recognizes the political status of deputies to the NPC and members of the Chinese People's Political Consultative Conference from Hong Kong.

Louis Cha's proposal leaves the Nominating Committee to formulate a procedure for consultation or balloting regarding the nomination of candidates for the office of the Chief Executive. This

95. *Ibid.*, Alternative 5 of Annex I, pp. 81-82.

procedure may well be crucial to achieving a compromise. If each member of the Nominating Committee can support only one candidate, and if the three candidates who receive the most members' support shall be formally nominated to be elected subsequently by all Hong Kong voters on a one-person-one-vote basis, then there is a good chance for the pro-democracy lobby to accept the alternative. The lobby can count on securing about a third of the seats in the Nominating Committee and getting its leader nominated as one of the three candidates who may then be elected on a universal franchise basis.

Beijing and the conservative business community are not expected to accept such a procedure, since it would not guarantee that the elected Chief Executive will be acceptable to them. If members of the Nominating Committee can indicate support for three candidates, then the conservative business community with its absolute majority in the Nominating Committee will control the nomination process. If the procedure for consultation or balloting regarding the nomination of candidates for the office of the Chief Executive is left to the decision of the Nominating Committee, it is likely that such a procedure will be adopted and will not be acceptable to the pro-democracy lobby.

Those who are familiar with the united front tactics of the PRC authorities may note that the proposal of the pro-democracy lobby and Alternative 4 (the most conservative proposal) are at the two ends of the political spectrum, while Louis Cha's proposal is a compromise formula. Four out of the five alternatives contain an electoral college, with Alternative 4's advisory group being the least democratic and Louis Cha's Nominating Committee the most liberal. So even the adoption of Louis Cha's proposal may be presented as a considerable concession on the part of Beijing and the conservative business community to the local pro-democracy lobby, though such a proposal yields nothing substantial.

Annex II, which deals with the method for constituting the Legislative Council of the HKSAR, presents four alternatives.[96] Since Article 67 already states that the Legislative Council shall be constituted by a combination of direct and indirect elections,[97] all four alternatives accept that at least 25 percent of the seats shall be directly elected by a universal franchise and that at least 25 percent shall be elected by functional bodies. As the powers of the Legislative Council are considerably less than those of the Chief Executive, the differences among

96. *Ibid.*, Annex II, Method for Constituting the Legislative Council of the Hong Kong Special Administrative Region, pp. 83-86.

97. *Ibid.*, p. 48.

the four alternatives on the method for constituting the Legislative Council of the HKSAR are less significant.

Alternative 2 comes from the Joint Committee for the Promotion of Democratic Political System, based on the declaration it issued on November 2, 1986.[98] It suggests that no less than 50 percent of the members shall be directly elected in a general election based on universal franchise, no more than 25 percent shall be elected by the functional bodies, and no more than 25 percent shall be elected by district organizations, *i.e.*, district boards, Urban Council and Regional Council, or other similar organizations.

Martin Lee, champion of the "democratic camp" and a member of the BLDC, however, proposed that all the members of the legislature of the HKSAR should be elected by districts through direct election on a one-person-one-vote basis. To counter-balance Lee's proposal, Simon Li, a former High Court judge and BLDC member, supported by Xu Chongde from Beijing, suggested that all the members of the legislature of the HKSAR should be elected by functional bodies. These two proposals are presented as Note 3 and Note 2 of Annex II, respectively.[99]

Alternative 1, on the other hand, comes from the Business and Professional Group of Members of the BLCC.[100] According to this proposal, the Legislative Council shall be composed of 80 persons, with 50 percent elected by functional bodies, 25 percent directly elected by districts and 25 percent elected by the same electoral college proposed by the group for the election of the Chief Executive.

Alternative 3 is the most conservative among the four.[101] It suggests that the legislature of the HKSAR shall have 60 members, with 30 percent of the members elected by the same advisory group proposed in Alternative 4 of Article I for the selection of the second or third Chief Executive and later for the nomination of the three candidates for the office of the Chief Executive. In addition, 40 percent of the members shall be elected by functional bodies, and 30 percent shall be elected directly by the districts.

Both Alternative 1 and Alternative 3 maintain that the proposed methods for electing members for the legislature are "package" deals, that is, direct district election is conditional upon the acceptance of the other two types of election.[102] One unique characteristic of Alterna-

98. *Ibid.*, p. 84.
99. *Ibid.*, p. 86.
100. *Ibid.*, pp. 83-84.
101. *Ibid.*, pp. 84-85.
102. *Ibid.*, Note 1 of Annex II, p. 86.

tive 3 is that it stipulates that at least one-third of those members elected by the advisory group from among non-advisors shall be principal officials, and the rest shall be members of the Executive Council and other public figures.

Alternative 4 is again presented by Louis Cha as a compromise formula.[103] According to his alternative, the composition of the legislature of the HKSAR shall be as follows: 30 percent of the members from business circles, 25 percent form the professions, 20 percent from grassroots organizations and 25 percent through district general elections.

As in Annex 1, the proposal of the pro-democracy lobby and Alternative 3 (the most conservative proposal) are again at the two ends of the political spectrum. Louis Cha's alternative, similar to Alternative 1 and 3, allows the conservatives to gain a majority in the Legislative Council but it offers more to the advocates for democracy than Alternatives 1 and 3.

The four alternatives are as yet brief outlines, and, for obvious reasons, they have not gone into detail regarding the electoral system and the distribution of seats within the broad categories of functional bodies, district organizations (grassroots organizations), business circles, and the like. While such distribution can be troublesome, the detailed arrangements of the electoral system may well be equally controversial. Since the existing ten district board constituencies of the electoral college will be replaced entirely by direct elections to the Legislative Council in 1991,[104] it will be interesting to observe how this will affect the proposals in the draft Basic Law concerning the indirect election to the Legislative Council from district (grassroots) organizations.

Note 4 of Annex II indicates that a member of the BLDC may raise the controversial issue of the nationality of the members of the Legislative Council. It was suggested that studies be made on the right of Hong Kong permanent residents who have moved to a foreign country (but might not have acquired foreign nationality) to vote and to stand for election.[105] It appears that the BLDC wants to play down the issue; it already has been pointed out that at least seven (out of 23) BLDC members from Hong Kong hold foreign passports.[106] While it

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103. *Ibid.*, pp. 85-86.

104. *See White Paper—The Development of Representative Government: the Way Forward*, Hong Kong: Government Printer, February 1988, p. 10.

105. *The Draft Basic Law, supra* note 13, p. 86.

106. *See* Emily Lau, "Breach of Promise?", *Far Eastern Economic Review*, Vol. 140, No. 19, May 12, 1988, p. 36.

is certainly legitimate to argue against the right of HKSAR permanent residents holding foreign passports to stand for elections to the Legislative Council, the fact that by 1997 a significant portion of community leaders may hold foreign passports poses a serious problem. Further, there are also people who concurrently hold passports from countries such as the Dominican Republic and Argentina; people how have gained the right of permanent residence, though not foreign nationality, in a foreign country; and, people whose spouses hold foreign passports or have secured the right of permanent residence in a foreign country. All these cases are very difficult to check. The controversy reflects a cleavage within the elites in Hong Kong, between those who have the option to emigrate and those who do not, with some of the latter trying to limit the political rights and various privileges of the former. The cleavage will become more serious as Hong Kong approaches 1997, and the controversy also demonstrates the confidence problem even among the community leaders who co-operate with Beijing and whose political status is recognized by Beijing.

Annex III, which deals with the method for the formation of the first government and the first Legislative Council of the HKSAR,[107] reflects the PRC's position first revealed by Lu Ping, deputy secretary-general of the BLDC, in October 1987. At that time, the BLDC's Sub-group on the Political Structure of the HKSAR met in Guangzhou.[108] It is significant that Annex III does not include the alternatives proposed by individual members of the BLDC from Hong Kong, but only registers them in "A Collection of Opinions and Suggestions of Some Members in Regard to the Articles Drafted by Their Respective Special Subject Subgroups" attached to the draft Basic Law.[109]

Annex III indicates that in 1996, the NPC shall establish a Preparatory Committee of the HKSAR composed of mainland members and of Hong Kong members who shall constitute no less than 50 per-

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107. *The Draft Basic Law, supra* note 13, Annex III: Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, pp. 87-90.

108. *See "Li Hou Lu Ping Tiyi 97 Qian Nishe Teque Chouweihui, Zai Gang Zu Jigou Chansheng Shouzhang* (Li Hou and Lu Ping Suggested to Establish HKSAR Preparatory Committee before 97, It Will Organize an Institution in Hong Kong to Select the Chief Executive), *Ming Pao*, October 7, 1987, p. 4; and *"Li Hou Lu Ping Changshe Chouweihui, Zhuchi Tequ Zhengfu Chansheng Shi, Xiang Renda Changwei Fuze* (Li Hou and Lu Ping Suggested to Form a Preparatory Committee, To Be In Charge of the Formation of the HKSAR Government and Responsible to the Standing Committee of the NPC)", *Wen Wei Pao* (Hong Kong), October 7, 1987, p. 24.

109. *The Draft Basic Law, supra* note 13, pp. 105-110.

cent to be appointed by the Standing Committee of the NPC. This Preparatory Committee shall in turn establish the "Election Committee for the First Government of the HKSAR". The Election Committee shall be composed entirely of permanent residents of Hong Kong with 25 percent from business and financial circles, 25 percent being professional circles, 25 percent from labour, grassroots and religious organizations. 20 percent from among political figures of former times, and 5 percent from among the Hong Kong deputies to the NPC and Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference. The Election Committee shall recommend the candidate for the first Chief Executive through local consultation or through local election after consultation, and report the recommended Chief Executive to the Central People's Government for appointment. The term of office of the first Chief Executive shall be the normal term. The Election Committee also will elect the first legislature of the HKSAR, whose term of office shall be two years.

Critics have expressed fear the Beijing will then control the formation of the first government and the first Legislative Council. They are not convinced by Beijing's arguments that because of sovereignty, elections cannot be held in Hong Kong while British authorities are still responsible for the administration of the territory. Also because of the sovereignty issue, the "through train" idea, *i.e.*, the existing Legislative Council in Hong Kong automatically will become the first (or provisional) legislature of the HKSAR on July 1, 1997, cannot be accepted.[110] It is significant that both the Joint Committee for the Promotion of Democratic Political system and the Business and Professional Group of Members of the BLCC supported the "through train" idea now rejected by Beijing.[111] The PRC authorities' concession is that all members of the former Hong Kong Legislative Council can be candidates for membership in the first legislature of the HKSAR.

Besides the arrangements approved by Beijing, Hong Kong members of the Sub-group on the Political Structure of the HKSAR put forward five other alternatives, two of which deserve some attention. The alternative presented by Martin Lee on behalf of the pro-democracy lobby suggests that the Standing Committee of the NPC shall establish a "preparatory Committee for the First Government of the HKSAR" in 1996, whose members shall all be Chinese nationals

110. *See* note 108.

111. Chris Yeung, "Rival Groups Back Through Train Plan", *Wen Wei Pao*, (Hong Kong), July 25, 1988, p. 2.

among the permanent residents of Hong Kong.[112] The first Chief Executive shall be elected by a general and direct election held by the Preparatory Committee in accordance with the Basic Law, meaning that the method of selecting the first Chief Executive should not differ from that of his successors. The alternative proposes that persons who are members of the Hong Kong Legislative Council in June 1997 automatically shall become members of the first legislature of the HKSAR. Another alternative presented by Maria Tam is simply a suggestion to postpone the decision on the arrangements.[113] It is widely believed that this alternative represents the position of the British government, which claims to have the right to have a say on the formation of the first government and the first Legislative Council of the HKSAR.[114] This claim is partly based on Article 3 of Annex II to the Sino-British Joint Declaration, which states that a function of the Sino-British Joint Liaison Group is "to discuss matters relating to the smooth transfer of government in 1997."[115] Further, since the PRC authorities will have to seek the co-operation on this matter of the British administration in Hong Kong, the British government is in a strong bargaining position.

It appears, however, that the PRC authorities already have made up their mind on the above alternatives, which may not attract too much attention in the local community. As a result, these alternatives will have a very limited chance of being adopted, although the PRC authorities will likely negotiate with the British government through diplomatic channels on the issue of British interests in exchange for British co-operation on the transfer of government in Hong Kong in 1997.

Obviously, the PRC authorities want to have a certain measure of control over the formation of the first government and the first Legislative Council of the HKSAR. Articles of the Basic Law, like any constitution, can only provide the bare skeleton of a political system that also involves numerous precedents, conventions, practices and regulations to be established through the actual implementation of the Basic Law. The first two or three years after 1997 therefore will be crucial. If, in the first two years, both the Chief Executive and members of Legislative Council are selected and elected, respectively, by

112. *The Draft Basic Law, supra* note 13, pp. 108-109.

113. *Ibid.*, pp. 109-110.

114. Gu Xinghui, "*Ji Pengfei Fang Gang Qianhou de Zhengzhi Xunxi* (The Political Messages Before and After Ji Pengfei's Visit to Hong Kong)", *The Mirror* (an influential pro-Beijing monthly in Hong Kong), No. 132, July 10, 1988, pp. 8-9.

115. *The Sino-British Joint Declaration, supra* note 1, p. 26.

the same Election Committee, it will be difficult for a system of checks and balances to function properly and therefore will adversely affect the evolution of the political system of the HKSAR.

## V. CONCLUSION

To a political scientist, the study of the PRC Constitution is of limited value, because the role and function of the CPC are largely omitted from the document. Similarly, an attempt to analyze the draft Basic Law has serious limitations without the development of a good understanding of the future role of the CPC in the HKSAR, which, unfortunately, is currently a matter of sheer speculation at best.[116]

Local organs of state administration in the PRC are involved in two systems of accountability.[117] The Light Industry Bureau of a province has to be accountable to the provincial people's government. In turn, the provincial people's government has to be accountable to the provincial people's congress. The bureau, however, has to be accountable to the Ministry of Light Industry at the State Council level, too. Parallel to the system of state administration is the hierarchy of CPC organs. The provincial Party committee normally has an office (and a deputy secretary) in charge of industry and transport, which has jurisdiction over the Light Industry Bureau. The provincial Party committee is accountable to the Secretariat of the Central Committee of the CPC as well as to the Political Bureau of the Party. In addition to this complicated nexus of ties, there are Party groups within organs of state administration. For example, Party members among the senior officials of the Light Industry Bureau form a Party group of the bureau which is accountable to the provincial Party committee.

This complicated system probably will not be borrowed by the HKSAR government. What needs to be highlighted here is that, within the PRC, problems that arise from the dual accountability on the part of a local organ of state administration are normally resolved by the Party committee at the corresponding or higher level. It is not clear what will happen if conflicts arise between the HKSAR Chief

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116. For an account of the activities of the CPC and PRC organs in Hong Kong, *see* Loong Sin (pseudonym), *Xianggang de Linyige zhengfu (A Shadow Government of Hong Kong)*, Hong Kong: Haishan Tushu Gongsi, no publication date given (probably 1986). *See also* Emily Lau, "Positioning for Power" and "Grasping the Grassroots," *Far Eastern Economic Review*, Vol. 137, No. 32, August 6, 1987, pp. 26-29.

117. *See* Chapter II: Party and Chapter III: Government of Franz Schurmann, *Ideology and Organization in Communist China*, Berkeley and Los Angeles: University of California Press, 1968 (2nd ed.,), pp. 105-219. Schurmann's book is obviously a bit outdated, but it still provides a good conceptual framework to understand the Party and the state administration systems in the PRC and how they interact.

Executive's accountability to the Central Government and his accountability to the local legislature or to the HKSAR as a whole.

The Hong Kong and Macau Work Committee probably will have a role in resolving such conflicts. Its views likely will be sought by the State Council or the Secretariat of the Party Central Committee, which will make the final decisions. The Hong Kong and Macau Work Committee is the CPC organ in Hong Kong and Macau, and its status is equivalent to that of a Provincial Party Committee.[118] Ever since the 1950s, the director of the Hong Kong Branch of the New China News Agency also serves as the secretary of the Committee. Xu Jiatun, the present director of the Hong Kong Branch of the New China News Agency, was first secretary of the Jiangsu Provincial Party Committee and a member of the CPC Central Committee before he took up his post in Hong Kong. It was considered that, given the presence of a considerable number of senior PRC cadres in Hong Kong working in places like the Bank of China's Hong Kong branch, a cadre with Central Committee membership would be required to coordinate the various lines of activities of the Party and the state administration in Hong Kong. What kind of influence such a high-ranking Party cadre would have on the HKSAR Chief Executive is difficult to assess today.

The draft Basic Law has not prescribed the role of the CPC Or that of the Hong Kong branch of the New China News Agency in the HKSAR. Xu Jiatun, however, indicated to a group of Hong Kong journalists at an off-the-record briefing in June 1987 that the future role of the CPC in Hong Kong would be "to assist the SAR government."[119]

According to the draft Basic Law, a committee for the Basic Law of the HKSAR will be set up under the Standing Committee of the NPC.[120] At present, the process whereby Hong Kong deputies to the NPC are chosen is unknown to the Hong Kong community. An educated guess is that they are selected through consultations among the CPC and the PRC organs in Hong Kong, with the Hong Kong and Macau Work Committee and the Hong Kong branch of the New China News Agency both playing a key role.[121] How the Hong Kong

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118. *See* note 116.

119. Emily Lau, "Positioning for Power", *supra* note 116, p. 26.

120. *The Draft Basic Law, supra* note 13, Note 2, p. 89.

121. For the list of the Hong Kong and Macau members of the NPC and the Chinese People's Political Consultative Conference, *see* "*Yue Xuan* 163 *Quanguo Daibiao, Gang Ao Ershi Ren Bangshang Youming* (Guangdong Elected 163 NPC Deputies, 20 from Hong Kong and Macau on the List)", *Ming Pao*, January 29, 1988, p. 14; and "*Zhongguo*

deputies to the NPC will be elected after 1997 when the PRC authorities can hold elections in the HKSAR will not be covered by the Basic Law. This remains the prerogative of the Organic Law of the NPC of the PRC.[122] The extent to which this Committee for the Basic Law of the HKSAR should be consulted by the HKSAR government, and the degree of influence it will have on the HKSAR government, are similarly left to speculation. It is not unnatural that the Hong Kong deputies to the NPC should demand a role in the HKSAR government. If they are elected by methods similar to those for the elections of members of the HKSAR legislature, then they certainly also have a legitimate claim to represent the people of the HKSAR.

Meanwhile, in the transitional period, the CPC is stepping up its activities in the territory and seeking to establish itself as the dominant political force.[123] It began publicly building its Hong Kong community network and influence in 1985 when the Hong Kong branch of the New China News Agency opened three district offices in Hong Kong, Kowloon and New Territories. Pro-Beijing political forces mounted a campaign to block the introduction of direct elections to the Legislative Council in 1988.[124] They also mobilized their supporters, identified candidates and isolated political opponents in district board elections in March 1988.[125]

Since the conclusion of the Sino-British Joint Declaration, the local New China News Agency and pro-Beijing organizations have been engaging in an all-embracing united front campaign to win the hearts of Hong Kong people. There have been numerous rounds of receptions, cocktail parties and trips to the PRC. To a certain extent, the PRC organs in Hong Kong have been successful in co-opting businessmen, professionals, fledgling politicians and grassroots community leaders, who are flattered by the embrace of the motherland and at the

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*Zhengxie Diqijie Quanguo Weiyuanhui Weiyuan Mingdan* (List of Members of the National Committee of the Seventh Chinese People's Political Consultative Conference)", *Wen Wei Pao*, March 9, 1988, p. 7.

122. For the text of the law, *see* "*Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanjufa*", *Renmin Ribao*, December 15, 1982, pp. 1 and 3.

123. *See* the author's "Hong Kong: The Decline of Political Expectations and Confidence", *supra* note 9. *See also generally* Emily Lau, "Positioning for Power" and "Grasping the Grassroots", *supra* note 116.

124. Emily Lau, "Yes, We Want No Elections", *supra* note 116, Vol. 137, No. 38, September 17, 1987, p. 21.

125. Emily Lau, "One Point for Democracy", *ibid.*, Vol. 139, No. 12, March 24, 1988, pp. 25-26. *See also* the author's "The 1988 District Board Elections—A Study of Political Participation in the Transitional Period", to be published by *The Asian Journal of Public Administration* in 1988.

same time afraid to reject it. A prominent sign of the united front's success is the expanding list of dignitaries on the organizing committee of the PRC National Day celebrations, membership of which is now considered a symbol of patriotism, identification with the motherland and an indication of recognition by the PRC authorities.

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

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

The above brief discussion is intended to arouse an awareness of political factors, as well as limitations relating to an analysis of the draft Basic Law. The PRC's increasing involvement in the Hong Kong economy will have a significant impact, too, an important subject which is not dealt with in this chapter.[126]

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

The refusal to revise the PRC Constitution means that the problem raised in an early part of this chapter will remain unsolved. This may not pose too serious a problem if the present policy orientation of the PRC leadership is maintained; after all, the reformers in the PRC today also encounter difficulties in finding a convincing ideological

126. Thomas M.H. Chan, "*Zhongzi Pengzhang dui Xianggang de Yingxiang* (The Impact on Hong Kong Regarding the Expansion of Chinese Capital)", *Ming Pao Monthly*, Vol. 23, No. 6, June 1988, pp. 107-110.

foundation to support their reforms.[127] In the event political conflicts in Beijing lead to uncertainties concerning existing policies, programs or even major redefinitions of them, the shock for Hong Kong would be considerable—the theoretical and constitutional bases of the "one country, two systems" policy would be in doubt.

In the course of drafting the Basic Law, it has become clear that the Central Government of the PRC often wants to retain final control, especially in matters relating to the autonomy of the political system. The decisions on the concept of "residual power," the amendment and the interpretation of the Basic Law are significant examples. The result appears to be that the Basic Law will offer very limited guarantees for the political autonomy of the HKSAR. The instinct of the CPC regime in following the Leninist principles of democratic centralism for maintaining control may well be at work here: when the control of the CPC is not secure in the HKSAR, the ultimate control of the Central Government has to be defined even more clearly in legal terms. Suspicions regarding Hong Kong becoming an "independent political entity" have been articulated openly by PRC officials in charge of Hong Kong affairs.[128] They, as well as the PRC leadership, must constantly be aware of the example that the HKSAR sets for the rest of the PRC. The PRC leaders will hardly dilute the unitary system of the state to accommodate Hong Kong or even Taiwan. Any concessions made likely are to be of a temporary, *ad hoc* and tactical nature.

Within the HKSAR political system, the appointments by the Central Government of the Chief Executive and the principal officials imply their accountability to the Central Government. This has been reaffirmed by Article 43 of the draft Basic Law, stipulating that the Chief Executive shall be "accountable to the Central People's Government and the Hong Kong Special Administration Region."[129] Conflicts between his respective responsibilities to the Central People's Government and to the HKSAR therefore may occur in the future. The substantial power of the Chief Executive, his appointment by, and accountability to, the Central Government, and the lack of specific provisions in the draft Basic Law concerning his accountability to the legislature have contributed to the emerging perception that Hong Kong will be treated as a colony of the PRC.[130]

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127. *See* Robert Delfs, "Ideological Inconsistencies", and "In Search of a Socialist Theory," *Far Eastern Economic Review*, Vol. 137, No. 41, October 8, 1987, pp. 50-52.

128. *See* the author's "Hong Kong: the Pressure to Converge", *supra* note 8, p. 272.

129. *The Draft Basic Law, supra* note 13, Article 43, p. 41.

130. *See* note 88.

The increasing presence and participation of the PRC authorities in the Hong Kong economy and society, together with the increase in united front activities of the local Party and state organs likely will result in the creation of a dominant political force in the HKSAR which can be mobilized at will at the order of the Central Government. These developments certainly do not augur well for the political autonomy of the HKSAR, nor for the development of a democratic political system there.

In the final analysis, the Hong Kong community may have to count not so much on the Basic Law but on the following domestic and international factors to ensure the observance by PRC leadership of its promises made to the Hong Kong people during the Sino-British negotiation for the Joint Declaration. In the first place, the PRC leadership has been assuring the international community in recent years that its open-door policy will remain unchanged for the long term' its policy towards Hong Kong also has been looked upon as a litmus test of its open-door policy. Any violation of the spirit and the terms of those promises would hurt the capitalist world's confidence in the PRC. Second, as SAR under the PRC's sovereignty, Hong Kong will set a significant example for Taiwan. Third, a change in the PRC's policy towards Hong Kong might have a signalling effect on its domestic reforms, too. Various liberal economic policies in the special economic zones and the coastal cities would most likely be affected. Finally, as long as the PRC leadership values Hong Kong's contribution to its modernization program, this capitalist enclave may continue to be tolerated. All of these factors, however, do not constitute an absolute guarantee that Hong Kong will remain unchanged up to the year 2047. Moreover, these factors will be more effective to ensure "that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years" than to guarantee the "high degree of autonomy" and "self-administration" promised.[131]

131. *The Sino-British Joint Declaration, supra* note 1, Article 1 of Annex 1 and Article 3(2), pp. 14 and 11.

# CHAPTER III

## WHAT WILL THE BASIC LAW GUARANTEE?—A STUDY OF THE DRAFT BASIC LAW FROM A POLITICAL AND COMPARATIVE APPROACH

*Ting Wai* *

## I. INTRODUCTION

The Sino-British Joint Declaration (JD) on the question of Hong Kong, initialled in September 1984, signed in December 1984 and ratified by the two signatory parliaments in May 1985, together with the Draft Basic Law (BL), released in April 1988, constitute the two most important documents for the future of Hong Kong. The JD was a result of consensus reached by the two sovereign states after two years of laborious negotiation, and it laid down the basic political principles for post-1997 Hong Kong. The BL, on the other hand, is to be passed in 1990 by the National People's Congress (NPC) of China and will be a detailed "mini-constitution"[1] which will form the basis of a legal system and political institutions in Hong Kong after China regains her sovereignty over the territory.

Although the BL should be a logical, legal and full implementation of the political principles laid down by the JD, it is doubtful that the BL loyally will follow the JD. There are two reasons. First, some of the provisions listed in the JD are controversial. One of the negotiating techniques of the Chinese government is to set up a time limit for the period of negotiation. Approaching the end of the period, the two parties were forced to arrive at an agreement. Hence, the agreement itself contains some elements that are the result of an "Agreement to Disagree," and these in turn result in some controversial articles that are subject to different interpretations. The clearest example is the appointment of Chief Executive (CE) by the Central People's Government (CPG) "on the basis of the results of elections or consultations to be held locally."[2] Election in a democratic way is absolutely different

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1. This is by nature a constitutional document since it constitutes the basis of all laws enacted in Hong Kong in the future, but it is not regarded as a "constitution" by Chinese jurists. We shall return to this point later.

2. *See Joint Declaration of the Government of the United Kingdom of Great Britain*

from the so-called "democratic consultation" (*Minzhu Xieshang*), which is the classic Chinese communist way of selecting executives or making decisions.

Second, China always stresses that, while the BL will provide a legal basis for China to recover her sovereignty over Hong Kong, it also will guarantee the territory the right of having autonomous status as a Special Administrative Region (SAR). However, instead of granting autonomy to Hong Kong, the BL also could serve as a legal basis to legitimize Chinese state control over, or intervention in, Hong Kong. Moreover, another argument frequently discussed in Hong Kong refers to the concept of "one country, two systems." The concept might fail because capitalist society in Hong Kong will be placed under control of a socialist state that is in turn dominated by the Chinese Communist Party (CCP), which holds absolute control of political power. The CCP, the only organ that holds power and the authority accustomed to the traditional way of "directing" the society through state intervention, might prove detrimental to the proper functioning of Hong Kong's capitalist system.

In order to prevent and preempt such a scenario, the JD, which is the only valid document in international law by which both countries have to abide, can be used to check and study whether the provisions of the BL contradict the basic principles agreed upon by Britain and China. Although the two documents are of a different nature, a comparative analysis of the two also can reveal how China's position has changed during the last four years in order to achieve political goals and to fulfill political interests.

In brief, the BL should be interpreted, not only as a legal document, but as a political document, in which are reflected China's perceptions of the political relationship between the socialist mainland and the capitalist enclave. This is the major focus of our concern.

This paper aims to answer the following questions regarding the political implication of the BL. What will be in China's eyes the ideal relationship between the sovereign state and the SAR after 1997? What kinds of "autonomy" will Hong Kong enjoy in the future? Will it be a kind of "autonomy of Chinese characteristics," that is to say, an autonomy under severe state control that serves primarily the interests of the motherland which is constructing its "socialism with Chinese characters," the principle proclaimed by Deng Xiaoping at the Twelfth Party Congress held in 1982? If this is the case, is it legiti-

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*and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, Hong Kong: Government Printer, 1984, Art. 3(4).

mate to say that the BL provides only a legal foundation for state intervention of China? Any legal system cannot be isolated from the grand socio-economic and political contexts. What lessons can we draw from the drafting process of the BL, which will incarnate the future political institutions of a capitalist society ruled by a sovereign socialist state? How do we interpret the realization of a new legal system in Hong Kong when both China and Hong Kong are undergoing rapid political change, notwithstanding the unchanging predominant role of the CCP in Chinese society and the potential for direct state intervention?

## II. CLARIFICATION OF SOME THEORETICAL PROBLEMS IN THE RELATIONSHIP BETWEEN CHINA AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION

When the Constitution of China was passed in 1982, the principles of Beijing's relationship with Hong Kong already had been laid down. Article 31 of the Chinese Constitution stipulates that "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions."[3] According to Annex I of the JD, in referring to the above-mentioned Art. 31, the NPC shall enact and promulgate a Basic law of the HKSAR, stipulating that "after the establishment of the HKSAR the socialist system and socialist policies shall not be practised in the HKSAR and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years":

> The HKSAR shall be directly under the authority of the Central People's Government of the People's Republic of China and shall enjoy a high degree of autonomy.[4]

Thus, through the signature of the JD, China's policies vis-à-vis the HKSAR are prescribed by international law in the form of a bilateral treaty. Although the CPG is well committed to the principles of "one country, two systems" and the maintenance of the capitalist system in Hong Kong for another 50 years beyond 1997, it is necessary to clarify what these principles mean in the minds of Chinese leaders. We are going to investigate the underlying rationale in formulating these principles in order to reveal the essence of the policies. Then we

3. Art. 31 of the *Constitution of the People's Republic of China*, passed in December 1982 by the Fifth National People's Congress, Beijing: the Law Press, 1986.

4. *See JD, supra* note 2, Annex I(I).

will proceed to the analysis of the Basic Law and see how this ambiguous document seeks to embody those principles.

We are convinced that the BL, as a constitutional document, is of vital importance, but the future of Hong Kong, to a great extent, will be determined by the political development inside China.

There are three conceptual problems that need to be examined: the concept of "one country, two systems," the meaning of "autonomy" in a nation-state having a tradition of centralized power and the nature of the BL in relation to the Chinese constitution.

### a) On the Concept of "One County, Two Systems"

The concept of "one country, two systems" was proclaimed by Deng Xiaoping during the 1982 Twelfth Party Congress of the CCP. However, the wording of this concept in Chinese gets a muddled and ambiguous meaning. In the original, *Yiguo Liangzhi*, the wording *Liangzhi* clearly means "two systems," but the former *Yiguo* can mean "one country" or "one nation" or "one state." These three terms, which denote different meanings in political science, all can be represented by the same Chinese term, "*guojia*"; hence confusions arise. Chinese leaders always stress the importance of national unity under the control of a unitary state. When they talk about the return of Hong Kong to China, they always point out that it would be beneficial to the unification and the modernization of China. As Premier Zhao pointed out in 1984: "we persist in the principle that all patriots belong to one big family. Everybody is responsible for the unification of the motherland."[5] The emphasis on national unity and the reliance on national and ethnic spirit always is used as a technique for encouraging a "United Front" in order to win the sympathy of Chinese living outside the mainland. Unification and modernization are the two ultimate goals of China, and although they are two clearly different concepts, for the Chinese leaders they are linked to each other. If China were united, the whole country would be modernized more rapidly, and so they believe that every patriotic Chinese should strive for unification.

However, when we say that a Chinese in Hong Kong or Taiwan is patriotic, it means that he loves the country in a general sense, that is, the nation which embodies history, language and a cultural tradition: in short, a national identity. Nevertheless, having a strong national identity has nothing in common with loving the "party," that is, the

5. "Talk given by Premier Zhao Zhiyang in meeting the Hong Kong delegation of political personalities," *Renmin Ribao* (Beijing), October 3, 1984, p. 1.

CCP, or the "state" under the leadership of that party. *Aiguo* in Chinese may mean loving the nation or loving the state, but conceptually, nation and state easily can be distinguished.

It is generally accepted that, while many Chinese living outside the mainland are patriotic in referring to their national sentiment, most of them nonetheless are skeptical of the consequence of unification. If the people in Taiwan and Hong Kong have no confidence in the state currently in power in Beijing, then they might not be sympathetic with the plan of unification proposed by that state. It is the general will of all ethnic Chinese to see a unified and prosperous Chinese nation, but unification and prosperity have no direct relationship. People need only to compare Taiwan, Hong Kong and the mainland to arrive at the conclusion that it is only because the two capitalist enclaves are not ruled by the Communists that the people can achieve relative prosperity. If the nation is unified under the control of one state, but the state is inefficient, corruptive and decadent, and such problems result in poor management of the society and its economy, then why unify?

The confusion that arises from the use of terminology, in which nation and state are virtually the same term, *guojia*, in Chinese, tends to mystify the situation regarding the future of reunification. As Beijing's theory runs, if you are patriotic, then you must be supportive of the reunification of China, and, as a consequence, you should welcome any attempt by Beijing to accomplish it. In other words, you should support the initiative of the mainland to proceed with the reunification process, irrespective of your own political beliefs and attitudes. The capitalist territory, after reunification, would be kept under the rules of that state in Beijing, since it is the state which claims to be the only legitimate Chinese regime. In short, by "one country, two systems," what Beijing really wants is to have the two systems/societies under Beijing's control. The capitalist territory would be ruled by a local government that is subordinate to the CPG although it might also enjoy a high degree of autonomy.

However, some scholars outside the mainland stress that the current division of Taiwan from the mainland already has achieved the goal of "one country, two systems." In the Chinese nation, we already have two distinctly different systems, but the two systems are ruled by two separate, effective regimes. In other words, what we have now are two separate states which govern two distinct societies. Each of the two states pretends to be the *only* legitimate regime in the country, and

considers its counterpart illegal and illegitimate.[6]

To facilitate Taiwan's reentry into international society, what some overseas Chinese scholars propose, such as "one country, two seats" or "one country, two rules"[7] all can be classified into the category of "one nation, two systems, *two* states (or regimes)." In other words, a single nation can be represented in the international arena by two regimes, each of which rules effectively a given territory, and the two regimes are not subordinate to each other. However, what China proposes can be simplified as "one nation, two systems, *one* state," where the two systems are only parts of a nation-state and the government of that particular capitalist system must be directly under the authority of the CPG.

This conceptual clarification is considered significant. If we are clear of the real meaning behind different proposals for reunification, a Chinese proposal to Taiwan to consider the Hong Kong model of "one country, two systems" will not be accepted by Taiwan. Taiwan is, after all, an independent polity. In the case of Hong Kong, sovereignty has been conferred on China by Britain. In such circumstances, the future HKSAR can only be a local government. There is no consideration given to two "states" or regimes. On the other hand, the regime of Taiwan still operates very efficiently, despite its non-recognition by most of the world. We are doubtful of Taiwan's ability to reunify China, but Beijing's wish to turn the Taiwan government into a local government, as with the HKSAR, would be unfulfilled if Taiwan refuses categorically to accept the Hong Kong model. Apart from using force, how can Beijing change the status of Taiwan from a *de facto* state into an autonomous, yet subordinate, or even subservient, government?

Returning to Hong Kong, the predominance of the central sovereign state over the autonomy of the local government in the HKSAR must first be taken into consideration in analysing the Basic Law. The concept of "one country, two systems" under the auspices of the CCP does not grant equal political status to the two systems although the two could coexist for 50 years or more. What kinds of autonomy will the HKSAR enjoy under a unitary state? This is related to the political considerations of the CCP regarding the role of the capitalist SAR in helping the modernization of the mainland. The next section will

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6. *See* Ting Wai & To Yiu-ming, "A query to the concept of 'One Country, Two Systems': a study of the role of Chinese communist politics on the socio-economic development of Hong Kong," *Ming Pao Monthly* (Hong Kong), May 1988, p. 35.

7. For all these terms, consult Li Jiachuan, "A comparative analysis of 'one country, two systems' and other models," *Outlook Weekly* (overseas edition), February 1, 1988, p. 7.

provide a political and constitutional analysis of the concept of autonomy.

**b) Autonomy Under a Unitary State**

It becomes a norm in any socialist country that the party-state cannot allow any other social or political forces to challenge its supreme and absolute authority. Granting autonomy to the HKSAR would not provide any deviation from this norm. In the future, the HKSAR government not only will be accountable to the citizens of Hong Kong, it will be under the authority of the CPG, which means it must be accountable to the NPC or, in principle, to the Chinese people.

The political accountability of the HKSAR government to the regime of the dictatorship of the people's democracy is related closely to Chinese perceptions of the roles played by the HKSAR in modernizing the socialist mainland. For China, there exists a relationship of inter-dependence between Hong Kong and China, The coexistence of two social systems that are mutually exclusive in nature paradoxically is considered mutually beneficial to one another. However, while in terms of socio-economic development, the two systems are dependent on each other, relative political independence, or the degree of autonomy enjoyed by the HKSAR, is limited. Not only cannot the supreme authority of the CCP be challenged, the CPG, under the leadership of the CCP, must ensure that the policies pertaining to Hong Kong be executed without any disturbance from the HKSAR in order to fulfill the national goals of socialist China. This demands, by consequence, a special kind of relationship between the central and local government. The CPG really can "lead" or influence the policies of the future HKSAR. Hence, the debate on the degree of autonomy enjoyed by the HKSAR makes no sense if we are ignorant of this crucial political reality.

Since capitalism in Hong Kong serves primarily the interests of the mainland in developing socialism, its *raison d' être* in existing for another fifty years has less to do with the natural wishes of the people living in the territory than with the sake of the socialist motherland. Thus, while in the socio-economic aspect, the capitalist enclave is asked to maintain the same character, it is condemned to erect a kind of "subordinate" relationship with the CPG.

For the theorists of Marxism-Leninism, the contradiction between socialism and capitalism is absolute, but under certain conditions the two can coexist for a fairly long period of time. The condition now for the coexistence is the need for mutual support.

However, the struggle of contradiction still persists. Two Chinese theorists point out:

> When we practice the concept of "one country, two systems," apart from paying attention to the struggle of contradiction, we have to study the conditions that influence the transformation of contradiction. Under the present situation in one country, socialism is in an absolute ruling position, and this determines that the capitalism of Hong Kong must be transformed into socialism some time in the future (maybe a few generations away), but not the opposite. It must be noticed that during the process of transformations, the struggle is very complex and we cannot be ignorant of that.[8]

We do not think that China will interfere with Hong Kong by initiating political movements in the territory. But, if the "contradictions" between the two systems are absolute, it is difficult to believe that the socialist motherland will not intervene to a certain extent in the domestic affairs of the HKSAR in one form or another.

But the theoretical development has arrived at a new stage. During the Thirteenth Party Congress held in October 1987, designate Party Secretary Zhao proposed the theory "on the preliminary stage of socialism."[9] At the preliminary stage, socialism is not yet perfect, since non-socialist elements can still coexist, and the experience derived from the capitalist commodities economy is helpful to socialist development. "One country, two systems" is considered an extension of this coexistence of socialist and non-socialist elements beyond the mainland.[10]

The "preliminary stage of socialism" will continue for around a hundred years (starting from 1949) and the end of this stage corresponds roughly to the end of capitalism in the HKSAR, which would continue for 50 years after 1997. Economically speaking, the theory of the preliminary stage of socialism justifies the necessity of coexistence of Hong Kong capitalism with mainland socialism in helping to modernize the mainland. But the theory does not give any direction re-

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8. Zhou Yizi & Shi Hanyong, " 'One Country, Two systems' from the question of Hong Kong," *Guang Dong She Hui Ke Xue Qing Bao Zi Liao*, No. 2, 1984, in Research Centre on theories of United Front, Central Institute of Socialism ed., *Yige Guojia, Liangge Zhidu*, Beijing: Catalogue & Document Press, 1987, pp. 79-90.

9. Report presented by General Secretary Zhao Ziyang during the Thirteenth Party Congress, *Tai Kung Pao* (Hong Kong), October 26, 1987, pp. 9-11.

10. Wen Jie, "Theory of 'Preliminary stage' and Idea of 'One country, two systems'," *Tai Kung Pao* (Hong Kong), November 23, 1987, p. 7.

garding the development of Hong Kong itself. In the next 60 years, socialism will continue to develop. It is hoped that, by the mid-twenty-first century, socialism will move to a higher stage. By that time, the level of development on the mainland will approach that of the HKSAR. Thus, the function of "one country, two systems" in helping to modernize the mainland will be fulfilled, and there would be no need to continue to coexist. However, does this mean that the HKSAR at that time should be integrated into the mainland in a transition to socialism? And if the capitalist system in the HKSAR remains unchanged for 50 years, how can it be integrated suddenly into the mainland system? These questions remain to be answered. However, if we are convinced that socialism is the principal body and the capitalist subsidiary territory serves only to buttress and promote the development of socialism, then we have reason to believe that socialism will consciously exert its political influence upon the tiny territory, in order to sustain the politically dependent relationship and facilitate the eventual integration of the territory into the socialist system. Thus, intervention to a certain degree is not illogical at all.

However, any interference or intervention by the "omnipotent" state could be harmful to the HKSAR since state intervention can change the nature of Hong Kong society. For instance, the influx of capital from China into Hong Kong certainly contributes to the development of the local economy. But this is "state capital" and the cadres who are in charge of it might disregard the rules of capitalism. What will this "capitalist paradise" look like if it is dominated increasingly by "state capitalists" who are backed by a huge political force?

Based on the above analysis, three sets of questions arise regarding the legal provisions prescribed by the BL.

(1) Could the Basic Law fully defend this autonomous status of the HKSAR? Or, on the contrary, does it put too much emphasis on the power of the sovereign state, so as to provide a legal foundation for state intervention?
(2) How could the actions and activities of the CPG be contained to purely external and defence matters, leaving all domestic matters to the government of the HKSAR?
(3) Is the local government formed according to the wish of the people living in the SAR so that it can safeguard their interests?

The BL serves to delineate the relationship between the HKSAR and China. By this, a division of powers between the two regions must

be stipulated clearly in the BL. However, while "the high degree of autonomy" is always stressed as a principle, it is not clearly defined in the Draft. On the other hand, there are no provisions restraining the power of the Standing Committee (SC) of the NPC. A clear division of powers is needed for the proper functioning of the SAR, but in the BL, matters to be governed by the CPG and the SAR are not clearly defined and distinguished, and the powers of the central government are not carefully circumscribed. While this will be more thoroughly discussed in the second part of the paper, we are going to discuss the concept of autonomy here.

Article 3(2) of the JD stipulates:

> The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.[11]

Clearly, the autonomy of the HKSAR is to be practised by a unitary state; this is ultimately different from that enjoyed by state governments in a federal system. In a federal system, the scope of power of both the federal government and the constituent state governments clearly are prescribed in a constitution. Although there is a clear division of powers between the federal government and the state governments, each of which has exclusive jurisdiction with respect to certain specific matters, the federal constitution is binding not only on the state governments but also on the federal government.[12] The autonomy of the states cannot be infringed upon by the federal government, since the power of the federal government derives from that of the member states. Any changes in the power relationship between the federal government and member states cannot be made without revision or amendment of the constitution.

According to Article 3(2) of the JD, the autonomy of the HKSAR is delegated by a unitary state, and its nature is radically different from the autonomy enjoyed by member states in a federal state as described above. Yan Jiaqi, former director of the Institute of Political Science in the Chinese Academy of Social Sciences, stresses that in general the power of a local government under a unitary state is not as

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11. *JD, supra* note 2, Art. 3(2).

12. *See* Albert H.Y. Chen, "The Relationship between the Central Government and the SAR" in P. Wesley-Smith and Albert Chen eds., *The Basic Law and Hong Kong's Future*, Hong Kong: Butterworths, 1988, p. 111.

great as a member state in a federal state, but the concept of "one country, two systems" is a major breakthrough from the traditional scope of limited power granted to the local government by the unitary state.[13] The "high degree of autonomy" prescribed in the JD implies that the HKSAR will be given even more power in comparison to the state governments in a federal state. However, we should be aware that the autonomy of the HKSAR is subject to strict limitations.

First of all, in many federal states, the state governments possess "residual powers." But the future HKSAR will not have such powers. The power of the SAR is delegated only by the sovereign state and, as a consequence, it "is usually derived not from the constitution of the unitary state but from a law enacted by the legislature of the state."[14] Thus the autonomy of the region is not strictly protected by the constitution, since withdrawal of the power can be made only by legislative amendment, not by constitutional amendment. Granting of autonomy to the SAR is a "voluntary delegation of power" by the national legislature and as a result it is not well secured.

For the administration of an autonomous region, some principles must be erected, including:

(1) a clear definition of the powers delegated by the central government to the autonomous government;
(2) a clear division of powers between the two;
(3) exclusive jurisdiction of the autonomous region within the scope of power delegated by the central government;
(4) vesting the SAR with executive, legislative and independent judicial power, including that of final adjudication. The exercise of these powers within the scope of autonomy should not be infringed upon by the central government; and
(5) to achieve a high degree of autonomy, vesting the central government with the necessary power to defend the national sovereignty, but delegating other powers to the autonomous region.[15]

But the autonomy of the HKSAR as prescribed in the BL is seri-

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13. *See* Yan Jiaqi, "The scientific meanings and characteristics of 'One Country, Two Systems'," in *Honqqi Monthly* (Beijing), September 1985, pp. 17-19.

14. Albert Chen, *supra* note 12, p. 112.

15. *See* Research Group on the Basic Law, Hong Kong Affairs Society, "Could the (Draft) Basic Law guarantee a high degree of autonomy," *Ming Pao* (Hong Kong), July 13, 1988, p. 29.

ously confined; it is not entitled to any "residual powers." Although China guarantees a high degree of autonomy in agreeing to the above principles, the retraction of power involves only an amendment of law by the national legislature. This affirms China's comfortably predominant position in exerting her influence on the HKSAR.

Hence a debate arises. The BL is not just a statute, but a constitutional document from which the future laws in the HKSAR will be derived. What is then the nature of the BL and its relationship to the national constitution?

### c) Nature of the Basic law in Relation to the Chinese Constitution

The most ambiguous point in the nature of the BL concerns its relationship with the Chinese Constitution. The BL derives its authority from Article 31 of the Chinese Constitution.[16] Thus, although the BL is only a state statute, in the eyes of the people living in HKSAR, it is a constitutional document from which other laws will derive their authority. Besides, it prescribes the future political institutions and the division of powers among the structures of the government. The enactment of the BL thus accomplishes what normal constitutional provisions usually accomplish. If the autonomy of the HKSAR is not directly protected by the Constitution, but only by a law enacted by the national legislature; and if the provisions listed in the BL contravene some provisions in the Constitution, then what guarantees are there of the sanctity of the BL?

In an important article,[17] the leading Chinese jurist, Zhang Youyu, specifies that it is inappropriate to call the BL a "little constitution:"

> The Hong Kong Basic Law will be legislation 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 place with the PRC Constitution.[18]

Thus, the HKSAR will not be a separate polity and consequently

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16. Constitution of the PRC, *supra* note 3, Art. 31.

17. *See* Zhang Youyu, "The reasons for and basic principles in formulating the Hong Kong Special Administrative Region Basic Law, and its essential contents and mode of expression" *Journal of Chinese Law*, No. 2, 1988, pp. 5-19. The Chinese version of this paper, distributed as Reference material CCBL-SECR-RM07-880819 by the Basic Law Consultative Committee (BLCC), is considered authentic.

18. *Journal of Chinese Law*, p. 7.

should be kept under control by the CPG. The delegation of power by the central authority is not therefore without limits:

> If some people in Hong Kong try to destroy the socialist system in the country outside Hong Kong, not only through expression of opinion, but also through actions, it will not be allowed by the Basic Law.[19]

The above passage appears in the Chinese version of the article but is omitted in the English version and is replaced by the following sentence which appears to be more subtle: ". . . the PRC must be able to protect itself."[20] He continues:

> The high level of autonomy it [HKSAR] will enjoy is conferred on it by the central organs of state power, and this high level of autonomy is not without limits. When exercising its high level of autonomy, Hong Kong will not proceed entirely without guidance, and even necessary intervention from the central government. However, China's national sovereignty may not be damaged by Hong Kong's enjoyment of its high level of autonomy.[21]

In a strong tone, Zhang stresses in the Chinese version of the article that:

> the provisions in the JD . . . make clear that the HKSAR executes the power of high degree of autonomy delegated by the central power structure under the leadership of the central government. [Again, this sentence is omitted in the English version.] The Basic Law must elaborate on these provisions and the policy of guidance embodied in them, but may not contradict them.[22]

These quotations suggest that the so-called "high degree of autonomy" is seriously confined by the CPG. This is particularly the case in the wording of the Chinese version. The central authority reserves the right to define the "degree" of autonomy, and to "guide" the SAR in executing its right of autonomy, through legal and constitutional means. But does it mean that the CPG actually will try to influence or even "lead" the policy-making process of the SAR, leaving only the day-to-day operations to the SAR? While the answer to this question

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19. BLCC Reference Material CCBL-SECR-RM07-880819, *supra* note 17, p. 2.

20. Zhang Youyu, *supra* note 17, p. 9 (English version).

21. *Ibid.*

22. *Ibid.*, p. 10 and BLCC reference material CCBL-SECR-RM 07-880819, *supra* note 17, p. 3.

remains to be resolved, one thing is very clear. The Chinese leaders cannot allow any challenge (especially actions) to the sovereign state and its political institutions, or to the socialist nature of the Chinese system. The BL, having no clear status as a constitution and enacted or amended only by the national legislature, is a kind of instrumental safeguard that the CPG reserves in order to intervene in SAR affairs during times of necessity when national interests are at stake. This is not unfamiliar to the Chinese political tradition, where rulers are more interested in *guan* ("supervise, control") than in *zhi* ("administer, manage").

Thus, we are now facing a new interpretation of the JD, a "tighter" interpretation by which the final say and overwhelming supervision is given to the CPG. This is clearly expressed in Zhang's article in the section on "Hong Kong people administering Hong Kong." After mentioning the clauses pertaining to the autonomy of HKSAR, including Article 3(3), 3(4) and Annex I, Section I and III of the JD, he adds:

> "Hong Kong people administering Hong Kong" thus means that under the leadership of the Central Government, the Hong Kong people themselves will manage specific legislative, administrative, judicial and other matters.[23]

Another article appeared in the same issue, written by Wu Jianfan, a Chinese jurist who is also a member of the BLDC, and it complements the points made by Zhang. Wu says that it is a misinterpretation of the JD in saying that the affairs to be managed by the CPG are limited strictly to foreign affairs and national defence, while all other affairs should be managed by the HKSAR.[24] There is in fact no limit to matters managed by the CPG. "The JD does not say that the affairs managed by the Central Government are limited to foreign affairs and national defense."[25]

Wu further points out that the exercise of national sovereignty by the CPG is manifested also by its supervisory power over the autonomy of the HKSAR.[26] Although he indicates that the CPG's supervision is with respect to whether the HKSAR is exercising its autonomy in accordance with the BL, and such supervision is itself carried out in

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23. Zhang Youyu, *supra* note 17, p. 13.

24. *JD, supra* note 2, Art. 3(2).

25. 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," *Journal of Chinese Law*, No. 2, 1988, p. 65-82.

26. *Ibid.*, p. 68.

accordance with the stipulations of the BL,[27] it seems that he has overlooked the fact that the CPG is able to amend the BL through the NPC. Tighter control over the SAR is always possible if the CPG wishes. On this basis, how can a high degree of autonomy be guaranteed, if the BL has no status as a constitution? If the political relationship between the CPG and the SAR is determined by a principle of "guidance," then what is the relationship between the Constitution and the BL?

Under Article 31 of the Chinese Constitution, the NPC is able to enact laws to prescribe for the SAR system. While the BL derives from Article 31 of the Constitution, many of its provisions are at odds with provisions in the Constitution. The legitimization of the capitalist, socio-economic system in the SAR under the sovereign state tends to contravene provisions in the Constitution like notably Articles 1, 3, 5 and 6. These articles prescribe the nature of the socialist state, the legislative and judicial systems of the state, and the predominance of socialist economic policies. Article 5 specifies that no laws shall contravene the national constitution. But it is illogical and unreasonable to ask the HKSAR to be subjected to constitutional constraints, which are applicable only to a socialist system. While it is clear that, politically speaking, the administration of the capitalist system in the SAR is to be "guided" by the central government, and the BL does not have the status of a constitution, the paradox that occurs between the BL and the provisions in the Constitution should be eliminated to provide the maximum guarantee for the proper functioning of the SAR system.

According to Chinese members of BLDC, the Constitution as a whole is applicable to HKSAR. The formation of the BLDC also is based on Article 31 of the Constitution, but if the Constitution is not applicable, then even the drafting process of BL is illegitimate. However, it is clear that some provisions are not applicable, while others may be. In a report given by the delegation of mainland members of the BLDC after their visit to Hong Kong in June 1988, it is mentioned that:

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

27. *Ibid.*

cable while the other one is not.[28]

Provisions prescribed in the BL may contradict those in the Chinese Constitution. The contradiction can only be solved by amending Article 31 to prevent the full application of other provisions of the Constitution to the HKSAR.[29] The constitutional status of the BL should be defined more precisely in relation to the Chinese Constitution. Residents in the HKSAR should not be subject to "national" laws that are not part of the law applicable in the region.

Up to this stage, some conclusions can be drawn:

1. The implementation of the concept of "one country, two systems" does not imply that the SAR has to be ruled by capitalist or other classes. The *raison d'être* for the continual existence of capitalism beyond 1997 is simple but paradoxical: it serves to assist in the modernization of the socialist mainland.
2. As a consequence, the capitalist enclave never can enjoy the same status as the socialist mainland. It is not considered a separate and individual polity. It has the right to survive generally at the mercy of the rulers of the mainland. In the name of sovereignty, the HKSAR will endure "guided" autonomy. Whether it is nominally of a "high degree" or not is meaningless, since the central authority will have the final say on the jurisdiction of the territory.
3. The above scenario is reflected in, and protected legally by, the BL. Although a constitutional document in nature, it is not considered a constitution. The Chinese Constitution empowers the NPC to enact laws for the SAR. Although "no amendment to this law (BL) shall contravene the basic policies of the PRC regarding Hong Kong,"[30] and the BL should be amended by special procedure, the legal guarantee of autonomy provided by the BL is not secure enough. It is subject to adjustments generated by changes in the "basic policies," and the na-

28. "Responses to questions on the Draft Basic Law by the delegation of mainland members of BLDC during its visit to Hong Kong" (4 to 7 June 1988), BLCC Reference Material CCBL-SECR-RM01-880803, para.2.6.2.

29. Some jurists in Hong Kong share this view, including Chief Justice Sir Ti Liang Yang. *See* Chris Yeung, "Chief Justice lists potential conflict areas," *South China Morning Post* (Hong Kong), 10 June 1988, p. 5. *See also* Albert C.Y. Ho, "Autonomy" in P. Wesley-Smith & A. Chen, *supra* note 12, p. 295.

30. *BL*, Art. 170.

tional legislature is powerful enough to effect those changes in the BL.

## III. THE PROVISIONS OF THE DRAFT BASIC LAW AS COMPARED TO THE JOINT DECLARATION

This part of the paper is divided into 3 sections, concentrating on the crucial yet controversial areas listed in the BL, namely the relationship between the central government and the HKSAR, the political structure of the SAR and human rights. We will examine whether the BL is drafted in accordance with the principles laid down by the JD. Although the JD is a document in international law that possesses binding power on both signatory states, the dominating opinion, or the opinion of the Chinese government in the BLDC, is that the enactment of the BL only implements those of China's basic policies regarding Hong Kong that are elaborated in the JD. Thus, drafting the BL provided a legal means for ensuring continuity of China's basic policies vis-à-vis the HKSAR.[31] As a signatory, although China has to assume the responsibility and duties obliged by the international agreement, the JD itself was not the legal basis of the BL. Enacting and promulgating the BL was purely an internal matter. The JD can serve only as a guide as to whether the BL, which embodies the basic policies of the PRC regarding Hong Kong, safeguards the interests of the local people.

### a) On the Relationship Between the Central Authorities and the HKSAR

If the autonomy enjoyed by the HKSAR is just a "guided" autonomy under the supervision of the central authorities, what is reflected in the BL is naturally an unclear devolution of power.

In the JD, it is clearly specified that

> Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the HKSAR shall be vested with executive, legislative and independent judicial power, including that of final adjudication.[32]

But for all the three powers concerned, certain provisions in the BL tend to derogate from the above mentioned principle.

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31. *Reference Material for the Draft Basic Law of HKSAR*, ed. by *Wen Wei Po* (Hong Kong), June 1988, p. 2.

32. *JD*, *supra* note 2, Annex I(I).

*i) The Limited Legislative Power of the HKSAR*

Article 16 of BL stipulates that

> If the Standing Committee of the National People's Congress, after consulting its committee for the Basic Law of the Hong Kong Special Administrative Region, considers that any law of the Region is not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This cessation shall not have retroactive effect.

The NPC thus is empowered to revoke any laws enacted by the HKSAR legislature, regardless of whether they pertain to domestic affairs of the SAR or not. This seriously undermines the legislative power of the HKSAR. The power of the NPC to revoke a law enacted in the HKSAR should be confined to defence and foreign affairs only.

Article 17 stipulates first that the laws of the HKSAR will be the BL, the laws previously in force in Hong Kong and the laws enacted by the HKSAR. This corresponds to the provisions listed in the JD, Annex I (II). However, Article 17 also stipulates that:

> Laws, enacted by the National People's Congress or its Standing Committee, which relate to defence and foreign affairs as well as other laws which give expression to national unity and territorial integrity and which, in accordance with the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region, shall be applied locally by the government of the Hong Kong Special Administrative Region by way of promulgation or legislation on the directives of the State Council, whenever there is the need to apply any of such laws in the Region.

This article involves the application of Chinese laws to the HKSAR. There are obvious deficiencies in this provision. First, apart from defence and foreign affairs for which only the NPC can enact relevant laws, it seems that, as Mr. Denis Chang said, "The NPCSC [National People's Congress Standing Committee] retains the power of legal supervision including plenary power of interpretation of *all* applicable laws regardless of whether they relate to purely internal matter of the

HKSAR."[33] The laws "which give expression to national unity and territorial integrity" also are not well defined. In mainland China, for the sake of "national unity," some citizens' rights can be suppressed. We are aware that, using this as a kind of pretext, the NPC can, in effect, enact laws for the HKSAR, thus overriding the legislative power of the HKSAR.

This should be amended in such a way that national laws, which pertain to foreign and defence affairs outside the limits of autonomy of the HKSAR, can be applied only locally through legislation by the HKSAR according to directives of the State Council.

As indicated by the mainland members of the BLDC, the national laws that are related to foreign and defence matter as well as "national unity and territorial integrity" include the following:

(1) the Resolution of 1949 regarding the capital, calendar, national anthem and national flag;
(2) National Day;
(3) National Emblem;
(4) the Declaration of the Chinese government in 1958 regarding territorial waters;
(5) the Declaration in 1986 regarding diplomatic privileges and immunities;
(6) Provisions governing the election of NPC's deputies in Hong Kong; and,
(7) the Chinese Nationality law of 1980.[34]

It should be indicated clearly in the BL that these laws are applicable to Hong Kong. Other national laws enacted after the promulgation of the BL, which pertained to foreign and defence matters and so are applicable to Hong Kong, also could be enacted by the local legislature of the SAR.

It is only through this institutional mechanism that a high degree of autonomy of the HKSAR can be guaranteed, and the powers of the NPC circumscribed.

*ii) The Judicial Independence of the HKSAR and the Basic Law*

Under Article 18 of the BL, the HKSAR is vested with independ-

33. Denis Chang, former Chairman of the Hong Kong Bar Association, "Inadequate safeguard threatens dual system," *South China Morning Post* (Hong Kong), 29 April 1988, p. 9.

34. *See* "Chinese Laws applicable to HKSAR," BLCC Reference Material CCBL-SECR-RM 04-880803.

ent judicial power, including that of final adjudication. However, the third paragraph imposes limits on the judicial power of the HKSAR:

> Courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases relating to defence and foreign affairs, which are the responsibility of the Central People's Government, and cases relating to the executive acts of the Central People's Government. Courts of the Hong Kong Special Administrative Region shall seek the advice of the Chief Executive whenever questions concerning defence, foreign affairs or the executive acts of the Central People's Government arise in any legal proceeding. A statement issued by the Chief Executive regarding such questions shall be binding on the courts.

It is not very clear what "executive acts" mean. According to the mainland drafters of the BL, "executive" acts do not include civil or commercial acts. Although many Chinese firms in Hong Kong are state-owned, their actions or activities are not regarded as "executive acts."[35] "Executive acts" may refer to "acts of state" in the Common Law System, which include acts regarding the relationship between states, such as the declaration of war and peace and the signing of international treaty.[36] It can also include acts concerning the state and the individual. However, in the common law system, although the court has no jurisdiction over "acts of state" (which concern the exercise of sovereignty), it nevertheless can determine whether "acts of state" or "facts of state" are involved.

By Article 18, it is still not clear whether HKSAR courts could have jurisdiction over the state organs of China and their staff. If a Chinese official committed a crime in the HKSAR, he should be brought to a local court. However, such a case also could relate to the executive acts of the CPG, thereby falling beyond the jurisdiction of local courts. The jurisdiction of HKSAR courts is thus seriously restricted by Article 18, in comparison to the present situation where the courts still have the power to determine whether "acts of state" are involved. The HKSAR courts currently have the power to deal with cases involving foreign and defence matters, under the condition that they would have to consult the administration on questions regarding acts of state.

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35. BLCC Reference Material CCBL-SECR-RM01-880803, *supra* note 28, para.2.3.1. and 2.3.2.

36. *See* "The concept of 'act of state' and 'fact of state'," BLCC Reference Material CCBL-SECR-RM02-880803.

The most fundamental issue regarding the limitation of judicial power of the HKSAR is that, according to Article 169, the power of interpretation of the BL is vested in the Standing Committee of the NPC:

> The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress [NPC].
>
> When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.
>
> The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government, the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.
>
> The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

Putting too much emphasis on national sovereignty restrains the power of the HKSAR courts to interpret the BL. Local courts have no power even to decide whether any provision of the BL concerns defence, foreign and other affairs, which are supposed to be the sole responsibility of the CPG. The consequence is that, in many cases, the court has to seek an interpretation from the NPCSC or, on the other hand, the NPCSC has to monitor closely the judicial process to see whether cases involve the interpretation of provisions regarding national sovereignty. As a consequence, the courts always have to wait for a decision from the NPCSC, thus causing undue delay in trials. This is in fact an institutional mechanism that reserves the power of the NPC to influence HKSAR courts, although the latter are vested with the power of final adjudication. Under such circumstances, how can one say that the SAR still enjoys a high degree of judicial independence?

The only way to relieve the anxieties of Hong Kong citizens, as most critics suggest, is to delegate this power of interpretation to the courts of the HKSAR. The courts of the HKSAR should be vested with plenary power to interpret all provisions in the BL which fall within the scope of the SAR's jurisdiction. For matters that are beyond this scope, the NPCSC could interpret the provisions in case of necessity, but this should not bear any retroactive effect.

Since China is a sovereign state, its parliament, the NPC, is vested with the powers of ultimate control. These include the power of interpretation and amendment of the BL and that of revoking any laws which contravene the BL. The NPC even can enact and promulgate laws relating to foreign and defence matters, as well as other national laws which fall beyond the scope of authority of the HKSAR, but yet are applicable to the region. This power of ultimate NPC control constitutes a real challenge to the autonomy of Hong Kong, since the above-mentioned provisions enable the central authorities to exercise their power, thus increasing the possibility of mainland intervention in the region's affairs.

The debate on such controversial provisions also reflects a basic problem in the process of unifying Hong Kong with China. The legal systems in capitalist Hong Kong and socialist China are definitely very different in nature. The state organs in China are articulated according to the principle of *Yixing Heyi*, that is, "a combination of legislative and executive powers."[37] All powers belong to the people and the people exercise their right by "electing" the NPC and the People's Congress at local levels. Thus, the NPC is supposed to be the most representative organ and is directly responsible to the people. All other state institutions, including the CPG and the people's courts, are subject to NPC supervision. Judicial independence, although stipulated in Article 126 of the Chinese Constitution, has no real meaning, since the judicial organ is totally subordinated to the NPC.

The supreme authority of the NPC represents the sovereign power. In the eyes of Chinese leaders, it should be vested with those powers for ultimate control, even if the HKSAR is to be granted a high degree of autonomy. However, if the NPC were the "actual" supreme authority, elected by the people as the legitimate ruling authority in China, the debate regarding the provisions in the BL would be milder. Unfortunately, declaring the NPC the "actual" supreme authority completely ignores the role of the CCP. Political observers

37. *See* explanation of "Yixing Heyi" in the *Great Chinese Encyclopaedia*, volume on Law, Beijing, Great Chinese Encyclopaedia Press, 1984, pp. 702-703.

tend to agree that the NPC is no more than a "rubber stamp," although during the 7th Plenum of the NPC, held in April 1988, the "rubber stamp" was said to be "hardened," as delegates to the NPC were more outspoken and critical of the CPG's policies. The CCP is really behind the master control over Chinese society, by virtue of its domination of the state organs. If the party, with more than 40 million members, were truly democratic, it would engender less concern over power abuse among the people of Hong Kong, since Hong Kong residents readily could understand that 40 million members more or less represent the true "people's" interests. However, the authoritarian nature of the party facilitates the concentration of power in the hands of a power elite, which possesses vested interests both in the "nomenklatura" and in the state organs.

The authoritarian nature of the state institutions and the paternalistic ruling style of the CCP is in fact the fundamental factor that stimulates the great debate between the "democrats" and the others regarding the political structure of the future HKSAR.

### b) On the Political Structure of the HKSAR

A high degree of autonomy for the HKSAR is also related to another political concept—self-determination. This term is never mentioned in the debate on the political future of Hong Kong, since everybody is aware that its independence could never be a real option for China. However, a true sense of self-determination, that is "to decide our own fate by ourselves," actually exists in Hong Kong, especially in the minds of the professionals and intellectuals in the territory. This is a common sentiment shared among the younger elites who were born and bred in Hong Kong after the War. People living in Hong Kong should be allowed to decide their own fate, and, ever since the signing of the JD, a movement for democracy has been growing in the territory.

Generally speaking, democracy means the political freedom to choose people to run the government. In this sense, democracy does not contravene the recovery of Chinese sovereignty over Hong Kong. In the JD, it is specified that:

> The legislature of the HKSAR shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.[38]

What has the BL offered in response to the call for democracy?

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38. *JD*, *supra* note 2, Annex I(I).

From what we have learned from the provisions of the Draft BL, on the division of power in the HKSAR, the methods of selecting or electing the Chief Executive and constituting the legislature have not been decided yet, and the relationship between the Chief Executive and the legislature is not clear enough.

The key issue refers to the concept of accountability. The Executive authorities shall be accountable to the Legislative Council (LC) of the HKSAR as stipulated in Article 64:

> The executive authorities of the Hong Kong Special Administrative Region must abide by the law and shall be accountable to the Legislative Council of the Hong Kong Special Administrative Region in the following respects: They shall implement laws passed by the legislature and already in force; they shall present regular reports on their work to the Legislative Council; they shall answer questions raised by members of the Legislative Council; and they shall obtain approval from the Legislative Council for taxation and public expenditure.

However, it is not prescribed in the BL that the Chief Executive, as the person who leads the executive authorities, should be accountable to the LC. On the contrary, as stipulated in Article 43, the Chief Executive who is the head of the HKSAR and represents the region, shall be accountable to both the CPG and the HKSAR. However, as head of the government of HKSAR, why is he not accountable to the LC?

From what the provisions of the BL show, most members of the BLDC are in favour of a very powerful Chief Executive. He is vested with enormous power (as prescribed in Article 48), like that of a governor in the colony. But the HKSAR will no longer be a colony. For the sake of autonomy, do we still need an all-powerful Chief Executive, who will, in addition, not be accountable to the LC? Is the concept of "check and balance" to prevent the abuse of power not applicable to the HKSAR?

The numerous articles in Chapter IV on political structure should be read as a whole. We notice that the LC is rather weak in keeping the Chief Executive in check. There does exist an institutional mechanism for checks and balances between the two organs, with the Chief Executive being granted the right to dissolve the LC (Article 50), while the latter can exercise the power of impeachment against the Chief Executive (Article 72). But the conditions laid down for the functioning of this mechanism clearly show that the Chief Executive is in a relatively more powerful situation.

According to Article 49, if the Chief Executive considers that a bill passed by the LC is not in the overall interests of the HKSAR, he may return it to the LC within three months for reconsideration. This is the same as current practice. The Governor has the right of vetoing the bills passed by the LC, although no recent Governor has ever exercised it.[39] However, if the LC passes the original bill again by no less than a two-thirds majority, the Chief Executive must sign and promulgate it within a month. But, according to Article 50, the Chief Executive again can reject the bill passed by the LC and then dissolve the latter. If the LC refuses to pass the budget or "other important bills," the Chief Executive also can dissolve the LC.

Under such circumstances the power of the legislature is significantly restrained by the Chief Executive. The LC certainly could use two other alternatives prescribed in the BL to check and balance the Chief Executive, but their application is subject to strict conditions.

First, according to Article 52, if the newly formed LC has again passed the original bill in dispute with a two-thirds majority after the dissolution of the original LC, then the Chief Executive has to resign. Nonetheless, it is obvious that in the new Council, it might not be possible to have a two-thirds majority to overrule the decision of the Chief Executive.

Second, according to Article 72, the LC can pass a motion of impeachment with a two-thirds majority against the Chief Executive. But a consensus view reached by two-thirds of the members is by no means easy and it again restricts the use of that mechanism to check the Chief Executive.

The power of the LC is seriously confined by Article 64. The Council is not even vested with the power to investigate the acts of executive authorities when problems arise, nor is it empowered to pass any motion of impeachment against senior government officials except the Chief Executive. The Executive Council, which assists the Chief Executive in policy-making, is another powerful organ similar to the current Executive Council presided over by the Governor.[40] However, this Council is not included in the Executive authorities and by consequence need not be accountable to the LC.

All this illustrates that there is a weak legislative organ. The enormous power possessed by the Chief Executive and the executive authorities will be kept unchecked. Chinese jurists maintain that the

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39. *See* OMELCO Standing Panel on Constitutional Development, "Report on the Draft Basic Law," August 1988, Hong Kong, para.5.3.

40. *BL*, Arts. 54, 55, and 56.

legislative and executive organs should keep a dual relationship. It is not only a relationship of "mutual checks and balances," but also a relationship of "mutual cooperation."[41] This is a distinct characteristic of the political structure of the HKSAR. It is different from the theory of separation of powers, in which only the principle of checks and balances is emphasized. Instead, "mutual cooperation" should be stressed. "Emphasis only on check and balance but not on cooperation will not be favourable to the prosperity and stability of HKSAR. That will cause the executive and legislative organs to be in a state of paralysis or interminable conflicts."[42]

However, the question remains: if the authoritative Chief Executive and his vested power are not subject to a severe check and balance, would it be detrimental to the principle of a high degree of autonomy and would it contravene the JD, in which the accountability of executive organ vis-à-vis the legislature is specified? The problem relating to the Chief Executive would be even more serious if he is not elected directly through universal suffrage. A Chief Executive "selected" by a grand electoral college cannot earn the necessary legitimacy to rule the region. Rather he tends to serve sectoral interests. If in that case he is vested with great power, the situation could become worse as sectoral conflicts simmer. In any case, the whole process of appointment of a Chief Executive who is "selected" by an electoral college can be regarded as an "instrument of total control"[43] exercised by China.

Generally speaking, the political structure as outlined in the BL tends to encourage a powerful Chief Executive, while the checking power of the legislature is limited. At the same time, the relationship between the central authorities and the HKSAR is a kind of subordinate relationship within a unitary state. The Chief Executive is the chief of the HKSAR government, but he is first of all the head of the HKSAR. Narrowly speaking, he may be regarded as a representative of the CPG in governing the region in accordance with the BL. For instance, he has to implement the directives issued by the CPG

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41. Xiao Weiyun, "A Framework for designing the future political structure of Hong Kong," BLCC Reference Material CCBL-SECR-RM08-880819, p. 5. The author earlier has published an article entitled "A Study of the Political System of the Hong Kong Special Administrative Region under the Basic Law," *Journal of Chinese Laws*, No. 2, 1988, pp. 95-113. While the two articles are basically the same, some of the important points mentioned in the former (in Chinese) do not appear in the latter. For instance, the dual relationship mentioned here does not appear in the English text.

42. Xiao Weiyun, *ibid.*, p. 5.

43. See Denis Chang, "How China Sees It," in W. McGurn, ed., *Basic Law, Basic Questions*, Hong Kong: Review Publishing Co., 1988, p. 132.

with respect to relevant matters provided for in the BL, and to deal with external affairs and other affairs authorized by the Central Authorities.[44] As a consequence, the Chief Executive should be accountable to both the CPG and the HKSAR.

The attitude of China toward the democratic development of Hong Kong is rather passive and skeptical. In order to maintain a capitalist Hong Kong, the "United Front" strategy tends to set the capitalists as the main target. China wants to assure capitalists that their interests will be well protected. But the suspicion of China concerning democratic developments in Hong Kong is not generated only by the anxieties of the capitalists, who are also suspicious of these developments. Rather, Beijing is very conscious of its role as a sovereign power and thus it tries to seek the best institutional arrangement so that the SAR can function more in accordance with the policy guidelines laid down by the CPG. The executive organ of the SAR as outlined in the BL is vested with enormous power but is immune from severe check by the legislature. This ensures that, on key issues, the CPG can intervene directly without being checked by the local legislature. This design is clearly welcome by China, as the model fits the state policy for unification and stability, ensuring that the CPG can have sufficient power and means to intervene.

### c) Rights and Duties of Citizens in the HKSAR

According to Article 3(5) of the JD, rights and freedoms of the citizens in the HKSAR will be protected by law:

> Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice, of occupation, of academic research and of religious belief will be ensured by law in the HKSAR. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

When we seek a comparison between the above passage and the Bill of Rights in Chapter 3 of the BL, three points should be taken into consideration.

First of all, people compared Chapter 3 with Chapter 2 of the PRC Constitution and discovered a lot of similarities. But the Bill of Rights in the Chinese Constitution, although elaborately written, does not guarantee the maximum degree of freedom to its citizens. When

44. *BL*, Art. 48.

their rights are infringed, they may be denied necessary legal protection. Then what is the meaning of offering a Bill of Rights?

One of the deficiencies in the two Bills of Rights is that the two clearly different concepts, rights and freedom, tend to be confused. In Chinese, the word freedom is always understood as equivalent to the concept of liberty. In fact, as shown in a Chinese dictionary, freedom is *ziyou*, while liberty is *ziyouquan*, which means literally, the "right of freedom" or "right of having freedom." If one has the "right" to do something, other people must respect his actions. On the contrary, if one is "free" to do something, there may be no obligation by third parties to respect his actions; he, in fact, may have to respect others' freedoms as well in doing what he wants. That is to say, freedom is not unlimited; one can enjoy his freedom provided that other peoples' freedoms are not infringed as a result. But a right can never be infringed in any case. In all international documents on human rights, such as the International Covenant on Civil and Political Rights or the World Declaration of Human Rights, it is always specified, for instance, that one shall have the "right to freedom of thought, conscience and religion," or "the right to freedom of expression."[45]

While the JD mentions ambiguously "rights and freedoms," at the same time, in the BL, such as in Article 26, only "freedom" is mentioned:

> Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, to form and join trade unions, and to strike; and freedom of assembly and of demonstration.

As in the case of the Chinese Constitution, if this is not a "right," then this has to be subject to some other conditions. If one has the freedom to do something but intrudes on the freedom of others, then his acts must be restrained through legal means. This restraint actually is provided in Article 39 of the BL, which stipulates that:

> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. But such restrictions shall not go beyond the necessity for the maintenance of national security, public order, public safety, public health, public morals and for the safeguarding of the rights and freedoms of other persons.

This imposes serious constraints to the freedoms listed in Article 26.

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45. International Covenant On Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966), Arts. 18 and 19.

If a group of people want to go on strike, they are allowed to do so according to Article 26, but they cannot infringe the freedom of others as prescribed in Article 39. Obviously, the "necessity for the maintenance of national security," as well as other necessities, can become a pretext for the state to suppress the strike.[46] Thus, such provisions actually empower the government to restrict the exercise of these rights, although the original purpose of a Bill of Rights is just the opposite: to defend the rights of citizens against intrusion by the state. It seems that the sovereign state is more anxious to ensure that peace and order prevail in the SAR and, as a consequence, it requires overwhelming control.

Second, as has been mentioned by some critics before, the legislature in the HKSAR will play an important role in guaranteeing the civil liberties of its inhabitants. The courts only have the power to interpret the law. If the legislature passes a law to restrict or remove a person's freedom, the court has no choice but to apply and interpret it. An observer notes: "so how far civil liberties will be preserved depends on what kind of law the future legislation will make and that depends on what kind of future legislature Hong Kong will have, especially how independent it can be from the executive."[47] Following our analysis in the section on political structure, a strong executive may face a weak legislature. If the executive wants strong social control, civil liberties might be encroached upon through legislature acts which could be passed to restrict human rights.

Thus, the word "unlawful" that always appears in Chapter 3, has no meaning at all in guaranteeing the rights of citizens. For instance, Article 27 stipulates that "Hong Kong residents shall not be unlawfully arrested, detained or imprisoned." But it seems that the drafters of the BL have overlooked the fact that a "lawful" arrest also can be illegitimate or unreasonable, especially in an authoritarian state. These provisions in fact empower the legislature to restrict rights, thus enabling the legislature to decide to what degree citizens can enjoy human rights. So, what is prescribed in the provisions is not a real protection against encroachment of human rights by the authorities, but only that rights can be restricted by passing laws, using such pretexts as safeguarding the national unity. This can be clearly illustrated by Article 22, which states:

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46. This in fact happened in January 1987 during the student movements in Shanghai. The students were allowed to congregate, but the police said they had no right to "congest the traffic" and they were forced to congregate either in the school campus or in the parks.

47. Margaret Ng, "Sorry Chapter in the bid for human rights?" *South China Morning Post* (Hong Kong), 13 July 1988, p. 21.

> The Hong Kong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government.

Legally speaking, the word "unlawful" should be replaced by "arbitrary," which carries the sense of illegitimate, unreasonable and unjustifiable: such a term also is used in the common law system.

Briefly, an adequate safeguard for human rights requires the establishment of institutional mechanisms for circumscribing executive and legislative power. Thus, the form of political structure to be set up will be vital to the guarantee of human rights.

Third, in Chapter 3, the right to "due process of law," which exists in common law practice and guarantees the rights of a person after being arrested, is not even mentioned. Other serious omissions include:

(1) the right to life;
(2) protection against torture and cruel, inhuman or degrading treatment or punishment;
(3) freedom from forced or compulsory labour;
(4) the right to prompt and fair trial;
(5) the right not to be subjected to retroactive criminal law.

In order to provide for maximum safeguards, we are convinced that the two international covenants on Human Rights should remain applicable to Hong Kong, as the JD, Annex I (XIII), specifies:

> The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.

However, in the BL, it is stipulated in Article 38 that,

> The provisions of the "International Covenant on Civil and Political Rights" and the "International Covenant on Economic, Social and Cultural Rights" as applied to Hong Kong shall be implemented through legislation by the Hong Kong Special Administrative Region.

Since Britain is the signatory country of the two covenants, while China is not, the two covenants should be accorded legal status in the HKSAR; that is, they should be integrated into the BL, in order to fully safeguard the rights and freedoms of people in Hong Kong. Hence, the rights of inhabitants can be protected through legislation, and the judicial organs also will be bound by the two covenants.

But, it is doubtful that China, itself not a signatory country of the

two covenants, would allow the HKSAR, which enjoys "guided" autonomy only, to incorporate formally the documents directly into the BL.

## IV. CONCLUSION

The draft BL lays down the framework for the future political institutions and legal system of the HKSAR. Although some issues—such as the election or selection of the Chief Executive, the formation of the first LC, the structure and functions of the Basic Law Committee, and the method of setting up the first government in the HKSAR—are not yet very clear and remain topics of debate, some ideas can be derived from our analysis of the BL. The crucial question concerns the relationship between the central authorities and the HKSAR. Although the BL is said to be the best guarantee of any high degree of autonomy enjoyed by the HKSAR, we are skeptical of this argument, simply because the powers of the NPCSC in relation to the HKSAR are not well circumscribed. Instead of providing a legal foundation for the autonomous region, the BL enables the central authorities to exercise supreme power in case of necessity. It limits the scope of powers enjoyed by the HKSAR, but no provisions are available in the Chinese Constitution to check upon the exercise of power by the CPG. This empowers the CPG to intervene as a last resort, under the pretext of "exercising the sovereign power," a highly regarded principle in China, in times of critical situation.

However, in order to achieve a high degree of autonomy, the HKSAR must be granted exclusive jurisdiction within the territory. There must be a real and clear division of powers between the SAR and the CPG. With no provisions of self-restraint on the part of the CPG, and a scenario in which the Chief Executive of the HKSAR, who is accountable to the CPG, is granted enormous power against the relatively weak legislature, it ensures that the policies of China regarding her relationship with Hong Kong can be implemented.

The essence of such a policy is based on the "utility" of Hong Kong in "serving" the socialist mainland. However, though there is no objection in Hong Kong regarding this principle, the integration of a capitalist territory into the socialist motherland does create problems.

There are three basic contradictions. First of all, there is the contradiction between the two legal systems. The organization of socialist state institutions embodies the principle of a "combination of legislature and executive power." There is no need to have any "checks and balances" mechanism, and the judicial organs must be accountable to

the NPC. On the other hand, capitalist Hong Kong practises a common law system in which judicial independence is emphasized. Now the BL, which is subordinate to the Constitution and enacted by the NPC, must seek to harmonize the contradiction between the two legal systems. How this is done remains to be seen. But there is a fear in Hong Kong that while the absolute power of the CCP remains unchecked, the integration of Hong Kong into the motherland will enable Chinese political practices to be applied to Hong Kong.

Second, there is the contradiction between state and society. In China, the party-state "directs" the society; intervention in civil society is not considered unusual. In the West, the state "serves" society. Accordingly, the state organs are all servants of the people, and they thus are subject to the people's supervision through votes. In colonial Hong Kong, democracy never existed, but under British rule, Hong Kong has benefitted from the western concept of the state-society relationship. The result is a limited government and a large degree of freedom enjoyed by the people. Will a strong executive authority and a weak legislature, as proposed in the BL, facilitate a change in the state-society relationship that resembles more closely the Chinese style?

Finally, there is the contradiction between the center (the mainland) and the periphery (the region). Should the periphery, as in the Chinese political tradition, always be subordinate to the center in order to achieve a highly powerful centralized state? Is there a sacred relation between unification and prosperity? If the country is not united, but other parts of China, namely Hong Kong and Taiwan, remain more prosperous under different regimes, then people may ask: why unify? Would unification by a centralised state guarantee continued prosperity?

# CHAPTER IV

## OPINION ON THE DRAFT HONG KONG BASIC LAW*

*William Wade***

### A. WHAT SORT OF AUTONOMY?

1. The first and vital question is what is to be the nature of the "high degree of autonomy" which the Hong Kong Special Administrative Region is to enjoy. Is it to be constitutional independence, secured by effective legal guarantees finally justiciable in Hong Kong? Or is to be guaranteed merely by political undertakings and the international obligations stated in the Joint Declaration? Autonomy of the latter kind is a common phenomenon in the British Commonwealth, where numerous territories have for long periods been subject to the sovereign powers of the Westminster Parliament, but have nevertheless in practice enjoyed effective autonomy under settled political principles and conventions. Hong Kong's present autonomy is of this kind, and so was that of Canada before the Canada Act 1982 and that of Australia before the Statute of Westminster 1931. Autonomy of the other kind, backed by enforceable legal guarantees, is possessed by the component states of federal countries, for example, the states of the United States of America and of Australia and the Canadian provinces. The essence of their legal autonomy is that they possess powers which cannot be invaded by the central government except through some established process of constitutional amendment; and that any dispute is justiciable by a Supreme Court. Autonomy of this kind, therefore, is effectively protected by law.

2. The Joint Declaration says nothing expressly about whether the "high degree of autonomy" is to be of the legal or of the political kind. It has much to say about the division of responsibilities after 1997 but it has nothing to say about who is to have the last word when the inevitable demarcation disputes arise. Nevertheless it seems clear to me from the general tenor of the Declaration, as well as from obvious political and legal circumstances, that the intention must be that

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* This opinion was given to The Law Society of Hong Kong on July 12, 1988.

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the Hong Kong SAR is to enjoy genuine legal autonomy, with effective judicial protection. Admittedly Hong Kong will not be part of a federation, but the special arrangements set out in the Joint Declaration represent a unique constitutional amalgam of two wholly disparate legal systems. Autonomy of the political kind, depending merely on convention and international good faith, would be entirely insufficient in the circumstances of the transfer of sovereignty over Hong Kong from the United Kingdom to China. It can operate only where there is an established political and legal framework within which conventions can become established and operate reliably, as they have done so often within the British Commonwealth. These necessary circumstances are completely absent in the Hong Kong-China situation. Furthermore, the conception of the relationship between law and politics is entirely different in China, where legal remedies against the state are not available, the judiciary play little part in public law, and the rule of law as established in British countries is unknown. Another pointer is the emphasis in the Joint Declaration on "final adjudication" in Hong Kong (Article 3(3)), which implies that the Hong Kong courts are to have final jurisdiction over all legal questions arising in Hong Kong, saving only those concerning foreign affairs and defence.

3. I conclude therefore that the Joint Declaration entitles Hong Kong to expect effective legal guarantees for its "high degree of autonomy". I conclude also that these guarantees must be finally justiciable in Hong Kong. The Chinese judicial system, so far as I understand it, is quite unsuitable for dealing with the questions that may arise, since it makes no provision for legal remedies against the state or for protecting the constitutional status of a particular territory. The great political changes and upheavals that have taken place in China during the last half century are another significant factor. I do not see, therefore, how the framers of the Joint Declaration can have contemplated any kind of autonomy other than one with final legal protection in Hong Kong.

## B. THE CHINESE CONSTITUTIONAL ASPECT

4. It is self-evident that the draft basic law conflicts fundamentally with the constitution of the People's Republic of China. The whole concept of "one country - two systems" is irreconcilable with Article 1 of the Chinese Constitution, enshrining the socialist system, and with numerous other provisions, such as Articles 6-10, which require state or collective ownership of economic resources, means of production, mineral resources, etc. Article 31 authorizes the establishment of special administrative regions, and the making of laws for

them, but it contains nothing to suggest that such laws may conflict with the constituion. Article 5, on the other hand, provides expressly that no laws or administrative or local rules may contravene the constitution. It is thus clear, at least in the eyes of an English lawyer, that the Chinese constitution and the Basic Law will inevitably be in conflict. Furthermore, Article 17 of the Draft Basic Law, providing that laws enacted by the National People's Congress or its Standing Committee will not be applied in the HKSAR, except in the stipulated cases, represents an attempt to fetter the sovereign legislative power of the National People's Congress which most British constitutional lawyers would hold to be ineffective.

5. It is a measure of the width of the gulf between British and Chinese constitutional thinking that none of the authors of the four articles from the *Journal of Chinese Law* [For titles of these articles, see Bibliograph in pp. 145-146 of this book], which have been shown to me, all of whom are lawyers and members of the basic law drafting committee, make any mention of these problems. This is probably because the Chinese legal system makes no provision for the legal adjudication of questions of this kind, so that Chinese lawyers assume that any law enacted by the National People's Congress is inherently valid, anything to the contrary in the constitution notwithstanding.

6. Constitutional difficulties of this kind can simply be obviated by recourse to Article 64 of the Chinese constitution. This provides that the constitution may be amended on the proposal of the Standing Committee of the NPC or of one-fifth of the deputies, if adopted by a vote of more than two-thirds of all the deputies. The PRC government should be asked to ensure that these requirements are observed, so that enactment of the Basic Law will automatically amend the constitution to the extent necessary.

## C. PROVISIONS OF THE DRAFT BASIC LAW

7. I will comment now on the provisions of the Draft Basic Law whose legal implications are of concern to the people of Hong Kong. In doing so I note that this is only the first round of consultations and that there will be a further round in 1989 (see page 4 of the DBL [Draft Basic Law] booklet); that a number of alternative proposals are included at the end of the booklet (page 91 onwards); that the four articles in the *Journal of Chinese Law*, already referred to, mention vigorous disagreements among the Chinese members of the drafting committee; and that several of those members consider that some of the central provisions need further study and amendment. The scope

for negotiation and the prospects for obtaining substantial amendments are therefore, I hope, quite favourable.

**Article 16**

8. This Article deals with the possibility of conflict between the Basic Law and legislation enacted in the Hong Kong SAR. Part II of Annex 1 of the Joint Declaration provides that laws enacted by the Hong Kong SAR legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid. But it does not say who is to decide any dispute as to whether or not there is a conflict between them.

9. The context suggests that that question is to be decided by the courts of Hong Kong; and it is obvious that many such questions may arise in the course of litigation in Hong Kong which the Hong Kong courts will have to decide, as Article 169 expressly allows. But Article 16, in addition, gives a power of veto over Hong Kong legislation to the Standing Committee of the National People's Congress if it considers that it conflicts with the Basic Law "or legal procedures"; and Article 172 confers a similar power over previous Hong Kong laws. These proposals naturally cause concern in Hong Kong, since they would allow a political body in China to strike down any Hong Kong legislation for alleged inconsistency with the Basic Law. On the other hand it must be admitted that the government of China has a legitimate concern with Hong Kong legislation, and can reasonably ask for some assurance that it shall accord with the new status of Hong Kong as an integral part of China. On this question someone must be entitled to the last word, and there is a genuine dilemma.

10. It may be noted that even on the Chinese side it has been suggested that the last word should rest with the Hong Kong courts; see page 92 of the DBL booklet, top of page. It may be noted also that there is no suggestion from the Chinese side that the last word should rest with any Chinese court, probably because of the different Chinese attitude to constitutional questions which I have already mentioned.

11. The question whether Hong Kong legislation conflicts with the Basic Law is a legal question, and in my opinion it is basically wrong that it should be determined by a political body in China. A general power of veto is also inconsistent with the very limited powers of the National People's Congress to legislate for Hong Kong under Article 17. In my opinion, the National People's Congress should be concerned with Hong Kong legislation only if it comes within the stipulated exceptions of Article 17, namely defence and foreign affairs and "national unity and territorial integrity", which need to be further de-

fined. Consequently I think that there is a good case for asking for Article 16 to be deleted, thus leaving the adjudication of conflicts for final decision by the courts of Hong Kong.

12. In his article in the Journal of Chinese Law (1988, page 76) Wu Jianfan contends that this function would be completely incompatible with the Hong Kong legal system, since questions of conflict could only be decided as particular cases arose. I do not think that there would be any such incompatibility, since British courts are entirely familiar with questions of this kind, and the rules of *locus standi* are now so liberal that such questions can be raised at any time by private citizens and, equally well, by governments: see, for example, *Blackburn* v. *Attorney General* [1971] 1 WLR 1037 and *R* v. *H.M. Treasury ex parte Smedley* [1985] QB 600.

13. An alternative solution, which might be more acceptable to China, might be to set up a special constitutional court or tribunal, to which questions of the legality of Hong Kong legislation could be referred. I return to this possibility at the end of this Opinion.

**Article 17**

14. Article 17 seems basically satisfactory, in that it restricts the power of the National People's Congress to legislate for Hong Kong to matters of defence and foreign affairs and matters of "national unity and territorial integrity", being outside the limits of Hong Kong's "high degree of autonomy". Even in those cases the laws of the National People's Congress are to be applied in Hong Kong by the Hong Kong Government on the directives of the State Council, subject only to a default power whereby, in the last resort, the State Council of the PRC may make decrees. The application of PRC laws, within these stipulated areas, will in all normal cases be a matter for the Hong Kong Government and finally justiciable in the Hong Kong courts. All this, however, is subject to what I say below about Article 169.

15. The one flaw in Article 17 is that the meaning of "other laws which give expression to national unity and territorial integrity" needs elucidation. As it stands this formula is far from precise, and there is a danger that it might be stretched so as to cover wide areas of political legislation, instead of being confined, as it should be, to matters such as territorial boundaries, nationality, the national flag and the national anthem. Wu Jianfan concedes in his article (page 79) that the language of this provision requires further deliberation and improvement. This therefore ought to be negotiable.

**Article 18**

16. The third paragraph of Article 18 contains the fundamentally objectionable provision that the courts of the Hong Kong SAR shall have no jurisdiction over "cases relating to the executive acts of the Central People's Government". It goes on to provide, inconsistently, that when questions concerning executive acts of the Central People's Government arise in any legal proceeding, the Hong Kong courts shall seek the advice of the Chief Executive, who has to "obtain a certificate from the standing committee of the National People's Congress or the State Council", before issuing a statement which is to be binding on the courts. Evidently then the court is expected to decide the case accordingly, even though the opening words of the paragraph say that it has no jurisdiction over it.

17. The exemption of executive acts of the CPG from the jurisdiction of the courts is such a startling proposition that I thought at first that the "executive acts" must mean acts concerning defence and foreign affairs, which are mentioned in the same sentence and are the accepted limitations on the jurisdiction of the Hong Kong courts. But I doubt if that is right. In the only one of the four articles in the Journal of Chinese Law which makes any reference to this question, Professor Xiao Weiyun mentions (at page 112) with approval but without explanation the suggestion "that courts of the Hong Kong SAR should have no jurisdiction over the administrative behaviour of the Central People's Government, acts of a purely political nature, or over acts committed in the name of the State". That seems to show that the intention of the Chinese draftsmen is to exempt all acts of the Chinese Government which are of a political or administrative character. Yet at the same time Article 21 very properly forbids departments of the CPG to interfere in the autonomous affairs of the Hong Kong SAR and requires their personnel to abide by the SAR's laws.

18. Here again we are faced by the immense gulf that separates Chinese and British constitutional principles. As I found on my own visits to China, there is no provision in Chinese law for bringing legal proceedings against the State or its administrative organs. The whole realm of administrative law, so familiar and so conspicuous in the British system, is simply unknown in China. It is natural for a Chinese lawyer to suppose that there can be no legal remedies against the state, and that the courts of Hong Kong should no more have power to question acts of the Chinese Government than have the courts in mainland China. But if the Chinese doctrine is made part of the law of Hong Kong, it would undermine all the provisions about autonomy,

the legal system and the power of final adjudication which the Joint Declaration and the Basic Law are intended to protect.

19. If all executive acts of the Central People's Government are to be outside the jurisdiction of the Hong Kong courts, the CPG is placed above the law and can do whatever it likes. It could make arrests, seize property, enforce restrictions or controls, and in effect it would have unlimited and uncontrollable executive powers. The rule of law, which in the British system requires that the government obey the law as declared by the courts, would no longer operate. This would flatly contradict the assurance in the joint declaration that "the laws currently in force in Hong Kong will remain basically unchanged" (para. 3(3)) and that "every person shall have the right to challenge the actions of the executive in the courts" (Annex I, Pt XIII, 2nd sentence). It would also contradict the assurance of "a high degree of autonomy", since the CPG could not be prevented from infringing that autonomy in any way whatever.

20. There is nothing in the Joint Declaration which could justify this part of Article 18, which can only be characterized as fundamentally unacceptable. That it is not regarded as necessary by at least some of the Chinese framers may be seen from "Alternative 2" on p. 94 of the DBL booklet, which omits the objectionable passage but provides, quite reasonably, for the Hong Kong legislature to make regulations for the handling by the Hong Kong courts of matters relating to agencies of the PRC.

**Article 169**

21. This article confers the power of interpretation of the basic law on the Standing Committee of the National People's Congress and obliges the Hong Kong courts to follow the Standing Committee's interpretations. It provides also that the Hong Kong courts may interpret the basic law in adjudicating cases before them, but that if the case involves defence, foreign affairs "and other affairs which are the responsibility of the Central People's Government", the Hong Kong courts must seek an interpretation from the Standing Committee of the NPC. It may be noted that this last procedure conflicts with the procedure prescribed for the same classes of cases in Article 18, which requires reference to the Chief Executive in Hong Kong who must then refer to the Standing Committee of the NPC or the State Council.

22. The power of interpretation is an absolutely vital power. The power to interpret a law is a power to lay down the law, and if committed to a political body such as the Standing Committee of the NPC, it is in effect a power of legislation. But the NPC's power to

legislate for the Hong Kong SAR is severely restricted by Article 17, as already mentioned, and its power of interpretation should be similarly restricted. If the Basic Law is to contain a general power of interpretation, legally protected against abuse, it is essential that it should be committed to a judicial body. Since the Chinese draftsmen themselves do not suggest that any judicial body in mainland China should be involved with the affairs of Hong Kong, it follows that the power of interpretation should belong to the courts of Hong Kong and fall within their power of final adjudication.

23. It must be admitted that the Chinese Government have a legitimate interest in seeing that the meaning of the Basic Law is not distorted by perverse interpretation by the Hong Kong courts. The independence of those courts, and the respect in which they are held by the Chinese community in Hong Kong, ought to give sufficient assurance. Possibly, however, consideration should be given to the possibility of establishing a mixed court or tribunal for the resolution of disputed cases, which I mention at the end of this Opinion.

## ARTICLE 170

24. This article confers the power of amendment of the Basic Law on the National People's Congress of the PRC. Amendments may be proposed by the Standing Committee of the NPC, the State Council and the Hong Kong SAR. Proposals from the SAR are to require the consent of the Chief Executive, plus two-thirds of the Hong Kong deputies to the NPC, plus two-thirds of the Hong Kong legislature. In all cases the Committee for the Basic Law of the Hong Kong SAR must first be consulted.

25. An important restriction in this article is that "no amendment to this law shall contravene the established basic policies of the PRC regarding Hong Kong". Those policies are set out in detail in para. 3 and Annex 1 of the Joint Declaration and para. 3(12) declares that they are to remain unchanged for fifty years. The power of amendment is therefore very limited, and is made subordinate to the Basic Law. Once again, neither the Joint Declaration nor the Draft Basic Law say anything about who is to decide, in case of dispute, whether an amendment contravenes the basic policies. But since under Article 169 the Hong Kong courts are empowered to interpret the Basic Law in adjudicating cases, it seems clear that their powers of final adjudication extend to deciding that question in any case where there is an argument about the validity of an amendment.

26. Accordingly I do not see any serious danger in the power of amendment in Article 170. But it remains of importance to secure a

suitable limitation of the power of interpretation which Article 169 proposes to confer on the Standing Committee of the NPC.

**Article 171 and Annex III**

27. Article 171 and Annex III prescribe special arrangements for constituting the first government and the first Legislative Council of the Hong Kong SAR. The essence of the procedure is that the National People's Congress of the PRC will establish a Preparatory Committee which in turn will appoint an Election Committee, to be composed entirely of permanent residents of Hong Kong and broadly representative, with fixed proportions from five different categories of Hong Kong residents. The Election Committee is also to recommend the candidate for the first Chief Executive "through local consultation or through local election after consultation".

28. The relevant provisions of the Joint Declaration are that the Chief Executive will be appointed by the CPG "on the basis of the results of elections or consultations to be held locally"; and that "the legislature of the Hong Kong SAR shall be constituted by elections". Nothing is said about the election of the first legislature and Chief Executive being made by any different procedure from normal elections. On the other hand, there are many forms of elections, both direct and indirect, so that it cannot be said that any particular procedure is required by the Joint Declaration. Nevertheless the procedure proposed in Annex III savours more of appointment than of election; and the words of the English text "shall be constituted by elections" (as opposed to "by election") suggest some much more democratic style of election than that proposed in Annex III.

29. Although Annex III contains detailed provisions about the Election Committee, it does not state what the size of that Committee is to be. If it is to be a very numerous body, it might possibly be accepted as providing a sufficiently democratic and representative basis for the constitution of the first government of the new region, but if it is to be a relatively small body, it would not seem to provide the mechanism contemplated by the Joint Declaration.

30. It is difficult to extract from the joint declaration any clear directions as to the system of elections, but the position ought to be negotiable between the Chinese and British sides.

31. The system of elections may be subject to modification from time to time under the arrangements proposed in Articles 45 and 67. The purpose of these seem to be to provide for a gradual broadening of the electorate by stages when the new constitution has settled down and proved capable of functioning smoothly. Any such modifications

are to require the consent of a two-thirds majority of the members of the Hong Kong Legislature, so that there is a safeguard against their being contrary to the wishes of Hong Kong. I do not see anything sinister in these provisions.

## D. A POSSIBLE CONSTITUTIONAL SOLUTION

32. I have made it clear in this Opinion that there are certain proposals in the Draft Basic Law which are contrary to the provisions, express or implied, of the Joint Declaration. In those cases Hong Kong and the British Government are clearly entitled to insist on amendments. In a number of other cases, however, the position is not so clear. Throughout the Joint Declaration there is a general lack of provision for powers of final determination in the case of demarcation disputes arising out of the division of powers and responsibilities. There may be some danger that in discussing these the two sides will simply be at loggerheads, with each insisting upon having the last word.

33. The natural suggestion to make in that situation is that consideration should be given to setting up some sort of constitutional court or arbitral tribunal, of the kind briefly mentioned already in paras. 13 and 23 above. A court of this kind exists in France and a somewhat similar one has existed in Cyprus. A possible plan would be to set up a constitutional court with three British and three Chinese judges with, in addition, a President from some third country appointed by agreement between both sides. The court could be given jurisdiction to decide a number of the questions discussed in this opinion, for example whether a law passed by the Hong Kong legislature was in conflict with the Basic Law (Article 16); whether a law passed by the National People's Congress or its Standing Committee was genuinely restricted to matters of defence, foreign affairs, national unity and territorial integrity (Article 17); what is the correct interpretation of a disputed provision of the Basic Law (Article 169); and whether an amendment of the Basic Law made by the National People's Congress was contrary to the established basic policies as set out in a Joint Declaration (Article 170).

34. We must naturally hope that the present negotiations will lead to results satisfactory to Hong Kong without adding more complications to those already under discussion. But if the negotiations should reach a point of deadlock, some device of the kind I mention might provide a solution.

## APPENDIX 1

"Chapter II, The Relationship between the Central Authorities and the Hong Kong Special Administrative Region," in Martin Lee and Szeto Wah, *The Basic Law, some basic flaws*, Hong Kong: 1988, pp. 12-22.*

### Article 16

The Hong Kong Special Administrative Region is vested with legislative power.

Laws enacted by the legislature of the Hong Kong Special Administrative Region shall be reported to the Standing Committee of the NPC for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the National People's Congress, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region (note), considers that any law of the Region is not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This cessation shall not have retroactive effect.

Note: At page 89 of the Draft Basic Law,the proposal on the establishment of the Committee for the Basic Law of the HKSAR is set out as follows:

The proposal on the establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region put forward by the Subgroup on the Relationship between the Central Authorities and the Hong Kong Special Administrative Region reads as follows:

(1) Name: To be called tentatively the Committee for the Basic Law of the Hong Kong Special Administrative Region of the Standing Committee of the National People's Congress.

(2) Affiliation: To be a subordinate organ of the Standing Committee of the National People's Congress.

(3) Duties: To study and submit its views to the "National People's Congress or its Standing Committee on the following questions:

(a) Questions on whether laws enacted by the legislature of the Hong Kong Special Administrative Region are in conformity with the Basic Law and legal procedures (Article 16 of the Draft Basic Law for Solicitation of Opinions);

(b) Questions relating to the applicability of nation-wide laws in the Hong Kong Special Administrative Region (Article 17);

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* Martin Lee and Szeto Wah are Hong Kong Members of the Basic Law Drafting Committee.

who have a deep knowledge of the law and a thorough understanding of the nuances of the legal terminology peculiar to the legal system of the HKSAR. It is therefore only sensible to reserve the task to the courts of the HKSAR. Under the present system, the courts in Hong Kong have to observe well-recognized legal principles in interpreting statutes. An example of such a principle is "the presumption against violation of international law". Since this process is a highly technical one, involving the interpretation of the relevant article of the Basic Law as well as the law passed by the HKSAR legislature, it is by no means clear that the Standing Committee of the NPC would be able to observe these principles and be in a better position to come up with the correct result. Of course there will be many legal experts working under the Standing Committee of the NPC as well as in the proposed Basic Law Committee; but since their experience add expertise do not relate to our system of law, one wonders whether it is not better to leave the job to the experienced and internationally renowned judges in the Court of Final Appeal.

Furthermore, the courts Hong Kong are at present the only authority to interpret the laws in Hong Kong, with the sole power to declare invalid any law that does not conform with our constitution, that is, the Letters Patent and the Royal Instructions. It is but a tiny though logical step forward to entrust the Court of Final Appeal, being the highest judicial organ of the Region, with the task of deciding on the constitutionality or otherwise of all laws passed by the HKSAR legislature by following the example of the U.S. Supreme Court. In this way, we believe that the people of Hong Kong will have more confidence in the laws that are passed by the HKSAR legislature.

### *Suggested provision*

*To amend paragraph 3 of this Article as follows:*

*"If the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region, considers any law of the Region not to be in conformity with this Law or legal procedures, it may refer the law in question to the Court of Final Appeal for its consideration. If that Court considers the law or a part thereof not to be in conformity with this Law or legal procedures, it may declare that the law or the part thereof null and void; but the declaration shall not have retroactive effect."*

**(3) Basic Law Committee**

(a) The Basic Law Committee is where the conflicts between the CPG and the HKSAR are to be resolved. Its main function is to assist the CPG and the HKSAR in arriving at a consensus on the interpretation and implementation of the Basic Law. Of course, if our proposed amendments to Articles 16, 17 and 169 are accepted, then the delineation of the high degree of autonomy of the HKSAR will become much clearer, and the jurisdiction of the courts of the HKSAR will also be ensured. In these circumstances, the need for the

(c) Questions relating to the interpretation of the Basic Law (Article 169); and

(d) Questions relating to the amendment of the Basic Law (Article 170).

(4) Composition: To be composed of mainland members and Hong Kong members, including persons from the legal profession, appointed by the Standing Committee of the National People's Congress. The number of its members and the proportions of its composition remain to be determined.

## Comment

### (1) Legislative power of the HKSAR

The provision for the legislative power of the HKSAR is already contained in Article 2 of the Draft; and this Article elaborates on the extent of such power. Section II of Annex I to the Joint Declaration contains an important elaboration which reads: "The legislative power of the HKSAR shall be vested in the legislature of the HKSAR." This provision has not been fully reflected in the Draft. We therefore suggest that paragraph 1 of Article 16 of the Draft should be amended in accordance with the provision in the Joint Declaration.

### *Suggested provision*

*To amend the first paragraph of this Article as follows:*

*"The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region."*

### (2) Review of the Constitutionality of laws passed by the HKSAR

Although the Joint Declaration provides that the laws enacted by the HKSAR legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid, it does not mention who will decide whether such laws are or are not in conformity with the Basic Law or legal procedures. But the Joint Declaration makes it quite plain that the common law shall continue to apply to the HKSAR after 1997. And in a common law system, all the laws passed by the legislature are to be construed by the courts and not by the executive or the legislature. The position is entirely different in the PRC, where the Standing Committee of the NPC is specifically enjoined to interpret all the laws of China, including the Chinese Constitution. The power conferred upon the Standing Committee of the NPC under Artcle 16 is clearly alien to the common law system; and the intermingling of the two different legal systems will pose a serious threat to the whole legal system of the future HKSAR. We therefore propose that the constitutionality of the laws passed by the HKSAR legislature should be left to the Court of Final Appeal of the HKSAR, following the example of the U.S. Supreme Court in construing the U.S. Constitution.

The question whether a given law passed by the HKSAR legislature does or does not contravene the Basic Law is one which should be determined bys those

Basic Law Committee to resolve conflicts will be greatly reduced. But even then, the Basic Law Committee is still a very important body.

(b) The Basic Law Committee is concerned with both political and legal matters. Whereas the interpretation of the Basic law is basically a legal matter, the amendment of the Basic Law is principally a political one. We suggest that in relation to legal questions, the Basic Law Committee should delegate its task to a legal sub-committee for consideration and resolution. The Basic Law Committee should accept the decisions of the legal sub-committee, and forward the same to the Standing Committee of the NPC, which in turn should adopt them as a matter of constitutional convention.

(c) The Basic Law Committee should be composed of representatives from both the CPG and the HKSAR. But since the CPG has the final say, we suggest that the Basic Law Committee should have more members from the HKSAR so as to ensure that the interests of the HKSAR will be safeguarded.

(d) As regards the composition of the Basic Law Committee, we suggest that they be elected from the HKSAR legislature and submitted to the Standing Committee of the NPC for appointment. In this way, the members will truly represent the HKSAR and will also be seen by the people of Hong Kong to be their representatives.

(e) As regards the composition of the legal sub-committee, we suggest that all its members should be legally qualified persons; and that those from the HKSAR should be judges nominated by the then equivalent of the Judicial Service Commission and also representatives nominated by the legal professional bodies.

(f) The Basic Law Committee and its legal sub-committee should have well-defined terms of reference and working procedures. Further, their deliberations should be fully minuted and made available to the HKSAR courts and the public for inspection.

## Article 17

*The laws of the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as stipulated in Article 8 of this Law, and the laws enacted by the legislature of the Hong Kong Special Administrative Region.*

*Laws enacted by the National People's Congress or its Standing Committee will not be applied in the Hong Kong Special Administrative Region except for those stipulated in Paragraph 3 of this Article.*

*Laws enacted by the National People's Congress or its Standing Committee, which relate to defence and foreign affairs as well as other laws which give expression to national unity and territorial integrity and which, in accordance with the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region,*

shall be applied locally by the government of the Hong Kong Special Administrative Region by way of promulgation or legislation on the directives of the State Council, whenever there is the need to apply any of such laws in the Region.

Except in cases of emergency, the State Council shall consult the Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Hong Kong Special Administrative Region before issuing the above-mentioned directives.

If the government of the Hong Kong Special Administrative Region fails to act in compliance with the directives given by the State Council, the State Council may decree the application of the above-mentioned law in the Hong Kong Special Administrative Region.

## Comment

### (1) Application of Chinese Laws to Hong Kong

The Joint Declaration has clearly set out three sources of law for the HKSAR: "The laws of the HKSAR shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the HKSAR legislature". In addition, it provides that "the legislative power of the HKSAR shall be vested in the legislature of the HKSAR". Therefore, to apply laws enacted by the NPC or its Standing Committee to the HKSAR would amount to the former taking over the legislative power of the latter, and this would definitely be in contravention of the Joint Declaration. Further, the legal system of the PRC differs greatly from that of Hong Kong, and the legal terminology, format and style of legislation in the two systems are also fundamentally different. Thus, simply to apply PRC laws to the HKSAR will create a lot of enforcement problems. And all these will further erode the confidence of the people of Hong Kong, and adversely affect the high degree of autonomy of the future SAR.

We therefore take the view that, generally speaking, PRC laws should not be made applicable to the HKSAR. We appreciate that according to the Joint Declaration, defence and foreign affairs are the responsibilities of the CPG. We have also heard persuasive arguments from some Mainland members that certain nation-wide laws of the PRC, like the Nationality Law and the Organic Law of the NPC, and the Proclamation of the Government of the PRC on Territorial Waters, etc., should be applicable to every part of the country. Even then Article 17 as presently drafted is difficult for the people of Hong Kong to accept. To give full effect to the Joint Declaration, we suggest that if laws are needed in matters relating to defence and foreign affairs which are outside the scope of the HKSAR's autonomy, the Standing Committee of the NPC should, after consultation with the Basic Law Committee, empower the HKSAR legislature to enact such laws. The

few existing nation-wide laws of the PRC mentioned above that are to be applicable to the HKSAR should be set out in the Basic Law by way of an annex. After 1 July 1997, if it is necessary to apply other nation-wide laws to the HKSAR, then they should be enacted through the HKSAR legislature. Indeed, many Acts of Parliament are presently re-introduced into the Hong Kong Legislative Council after making such amendments as are necessitated by local conditions and are then passed into law. Further, the phrase "laws relating to the expression of national unity and territorial integrity" is far from clear, and may include the law on treason and counter-revolutionary crimes. Lastly, there is no mention of the word "nation-wide" in this Article in relation to the "laws" that are to be applied to the HKSAR, and it seems to be at variance with the original intention that only some "nation-wide laws" of the PRC are to be applied to the HKSAR.

### *Suggested provision*

*"The laws of the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as stipulated in Article 8 of this Law, and the laws enacted by the legislature of the Hong Kong Special Administrative Region.*

*Laws enacted by the National People's Congress or its Standing Committee shall not apply in the Hong Kong Special Administrative Region except for those relating to defence and foreign affairs which, according to the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region.*

*Whenever there is need to apply in the Hong Kong Special Administrative Region any of the above-mentioned laws concerning defence and foreign affairs, they shall be applied by way of legislation by the legislature of the Region at the requests of the Standing Committee of the National People's Congress.*

*Except in cases of emergency, the Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Hong Kong Special Administrative Region before making the above-mentioned requests.*

*Apart from the laws concerning defence and foreign affairs as mentioned above, a few nation-wide laws which give expression to national unity and territorial integrity (as listed in the annex of this Law) shall be applicable in the Hong Kong Special Administrative Region."*

**(2) Conflict of Laws between the Mainland the HKSAR**

The subject sub-group on the Relationship between the Central and HKSAR Governments has considered the question of the applicability or otherwise of PRC laws to Chinese nationals from the Mainland while they are in the HKSAR and the question whether Chinese nationals from the HKSAR may, during visits to the Mainland, be prosecuted for acts carried out in the HKSAR that may contravene the laws of the PRC. The subject sub-group had set up a 5-member special sub-group to study these questions and has reached consensus on the following points of principle:

(a) The rights and obligations of the people in the HKSAR should be governed by the laws of the HKSAR, including the Basic Law;
(b) When an act is done in a territory, whether or not it constitutes an offence is to be determined by the law of that territory.
(c) And if it does, then only the court of that territory will have jurisdiction to try the offender, applying the law of that territory.
(d) Thereafter, irrespective of the result, he cannot be tried again for the same act in another territory.
(e) Chinese nationals in the HKSAR are required only to abide by the laws of the HKSAR, and not the laws of the PRC.

We agree with these basic principles; and we suggest that they be embodied in the Basic Law or be enacted both by the Standing Committee of the NPC and the HKSAR legislature.

Further, Article 22 requires the HKSAR to "prohibit by law any act designed to undermine national unity or subvert the Central People's Government". This Article deals in effect with acts of treason; and we are firmly of the view that the above five basic principles should also apply to treason and related offences.

## Article 18

The Hong Kong Special Administrative Region is vested with independent judicial power, including that of final adjudication.

Courts of the Hong Kong Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system shall be maintained.

Courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases relating to the defence and foreign affairs, which are the responsibility of the Central People's Government, and cases relating to the executive acts of the Central People's Government. Courts of the Hong Kong Special Administrative Region shall seek the advice of the Chief Executive whenever questions concerning defence, foreign affairs or the executive acts of the Central People's Government arise in any legal proceeding. A statement issued by the Chief Executive regarding such questions shall be binding on the courts.

Before issuing such a statement, the Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council.

## Comment

Under the common law, certain matters are not justiciable in the courts of Hong Kong, for example, "acts of state" (such as declarations of war). But it is still for the courts to determine whether a particular act is or is not an act of state. Further, some facts which have been conveniently called "facts of state" (for example, whether a certain country was at war with another country on a given date) are to be decided by the courts in a prescribed manner, namely, by a certificate issued by the Chief Secretary in Hong Kong which shall be binding on the courts.

Mainland members of the Drafting Committee have repeatedly stressed that they have no intention to curtail the present jurisdiction of the courts in Hong Kong. Indeed, they have categorically stated that what the Hong Kong courts can try today, they can continue to try in the future. But surely, in excluding the jurisdiction of the HKSAR courts on matters pertaining to "defence, foreign affairs and the executive acts of the CPG", the present jurisdiction of the courts of Hong Kong will most certainly be curtailed after 1997. Further, the term the executive acts of the CPG" is vague and may be open to a wide interpretation or abuse.

The following example will illustrate how this Article will work in practice in curtailing the jurisdiction of the HKSAR courts. A law-abiding business man is suddenly arrested in the HKSAR on the ground that the CPG believes him to be a spy. He is being sent to Beijing. In the meantime, his wife goes to a lawyer who immediately applies to the High Court for a writ of Habeas Corpus. But the Court will have to decline jurisduction if it is satisfied that the matter in question relates to defence affairs, or an executive act of the CPG; and under Article 169, it is up to the Standing Committee of the NPC to interpret this Article. This example shows that all the safeguards of human rights in Chapter 3 of the Draft may be rendered nugatory if the HKSAR courts were to be deprived of their jurisdiction under this Article.

Further, the exclusion of jurisdiction of the HKSAR courts will bring about great delay in trials as well as endless trouble for the courts in the HKSAR, the Standing Committee of the NPC and the Chief Executive. For many a defendant will raise by way of defence that the plaintiff's claim involves an interpretation of an Article of the Basic Law concerning foreign or defence affairs, and will thereby bring a halt to the proceedings. The judge will have to request for a statement from the Chief Executive, who will have to obtain a certificate from the Standing Committee of the NPC or the State Council. In this way, the efficiency and authority of the HKSAR courts will be greatly hampered.

For these reasons, we believe that paragraph 2 of this Article is already sufficient to preserve the existing jurisdiction of the courts of Hong Kong subject also to the existing limitations, and that it would be wrong to stipulate any additional restrictions as contained in paragraphs three and four of this Article.

### *Suggested provision*

*"The Hong Kong Special Administrative Region is vested with independent judicial power, including that of final adjudication.*

*The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system and principles shall be maintained."*

## Article 20

Residents of the Hong Kong Special Administrative Region who are Chinese nationals are entitled to participate in state affairs as prescribed by law.

In accordance with the assigned number of seats and the election procedures specified by the Standing Committee of the National People's Congress, the Chinese nationals among the Hong Kong residents shall locally elect deputies of the Hong Kong Special Administrative Region to the National People's Congress to participate in the work of the highest organ of state power.

### Comments

#### (1) Deputies – permanent residents

No one will disagree that all deputies of the HKSAR to the NPC must be Chinese nationals. But should they also be permanent residents of the HKSAR? We believe that they should be. As representives of the HKSAR in dealing with national affairs, the more representative they are, the better it is for them and for the people of Hong Kong. Therefore, we propose that they should be permanent residents of the HKSAR in the sense of their having ordinarily resided in Hong Kong for a continuous period of 7 years or more.

### (2) Deputies – the SAR's Autonomy

The HKSAR deputies to the NPC are the representatives of the people of the HKSAR when they participate in the affairs of the NPC. But they should not interfere with any of the affairs of the HKSAR. Chapter IV of the Draft Basic Law already sets out the political structure of the HKSAR; but it is necessary to make it clear in the Basic Law that these deputies should not interfere with the autonomy of the HKSAR.

### *Suggested provision*

*"Chinese nationals who are permanent residents of the Hong Kong Special Administrative Region are entitled to participate in state affairs as prescribed by law. In accordance with the assigned number of seats and the election procedures specified by the Standing Committee of the National People's Congress, Chinese nationals who are permanent residents of the Region shall elect Chinese nationals of the same status to be deputies of the Region to the National People's Congress.*

*The deputies of the Hong Kong Special Administrative Region to the National People's Congress shall not interfere with or intermeddle in the affairs which the Region administers on its own in accordance with this Law."*

## Article 22

The Hong Kong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government.

### Comment

After the publication of the Draft Basic Law, this Article has attracted more than a fair share of criticism. For many critics have expressed their concern that this Article may result in laws being enacted in the HKSAR which are similar to those dealing with "counter-revolutionary crimes" in the PRC, thereby eroding the rights and freedoms of the residents of the HKSAR. Such fears are not without foundation. For in the present Draft, all laws passed by the HKSAR legislature have to be reviewed by the Standing Committee of the NPC; and if the latter is of the view that any law passed by the former is in contravention of the Basic Law, it may return such law for reconsideration. (Article 16). At the same time, the Standing Committee of the NPC has power to extend to the HKSAR those laws of the PRC which relate to "defence and foreign affairs as well as other laws which give expression to national unity and territorial integrity" (Article 17). Furthermore, the ultimate right to interpret the Basic Law is vested with the Standing Committee of the NPC (Artilce 169). When Article 22 is read in conjunction with Articles 16, 17 and 169, it is not unreasonable for one to fear that any laws passed by the HKSAR legislature under this Article will be unduly or unnecessarily harsh.

On the other hand, but for the unsatisfactory provisions contained in Articles 16, 17 and 169, and the interplay between them and Article 22, we would not have found Article 22 to be objectionable in itself. For in that situation, the HKSAR legislature will pass the requisite law to prohibit the acts in question, but it will be for the courts of the HKSAR to decide whether such law conforms with the Basic Law, including not only Article 22, but also those Articles contained in Chapter 3 which protect fundamental rights. And the courts of the HKSAR will apply well-recognized legal principles in coming to a decision on the constitutionality of the law in question.

For these reasons, until our reservations on Articles 16, 17 and 169 are resolved, we cannot support this Article.

# APPENDIX 2

## THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

MEMORANDUM FROM AMNESTY INTERNATIONAL TO THE BASIC LAW DRAFTING COMMITTEE

### 1. Introduction

This memorandum reviews the Draft Basic Law which has been proposed for the Hong Kong Special Administrative Region (HKSAR), when the People's Republic of China resumes sovereignty over that territory on 1 July 1997. Following its plenary meeting of 26 - 28 April 1988 the Drafting Committee for the Basic Law issued "The Draft Basic Law of the HKSAR of the People's Republic of China (for the Solicitation of Opinions)". The Drafting Committee has openly solicited opinions from the general public regarding the Draft Basic Law during the period of May to September 1988.

This analysis indicates provisions in the Draft Basic Law which concern Amnesty International and should be considered for revision in the light of international human rights standards. The principal foundations of international human rights law are the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights presently apply to Hong Kong by virtue of their ratification by the Government of the United Kingdom. Furthermore, the Government of the People's Republic of China and the Government of the United Kingdom have agreed in Annex 1 to their Joint Declaration, which came into force on 27 May 1985, that: "The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force". These Covenants, both of which provide specificity to the rights set forth in the Universal Declaration of Human Rights, have been ratified by more than 85 nations with a wide variety of legal systems. The Universal Declaration of Human Rights provides an authoritative articulation of the internationally-recognized human rights obligations of all United Nations (UN) Member States under the UN Charter.

Based upon the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Amnesty International seeks the release of prisoners of conscience, advocates fair and prompt trials for all political prisoners, and opposes the death penalty, torture, and other cruel, inhuman or degrading treatment of prisoners.

The following analysis will focus on Amnesty International's statutory human rights concerns as they relate to specific articles of the Draft Basic Law which, in their present form, appear to be incompatible with the International Covenant on Civil and Political Rights as well as other international human rights standards.

Amnesty International is principally concerned:

(1) that persons in the Hong Kong region should continue to be protected by the fundamental provisions of the International Covenant on Civil and Political Rights;

(2) that they should be afforded clear protections against torture and other cruel, inhuman or degrading treatment or punishment;

(3) that they should be afforded protections for the right to life;

(4) that they should be guaranteed the right to fair trial;

(5) that they should be afforded those rights which will safeguard against the detention of prisoners of conscience; and

(6) that the Draft Basic Law should not include a limitations clause of such a general nature that it could be used to undermine all other human rights protections.

In presenting these comments, Amnesty International wishes to make clear that it takes no position regarding the objective of the Joint Declaration and the Draft Basic Law, that is, to return sovereignty over Hong Kong to the People's Republic of China with effect from 1 July 1997.

## 2. Background

In the Joint Declaration issued by the Governments of the People's Republic of China and the United Kingdom, the People's Republic of China declares its basic policies regarding Hong Kong which include:

"(3) The HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the HKSAR"‹1›.

The Joint Declaration also states that the Government of the United Kingdom and the Government of the People's Republic of China agree to implement the annexes to the Joint Declaration. Annex 1 to the Joint Declaration contains an "Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong"‹2›. Annex 1 declares, "The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force"‹3›.

The United Kingdom of Great Britain and Northern Ireland signed the International Covenant on Civil and Political Rights on 16 September 1968 and ratified the Covenant on 20 May 1976. The Covenant currently applies to Hong Kong. In signing and ratifying this Covenant, the Government of the United Kingdom interposed a few reservations and understandings, but those

limitations on their treaty obligations do not generally relate to matters of direct concern to Amnesty International. The People's Republic of China has neither signed nor ratified this Covenant.

The Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom provides that the "National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the HKSAR of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, stipulating ... that Hong Kong's ... life-style shall remain unchanged for 50 years".

On 10 April 1985 the National People's Congress resolved to establish a drafting committee for the Basic Law of the HKSAR. After more than two years of work and immediately following its plenary meeting of 26 - 28 April 1988, the Drafting Committee for the Basic Law issued "The Draft Basic Law of the HKSAR of the People's Republic of China (for the Solicitation of Opinions)". The Draft Basic Law provides the structure of the governmental, legal, economic, and social system of the HKSAR after 1 July 1997, when the People's Republic of China resumes sovereignty over that territory.

### 3. The continuing application of the International Covenants

Article 38 of the Draft Basic Law of the HKSAR of the People's Republic of China states, "The provisions of the 'International Covenant on Civil and Political Rights' and the 'International Covenant on Economic, Social and Cultural Rights' as applied to Hong Kong shall be implemented through legislation by the HKSAR"‹4›.

In explaining the impact of this proposed article, the official commentary of the Secretariat of the Consultative Committee for the Basic Law has stated, "It is thus made clear that Hong Kong residents will enjoy the same protection of the law as they do now against infringements of their fundamental rights after the establishment of the HKSAR"‹5›.

Unfortunately, it is not clear from the language of Article 38 of the Draft Basic Law how the residents of Hong Kong will "enjoy the same protection ... of their fundamental rights after the establishment of the HKSAR". The Joint Declaration assures that the two Covenants "as applied to Hong Kong shall remain in force". This would necessarily require that the Hong Kong Special Administrative Region (or the People's Republic of China including the HKSAR) become party to the Covenants and comply with the reporting procedure provided by each Covenant.

Indeed, for the Covenants to remain in force as agreed in the Joint Declaration, all of its interdependent provisions must remain in force, including both the enumerated rights and the mandatory procedures set forth in each Covenant for international monitoring of the implementation of such rights. Thus, the International Covenant on Civil and Political Rights not only requires States Parties "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (Article 2), but also requires (in Article 40) that States Parties accept a carefully established system whereby they submit periodic reports to an international body of experts (the Human Rights Committee) which monitors implementation of the Covenant's guarantees.

The Draft Basic Law leaves unclear how these two inseparable aspects of the application of the Covenants, which are discussed further below, will be effective after 1997.

### 3.1 Procedures for international monitoring and reporting

Under Article 40 of the International Covenant on Civil and Political Rights, every State Party is obliged to submit periodic "reports on the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights". For example, the United Kingdom's first and second periodic reports to the Human Rights Committee have been accompanied by separate reports concerning implementation of the Covenant in Hong Kong. As required by Article 40 of the Covenant, reports by States Parties are examined by the Human Rights Committee, composed of 18 experts elected by States Parties to serve in their personal capacities. In conducting its examination of a state report, the Committee invites representatives of that state to appear before it. Committee members seek an open and constructive dialogue with the state representatives about achievements in giving effect to the rights in the Covenant, as well as difficulties in implementing the Covenant and how they might be overcome.

This reporting procedure applies to Hong Kong at present, but the Draft Basic Law fails to make clear how the compliance of the HKSAR of the People's Republic of China will be monitored after 1 July 1997.

Similarly, the United Kingdom has made a declaration under Article 41 of the International Covenant on Civil and Political Rights accepting the competence of the Human Rights Committee to receive and consider communications by a State Party to the effect that another State Party is not fulfilling its obligations under the International Covenant on Civil and Political Rights. This means of monitoring implementation of this Covenant in Hong Kong will also be unavailable after 1 July 1997, unless the HKSAR (or the People's Republic of China including the HKSAR) becomes a party to the Covenant and makes such a declaration under Article 41.

There are two possible ways by which the International Covenants, as applied to Hong Kong, may be kept in force:

**1) First, Hong Kong might be permitted by the Government of the People's Republic of China to become a party in its own right to the two International Covenants.**

Article 48 of the International Covenant on Civil and Political Rights and Article 26 of the International Covenant on Economic, Social and Cultural Rights state that these instruments are open for signature "by any State Member of the UN or member of any of its specialized agencies". Hong Kong presently is a member in its own right of two UN specialized agencies: the World Meteorological Organization (full membership but with some qualifications on its voting rights) and the International Maritime Organization (associate member). Hong Kong is also a party to the General Agreement on Tariffs and Trade (GATT) separate from the United Kingdom. The People's Republic of China has agreed in Annex 1 to the Joint Declaration to permit "Hong Kong, China" to ratify other international agreements, even if the People's Republic of China has not become a party to those agreements<6>. This approach would most clearly permit the residents of Hong Kong to continue their human rights protection by the two Covenants.

**2) As an alternative, the People's Republic of China (including the HKSAR) might become a party to the Covenants and comply with the reporting procedures provided by each Covenant.**

In this case, each of the periodic reports by the People's Republic of China to the Human Rights Committee after 1997 should include a separate section about the HKSAR presented by the Hong Kong authorities.

Additionally, allowing the HKSAR to ratify the Optional Protocol to the International Covenant on Civil and Political Rights would be the most concrete means of demonstrating to the people of Hong Kong and the international community a fundamental commitment to ensuring continued protection in Hong Kong of internationally recognized human rights set forth in the Covenant. Ratification of the Optional Protocol would enable the Human Rights Committee to consider at closed meetings communications from private individuals who claim to be the victims of violations of rights set forth in the International Covenant on Civil and Political Rights. This allows correction of miscarriages of justice which occur under any legal and political system, and also permits false allegations to be dispelled. States Parties to the Optional Protocol are protected by the requirement that communications by individuals may be considered only if the individual has exhausted all domestic remedies or can show that in practice such remedies are ineffective or that procedures for securing such remedies are unduly prolonged. The Committee's findings with respect to such communications are based on a sober and careful review of the case by the experts who comprise the Committee, including scholars of international and comparative law. The Committee's decision is reached only after the state in question has had ample opportunity to present its information about the case.

While Amnesty International considers it important that the provisions of the Covenants be fully incorporated into domestic legislation or constitutions, such incorporation is not a substitute for the mandatory system of international supervision set forth in the Covenants. Indeed, a number of states have incorporated provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights into their constitutions and other laws, but this in itself does not guarantee adequate protection of these rights.

The Human Rights Committee itself has noted that implementation of the International Covenant on Civil and Political Rights "does not depend solely on constitutional or legislative enactments" (general comment 3/13). The Committee has also emphasized this point in the following statement:

> "The Committee considers that the reporting obligation embraces not only the relevant laws and other norms relating to the obligations under the Covenant but also the practices and decisions of courts and other organs of the State party as well as further relevant facts which are likely to show the degree of the actual implementation and enjoyment of the rights recognized in the Covenant, the progress achieved and factors and difficulties in implementing the obligations under the Covenant" (general comment 2/13).

### 3.2 Domestic implementation

Article 38 of the Draft Basic Law should also be amended to provide that the terms of the two Covenants shall be a part of the law of the HKSAR and shall be implemented through both legislation and by action of the judicial organs of the HKSAR. By permitting the courts of the HKSAR to enforce the terms of the Covenants, the people of the HKSAR will be better assured that their rights are protected.

Article 38 is vague as to how the two Covenants "shall be implemented through legislation by the HKSAR". Will the two Covenants be promulgated as legislation with language closely resembling the two treaties? Will different aspects of the two treaties be the subject of various laws with distinct topics? How can the people of Hong Kong be assured that their rights will be protected, as provided in the two Covenants?

The vagueness of Article 38 is of particular concern with respect to those provisions of the International Covenant on Civil and Political Rights which are intended to be implemented by specific prohibitions. For example, Article 7 of the Covenant provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 9 states, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention". Article 10 similarly provides, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". These provisions are intended to be absolute prohibitions on governmental abuses.

The Draft Basic Law presently omits fundamental human rights protections found explicitly in the Covenants and of particular concern to Amnesty International. Indeed, the Draft Basic Law contains only very limited aspects of the important human rights provisions found in the two Covenants. For example, the Draft Basic Law does not contain a prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This deficiency could be remedied by incorporating in the Basic Law provisions which reflect the specific guarantees of the Covenants so that it will actually be known how the two Covenants "shall be implemented through legislation by the HKSAR".

However, the most succinct way of supplying these missing provisions would be for the Basic Law to state simply that the two International Covenants in their entirety shall form part of the law of the HKSAR.

## 4. Human rights and the Basic Law

There are several fundamental human rights of concern to Amnesty International which are not found in the Draft Basic Law and which require further discussion. They include the prohibition of torture and cruel, inhuman or degrading treatment or punishment; the right to life; and the right to be free from arbitrary arrest or detention.

### 4.1 Torture and cruel, inhuman or degrading treatment or punishment

As indicated above, the Draft Basic Law lacks any protections against torture and cruel, inhuman or degrading treatment or punishment. In its Declaration on the Protection of all Persons from Torture and other Cruel,

Inhuman or Degrading Treatment of Punishment, adopted on 9 December 1975, the UN General Assembly condemned torture as an offence to human dignity and said that no state may permit or tolerate it. The General Assembly called on every state to take effective measures "to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction".

By stating in the Joint Declaration that the "provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force", the Government of the People's Republic of China has, in effect, pledged that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 7 of the International Covenant on Civil and Political Rights).

*The Human Rights Committee has made the following comment on Article 7* of the International Covenant on Civil and Political Rights:

> "The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from Article 7, read together with Article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees, provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives, provisions making confessions or *other evidence obtained through torture or other treatment* contrary to Article 7 inadmissible in court, and measures of training and instruction of law enforcement officials not to apply such treatment." (general comment 7(16))

In Amnesty International's experience torture usually takes place in particular conditions, when detainees are held incommunicado or in secret, without access to relatives, lawyers or doctors, often without being brought before a judicial authority such as a magistrate or judge. It is, therefore, clearly necessary not only for torture to be prohibited explicitly by law, but also for safeguards - including those listed above - to be introduced to prevent torture.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the General Assembly on 10 December 1984, provides for specific measures to be taken by goverments for protection against torture. By ratifying this Convention, States pledge to take specific steps against torture in law and practice. The General Assembly has called on all governments to consider signature and ratification of this convention "as a matter of priority". Amnesty International has welcomed the signing of the Convention by the United

Kingdom in March 1985 and by the People's Republic of China in December 1986. It has urged both governments to ratify the Convention without reservations as many other states have done. Such ratification would be an important safeguard against torture for the HKSAR.

Article 34 of the Draft Basic Law contains language which might be helpful in preventing torture: "Hong Kong residents have the right to confidential legal advice, access to the courts, and choice of lawyers for timely protection of their legitimate rights and interests, and for representation in the courts, and the right to judicial remedies". The Basic Law would be strengthened in this regard by stating that relatives and legal counsel should be informed without delay of the arrest and whereabouts of detainees and that they and medical personnel should have prompt and regular access to detainees.

One way to help ensure that other important protections against torture are available in the HKSAR would be for the Basic Law to incorporate by reference the provisions of the UN Convention against Torture.

### 4.2 Right to life

Hong Kong presently has a statute which makes the death penalty compulsory in every case of murder. Since 1966, however, all those sentenced to death in Hong Kong have had their death sentences commuted to life imprisonment or set terms of imprisonment. In the People's Republic of China, on the other hand, the death sentence is still widely used, and widely carried out.

In this context it is regrettable that the Draft Basic Law does not contain a provision protecting the right to life. Indeed, it does not explicitly deal with the death penalty, which Amnesty International considers to be not only a violation of the right to life, but also the ultimate form of cruel, inhuman or degrading punishment. There is no conclusive evidence to suggest that the death penalty is a deterrent against crime. A UN study prepared for the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1980 stated that "despite much more research effort mounted to determine the deterrent value of the death penalty, no conclusive evidence has been obtained on its efficacy". In practice, the death penalty is an arbitrary punishment. It is irrevocable and always carries the risk that the innocent may be put to death. For these reasons Amnesty International opposes the death penalty in all circumstances.

Accordingly, Amnesty International recommends that the Basic Law specifically protects the right to life by abolishing the death penalty. If this humanitarian step cannot be taken, at least the Basic Law should include an assurance that Hong Kong's current policy of not carrying out death sentences will be continued after 1 July 1997.

Article 6 of the International Covenant on Civil and Political Rights states that:

> "1 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 6 also contains significant language which limits the imposition of the death penalty. For example, Article 6, paragraph 2, states, "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ... and not contrary to the provisions of the present Covenant". The relevant "provisions of the present Covenant" include Article 14, which contains an important recitation of procedural rights in the "determination of any criminal charge". For example, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ... Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. ... In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees ... not to be compelled to testify against himself or to confess guilt." Article 6(4) requires that anyone "sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." Article 6(5) further provides, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

Article 6 of the Covenant also anticipates the progressive abolition of the death penalty. For example, Article 6(6) indicates that nothing in that article "shall be invoked to delay or to prevent the abolition of capital punishment." In view of the current de facto abolition of the death penalty in Hong Kong, it would be a contravention of the thrust of Article 6 for the application of the death penalty to be revived in Hong Kong after 1997.

### 4.3 Right to fair trial

Article 27 of the Draft Basic Law states,

> "The freedom of the person of Hong Kong residents is inviolable.
>
> "Hong Kong residents shall not be unlawfully arrested, detained or imprisoned. Unlawful deprivation or restriction of the residents' freedom of the person by any means shall be prohibited. Unlawful search of the body of any resident shall be prohibited."

Article 34 of the Draft Basic Law provides,

> "Hong Kong residents shall have the right to confidential legal advice, access to the courts, and choice of lawyers for timely protection of their legitimate rights and interests, and for representation in the courts, and the right to judicial remedies.
>
> "Hong Kong residents shall have the right to challenge in the courts the actions of the executive organs or their personnel."

Article 37 of the Draft Basic Law is also relevant to the right to a fair trial in providing, "Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the HKSAR". Furthermore, Articles

79 - 95 afford considerable protection for the right to fair trial. For example, Article 80 states, "The judicial system previously in practice in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal in the HKSAR". Article 85 provides, "The principle of trial by jury previously practiced in Hong Kong shall be maintained." Article 86 assures, "In criminal and civil proceedings in the HKSAR, the principles previously applied in Hong Kong and the rights previously enjoyed by the parties to the proceedings shall be maintained." Articles 87-94 afford considerable protection for the independence of the judiciary in regard to appointment, retention, and removal.

Accordingly, it appears that the Draft Basic Law contains a significant number of provisions directed towards the protection of the right to fair trial.

Article 27 of the Draft Basic Law is, however, in some respects not as protective of human rights as the International Covenant on Civil and Political Rights. Article 27 prohibits unlawful arrest, detention or imprisonment, unlawful deprivation or restriction of the residents' freedom of the person, and unlawful search of the body of any resident. Article 9 of the International Covenant on Civil and Political Rights omits the word "unlawful", but uses instead the term "arbitrary." In order to evade the purported protections in Article 27 of the Basic Law, a future legislature of the HKSAR could simply adopt a law which makes searches and arrests "lawful" in a few or in many circumstances. The protection of Article 27 would thus be illusory. Article 9 of the International Covenant on Civil and Political Rights contains much more effective language: "No one shall be subjected to arbitrary arrest or detention." While Article 9 permits arrests "on such grounds and in accordance with such procedures as are established by law", the term "arbitrary" adds an objective test for determining whether an arrest might constitute a violation of human rights. Similarly, Article 17 of the International Covenant on Civil and Political Rights provides, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence,..." The use of both "unlawful" and "arbitrary" provides far greater human rights protection than simply "unlawful."

Similarly, the significant protections for the right to a fair trial in the Draft Basic Law would be strengthened by a specific reference to the fair trial provisions in Articles 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights. For example, Article 14 provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This very fundamental provision would strengthen, support and reinforce the more detailed provisions of the Draft Basic Law. This general but important norm of fairness might be required in a case in which the more detailed provisions of the Draft Basic Law do not function as they should to assure fairness.

The Basic Law would be significantly improved by adopting the specific guarantees of the International Covenant on Civil and Political Rights, rather than the less precise and less well understood language of the present Draft Basic Law.

The Basic Law would also be strengthened by making specific mention, incorporated by reference, of the fair trial provisions of the International Covenant on Civil and Political Rights.

**4.4 Protection against arbitrary arrest or imprisonment**

Amnesty International works for the unconditional release of prisoners of conscience, that is, persons who are imprisoned, detained or otherwise restricted because of their political, religious or other beliefs, or because of their ethnic origin, sex, colour or language, provided that they have not used or advocated violence. The Draft Basic Law provides some protection for the rights of those persons who might otherwise be detained as prisoners of conscience. However, the Draft Basic Law still poses significant risks to human rights defenders, journalists, religious teachers or leaders, politically active individuals, leaders of minorities, and others who might become prisoners of conscience.

Article 24 of the Draft Basic Law contains a significant protection for human rights by stating, "All Hong Kong residents shall be equal before the law, regardless of their nationality, ethnic origin, language, sex, occupation, religious belief, political views, educational level and property status." Article 25 guarantees the right to vote and to be elected for all permanent residents of Hong Kong over the age of 21. Article 26 provides for "freedom of speech, of the press and of publication, freedom of association, to form and join trade unions, and to strike, and freedom of assembly and of demonstration." Article 31 guarantees that "Hong Kong residents shall have the freedom of conscience. Hong Kong residents shall have the freedom of religious belief and the freedom to preach and to carry out and participate in religious activities in public."

Despite these worthwhile protections, there are several provisions in the Draft Basic Law which give cause for concern. For example, this memorandum has already noted the inadequacy of the language in Article 27 of the Draft Basic Law which states that Hong Kong residents "shall not be unlawfully arrested, detained or imprisoned." This provision might not protect individuals from being imprisoned for political reasons if a law is promulgated to authorize such detentions.

While Article 26 protects freedom of speech, press, and publication, this clause does not provide as much protection for individual rights as does Article 19 of the International Covenant on Civil and Political Rights which states, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers..." Furthermore Article 29 of the Draft Basic Law jeopardizes freedom of expression and risks imprisonment of journalists in contravention of the Covenant by stating that "relevant authorities may censor communication in accordance with legal procedures."

Particularly troublesome may be Article 22 of the Draft Basic Law, which states, "the HKSAR shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government". This provision could be used as a basis for the imprisonment of political or religious advocates and ethnic minorities, as well as other people who exercise the right to freedom of expression and association as guaranteed by the Covenant. Furthermore, it is unclear whether the courts of the HKSAR would have jurisdiction to try such cases or whether they would be referred to the Supreme People's Court of the People's Republic of China. (Article 17 of the Criminal Procedure Law of the People's Republic of China provides that the Supreme People's Court shall have jurisdiction at first instance over criminal cases which are of national significance.)

These concerns are heightened by the provisions of Article 17 of the Draft Basic Law which gives the National People's Congress of the People's Republic of China very broad authority to make any laws which "give expression to national unity and territorial integrity ... whenever there is a need to apply any such laws in the Region". this provision leaves unclear whether provisions of the Criminal Law of the People's Republic of China on "counter-revolutionary" offences might apply to Hong Kong. It gives cause for concern that it could be used to imprison people who exercise their right to fundamental freedoms.

As mentioned above, Article 31 provides for "freedom of religious belief and the freedom to preach and to carry out and participate in religious activities in public." Article 18 of the International Covenant on Civil and Political Rights provides more ample protection by defining the "right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching." Hence, Article 18 of the Covenant provides a better protection for the rights of individual worshippers and religious teachers, and for other forms of manifesting one's religious beliefs.

Although Article 24 of the Draft Basic Law provides that all Hong Kong residents shall be equal before the law there is no provision in the Draft Basic Law equivalent to Article 27 of the International Covenant on Civil and Political Rights<7>. The Covenant's Article 27 provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

In the absence of such a provision in the Basic Law, the leaders or active members of ethnic, religious or linguistic minorities could be imprisoned.

### 4.5 The limitations clause

Article 39 of the Draft Basic Law states:

> "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. But such restrictions shall not go beyond the necessity for the maintenance of national security, public order, public safety, public health, public morals and for the safeguarding of the rights and freedoms of other persons."

Such a broad limitations clause raises the risk that a future legislative measure could undermine some or all of the rights prescribed in the other provisions of the Draft Basic Law or in any additional clauses which might be added. Such a broad limitations clause could be used as a possible legal basis for nullifying all of the Fundamental Rights and Duties of the Residents in Chapter III of the Draft Basic Law.

For example, Article 34 of the Draft Basic Law appears to protect the rights of confidential legal advice and access to the courts. Similarly, Article 24 of the Draft Basic Law declares that all Hong Kong residents shall be equal before the law, regardless of their nationality, race, ethnic origin, language, sex, etc. But a later law could conceivably be promulgated to limit or abolish such fundamental rights simply by reciting the need to preserve public safety and public morals.

These concerns are heightened by the provisions in Article 169 of the Draft Basic Law which gives the Standing Committee of the National People's Congress of the People's Republic of China power of interpretation of the Basic Law. Although the courts of the HKSAR may interpret the provisions of the Basic Law in adjudicating cases before them, Article 169 requires that they seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress. Article 172 states, "laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law". Article 16 of the Draft Basic Law provides that the Standing Committee of the National People's Congress will have veto power over "any law of the Region [which] is not in conformity with this [Basic] Law or legal procedures. "...Furthermore, Article 17 gives the National People's Congress or its Standing Committee very broad authority to make any laws which "give expression to national unity and territorial integrity... whenever there is a need to apply any such laws in the Region". Hence, it would be very easy for the limitations clause in Article 39 to be used as a means of restricting the "rights and freedoms enjoyed by Hong Kong residents" by changes in the law or changes in the interpretation of the law.

Limitations clauses must be construed in a narrow fashion so as to avoid undermining the rights which are granted in the same treaty or legislative instrument. The overbroad language of Article 39 presents too great a risk of abuse to permit Article 39 to remain as it stands.

There are, of course, some rights which do require limitations, but those limitations must be carefully focused upon the specific rights involved. One approach to this complex and difficult issue can be found in the International Covenant on Civil and Political Rights, which provides that some fundamental rights cannot be the subject of any limitation or derogation even "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4). These rights include the rights to be free from torture, arbitrary deprivation of life or racial inequality, and the right to freedom of thought, conscience and religion. Other rights are subject to carefully drafted and internationally agreed limitations which are tailored to each specific right.

The human rights provisions of the Basic Law would be greatly strengthened if Article 39 were replaced by specific reference to or incorporation of Article 4 and other provisions of the International Covenant on Civil and Political Rights which specify for each right the conditions, if any, under which it may be limited and those rights from which there can be no derogation.

that the Covenants are a part of the law of the HKSAR which shall be implemented both through legislation and by action of the judicial organs of the HKSAR.

In this context it must be noted that even the most generously drafted guarantees for fundamental rights would be of little worth if they could not be enforced effectively by the courts. Thus it is important that the courts of the HKSAR be given the power to review the compatibility of any legislation with the rights and freedoms guaranteed in the Basic Law. Similarly, ratification of the International Covenants by the HKSAR (or the People's Republic of China including the HKSAR) is essential to ensure that the international obligations and monitoring procedures established in the Covenants remain fully in force.

## 6. Notes

<1> 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, paragraph 3(3) and 3(5) at 30 - 31.

<2> Idem paragraph 7, at 33.

<3> Idem Annex 1 at 49.

<4> Drafting Committee for the Basic Law, Draft Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (For Solicitation of Opinions) 40 (April 1988).

<5> Drafting Committee for the Basic Law, Draft Basic Law of the HKSAR of the People's Republic of China 12 (April 1988).

<6> The Joint Declaration at page 47 states, "International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the HKSAR. The Central People's Government shall, as necessary, authorize or assist the HKSAR Government to make appropriate arrangements for the application to the HKSAR of other relevant international agreements."

<7> Article 40 of the Draft Basic Law does assure that the "legitimate traditional rights and interests of the indigenous inhabitants of 'New Territories' shall be protected by the HKSAR". While this provision may constitute a helpful measure for the indigenous inhabitants, they may not wish to be considered a minority under Article 27 of the Civil and Political Covenant and other minorities are not given similar protections by the Draft Basic Law.

## 5. Conclusions and recommendations

In this memorandum, Amnesty International has not recommended the adoption of specific language which might be incorporated in the Draft Basic Law, but has simply identified some concerns about the present draft and has suggested a number of important principles which might guide the redrafting of the Basic Law. It has also suggested measures which it considers essential to ensure, in accordance with the pledge in the Joint Declaration, that the Covenants on human rights shall remain in force in Hong Kong after 1997.

Accordingly, Amnesty International suggests the following fundamental principles and makes the following recommendations:

1 All persons within Hong Kong presently are protected by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The People's Republic of China has assured Hong Kong residents that this critical international human rights protection will continue after 1 July 1997. The Draft Basic Law issued in April 1988 does not, however, adequately ensure the continued effectiveness of the two international covenants after 1997. In order to ensure that the rights of Hong Kong residents are fully protected under the two international covenants, "Hong Kong, China" should be permitted by the People's Republic of China to ratify the two international covenants and the Optional Protocol to the International Covenant on Civil and Political Rights. If, alternatively, the People's Republic of China becomes a party to the two covenants and the Optional Protocol, each of the periodic reports of the People's Republic of China to the Human Rights Committee after 1997 should include a separate section about the HKSAR presented by the Hong Kong authorities.

2 The Basic Law as a legal instrument tantamount to a constitution or fundamental law for the HKSAR should contain a suitable body of protections for human rights.

At present, the Draft Basic Law does not contain a number of very important international human rights protections, including a number of protections of particular concern to Amnesty International. Among these are the protection against torture and other cruel, inhuman or degrading treatment or punishment; the protection of the right to life, including the abolition of the death penalty or at least an assurance that Hong Kong's current policy of not using the death penalty will be continued after 1 July 1997; specific provisions for the protection of the right to a prompt and fair trial; and the establishment of a number of human rights norms which will make it less likely that individuals will be detained as prisoners of conscience. The Draft Basic Law also includes a general limitations provision which could be used to undermine all the other human rights protections. All of these difficulties can and should be overcome by redrafting or adding specific provisions. They can also be resolved in a more general way, namely by incorporating the two Covenants on human rights in the Basic Law by reference, and by providing

# APPENDIX 3
# BASIC DRAFT LAW

## *Foreign Broadcast Information Service*, China
## May 2, 1988, pp. 50-76

**Text of Hong Kong Draft Basic Law Published**
*HK2904040088 Beijing CHINA DAILY (Supplement on HKSAR Draft Basic Law [for discussion]) in English 29 Apr 88 pp I-VIII*

[Text] The Draft Basic Law of the Hong Kong Special Administrative Region [HKSAR] of the People's Republic of China for Solicitation of Opinions Preamble [subhead]

Hong Kong has been part of China's territory since ancient times, but it was occupied by Britain after the Opium War in 1840. On December 19, 1984, the Chinese and British governments signed the Joint Declaration on the Question of Hong Kong, affirming that the Government of the People's Republic of China will resume the exercise of Sovereignty over Hong Kong on July 1, 1997, thus fulfilling the long-cherished common aspiration of the entire Chinese people for the recovery of Hong Kong.

In order to uphold national unity and territorial integrity and to maintain Hong Kong's prosperity and stability, and taking account of the history of Hong Kong and its 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", socialist system and policies will not be practised in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by our government in the Sino-British Joint Declaration.

In accordance with the Constitution of the People's Republic of China, the National People's Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong. Chapter I: General Principles [subhead]

Article 1
The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.

Article 2
The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy in accordance with the provisions of this Law and to enjoy executive, legislative and independent judicial power, including that of final adjudication.

Article 3
The executive authorities and legislature of the Hong Kong Special Administrative Region shall be composed of permanent residents of Hong Kong in accordance with the relevant provisions of this Law.

Article 4
Socialist system and policies shall not be practised in the Hong Kong Special Administrative Region and the existing capitalist system and way of life shall not be changed for 50 years.

Article 5
The Hong Kong Special Administrative Region safeguards the rights and freedoms of the residents and other persons in the region in accordance with law.

Article 6
Rights of property ownership, including those relating to acquisition, use, disposal, inheritance and compensation for lawful take-over shall be protected by law. The compensation for lawful takeover shall be corresponding to the real value of the property concerned, freely convertible and paid without undue delay.

Article 7
The land and natural resources within the Hong Kong Special Administrative Region are the state property of the People's Republic of China. The government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals or legal persons for use or development. The revenue derived shall be entirely at the disposal of the government of the Hong Kong Special Administrative Region.

Article 8
The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for those that contravene this Law or have been amended by the legislature of the Hong Kong Special Administrative Region.

Article 9
In addition to the Chinese language, the English language may also be used by the executive authorities, legislature and judicial organs of the Hong Kong Special Administrative Region.

Article 10
In accordance with Article 31 of the Constitution of the People's Republic of China, the policies and systems practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents and the executive, legislative and judicial systems, shall be based on the provisions in this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this law.

Chapter II: Relationship between the Central Authorities and the Hong Kong Special Administrative Region [subhead]

Article 11
The Hong Kong Special Administrative Region is a local administrative region of the People's Republic of China, enjoying a high degree of autonomy, and comes directly under the Central People's Government.

Article 12
The Central People's Government is responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.
The Central People's Government authorizes the Hong Kong Special Administrative Region to deal with relevant external affairs on its own in accordance with this Law.
The Ministry of Foreign Affairs of the People's Republic of China will establish an office in Hong Kong to deal with foreign affairs.

Article 13
The Central People's Government is responsible for the Defence of the Hong Kong Special Administrative Region.
Military forces sent by the Central People's Government to be stationed in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the region. The government of the Hong Kong Special Administrative Region may, in times of need, request the Central People's Government for assistance from the garrison in the maintenance of public order and disaster relief.
Apart from abiding by nation-wide laws, members of the garrison shall also abide by the laws of the Hong Kong Special Administrative Region.
All expenses for the garrison shall be borne by the Central People's Government.

Article 14
The Central People's Government appoints the Chief Executive and principal executive officials of the Hong Kong Special Administrative Region in accordance with the provisions of Chapter IV of this Law.

Article 15
The Hong Kong Special Administrative Region is vested with executive power. In accordance with the relevant provisions of this Law it shall, on its own, manage public finance, monetary matters, economy, industry and commerce, trade, taxation, postal service, civil aviation, maritime matters, traffic and transport, fishery, agriculture, personnel administration, civil affairs, labour, education, medical and health services, social welfare, culture and recreation, municipal facilities, urban planning, housing, real estate, public order, entry and exit controls, meteorology, communications, science and technology, sports and other administrative affairs.

Article 16
The Hong Kong Special Administrative Region is vested with legislative power.
Laws enacted by the legislature of the Hong Kong Special Administrative Region shall be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws.
If the Standing Committee of the National People's Congress, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region, considers that any law of the region is not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This cessation shall not have retroactive effect.

Article 17
The laws of the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as stipulated in Article 8 of this Law, and the laws enacted by the legislature of the Hong Kong Special Administrative Region.
Laws enacted by the National People's Congress or its Standing Committee will not be applied in the Hong Kong Special Administrative Region except for those stipulated in Paragraph 3 of this article.
Laws, enacted by the National People's Congress or its Standing Committee, which relate to defence and foreign affairs as well as other laws which give expression to national unity and territorial integrity and which, in accordance with the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region, shall be applied locally by the government of the Hong Kong Special Administrative Region by the way of promulgation or legislation on the directives of the State Council, whenever there is the need to apply any of such laws in the region.
Except in cases of emergency, the State Council shall consult the Committee for the Basic Law of the Hong Kong Special Administrative Region and the Government of the Hong Kong Special Administrative Region before issuing the above-mentioned directives.
If the government of the Hong Kong Special Administrative Region fails to act in compliance with the directives given by the State Council, the State Council may decree the application of the above-mentioned law in the Hong Kong Special Administrative Region.

Article 18
The Hong Kong Special Administrative Region is vested with independent judicial power, including that of final adjudication.
Courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the region, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system shall be maintained.
Courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases relating to defence and foreign affairs, which are the responsibility of the Central People's Government, and cases relating to the executive acts of the Central People's Government.
Courts of the Hong Kong Special Administrative Region

shall seek the advise of the Chief Executive whenever questions concerning defence, foreign affairs or the executive acts of the Central People's Government arise in any legal proceeding. A statement issued by the Chief Executive regarding such questions shall be binding on the courts.
Before issuing such a statement, the Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council.

Article 19
The Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the State Council.

Article 20
Residents of the Hong Kong Special Administrative Region who are Chinese nationals are entitled to participate in state affairs as prescribed by law.
In accordance with the assigned number of seats and the election procedures specified by the Standing Committee of the National People's Congress, the Chinese nationals among the Hong Kong residents shall locally elect deputies of the Hong Kong Special Administrative Region to the National People's Congress to participate in the work of the highest organ of state power.

Article 21
Departments under the Central People's Government as well as provinces, autonomous regions, and municipalities directly under the Central Government shall not interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.
If departments under the Central Government, provinces, autonomous regions, and municipalities directly under the Central Government need to set up offices in the Hong Kong Special Administrative Region, they must have the consent of the government thereof and the approval of the Central People's Government.
All offices set up in Hong Kong by the departments under the Central Government, or by provinces, autonomous regions and municipalities directly under the Central Government and personnel of these offices shall abide by the laws of the Hong Kong Special Administrative Region.
People from other parts of China must apply for approval for entry into the Hong Kong Special Administrative Region.
The Hong Kong Special Administrative Region may establish an office in Beijing.

Article 22
The Hong Kong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government.

Chapter III: Fundamental Rights and Duties of the Residents [subhead]

Article 23
Residents of the Hong Kong Special Administrative Region, or Hong Kong residents for short, include permanent residents and non-permanent residents.

Permanent residents of the Hong Kong Special Administrative Region are:
(1) Chinese nationals born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
(2) Chinese nationals who have ordinarily resided in Hong Kong for a continuous period of no less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
(4) Persons of non-Chinese nationality who have ordinarily resided in Hong Kong for a continuous period of no less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
(5) Persons under 21 years of age born in Hong Kong of residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and
(6) Persons other than those residents listed in categories (1) to (5), who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region.

The above-mentioned residents have the right of abode in the Hong Kong Special Administrative Region and are qualified to obtain, in accordance with its law, permanent identity cards whiqh state their right of abode.
Non-permanent residents of the Hong Kong Special Administrative Region are persons who, in accordance with the laws of the Hong Kong Special Administrative Region, are qualified to obtain Hong Kong identity cards but have no right of abode.

Article 24
All Hong Kong residents shall be equal before the law, regardless of their nationality, race, ethnic origin, language, sex, occupation, religious belief, political views, educational level and property status.

Article 25
Permanent residents of the Hong Kong Special Administrative Region who have reached the age of 21 shall have the right to vote and the right to stand for election as prescribed by law.

Article 26
Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, to form and join trade unions, and to strike; and freedom of assembly and of demonstration.

Article 27
The freedom of the person of Hong Kong residents is inviolable.
Hong Kong residents shall not be unlawfully arrested, detained or imprisoned. Unlawful deprivation or restriction of the residents' freedom of the person by any means shall be prohibited.

Article 28
The homes and other premises of Hong Kong residents shall not be violated. Unlawful search of, or intrusion into, a resident's home or other premises is prohibited.

Article 29
The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any ground, infringe upon the residents' freedom and privacy of communication except in case where, to meet the needs of public security or of investigation into criminal offences; the relevant authorities may censor communication in accordance with legal procedures.

Article 30
Hong Kong residents shall have the freedom of movement within the Hong Kong Special Administrative Region and the freedom of emigration to other countries and regions. Hong Kong residents who hold valid travel documents shall have the freedom to travel and the freedom of entry and exit and, unless restrained by law, shall be free to leave the Hong Kong Special Administrative Region without special authorization.

Article 31
Hong Kong residents shall have the freedom of conscience.
Hong Kong residents shall have the freedom of religious belief and the freedom to preach and to carry out and participate in religious activities in public.

Article 32
Hong Kong residents shall have the freedom of choice of occupation.

Article 33
Hong Kong residents shall have the freedom of academic research, of literary and artistic creation and of other cultural pursuits.

Article 34
Hong Kong residents shall have the right to confidential legal advice, access to the courts, and choice of lawyers for timely protection of their legitimate rights and interests, and for representation in the courts, and the right to judicial remedies.
Hong Kong residents shall ahve the right to challenge in the courts the actions of the executive organs or their personnel.

Article 35
Hong Kong residents shall have the right to social welfare; the welfare benefits of the working people shall be protected by law.

Article 36
The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.

Article 37
Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the Hong Kong Special Administrative Region.

Article 38
The provision of the "International Convenant on Civil and Political Rights" and the "International Convenant on Economic, Social and Cultural Rights" as applied to Hong Kong shall be implemented through legislation by the Hong Kong Special Administrative Region.

Article 39
The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. But such restrictions shall not go beyond the necessity for the maintenance of national security, public order, public safety, public health, public morals and for the safeguarding of the rights and freedoms of other persons.

Article 40
The legitimate traditional rights and interests of the indigenous inhabitants of "New Territories" shall be protected by the Hong Kong Special Administrative Region.

Article 41
Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescibed in this Chapter.

Article 42
Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws of the Hong Kong Special Administrative Region.

Chapter IV: Political Structure [subhead]

Section 1: The Chief Executive

Article 43
The Chief Executive of the Hong Kong Special Administrative Region is the head of the Hong Kong Special Administrative Region and represents the region.
The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.

Article 44
The Chief texecutive of tge Hong Kong Special Administrative Region shall be a Chinese national of no less than 40 years of age who is a permanent resident of the region and has ordinarily resided in Hong Kong for a continuous period of 20 years.

Article 45
The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government
The Specific method for selecting the Chief Executive is prescribed in Appendix (1): "Method for selecting the Chief Executive of Hong Kong Special Administrative Region."
The method for selecting the Chief Executive as prescribed in Appendix (1) may be modified in the light of actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. Such modifications shall require the endorsement of a two-thirds majority of the members of the legislative Council of the Hong Kong Special Administration Region and the consent of the Chief Executive, and shall be submitted to the Standing Committee of the National People's Congress for approval.

Article 46
The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He/she may serve for no more than two terms.

Article 47
The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his/her duties.
The Chief Executive, on assuming office, shall declare his/her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region. This declaration shall be put on record in strict confidence.

Article 48
The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
(1) To lead the government of the region;
(2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region;
(3) To sign bills passed by the Legislative Council and to promulgate laws;
To sign bills on budget and final accounts passed by the Legislative Council and report them to the Central People's Government for the record;
(4) To decide on government policies and to issue executive orders;
(5) To nominate and to report to the Central People's Government for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaus, Commissioner Against Corruption, Director of Audit, Commissioner of Police and Commissioner of External Affairs # 3 [see notes following Annex III] and to propose to the Central People's Government the removal of the above-mentioned officwals;
To employ advisers at or above the director level as required and subject to the approval of the Central People's Government.
(6) To appoint or remove judges of the courts at various levels in accordance with legal procedures;
(7) To appoint or remove public servants in accordance with legal procedures;
(8) To implement the directives issued by the Central People's Government in respect of the relevant matters provided for in this Law;
(9) To deal with, on behalf of the government of the Hong Kong Special Administrative Region, external affairs and other affairs authorized by the Central Authorities;
(10) To approve the introduction of motions regarding revenues or expenditure to the Legislative Council;
(11) To decide, in the light of security and public interest, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council;
(12) To pardon persons convicted of criminal offences or commute their penalties; and
(13) To handle petitions and complaints.

Article 49
If the Chief Executive considers that a bill passed by the Legislative Council is not compatible with the overall interest of the Hong Kong Special Administrative Region, he/she may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by no less than a two-thirds majority, the Chief Executive must sign and promulgate it within one month, or act in accordance with the provisions of Article 50 of this Law.

Article 50
If the Chief Executive refuses to sign the bill passed by the Legislative Council for a second time, or the Legislative Council refuses to pass the budget or other important bills introduced by the government and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.
Before dissolving the Legislative Council the Chief Executive should ask for opinions from the Executive Council. A Chief Executive can dissolve the Legislative Council only once in each term of office.

Article 51
If the Legislative Council refuses to pass the budget bill presented by the government, or if appropriation of public funds cannot be approved because the Legislative Council is already dissolved, the Chief Executive may

approve temporary short-term appropriations according to the level of the previous fiscal year's expenditure prior to the election of the new Legislative Council.

Article 52
The Chief Executive shall have to resign under any of the following circumstances:
(1) When he/she loses the ability to discharge the functions of his/her office due to serious illness or other reasons;
(2) When, after the Legislative Council is dissolved because he/she twice refuses to sign the bill it passes, the new Legislative Council has again passed the original bill in dispute with a two-thirds majority; and
(3) When, after the Legislative Council is dissolved because it refuses to approve the budget or any other important bill, the new Ltgislative Council still refuses to pass the original bill in dispute.

Article 53
If the Chief Executive of the Hong Kong Special Administrative Region is not able to discharge his/her duties for a brief period, such duties shall temporarily be assumed by Administrative Secretary, Financial Secretary, Secretary of Justice in this order of precedence.
In the event that the office of Chief Executive becomes vacant a new Chief Executive shall be selected within six months, and during the period of vacancy, his/her duties shall be assumed according to the provisions of the preceding Paragraph.

Article 54
The Executive Council of the Hong Kong Special Administrative Region is an organ for assisting the Chief Executive in policy-making.

Article 55
Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. Their term of office and the termination of their appointment before their term expires shall be decided by the Chief Executive. The term of office of members shall not exceed that of the Chief Executive who appoints them.
Members of the Executive Council of the Hopg Kong Specialh Administrative Region shall be Chinese nationals who are permanent residents of the region.
The Chief Executive may invite other persons concerned to sit in at council meetings as he/she deems necessary.

Article 56
The Executive Council of the Hong Kong Special Administrative Region shall be presided over by the Chief Executive.
Except for the appointment, removal and disciplining of public officers and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important decisions, introducing a bill to the Legislative Council, enacting subsidiary legislations, or dissolving the Legislative Council.
If the Chief Executive does not adopt a majority opinion of the Executive Council, he/she must put his/her specific reasons on record.

Article 57
A Commission Against Corruption shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive.

Article 58
A Commission of Audit shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive.

Section 2: The Executive Authorities [subhead]

Article 59
The government of the Hong Kong Special Administrative Region is the executive authorities [word as published] of the region.

Article 60
The Chief Executive of the Hong Kong Special Administrative Region is the head of the government of the region.
Department of Administration, Department of Finance, Department of Justice, bureaus, divisions and commissions shall be established under the government of the Hong Kong Special Administrative Region.
The structure of the government of the Hong Kong Special Administratwve Region shall be prescribed by law.

Article 61
The principal officials of the Hong Kong Special Administrative Region shall be Chinese nationals who are permanent residents and have ordinarily resided in Hong Kong for a continuous period of 15 years.

Article 62
The government of the Hong Kong Special Administrative region shall exercise the following powers and functions:
(1) To formulate and implement policies;
(2) To manage the administrative affairs specified in Article 14 of this Law;
(3) To manage the external affairs authorized by the Central People's Government under this law;
(4) To draw up and present budgets and final accounts; and
(5) To draft and introduce bills, motions and subsidiary legislations.

Article 63
The prosecuting authority of the Hong kong Special Administrative Region shall institute criminal prosecutions independently, free from any interference.

Article 64
The executive authorities of the Hong Kong Special Administrative Region must abide by the law and shall

be accountable to the Legislative Council of the Hong Kong Special Administrative Region in the following respects: They shall implement laws passed by the legislature and already in force; they shall present regular reports on their worklto the Legislative Council; they shall answer questions raised by members of the Legislative Council; and they shall obtain approval from the Legislative Council for taxation and public expenditure.

Article 65
The establishment of advisory bodies under the executive authorities of the Hong Kong Special Administrative Region shall be maintained.

Article 66
The Legislative Council of the Hong Kong Special Administrative Region is the legislature of the region.

Article 67
The Legislative Council of the Hong Kong Special Administrative Regional shall be constituted by a combination of direct and indirect elections.

The specific methods for forming the Legislative Council are prescribed in Annex II: "Methods for Constituting the Legislative Council of the Hong Kong Special Administrative Region."

The methods for forming the Legislative Council provided in Annex II may be modified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. Such modifications shall require the endorsement of a two-thirds majority of the members of the Legislative Council of the region and the consent of the Chief Executive, and shall be submitted to the Standing Committte of the National People's Congress for approval.

Article 68
The term of office of members of the Legislative Council of the Hong Kong Special Administrative Region shall be four years.

Article 69
If the Legislative Council of the Hong Kong Special Administrative Region is dissolved by the Chief Executive in accordance with the provisions of this Law, it shall be reconstituted by election within three months as prescribed by Article 67 of this Law.

Article 70

Alternative 1:
The president of the Legislative Council of the Hong Kong Special Administrative Region shall be elected from among the members of the Legislative Council.
The president of the Legislative Council of the Hong Kong Special Administrative Region shall be a Chinese national of no less than 40 years of age, who is a permanent resident of the region and has ordinarily resided in Hong Kong for a continuous period of 20 years.

Alternative 2:
The Chief Executive shall concurrently be the president of the Legislative Council of the Hong Kong Special Administrative Region.

Article 71
The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
(1) To preside over meetings;
(2) To decide on and control the agenda;
(3) To decide on the time and duration of meetings;
(4) To call special meetings during the recess; and
(5) Other powers and functions as prescribed in the rules of procedure of the Legislative Council.

Article 72
The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions;
(1) To enact, repeal or amend laws in accordance with the provisions of this Law and legal procedures;
(2) To examine and approve budgets and final accounts submitted by the executive authorities;
(3) To approve taxation and public expenditure;
(4) To hear and debate on the work reports of the Chief Executive;
(5) To raise questions on the work of the executive authorities;
(6) To hold debates on any issue concerning public interests;
(7) To endorse the appointment and removal of the judges of the Court of the Final Appeal and the Chief Justice of the High Court;
(8) To receive and deal with complaints from Hong Kong inhabitants; and
(9) In the event of serious breach of law or dereliction of duty by the Chief Executive, an independent investigating committee, to be chaired by the Chief Justice of the Court of Final Appeal, on the motion initiated jointly by one-fourth of the members of the Legislative Council and passed by the council, may be stablished to carry out investigations and to report its findings to the council. If the committee considers the evidence sufficient, the council may pass a motion of impeachment with a two-thirds majority and report it to the Central People's Government for decision.

Article 73

Alternative 1:
Members of the Legislative Council of the Hong Kong Special Administrative Region may, in accordance with the provisions of this Law and legal procedures, individually or jointly introduce any bills. However written consent of the Chief Executive is required before the

following three kinds of bills are introduced:
(1) Bills relating to revenue and expenditure;
(2) Bills relating to government policies; and
(3) Bills relating to the structure and operation of the government.

Alternative 2:
*Members of the Legislative Council of the Hong Kong* Special Administrative Region may, in accordance with the provisions of this Law and legal procedures, introduce bills. Bills which do not relate to public expenditure or public policies may be introduced individually or *jointly by members of the council.*

Article 74
The quorum for the meeting of the Legislative Council of the Hong Kong Special Administrative Region shall be no less than half of its members.
Unless otherwise provided for in this Law, the passage of any bill or motion in the Legislative Council of the Hong Kong Special Administrative Region requires the votes of more than half of its members present.
The rules of procedure of the Legislative Council shall be established by the council on its own, but they should not contravene this Law.

Article 75
A bill passed by the Legislative Council of the Hong Kong Special Administrative Region takes effect only after it is signed and promulgated by the Chief Executive.

Article 76
Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be legally liable for speeches made at meetings of the council.

Article 77
Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be subject to arrest when attending or on their way to a meeting of the Legislative Council.

Article 78
The president of the Legislative Council shall declare that a member of the council is no longer qualified to serve under any of the following circumstances:
(1) When he/she loses the ability to discharge the functions of his/her office due to serious illness or other reasons;
(2) When he/she is absent from meetings for three consecutive months without the consent of the president of the Legislative Council;
(3) When he/she loses or renounces hiser [word as published] status as a permanent resident of the Hong Kong Special Administrative Region;
(4) When he/she is bankrupt or fails to pay debts in defiance of a court ruling;
(5) When he/she is convincted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Hong Kong Special Administrative Region and is relieved of his/her duties by a motion passed by two-thirds of the members of the legislative Council present; and
(6) When he/she is censored for misbehavior or breach of oath by a vote of two-thirds of the members of the Legislative Council present.

Section 4: Judicial Organs [subhead]

Article 79
The courts of the Hong Kong Special Administrative Region at various levels are the judicial organs of the *region, exercising the judicial power of the region.*

Article 80
The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts are established in the Hong Kong Special Administrative Region. The High Court comprises the Court of Appeal and the Court of the First Instance.
The judicial system previously in practice in Hong Kong shall be maintained except for those changes consequent upon the established of the Court of Final Appeal in the Hong Kong Special Administrative Region.

Article 81
The power of final adjudication of the Hong Kong Special Administrative Region is vested in the Court of Final Appeal in the region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.

Article 82
The structure, power, and functions of the courts of the Hong Kong Special Administrative Region at various levels shall be prescribed by law.

Article 83
The courts of the Hong Kong Special Administrative Region decide cases in accordance with the laws applicable in the region as prescribed in Article 17 of this Law and may refer to precedents in other common law jurisdictions.

Article 84
The courts of the Hong Kong Special Administrative Region exercise judicial power independently and free form any interference. Members of the judiciary are immune from legal action in respect of their judicial functions.

Article 85
The principle of trial by jury previously practised in Hong Kong shall be maintained.

Article 86
In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles, previously applied in Hong Kong and the rights previously enjoyed by the parties to the proceedings shall be maintained.

Article 87
Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.

Article 88
A judge of a court of the Hong Kong Special Administrative Region may be removed for inability to discharge the functions of hiser [word as published] office, or for misbehaviour, by the Chief Executive acting in accordance with the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal in the Hong Kong Special Administrative Region may be investigated for inability to discharge the functions of hiser [word as published] office, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures provided for in this Law.

Article 89
In addition to the procedures prescribed in Article 87 and 88 of this Law, the appointment and removal of judges of the Court of Final Appeal and the Chief Justice of the High Court in the Hong Kong Special Administrative Region shall be made by the Chief Executive with the endorsement of the Legislative Council of the region and reported to the Standing Committee of the National People's Congress for the record.

Article 90
The previous system of appointment and removal of members of the judiciary other than judges of the Hong Kong Special Administrative Region shall be maintained.

Article 91
Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen by reference to their judicial and professional qualities and may be recruited from other common law jurisdictions.

Article 92
Judges and other members of the judiciary serving in Hong Kong before the establishment of the Hong Kong Special Administrative Region may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 93
The Hong Kong Special Administrative Region shall pay to judges and other members of the judiciary who retire or leave the service in compliance with regulations as well as to those who have h retired or left the service before the establishment of the Hong Kong Special Administrative Region, or to their dependents, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.

Article 94
The judicial organs of the Hong Kong Special Administrative Region may, through consultation and in accordance with law, maintain judicial relations with those of other parts of the country, and they may render assistance to each other.

Article 95
With the assistance or authorization of the Central People's Government, the government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal judicial assistance.

Section 5: District Organizations [subhead]

Article 96
District organizations which are not local organs of political power may be established in the Hong Kong Special Administrative Region, to be consulted by the government of the region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation.

Article 97
The powers and functions of the district organizations and their composition shall be prescyibed by law.

Section 6: Public Servants [subhead]

Article 98
Public servants serving in all government departments of the Hong Kong Special Administrative Region must be permanent residents of the region, except where otherwise provided for in Article 100 of this Law and except for those below a certain salary point as prescribed by law.
Public servants must be dedicated to their duties and be responsible to the government of the Hong Kong Special Administrative Region.

Article 99
Public servants serving in all Hong Kong Government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 100
The government of the Hong Kong Special Administrative Region may employ British and other foreign nationals previously serving in the public service in

Hong Kong, or those holding permanent identity cards of the region to serve as public servants at various levels, but only Chinese nationals among permanent residents of the region can fill the following posts: the Secretary and Deputy Secretaries of Departments, Directors of Bureaus, Commissioner Against Corruption, Director of Audit, Deputy Directors for Security and for Civil Service, Commissioner and Deputy Commissioners of Police, Commissioner and Deputy Commissioners of External Affairs, Commissioner of Immigration and Inspector General of Customs and Excise.
The government of the Hong Kong Special Administrative Region may also employ British and other foreign nationals as advisers to government departvents and, when there is need, may recruit qualified candidates from outside the region to professional and technical posts in government departments. These foreign nationals shall be employed only in their individual capacities and shall be responsible to the government of the region.

Article 101
The government of the Hong Kong Special Administrative Region shall pay to public servants who retire or leave the service in compliance with regulations as well as to those who have retired or left the service in compliance with regulations before the establishment of the Hong Kong Special Administrative Region, or to their dependents all pensions, gratuities, allowance and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.

Article 102
The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals.

Article 103
The Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must be sworn in according to law when assuming office.

Chapter V: Economy [subhead]

*Section 1: Public Finance and Taxation [subhead]*

Article 104
The Hong Kong Special Administrative Region shall have independent finances.
The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People's Government.

Article 105
The government of the Hong Kong Special Administrative Region shall follow the principle of measuring expenditure by revenues in drawing up its budget.
The government of the Hong Kong Special Administrative Region shall, over a number of fiscal years taken as a whole, maintain a basic balance between total budgetary revenues and expenditure.
In principle, the rate of increase of the budgetary revenues and the expenditure of the Hong Kong Special Administrative Region shall not exceed that of the gross domestic product over a number of fiscal years taken as a whole.

Article 106
The Hong Kong Special Administrative Region shall practise an independent taxation system.
The Central People's Government shall not levy taxes in the Hong Kong Special Administrative Region.

Article 107
The Hong Kong Special Administrative Region shall continue to practise a low tax policy.

Article 108
The types of taxes, the tax rates and tax exemptions in the Hong Kong Special Administrative Region shall be prescribed by law.

Section 2: Money and Finance [subhead]

Article 109
The government of the Hong Kong Special Administrative Region shall create conditions and take measures for the maintenance of the status of the Hong Kong Special Administrative Region as an international financial centre.

Article 110
The Hong Kong Special Administrative Region shall continue to practise free and open monetary and financial policies. Its monetary and financial systems shall be governed by law.

Article 111
No exchange control policies shall be applied in the Hong Kong Special Administrative Region. Markets for foreign exchange, gold, securities and futures shall continue.

Article 112
The government of the Hong Kong Special Administrative Region shall safeguard the free flow of all capital within, into and out of the region.

Article 113
The government of the Hong Kong Special Administrative Region shall safeguard the free operation of financial business and financial markets and shall regulate and supervise them in accordance with law.

Article 114
The Hong Kong dollar, as the legal tender in the Hong Kong Special Administrative Region, shall continue to circulate and remain freely convertible.

Article 115
The authority to issue Hong Kong currency shall be vested in the government of the Hong Kong Special Administrative Region. The system regarding the issue of Hong Kong currency shall be prescribed by law.
The issue of Hong Kong currency shall be backed up by a reserve fund of no less than 100 percent freely converftible foreign currency.
The government of the Hong Kong Special Administrative Region may authorize designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency will be soundly based and that the arrangements for such issue are consistent with the object of maintainingIthe stability of the currency.

Article 116
The Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the government of the region, primarily for regulating the exchange value of the Hong Kong dollar.

Section 3: External Trade and Economic Relations [subhead]

Article 117
The Hong Kong Special Administrative Region shall continue the policy of free external trade and free external economic relations.
The government of the Hong Kong Special Administrative Region shall safeguard the free movement of goods, intangible assets and capital.
Investments from outside the region shall be protected by law.

Article 118
The Hong Kong Special Administrative Region shall remain a free port.
The Hong Kong Special Administrative Region shall not impose any tariff unless otherwise stipulated by law.

Article 119
The Hong Kong Special Administrative Region shall be a separate customs territory.
The Hong Kong Special Administrative Region may, using the name "Hong Kong, China," participate in relevant international organizations and international trade agreements, including preferential trade arrangements, such as the General Agreement on Tariffs and Trade and arrangements regarding internationzl trade in textiles.

Article 120
Export quotas, tariff preferences and other similar arrangements, which are obtained by the Hong Kong Special Administration Region or which were obtained and remain valid, shall be enjoyed exclusively by the region.

Article 121
The Hong Kong Special Administrative Region may issue its own certificates of origin for products manufactured locally in accordance with prevailing rules of origin.

Section 4: Industry, Commerce and Other Trades [subhead]

Article 122
The Hong Kong Special Administrative Region shall practise free and open policies regarding industry, commerce and other trades.

Article 123
The government of the Hong Kong Special Administrative Region shall create the necessary environment and conditions for encouraging industrial invtstment, technological progress and the development of new industries.

Article 124
The government of the Hong Kong Special Administrative Region shall formulate appropriate policies to promote and co-ordinate the development of various trades such as commerce, tourism, real estate, transport, public utilities, services, agriculture and fishery.

Section 5: Land leases

Article 125
The government of the Hong Kong Special Administrative Region may, on its own, formulate policies regarding the development, management and use of land.

Article 126
All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond June 30, 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the region.

Article 127
As regards leases of land granted or renewed where the original leases contain no right of renewal, during the period from May 27, 1985 to June 30, 1997, which extend beyond June 30, 1997 and expire not later than June 30, 2047, the lessee is not required to pay an additional premium as from July 1, 1997, but an annual rent equivalent to 3 percent of the rateable value of the property at that date, adjusted inlstep with any changes in the rateable value thereafter, shall be charged.

Article 128
In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on June 30, 1984 held by, or, in the case of small houses

granted after that date, where property is granted to, a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the previous rent shall remain unchanged so long as the property is held by that person or by one of his lawful successors in the male line.

Article 129
Where leases of land without a right of renewal expire after the establishment of the Hong Kong Special Administrative Region, they shall be dealt with in accordance with laws and policies formulated by the region on its own.

Section 6: Shipping [subhead]

Article 130
The Hong Kong Special Administrative Region shall maintain Hong Kong's previous systems of shipping management and shipping regulation.
The specific functions and responsibilities of the government of the Hong Kong Special Administrative Region in respect of shipping shall be defined by it on its own.

Article 131
The Hong Kong Special Administrative Region shall be authorized by the Central People's Goverpment to continue to maintain a shipping register and issue related certificates under its own legislation using the name "Hong Kong, China."

Article 132
With the exception of foreign warships, access for which requires the special permission of the Central People's Government, ships shall enjoy access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the region.

Article 133
Private shipping businesses and shipping-related businesses and private container terminals in the Hong Kong Special Administrative Region may continue to operate freely.

Section 7: Civil Aviation [subhead]

Article 134
The government of the Hong Kong Special Administrative Region shall create conditions and take measures for the maintenance of the status of the region as a centre of international and regional aviation.

Article 135
The Hong Kong Special Administrative Region shall continue the previous system of civil aviation management in Hong Kong and keep its own aircraft register in accordance with provisions laid down by the Central People's Government concerning nationality marks and registration marks of aircraft.

Access of foreign military aircraft to the Hong Kong Special Administrative Region requires the special permission of the Central People's Government.

Article 136
The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation, including the management of airports, the provision of air traffic services within the flight information region of the Hong Kong Special Administration Region, and the discharge of other responsibilities allocated to it under the regional air navigation procedures of the International Civil Aviation Organization.

Article 137
The Central People's Governvent shall, in consultation with the government of the Hong Kong Special Administration Region, make arrangements providing for air services between the region and other parts of the People's Republic of China for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and other airlines of the People's Republic of China.

Article 138
All air service agreements providing for air services between other parts of the People's Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region and for air services between the Hong Kong Special Administrative Region and other states and regions with stops at other parts of the People's Republic of China shall be concluded by the Central People's Government.
In concluding the international air service agreements referred to in the first Paragraph of this Article, the Central People's Government shall take account of the special conditions and economic interests of the Hong Kong Special Administrative Region and consult the government of the region.
Representatives of the government of the Hong Kong Special Administrative Region may participate, as members of the delegations of the Government of the People's Republic of China, in air service consultations with foreign governments concerning arrangements for such services referred to in the first Paragraph of this Article.

Article 139
Acting under specific authorizations from the Central People's Government, the government of the Hong Kong Special Administrative Region may:
(1) renew or amend air service agreements and arrangements previously in force;
(2) negotiate and conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and rights for over-flights and technical stops; and
(3) negotiate and conclude provisional arrangements where no air service agreement with a foreign state or with another region is in force.

All scheduled air services to, from or through Hong Kong, which do not operate to, from or through the mainland of China shall be regulated by the air service agreements or provisional arrangements referred to in this Article.

Article 140
The Central People's Government shall give the government of the Hong Kong Special Administrative Region the authority to:
(1) negotiate and conclude with other authorities all arrangements concerning the implementaoion of the air service agreements and provisional arrangements referred to in Article 139 of this Law:
(2) issue licences to airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong;
(3) designate such airlines under the air service agreements and provisional arrangements referred to in Article 139 of this law; and
(4) issue permits to foreign airlines for services other than those to, from or through the mainland of China.

Article 141
Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses there before the establishment of the Hong Kong Special Administrative Region may continue to operate.

Chapter VI: Education, Science, Culture, Sports, Religion, Labour and Social Service [subhead]

Article 142
The Hong Kong Special Administrative Region shall maintain the educational system previously practised in Hong Kong.

Article 143
The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications.
Community organizations and individuals may, in accordance with law, run educational undertakings of various kinds in the Hong Kong Special Administrative Region.

Article 144
Educational institutions of all kinds may retain their autonomy and enjoy academic freedom. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Schools run by religious organizations may continue to provide religious education, including courses on religion.
Students shall enjoy freedom to choose between educational institutions and to pursue their education outside the Hong Kong Special Administrative Region.

Article 145
The government of the Hong Kong Special Administrative Region shall promote the development of medical and health services and the development of Western and Chinese traditional medicine, and encourage community organizations and individuals to provide medical and health services of various kinds.

Article 146
The government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology. The Hong Kong Special Administrative Region shall protect, by law, achievements in scientific and technological research, patents, discoveries and inventions.
The government of the Hong Kong Special Administrative Region shall, on its own, decide on the scientific and technological standards and specifications applicable in Hong Kong.

Article 147
The government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect the achievements and the legitimate rights and interests of authors in their literary and artistic pursuits.

Article 148
The government of the Hong Kong Special Administrative Region shall not interfere in the internal affairs of religious organizations and shall not restrict religious activities which do not contravene the laws of the region.
Religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected.
Religious organizations may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.

Article 149
Religious organizations and believes in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organizations and believers elsewhere.

Article 150
The government of the Hong Kong Special Administrative Region shall, on its own, decide on the methods of assessing and accrediting qualifications for professional practice for the various professions. The methods of assessing and accrediting qualifications previously practised in Hong Kong may be maintained and perfected.
Persons with professional qualifications or qualifications for professional practice obtained prior to the establishment of the Hong Kong Special Administrative Region may retain their previous qualifications.

The Hong Kong Special Administrative Region shall maintain the professions and the professional organizations recognized prior to the establishment of the region, and these organizations may, on their own, assess and accredit professional qualifications.
The government of the Hong Kong Special Administrative Region may, as required by developments in society and in consultation with the parties concerned, recognize new professions and professional organizations.

Article 151
The government of the Hong Kong Special Administrative Regional [word as published] shall, on its own, formulate policies on sports. Previous non-governmental sports organizations may continue to exist and develop in accordance with law.

Article 152
The Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for organizations in fields such as education, medicine, culture, arts, recreation, sports, social welfare and social work. Staff previously serving in subventioned organizations in Hong Kong may remain in their employment in accordance with the previous system.

Article 153
The government of the Hong Kong Special Administrative Region shall maintain the previous social welfare system and shall formulize, on its own, policies on the development and improvement of this system in the light of the economic conditions and social needs.

Article 154
Voluntary organizations providing social services in the Hong Kong Special Administrative Region may, on their own, decide their forms of service in accordance with law.

Article 155
The Hong Kong Special Administrative Region shall, on its own, formulate labour laws and policies in the light of economic development, social needs and the specific circumstances of labour-management consultations.

Article 156
The relationship between non-governmental organizations in fields such as education, science, technology, culture, sports, the professions and social welfare as well as religious organizations in the Hong Kong Special Administrative Region and their counterparts on the mainland shall be in conformity with the principles of non-subordination, non-interference and mutual respect.

Article 157
Organizations in fields such as education, science, technology, culture, sports, health, the professions, labour, social welfare and religion in the Hong Kong Special Administrative Region may maintain and develop relations with foreign countries and other regions and with relevant international orxanizations. They may, as required, use the name "Hong Kong, China" in the relevant activities.

Chapter VII: External Affairs [subhead]

Article 158
Representatives of the government of the Hong Kong Special Administrative Region may participate, as members of delegations of the Government of the People's Republic of China, in negotiations at the diplomatic level directly affecting the region conducted by the Central People's Government.

Article 159
The Hong Kong Special Administrative Region may, on its own, using the name "Hong Kong, China," maintain and develop relations and conclude and implement agreements with states, regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.

Article 160
Representatives of the Hong Kong Special Administrative Region may participate, as members of delegations of the Government of the People's Republic of China, in international organizations or conferences in appropriate fiels limited to states and affecting the region, or may attend in such other capacity as may be permitted by the Central People's Government and that international organization or conference concerned, and may express their views, using the name "Hong Kong, China."
The Hong Kong Special Administrative Region may, using the name "Hong Kong, China," participate in international organizations and conferences not limited to states.
The Central People's Government shall take the necessary steps to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organizations of which the People's Republic of China is a member and in which Hong Kong participates in one capacity or another.
The Central People's Government shall, where necessary facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizatiops in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member.

Article 161
The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the region, and after seeking the views of the government of the region.

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International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the region to make appropriate arrangements for the application to the region of other relevant international agreements.

Article 162
The Central People's Government shall authorize the government of Hong Kong Special Administrative Region to issue, in accordance with law, passports of the Hong Kong Special Administrative Region of the People's Republic of China to all Chinese nationals who hold permanent identity cards of the region, and travel documents of the Hong Kong Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the region. The above passports and documents shall be valid for all states and regions and shall record the holder's right to return to Hong Kong.
The government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and other regions.

Article 163
The Central People's Government shall assist or authorize the government of the Hong Kong Special Administrative Region to conclude visa exemption agreements with states or regions.

Article 164
The Hong Kong Special Administrative Region may, as necessary, establish official or semi-official economic and trade missions in foreign countries and shall report the establishment of such missions to the Central People's Government for the record.

Article 165
The establishment of foreign consular and other official or semi-official missions in the Hong Kong Special Administrative Region requires the approval of the Central People's Government.
Consular and other official missions established in Hong Kong by states which have formal diplomatic relations with tht People's Republic of China may be maintained.
According to the circumstances of each case, consular and other official missions established in Hong Kong by states which have no formal diplomatic relations with the People's Republic of China may either be permitted to remain or be changed to semi-official missions.
State not recognized by the People's Republic of China can only establish non-governmental institutions in Hong Kong.

Chapter VIII: The Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region [subhead]

Article 166
Apart from displaying the national flag and national emblem, the Hong Kong Special Administrative Region may use a regional flag and regional emblem of its own (to be drafted).

Article 167
The regional flag of the Hong Kong Special Administrative Region (to be drafted).

Article 168
The regional emblem of the Hong Kong Special Administrative Region (to be drafted).

Chapter IX: Interpretation and Amendment of the Basic Law [subhead]

Article 169
The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress.
When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.
The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government, the courts of the region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.
The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

Article 170
The power of amendment of this Law is vested in the National People's Congress.
The right to propose amendments to this Law rests with the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment proposals from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the region to the National People's Congress, two-thirds of all the members of the legislature of the region, and the Chief Executive of the region.
Before a proposal for an amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall first study it and submit its views.

No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.

Chapter X: Supplementary Provisions [subhead]

Article 171
The first government and the first Legislative Council of the Hong Kong Special Administrative Region shall be established in accordance with the principles of national sovereignty and of smooth transition and in accordance with the stipulations of Annex III: "Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrtive Region."

Article 172
At the time of the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the region except for those which tht Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they can be annualed or revised according to the procedure as prescribed by this Law.
Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the laws of the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

Annex I: Method for Selecting the Chief Executive of the Hong Kong Special Administrative Region [subhead]

Alternative 1
1. The Chief Executive of the Hong Kong Special Administrative Region shall be elected locally by a broadly representative electoral college.
2. The electoral college shall be composed of about 600 representatives from various walks of life in Hong Kong, including members of the legislature; representatives of district organizations; representatives of corporate bodies and non-corporate permanent organizations; and representatives of various functional constituencies (including industry, commerce, finance, professions, education, labour, religious communities, social services and the public servants).
3. Communities and organizations with seats in the electoral college may, according to their own rules, elect their representatives by a democratic procedure. Each elected representative must not concurrently represent several organizations and shall vote in an individual capacity. The electoral college will be dissolved after the election is completed.
4. The electoral college shall elect a nominating committee of 20 members from its own midst. The committee shall nominate three candidates for the office of the Chief Executive. Members of the nominating committee cannot run for the office of the Chief Executive0 nor can they vote in the election of the Chief Executive.
5. The electoral college shall vote on the nominations by the nominating committee, and a candidate must win over half of the votes to be elected. If no one wins over half of the votes on the first ballot, a second ballot has to be taken on the two candidates with the highest number of votes. The Chief Executive elected by the electoral college shall be reported to the Central People's Government for appointment.
6. Detailed election rules shall be prescribed by the laws of the government of the Hong Kong Special Administrative Region.

Alternative 2
1. The Chief Executive of the Hong Kong Special Administrative Region shall be nominated by no less than one-tenth of the members of the legislature, and directly elected by a general election held throughout Hong Kong.
2. Each member of the legislature can nominate only one candidate for the Chief Executive.
3. The election for the Chief Executive must be genuine and held at regular intervals. The right to vote must be universal and equal. Election should be by secret ballot to ensure free expression of the will of the voters.
4. If the elected Chief Executive is a member of the legislature, the executive authorities, or the judicial mrgans, he/she must resign from his/her original post upon election.
5. Detailed rules for the election of the Chief Executive shall be prescribed by the laws of the Hong Kong Special Administrative Region.

Alternative 3
1. The Chief Executive shall be elected by a functional electoral college on a one-person-one-vote basis.
2. The functional electoral college shall have no more than 600 members and be composed of representatives elected from among the permanent residents of the Hong Kong Special Administrative Region, who belong to business, finance, professional, labour and other organizations which have an influence on the operation of the government and social services. The proportions of representation shall be as follows:

| | |
|---|---|
| Business and financial organizations | 25 percent |
| Professional bodies | 35 percent |
| Labour organizations | 10 percent |
| Religious, social welfare and philanthropic institutions | 15 percent |
| Area committees and street vendors' organizations | 15 percent |

3. Any person with qualifications prescribed by Article 44 of this Law and nominated by no less than 50 permanent residents of Hong Kong can become a candidate for the Chief Executive of the Hong Kong Special Administrative Region.
4. Members of the electoral college shall not nominate or be nominated as candidates. Nominators shall not be members of the electoral college or be candidates. Candidates shall not be members of the electoral college or nominators of other candidates.

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Alternative 4

1. The selection of the first Chief Executive is specified in other provisions. The second or third chief executives shall be selected by an advisory group through consultation.

The advisory group shall be composed of 50-100 advisers. Candidates for advisers shall be nominated by different circles in Hong Kong, selected by the Executive Council and then appointed by the Chief Executive after approval by the Central People's Government. (These are special political advisers, different from other professional advisers).

Each advisory group must be formed six months before the term of office of the incumbent Chief Executive expires. But if the advisory group and the Central People's Government endorse him for another term, the next advisory group need not be formed.

2. Subsequent chief executives shall be elected by an electoral college.

The electoral college shall be composed of former members of the Legislative Council, former members of the Executive Council, former chief executives, and former principal officials appointed by the Central People's Government. The first electoral college cannot be formed with less than 250 members. The number may gradually increase in the successive electoral colleges, but shall not exceed 500. Once that number is exceeded, members will have to resign in the order of their length in office. If their length in office is the same, the member elder in age shall resign first.

Three candidates for the office of the Chief Executive shall be nominated by the advisory group and, after the approval of the Central People's Government, the Chief Executive shall be voted on by the electoral college.

Alternative 5

1. The Chief Executive shall be elected by all the voters of Hong Kong on a one-person-one-vote basis. Three candidates shall be nominated, through consultation or by ballot after consultation, by the "Nominating Committee for the Election of the Chief Executivelof the Hong Kong Special Administrative Region."

2. The "Nominating Committee" shall be composed of permanent residents of Hong Kong who must be broadly representative, including deputies of the Hong Kong region to the National People's Congress, members of the National Committee of the Chinese People's Political Consultative Conference from the Hong Kong region, representatives from Hong Kong's legislature and from district organizations, and from other strata and sections of society in Hong Kong.

3. The proportions of representation of The "Nominating Committee" shall be as follows:

| | |
|---|---|
| Representatives of business and financial circles | 25 percent |
| Representatives of professional bodies | 25 percent |
| Representatives of labour, grass-roots and religious organizations | 25 percent |
| Members of the legislature | 12 percent |
| Members of district organizations | 8 percent |
| Deputies to the National People's Congress and members of the National Committee of the Chinese People's Political Consultative Conference | 5 percent |

4. The "Nominating Committee" shall formulate a procedure for consultation or balloting and nominate candidates for theloffice of the Chief Executive. Members of the Nominating Committee shall not be candidates for the office of the Chief Executive.

5. Members of The "Nominating Committee" shall be elected, recommended or selected through consultation by corporate bodies or noncorporate permanent organizations in various fields. Rules of the "Nominating Committee" shall be prescribed by the laws of Hong Kong Special Administrative Region.

6. The Hong Kong Special Administrative Region shall stipulate by law the provisions for constituency registration and voting procedures for a one-person-one-vote general election of the Chief Executive.

Annex II Method for Constituting the Legislative Council of the Hong Kong Special Administrative Region [subhead]

*Alternative 1*

1. The legislature of the Hong Kong Special Administrative Region shall be composed of 80 persons. The proportions of the representation shall be as follows:

| | |
|---|---|
| Members elected by functional bodies | 50 percent |
| Members directly elected by districts | 25 percent |
| Members elected by the electoral college | 25 percent |

2. The composition of the electoral body and the nominating committee shall be the same as that prescribed in Alternative 1, "Method for Selecting the Chief Executive of the Hong Kong Special Administrative Region", and the chairman of the Nominating Committee shall be the Chief Executive.

3. In the above three types of election, each person can vote and stand for election only in one.

4. The term of office of the members of the legislature shall be four years, and half the members shall be elected every two years. The functional bodies shall elect half of their members to the legislature every two years. The direct election in the districts and the election by the electoral college shall be held alternately every two years (District direct elections and elections of the Chief Executive shall take place in the same year).

5. District direct elections: Hong Kong shall be divided into 10 constituencies, with two seats for each constituency, and the two candidates with the first and second highest number of votes shall be elected.

6. Detailed election rules shall be prescribed by the laws of the Hong Kong Special Administrative Region.

Alternative 2
1. The legislature of the Hong Kong Special Administrative Region shall be constituted as follows: No less than 50 per cent of the members shall be directly elected in a general election; no vore than 25 per cent shall be elected by the functional bodies, and no more than 25 per cent shall be elected by district organizations (i.e. district boards, Urban Council and Regional Council or other similar organizations).
2. The direct election of the legislature must be genuine and held at regular intervals. The right to vote must be universal and equal. Election shall be by secret ballot so as to ensure free expression of the will of the voters.
3. Detailed rules for the election of the legislature shall be prescribed by the laws of the Hong Kong Special Administrative Region.

Alternative 3
1. The legislature of the Hong Kong Special Administrative Region shall have 60 members.
2. Thirty per cent of the members (i.e. 18 persons) shall be elected by the advisory group from among non-advisers. At least one-third of these members (i.e. 6 persons) shall be principal officials, and the rest (around two-thirds) shall be members of the Executive Council and other public figures. (members of the legislature elected by the advisory group must include members of the Executive Council and principal officials so as to strengthen the links between the executive and the legislature).
3. Forty per cent of the members (i.e. 24 persons) shall be elected by functional bodies.
4. Thirty per cent of the members shall be elected directly by the district. The members of the legislature directly elected and those elected by the advisory group shall be roughly the same in numbers and shall be elected roughly at the same time, so that balance can be maintained. (Unless the method of the election by the advisory group is accepted, direct election cannot be held).
5. Two election methods stated above in paragraphs 3 and 4 shall be prescribed in detail by law.

Alternative 4
1. The composition of the legislature of the Hong Kong Special Administrative Region shall be as follows:

| | |
|---|---|
| From business circles | 30 percent |
| From the professions | 25 percent |
| From grass-roots organizations | 20 percent |
| Through district general elections | 25 percent |

2. The composition is thus divided into four major categories. The first three major categories are further divided into sub-categories according to trades or professions. The delimitation of each sub-category and the number of members it elects to the legislature shall be prescribed by the laws of the Hong Kong Special Administrative Region.
All members of the legislature who belong to the three major categories shall be elected from corporate bodies in accordance with law.
According to the assigned number of seats, each corporate body shall decide on its own which of the following methods to adopt for electing its members to the legislature:
(1) Each member is directly elected on a one-person-one-vote basis;
(2) Members from its subsidiaries are elected through indirect election on a one-unit-one-vote basis; and
(3) The general membership conference authorizes a council to elect members through indirect election.
3. The division of the district constituencies, the voter registration, the voting procedures, and the nomination of candidates in district general elections shall be prescribed by the laws of the Hong Kong Special Administrative Region.

(Notes)

1. The members who put forward alternatives 1 and 3 maintained that their proposed methods for electing members of the legislature are "package" deals, that is to say, direct district election is conditional upon the acceptance of the other two types of election.

2. Some members proposed that all the members of the legislature of the Hong Kong Special Administrative Region be elected by the functional bodies and that the method of election by the functional bodies be the same as that in Alternative 3 in Annex I.

3. A member proposed that all the members of the legislature of the Hong Kong Special Administrative Region be elected by districts through direct election on a one-person-one-vote basis. The election of the legislature must be genuine and held at regular interval. The right to vote must be universal and equal. The election must be by secret ballot so as to ensure a free expression of the will of the voters.

4. A member proposed that the method of general election on a one-person-one-vote basis should be considered together with the question of nationality, and studies must be made on the right to vote and to stand for election of Hong Kong permanent residents who have moved to a foreign country (but might not have acquired foreign nationality).

Annex III Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region [subhead]

1. Within the year of 1996, the National People's Congress shall establish a Preparatory Committee of the Hong Kong Special Administrative Region, which shall be responsible for the preparations of the establishment of the region, and shall decide on the specific method for the formation of its first government. The preparatory committee shall be composed of mainland members and of Hong Kong members who shall constitute not less than 50 percent. Its chairman and members shall be appointed by the Standing Committee of the National People's Congress.

2. The Preparatory Committee for the Hong Kong Special Administrative Region shall be responsible for preparing the establishment of the "Election Committee for the First Government of the Hong Kong Special Administrative Region."

"The Election Committee" shall be composed entirely of permanent residents of Hong Kong and must be broadly representative. It shall include deputies of the Hong Kon

region to the tnational People's Congress of the People's Republic of China, Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference, experienced persons who have served in Hong Kong's administrative, legislative and advisory organizations before the establishment of the Hong Kong Special Administrative Region, as well as persons representative of all strata and sections of society.

The proportions of the composition of "the Election Committee" are tentatively proposed as follows:

| | |
|---|---|
| Persons from business and financial circles | 25 percent |
| Professionals | 25 percent |
| Persons from labour, grass-roots and religious organizations | 25 percent |
| Political figures of former times, Deputies to the National People's Congress and members of the National Committee of the Chinese People's Political Consultative Conference | 5 percent |

3. "The Election Committee" shall formulate procedures and accordingly recommend the candidate for the first Chief Executive through local consultation or through local election after consultation, and report the recommended Chief Executive to the Central People's Government for appointment. the term of office of the first Chief Executive shall be the normal term.

4. The Chief Executive of the Hong Kong Special Administrative Region shall be responsible for preparing *the election of the first government of the region accord*ing to this Law.

5. The first (or provisional) legislature of the Hong Kong Special Administrative Region shall be elected by the "Election Committee". All members of the former Hong Kong Legislative Council can all be candidates for membership in the first (or provisional) legislature of the region.

The term of office of members of the first (or provisional) legislature of the Hong Kong Special Administrative Region shall be two years.

6. The first Chief Executive of the Hong Kong Special Administrative Region shall be sworn in to office on July 1, 1997. On July 1, 1997, the first government and legislature of the Hong Kong Special Administrative Region shall be inaugurated simultaneously.

(Note)

1. The members proposed that a map showing the administrative boundaries of the Hong Kong Special Administrative Region be published by the State Council when the Basic Law is promulgated by the National People's Congress. [position for note not indicated within body of text]

2. The proposal on the establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region put forward by the Sub-group on the Relationship between the Central Authorities and the Hong Kong Special Administrative Region reads as follows:

(1) Name
To be called tentatively the Committee for the the Basic Law of the Hong Kong Special Administrative Region of the Standing Committee of the National People's Congress.

(2) Affiliation
To be a subordinate organ of the Standing Committee of the National People's Congress.

(3) Duties
To study and submit its views to the National People's Congress or its Standing Committee on the following questions.
(a) Questions on whether laws enacted by the legislature of the Hong Kong Special Administrative Region are in conformity with the Basic Law and legal procedures (Article 16 of the Draft Basic law for soliciting opinions);
(b) Questions relating to the applicability of nationwide laws in the Hong Kong Special Administrative Region (Article 17);
(c) Questions relating to the interpretation of the Basic Law (Article 169); and
(d) Questions relating to the amendment of the Basic Law (Article 170). [position for note not indicated within body of text]

(4) Composition
To be composed of mainland members and Hong Kong members, including persons from the legal profession, appointed by the Standing Committee of the National People's Congress. The number of its members and the proportions of its composition remain to be determined.

3. The names of the different departments of the executive authorities of the Hong Kong Special Administrative Region shall tentatively be called:
1) The three main departments: the Department of Administration, the Department of Finance and the Department of Justice shall be called si, or department in English, and those heading them shall be called Administrative Secretary, Financial Secretary and Secretary of Justice respectively.
2) Those departments with policy-making powers shall be called ju, or bureaus in English, such as the Bureau of Finance, the Bureau of Industry and Commerce, the Bureau of Transport, the Bureau of Education and Manpower and the Civil Service Bureau.
3) Those departments which carry out administrative duties and do not make policies shall be called chu, or divisions in English, such as the Police Division, th. External Affairs Division and the Immigration Servi Division.

4) Those departments whose work is relatively independent shall be called shu, or commissions in English, such as the Commission against Corruption and the Commission of Audit.

4. The members held that in general, principal officials should be selected from among public servants. However, they can also be selected from among prominent members of society other than public servants. Principal officials of the latter type would be remunerated as public servants working on contract. They would leave the service on expiry of their terms of office. Transfers of principal officials and increase of officials of the secretary level must be reported to the Central People's Government for approval.

5. The members agreed that the English translation of [li fa hui yi 4539 3127 2585 6231] shall continue to be "Legislative Council."

6. Whether or not members of the legislature should be required to resign after being appointed principal officials in the executive authorities remains to be studied.

7. "Judges" of the courts of the Hong Kong Special Administrative Region refers to judges of the district court or above. Other members of the judicwary include magistrates of magistrate courts and presiding officers at special tribunals. Other persons working in the judiciary are considered public servants.

8. The members held that if the present three-tier structure was retained, district boards should still be district consultative bodies.

A Collection of Opinions and Suggestions of Some Members in Regard to the Articles Drafted by Their Respective Subject Sub-Groups [subhead]

Chapter I Article 2
1. A member proposed the article be revised as follows: "The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy in accordance with the provisions of this Law. The power of supervision over the implementation of this Law shall be vested in the Standing Committee of the National People's Congress. Any executive, legislative or judicial act which exceeds the powers authorized by this Law may be declared null and void by the Standing Committee of the National People's Congress."
2. Another member proposed the following amendment: "Except for foreign affairs and defence which are the responsibility of the Central People's Government, the Hong Kong Special Administrtwve Region shall enjoy a high degree of autonomy."

Article 10
A member proposed that the last phrase of paragraph 1 be revised to read: "shall be ultimately based on the provisions of this Law." And the second paragraph should become a separate article.

Chapter II

Article 13
A member proposed that there should be separated laws to deal with offenses committed by members of the garrison.

Article 16 paragraph 3
1. A member proposed that the paragraph be revised to read: "If the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region, considers any law of the region not to be in conformity with this Law or legal procedures, it may refer the law in question to the Court of Final Appeal for its consideration. if the court considers this law or a part thereof not to be in conformity with this Law or legal procedures, it may declare that the law or part null and void, but the declaration shall not have retroactive effect."
2. A member proposed that the last clause of paragraph 3 of Article 16 be amended to read: "This cessation shall not have retroactive effect except in criminal and constitutional cases."

Article 17
A member proposed that the article be amended to read: "The laws of the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided in Article 8 of the General Principles of this law, and laws enacted by legislature of the region.
"Laws enacted by the National People's Congress or its Standing Committee shall not apply in the Hong Kong Special Administrative Region except for those relating to defence and foreign affairs and other matters which, according to the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region.
"Whenever there is need to apply in the Hong Kong Special Administrative Region any of the above-mentioned laws concerning defence and foreign affairs, they shall be applied by way of legislation by the legislature of the region on the directives of the Standing Committee of the National People's Congress.
"Except in cases of emergency, the Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong special region and the government of the region before issuing the above-mentioned directives
"If the legislature of the Hong Kong Special Administrative Region fails to act in compliance with the directives of the Stanhing Committee of the National People's Congress, the Standing Committee may promulgate and

apply the above-mentioned law in the Hong Kong Special Administrative Region through the Chief Executive of the region.
"Apart from the laws concerning defence and foreign affairs as mentioned above, a few nation-wide laws which give expression to national unity and territorial integrity (as listed in the appendix of this Law) shall be applicable in the Hong Kong Special Administration Region."

Article 18
Some members put forward the following two alternatives:

*Alternative 1*
The courts of the Hong Kong Special Administrative Region shall continue to have jurisdiction over cases originally under the jurisdiction of courts in Hong Kong, except for those Listed in the following clauses (1) to (4):
(1) Cases relating to the relationship between the Central Authorities and the Hong Kong Special Administrative Region;
(2) Cases relating to the validity of executive acts (including defence and foreign affairs) of the Central Authorities.
(3) Cases relating to the validity of executive acts of the Government of the Hong Kong Special Administrative Region in implementing, in accordance with the provisions of this Law, the directives of the Central Authorities concerning defence and foreign affairs; and
(4) Cases relating to the validity of those executive acts of the Government of the Hong Kong Special Administrative Region in dealing with external affairs on its own as authorized by the Central Government and in accordance with the provisions of this Law, which were deemed to be "acts of state" under the laws previously in force in Hong Kong, and cases relating to the contents of the executive acts which were deemed to be "facts of state" under the laws previously in force in Hong Kong.

The courts of the Hong Kong Administrative Region shall seek the advice of the Chief Executive when questions mentioned in Clauses (1) to (4) arise in any legal proceedings. A statement issued by the Chief Executive regarding the matter shall be binding on the courts.
Before issuing such a statement, the Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council.

(Explanatory note: The types of cases listed in the Clauses (1) to (4) above are not suitable for a court under a local government to try, although the court enjoys power of final adjudication.)

Alternative 2
The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the region, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system and principles shall be maintained.
The courts of Hong Kong Special Administrative Region shall seek the advice of the Chief Executive in accordance with the principles and legal precedents of the Common Law when questions concerning foreign affairs and defence arise in any legal proceedings. A statement issued by the Chief Executive regarding such questions shall be binding on the courts.
Before issuing such a statement, the Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council.
Regulations regarding the handling by courts of the Hong Kong Special Administrative Region of cases relating to organizations, organs of state power or their personnel of the People's Republic of China (including those mentioned in Articles 13 and 21 of Chapter 2), and regulations concerning compensations by organizations, organs of state power and the personnel concerned, shall be stipulated by the law of the region.

Article 20
A member proposed that the article be revised to read: "Chinese nationals holding identity cards as permanent residents of the Hong Kong Special Administrative Region are entitled to participate in the state affairs as prescribed by law. In accordance with the assigned number of seats and the election procedures specified by the Standing Committee of the National People's Congress, Chinese nationals who are permanent residents of the region shall elect Chinese nationals of the same states to be deputies of the region to the National People's Congress.
"The deputies of the Hong Kong Special Administrative Region to the National People's Congress shall not interfere in the affairs which the region administers on its own in accordance with this Law."

Chapter III

Article 24
A member proposed that the Article be revised to read: "Hong Kong residents shall be equal before the law. They shall not be subject to discrimination on grounds of nationality, race, ethnic origin, language, sex, occupation, religious belief, political views, educational level, or property status."

Article 25
Some members proposed that this Article be revised to read: "Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election as prescribed by law."

Article 26
Some members proposed the adoption of the wording: "Hong Kong residents shall, in accordance with law, have:"

Article 29
A member proposed the deletion of "except in cases where, to meet the needs of public security or of investigation into criminal offenses,... " from the article. But after deliberation by the sub-group, the clause i retained.

Article 31
1. Some members proposed that a third paragraph be added to this Article: "No person shall be subject to discrimination or impairment of his/her civil rights on grounds of religious belief."
2. Some members proposed that the Article be rewritten as follows: "Residents of the Hong Kong Special Administrative Region shall have the right to freedom of thought, conscience and religion. These rights shall include the freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching."

Article 34
1. Some members proposed that the word "legitimate" as in "legitimate rights and interests" be deleted.
2. As to whether Hong Kong residents shall have the right to challenge in the Hong Kong courts the actions of the offices of the Central Authorities and their personnel in Hong Kong, the Subgroup on the Fundamental Rights and Duties of the Residents proposed that provisions be made for it by the relevant sub-groups under the subject of jurisdiction.

Article 41
A member proposed that this Article be revised to read: "Persons in Hong Kong other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms (except the right to vote and to stand for election) of Hong Kong residents prescribed in this Chapter." After deliberation the Sub-group on the Fundamental Rights and Duties of the Residents found apart from the right to vote and to stand for election, there are a few other rights, such as the rights to free entry into Hong Kong, which "other persons" cannot enjoy. The article thus remains unchanged.

Chapter IV

Article 43
A member proposed that this article be revised to read: "The Chief Executive of the Hong Kong Special Administrative Region is the head of the region and the head of the executive organs of the region, representing the region and leads its executive organs and shall be accountable to the Central People's Government, the Hong Kong Special Administrative Region, and the legislature of the region in accordance with the provisions of this law."

Article 44
A member proposed that this Article be revised to read: "The Chief Executive of the Hong Kong Special Administrative Region shall be a Chinese national of no less than 40 years of age who is a permanent resident of the region, who has ordinarily resided in Hong Kong for 20 years and who, before assuming office, has resided in Hong Kong for a continuous period of 10 years.

Article 46
Some members held that the term of office of the Chief Executive should be considered in conjunction with the term of office of members of the legislature. The term of office for both should be four years, and the Chief Executive may serve two consecutive terms.

Article 47
Some members pointed out that the question of restrictions on the occupation of retired chief executives and principal officials has yet to be studied. A member proposed adding the following content to this Article: "The Chief Executive, on assuming office, must resign from all other positions with pay or remuneration."

Article 48 Clause (1)
Some members held that if government was understood in its broad sense this Clause should read: "to lead the executive authorities of the Hong Kong Special Administrative Region."

Article 48 Clause (11)
A member proposed that this Clause be revised to read: "to approve (or to disapprove) public officers appearing before committees under the legislature to testify or to give evidence with regard to matters relating to the navy, army or air force, the security of Hong Kong, or the responsibility of the Central People's Government over the administration of the Hong Kong Special Administration Region.

Article 48
A member proposed that the following paragraph be added: "To exercise other powers, which are necessary and reasonable for carrying out his duties." Another member proposed that it be revised to read: "To exercise other powers prescribed in this law."

Article 52
A member held that a Clause (4) should be added to this Article: "When vote of non-confidence is passed against the Chief Executive by a two-thirds majority of the members of the legislature." Another member held that if such a provision were to be included in the Article, it should specify that the Chief Executive could dissolve the legislature after its vote of non-confidence against him, but the Chief Executive would have to resign if the newly-elected legislature again cast a vote of non-confidence.

Article 54
A member did not agree to the establishment of an Executive Council.

Article 55
1. Some members held that to serve on the Executive council members of the legislature had to be elected by the legislature and eminent members of the public required the endorsement of over half of the members of the legislature. Another member held that without an election by the legislature, members could not serve on the Executive Council.

2. As to the size of the Executive Council and whether there is a need for a proportion of its composition, a member held that the Council should be composed entirely of principal officials; another member held that at least half of the membership of the council should be members of the legislature. members agreed that no stipulations would be made for the time being pending further study.

Article 58
A member proposed that this article be rewritten as follows: "The Chief Executive may appoint or remove the commissioner of Audit with the approval of the legislature of the Hong Kong Special Administrative Region. In discharging their functions in accordance with law, the Commissioner of Audit and the Commission of Audit under him shall not be subject to any restriction by way of directive or control of any person or organ."

Article 60
A member proposed that this Article be rewritten as follows: "Members of the executive authorities shall include: (1) The Chief Executive; (2) Principal officials nominated by the Chief Executive and appointed by the Central Government (officials corresponding to the Secretary level): (3) Members of the Executive Council, including the Chief Executive and principal officials appointed by him."

Article 62
A number proposed adding a Clause (6): "Other powers which are necessary and reasonable for carrying out its duties in accordance with the provisions of this Law."

Article 64
Some members did not agree to the use of the colon after "accountable ... in the following respects" on the ground that the scope of matters for which the executive authorities are accountable would be wider than that covered by this Article.
They propose that this article be revised to read: "The executive authorities of the Hong Kong Special Administrative Region must abide by the law and shall be accountable to the legislature of the region. They shall (1) implement laws passed by the legislature and already in force; (2) present regular reports on their work, to the legislature; (3) be subject to supervision by the legislature; (4) answer questions raised by members of the legislature, and be subject to or assist in investigations by the legislature on special issues; and (5) obtain approval from the legislature for taxation and public expenditure, and be subject to supervision by the legislature in respect to public expenditure."

Article 66
Some members proposed that a second paragraph be added to this article: "The legislative power of the Hong Kong Special Administrative Region is vested in the legislature of the region." However, a member held that the wording should read "The legislative power of the Hong Kong Special Administrative Region."

Article 70
Most members were in favour of Alternative 1; some members were in favour of Alternative 2.

Article 71 Clause (2)
Some members believed that the agenda should be decided on by the Chief Executive.

Article 72 Clause (5)
A member proposed that this Clause be revised to read: "To review and question the work of the executive authorities."

Article 72 Clause (9)
1. A number proposed that the legislature should be able to pass a vote of non-confidence with a two-thirds majority against the Chief Executive or any principal official on a motion jointly proposed by one-fourth of the members of the legislature, and it shoulh report the non-confidence motion to the central People's Government for the dismissal of the Chief Executive or the principal official concerned. But most members did not agree.
2. Some members believed that the proportions as prescribed by Clause (9) are too low, and the wording also contains some faults. They proposed rewriting the clause to read: "If over 50 per cent of all the members of the legislature suspect the Chief Executive of being guilty of serious breach of law or dereliction of duty, a joint motion can be proposed to establish an independent investigating committee in accordance with law. This committee, headed by the Chief Justice of the Court of Final Appeal, shall be responsible for carrying out investigations and reporting its findings to the legislature. If the committee considers the evidence sufficient, the legislature may pass motion of impeachment with a three-quarters majority and report it to the Central People's Government.

Article 72
1. A member proposed the inclusion of the following Clause: "The legislature and its subordinate committees shall have the power to summon the persons concerned to appear before them to testify and give evidence."
2. A member proposed that a provision for the establishment of standing committees and ad hoc committees should be added to this Article. But another member held that such a provision should be covered by the standing orders of the legislature.
3. A member proposed adding a Clause (10) to this Article: "other powers which are necessary and reasonable for carrying out its functions in accordance with the provisions of this law."

Article 72
A member held that bills relating to public expenditure or public policies should be jointly proposed by no less than one-tenth of the members of the legislature, but that the prior written consent of the Chief Executive should not me required.

Article 74
Some members pointed out that the quorum for meetings of the legislature could be less than half but not less than one-third of its total members and that it would not be easy to call a meeting if the quorum was set too high.

Article 84
A member proposed that after the phrase "free from any interference" in this Article, the following words should be added: "but subject to the supervision of the Standing Committee of the National People's Congress in regard to the question of whether the jurisdiction stipulated by this Law has been exceed.

Article 86
A member proposed that the principles and rights mentioned in this Article should be specified in an appendix.

Article 87
1. A member pointed out that it was not desirable to have too many members in the independent commission and that its recommendations should be made with unanimity.
2. Some members pointed out that this Law should specifically provide for the independent finance of or special appropriation of funds for the judicial organs.

Article 100
1. A member suggested that it might not be necessary to exclude foreign nationals from consideration for the post of Deputy Director for Civil Service.
2. A member pointed out that whether the posts of the Commissioner of Immigration and Inspector General of Customs and Excise should be subject to restriction could be further considered, since these two posts were not ranked at Secretary level.

Article 102
A member proposed that the following be added at the end of this article: "The government of the Hong Kong Special Administrative Region may develop and improve the above system in accordance with law and in the light of actual conditions, in order to raise the efficiency of work and the quality of public servants."

Article 103
A member proposed that this Article should be placed in the General Principles. Most members maintained that it should remain as Article 103 for the time being and that decision should be made after overall consideration by the general working subgroup.

Chapter V

Article 105
Some members held that Paragraph 2 could be omitted from the Basic Law.

Article 107
A member held that this Article could be omitted from the Basic Law.

Article 111
1. A member proposed that the words "foreign currencies" should be inserted into this Article.
2. A member proposed that the word "commodity" should be added before the word "futures."

Article 135
The Sub-group on Economy suggested that the question of what "foreign military aircraft" includes be restudied and made specific.

Chapter IX

Article 169
A member proposed that the article be revised as follows:
"The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress. The courts of the Hong Kong Special Administrative Region may interpret all the provisions of this Law.
"Regarding the provisions which are within the limits of the autonomy of the Hong Kong Special Administrative Region, the Standing Committee of the National People's Congress will grant full power to the courts of the region to interpret them when adjusticating cases.
"When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law which is outside the limits of the autonomy of the Hong Kong Special Administrative Region, the courts of the region, in applying such a provision, shall follow the interpretation of the Standing Committee. However, cases under adjudication and judgments previously rendered shall not be affected.
"The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving and interpretation of this Law.
"Provisions of Chapters 3, 4, 5, 6 and 10 are all within the limits of the autonomy of the Hong Kong Special Administrative Region. Whether the provisions of other Chapters are within the limits of the autonomy of the region may be decided by the courts of the region or by the Standing Committee of the National People's Cmngress. The Standing Committee will consult the Committee for the Basic Law of the Hong Kong Special Administrative Region before making a decision. The decision of the Standing Committee of the National People's Congress shall be final.

Article 170
1. A member proposed that the Article be revised as follows: "The power of amendment of this Law is vested in the National People's Congress.

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"The right to propose amendments to this Law rests with the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment proposals from the region shall be submitted to the National People's Congress through the State Council after obtaining the consent of two-thirds of all the members of the legislature of the Hong Kong Special Administrative Region and the Chief Executive of the region.

"Before a proposal for an amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall first study it and submit its views. No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding the [word as published] Hong Kong as stated in the preamble."

2. A member proposed that paragraph 2 be revised as follows: "The right to propose amendments to this Law rests with the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment proposals from the region shall be submitted to the National People's Congress by the delegation of the region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the region to the National People's Congress, and the Chief Executive of the region."

Chapter X

Article 171

The Sub-Group on Political Structure put forward the following alternatives

1. A member proposed that Annex III be as follows:

(1) Before 1997, the Central Authorities shall form a preparatory committee composed of both Hong Kong and mainland members. An advisory group consisting of no less than 50 persons from various walks of life in Hong Kong, appointed by the preparatory committee shall, through local consultation, select the Chief Executive for appointment by the Central Authorities.

(2) The Chief Executive shall form the Executive Council and nominate the principal officials for appointment by the Central Authorities.

(3) The advisory board shall elect legislative members nominated by the Chief Executive in conjunction with the Executive Council to form a provisional Legislative Council.

(4) The term of office of all the members of the first government shall not exceed three years. A regular government must be formed within free years in accordance with this Law.

2. A member proposed that Annex III be as follows:

The candidate for the first Chief Executive designate of the Hong Kong Special Administrative Region shall be selected through local consultation on December 1, 1996 in accordance with the method stated in Annex I. The selected candidate shall, upon the endorsement of the Central People's Government, become the first Chief Executive designate.

Before April 1, 1997, the first Chief Executive designate shall nominate candidates to be the perspective [as published] members of the first Executive Council.

The first Chief Executive designate shall, in conjunction with the perspective [as published] members of the first Executive Council, organize the "Preparatory Committee for the Formation of the First Government". At zero hour on July 1, 1997, the first Chief Executive, after being officially appointed by the Central People's Government, shall with the assistance of members of the first Executive Council, proclaim the formation of the first government of the Hong Kong Special Administrative Region and shall, as authorized by the Central Authorities, take over the administration of the region from the Standing Committee of the National People's Congress. Before the formation of the first legislature, a provisional legislature shall exercise provisional legislative power and may enact provisional ordinances if necessary.

(Explanatory note) The provisional legislature shall be elected by the electoral college locally in accordance with the method stated in the Annex. Members of the previous legislature who are relieved of their office on June 30, 1997 shall not be excluded from candidacy.

After the establishment of the first government of the Hong Kong Special Administrative Region, elections for the first district boards and the first Urban Council shall be held within 6 months in accordance with the method stated in the Annex; and the first legislature shall be elected and formed within 12 months in accordance with the method stated in Annex II.

Appendix I. Procedures for the Selection of the First Chief Executive through Local Consultation by the Various Sectors in Hong Kong. [subhead]

After the promulgation of the Basic Law, the National People's Congress shall appoint no less than 50 members to form a Preparatory Committee which will be diverse, including the drafting (by itself or by a subordinate special group), after consulting the various sectors, of the "consultation procedures" for review and approval by the National People's Congress.

On July 1, 1995, members of the "Preparatory Committee for the Implementation of the Basic Law" will elect from among themselves no less than 10 persons to form a "consultation committee" which shall organize open consultation in accordance with the "consultation procedures". Members of the "consultation committee" shall not be candidates for Chief Executive, nor shall they nominate or support any candidate for Chief Executive. The "consultation committee", responsible for promoting and supervising the consultations, shall be objective and impartial.

A candidate for the first Chief Executive designate shall be selected on December 1, 1996 for endorsement by the Central Authorities and be officially appointed as the Chief Executive on July 1, 1997.

Appendix II. Method of Election of the First Legislature [subhead]

Electoral college — Half of the members of the legislature shall be elected by a broadly representative grand electoral college. No less than two-thirds of these shall be Chinese nationals.

Indirect election — One-fourth of the members of the legislature shall be elected from among members of the district boards and the Urban Council who are Chinese nationals.

Direct election by functional constituencies — One-fourth of the member of the legislature shall be directly elected by functional constituencies (the functional constituencies shall be registered as legal persons in accordance with local laws and shall be of Chinese nationality. Regardless of their own nationalities, members of the legislature who are directly elected by functional constituencies may, by virtue of the Chinese nationality of the functional constituencies to which they belong, exercise the civil rights of Chinese nationals during their term of office.) 3. Some members proposed that Annex III be as follows:

(1) The Standing Committee of the National People's Congress of the People's Republic of China shall appoint a "Preparatory Committee for the First Government of the Hong Kong Special Administrative Region". All the members of the Committee shall be Chinese nationals, comprising mainland residents and Hong Kong Permanent residents in equal number. The chairman of the committee shall be a member of the Standing Committee of the National People's Congress.

(2) The "Preparatory Committee for the First Government of the Hong Kong Special Administrative Region" shall entrust its Hong Kong members with the responsibility of forming an electoral college in the Hong Kong Region which shall comprise representatives of the legislature and of district organizations prior to the establishment of the Hong Kong Special Administrative Region, representatives of corporate bodies and permanent non-corporate organizations, and representatives of various sectors of the community. The electoral college, which must be broadly representative, shall be called the "Electoral College for the First Government of the Hong Kong Special Administrative Region".

(3) The Electoral College for the First Government of the Hong Kong Special Administrative Region shall be responsible for drawing up the procedures for the selection of the first Chief Executive through consultation, or by election following nomination through consultation.

(The qualifications, powers, and functions of the Chief Executive shall be provided for in Chapter 4 of this Law.)

(4) The electoral college for the First Government of the Hong Kong Special Administrative Region shall be responsible for drawing up the procedures for the election of the first legislature. Members of the legislature before the establishment of the Hong Kong Special Administrative Region who meet the requirements of Chapter 4 of this Law may be elected as members of the first legislature.

(The qualifications, powers, and functions of the members of the legislature shall be provided for in Chapter 4 of this Law.)

(5) Government officials, public servants and members of the judiciary before the establishment of the Hong Kong Special Administrative Region who meet the requirements of this Law shall remain in employment in the first government.

(The composition, powers, and functions of the executive authorities shall be provided for in Chapter 4 of this Law). 4. A member proposed that Article 171 be as follows:

The first government of the Hong Kong Special Administrative Region shall be established according to the provisions of the Annex, "Method for the Formation of the First Government of the Hong Kong Special Administrative Region." The first Chief Executive and the members of the first legislature selected according to the provisions of this Annex shall be deemed to have been selected according to the provisions of Chapter 4 of this Law. But the term of office of the First Chief Executive shall expire six months after the expiry of term of office of the members of the first legislature.

Appendix: Method for the Formation of the First Government of the Hong Kong Special Administrative Region [subhead]

1. Within the year of 1996, the Standing Committee of the National People's Congress shall establish a "Preparatory Committee for the First Government of the Hong Kong Special Administrative Region." Members of the preparatory committee shall all be Chinese Nationals among the permanent residents of Hong Kong, and the chairman shall be elected from among the members.

2. In the middle or at the end of 1996, the preparatory committee shall hold a general and direct election in Hong Kong in accordance with this Law to elect the Chief Executive designate.

On July 1, 1997, the Chief Executive designate shall be appointed by the Central People's Government and be officially sworn in to office.

3. Before July 1, 1997, the Chief Executive designate shall nominate the principal officials of the Hong Kong Special Administrative Region for appointment by the Central People's Government. All the principal officials shall be sworn in to office on July 1, 1997.

4. Persons who are members of the Hong Kong Legislative Council in June 1997 shall automatically become members of the first legislature of the Hong Kong Specia

Administrative Region on July 1, 1997 and serve to the end of their term. Except for the ceremony of pledging their loyalty to the Hong Kong Special Administrative Region, there shall be no particular arrangement.

5. Some members proposed that Article 171 be as follows:

"The first government of the Hong Kong Special Administrative Region shall be established through arrangements based on the principle of the sovereignty of the People's Republic of China and smooth transition for Hong Kong." The contents of the Annex to this Article shall not be stipulated for the time being. Decision shall be made after extensive consultation and detailed study.

## SELECTED BIBLIOGRAPHY

1. *Hong Kong: Transfer of Sovereignty*, in *Case Western Reserve Journal of International Law*, Vol. 20, No. 1 (Winter 1988), pp. 1-292, 301-368. Articles' titles are reproduced below:

2. Hungdah Chiu, Y.C. Jao and Yuan-li Wu, editors, *The Future of Hong Kong, Toward 1997 and Beyond,* New York, Westport—Connecticut, London: Quorum Books, Greenwood Press, 1987. 262 pp.

3. Lee, Martin and Szeto Wah, *The Basic Law, some basic flaws,* Hong Kong: Published by the authors, 1988.

4. McGurn, Williams, ed., *Basic Law, Basic Questions, The Debate Continues*, Hong Kong: Review Publishing Co., 1988. 218 pp.

5. *Symposium on the Hong Kong Basic Law*, in *Journal of Chinese Law*, Vol. 2, No. 1 (Spring 1988), pp. 1-152. Articles' titles are reproduced below:

6. *Zhonghua Renmin Gonghegu Xianggang Tebie Xingzhenggu Jibenfa (Caoan) Zhengqiu Yijiangao* (The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (For Solicitation of Opinions)), Hong Kong: Secretariat of the Basic Law Consultative Committee, 1988. In Chinese, 62 pp.

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