HONG KONG'S NEW CONSTITUTIONAL ORDER
The Resumption of Chinese Sovereignty and the Basic Law
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I provide a brief note on how this edition is organized. The principal change from the first edition is the inclusion now of a new chapter on the economic system of Hong Kong. In the first edition the essentials of the economic chapter were considered in Chapter 4 which aimed to provide an overview of the Basic Law. It seems appropriate to have a separate chapter on the economy in view of the centrality of the economic system to a major purpose of the Basic Law in preserving Hong Kong’s market economy.

This edition also examines the way in which the transition of the colonial legal and political systems to those of the Hong Kong Special Administrative Region was handled; this helps to illustrate the contrast in attitudes or approach to legality of Mainland China and Hong Kong, which was a principal theme of the first edition. It discusses as well the growing case law on the Basic Law developed by the HKSAR courts. Already key constitutional issues have been litigated which helps to sharpen the contours of the Basic Law.

I should like to acknowledge the help I have received once again from Jill Cottrell. I have also benefited from discussions with Tony Yen of the Department of Justice. And I thank my two research assistants, Joanne Oh and Ling Wai Kwan.

Yash Ghai
June 1998
Preface to the First Edition

This book provides an analysis of the Basic Law of the Special Administrative Region of Hong Kong which was enacted by the National People’s Congress of the People’s Republic of China in April 1990 to come into effect on 1 July 1997. The principal focus of the study is the legal analysis of the Basic Law, but I have attempted to place that analysis in its historical, political and economic context.

I begin the book with a review of the history of the British acquisition of Hong Kong, pointing to its circumstances and method which caused such grave offence to China. The second chapter examines the process of the resumption of Chinese sovereignty, and some of the problems of the transition from one sovereignty to another. The third chapter provides a general background to the constitutional and political system of the People’s Republic of China in order to locate the Basic Law within that system. The fourth chapter is fundamental to the book: it attempts a conceptualization of the Basic Law, arguing that it has to be understood as much in terms of the separation of Hong Kong’s system from that on the mainland as in terms of autonomy. I continue this attempt in the fifth chapter which proposes a scheme of and approach to the interpretation of the Basic Law. The following chapters explore different aspects of Hong Kong’s constitutional order. Appendix 1 examines the decision of the Standing Committee of the National People’s Congress under art. 160 of the Basic Law on the adoption of previous laws; it should be read in conjunction with Chapter 7 on the Sources of Law. The book ends with some reflections on the Basic Law and the general frameworks and circumstances surrounding its implementation.

I have referred to the process whereby Chinese sovereignty has come to prevail in Hong Kong interchangeably as the transfer of sovereignty or
the resumption of sovereignty — not wishing to take sides in the controversy between China and Britain on the previous status of Hong Kong. China asserts that the nineteenth century treaties whereby Britain claimed sovereignty over Hong Kong were invalid and therefore Hong Kong continued to be a part of China. China allowed Britain to administer Hong Kong, but decided to resume the exercise of its sovereignty as from 1 July 1997. For its part, Britain asserts that the treaties were lawfully concluded and served to pass sovereignty over Hong Kong to Britain. However, it decided to restore Hong Kong to China as from 1 July 1997.

What is incontrovertible is that as from 1 July 1997 Hong Kong is a part of China. Recognizing this fact, I have for the most part made the distinction between Hong Kong and the rest of China or the Central Authorities of the PRC (following the terminology of the Basic Law), although occasionally I have referred to Hong Kong in contradistinction to China. Hong Kong’s new title is the Hong Kong Special Administrative Region of the People’s Republic of China; I have referred to Hong Kong after the change of sovereignty either by that title or simply as Hong Kong.

The Basic Law was enacted in Chinese. On 28 June 1990 the Standing Committee of the National People’s Congress adopted an English version of the text of the Basic Law which had been prepared under the auspices of the Law Committee of the National People’s Congress, as the official English text to ‘be used in parallel with the Chinese text’. The Chinese text prevails in the event of a discrepancy between the two texts. I have relied on the official English text in the writing of this book, but when the English text seemed unclear or puzzling, I referred to the Chinese text with the help of colleagues or research assistants.

It is a pleasure to acknowledge the assistance that I received in the preparation of the book. For the translation of various provisions of the Basic Law, other Chinese legislation and commentaries in Chinese on the Basic Law and other relevant legislation, I am grateful to Jennifer Tsui, Biby Chan Fung Kuen, Wu Zeng, Clara Tam Shuk Fong, Yang Hongyan and Davy Wu Ka Chee. I have frequently consulted William Alford and Albert Chen on the Chinese text of the Basic Law.

For research assistance I am grateful to Yang Hongyan, Richard Grams, Wu Zeng and Jayantha Jayasuriya.

I am grateful to William Alford, Andrew Byrnes, Albert Chen, Johannes Chan, Alison Conner, Cheryl Saunders, Lobsang Sangay, Peter Wesley-Smith, Michael Wilkinson and John Wilson for their comments on various chapters of the book.

I am grateful to Martin Lee, Elsie Leung, Maria Tam, Albert Chen, Johannes Chan, Andrew Byrnes, Gary Heilbronn, Janice Brabyn, Edward
Epstein, Michael Wilkinson, Bart Rwezaura, David Little, James O’Connell and John Burns for providing me with materials and information.

I am grateful to students at the University of Hong Kong and the Harvard Law School who took my courses on the Basic Law for the stimulation they provided me through their questions and comments.

I am glad to acknowledge research grants from the Conference and Research Grants Committee of the University of Hong Kong and the Research Grants Council of the government of Hong Kong. I have benefited from the resources established through two major grants from the Research Grants Council to members of the Law Department, for projects on the Bill of Rights Ordinance and treaty succession.

I should like to offer my special thanks to two persons who provided invaluable assistance and without whose generous assistance and support the book could not have been completed. Jennifer van Dale was my research assistant for most of the time I worked on the book, providing reliable and cheerful help. There is no way that I can adequately express my gratitude to Jill Cottrell who helped with the research, commented on every chapter, and read all the page proofs. I am greatly indebted to her.

Finally I should like to thank Anna and Helmut Sohmen whose generous donation in 1988 to the University of Hong Kong endowed the Sir Y. K. Pao Chair of Public Law. They hoped thereby to promote academic contributions to the debates on the future constitutional system of Hong Kong. Anna’s father, Sir Y. K. Pao, was a Vice-Chairman of the Basic Law Drafting Committee and played a key role in its drafting. So it seemed natural to me that as the first holder of the Chair in his memory, I should devote myself to the study of the Basic Law and the processes that led to it.

In relation to a book on the Basic Law, an instrument whose interpretation and implementation have already generated much controversy, it is only fair to assure the reader that while those who have assisted me in its preparation have greatly enriched it and saved me from many errors, I alone am responsible for the views expressed in it.

Yash Ghai
Abbreviations

The principal abbreviations used in the book are:

BLCC  Basic Law Consultation Committee
BLDC  Basic Law Drafting Committee
CBL   Committee for the Basic Law
CCP   Chinese Communist Party
CFA   Court of Final Appeal
CPG   Central People’s Government
HKMAO Hong Kong and Macau Affairs Office of the State Council
HKSAR Hong Kong Special Administrative Region
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
ILO   International Labour Organization
NPC   National People’s Congress
NPCSC Standing Committee of the National People’s Congress
PC    Preparatory Committee
PLA   People’s Liberation Army
PRC   People’s Republic of China
PWC   Preliminary Working Committee
SCMP  South China Morning Post
UK    United Kingdom of Great Britain and Northern Ireland
UN    United Nations
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The Acquisition of British Sovereignty Over Hong Kong

INTRODUCTION

In few colonial situations has the mode of the acquisition of British sovereignty scarred British relations with the ‘colonized’ as deeply as in Hong Kong. In other instances there was no continuing questioning of the right of British sovereignty, even if there was pride in the initial resistance to colonial rule. Claims of the colonized to independence were not based on the illegality of British occupation but on its illegitimacy as well as nationalism, self-determination, democracy and human rights. By contrast, for most of the period of the colonial occupation of Hong Kong, China rejected British claims of sovereignty, but did little, even when it had the means, to bring it to an end. The rejection of the claims of British sovereignty had legal and constitutional consequences which became clear only when sovereignty was about to be restored to China. But more important has been a continuing sense of moral outrage by the Chinese authorities (and a large part of its populace) at the colonization of a part of China. China was particularly weak and vulnerable when foreigners established their hegemony through superior armed force, imposed trade, extra-territoriality and other assertions of jurisdiction. For a nation and civilization as grand, ancient and proud as China, these experiences were a source of great humiliation and inflicted a deep wound in the national psyche — with Hong Kong occupying a symbolic place in its history as the first loss to the superior might of the West.

For the British, a large and hardened colonial power, there was nothing extraordinary in its acquisition of Hong Kong. The convenience of having it alone justified its annexation. Nor was the method of acquiring sovereignty, through the use of force as well as the threat of further force,
unusual; indeed the precise modality was not deemed of great consequence. Such was the world view of Western imperialists. Hong Kong fitted in easily and conveniently into the imperial legal framework for the acquisition and the running of overseas possessions, developed through Acts of Parliament and Orders in Council, building on the wide powers of British monarchy under the common law, often exercised through executive action only.

Much is made of the blessings of the rule of law brought by the British to Hong Kong, but it was acquired by the force of arms in the pursuit of one of the most disreputable commercial enterprises known to the world — the trade in opium forced on a regime which sought to protect its citizens from its deleterious effects. At that time the rule of law was merely the ‘rule by might’, fully reflected in the norms and practices of international law concerning the relations between the West and Asia and Africa. As international law was then conceived, all non-European nations and peoples were mere objects of international law with no legal status or voice (Anand 1987; Gong 1984). International law was reserved for ‘civilized states’ (which excluded both China and India); other peoples could be treated according to ‘discretion’, and they had no redress against depredations and injuries committed against them by the European powers. That great liberal, John Stuart Mill wrote in 1867 that to ‘characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject’ (as quoted in Anand 1987: 24). It was conceived to be the divinely ordained right of the West to force open the frontiers of other lands to trade or settlement and to carry their own laws there. If there was resistance to these intrusions, the use of armed force or other forms of coercion as ‘punitive expedition’ was entirely justified (Anand 1987: 26). ‘Treaties’ were forced upon these people, primarily to safeguard the position of one colonial power against expansionist ambitions of another.

Times and mores have changed. Chinese recovery of Hong Kong comes at a time of and reflects its growing economic and political strength. There is therefore a special joy and pride in the restoration of sovereignty, the exorcism of the ghost of the terrible past. Hong Kong is no longer a small fishing community, ‘a barren rock’, but a thriving and prosperous metropolis with over six million people. More civilized norms of international conduct have replaced the opportunistic rules of the last century. Colonialism is illegal; people have, at least in theory, the right to

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1 In 1898 Keswick of the leading firm of Jardines, urged Britain to claim all the maritime provinces of China as a British sphere, saying ‘we had the might, therefore we had the right’ (quoted in Welsh 1993:319).
self-determination, no longer object of transfer from one sovereignty to another as if chattels, and individuals have fundamental rights that secure their autonomy, no longer mere subjects. The terms for the transfer of sovereignty have undoubtedly been influenced by these ideas but whether they are consistent with the new regime of international law may be questioned (the position is briefly examined later). China does not think that the analogy of decolonization applies, and thus sought to disapply the principal norms of self-determination.

THE BASIS OF BRITISH JURISDICTION IN HONG KONG

British jurisdiction was acquired through three treaties with China between 1842 and 1898 (for an excellent account, see Dicks 1983). The background to the conclusion of these treaties lies in the policy of the British to force the liberalization of trade with China and to secure territorial concessions from which to conduct the trade. At various periods in Chinese history, there was open trade with the outside world, but by the eighteenth century, there were serious restrictions. Trade with China could be conducted only in Canton, where foreign traders were able to establish ‘factories’ or warehouses. The trade developed steadily from towards the close of the eighteenth century, and consisted largely of the purchase of Chinese tea. Foreigners could only trade through a guild of Chinese traders (co-hongs) and could only communicate with Chinese officials through them. There were restrictions on the movement of foreign traders, confined for the most part to the factory areas. These and other difficulties (for a summary, see Endacott 1964: 7–9) were compounded when the British introduced the sale of opium, in part to provide revenue for the purchase of tea. The consumption of opium increased rapidly (resulting in widescale addiction and the loss of valuable resources as payment). Attempts to curb it having failed, in 1800 the Chinese banned outright its import and local production. However, trade continued (in increasing quantities) illegally, with the connivance of foreign trading houses. After the Chinese authorities tried without avail to invoke Chinese law and international law, as well as the norms of morality to suppress the opium trade, they began to enforce the ban strictly in 1839 when all known stocks of opium in warehouses were confiscated and destroyed.2

2 Cohen and Chiu (1974: 5–7) cite attempts by China to use international law as understood by the West to stop the opium trade. The Imperial Commissioner Lin Tse-hsu arranged for the translation of relevant parts of Vattel’s Le Droit des Gens, which stated that it was
Under pressure from British traders, the British government, having occupied Chusan Island and blockaded the coast, demanded compensation for the opium so destroyed (even though the product was banned), as well as other concessions, including the opening of other ports to trade and a commercial treaty to safeguard British trade interests. An agreement (the Convention of Chuenpi) was reached in 1841 ceding Hong Kong to the British whereupon Britain occupied the island. However, the agreement was repudiated by both sides — meanwhile the opium trade had resumed, and this time British forces, under the command of Pottinger who replaced the more conciliatory Elliot, and using greater violence, occupied the chief ports on the coast, sailed up the Yangtze River, blockaded the Grand Canal and threatened Nanking. The Chinese suffered heavy casualties: the vulnerability of the Chinese empire to the superior sea power and weaponry of the West was driven home. The Chinese capitulation was the Treaty of Nanking, signed (on the British warship *Cornwallis*) in 1842 and ratified the following year.

In addition to Canton, China was forced to open Amoy, Foochow, Ningpo and Shanghai to Britons for mercantile purposes and to allow communications between British traders and the Chinese government through British officials. China was to pay a compensation of $21 million (which included 12 million for the costs of the British expedition and 6 million for the destruction of the opium). Most importantly (in retrospect) China ceded in perpetuity the island of Hong Kong, it ‘being obviously necessary and desirable that British subjects should have some port whereat they may careen and refit their ships when required, and keep stores for that purpose’. Hong Kong was ‘to be governed by such laws and regulations’ as were directed by Britain (art. III).

The second treaty, the Convention of Peking 1860, conceded the Kowloon peninsula (the exact area having already been determined by British and Chinese officials in what amounted to a private treaty) to Britain ‘to have and hold as a dependency of the colony of Hong Kong’ (art. VI). Hong Kong was only a few hundred yards from Kowloon, at the southern tip of the Chinese mainland, and with improvements in the range of gun power, it was vulnerable to attacks from there. Security
considerations were important to the acquisition of Kowloon, although the British mercantile community in Hong Kong also saw its commercial potential. The private initiative of a British official, Harry Parkes, had already secured a lease in his own name for the peninsula, including Stonecutters Island, thus adding 3.5 square miles to Hong Kong’s 29 square miles. The convention cancelled the lease and ceded Kowloon to Britain.

The convention was part of a wider peace settlement between Britain (and other Western powers) and China following serious conflicts regarding the full operationalization of the Treaty of Nanking and the forcing of China to allow the permanent diplomatic representation of Western states in Beijing. The Chinese capitulation was again brought about by massive use of Western armed might, numerous Chinese casualties, and the destruction of the Summer Palace outside Beijing (for a detailed account, see Welsh 1993: 199–210; 223–228). The complementary Treaty of Tientsin 1858 was a watershed in China’s relations with the West; and a turning point in its history. Foreigners were now allowed ‘to travel anywhere in China, to preach Christianity, to establish an embassy in Peking, and to trade up to the Yangtze to Hankow, which was, with nine others, designated as a treaty port’ (Welsh 1993: 210).

The third treaty, the Convention of Peking 1898, provided for a 99-year lease of the immediate hinterland of Kowloon. As with Kowloon, the reasons for Britain wanting this area were a mixture of military — further improvement in weaponry rendered the peninsula insufficiently protected — and commercial. The British request for it was made in the context of the carving up of China by foreign powers (now joined by Japan) with further decline in the ability of the Chinese government to resist external demands. Britain’s wish was for outright cession, but that option was problematic since other European powers were content with leases (the longest of which was 99 years). Britain itself had acquired a lease in Weihaiwei — primarily to counter Russian influence in the north (for an account of the general situation and the negotiations see Welsh 1993: 313–330). The new leased area was indicated on a map accompanying the treaty; the exact boundaries were to be determined later. In fact only the northern boundary was delimited by both sides, but it was only partially demarcated on the ground and British officials determined the rest (Wesley-Smith 1994b: 29). The New Territories included several

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3 Wesley-Smith writes that the delimitation and demarcation of the western and eastern boundaries were carried out by the British alone, who unilaterally revised the southern sea boundary and amended other boundaries as well. ‘It is unclear whether, as appears to be claimed in theory (though not always in practice) by British officials, islands
large islands, including Lantau. The total area was 365 square miles, larger territory than China had intended to provide and certainly well in excess of the needs which had provided the justification for its acquisition. There is little doubt that the treaty was forced upon the Chinese (although not under threat of military force).

The Convention of Peking 1898 was different from the previous treaties not only in its duration, but also in its provisions for ancillary matters. Dicks (1983: 443–444) suggests that this reflects a greater degree of Chinese sophistication due to new familiarity with international law acquired through translations of some standard European texts, but it must also reflect bitter Chinese experience with earlier treaties. There was no delineation of the nature of the authority that Britain would exercise over the leased territory (other than that Britain would have ‘sole jurisdiction’). China kept the Walled City of Kowloon within its jurisdiction where its officials would continue to reside — ‘except so far as may be inconsistent with the military requirements for the defence of Hong Kong’. The Walled City had a particular symbolic significance for the Chinese, for it was built as a reaction to the forced cession of Hong Kong and its retention signified Chinese sovereignty despite the lease (Dicks 1983: 449–450). China also reserved the landing-place near Kowloon city for its men-of-war, merchant and passenger vessels as well as the movement of the officials and people within the city and retained the right to use the waters of Mirs Bay and Deep Bay. Extradition of criminals was to be dealt with in accordance with the then existing treaties between China and Britain. Three other provisions were made for the benefit of the Chinese inhabitants of the territory (who numbered a great deal more than those in Hong Kong and the peninsula when they were ceded). They could use the road from Kowloon to Hsinan; they could not be expelled from the territory; and their land could not be appropriated except when required for a public purpose and in return for a fair price (see Wesley-Smith 1980 for an account of the negotiations for the treaty and the problems in its implementation). China got nothing in return for the lease.

within the New Territories have a belt of territorial sea. The convention map is seriously inadequate and provides no guidance on these matters. China has not been consulted, so far as is known, on any matters relating to boundary revisions. Thus no one can say with certainty what the boundaries of Hong Kong are’ (1994b:29).

As I point out below, the matter of boundaries is left in some confusion by the NPC Decision (4 April 1990) to establish the HKSAR. The Decision states that a map of the administrative boundaries is to be provided by the State Council. The State Council issued an order on 1 July 1997 specifying the land and sea boundaries of the HKSAR (reprinted in S.S. No. 5 to Gazette No. 6/1997 of the Gazette).
These treaties were regarded by the British as giving them full sovereignty over Hong Kong, Kowloon and the New Territories, albeit for a limited period in relation to the last. Although the 1898 treaty had at best given the right of administration of the New Territories to Britain, reserving various matters to China, Britain proceeded to rule the New Territories (with the reservation about the Walled City) as if its jurisdiction over them were as plenary as over Hong Kong and Kowloon. The British promulgated the New Territories Order in Council in 1898 which stated that the New Territories ‘shall be and are hereby declared to be part and parcel of Her Majesty’s Colony of Hong Kong and Kowloon in like manner and for all intents and purposes as if they had originally formed part of the said Colony’ (art. 1). The powers of the Governor and the Legislative Council were extended to them as were the laws of Hong Kong (arts. 2 and 3 respectively). Furthermore, six months after the treaty was signed, Britain unilaterally abrogated the provision for Chinese jurisdiction over the Walled City by occupying it and expelling the sub-magistrate, allegedly for defence reasons. An Order in Council (December 1898) revoked article 4 of the previous Order concerning the reservation and provided for the total integration of the city in the colony (art. 1) (see Wesley-Smith 1980: chap. 7, for an account of these events). Land in the New Territories was vested in the Crown, and leasehold interests given to the original occupiers on the approval by a land court of presentation of claims by them (New Territories (Land Court) Ordinance, 1900), in what would seem a violation of land guarantees in the treaty.

Such usurpations of jurisdiction as might be implied in these orders were condoned by Hong Kong courts. In *Re Wong Hon* [1959] HKLR 601, the Full Court held that the question of the jurisdiction of the British government was to be determined by the government itself, not regulated by a treaty even if the assumed jurisdiction was contrary to the assertions of the government. Assertions of jurisdiction (i.e., authority over a territory) were acts of state and therefore binding on the courts. Thus the government may evade its solemn undertakings in an international treaty by its own unilateral act. The court said, ‘Whence else than from the Crown, with or without the aid of Parliament, is jurisdiction outside the United Kingdom to be derived; and how else except by the Crown is such

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4 The decision was given under the rule then prevailing that the exercise of the royal prerogative could not be questioned by courts. In 1985 the House of Lords held that prerogative powers were as reviewable as other sources of power, but that the courts might refuse to review particular exercises of the prerogative due to reasons of public policy (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). Given the close connections between the assertion of jurisdiction overseas and foreign policy, it is likely that the courts would defer to the executive on this point.
jurisdiction to be defined or circumscribed? In these matters the Crown speaks with one voice, and alone determines the sphere in which, and the extent to which, its various organs of government, legislative, executive and judicial, shall properly function.’

In another case, which went all the way to the Privy Council, the provision of the 1898 treaty precluding the appropriation of land except for public purposes and on the payment of fair price was invoked to invalidate local legislation. The court enforced the local legislation which had breached the terms of the treaty on the ground that, according to the common law, breaches of treaties were not justiciable in municipal courts (Winfat Enterprise (HK) Co. Ltd. v Attorney-General [1985] 2 WLR 786).

The judicial support of administrative and legislative acts of the colony in contravention of the treaty merely compounded the British view of its rights and jurisdiction under the treaties. Dicks (1983: 444–446) has argued that the Chinese understanding of what they had granted Britain varied significantly from the British view, the divergence of views being due to problems of translation as well as legal concepts. As regards the 1842 and 1860 treaties, Dicks says that words ‘cede’ and ‘cession’ were terms of art which had long been understood by Western lawyers to mean the transfer of territory, together with all the legal rights appertaining to it, from one sovereign state to another, while in the Chinese view of imperial supremacy there was no room for the idea that the Emperor might transfer territory to an equal in this way. Dicks notes that there was no equivalent to the term ‘cede’ in early nineteenth-century China, and the standard expressions which began to be used at the end of the century, gerang and rangyu, had the distinct connotation of yielding or making a concession. The expressions in the two treaties are much less precise, and reminiscent of an imperial grant that the Emperor might make to an inferior ruler or tributary, with no notion of permanence. Dicks concludes that it is ‘doubtful whether even the most dispassionate Chinese reader who examined’ these treaties in the Chinese version ‘would have understood it in the sense intended by the draftsman of the English text’. Wesley-Smith makes similarly critical comments on the British interpretation of the 1898 convention, when Britain effectively equated the lease to cession. He calls this a decision based on ‘expediency, not law’ and says that Britain could not legitimately claim that ‘the concept of a “cession for a term of years” necessarily flows from the general words of the leasehold treaty’, especially as defence, not commercial development, was its raison d’etre as British legal advisers themselves realized’ (1980: 178). A study of British colonial treaty practice reveals that the Hong Kong experience was not unusual. Britain imposed treaties on indigenous authorities when it suited them and broke them with impunity, protected
by British and colonial courts. When there were divergent understandings of their terms (especially sovereignty, a peculiar artefact of Western statecraft, and in relation to land rights) — whether due to linguistic, legal or cultural reasons — it was the British interpretations which were followed.\(^5\) Certainly the early Chinese experiences with British versions of ‘legality’ can hardly have inclined them to value either international law or ‘constitutionalism’.

**Unequal Treaties**

Not surprisingly, successive Chinese governments have been resentful of these treaties, and other treaties that China was forced to sign in the nineteenth century and the early part of the twentieth century, which undermined many of its sovereign rights. However, it was not until the 1920s that their validity began to be challenged under the doctrine of unequal treaties (see Chiu: 1972, on which the following account is substantially based; Wesley-Smith 1980: 184–187; Wang 1990). Although some classical scholars of international law like Grotius had distinguished between equal and unequal treaties, and defined unequal treaties as lacking reciprocity and imposing permanent or temporary burdens on one of the states, they did not say that unequal treaties were invalid, merely urging that so far as possible treaties should be equal. In the nineteenth century, with the expansion of European empires, the doctrine was inconvenient and there was little mention of unequal treaties, but after the Bolshevik revolution in Russia in 1917, the new regime abrogated a number of treaties which previous Russian governments had forced upon China, Persia and Turkey on the grounds that they were coercive and predatory. The term unequal treaty was used when the Kuomintang government demanded the abrogation of treaties forced upon China. The Chinese Communist Party adopted a similar position, which remained the official policy when the communists came to power.

\(^5\) In relation to the treaty practice in Kenya, see Ghai and McAuslan (1970: 18–25), where in a particular instance the Privy Council sanctioned repeated violations of solemn undertakings by the British, at first forcing people off their traditional land, and later confiscating the land on which they had made their new habitation. We concluded, ‘The use of the defence of Act of State in these circumstances provides an example of arbitrary government which it is hard to parallel’ (at p. 23).

Another example comes from the attitude of the British and subsequently New Zealand governments to the Treaty of Waitangi that Britain made with the Maori, the original inhabitants of Aotearoa, as New Zealand was known to them. In recent years the attitudes of the New Zealand courts and therefore of the government has changed towards a proper regard for the undertakings of the treaty. See Orange 1987.
While the doctrine of unequal treaties has been argued by China for over 70 years, the precise contents of the doctrine are unclear. The theoretical basis is that treaties are ‘based on mutual benefit and equality of states’. Therefore a treaty under which only one state incurs obligations and only the other state acquires rights would be unequal. In 1924 the Kuomintang authorities listed various provisions that rendered treaties unequal:

(a) foreign leased territories;
(b) consular jurisdiction (extraterritoriality);
(c) administration of customs by foreigners; and
(d) political rights that infringe upon the sovereignty of China.

Other items were added later, but they did not include cession (Chiu 1972: 250–252). The Kuomintang appeared not to have argued that unequal treaties were void or could be abrogated at will, favouring their revision or abrogation through diplomatic negotiations. Nevertheless, when negotiations with the US, the UK and France on the termination of extraterritorial advantages failed, the government terminated them unilaterally, relying on the principle of *rebus sic stantibus* and article 19 of the Covenant of the League of Nations regarding the reconsideration of treaties that have become inapplicable. The implementation of the law was delayed due to the Japanese invasion of China, and in 1942 the US and the UK agreed to the abolition of extraterritoriality and the remaining ones were terminated after the Second World War.

The Chinese communists relate the doctrine of unequal treaties to the violation of sovereignty, which demanded the equality of rights and treatment. Whether a treaty was equal depended not on its formal terms, but ‘upon the state character, economic strength, and the substance of correlation of the contracting parties’ (Chiu quoting a Chinese scholar, Wang Yao-t’ien 1972: 259). This might mean that no treaty between states which have unequal economic and political strength can be valid; but China cannot mean that since it has signed treaties with its neighbours, like Burma, which are infinitely inferior in these respects to China. Presumably some element of coercion is necessary, although its absence does not necessarily validate a treaty as is obvious from the analysis of some modern treaties offered by mainland scholars.\(^\text{6}\) A modern formulation

\(^{6}\) Hungdah Chiu gives as an example the Chinese condemnation as unequal of the 1956 US-Swiss treaty on cooperation on nuclear uses of atomic energy. The US supplied the fissionable material as well as some technology and information. It reserved the right to inspect or supervise the use of the material, and the right to acquire or use any Swiss inventions based on the information supplied to it. Chiu accuses the PRC of an opportunistic and unprincipled use of the doctrine, as many of its own treaties fall foul of their own criteria (1972: 260–266).
(in *Concise Law Science Dictionary* published in 1991 by Jilin People’s Publishing Corporation) defines unequal treaties as those ‘concluded by the coercion of one party through unjust methods with the aim of imposing unequal obligations on the other party’. It goes on to say that they are mostly ‘concluded by small and weak states under the coercion of imperialist powers that seek to oppress and plunder the weak and small states’ (p. 175).

The communist regime regards all treaties imposed on China in the nineteenth and twentieth centuries as unequal. Unequal treaties are invalid in law (and therefore void *ab initio*), although for practical reasons they may be temporarily tolerated. Thus while there are clear formal differences on this point from the position taken by the Kuomintang, in some respects the views of the communist government do not differ from those of the Kuomintang, especially as regards treaties dealing with boundaries and cession (Chiu quotes Zhou Enlai as saying that ‘on the question of boundary lines, demands made on the basis of formal treaties should be respected according to the general international practice’ and if necessary differences should be settled by friendly means, 1972: 266). The PRC has (in the absence of an alternative) followed in practice the Hong Kong treaties with Britain, despite its views of their illegality, waiting for when ‘the time is ripe’ for a diplomatic settlement of their differences with the British (the removal of Hong Kong from the list of colonies that the UN supervised in 1972 being a manifestation of the Chinese view of the treaties and setting the stage for the eventual return of Hong Kong to China). In some respects, such as the applicability of Chinese and British nationality laws in Hong Kong, it has however treated the treaties as invalid (see Chapter 3). The Sino-British Joint Declaration providing for the return of sovereignty effectively brings the treaties to an end, and provides, at least in Chinese view, the only basis for British authority in the transitional period (this point is discussed later in this chapter).

There is a widespread view that the Chinese position on unequal treaties is not supported in traditional international law. Nor it is supported under the 1969 Vienna Convention on Treaties in so far as it might be deemed to cover unequal treaty situations as it does not apply retrospectively (Wesley-Smith 1980: 187, and 1994a; Chiu 1972: 267; Dicks 1983: 434–435). Delegates to the Vienna meeting were agreed that treaties secured through the use or the threat of force would be void, but differed in their view as to what constituted ‘force’. Some, especially those representing third world countries, wanted a broad definition to include economic and political coercion while Western states wanted to restrict it to military force. The compromise was to adopt a broad non-
binding declaration (‘deploring the fact that in the past states have sometimes been forced to conclude treaties under pressure exerted in various forms by other states’ and ‘desiring to ensure that in the future no such pressure will be exerted in any form by any State in connection with the conclusion of a treaty’) and a narrower binding article in the Vienna Convention (stating that a ‘treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations’, art. 52). Under the Vienna Convention a treaty is also void if at the time of its conclusion, it conflicts with a peremptory norm of international law (art. 53). Although under one or both of these provisions the Hong Kong treaties would be void, the convention applies only to treaties concluded after the adoption of the convention (art. 4). The Chinese position of course does not depend on the provisions of the Vienna Convention but on general principles of international law which were binding even in the nineteenth century.

These controversies are of limited relevance to the Hong Kong situation since the Sino-British Joint Declaration which provides for the transfer of sovereignty to China. However, the impulses behind the original claims of invalidity are still important. The legal doctrine of unequal treaties reflects profound resentment of an unequal world, where under the hegemony of Western imperialism many parts of the world have been subjugated and plundered in total disregard of norms of equity, fairness, and civilized conduct. China feels particularly humiliated at its treatment by European powers (particularly Britain) in the nineteenth and twentieth centuries. The resentment has been nursed over decades, intensified by the realization that for long periods China was unable to redress the inequities of the treaties. This bitterness is all too evident today; and has complicated the problems of transition and may affect the full implementation of the autonomy of Hong Kong under the Basic Law, premised as it is in part on the internationalization of Hong Kong. Formalistic analysis of the legal soundness of the doctrine of unequal treaties obscures its underlying historical and psychological bases.

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7 The International Court of Justice has interpreted the article to restrict the term ‘force’ to military force, *Fisheries Jurisdiction (UK v Iceland)* ICJ Reports (1974) 3. See also Sinclair (1973).
THE ASSUMPTION AND EXERCISE OF BRITISH AUTHORITY

It is not my purpose to provide a detailed account of the manner of the assumption and exercise of British authority over Hong Kong. I propose to describe the constitutional, legal, economic and social systems that had been established by the time the negotiations between China and Britain for the transfer of sovereignty began, since the negotiations were conducted against the background of these systems and it was the intention of both states to substantially preserve these systems. (For this reason the use of the past tense to describe the benchmark does not mean that the system has necessarily changed since the early 1980s; I hope the situation will be clear from the context.) I will pay particular attention to factors which are often ascribed to the nature of British policies and administration in Hong Kong, such as the rule of law, a regime of rights and freedoms, and a successful economy, to assess how far they were the inevitable consequences of British policy and to separate myth from reality. It is significant that many of the problems that Hong Kong faced at the transfer of sovereignty to China had their roots in British policies and laws.

British authority in Hong Kong was exercised on the basis of British law, not the Sino-British treaties of the nineteenth century. The treaties were relevant to the extent that they provided the basis for the operation of rules governing the administration of British colonies. There are two types of colonies under British law, the first being colony by settlement, through occupation and establishment by British subjects, and the other the colony by conquest or cession. The basis for the application of English law and the extent of British authority differ for the two types of colonies, the British government having more authority in the latter (Roberts-Wray 1966). There was little doubt among British officials that the Treaty of Nanking and the first Convention of Peking ceded Hong Kong and Kowloon to Britain and that they were therefore a colony (a position on which the Orders in Council were based). The position was less clear cut about the New Territories since there was little precedent for the status of a territory which was leased. Since British sovereignty was limited, logically it was closer to a ‘protectorate’. However, as has been shown above, it suited Britain to disregard these niceties and through an Order in Council, the New Territories were assimilated to the status of Hong Kong and administered as an integral part of the colony (this approach may be contrasted with the British lease over Weihaiwei over which Britain claimed no such extensive rights). In practice, the integration was not achieved until the early 1980s as the New Territories, due to their rural nature and dispersed population, were originally administered through a separate system based on district administrative officers who liaised with the central
government and exercised a wide range of functions, with the assistance of traditional authorities, almost as a form of indirect rule.

British authority in Hong Kong (broadly defined) rested on a mixture of prerogative and statute. I do not intend to provide a detailed account of the basis and system of British authority in or the administration of Hong Kong (see Wesley-Smith 1994b for an authoritative account). Briefly the legal situation, as clarified in the Colonial Laws Validity Act 1865, provided for the plenary powers of the British Parliament to make laws for Hong Kong. The British government had extensive powers of law making as well, deriving from prerogative as well as legislation and exercised principally through Orders in Council. It could authorize institutions in Hong Kong to make laws and to establish courts, but no law locally enacted could contravene a provision of an act of parliament which applied of its own force in Hong Kong.

Compared with many other colonies where there was fierce resistance from the local people, the establishment of British authority was relatively unproblematic once China had been brought to heel. There were some protests in the New Territories to start with (which provided the pretext for the takeover of the Walled City) but on the whole the population existing then and particularly the subsequent migrants seemed to have welcomed British authority. Unlike other places, Britain did not establish plantations, extract minerals, compel people into labour or take over their land, activities which normally required coercion. It was thus possible to establish a reasonably benign administration, although not without a panoply of harsh legislative measures nor as fairly as the colonial authorities would have us believe.

The Constitution and the System of Government

Relying upon general British law, no specific legislative measure was needed to enable the British authorities to exercise jurisdiction in Hong Kong (the Kowloon and New Territories Orders in Council were necessary only to clarify their legal status). To start with, British authority was exercised by virtue of general powers vested in Pottinger as Plenipotentiary and Superintendent of Trade, in which capacity his responsibilities extended beyond Hong Kong. These powers did not provide sufficient basis for orderly administration and so, in accordance with normal colonial practice, a Charter in the form of Letters Patent was issued in 1843 by the Crown (i.e., the government) to provide for government in Hong Kong. The Charter, which established the office of the Governor and the Legislative Council, was accompanied by Instructions to the Governor on the exercise
of certain of his powers (the Charter is reprinted in Tsang 1995:19). The Charter was subsequently replaced by other Letters Patent, which with periodic amendments, formed the basis of government together with the Royal Instructions.\(^8\)

The constitution of Hong Kong, as of other British colonies, was based on what that great scholar of colonial administration, Martin Wight, has called the double principle of subordination: the subordination of the colonial executive to the metropolitan executive, and the subordination of the colonial legislature to the colonial executive (Wight 1952: 17). The precise form that this principle took has varied from colony to colony, and in the same colony over time. In Hong Kong the basic form of the colonial constitution remained remarkably unchanged from 1840 until the 1980s. The essence of it was the wide executive and legislative powers of the Governor under the supervening authority of the Colonial Office. Britain retained the power to legislate for Hong Kong either by an act of parliament or by prerogative, i.e., by the executive. It also retained control over the legislative process in Hong Kong by its powers of disallowance and the reservation of certain types of legislation for its approval. It gave the Governor the authority to legislate with the advice of the Legislative Council. It appointed and dismissed the Governor and other senior officials in the territory, and had the power to give directions to the Governor on the discharge of his functions. An executive council was appointed to advise the Governor on policy and administration, as well as a legislative council to help him in law making.

At first both the councils consisted of coteries of officials appointed by him on instructions from or approval by London. Attempts by the officials to hew a path independently of the Governor were scotched in the early days\(^9\) and these bodies functioned effectively therefore as

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\(^8\) While the Letters Patent were legally binding, it has been held that the Royal Instructions were merely a matter between the sovereign and the Governor. This decision was made in a case when the Crown Lands Resumption Ordinance 1900 was challenged for incompatibility with the ‘no expropriation’ clause of the New Territories lease. The Royal Instructions required the Governor to reserve bills which had provisions inconsistent with British treaty obligations for approval by the Crown. The failure to do so was held not to affect the validity of the Ordinance (Pong Wai-ting v Attorney-General (1925) 20 HKLR 22). After an interesting review of the controversy, Wesley-Smith concludes that in ‘the final analysis, it is perhaps of no great consequence whether the Royal Instructions are termed “law” or not, and they are at least as important to the constitutional scheme of things as conventions’ (1994b: 43–45).

\(^9\) Endacott (1964: 42) provides an early but rare example of a successful opposition to the Governor by the Legislative Council in 1846 (when the Council consisted only of officials) over the Governor’s tax proposal. Gladstone, then Secretary for Colonies, upheld the objection of the Legislative Council.
extensions of his office and authority. In due course unofficial members were nominated to these bodies, and various interest groups were coopted or integrated within the administration; subsequently such members acquired majorities in both the councils. There were also the beginnings of functional representation as early as 1850 when Bonham, the Governor, asked the unofficial Justices of the Peace to propose to him two of their number to sit in the Legislative Council, who were joined by a nominee of the Chamber of Commerce in 1884 (Endacott 1964: 45) (functional representation was of course not to flower into full bloom until the reforms of the 1980s, when it became at first the only form of representation). In fact the JPs always nominated men of substance and commerce, and it is fitting that the first nominee of the JPs was the head of Jardine Matheson and the first nominee of the Chamber of Commerce was the manager of the Hong Kong and Shanghai Banking Corporation. It established a pattern which was to persist for most of Hong Kong’s colonial history.

An examination of the formal constitutional arrangements is of course not necessarily a guide to political, or indeed constitutional, development. Numerous British colonies, destined in the fullness or the rush of time for independence, have carried similar formal arrangements well into their period of self-government, if not actually right to the very eve of independence. These arrangements are moderated by that quintessentially British technique of transforming power, the constitutional convention. Conventions have been employed essentially to guide and register progress towards self-government and independence; so that at a certain stage the Governor begins to take a back seat (while retaining all his legal powers), the centre of the stage being occupied by an indigenous chief minister, who owes his or her position to electoral success. The Governor also retreats from the legislative assembly, where the chief minister leads government business and an independent speaker presides over its deliberations. The balance between the official and unofficial members in both the legislative and executive councils moderate or reinforce conventions, depending on the stage of decolonization. The conventions do not affect the relationship between Britain and the colony (although Hong Kong may well have been a partial exception); in fact the metropolitan role increases as key decisions on decolonization and evolving constitutional forms and settlements have to be taken by the Secretary of State (not unlike the increasing role of the UK towards the end of its rule in Hong Kong, the evolving relationship with the PRC being the analogue of independence).

However, it is possible to exaggerate the significance of conventions in a colonial context; except perhaps in the white dominions, conventions have not led to the surrender of power. As far as the metropolitan government is concerned, it remains responsible to Parliament and British
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public opinion for the administration of the colony, which is scarcely compatible with the surrender of power. The Governor on his part retains responsibility for law and order until the dying days of colonial rule, and most matters can be made to hang on law and order.

Given that Hong Kong did not progress to representative institutions and was not destined for independence, conventions, contrary to some opinion (Miners 1991: 61–63), have not played a significant role. Not all the examples Miners cites of the divergence between the legal provisions and practice are really instances of conventions properly understood, that is, treated as binding (as is evidenced from increased Whitehall intervention in policy and administration in Hong Kong in the last few years before the transfer of sovereignty). Such as they were, they operated within an overarching framework in which the Governor’s position remained dominant and membership of key institutions was through his nomination. In any event, conventions may register shifts of power within the colony, but they do not alter the nature of the powers themselves. Changes in Hong Kong’s constitution came about less through conventions or formal amendments, than through legislative measures within the framework of the Letters Patent, principally through the provision for local advisory bodies (Scott 1989: 140–46). It is of course true that several provisions of the Letters Patent did not work in the way originally envisaged, but this was due less to a shift in power than to modern technology (a royal veto was important when communications were slow, and precluded advance discussions in many cases). Nevertheless it must be acknowledged that there was a marked decrease in the detail with which Britain exercised its control and supervision over Hong Kong after the Second World War (as Hong Kong’s economy began to industrialize and its financial position improved). Increasingly, economic and social (but not political) policies and decisions were being made locally (although they bore the stamp of the Governor of the day rather than of the populace of the territory).

From the beginning, British concern with designing the constitution for Hong Kong had been to maintain a wide measure of flexibility. Hong Kong was an unusual kind of colony; less important for itself than for its role in the British trade with China. The settlement was small and most British residents were itinerant or transient traders. The dominant concern being the management of relations with China and the exercise of British extra-territorial jurisdiction in the treaty ports, local issues were subordinated to imperial interests. That scheme of things suggested a free hand for the Governor under the tutelage of the British government, particularly the Foreign Office.

In the course of time, as the settlement in Hong Kong increased and its economy developed and as imperial policy began to be managed directly
from London, local issues became more pressing. An open-ended constitution operating under gubernatorial hegemony was still considered necessary because of the way the economy had developed: a laissez-faire market dominated by expatriate business houses. The greater formalization and specification of institutional arrangements that excluded the dominance of the business houses would be seen to undermine the market basis of the economy, while their formal incorporation would be regarded as the abdication of imperial responsibilities and the placing of the Chinese population at the mercy of a handful of transient expatriate businessmen. An open-ended constitution was better able to maintain the privileged status of the market and the influence of the business houses through informal arrangements or through cooption by the administration. The powers of the Governor to nominate private citizens to governmental bodies, particularly the legislative and executive councils, were invaluable for this purpose. A close alliance was established between the administration and expatriate business community (typified in many ways by the privatization of significant public power to the Royal Hong Kong Jockey Club, which, thanks to its monopolies, disposed of large sums of money to charity projects of its choice). The increase in the Chinese settlement and the rise to eminence of various Chinese professionals and businessmen could equally be accommodated through the system of nomination. The accommodation was facilitated by the absence of ethnic conflict: the market provided a much stronger basis of identification for the important members of both communities.

Social and economic developments after the 1950s led to the growth of a labour class and other groups which could not so easily be accommodated within the close and cosy world of nominated members without upsetting the structure of power and authority. The social disturbances of the 1960s stimulated the search for other forms of cooption and participation. This led to reforms at the local and district level, with an emphasis on better communication of government policies and intentions and more effective channels for feedback of public opinion into policy making and administration. Numerous committees and consultative organizations were set up. At the same time the government undertook measures for the social amelioration of the working and other less well off communities, including extensive labour legislation. Helped by a buoyant economy, these measures took the heat out of social discontent, and led to the establishment of a system in which there was considerable public participation in administration, what the Hong Kong government has called government by consensus and consultation and others have called the ‘administrative absorption of politics’ (King 1975). This form of government was carried on within an essentially nineteenth century
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The continuity of these formal constitutional arrangements was possible due to their flexibility. Resting in part upon the extensive patronage powers of the Governor and the provisions for the accommodation of non-official interests and groups into the establishment, they enabled the government to progressively coopt fresh groups into a partnership. As we have seen, the system coped with the emergent forces at different stages of Hong Kong’s history, although not always with the same degree of success. These accommodations were, however, made within a system that demonstrated a very clear bias towards the business community.

The constitution and the market

The continuity of the constitutional arrangements was facilitated by a remarkable degree of social consensus centring on a belief in the superiority and efficacy of the laissez-faire market. The doctrine and pre-requisites of the free market shaped powerfully the ways in which the framework of the constitution was utilized. One implication of the influence of the market was that it led to a sharp distinction between the public and the private (something unusual in a colonial context, for a colonial administration cannot usually achieve its purposes without a total domination of civil society, fragmented though it is, see Balandier 1970). The sharp distinction in itself was premised on a minimal role for the government, although the minimal role itself was not politically neutral. Because the role of the state was narrow and did not enter many controversial areas of social policy, it did not itself become an object of controversy and competition (Lau 1982).

The second implication is that in order to provide a privileged position for the business community in this scheme, notions of electoral representation had to be abandoned. The business community was small, and in any electoral system, it would find itself in a small minority. It would have been possible to secure a dominant position for it through rigid property qualifications for the franchise, as indeed was done in settler dominated colonies in Africa; but to give a small expatriate business community control, formally, over the vast majority of indigenous Chinese would probably have been unacceptable in the UK as well as China. It
was politically easier to provide a privileged position for the business community through nomination to the two major councils (and of course through its control of the economy). The one group at that time which could have mounted a campaign to reform the constitution thus had little incentive to do so; indeed had much to preserve it.

The system of nomination may also have helped to dampen the mobilization of social demands on the government (thus facilitating the laissez-faire system) as well as political mobilization. Individuals were picked to represent specific interests; they did not have to seek re-election and appeal to the public. There was consequently no scope for political parties and little mobilization of the people occurred (although it should be remembered that in many former colonies political parties developed precisely in opposition to the system of representation through nomination in a search for more democratic institutions, and so their absence in Hong Kong may represent broad satisfaction with the system). Leaders who emerged as spokespersons for the community under this system had an uncertain social basis of support. The government claimed nevertheless that it was able to represent and interpret public opinion. There were of course other factors reinforcing this system, which have been well analysed: the apathy of the local Chinese community, dominated by considerations of economic gain and the unease with which China would have viewed political and constitutional progress towards some form of self-government (as well as the fear that the electoral system of Hong Kong would provide a proxy battle ground for the rivalries on the mainland between the Kuomintang and the Communists, with unsettling effects on the market). It has frequently been alleged that a fundamental obstacle to reform was the attitude of the Chinese government which did not favour the democratization of Hong Kong, either because it might signal a separate future for Hong Kong or might make its return to China problematic. There is no conclusive evidence for this view, and it is interesting that the major attempt, until the 1980s, to introduce political reform after the Second World War foundered not on Chinese opposition, but the lack of enthusiasm in Whitehall and resistance of the colonial officers and Europeans in Hong Kong who were fearful that with the increasing number of Chinese migrants, there would be a severe demographic balance against them (Welsh 1993: 433–440; Tsang 1988).

The colonial constitution provided the broadest of frameworks for the exercise of power. It was lacking in any normative rules and was weak on procedure. It was not the instrument through which one could raise profound questions of community morality and public interest or of the permissible use of state power. The broad framework established by the constitutional arrangements, and within it the dominance of the
executive, meant that it became the instrument of demand management (instrumental in generating, as well as facilitated by, the low level of political consciousness and mobilization). It bred a powerful and paternalistic bureaucracy, and a weak legislature, and little accountability. It negated the separation of powers. Policy making was a prerogative of the government, and the Governor exercised important powers over the composition of the legislature and the judiciary. And, obviously, the constitution was not the product of local bargaining.

Such an instrument, it might be thought, would command little legitimacy. There is certainly little evidence that people of Hong Kong have looked to the constitution as a safeguard of their freedoms. Such legitimacy as the system enjoyed came from the way in which that instrument was used, in a relatively benign manner, ensuring to a large extent fundamental liberties (if not political rights) and the operation of, for long periods, a largely free market. Given the early nature of capitalism in Hong Kong, the first was perhaps a necessary pre-condition for the second. It is widely agreed that these two factors were the key elements of the legitimacy of the administration. Neither is a natural or inevitable consequence of the colonial constitution. But the capitalism that it engendered produced great economic growth and prosperity, for a community which had suffered from poverty and great social turmoil. It was that situation which has raised pragmatism to high dogma, and made it a powerful ideological force. But there was a price, if that is the right term, to pay for it. The state became the captive of the market. The demands of the market dictated, to a significant extent, how powers under the constitution would be exercised. The power of the market was particularly strong when it was based on activities that could readily be relocated elsewhere. With the growth of manufacturing the situation changed somewhat, but Hong Kong remains vulnerable to the mobility of capital, technology and skills, in a region hungry for them. The state’s ability to raise revenue and provide services depends on the performance of the economy. Consequently the constitution must yield to the market. So much did the ideology of the market dominate that of constitutionalism that constitutionalism (especially the democratic aspect of it) came to be seen as a major threat to the market and the prosperity of Hong Kong.

The market was not the only basis of legitimacy; other factors which promote it were connected with it. As we have seen, colonial rule fostered and coopted interests which had a stake in the system (they were or became the spokespersons for their communities). The top administrators were not rapacious or, for the most part, corrupt. The civil service allowed some mobility, although not to the highest echelons. More fundamentally, the residents of Hong Kong had come there through choice, migrants
from political oppression or harsh economic circumstances, who found
the system of government as well as the potential in the economy altogether
more congenial. Generally people were allowed to get on with their lives
and occupations, an approach that was favoured by many.

The Legal System

In almost all colonies, one of the first acts of Britain was the establishment
of a system of law. A system of law was particularly urgent in Hong
Kong as it was acquired to be a centre of commerce. Under the imperial
legal doctrine of cession whereby Britain exercised jurisdiction over Hong
Kong, the pre-existing laws continue in force unless they are expressly
modified or disapplied (Campbell v Hall (1774) 1 Cowp 204; for a more
detailed discussion of the establishment of the legal system, see Wesley-
Smith 1994c as well as Chapters 8 and 9 of this book). On 26 January
1841, after occupying Hong Kong under the Treaty of Chuenpi which
preceded the Treaty of Nanking (and was not ratified), Elliot, the officer
in charge of British trade in China, issued a proclamation on the laws to
be applied there. A distinction was made between Chinese and others.
Chinese were to be governed according to the ‘laws and customs of China
(every description of torture excepted)’. Another proclamation a few days
later reinforced this rule by promising them the free exercise of their
religious rites, ceremonies, and social customs, to be applied by village
elders under the control a British magistrate. Non-Chinese were to be
governed by the British law which had been applied to the British in
Canton in exercise of British rights of extra-territoriality, as well as, more
generally, ‘the principles and practice of “British law”’. These arrangements
were formalized by one of the first ordinances (The Supreme Court
Ordinance 1844) passed by the Legislative Council set up under the Charter
of 1843. It provided for the application of the Law of England, ‘except
where the same shall be inapplicable to the local circumstances of the said
Colony, or of its inhabitants’. When English law was not suitable, Chinese
law and customs would apply. The formula was amended various times
and later provided for English law to be applied in a modified form if
necessary (see Chapter 8), but no clearer basis for the application of

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10 Wight (1952:19) has remarked the ‘Dependent Empire illustrates how in constitutional
development the stage of judicial power precedes the stage of legislative power. Early or
undeveloped constitutions are concerned with organising jurisdiction rather than
establishing legislative and executive organs. The Foreign Jurisdiction Act itself was
concerned with the establishment and regulation of courts.’
Chinese law was provided (except in relation to land in the New Territories). Chinese law was administered in formal English style courts, which had considerable discretion in applying it.

The Chinese authorities were not happy with these arrangements for the application of Chinese law (see Endacott 1964: 26–38 for Chinese demands and early discussions on the application of Chinese law). Indeed at first Britain intended to place its Chinese subjects under their own law administered by Chinese officials. This was consistent not only with the dual system of law that applied to trading communities in Canton, but also with the principle of extra-territoriality that the European powers had successfully claimed in China. China already had a magistrate in Macau for dealing with Chinese residents in the Portuguese enclave. During the negotiations over the Treaty of Nanking, China demanded and Britain agreed, that Chinese in Hong Kong should remain subject to Chinese law and Chinese imperial officials. However, with the British position on the matter shifting (and with the Foreign and Colonial Offices not of the same mind), agreement on details was hard to achieve. Various arrangements were canvassed, such as that Chinese accused of serious crimes should be sent to China for the trial, that Chinese magistrates should be stationed in Hong Kong or Kowloon, that a distinction be made between Chinese who were permanently settled in Hong Kong who would be subject to colonial law and institutions and sojourners who would be subject to Chinese law to be administered in Hong Kong or China. In the end none of these proposals was accepted, the British anxious that these might provide the Chinese with an argument that they exercised some sovereignty in Hong Kong and the Governor worried by the deteriorating law and order situation, which he considered required to be dealt with through the colonial law. Over Chinese protests that Britain had reneged on earlier written assurances, the Legislative Council enacted the ordinance providing for the limited application of Chinese law and no role for Chinese officials in its administration. The Treaty of the Bogue (October 1843), supplementary to that of Nanking, provided merely for the mutual extradition of offenders.

Chinese law was applied to the Chinese in civil matters and remained important for regulating their personal, family and property matters until the reforms of the 1970s when most of Chinese customary or imperial law (by this time applicable formally neither in the PRC or Taiwan) was replaced by English principles in recognition of the massive changes in the life-style of the Chinese. The reforms had the support of most of the Hong Kong people, and reflected a general tendency in law reform to adopt new legislative initiatives in Britain. However, the principles of English law that applied in Hong Kong had been adapted to local conditions. It was
recognized in the 1844 Ordinance that English law could be modified or
disapplied by local legislation. A very considerable body of local laws has
been enacted, and although some British legislation still applied in Hong
Kong in the 1980s, it can be said that Hong Kong had a truly autonomous
legal system. However, its inspiration and fundamental principles were
derived from English law, particularly the common law on which decisions
of the House of Lords and other British courts are based.

The autonomy of the legal system was also manifest in the institutions
of the law (although the Privy Council in London remained the final court
of appeal). Law making had become largely a local enterprise, and the
British veto over it, provided for in the Letters Patent, had not been
exercised for decades (although undoubtedly in controversial matters a
prior clearance from London would have been obtained). A complex
system of courts and tribunals, based largely on English principles and
practice, had been established to administer the law (Wesley-Smith 1994b:
chap. 6). Judges had substantial independence, for although their
appointments were made by the Governor under the Letters Patent, he
was advised by a statutory Judicial Service Commission on appointments.
Senior judiciary enjoyed security of tenure and could only be dismissed
for inability to discharge their duty or for misbehaviour, after an enquiry
by the Privy Council following a preliminary enquiry held locally. There
was a large, well established and independent legal profession, which
provided legal advice and other services to the public, including defence in
criminal cases. The government had a large legal service, partly to ensure
that government departments observed the law. Legal training was available
locally at the University of Hong Kong, but lawyers trained in some
overseas jurisdictions could also practise. There was a well established
tradition of legal research.

Thus, although not perfectly, the Hong Kong legal system was based
on the essential principles of the common law. There was equality before
the law. Individuals and groups aggrieved by a decision of a government
official or public agency could go to courts for redress. Courts could also
review the legality of legislation and government policies. The common
law rules of interpretation lean in favour of rights and freedoms when
there are ambiguities. It is often claimed that rights and freedoms as well
as the economic success of Hong Kong are based on this legal system,
which provides predictability and rationality through the impartial
administration of justice. It defines and protects property rights and enforces
contracts that parties have freely made. Combined with the general rule
of the equality of all parties before the law, these principles provide a
necessary framework for the operation of the market (for a number of
statements by various individuals and groups, including those cited here,
on the virtues of Hong Kong’s legal system as developed during the colonial period see Ghai 1993: 353–356).

As early as 1914 Wu Tingfang (the first Chinese barrister and member of the Legislative Council in Hong Kong and subsequently a senior official in the Chinese government) wrote that Britain’s distinctive contribution was ‘a working model of a Western system of government which, notwithstanding many difficulties, has succeeded in transforming a barren island into a prosperous town . . . The impartial administration of justice . . . cannot but excite admiration and gain the confidence of the natives’ (as quoted by Wesley-Smith 1988:3). Former Chief Justice Sir Ti Liang Yang often extolled the value of an independent legal profession as the bulwark of a free society and as providing the security and the competence that the international business community needed — ‘to decide the complexities of commercial dispute on familiar principles’ (Yang 1992). The Law Society, referring to uncertainties about the future, said that ‘a reliable, predictable legal system can provide much needed stability at society’s core in time of transition. It goes without saying that the rule of law will guide us and steady us’.

The rule of law became a powerful means to legitimize colonial rule, particularly as the ideology of a democratic and accountable government could not be pressed into service. The rule of law so selectively conceived was especially congenial to business, the raison d’etre of Hong Kong. These rosy images of the law come, not surprisingly, from administrators or the high priests of the law. How far it had resonances for all the people of Hong Kong is hard to tell; such limited research or opinions as exist do not tell a consistent story: a mixture of admiration, ignorance and misunderstanding (Ghai 1993:343, 354; Lau and Kuan 1991; Hsu 1992; Ti Liang Yang 1992). It is clear that for many decades after the establishment of British authority, the Hong Kong Chinese had little truck with the formal legal system except as accused in criminal cases. They effectively set up their own mechanisms for dispute resolution (Sinn 1989; Chan, WK 1991) and relied minimally on the formal system even for their commercial transactions (Tricker 1990; Wong 1991). Even now it is not clear how much resort is had to the formal legal system by the Chinese business community (although there is no doubt that more use is being made than before and Hong Kong has an unusually high rate of litigation (Ghai 1993: 356)), and the existence of rules which protected property rights facilitated Chinese economic enterprise. Nor is it clear that even the top European firms needed the law to pursue their enterprise, for undoubtedly much business was transacted in the elite Jockey and Hong Kong Clubs between them and the administration, and between the leading firms themselves, both European versions of guanxi (Chan, WK 1991:
On the other hand, the legal rules and system undoubtedly played an important role in the internationalization of Hong Kong’s economy.

The common law that was applied in colonies was generally a truncated version of the genuine article, often stripped of its ameliorative qualities (Seidman 1969). The common law cheerfully accommodated enormous discriminations against the Chinese, which began to be dismantled only after the end of the Second World War (Wesley-Smith 1994d). Nor did the common law or Letters Patent provide any barrier to a fair amount of repressive legislation, including extensive emergency regulations, that the administration wanted to arm itself with during occasional periods of crisis (for numerous restrictions on rights and freedoms before the enactment of the Bill of Rights Ordinance in 1991, see two volumes edited by Wacks 1988 and 1992). As we have seen in relation to the judicial attitudes towards treaties, the common law was often a slender reed, qualified as it was in its application in colonies by layers of the prerogative. The rule of law was itself a doctrine of procedure rather than substantive principles (especially given the lack of normative principles in the Letters Patent). The ideology and principles of the common law can be used to strengthen the regime of rights and the legal accountability of the government, as is demonstrated by recent decisions of courts, particularly in New Zealand and Australia where there are few fundamental or entrenched provisions for the protection of individual rights (e.g., Tracy; ex parte Regan (1989) 166 CLR 518; Polyukhovich v Commonwealth (1991) 172 CLR 501; Lim v Minister for Immigration (1992) 176 CLR 1; L v M [1979] 2 NZLR 519; Brader v MOT [1981] 1 NZLR 73; Keenan v AG [1986] 1NZLR 241; but compare Winterton 1994). But that this is not inherent in the common law is evidenced by the fact that judicial activism associated with the common law is a development of very recent years.

There is no questioning the considerable strengths and virtues of the common law and the legal systems founded on it. It provided a view of the law and the relationship between the government and the courts which was new to Hong Kong’s Chinese residents, even the very opposite of what they had experienced in China. However narrow the scope of legal challenge under the common law in Hong Kong, it did present to the people the notion that the government was not above the law and could be challenged in the courts. It did protect the lives and property of its residents, which played a crucial role in the legitimization of the colonial regime. Above all its ideology of the rule of law contributed to the raising of public consciousness of rights and the value of fair administration, which flowered as China sought to assert its sovereignty over Hong Kong, and provided a bench mark for an acceptable legal system.
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The Economic System

From the very beginning Hong Kong was conceived in the womb of commerce as a free port (although, ironically, it was delivered with the armed might of the government). The implications of the decision were set out clearly in the instructions of the British Foreign Secretary Lord Aberdeen to Governor Pottinger in a dispatch of 4 January 1843 (the relevant parts of the dispatch are reproduced in Tsang 1995: 17). To encourage its development as a free port it was necessary to keep harbour dues low, and income from import or export duties would not be available to finance the administration. The principal source of government revenue would be land, and its allocation. It was therefore necessary to increase the value of land, which would be done by ‘tempting’ British subjects and foreigners to establish themselves on the island. It was considered best not to alienate land but to allocate it on short term leases, so as to retain for the government the benefits of increase in land values. The auction of land was recommended to tap the best prices. A free port could not exist without a free market. The essential characteristics of the Hong Kong so delineated became firmly established. The early, swashbuckling pioneers would not have tolerated government intervention in their affairs, and so Hong Kong was allowed to become a particularly free, laissez-faire, market. The popular image of Hong Kong as the world’s most free economy has persisted, in the face of considerable evidence to the contrary. But there is no doubt that Hong Kong is a celebration of the capitalist market which has strong ideological attraction there and abroad.

There were no restrictions on convertibility of the Hong Kong dollar (an independent currency backed by considerable reserves of foreign exchange); and in 1983 the Hong Kong dollar was pegged to the US dollar at a rate of 7.8 local dollars to the US (to avert the collapse of the Hong Kong dollar following uncertainties of Sino-British negotiations on the transfer of sovereignty). There was no central bank; a local bank, the HongkongBank, acted as government’s banker. Currency notes were issued by private banks on licence from the government. Hong Kong maintained an open door policy in other ways as well. Movement in and out of Hong Kong was relatively easy, although immigration controls were introduced after the Second World War. Foreign businesses competed on the same terms as local or British residents (and enjoyed such political rights as were available to others). Relatively few business decisions required government approval. The framework for the conduct of business and financial transactions (and the internal affairs of companies) was loose, even relaxed. There were no price controls except on a few items (and these were not for commercial reasons). Personal and corporation taxes
were low; there was no sales tax. Except in some special cases, the
government did not enter directly into commerce or establish business
corporations. The distinction between the private and the public was
clear. For long periods government expenditures were a smaller proportion
of the GDP than in most countries. Big commercial interests were able to
organize themselves into powerful chambers or organizations and to
negotiate with the government for concessions. A consequence of these
policies was that laws to protect labour were weak and their enforcement
even laxer. Labour had no political clout — major strikes or even riots
were the medium of their influence. Social welfare did not figure high on
the official or corporate agenda.

Various features qualified the laissez-faire orientation of the market. As
the ultimate landowner, the government had considerable control over land,
such as bringing new land on the market, determining rents and premiums
that leaseholders must pay for change of land use, which were additional
to statutory powers under planning laws — a key instrument of control
when usable land is as scarce as in Hong Kong. The government was also
a major player in the housing market. Since 1953 (with alarming increases
in squatter settlements) the government had assumed the responsibility to
provide subsidized housing for lower income groups (and to manage a
systematic distribution of population to new industrial areas). It set up the
Hong Kong Housing Authority (and a subsidized private group, the Hong
Kong Housing Society) for this purpose. Public housing accounted for over
40% of total housing. However, the private housing market thrived as well,
even though its domination by a few large firms meant that it was not fully
competitive. The third major area of government intervention was
transport. Railway transport systems were owned by government-owned
corporations and other forms of transport (including harbour facilities) were
owned and run by private companies, although subject to regulation
through licencing and fare control (Clark and McCoy 1995: chap. 11).

Within this broad framework, the economy developed rapidly after
the Second World War with the influx of entrepreneurs from Shanghai
after the communist takeover. Since then Hong Kong had experienced a
steady increase in standards of living so that in the 1980s it was the most
prosperous part of Asian next to Japan. Its prosperity was based on
several factors. The oldest and most important was entrepot trade,
particularly its mediation of China’s international trade accounting for
most of its imports and exports. Regular migration from China before
and after the establishment of the PRC provided a constant supply of
cheap labour. A good educational system provided people with skills. Its
domestic industry was based on simple manufacturing, especially textiles
and plastic goods, destined for markets in Europe and North America. Its
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burgeoning financial markets made Hong Kong an important regional financial centre, with the second largest stock market in Asia. These developments gave a considerable boost to the property market which constituted one of the leading sectors of the economy.

As a major trading centre, Hong Kong became increasingly integrated into the world economy. As its industry became more sophisticated, foreign investment, particularly from the US and Japan, came in. It became necessary for Hong Kong to manage its own international economic relations, e.g., to maintain its customs regime and to promote its textiles under international agreements. Britain authorized Hong Kong to become a separate member of several international economic organizations (such as the GATT and the International Monetary Fund) and to enter into treaty relations, for trade and investments.

The opening up of China to the outside world for economic development in the late 1970s and early 1980s had a major impact on Hong Kong. Its role as the main gateway to China, not only for exports and imports, but also investments, increased greatly. Rising labour and land costs prompted many industrialists to shift their factories to the newly established free economic zone in Shenzhen just to the north of Hong Kong, leaving Hong Kong to concentrate on more advanced industrial products, like electronics, but especially on financial services and tourism. China itself began to invest in Hong Kong. This was to have major consequences for social structures, labour relations, the emergence of a middle class, government economic policies, and politico-economic relations with China (which are discussed briefly in the following section). However, these developments had not advanced significantly when Sino-British negotiations on the transfer of sovereignty started.

The Social and Civic Structure

The laissez-faire economic policy resulted in relatively restricted involvement of the government in social matters. The early pattern of development resulted in Europeans and Chinese living in separate communities, and effective exclusion of the Chinese from the apparatus of government drove them to establish their own organizations which became de facto sites of governance of their social, economic, and to some extent, legal affairs. The development of private organizations was prompted also by the lack of government provision for social welfare. There was a proliferation of welfare agencies after 1946, funded by external donors, covering health, education, and the care of old people among other activities. From 1967 the government began to take over more responsibility for their funding,
so that by the time of the negotiations on the transfer of sovereignty, a considerable portion of government money was devoted to this purpose. So while welfare agencies continued to play an important role in the provision of services, they came increasingly under official influence if not control, almost an extension of the administration (Pearson 1992; Chow 1990; Morris 1992). Nevertheless the number of voluntary organizations in these and other areas (like sports and religion) involved a large number of people in social activities and provided an important base for lobbying and participation in policy making. They laid the foundations of civil society.

The emergence of civil society was facilitated by other factors as well. One was the development of a significant local commercial community. The rise of Chinese business enterprise in Hong Kong goes back to the early years of colonialism, but for a long time it played a secondary role to European firms (to which it was linked in many ways). The waves of entrepreneurs and skilled workers from Shanghai in the 40s and 50s are often held responsible for the transformation of Chinese small scale and simple enterprises to sophisticated, industrialized firms which provided the basis for further expansion of local capital, so that by the 70s Chinese businesses were able to mount a major challenge to the old hongs. Economic power was steadily, sometimes dramatically, but surely passing over to local firms.

Increasing prosperity, rising population (based largely on immigration from China), housing settlements, and greater educational opportunities exposed Hong Kong residents to the modern world and fostered a sense of Hong Kong community. Growing literacy encouraged the development of newspapers and journals, a lively and diverse press with nearly 60 newspapers and a wide readership (Chan and Lee 1991). Arts and culture also flourished with the new prosperity, and the freedom to experiment that was denied to Chinese on the mainland.

The dominant factor in the social and economic development of Hong Kong, as has already been pointed out, was the market. The market defined people’s expectations of and accommodation to the colonial regime. It provided the basis for the interactions between the Europeans and the Chinese. It influenced class and gender relations. For a society lacking a pre-established social structure or aristocracy, the market determined hierarchy and status, overcoming in time the racial and occupational hierarchies of colonialism. It provide the most effective ideology for Hong Kong’s special social and political system.

Hong Kong is not and has not been an egalitarian society. There are vast differences in incomes and wealth, perhaps bigger than in any other industrialized society. However, the belief that Hong Kong offers social
mobility and equal opportunity is sedulously nurtured (and is believed even by those whose daily experience demonstrates its invalidity, Wong, T and Lui, T 1994). This was undoubtedly true in the past where the strength of the market system may have been the absence of class distinctions within both the European and Chinese communities (though not as between them). But class differentiation started early (the Hong Kong Club, that bastion of privilege and male dominance, was established in 1842), and on the Chinese side too the establishment of communal organizations facilitated the consolidation of social hierarchy (Chan, WK 1991). The transience of the population and an expanding economy facilitated both opportunity and mobility. Now the evidence no longer supports the belief of equal opportunity. Social origins and class backgrounds have become important determinants of one’s life chances and wealth and power are being consolidated in families and groups (Tsang, WK 1994).

The picture of industrial relations was generally unsatisfactory. Trade unionism was astonishingly low (being under 20% of all employees), due to a variety of factors: the small size of firms (very few employed more than 50 employees), tendency for employers to hire persons from kinship or clan networks, discouragement from employers, the ignorance or caution of workers (mostly migrants), and the politicization of unions (many unions being fronts for either the Chinese Communists or Nationalists). The last factor also muted class differences and conflicts. There was little use of collective agreements, only 4% of workers being covered by them in the late 1970s. The level of industrial safety was low. Labour law was reasonably progressive (based substantially on British legislation), although it was designed to prevent political organization of workers — which shows that economic and political realities were more influential than the law.

Within families, there was little gender equality and it was the extra burden imposed on women that has helped families in Hong Kong to cope with the stresses of industrialization (Ng 1994). Gender inequality was institutionalized in Chinese customary law (incorporating traditional Chinese patriarchalism) which continued to apply until the 1970s and remnants of which lingered in the land law and practices in the New Territories (Jones 1994). Gender inequality was replicated in employment practices. The government was always reluctant to legislate for equality in the public and private sectors, due to explicit or perceived opposition from traditionalists or the business community.
CONCLUSION

The Joint Declaration promises to preserve ‘the current social and economic systems in Hong Kong’ as well as its ‘life-style’ (art. 3(5)). Life-style is an elusive concept, but it becomes necessary to define it or at least develop an understanding of it. From the preceding account, it is possible to draw a picture. The distinctiveness of Hong Kong’s ‘systems’ is reasonably clear, although it denies the premise of change which has been itself a defining feature of the territory. The reference to ‘systems’ in the plural seeks to separate off parts which are of a whole. The notion of ‘life-style’ through the concept of identity may provide a framework which shows the unity of systems. But the question was often asked, is there a Hong Kong identity? It is generally argued that for a long period Hong Kong did not have an identity; its population, whether Chinese or foreign, was too transient, and bound to its culture of origin. After the Second World War this seemed to change, at least as far as the Chinese were concerned.

There continued to be steady migration from China, but settlement in Hong Kong became more permanent. In the 1980s about 60% of the population was Hong Kong born. Hong Kong also became more industrialized and modernized; and from early days it was urbanized. Western education and the international position of Hong Kong (with the Hong Kong diaspora overseas) gradually defined a culture and outlook different from their antecedents on the mainland. Their Confucianism was moderated by Western forms of economy (in which commerce occupied a lofty place) and government. The new morality was market oriented, with little place for compassion, virtue or equality, business entrepreneurs being venerated instead of the scholar-bureaucrat. On the other hand, the relative freedoms in Hong Kong encouraged self-expression, in traditional as well as Western cultural forms, and other forms of creativity too. Hong Kong identity was sharpened by the impending transfer of sovereignty, making its residents aware of their own distinctiveness.11

Lau and Kuan state that the Hong Kong identity, ‘though not implying rejection of China or the Chinese people, necessarily takes China or the Chinese people as the reference group and marks out the Hong Kong Chinese as a distinctive group of Chinese. This group is perceived as one with a separate subculture which is more “advanced” than the dominant culture in contemporary China or the often touted traditional Chinese culture. This Hong Kong identity does not entail much political overtones

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11 Lau and Kuan report that in their survey a year after the signing of the Joint Declaration that ‘an astonishingly’ large number of respondents (59.5%) identified themselves as ‘Hongkongese’ rather than ‘Chinese’ (1988: 2).
in terms of Hong Kong nationalism or the desire for political independence . . . ’ (1988: 2). It is an identity of ambiguity, traditional and yet modern, which, for example, has been nourished on the freedoms of Western liberalism but does not fully accommodate it within its mind set, or is suspicious of communist China yet hurries to make peace with (even to placate) it — perhaps because it is founded on the morality of commerce.

There were latent forces which might in due course have resolved the ambiguity. While Britain ruled Hong Kong through an authoritarian system, it also laid the foundations for democracy. It secured the rule of law and the notion of the legal accountability of the government. It established a responsive public service (if only for the exigencies of governing). It protected private property and the security of transactions, and developed (in practice if not always in law) a generous regime of rights and freedoms. It generated a lively civil community. It consulted the people (though somewhat manipulatively) on policy and administration. It introduced Western education and ideology, in which democratic values were celebrated. Migration and the market led to some atomization of society and the autonomy of the individual. Prosperity and a high degree of literacy would have facilitated the transition to democracy.

However, whether due to constraints forced on the colonial enterprise stemming from China’s ultimate claim to Hong Kong or other reasons, Britain left the democratic part of the agenda unfulfilled. What Britain left behind was manipulative politics, a privileged political position for business and professional elites, and access to influence through patronage and cooptation. It made the Heng Seng Index the barometer of well being and fostered the notion that democracy was somehow antithetical to economic prosperity. The Joint Declaration, in wanting to preserve ‘current systems’, also wished to stunt the growth of democracy. In this as in other respects, rapid changes were inherent in the logic of the organization of economy and society in Hong Kong which the Joint Declaration and more particularly the Basic Law insufficiently recognize or provide for.
The Resumption of Sovereignty

INTRODUCTION

There were three distinct stages in the recovery of sovereignty by China and the establishment of the Hong Kong Special Administrative Region. The first stage consisted in negotiations between China and the United Kingdom, which started effectively in September 1982 when Deng Xiaoping, the Chinese paramount leader, and Margaret Thatcher, the British Prime Minister had their first meeting in Beijing, and ended with the ratification and signing in December 1984 of the Joint Declaration on the transfer of sovereignty. The next stage was the drafting of the Basic Law which China had undertaken to enact to give effect to those provisions which prescribed the future constitutional system of Hong Kong. This stage started in June 1985, when China announced the composition of the Basic Law Drafting Committee which was to have the primary responsibility for the preparation of the Basic Law, and ended with its adoption by the National People’s Congress in April 1990. The third stage was the establishment of the Hong Kong Special Administration Region (HKSAR), by creating legal and political conditions for the handover of sovereignty and the formation of the first government and legislature, to be completed by 30 June 1997.

These stages were spread over 15 years, and what may be described as the transitional period after the agreement on the transfer of sovereignty alone lasted for 12 years. This is not in itself long, but was likely to be problematic, even acrimonious, unless there was a high degree of consensus among the People’s Republic of China, the United Kingdom and the people and authorities of Hong Kong. All stages of the transition were difficult, marked by bitter controversies. The machinery for the transition
was complex, with authority for decision making and implementation diffuse and fragmented. The process of the decolonization of Hong Kong was very different from any that the UK had experience of, while for the People’s Republic this was the first instance of re-unification of China. Consequently in the absence of precedents there was a considerable amount of improvisation. The massacre in Tiananmen Square in June 1989, almost half way through the 15-year period, compounded many-fold the difficulties that were already inherent in the process. It left deep marks not only on the Basic Law but also in the psyche of the people, and altered in fundamental ways the relationship between the three parties to the process. An unfortunate consequence of its aftermath is that the establishment of the HKSAR was accompanied by much anxiety, resentment and even rancour, a poor start for the Special Administrative Region which needed goodwill, patience and skills to succeed even in the best of circumstances.

THE JOINT DECLARATION

Background to the Negotiations

The reason for the relinquishment of British sovereignty was similar to that for its acquisition: the demands of commerce. With impending expiry of the Peking Convention on the New Territories and the inability of the Hong Kong administration to grant leases for more than the remaining short period, there were likely to be problems, specifically of raising loans from financial institutions, and more generally of business and political confidence in the future of the territory. A settlement of the future status of Hong Kong seemed imperative. In one sense the expiry date of 30 June 1997 seemed irrelevant as China had always regarded the convention as void; and it was argued that the simple expedient was for Britain as well to disregard the convention and to continue its administration of Hong Kong beyond that date (Wesley-Smith 1983: 188–190). This might not have been sufficient for nervous business people, and other avenues were suggested, including testing Chinese intentions by the administration granting leases beyond 1997 — suggested by T.S. Lo (Cottrell 1993: 46; Roberti 1994: 13–14). In the end it seemed to the British that there might be no substitute for formal talks with China, especially after the tentative probings of Deng Xiaoping by the Governor, Murray MacLehose, in March 1979 as to the extension of commercial leases misfired (perhaps because misunderstood, Cottrell 1993: 54–57).

It seemed to both parties that time was ‘ripe’ for negotiations (although
it is possible that MacLehose’s intervention somewhat precipitated the issue). After the long period of anti-rightist campaigns and the Cultural Revolution, Chinese leaders were looking to order and stability and to economic development, central to which was, on the one hand, a measure of democratization and legality, and on the other greater reliance on market mechanisms and foreign investments (this point is elaborated in Chapter 3). China expected that Hong Kong would contribute to its economic development through capital and skills. It therefore seemed to Britain that China would be receptive to its proposals for a reasonable settlement of Hong Kong which would involve minimum disruption to its system and which might include a continued role for Britain. Even if a formal role for Britain was excluded, conditions were propitious for preserving the essential features of Hong Kong’s economy and administration. It was best to deal with Deng, who had the reputation of being a moderate, and at a time when his dominance over the Communist Party seemed secure. Britain was impelled towards negotiations for two further reasons. It wanted, as did other Western powers, to cash in on China’s opening to the outside world, prospects for which would be enhanced once the irritations of the Hong Kong question were out of the way. Secondly, it was afraid that continuing uncertainty would erode confidence of Hong Kong residents and they might begin to look for resettlement in Britain. Over decades many a British politician has had sleepless nights haunted by the spectre of coloured immigration, and the fear that hordes of Hong Kongers would beat a path to Heathrow or Dover was undoubtedly a major concern (even though, as explained in Chapter 4, Britain had already amended its nationality law to exclude Hong Kongers from the right of abode there). Putting a more charitable interpretation on the matter, Britain may have opted for an orderly and honourable transfer of sovereignty of its last major colony.

China too considered it a good time to begin negotiations. The lease could hardly be extended without a considerable loss of face and domestic legitimacy (it is significant that when China refused to accept Portugal’s offer to return Macau after the Portuguese military revolution in 1974, it swore Portugal to secrecy, Pereira 1991: 274). China was interested in the recovery of Hong Kong to assist in its economic and technological development. The recovery of Hong Kong was important for Deng Xiaoping, rapidly emerging as a key leader, as this would help to consolidate his authority over his left wing rivals. The PRC government had already, in 1978, established the Hong Kong and Macau Affairs Office directly under the State Council for developing policies towards Hong Kong; the Office was to play a key role in the process of the recovery of Hong Kong (although its existence was kept secret until 1982, Cottrell 1993: 58–59; Roberti 1994: 18–19).
Uncertainties about the date for the return of the New Territories were implicit in the Chinese view that although the Peking Convention was unequal, China would deal with the matter through negotiations ‘when conditions were ripe’. This vested the power of the initiative with China. The parameters within which the Hong Kong issue might be dealt with were fundamentally redefined through one of the first acts of the PRC when it was admitted to China’s seat at the United Nations. Until then Hong Kong was regarded by the UN as a colony, and therefore subject to the supervision of its Special Committee on Decolonization, to which Britain submitted regular reports on constitutional developments in Hong Kong. In March 1972 China requested the United Nations to remove Hong Kong and Macau from the list of colonies covered by the declaration on the granting of independence to colonial people. It asserted that Hong Kong and Macau were part of China occupied under unequal treaties by British and Portugal authorities, and that the ‘settlement of the questions of Hong Kong and Macau is entirely within China’s sovereign right’. The UN acceded to the request; Britain did not object and had probably acquiesced in it (later merely asserting that the removal of Hong Kong from the list did not affect its ‘legal status’, Jayawickrama 1990: 90–93).

**Sovereignty and Self-determination**

Self-determination is closely connected with sovereignty, and indeed is frequently regarded as the other side of the coin. Since the question of sovereignty has been so central to the troubled relationship between China and Britain, was a major influence on the drafting of the Basic Law, and is likely to determine the future relationship between the Central Authorities and the HKSAR, it is necessary to discuss briefly Chinese views of sovereignty. Lying between the domains of law and politics, and between the international and domestic communities, it is an elusive concept. It used to denote the absolute equality of states and their sole right to deal with their internal affairs without interference from other states. Domestically, it meant that there resided in some national institution, the ruler or the government absolute powers (illimitable, in Hobbesian terms) to govern the country; its policies and acts were basic to the polity and beyond legal challenge.

Responding to the changing strategies of statecraft, the exigencies of international order and the rise of democratic ideas, the significance and scope of sovereignty have been altering. In inter-state relations, while state sovereignty is still a fundamental principle, there has been considerable erosion at its periphery. Lip service is still paid to the equality of states,
but international life (reflected in numerous instruments and treaties, including that most sacred document, the UN Charter) is based on the unequal powers of states, and the hegemony of the big and powerful states. There is much international law making which imposes obligations on states effectively without their consent. The international community has taken over increasing responsibility for the protection and welfare of citizens of other states (refugees, humanitarian law, armed intervention to stop massive destruction of life and property, rights, etc). The economies of states have been drawn closer and integrated, through the logic of the market itself, assisted by numerous treaties and legal arrangements, restricting even within its own territory the ability or the legal competence of a state to regulate its domestic economy (the so-called globalization).

At the national level, the absolutism of the ruler (whether an individual or a collective, like parliament or the government) has been dethroned by the rise of the notion of popular sovereignty. Power is seen increasingly to emanate from the people, moving upwards to governments, mandated through the exercise of universal suffrage. The limits on the powers of the government are inscribed in the national constitution (the surrogate of popular sovereignty); these powers are a trust, for which the government is accountable to the people. The powers of government are divided in different ways (horizontally as well as spatially), to prevent abuse and corruption as well as to express more concretely the sovereignty of people — such as the separation of powers, federalism or various other forms of autonomy, and the recognition of civil society and human rights (spheres of personal autonomy). This disaggregation of sovereignty at the inter-state and national levels (as well as the conceptual separation of international from national sovereignty) has provided the flexibility that makes possible new structures of international cooperation and new configurations of domestic arrangements for governance, more congenial to modern ideas and aspirations.

China, like India and the aboriginal peoples of the Americas and Australasia, was an early victim of the Western notions of state sovereignty and international relations, which persisted right up to the early part of this century (the following account draws substantially upon Ogden 1975). Its views of sovereignty were profoundly influenced by its encounter with the West in the nineteenth century. At that time China allegedly did not have a developed notion of sovereignty. It had no awareness of other states. It believed in universal kingship, with the Mandate of Heaven conferred on its own Emperor. China therefore had the right to rule the world; it seemed to have had limited territorial ambitions, satisfied once its suzerainty was acknowledged (and the acknowledgement renewed by periodic payment of tributes) — it had no ministry dealing with foreign
affairs.\textsuperscript{1} When in the eighteenth century Lord Macartney ventured to China to seek the right to establish a British embassy in Peking, China attempted to fit Britain in its view of universal kingship and Chinese suzerainty (the excellent account of that encounter by Peyrefitte 1992 provides many insights into how China — and Britain — perceived the world at that time). China did not have a strong sense of a political community (although it assumed the existence of the unity of the Chinese nation, despite considerable evidence to the contrary). Instead China was perceived as an ethical, cultural community where public power was mediated through Confucian norms.

These views were to change under the impact of the West, which at that time had its own view of ‘universalism’ and sovereignty. A distinction was made between civilized Christian states and the ‘barbarous’ peoples; only the former were subject to the norms of international law, under which territorial integrity and sovereignty were respected (Gong 1984). Consequently it was lawful to disregard their laws and government and to impose those of the West, either generally or in enclaves, and if necessary to occupy their lands. These doctrines and practices led to the steady erosion of Chinese ‘sovereignty’, through being forced to open its borders to outside trade, accept extra-territoriality whereby Western laws were applied to nationals of their states, succumb to spheres of influence, and to the loss of territory. As China was unable to withstand these assaults on its power and competencies, and as Chinese scholars and officials turned to the study of Western texts of international law, they realized that safety lay in sovereignty — if they could establish their claim to being ‘civilized’, for at that time China does not seem to have challenged Western theories of international law.

Attempts at the reform of Chinese constitution and law were undertaken to establish a ‘civilized’ system of law and government from which to negotiate the abolition of treaties that had undermined its sovereignty. It was therefore important to hold to the then absolutist notions of sovereignty as protection for the future. These attitudes towards sovereignty were reinforced when the communists took charge of China, for they had considerable resonances with the Soviet theory of international law in which state sovereignty was the centre piece. The old notion of state sovereignty (shorn of its cultural and imperial overtones) was fundamental to the Chinese principles of foreign policy known as peaceful co-existence (Chiu 1996 and 1987; Kim 1987; Scott, G 1975). Sovereignty was a protection for weak states and any doctrines or rules which derogated

\textsuperscript{1} It is the hardening of suzerainty into claims of sovereignty that has caused China special difficulties with neighbouring states and its border communities (see Chapter 3).
The Resumption of Sovereignty

From it rendered them vulnerable to outside influences. Thus China resists the developing notions of international responsibility for human rights, etc. The Chinese notion of sovereignty in inter-state relations spills over into its perception of domestic governance. China believes that it will be able to resist foreign incursions on its sovereignty only if it is strong and united. Unity and strength are the products of domestic sovereignty, manifested in the centralization and concentration of power. This strong view of sovereignty has hitherto been possible in China because the popular conception of public power did not change much from imperial times when it was personalized and absolute. The principles of self-determination, which lie in the borderland between the international and domestic, are therefore particularly suspect, holding the threat of the disintegration of the country (with Taiwan already poised on the brink of independence). In the context of the return of sovereignty over Hong Kong, self-determination would have complicated the process which China’s leaders had already mapped out.

Under the decision of the UN in 1972, Hong Kong became at best a bilateral matter. Its effect was to remove the decolonization of Hong Kong from the principles and procedures of the UN, including self-determination. The UN Charter obliges colonial powers to promote self-government (art. 73). General Assembly resolutions in 1960 (UNGA Res. 1514(XV)) and 1970 (UNGA Res. 2625(XXV)) reaffirmed the right of self-determination of colonized people. The International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights (1976) give special prominence to self-determination (although in their application to Hong Kong Britain qualified the principle by reference to the UN Charter which assumes a gradual transition to self-government). The International Court of Justice has endorsed the principle, in the context of the transfer of territory (Advisory Opinion of the ICJ in Namibia, ICJ Report 1971 and the Advisory Opinion in Western Sahara, ICJ Report 1975). The jurisprudence of the International Court indicates that the rule has been a peremptory norm of international law and, as such, under the Vienna Convention on Treaties, supreme over treaties (Jayawickrama 1990: 88–89).

Agreement on the principle is possible in the abstract, for it is when the discussion turns to its scope or what constitutes ‘people’ who are entitled to it that difficulties arise. Briefly, the principle of self-determination has two aspects. Externally, it operates to allow a people to decide on their international status, which can range from independence to association or integration with another state. Domestically, it means that the people of a state or territory should be free to decide on their constitutional and political system and choose their governments through periodic and free elections. The argument of the applicability of self-determination appears
not to have been raised officially (or even for the most part in academic circles) in the context of Sino-British negotiations on the transfer of sovereignty over Hong Kong.\(^2\) China’s position, relying on the invalidity of treaties, was legalistic, that the people of Hong Kong were always part of China. Moreover they wanted to be reunited with it (China declared in art. 1 of the Joint Declaration that the recovery of Hong Kong is the ‘common aspiration of the entire Chinese people’ and the preamble of the Basic Law refers to the resumption of sovereignty as ‘fulfilling the long cherished aspiration of the Chinese people’). This position conveniently ignored fundamental changes in the situation of Hong Kong and the emergence of a distinct identity that under modern international law would justify its right to self-determination. Even the British Prime Minister Mrs Margaret Thatcher’s rejection of the Chinese view of the invalidity of the treaties was raised to assert British sovereignty, not Hong Kong’s right of self-determination. Self-determination would have required giving a choice to the people of Hong Kong on whether they wished to stay on with Britain, become independent or be associated with China (either fully integrated or in some autonomous relationship).

If external self-determination was unacceptable to China, it seemed that internal self-determination was equally out of bounds. Although China was developing principles for the unification with Taiwan and Hong Kong which envisaged a high degree of autonomy for them (which in substantive terms might be seen as sufficient self-determination), China was not prepared to engage in a dialogue with the people of Hong Kong. China was quite resolute on this point, stamping on any attempts on the part of Britain which it suspected of involving Hong Kong officials or unofficial leaders in the negotiations on the transfer (as with Britain’s proposal to establish the notion of a ‘three legged stool’ whereby China, Britain and Hong Kong would all in some sense be parties to the negotiations or the acceptance of the final outcome).\(^3\) It was not consistent

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\(^2\) The most active proponent of the principle in Hong Kong, Jayawickrama complained in public that ‘not many people in Hong Kong have been willing to listen to it’ (Jayawickrama 1990: 85). He has further developed his arguments (1991). A delegation of the International Commission of Jurists raised arguments similar to that of Jayawickrama (ICJ, 1992: chap. V). It stated, ‘We have concluded, without hesitation, that the people of Hong Kong are entitled to the right of self-determination’ and that they were denied it. Recognizing the practical difficulties of implementing the right in 1992, it recommended that Britain should give the right of abode in Britain or secure it elsewhere to British Dependent Territories citizens.

\(^3\) A dramatic illustration of this attitude was provided by the Chinese refusal to allow a senior Hong Kong aide to the Governor, Peter Tsao, to join the delegation as he did not carry a full British passport. The Governor was admitted only on the understanding that he was a representative of the British government. (Cottrell 1993: 108)
with its notion of sovereignty that it should be negotiating with its own people — even though international self-determination assumes just such negotiations (Quebec with Canadian federal authorities, Puerto Rico with the US, Assam with India, Mindanao with the Philippines — the examples can be multiplied many-fold).

However, it was imperative for both Britain and China that the people be consulted in some form. For Britain it was important so that it could eventually persuade Hong Kong and the British Parliament that the settlement was honourable and fair (although it probably did not want too active a role for them as it might complicate negotiations with China). Britain also expected that its positions would be strengthened if the residents of Hong Kong were involved, as it assumed that it would have the support of a large majority of them. China needed consultation for assurance that the people of Hong Kong would not subvert the eventual arrangements either by mass migration or transfer of capital, or through outright resistance (as I discuss in Chapter 4, Deng was particularly worried about these possibilities).

Britain resolved the matter (though not without opposition from its Foreign Office) by informing the Governor’s Executive Council of the progress of the negotiations and giving an opportunity for comments, and China by inviting delegations from Hong Kong to meet with its leaders to be apprised of (rather than consulted on) its future policies for Hong Kong. The Chinese did consult some Hong Kong persons but the outline of its policies seems to owe little to them. China was anxious to reassure the people of Hong Kong without giving them any purchase on the process. Occasionally China used these meetings with Hong Kong delegations so as to appear as if it intended to by-pass negotiations with Britain, and consequently as a way to put pressure on Britain. Thus the leaders and people of Hong Kong were used opportunistically and cynically by both sovereigns.

**The Framework for the Negotiations**

The framework for the negotiations was in this way prescribed essentially by the Chinese. Negotiations were to be bilateral, unencumbered by modern international principles of decolonization and self-determination.

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4 I do not propose to provide a detailed account of the negotiations, for which several excellent histories by insiders or their confidants exist, see Cottrell 1993, Roberti 1994, Cradock 1994, Segal 1993 and Scott 1989. These accounts rely largely on British sources, and therefore do not provide any authoritative guidance on Chinese policy making as perforce they have to depend on circumstantial evidence.
Negotiations were to be held in Beijing. At first China was not sure that negotiations were strictly necessary since it could decide when and how it wished to recover Hong Kong, but with the softening of British attitudes, it could see obvious advantages in a negotiated settlement (especially as it wished to promote its new image of legality and moderation). However, China constantly upstaged the British by public announcements of its policies regarding Hong Kong in advance of its meetings with Britain. This was consistent with its general position that China’s relations with Hong Kong were an internal matter, not suitable for negotiations with a foreign power. As far as its view of British participation was concerned, all that was necessary was to agree on the modalities of the handover of sovereignty. Britain, on its part, tried repeatedly to expand the framework and the scope of negotiations, central to which remained for a considerable time the question of sovereignty.

The negotiations were conducted largely by officials on both sides and when deadlocks occurred, ministerial interventions were necessary. On the Chinese side Deng’s approval was essential, although he seems to have confined himself to broad principles, and may not have seen certain details negotiated at the closing stages which probably contravened his instructions on the need for brevity as well as on aspects of the political structure. On the British side, proposals and counter proposals had to go past Mrs Thatcher, whose appetite for detail was considerably sharper than Deng’s, even if her understanding of issues was less acute. The key role she took on probably altered the strategy of the small group of ‘mandarins’ at the British Foreign Office who had traditionally handled Chinese policy — for they would undoubtedly have accepted the Chinese version of sovereignty. In the end, however, she had to give way and accepted guidance from Percy Cradock, at first British Ambassador in Beijing and later Mrs Thatcher’s adviser on foreign affairs, who played a crucial role throughout (and after) the negotiations (Cradock 1994). Of the foreign ministers, Geoffrey Howe was most deeply involved and played a key in securing compromises in the closing stages (Howe 1994).

The Hong Kong Executive Councillors, who were privy to some of the negotiations, played a role as a ginger group, lobbying the British Parliament and putting pressure on the British government, principally through the Governor, Edward Youde (who seems to be the only key person to have had sympathy for them). Although not without influence on some minor issues, their role was very subsidiary. Nor were they able to mobilize public opinion since they received the information about the negotiations on a confidential basis. However, they would have had a limited interest in mobilizing the public; such was not their political style. On substantive issues, their primary interest seems to have been to prolong
British influence as long as possible (they were the great champions of British sovereignty or continued administration) and to halt democratization (a project they were able to pursue with vigour during the formulation of Hong Kong government’s policies for political reform as well as the drafting of the Basic Law). The Legislative Council, which had been kept in the dark throughout, sought to secure a role for itself. Over the opposition of the Chinese government, it passed a resolution in March 1984 to the effect that it was essential that the Legislative Council should debate proposals for the future of Hong Kong before any agreement was reached (one member saying that ‘we are a modern people who cannot relish the prospect of an arranged marriage’, Roberti 1994: 82).

The Agenda of the Negotiations

Negotiations got under way after a meeting between Deng Xiaoping and Margaret Thatcher in Beijing in September 1982 which had provided no real guidance to the negotiators and which had left the two parties far apart. The only agreement the official communiqué was able to indicate was the need for diplomatic talks to maintain the ‘stability and prosperity of Hong Kong’ — a phrase which has become hallowed. However, Deng set out the principal issues that, in his view, needed to be resolved: the question of sovereignty, how China would maintain Hong Kong’s prosperity after 1997, and how Britain and China would co-operate to ‘avoid major disturbances’ during the transition period (Roberti: 48–49). This formulation determined the formal agenda of the negotiations (agreed in May 1993):

1. arrangements for the maintenance of stability and prosperity after 1997;
2. arrangements in Hong Kong between then and 1997; and
3. matters relating to the transfer of sovereignty.

The listing of sovereignty at the end might be seen as a British victory, for Thatcher had maintained that Britain would only consider the question of sovereignty after it was satisfied with arrangements made, in other respects, for the future of Hong Kong. In fact the agenda reflected a victory for China, for China had effectively refused to begin negotiations unless the British position on sovereignty was clarified in a manner satisfactory to it. That clarification came in a letter from Thatcher to the Chinese Prime Minister, Zhao Ziyang in March 1983 in which she stated that if the negotiations yielded ‘arrangements acceptable to the people of Hong Kong’ then she ‘would be prepared to recommend’ to Parliament the transfer of sovereignty (Cottrell 1993: 102–103). Although this was generally
understood as implying that Britain no longer considered as serious its claims to continued sovereignty and opened the door to formal negotiations, it did not prevent considerable debate on the issue in the talks.

**The Conduct of Negotiations**

In broad terms, it is possible to divide the negotiations into two periods. The first period lasted from 12 July 1982 to 15 November 1983, and the second from 7 December 1983 to 18 September 1984 when the full draft was agreed by the officials. The first period was unproductive and acrimonious; it ended with major concessions by the British. The second period, building on those concessions, concentrated on the specific arrangements which would be established for Hong Kong after the transfer of sovereignty based on proposals submitted by China. China had already a clear idea of the system it would establish in Hong Kong which it had first conceptualized in the case of Taiwan and for which provision was to be made in the constitution that was adopted in 1982. In essence, it provided for the continuation of Hong Kong’s economic and legal systems and recognized substantial autonomy for Hong Kong. This policy was explained to various visiting Hong Kong groups and journalists; and intimations of it were given to British politicians and Hong Kong administrators. By the time the negotiations began Britain should have had a reasonably clear idea of what China would propose. However, Britain had its own agenda, and it was not until that was disposed of that serious substantive negotiations began. Britain probably realized (its officials undoubtedly did) that British proposals (premised initially on British sovereignty over Hong Kong) would not go past China, but it presented them in order to demonstrate that Britain tried to secure the best deal for Hong Kong (quite apart from the benefits that would have accrued to Britain itself). 

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5 If British negotiators had read the report on the revised constitution presented by Peng Zhen to the NPC on 26 November 1982, they would have gathered a fairly accurate impression of Chinese stance. Referring to art. 31 which provided for special administrative regions (on offer to Taiwan), he said, ‘We will never waver on the principle of safeguarding China’s sovereignty, unification and territorial integrity. At the same time, we are highly flexible as regards specific policies and measures and will give full consideration to the realities of the Taiwan region and the wishes of the people of all quarters in Taiwan. This is our basic position in handling problems of a similar kind.’ The difference was of course that in Taiwan China would have to negotiate with the government and the representatives of people of Taiwan, while for Hong Kong they would deal only with the British. There are obviously limits to flexibility, although the actual drafting of the Basic Law provided restricted opportunities for the participation of nominated Hong Kong persons and groups.
The Resumption of Sovereignty

Sovereignty

As indicated, the issue of sovereignty was resolved preliminarily by a British concession — in substance if not in form. The issue was important symbolically because so much of Chinese resentment against Britain and the general difficulties of their relationship were connected to British undermining of Chinese sovereignty in the nineteenth century. Although these considerations had not, over the decades, prevented the emergence of understandings and even cooperation between the two over the administration of Hong Kong and although no doubt the question of sovereignty would be resolved during the negotiations, it was important for China to have its sovereignty acknowledged at the start. At the very first meeting (29 March 1979) where the question of the future of Hong Kong was raised between the two states, Deng told MacLehose of China’s consistent view that the PRC had sovereignty over Hong Kong and that a negotiated settlement of the Hong Kong question should be based on the premise that the territory was part of China (Cottrell 1993: 54). How emotionally important this was for China was demonstrated by Deng’s reaction to Thatcher during their meeting in 1982 when she asserted the validity of the nineteenth century conventions and thus British sovereignty over Hong Kong.  

The issue was also of some practical significance in terms of the balance of power between the two negotiating sides. The British considered that they would have little bargaining power if the concession on sovereignty were made at the start. By asserting that Britain had sovereignty under the treaties and that any new arrangements would require their revision, they sought to obtain more leverage over the process in which the cards were heavily staked in favour of China.

British administration of Hong Kong?

The second issue was the demand of Britain that even if it agreed to the reversion of sovereignty, it should continue to administer Hong Kong. The British delegation presented a number of papers to ‘educate’ China

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6 Cottrell records that ‘At this, Deng’s mood shifted from assertiveness to genuine anger. His immediate comments were lost to the British record, but appear to have included the remark that Mrs Thatcher should be “bombarded” out of her obstinacy’ (p. 88). When Thatcher embellished on this point subsequently in public conferences, comments in the Chinese press were truly vituperative. There is reason to believe that the Foreign Office was prepared to concede the point, but Thatcher brought an old fashioned imperial robustness to the talks.

7 The irony may have escaped the British, but what could be more appropriate for a commercial place like Hong Kong than a grand management contract (indeed the mother of all management contracts)?
on how Hong Kong was administered (in terms of the economy, monetary affairs, international trade, the legal system, etc.), which were intended to demonstrate the necessity of the British connection. Trying to cash in on China’s anxieties about law and order and the economy in Hong Kong under Chinese rule, Thatcher had sought to convince Deng in their meeting that it was only through continued British administration that confidence in Hong Kong could be maintained, public opinion assuaged, and its stability and prosperity assured. The Chinese emphatically rejected this demand for pragmatic and doctrinal reasons. They were convinced that Hong Kong would be administered successfully without the British, but it was on the doctrinal issue — that of sovereignty once again — that the greater emphasis was placed. On 15 September 1983 the New China News Agency stated that if administrative powers remained in British hands, ‘how can China be said to have recovered sovereignty?’ Public opinion could not decide these matters, nor was there any precedent for the separation between sovereignty and administration. The latter point was emphasized by Zhou Nan, soon to assume the leadership of the Chinese negotiating team, saying that the British proposal was ‘totally lacking both in jurisprudence and reality’ (Cottrell 1993: 119–120).

Another British capitulation followed. A message was sent to the Chinese Foreign Ministry in October 1983 that Britain was prepared ‘to see whether Britain and China could together construct, on the basis of proposals put forward by China, arrangements of lasting value for the people of Hong Kong’. If this could be achieved, then ‘the British Government would be prepared to recommend to Parliament a treaty enshrining them, and to do its utmost to assist in their implementation’ (Cottrell 1993: 13). Although there was some misunderstanding about the conditionality involved in the offer, it was accepted by the Chinese that Britain had effectively given up the claim to administer Hong Kong.

**Chinese Proposals: One Country Two Systems**

This finally set the stage for the exploration of the Chinese proposals which had been so carefully put together over after discussions at the highest echelons of authority in the government and the Communist Party. Notwithstanding the conditionalities in the issues over sovereignty and

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8 In fact China was wrong as they must have known, for they had entered into a precisely similar scheme with the Portuguese over the administration of Macau. When China refused formally to resume sovereignty over Macau (which it had always asserted), both sides agreed that Macau was ‘Chinese territory under Portuguese administration’ (Pereira 1996: 274).
administration, Britain had left itself with little option; as Cottrell says, either Britain would endorse China’s plan, or it would decline to endorse it, in which case the plan would be implemented nonetheless (130). However, in the improved and business like atmosphere that the British concessions produced, Britain was not without influence, both for its knowledge of what made Hong Kong tick and the Chinese desire to secure its co-operation in the process of the transition of sovereignty.

In the second phase of the negotiations, the Chinese concern was to keep intact as much as possible of its original proposals, to minimize formal provisions or guarantees underwriting those proposals, in any case to restrict them as purely domestic obligations, and to secure British cooperation during the transitional period and in the handover of sovereignty while minimizing Britain’s role in the establishment of new legal arrangements for Hong Kong. The British concern was to provide a detailed legal basis for the continuation of Hong Kong’s system of administration and economy and for its autonomy, and to anchor it in both domestic and international law (for which purpose the British delegation presented a new set of papers showing how Hong Kong might survive on its own). Britain was also particularly concerned that its powers to administer Hong Kong during the transitional period should not be tramelled; it did not wish to be a lame-duck administration.

The proposals that China presented on 27 June 1984 were 12 short points; they had already been shown to visiting secondary school students earlier in the month. It provided that the Hong Kong ‘special region’ would:

1. keep its capitalist system;
2. remain a free port and a financial centre;
3. retain a convertible currency;
4. not be run by emissaries from Beijing;
5. have a ‘mayor’ elected by local inhabitants, who should be a ‘patriot’;¹⁰

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⁹ Cottrell comments, ‘Where the previous set of papers had anatomized Hong Kong in structural terms, highlighting the ubiquity of the British ‘link’, the new papers anatomized it in functional terms, looking at the internal workings of the various systems and institutions, and isolating those aspects which would have to be made self-sufficient of both Britain and China, if Hong Kong were really to survive a British withdrawal and re-group its resources under a local government’ (p. 134).

¹⁰ Deng has provided the following definition of a ‘patriot’: ‘The qualifications for a patriot are respect for the Chinese nation, sincere support for the motherland’s resumption of sovereignty over Hong Kong and a desire not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are patriots, whether they believe in capitalism or feudalism or even slavery. We do not demand that they be in favour of China’s socialist system; we only ask them to love the motherland and Hong Kong’. Deng would apply the requirement of patriotism so defined to the ‘main body of administrators’ (Deng 1993: 10–11).
6. run its own affairs without central government interference, except in matters of defence and foreign affairs;
7. have ‘considerable’ freedom to take part in international activities;
8. issue its own travel documents;
9. keep its present legal system, so long as this did not conflict with Chinese sovereignty, and have its own final court of appeal;
10. be responsible for its own law and order, to be maintained by the police force;
11. tolerate political activities, even of the Nationalists, so long as these did not constitute sabotage; and
12. conduct its own ‘social reforms’ without impositions from Beijing (Cottrell 1993: 112). 11

Once agreed with Britain, they would form the basis for the drawing up of a detailed Basic Law under art. 31 of the constitution.

The British delegation did not consider that the 12 points constituted arrangements on the basis of which Britain would be willing to relinquish sovereignty or the claim to administer Hong Kong, although in retrospect, these points were probably the high water mark of autonomy. The British difficulty was not with the concepts but with the lack of detail, which it wanted to be agreed between China and Britain. There would seem to be three reasons why China was not interested in an elaboration of the 12 points. First, China was in general averse to detail (apparently Deng had imposed an upper limit on the number of characters); brevity is characteristic of China legislation, leaving it to the implementing authorities to flesh it out. Second, it objected as a matter of principle to negotiating with Britain on matters which it deemed within its sovereignty — the relationship of the central government with its own people. Third, China did not want to incur extensive obligations which might complicate the task of the drafting of the Basic Law. Nevertheless the Chinese studied the British texts and approved large sections, a process which picked up momentum after Deng indicated to Howe on a visit to Beijing in late April 1984 that some detail to supplement the 12 points would be acceptable. (This did not prevent the negotiators from refining the 12 points themselves, but retaining their status as ‘China basic policies’ towards

11 Although these proposals were undoubtedly original and innovative, they have some resonances with the proposals that Chiang Kai-shek advanced at the end of the Second World War for the recovery of Hong Kong under the Nationalist government. He had envisaged making all or part of Hong Kong a ‘free port area’ and referred the matter to the Supreme National Defence Council, which endorsed the proposal but stated that the creation of the free port must be ‘done through China’s own initiative and could not be made a condition for restoring Hong Kong’ (Chiu 1972: 253–254).
Hong Kong.) In the end most British texts were adopted, especially on trade, currency, tax and expenditure policies, international relations, the expansive role of the executive, and the legal system (China even agreeing that foreign judges might be invited to sit in the court of final appeal).

Agreement was harder to obtain on the nature of the legislature and its relationship with the executive (on which the 12 points were silent), the scope for the protection of civil rights and freedoms, the stationing of Chinese troops in Hong Kong, Hong Kong’s control over its aviation, nationality, and land leases (during the transitional period). Agreement was eventually forthcoming on these issues, under the pressure of the deadline of September that the Chinese had set (agreement on these and a host of other issues had eluded the negotiators as late as July 1984 when another visit by Howe helped to resolve them). The Chinese position regarding the stationing of Chinese troops (which Deng regarded as an essential attribute of sovereignty) was accepted, but it was balanced by the provision that the responsibility for law and order would lie with Hong Kong. On civil aviation, it was decided against the advice of the Civil Aviation Administration of China that Hong Kong would control its own landing rights, subject to authorization from China.

Other issues proved more intractable. On human rights, China was willing to spell out specific rights but reluctant to accept the application of the International Covenant of Civil and Political Rights, but accepted it subject to the formula, ‘as applied’ to Hong Kong (referring to the British reservations, see Chapter 10 for the implications of this). China proved more resistant on the degree of Hong Kong’s democratization; it would not remove the formula for the appointment of the chief executive through ‘consultations’ nor would it agree to elections by universal franchise for the legislature. In the end Britain had to content itself with the formulations that the legislature would be ‘constituted by elections’ and that the executive would be ‘accountable’ to the legislature, knowing well that China understood them in a more restrictive sense than their ordinary meaning. No agreement was possible on the sensitive question of nationality — here again, different positions on sovereignty led to opposing consequences as to pre-transfer nationality status of most Hong Kong residents — but an understanding was reached. The consequences of the differences were not too serious, and in any case were mitigated by the fact that rights and obligations were ascribed on the basis primarily of permanent residency, not nationality, as far as the future Hong Kong was concerned, and there appears to have been no dispute as to qualifications for permanent residency. The lease issue was dealt with by making a distinction between grants during and after the transitional period, with wider powers for the latter (as explained below).
While Britain was interested in elaborating details of the post-1997 arrangements, the Chinese were anxious to establish the framework for the transition, a period of 13 years as China had decided to recover Hong Kong at the expiry of the second Peking Convention. China’s concern about the transitional period was motivated by at least three considerations. It feared that the people of Hong Kong might resist the transfer of sovereignty, possibly in violent ways. Second, it feared that Britain might try to create chaos before it left Hong Kong, sabotaging the economy and encouraging dissension. Deng would have regarded increasing democratization, by giving the people a sense of autonomy, as a manifestation of that purpose. Third, it wanted to protect the considerable financial reserves of Hong Kong from probable predatory policies or acts of the British. China’s proposals for neutralizing these possibilities, presented in February 1984, took the British by total surprise. It provided for the establishment of a Sino-British joint commission to oversee all major aspects of Hong Kong’s administration including civil service appointments, fiscal and monetary policy, land sales and constitutional development. It would exercise ‘a high degree of surveillance’ over Hong Kong, particularly during the last four years of the transition (Cottrell 1993: 143). Clearly such arrangements would undermine British administration of Hong Kong, more particularly the Hong Kong government. It was also much criticized by the Executive Council (led in this regard by Sir S.Y. Chung and Maria Tam) who were resolutely opposed to any Chinese role before the actual handover of sovereignty. After ministerial intervention (including a Deng-Howe meeting on 18 April 1984), the British began to water down the proposals. Latching on to the Chinese denial of the Sino-British joint commission as ‘as an organ of power’, they began to strip it of its power, to turn it into ‘an organ of liaison’, with a largely consultative role. Britain also proposed that the commission should continue to function after 1997 so that Britain would be able to review post-transfer developments. In order to meet Deng’s deadline, the Chinese agreed to the British version of the joint body and to a statement that Britain alone would be ‘responsible for the administration of Hong Kong’ until 1997, and that China would ‘give its cooperation in this connection’.

However, China was able to secure a greater say on another issue, land leases in the transitional period. Agreement was reached early on the point that had triggered off the talks in the first place, that the Hong Kong administration could grant leases to run beyond 1997, in fact to 2047, up to which time Chinese guarantees for Hong Kong would run. But China was anxious to have some limits on the grant of leases and the collection
of the very considerable revenues generated thereby, as from the signing of the Joint Declaration to the transfer of sovereignty, to prevent the dissipation or withdrawal of the revenue by the British. Britain had to concede a role to China: it was agreed to have a joint Sino-British Land Commission whose approval would be needed for leases in excess of 50 hectares a year and half of the revenues would be placed in a special fund to be handed over to the HKSAR government after the end of British rule.

**Finalizing the Joint Declaration**

The format of the final document that would record the understanding of the parties eventually provided the solution to various problems. Chinese had at first resisted the idea of a treaty, recording merely the understandings of the parties as ‘parallel statements’. Deng eventually reversed this position and agreed (as late as April 1984) that the document would be a legally binding treaty. However, given the differences between the two parties on the historical question of sovereignty, it was agreed that each would state its own position, but that where the parties were agreed, this would be stated in the form of a common declaration.

The preamble notes with satisfaction the friendly relations between Britain and China and their intention to seek a negotiated settlement of the ‘question of Hong Kong, which is left over from the past’ with a view towards maintaining the ‘prosperity and stability of Hong Kong’ and the strengthening and development of relations between China and Britain ‘on a new basis’. The opposing views on sovereignty are reflected in arts. 1 and 2. In art. 1 the government of the PRC declares that ‘to recover Hong Kong’ is ‘the common aspiration of the entire Chinese people’ and that it ‘has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997’, making no distinction in the status of different parts of the territory to be recovered. More succinctly, the government of the UK declares that it ‘will restore Hong Kong to the People’s Republic of China with effect from 1 July 1997’ (art. 2).

The future systems to be established in Hong Kong — the heart of the document — are set out in the form of a unilateral declaration by China of ‘its basic policies regarding Hong Kong’ in 12 paragraphs in art. 3 (to be implemented in a Basic Law enacted by the NPC and not to change for 50 years). They represent the joint refinement of the original 12 points.

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12 There appears to have been no discussion between Britain and China on the period; it was fixed unilaterally by China. Deng has explained as follows why the period of 50 years was chosen (as well as why China would stick to the guarantee), ‘We need not...’
talled by the Chinese. Annex I contains detailed elaborations of these policies. The remaining articles are joint statements. Article 4 provides for British authority to administer Hong Kong until 30 June 1997. Article 5 refers to the establishment of the Sino-British Joint Liaison Group to ‘ensure a smooth transfer of government in 1997’ (the details of which are set out in Annex II). Article 6 covers land leases which are to be dealt with according to the provisions of Annex III. Article 7 records the agreement of the parties ‘to implement the preceding declarations and the Annexes . . .’ Finally, art. 8 provides for the coming into force of the Joint Declaration upon the ratifications of the Joint Declaration to be exchanged ‘in Beijing before 30 June 1985’. It also states that the Joint Declaration and the Annexes are ‘equally binding’ and makes the English and Chinese language texts ‘equally authentic’.

The format of the treaty thus enabled the main text to be kept brief, with the basic principles stated there and the details that the British had insisted on included in an annex, as fully binding as the rest of the document. It enabled several other issues which required considerable detail to be dealt with in annexes. However, the flexibility of the document could not accommodate the different positions on nationality, and the understandings that the parties reached were recorded in an exchange of memoranda at the same time but as documents outside the framework of the treaty.

A balance sheet of the results of this protracted process shows that China got substantially all it wanted. The agreement terminated British sovereignty and its pretensions to continue to administer Hong Kong (giving Britain merely a qualified licence to administer Hong Kong during the transitional years). China succeeded in keeping features of an outdated Crown colony of Hong Kong, fighting effectively to keep democracy off the agenda. It kept to itself considerable flexibility in relation to the

only to reassure the people of Hong Kong but also to take into consideration the close relation between the prosperity and stability of Hong Kong and the strategy of development of China. The time needed for development includes the last 12 years of this century and the first 50 years of the next. So, how can we change our policy during those 50 years? Now there is only one Hong Kong, but we plan to build several more Hong Kongs in the interior. In other words, to achieve the strategic objective of development, we need to open wider to the outside world. Such being the case, how can we change our policy towards Hong Kong? As a matter of fact, 50 years is only a vivid way of putting it. Even after 50 years our policy will not change either. That is, for the first 50 years it cannot be changed, and for the second there will be no need to change it. So this is not just idle talk’ (Deng: 61). See also Chapter 4, pp. 142–143.

13 Article 4 of the Joint Declaration states ‘the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability . . .’ (italics supplied).
design of institutions, the precise relationship between itself and Hong Kong, and the mechanisms for securing Hong Kong’s autonomy — crucial questions for the future of Hong Kong. It secured the recovery of Hong Kong as a thriving economy, with investor confidence high. It added to the prestige of Deng Xiaoping and the Communist Party at the same time as it demonstrated to the world China’s reasonableness and willingness to be bound by norms of international law and conventions (without giving up on its views of sovereignty and past treaties). It also demonstrated to the people of Hong Kong the clout that China now wielded.

Britain’s success lay in the mass of detail that elaborate China’s basic policies towards Hong Kong, providing a firmer and clearer structure and framework for the administration of the HKSAR. (I discuss in Chapters 4 and 6 how these details, intended to strengthen Hong Kong’s autonomy, were turned into restrictions on the autonomy.) It succeeded in ensuring that the agreement was an international treaty, binding in law (and registered as such with the United Nations). But this may have been a hollow victory since the Joint Declaration provides no procedures for settling disputes about its implementation, and no sanctions for the failure. It kept its right to rule Hong Kong for another 13 years. However, the right was considerably attenuated, and the logic of the Joint Declaration was to undermine that right further. It succeeded in imposing no obligations on China that China had not itself unilaterally announced in public. But it succeeded in its diplomatic aims, of persuading (by means of fudging key issues) the people of Hong Kong that it had fought hard (and mostly successfully) for their future and the British Parliament (and others) that it had secured an honourable settlement for Hong Kong, including the guarantee of democracy.

In more general terms, the Joint Declaration is a remarkable document. Its foundations in the doctrine of ‘One Country Two Systems’ are an interesting contribution to theories or regimes of autonomy. It is the product of considerable pragmatism. By its emphasis on systems of economy, law, rights and social policies at the expense of institutions, it proclaims as its primary purpose the conservative one of perpetuating a substantive system rather than promoting institutional autonomy which might threaten that system. But it was also clear from certain cryptic phrases that the institutional question would have to be confronted at the next stage of the unfolding of ‘One Country Two Systems’, by which Britain would be largely out of the way — but not quite.

The Joint Declaration was initialled on 24 September 1984 in Beijing. Public perceptions of the agreement were largely positive — Britain and China having joined forces in selling it. The Legislative Council endorsed it on 16 October 1984, the National People’s Congress on 14 November
and the House of Commons on 5 December. Prior to the debate in London, an official survey of opinion (under independent monitors) had been conducted in Hong Kong, through the solicitation of views as well as the monitoring of speeches, opinion polls and press reports. The choices offered to the public were somewhat stark: the return to China with the Joint Declaration or without it. The government used its machinery to get the public to support the agreement. Those who made submissions did support it, by a substantial majority, but even some of them expressed concerns about the possibility of undue interference by China, the viability of ‘one country two systems’, the lack of democracy, the stationing of Chinese troops, and nationality (Independent Monitoring Team 1984). The agreement was signed on 18 December 1984 by the prime ministers of the two states, Zhao and Thatcher, in the Great Hall of the People. It came into force on 27 May 1985 on the exchange of instruments of ratification.

**THE BASIC LAW**

**The Power of the NPC to Establish Special Administrative Regions**

China proceeded speedily to carry out its promise to give effect to its basic policies towards Hong Kong in a law to be passed by the NPC. The authority of the NPC to establish a special administrative region comes from art. 31 of the PRC constitution. It 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 the specific conditions’. The NPC is specifically given power to ‘decide on the establishment of special administrative regions and the systems to be instituted there’ (art. 62(13)). These articles give the NPC very broad powers to establish a special administrative region and to formulate the structure and powers of the region. This degree of discretion is necessary as art. 31 was drafted with a view to the reunification of Taiwan with the mainland. The terms of the reunification would have to be negotiated with Taiwan (on the basis of the general policy of ‘one country two systems’) and the PRC constitution had to be flexible to accommodate the eventual agreement. Moreover, it was necessary to allow for diversity, as different arrangements might be necessary for the other prime candidates for a special administrative region: Hong Kong and Macau with their colonial history and institutional traditions.
However, it is not clear how broad the powers of the NPC are, particularly in relation to other provisions of the constitution. Given its objectives, art. 31 makes sense only if the NPC is able to disapply at least some of these provisions in special administrative regions. Attempts by some Hong Kong persons to clarify the point at an early stage of the drafting of the Basic Law were rejected by the mainland members, which produced the unsatisfactory result that the drafters could not be sure about the precise effect of the provisions they were drafting or approving. The question was specially pertinent as this was the first legislation under art. 31.

The Process and Procedure for Drafting the Basic Law

In contrast to the negotiations of the Joint Declaration, considerable scope was provided for the participation of the people of Hong Kong in drafting the Basic Law. There were no doctrinal objections to local participation, the matter now being domestic, although China was anxious that it should be clearly understood that Hong Kong’s autonomy came from the Central Authorities, and not from Britain or any agreement with Britain. However, it has been suggested that China had originally planned to draft the Basic Law on its own but was persuaded by pressures from Hong Kong that its representatives should participate (Lau, Emily 1988).

The primary responsibility for the drafting of the Basic Law was vested in the Basic Law Drafting Committee (BLDC). The committee was established by the Standing Committee of the National People’s Congress (NPCSC) and consisted of mainland and Hong Kong members. It had 59 members (apparently the original figure of 60 was not reached as it proved impossible to persuade a particular pro-Taiwanese person to sit on it), of which a majority, 36, were from the mainland. The Chinese members consisted of senior figures from the various departments and agencies of the government (including those representing Chinese’s commercial interests in aviation and foreign investment) and universities, many of whom had been involved in negotiations over the Joint Declaration, and some also had advised on the 1982 reform of the PRC constitution. The Hong Kong members were drawn from various sectors, but there was a clear dominance of business people, including the most wealthy and influential of them (Lau, Emily 1988). There were a number of lawyers, 11 from China and 4 from Hong Kong. None of the members was elected or (at least on the Hong Kong side) in any sense representative, the Hong Kong members being nominees of the New China News Agency (Xinhua) in Hong Kong. This form of nomination was of course entirely
in keeping with the traditions of the Hong Kong government itself. The BLDC was chaired by the director of the Hong Kong and Macau Affairs Office (HKMAO), Ji Pengfei and the secretariat services were provided out of that office, showing that it was the primary agency responsible for the Basic Law, although it operated under guidance from a higher group in the Communist Party, which included Deng himself.

Much of the work of the BLDC was carried out by five groups appointed at its second plenum in April 1986, on the basis of a draft of the Basic Law which had been prepared by the secretariat. Each group had two convenors, one from the mainland and the other from Hong Kong, who were also appointed by the Chinese authorities. The chair and the eight convenors were responsible for the agenda of the committee and the organization of its work. The groups were on:

1. the Relationship Between the Central Authorities and the HKSAR;
2. Fundamental Rights and Duties of Residents;
3. the Political Structure;
4. the Economy; and

The General Working Group of the committee made ‘overall adjustment and revision’ of the draft proposals of the groups. In these ways the secretariat kept a reasonably firm control over the process. The process started off with a draft produced by the secretariat (normally the party which produces the draft has at least an initial advantage) and the assignment of different sections to relevant groups. There was little debate about the philosophy or structure of the Basic Law (an influential member of the BLCC had emphasised the importance of an overall philosophy and proposed to the relevant Chinese officials that an international committee of jurists should be commissioned to help produce the first draft, Sohmen: 13).

The BLDC had the assistance of a Basic Law Consultative Committee (BLCC), consisting entirely of Hong Kong persons, for consultation with the people of Hong Kong on various drafts of the Basic Law. The decision to set up the Consultative Committee was made at the first meeting of the Drafting Committee; its appointment was opposed by some influential Hong Kong business members of the BLDC, as introducing an unnecessary degree of democracy and public participation. In the end these BLDC members had considerable influence over the composition and work of the Consultative Committee, as they were responsible for its membership, and its chief opponent was appointed the chair of the BLCC and other members were given key positions through procedures of dubious validity (Lau, Emily 1988). The effectiveness of public opinion would also be
The Resumption of Sovereignty

attenuated by a rule that they pushed through whereby the BLCC would merely report the diversity of views to BLDC, but not indicate the degree of public support for the different views. Some of its 180 members were nominated by designated organizations, although a majority were invited directly by the BLDC members, who also exercised a veto over nominations of the organizations. Although the BLCC had the usual Hong Kong bias in favour of the conservative business and professional interests, and some key pro-Beijing persons were expressly nominated to strengthen the Chinese positions, the committee was regarded as fairly representative, certainly more so than the BLDC. The task of the BLCC was confined to seeking the views of the Hong Kong residents. It was planned to seek the views of groups, ministries and individuals in China as well, but apparently no formal machinery was established for this purpose.

The plan of action adopted at the first meeting of the BLDC was that it would produce drafts of the Basic Law which would then be submitted to the public for their comments. There were to be two stages at which public views would be invited: the first on a draft to be issued in April 1988 (‘for the solicitation of opinions’) and the second on a draft, taking into account comments on the first draft, to be issued in February 1989 (after its promulgation by the NPCSC as the Draft Basic Law). After the second consultation, the Drafting Committee would prepare the final draft for submission through the NPCSC to the National People’s Congress (NPC) for its adoption. One hundred revisions were made after the first consultation and 24 after the second. At each stage the provisions were adopted by the BLDC by a two-thirds majority (the only proposal which failed to secure this majority at the first stage, concerning ‘acts of state’, was included in the draft with a note that it was not final). The voting at the second stage was by secret ballot. In general the schedule was maintained, except for a slight extension of the second consultation period as it had been interrupted after the massacre in Tiananmen Square when the BLCC suspended its work for a few weeks. The Basic Law was adopted by the NPC on 4 April 1990 and promulgated the same day by the President of the Republic, Yang Shangkun.

This brief account fails to capture the drama of the making of the Basic Law (see Roberti, 1994 for a highly dramatized account of the process). First, there were noises off stage, particularly the participation of Britain. The Joint Declaration provided no role for Britain in the drafting of the Basic Law, but presumably Britain could have sought some say on the grounds that the Basic Law had to conform to the Joint Declaration. Instead Britain agreed under Chinese pressure to ‘convergence’ whereby Britain would undertake no constitutional reforms in the transitional period which would be inconsistent with the Basic Law (this
took place at a meeting of the Joint Liaison Group when even an outline of its draft was not available). But the imperative of political reform in the transitional period implicit in the Joint Declaration in conjunction with ‘convergence’ and the ‘through train’ (see below) gave Britain some slight influence on the process, centring principally on the number of directly elected members in the first legislature. Britain was also able to persuade China to let its legal advisers comment on a draft of the Basic Law (which apparently resulted in greater treaty making powers for the HKSAR and the strengthening of the regime of rights, Roberti: 219–220) but failed to change the formulation about ‘acts of state’ (see below). Britain also provided briefs to various members of the BLDC on key aspects of the drafts of the Basic Law, although it is hard to assess their impact.

The consultative process stimulated much public discussion and lobbying. During the first consultation period, the BLCC received 73,000 submissions; in addition, there were many public meetings and discussions in the media. The response in the second period was considerably smaller, overtaken as it was by the Tiananmen Square events. The most important development was the emergence of two clear groups, the conservative business people who formed a well funded and effective lobby, the Group of 89, and the liberals who formed the Joint Committee for the Promotion of Democratic Government. They organized their support among the public, lobbied for their positions through the consultative process, in the BLDC as well as directly with the Chinese authorities. Individuals also got into the act, particularly T.S. Lo, who presented proposals for a bicameral legislature at a time when it looked as though the case for democratization was gaining strength. The intensity of the debate was intensified by the events in Tiananmen Square, which reinforced the liberals’ view of the imperative of democracy, while it gave additional ground to the conservatives to oppose it, as provocative to the new sovereign.

The considerable degree of public participation and diversity of views were not reflected in the BLDC, especially after Tiananmen Square. Before then China had shown an openness to different points of view, and had listened to Hong Kong members when there was a consensus among them. Attitudes hardened after Tiananmen Square and the overwhelming demonstrations of support in Hong Kong for the students. Even before then, the Chinese had used the high authority of Deng to warn the members of the BLDC against democratization and free elections (saying that there was no guarantee free elections would bring out people who ‘love the motherland and Hong Kong’, Deng: 56). When the group on political structure met to finalize its proposals, little attention was paid to the views which had been conveyed through the BLCC; instead attention was
The Resumption of Sovereignty

focused on a small number of largely conservative suggestions. Towards the end, China, under instructions from senior Communist Party members, was increasingly dictating the terms of the Basic Law, including provisions against promoting subversive activities on the mainland. Chinese dictation was facilitated by the divisions within the Hong Kong members and the Hong Kong community, although even when the Legislative and Executive Council members were able to agree on the ‘OMELCO consensus’ on the electoral system, China chose to ignore it. China’s own delegation was not necessarily monolithic (and it was well known that there was some tension between the HKMAO and Xinhua in Hong Kong), but the overall control by higher authorities was able to impose a united stand. The role of the NPC, the highest body in the land and with responsibility for the establishment of the special administrative region and the adoption of its Basic Law, seems throughout to have been perfunctory — perhaps not a good omen for the future, if its role is seen as umpiring the system of ‘One Country Two Systems’.

Issues

Not surprisingly, the most contentious issues were those which had not been properly settled in the Joint Declaration, although to some extent the very process of drafting the Basic Law sharpened other issues as well. The provisions on the economy, international trade, social organizations and the law were straightforward and in many instances sections were lifted verbatim from the Joint Declaration. There were one or two difficulties on human rights, but these were settled without much discussion. The two broad areas on which there was considerable contention were the relations between the Central Authorities and the HKSAR and the political structure of the HKSAR. China had fought off the British during the negotiations for the Joint Declaration on these issues, and an appearance of consensus was purchased at the expense of ambiguity and obfuscation. The issues could no longer be avoided.

Scope of the application of Chinese constitution

At the very beginning of the process, some Hong Kong members requested a clarification of the relationship between the Chinese constitution and the Basic Law. Without such clarification the committee would not be sure of the precise effect of the Basic Law or of the extent of the role of the Central Authorities of the PRC in Hong Kong. Martin Lee proposed that the Basic Law should specify which articles of the Chinese constitution
applied to Hong Kong. This was rejected by the mainland members, who considered that the Basic Law would be subordinate to the constitution but only the NPC could specify which provisions of the constitution would apply to Hong Kong (Robert: 165–166). Towards the end it was decided that the NPC should make a formal declaration of the validity of the Basic Law at the same time as it adopted the Basic Law (for its consequences, see Chapter 4).

Residual powers

The question of residual powers was also raised at the start. Szeto Wah proposed an article to the effect that Hong Kong would be given authority over all powers not specifically vested in the Central Authorities. This was resisted by the Chinese legal experts who considered that the vesting of residual powers in Hong Kong was inconsistent with its status as a local administrative region and with the unitary nature of the Chinese state. An attempt to stipulate definitively the powers that would be vested in the region was abandoned. No satisfactory basis for establishing the powers of the HKSAR was provided (see Chapter 4 for a detailed discussion).

Interpretation

A third related issue was the provision for the interpretation of the Basic Law. The issue was important for several reasons: it would determine the status of the Basic Law, particularly as to how justiciable it would be, the role of the HKSAR courts, the accommodation of the Basic Law within the common law, and the relationship between the Central Authorities and the HKSAR. The Joint Declaration provides that the powers of final adjudication would lie with the HKSAR courts, but in the Chinese concept, adjudication did not include interpretation, which under the PRC constitution was a responsibility of the NPCSC. Martin Lee argued that the power of interpretation should be vested in the Hong Kong courts, not the NPCSC as the original draft of the Basic Law had provided. After considerable debate, a compromise was struck whereby the power to interpret those provisions which concerned the autonomy of the region was to be delegated to the HKSAR by the NPCSC (see Chapters 4 and 5). The role of the HKSAR courts was also affected by a provision in the original draft which would have excluded from their purview any executive acts of the central government. Lee regarded this as a major derogation from the principle of the rule of law. This technical point was one of the hardest to resolve and it was only towards the end that a compromise was reached (Lee 1988; see also Chapter 5).
The political system

This was the most contentious area, and unlike the other issues, it was as hotly debated outside as inside the Drafting Committee. Extraordinarily large numbers of proposals were presented by individuals and groups; for a while the question seemed to have become every one's favourite pastime (see Roberti for some of the proposals; see also the drafts of the Basic Law and the consultation papers by the BLCC). The principal issues were the methods for the election of the members of the legislature, the election or appointment of the Chief Executive, and the relationship between the executive and the legislature.

From the very beginning views were divided between those who wanted to restrict direct elections of the legislature — preferring a combination of functional representation and election by an electoral college (largely the business community) — and those who wanted all or substantial number of members elected directly through universal franchise (some professionals and grass roots organizations). Views were similarly divided as to the election of the Chief Executive, the options being direct elections (a variant being nomination by a fully directly elected legislature) or selection through an electoral college. As to the relationship between the executive and the legislature, the conservative business lobby wanted an ‘executive led’ system in which the executive would dominate the political system. By this time the liberals had a large following, even the members of the Legislative and Executive Councils supporting them on the electoral system. The Chinese authorities were sympathetic to the conservative faction, but it was not until after Tiananmen Square that it threw its full support behind them. Britain supported a significant directly elected representation and was able to persuade China to be more generous than the business community. The final outcome was still in favour of the conservatives, especially after T.S. Lo’s intervention which resulted in a dual system of voting, which strengthened both the executive and the functional members (see Chapter 7).

The ‘through train’

At an early stage of the proceedings, some Hong Kong members had proposed, in the interests of a smooth transition, that the last legislature to be elected before the handover should become the first legislature under the Basic Law. This was allegedly strongly opposed by Ji Pengfei. However, when in November 1988, the matter was raised by the British in the context of the discussions with China on convergence, China was more receptive. It agreed that the Basic Law should not include provisions on the formation of the first legislature, which would be provided in a
separate NPC resolution after the two sovereigns had worked out the
details (Roberti: 227). The proposal for a through train came under
considerable strain after Tiananmen Square as Britain wanted to speed up
the pace of democratization while China wanted to slow it down. A series
of high level meetings were necessary to reach agreement on the number
of directly elected members, which would then be reflected in the electoral
regulations for the last colonial legislature, to be elected in 1995 (giving it
two years after the handover) and in the Basic Law provisions for the
composition of the first HKSAR legislature. These discussions were a well
kept secret, and even the members of the Drafting Committee did not
know of them until the decision was made by the two governments (the
documentation on these negotiations were published by China in the
wake of the controversy surrounding the Patten reforms, discussed below).
The process of drafting the Basic Law was long drawn out and fraught at
times. It was the first occasion on which so many Hong Kong persons had
worked so closely with Chinese officials. It gave China an opportunity to
assess them for future purposes. It gave Hong Kong people a chance to
assess the Chinese, to become familiar with their ways of operation and
to determine their chances and strategies of future preferment. In particular
it consolidated the already close links between the Chinese authorities and
individuals and the Hong Kong business community, especially its tycoons,
which was to form such a key axis for the politics of the transition.

The Basic Law, like the curate’s egg, was good in parts. It consolidated
many of the positive features of the Joint Declaration. China showed
some sympathy for Hong Kong’s tradition of law and social organization.
It made several concessions to the Hong Kong position. But it withheld its
consent to changes that would have strengthened the democratic nature
of Hong Kong institutions and enabled it to exercise the autonomy that it
was promised. There remain various structural problems, and numerous
ambiguities. Perhaps these were the consequence of the lack of the relevant
constitutional law expertise. China recognized that its own legal concepts
or practices are in many respects unsuitable, but its experts often seemed
formalistic and lacking in imagination for the innovative task that the
transformation of the Joint Declaration into a constitutional document
was. Hong Kong lawyers were perhaps too close to the English common
law traditions which are inadequate to deal with fundamental constitutional
issues. In any case only one Hong Kong lawyer, Martin Lee, applied
himself to the task with lawyerly perspectives. It seemed that if the Basic
Law was to be applied as a constitutional instrument which could both
serve as Hong Kong’s internal charter and balance the interests and
expectations of China and Hong Kong, an imaginative and sophisticated
approach to its implementation and interpretation would be necessary.
The Basic Law contains 160 articles and three annexes. It has (by Chinese standards) a short preamble which recites China’s ancient claim to Hong Kong and its occupation by the British in 1840 (no mention of any treaty here). It refers to the ‘long-cherished common aspiration of the Chinese people for the recovery of Hong Kong’ and the decision of the Chinese government expressed in the Joint Declaration to do so. It states that while ‘upholding national unity and territorial integrity’, the PRC has decided to establish a special administrative region in Hong Kong for maintaining its ‘prosperity and stability’, taking into account its ‘history and realities’. Under the principle of ‘one country two systems’ the socialist system and policies will not be practised in Hong Kong; instead the ‘basic policies’ regarding Hong Kong will be those elaborated by China in the Joint Declaration. The purpose of the Basic Law is to ‘ensure the implementation’ of these basic policies.

The Basic Law has nine chapters. In accordance with Chinese practice, the first chapter sets out the ‘General Principles’ which underlie the Basic Law. The genesis of the General Principles is China’s 12 points presented during the Sino-British negotiations on the transfer of sovereignty and the ‘basic policies’ in the main text of the Joint Declaration (although in an abbreviated form). It provides for the autonomy of the HKSAR as well as the ‘systems’ that are to be maintained there. The supremacy of the Basic Law over laws of the legislature of the region is asserted (art. 11). The General Principles are a prelude to more detailed provisions, but sometimes they are ‘self-executing’ as with art. 7 which vests the management of land and natural resources in the HKSAR or art. 8 which makes English an additional official language. The scope of the remaining chapters appears from the titles; the relationship between the Central Authorities and the HKSAR (chap. II); fundamental rights and duties of the residents (chap. III); the political structure (chap. IV); economy (chap. V); education, science, culture, sports, religion, labour and social services (chap. VI); external affairs (chap. VII); interpretation and amendment of the Basic Law (chap. VIII); and supplementary provisions, with a solitary article dealing with the continuity of laws and legal transactions (chap IX). Of the three annexes, the first provides the method for the selection of the chief executive, the second the method for the formation of the legislature, and the third lists the national laws to be applied in the HKSAR on the transfer of sovereignty.

The Basic Law is supplemented by four Decisions of the NPC made at the same time as the adoption of the Basic Law and one Decision of the NPCSC made on 28 June 1990 (which are legally binding).
Decision provides for the coming into effect of the Basic Law on 1 July 1997 and states that the Basic Law is ‘constitutional as it is enacted in accordance with the Constitution of the People’s Republic of China and in the light of the specific conditions of Hong Kong’ and that systems, policies and laws to be instituted after the establishment of the HKSAR shall be based on the Basic Law. The next Decision is made in accordance with art. 62(13) of the PRC constitution declaring that the HKSAR shall be established on 1 July 1997. It also prescribes the area of the HKSAR, as covering ‘the Hong Kong island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction’. There is no mention of the New Territories; this may have been an oversight, since the Basic Law itself assumes its applicability to the New Territories (as for example in art. 40 which protects the lawful rights of the inhabitants of the New Territories, and art. 122 which deals with the land rights of males descended from residents of ‘an established village’ in 1898). Moreover, the boundaries of the HKSAR (a problem left over from history, see Chapter 1) are not specified, the Decision merely providing for the map of the administrative division of the HKSAR to be published by the State Council.

The next Decision deals with the method for the formation of the first government and the first legislature of the region, under the general principles of ‘state sovereignty and smooth transition’. It provides for the establishment in 1996 by the NPC of a Preparatory Committee for this task, and lays down the details of the method of selection of the Chief Executive and the composition of the first legislature, leaving the precise electoral system to the committee (but also allowing for the possibility of a ‘through train’ under specified conditions).

The final Decision approves a proposal of the BLDC to establish the Committee for the Basic Law under the NPCSC on the establishment of the SAR and attaches to it the proposal which outlines its various advisory and consultative purposes functions as well as its membership.

The Decision of the NPCSC is on the English text of the Basic Law which was prepared under the auspices of the Law Committee of the NPC. It makes the text the official English text, which ‘shall be used in parallel with the Chinese text’, although in case of discrepancy ‘in the implication of any words used’, the Chinese text shall prevail.

A brief comment may be offered on the layers of articles, annexes and Decisions on the formation of the government and the legislature. This arrangement of some of the most important provisions of the Basic Law reflects continuing debate and the lack of consensus. The articles record the ultimate objective (which is election by universal franchise), the annexes the arrangements for the first 10 years, and the Decision the contingencies of the actual transfer and the ‘through train’.
COMPATIBILITY WITH THE JOINT DECLARATION

Before leaving this discussion, it is necessary to review whether the Basic Law is compatible with the Joint Declaration, in accordance with China’s undertaking in the Declaration and the preamble to the Basic Law itself. It must be recognized that it is inevitable in the translation of the Declaration into domestic law that there would arise points not dealt with in the Declaration or that points included in the Declaration would need to be put in somewhat different (or more elaborate) terms. It would be pedantic to regard these as deviations from the Declaration if the spirit of the Declaration has been maintained. There is also the consideration that many expressions do not carry a fixed meaning, especially when two distinct historico-legal traditions are concerned. With these provisos, I discuss briefly some possible deviations (ICJ 1992: 110–115; Martin Lee, speech in the Legislative Council on 4 April 1990).

(a) The most glaring differences appear in the meaning the Basic Law gives to ‘elections’ and ‘accountability of the executive to the legislature’. Only a minority of members of the legislature are directly elected through universal franchise, while the ‘election’ to the Chief Executive is not only made by a committee but the candidature will also be controlled by another body. In the general contemporary understanding of the term, these arrangements would probably not count as ‘elections’ (although of course in Hong Kong they were the norm in the colonial period). However, in Chinese law and practice (where there is a considerable manipulation of the electoral process) there is little difficulty in accepting these provisions as appropriate.

‘Accountability’ covers a number of stipulations in the Basic Law, like enacting or repealing laws which bind the administration, the approval of budgets, the questioning of the government on its policies, to receive and debate the policy addresses of the Chief Executive and the like (see Chapter 6). It does not include the collective or individual ‘ministerial’ responsibility or the removal of the government on a vote of no confidence, which are the essence of accountability in parliamentary systems. But then not all political systems have this notion of accountability (e.g., the US).

However, it is true that under the Basic Law the legislature is extremely weak in several important respects and the executive is particularly dominant (see Chapter 6) — for which there is little foundation in the Joint Declaration — so that one may question whether there can be any real accountability. Similarly the Chief Executive is made accountable to the Central People’s Government (art. 43) for which there is no explicit warrant in the Joint Declaration.
Another major area of controversy is the scheme for the interpretation of the Basic Law. The ultimate powers of interpretation are vested in the NPCSC (arts. 158, 160 and 17) while the Joint Declaration gives to the HKSAR courts the powers of final adjudication. In the common law the functions of interpretation and adjudication generally (although not always) go together, but this is not necessarily the case in all systems, and is not so in China. It is true that the Joint Declaration does not refer to the NPCSC’s power of interpretation — in fact it makes no reference to interpretation. But the Chinese, who regarded the Basic Law primarily as a Chinese statute, may have assumed that the general principle of its constitution would apply (however odd or even objectionable that position might strike a common lawyer). The Joint Declaration says relatively little about the role of the NPC or the NPCSC; relationships between the Central Authorities and the HKSAR are expressed largely by reference to the People’s Central Government. If the broad spirit of art. 158 as to the division of responsibilities between the NPCSC and the HKSAR courts is respected (see Chapter 5), the provisions for interpretation need not undermine the autonomy of the region.

Another restriction on the powers of the HKSAR courts beyond the Declaration may be implied by the exclusion of acts of state from their jurisdiction. ‘Acts of state’ are not mentioned in the Declaration, which prescribes the ‘judicial system previously practised in Hong Kong’ as the basis of the jurisdiction of the HKSAR courts (Annex I, art. III). Article 19 of the Basic Law repeats the formula but also states that the courts shall have no ‘jurisdiction over acts of state such as defence and foreign affairs’. Controversy has arisen over the expression ‘such as’, as to whether the expression implies restrictions which are broader than under the common law which previously bound the courts. The outcome may depend on whether the common law or the Chinese law meaning of ‘act of state’ is operative (see Chapter 8).

It is in the division of powers that there is considerable deviation, at least at a conceptual level. In the Joint Declaration, China had promised ‘a high degree of autonomy except in foreign and defence affairs’ (art. 3(2)) but in the Basic Law the formulation is different; it is now merely a high degree of autonomy without reservation, the effect of which might be that all autonomy is qualified, rather than there is a division of powers. There are other formulations in the Basic Law which suggest a smaller area for autonomy than in the Joint Declaration (see Chapter 4). Furthermore, in the areas within its autonomy, there are restrictions on the exercise of the autonomy which were not presaged in the Declaration (e.g., as regards fiscal policies).
(e) The Basic Law introduces qualifications for certain offices which do not exist in the Joint Declaration. Rights and obligations in the HKSAR under the Declaration are tied to residency rather than nationality; and all elected and appointed offices are, according to it, open to all ‘local inhabitants’. The concept of ‘permanent resident’ is developed for the purposes of the right of abode in the HKSAR, but it has no significance beyond that. However, the Basic Law requires permanent residency for most purposes, and requires additionally, in relation to the post of the Chief Executive, the President of the Legislative Council, Chief Justice of the Court of Final Appeal, the Chief Judge of the High Court, principal public servants, members of the Basic Law Committee, and up to at least 80% of the membership of the legislature, that they be Chinese nationals who are permanent residents of Hong Kong and have no right of abode in a foreign country. These provisions exclude a large number of persons who would otherwise have been eligible for these posts, and represent a significant diminution of rights as compared with the Declaration. The reason for the additional qualification lies in the Chinese reaction to the proposed British nationality legislation, in the wake of Tiananmen Square, for the grant of full British citizenship to up to 50,000 heads of families in Hong Kong (see below, and Chapter 4).

(f) Rights and freedoms of the residents of the HKSAR have been reduced in another manner which is not expressly authorized in the Declaration. Article 23, tightened also in the wake of Tiananmen Square, obliges the HKSAR to enact laws to prohibit acts of treason, subversion, etc. against the Central People’s Government as well as to prohibit foreign political organizations from operating in Hong Kong, and HKSAR political groups from establishing ties with foreign organizations. Although the provisions against treason and secession may have been implied in the notion of Chinese sovereignty, some other restrictions are wide ranging and probably inconsistent with guarantees of rights both in the Declaration and the Basic Law itself (see Chapter 10).

(g) The Joint Declaration vests the responsibility for the maintenance of public order in the HKSAR itself and says expressly that the military forces of the Central Government shall not interfere in its internal affairs (Annex I, art. XII). But the Basic Law authorizes a degree of mainland intervention in the internal affairs of the HKSAR when there is ‘turmoil’ in the HKSAR which threatens national unity or security and is beyond the control of the HKSAR authorities (art. 18). Whether there are circumstances justifying the intervention, which take the form of applying ‘relevant’ national laws and therefore deploying the military, depends entirely on the subjective judgement of the Central People’s Government.
THE STATUS OF THE JOINT DECLARATION

What are the consequences of these discrepancies? This question raises complex issues, relating to the status of the Joint Declaration in international law and in the domestic laws of the PRC as well as the HKSAR. Hong Kong courts have already held that the Declaration does not by itself give any rights under Hong Kong, relying on the well established English common law principle that a treaty cannot be given effect to in local law until it has been incorporated (see Chapter 1; the cases on the Declaration are *The Home Restaurant Ltd. and Attorney-General* [1987] HKLR 237 and *Tang Ping-hoi and Attorney-General* [1987] HKLR 324). However, while not directly applicable, the Declaration may have some influence when the courts begin to interpret the Basic Law under the rule that when legislation is based on a treaty, the treaty and its legislative history may be referred to in the interpretation of the legislation (*Buchanan v Babco* [1978] AC 141; *Fothergill v Monarch Airlines* [1981] AC 251; for Hong Kong cases, see *Attorney-General v Yau Kwok-lam* [1988] 2 HKLR 394; and *Hill and Delamain (HK) v Manohar Gangaram* [1994] 1 HKLR 353). There is some controversy as to whether resort may be had to the treaty or its history when the words of the legislation seem clear (as perhaps with the meaning of ‘act of state’). Similarly when it is clear that the legislation intended to depart from the treaty, the courts would give effect to the legislation. In recent years the rule of reference to extrinsic materials has been extended to the legislative history (or some aspects of it) of the domestic legislation itself (following *Pepper v Hart* [1993] AC 593) in similar circumstances, which in the case of the Basic Law might merely affirm its more restrictive provisions (see Chapter 5).

Whether the underlying basis of the rule that treaties are not binding in domestic law unless incorporated would be modified in the case of the Declaration depends to some extent on the relevant rules under the Chinese legal system (and on their applicability in the HKSAR). The position of many of the rules about treaty law and practice which bear on the question under review is unclear (Wang, Tieya 1995, on which much of the following account is based). The PRC constitution does not make any provision for the effect of treaties in domestic law, although it prescribes the procedure for their conclusion and ratification. As the procedure for the conclusion (by the State Council) and ratification (by the NPCSC and the President of the Republic) are analogous to the making of statutes, Wang has suggested that treaties are at the least on a par with statutes. There is no formal legislation on this point, but Wang notes a recent tendency in law as well as official statements towards holding treaty obligations as superior to domestic law (one of the many examples he cites is the General Principles of Civil Law
1986 which provides that ‘where an international treaty concluded or
acceded to by the People’s Republic of China contains provisions differing
from those in the civil laws of the Peoples Republic of China, the provisions
of the international treaty shall apply, with the exception of those on which
the People’s Republic of China has declared reservation’, art. 142(2)). On
a more general basis, he refers to the enactment by the NPCSC of the Law
on the Procedure for the Conclusion of Treaties 1990 which requires the
ratification of a treaty if it contains a provision different from the laws of
the Republic, and the NPCSC has in this way indirectly affirmed the
principle that treaties are superior to national laws. He advocates this
interpretation as China has, since its modernization policies, entered into a
large number of treaties which affect its relations with other states and their
nationals as well as the pace of China’s development.

He also discusses the question whether it is necessary to give express
effect to treaties by national law, and concludes that there is no such
necessity. He cites (at p. 6) a Chinese delegate to the UN Committee
Against Torture who stated the position of his government as follows,
‘Under the Chinese legal system, an international treaty that China
concludes or joins will go through the ratification process in the legislature
or the approval process in the State Council. Once it becomes effective to
China, the treaty will have legal force in China, and China undertakes the
relevant obligations to implement the treaty’.

These propositions lead to the conclusion that the Joint Declaration
is effective in Chinese laws, and probably also that it is superior to the
Basic Law when their provisions conflict. However, it is not clear that this
principle of law will apply in Hong Kong although in foreign affairs, the
HKSAR is subject to Central Authorities. Nor is the possibility of pursuing
remedies in China obvious, both for procedural and practical reasons, in
part connected with the underdevelopment of the Chinese legal system
(see Chapter 3).

This leads to the consideration of possible recourse under international
law. China appears to accept the general international rule, affirmed in
art. 27 of the Vienna Convention on the Law of Treaties, that a ‘party
may not invoke the provisions of its internal law as justification for its
failure to perform a treaty’. It would seem clear that the residents of
Hong Kong have no remedy under international law; they are not parties
to the Declaration nor would they have standing themselves in international
law to pursue remedies. China owes obligations to Britain (despite the
formulation of unilateral declarations in the agreement) but the Declaration
does not provide an effective means of redress. The Joint Liaison Group
continues in existence until 1 January 2000, and, as one of its functions is
to ‘conduct consultations on the implementation of the Joint Declaration’,
Britain could no doubt raise in the JLG questions of its breach by China. However, the JLG is an ‘organ of liaison and not an organ of power’, so presumably it could not take measures of redress. China has not accepted the jurisdiction of the International Court of Justice so that Britain could not use that forum. It will be reduced to diplomatic pressure or ultimately a complaint at the United Nations. Moreover, since the Joint Declaration concerns boundaries and the status of a territory, the redress that may be available is limited. Normally a breach of a treaty by one party entitles the other to terminate or suspend the treaty (art. 60(1) of the Vienna Convention on the Law of Treaties). If Britain were to repudiate the Declaration, it would not restore sovereignty to her, nor affect the status of the Basic Law. Nor could Britain rely on the doctrine of a fundamental change of circumstances, for it does not apply if the treaty establishes a boundary (art. 62(2) of the Vienna Convention). Thus, despite the binding nature of the Joint Declaration, it is unlikely to be the basis of an effective action in the case of its breach (whether other mechanisms can be tied to the observance of the Declaration is discussed in Chapter 11).

THE TRANSITION TO THE TRANSFER OF SOVEREIGNTY

For Britain the transfer of sovereignty over Hong Kong was radically different from its other decolonization experiences (see Ghai 1993 for a detailed analysis of standard British practice and the peculiarities of the Hong Kong situation). There Britain remains in charge of the process until the last minute of its rule, although for a few years before then it cooperates closely with local political leaders, who have already assumed responsibility for major areas of administration and begun to deal directly with the legislature. The division of powers between the Governor and the local leaders is based on the salutary, parliamentary principle that the government which is not in control of the legislature cannot govern effectively; responsibility moves to where power is. The intimacy of the relationship between the Governor and the chief minister (destined to become prime minister on independence) is a key determinant of how smooth the transition would be.14 The members of the future government

14 This method for transition would have been possible in Hong Kong if relations between Britain and China had not deteriorated so badly. Lu Ping disclosed in September 1996 that at one stage the two sovereign powers had discussed that the Chief Executive Designate chosen should be acceptable to both sides and would function as the vice-governor (SCMP 8 September 1996).
emerge through free elections, and are able to carry public opinion with
them on policy and administration, and questions of transition. The
Governor’s responsibilities shrink correspondingly. Independence frequently
merely registers the shift of power that has already taken place.

Britain remains responsible for the legal provision of transitional
arrangements and the establishment of the instruments for the new
sovereignty (which does not come into existence until independence). The
instrument that renounces British sovereignty also brings into existence
(or authorizes) the new constitution; thus changes can be perfectly
dovetailed and continuity of laws (including imperial enactments applying
by their own force), offices, legal transactions and proceedings can be
secured. The old laws are subject to the new constitution, but there is no
need for a detailed scrutiny of these laws, as there is provision for courts
to apply them subject to any necessary changes, and the executive is given
authority for a limited period to amend the laws to bring them in
conformity with the constitution (these amendments are generally of a
formal rather than substantive nature).

These arrangements were not possible in Hong Kong as sovereignty
was not to be transferred to Hong Kong but to China. But it was not to
be a straightforward transfer of sovereignty (as China sometimes tended
to see it, and as it might be in strict theory), since Hong Kong was to be
vested with considerable institutional and substantive autonomy. The goal
of constitutional development was not a Westminster parliamentary system;
in fact there was some haziness about the ultimate constitutional system
and key decisions had to be made about the rules and structure for the
new system of government. A perfect conjunction between the renunciation
and resumption of sovereignty was possible only on the premise of full
and amicable cooperation between the two sovereigns (and a measure of
the support of the legislature of Hong Kong at a time when official
dominance of it was coming to a close). Britain enacted the instrument for
the renunciation of its sovereignty or jurisdiction over Hong Kong as
from 1 July 1997 even before the formal ratification of the Joint Declaration
(Hong Kong Act 1985). The only consequential matters dealt with were
nationality, authorizing the Hong Kong legislature to amend or repeal
British enactments in so far as they were part of Hong Kong and to make
laws with extra-territorial effect, and the conferment of diplomatic
privileges on the Chinese members of the JLG. Subsequently two Orders
in Council were passed to give the authority to the legislature (The Hong

The agenda of tasks for the transition was established firstly by the
Joint Declaration and then the Basic Law. Some tasks had become obvious
from the agreements in the Declaration, e.g., the localization of imperial
enactments (i.e., re-enacting them as Hong Kong ordinances), the adaptation of laws to conform to the Basic Law (although work on it could not begin until the terms of the Basic Law had been determined), and the arrangements for treaty succession. Others had to await the adoption of the Basic Law. The chief new task under it was the formation of the first government and the legislature of the HKSAR. It would also be necessary to review all previous laws to ensure that only those which were consistent with the Basic Law were adopted on the establishment of the HKSAR. However, the changes that were necessary to ensure that laws and institutions were appropriate for the establishment of the HKSAR were on the whole relatively small — in contrast with the scale and pace of change that have been required in other British colonies in the transition to independence. In keeping with their conservative orientation, the Joint Declaration and the Basic Law had already codified the economic, legal, international and social systems of Hong Kong — and prohibited fundamental changes. What was necessary was to provide some details to underpin these systems.

Both the Joint Declaration as well as the Basic Law provided for the machinery for the transition. The scheme of the Declaration was that while China would prepare and adopt the Basic Law, Britain would have the responsibility for the administration of Hong Kong’s until the actual transfer of sovereignty. Laws for Hong Kong would be made by the Hong Kong legislature (so that it would enact the laws or amendments to localize or adapt laws). In order to facilitate these as well as other tasks necessary for the transfer of power and the establishment of the HKSAR, a Sino-British Joint Liaison Group (JLG) was set up (art. 5 and Annex II). Its specific tasks included consideration of action to be taken by the two governments for the maintenance in the HKSAR of economic relations as a separate customs territory, especially its participation in the GATT, the Multifibre Arrangements and other international arrangements; and action by them to ensure the continued application of international rights and obligations affecting Hong Kong. It would also consider procedures for the smooth transition in 1997 and the action to assist the HKSAR to maintain and conclude agreements on these matters with states, regions and relevant international organizations.

The Declaration established another joint body, the Land Commission, with responsibility for certain land matters (art. 6 and Annex III). Unlike the JLG, it had executive functions. It could authorize the grant by the government of more than 50 hectares of land in any year (the limit prescribed in the Declaration) as well as the use of the income from land sales attributed to the HKSAR (which is half of the total income). In addition, it had general supervision over land policies set out in the
The Resumption of Sovereignty

Declaration (including the amount of land granted to the Hong Kong Housing Authority for public rental housing).

As regards the Basic Law, a Decision of the NPC (already referred to) provided for the establishment by the NPCSC of a Preparatory Committee of mainland and Hong Kong members in 1996 with responsibility for forming the first government and legislature. It would in turn set up a broadly representative Selection Committee composed entirely of the permanent residents of Hong Kong (drawn from specified sectors of society). The Selection Committee would recommend a candidate for the Chief Executive to the Central People’s Government after local consultations or elections. The Chief Executive would then form the government. The Selection Committee would also prescribe the ‘specific method’ (presumably the electoral system) for the election of the first legislature, whose membership of 60 was prescribed in the Decision (30 functional constituencies, 20 geographical constituencies, and 10 by an electoral college) — unless of course the arrangements for the ‘through train’ were met in which case there would be no need for an election.

It is obvious from the above account that the machinery was somewhat complex and authority was fragmented. The UK would administer Hong Kong (a right it fought hard for) but the exact state of its authority was unclear, Britain claiming full sovereignty and China restricting the purpose of British administration to ‘maintaining and preserving its economic prosperity and social stability’ (art. 4, JD). No formal role was recognized for Hong Kong institutions, yet key legislation would need to be passed by its legislature. There was no formal provision for the exercise of any authority by the PRC government in Hong Kong before the transition, although it was obvious that the HKMAO and other institutions would play an increasing role in Hong Kong. In particular no provision was made for the Preparatory Committee to organize elections in Hong Kong for the first legislature, despite the requirement of three types of elections which would call for massive organization. The only body for coordinating the relinquishment and the resumption of sovereignty was merely an ‘organ of liaison’.

The inappropriateness of these arrangements (and their potential for conflict) became obvious from the very beginning. It seemed obvious that Britain would push for rapid democratization (responding to pressure from Parliament and Hong Kong lobbies), at the same time that China would begin to assert its sovereignty. Democratization itself would create tensions due to greater assertiveness by political groups in Hong Kong and their ability to hold up legislation for transitional matters (as indeed happened with its refusal in 1991 to endorse the Sino-British deal on the Court of Final Appeal). These difficulties were compounded by the different
reaction of the various parties to the Tiananmen Square massacre. There were pressures on Britain from Hong Kong and abroad to speed up democratization and provide greater security for rights and freedoms, demands from various Hong Kong groups for a greater say during the transitional period, and Chinese attempts to impose its own stamp on the future political structure and to put a brake on democratization and legislative reform, and generally to put fetters on British power of interim administration.

Britain started off with an ambitious agenda for political reform even before the Joint Declaration was finalized (the most detailed account of British/Hong Kong proposals and their demise is in Roberti; a more academic analysis is Miners 1989). In a Green Paper the Hong Kong government detailed proposals for political reform so as ‘to develop progressively a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the views of the people of Hong Kong and which is more directly accountable to the people of Hong Kong’ (Hong Kong 1984). The Legislative Council would have a majority of elected members by 1990, a majority of the Executive Council would be chosen by the Legislative Council, and the Governor would be selected by a joint meeting of the unofficial members of the Legislative Council and the Executive Council. In due course China objected to British proposals as well as to the notion that Britain could proceed unilaterally with political reform. Under Chinese pressure, Britain agreed in late 1985 to the doctrine of ‘convergence’ whereby political and other changes in the transitional period would conform to the Basic Law (since the process of the drafting of the Basic Law had barely begun, ‘convergence’ put a stop to further reform for the time being, and determined the future by its terms) (Cheng 1986–7; Chen 1990). The principle of ‘convergence’ has much to commend it, certainly if the Joint Declaration were clearer on political structure. As it was, ‘convergence’ gave China a significant influence on political reform in the interim period.

China asserted its influence, even control, through other devices as well. It constantly sought to expand the remit and powers of the JLG, which rapidly became a centre of decision making — or more usually of the blocking of decisions. The role of the JLG (or rather of its Chinese members) was expanded by relying on the provision in the Joint Declaration that the ‘current’ laws and economic and social systems would remain unchanged — except, according to the gloss on it put by the Chinese, with their consent. Secondly, China argued that contracts to which the government was a party and which ‘straddle’ 1997 would not be valid thereafter until they had been endorsed by it (in a highly dubious interpretation of art. 160 of the Basic Law which provides for the
continuing effect of documents, certificates, contracts, rights and obligations valid under previous law, ‘provided they do not contravene this Law’). This proved a highly potent threat since the Hong Kong government had embarked on an ambitious airport and ports development project which depended on franchise capital from the private sector which clearly would not be forthcoming if the new sovereign was asserting the invalidity of contracts. China also obtained a kind of retrospective veto on legislation passed in the interim period by virtue of art. 160 which authorizes the NPCSC to invalidate a previous law which is inconsistent with the Basic Law. China could also stop many infrastructure projects by refusing the release of land through its veto in the Land Commission. China also assumed a ‘surrogacy’ role on behalf of Hong Kong, forcing the Hong Kong government to conform strictly to the provisions of the Basic Law even when they concerned the autonomy of the HKSAR (and thus, for example, discouraging the improvement in welfare services as this might compromise a low tax policy, etc.). In this context it advanced various interpretations of the Basic Law which served to limit initiatives of the government or people of Hong Kong.

In large measure China was successful in these attempts. The most dramatic example was the Memorandum of Understanding on the new airport, signed by the British prime minister, Major, in Beijing in September 1991 under which a new structure for policy making and supervision was established under the auspices of the JLG. Working in secrecy, it set a bad precedent for public participation, policy making and accountability, just at a time when it was necessary, in preparing for the autonomy of Hong Kong, to emphasize and cultivate these values.

However, for a while the memorandum was the last British concession, for its not very effective implementation led to a reappraisal of British policy. Britain had already approved the enactment of a Bill of Rights Ordinance in Hong Kong and its own Parliament had passed a new nationality law to give full British passports to 50,000 families — both of

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15 The Memorandum of Understanding established an Airport Committee under the JLG, where the UK had to consult with the PRC on the grant of major airport-related franchises or contract or guarantees straddling 1997. Projects which are not listed in the schedule to the MOU required the consent of the PRC if the bulk of the expenditure on them after 1997 would fall on the government. No loans (to be repaid after June 1997) in excess of HK$ 5 billion could be incurred without the consent of the PRC. The Hong Kong government had to leave fiscal reserves of no less than HK$25 billion on the transfer of sovereignty.

The PRC was to be consulted on any legislation on the airport, and to provide for the membership of a nominee of the PRC on the Airport Authority. A Consultative Committee with PRC membership was set up with general advisory functions on airport development.
which had been objected to by the Chinese. The new British policy, of standing firmly by the Joint Declaration and up to the Chinese, was heralded by the appointment of Christopher Patten, a senior British political figure, as Governor in 1992. In October of that year he announced his constitutional reforms which would have the effect of considerably broadening the franchise for functional constituencies and for providing more democratic elections for members elected by an electoral college. These and other proposals were in keeping with the letter of the Basic Law for the composition of the first HKSAR legislature, but probably not with its spirit of returning a select, conservative bunch of members (for a detailed discussion, see Ghai 1993a: 42–50).

The failure to resolve differences between China and Britain over a long series of meetings resulted in the passage of legislation in Hong Kong incorporating substantially most of Patten’s proposals and China declaring that the ‘through train’ was derailed. It proceeded to establish its own mechanisms for ‘consultation’ with the people of Hong Kong on alternative arrangements for the transition, and particularly the establishment of an interim or provisional legislature, pending the election of a legislature in accordance with the provisions of the Basic Law. The mechanisms were China’s Hong Kong Advisers and a Preliminary Working Committee (PWC) — as a sort of forerunner of the Preparatory Committee under the NPC Decision. The PWC began work on the review of previous laws (China having refused to continue to use the JLG machinery for this purpose) and recommended that the NPC should adopt the laws to govern the HKSAR on its establishment by its own resolution, as well as on other issues like the right of abode. The legality of an interim legislature, for which there is no authority in the Basic Law, was much contested (Ghai 1995; Law 1995), and was seen by many as presaging a cavalier attitude towards the Basic Law and providing intimations of an over-arching authority of the NPC (points which some Hong Kong members of the BLDC had unsuccessfully tried to clarify during the negotiations on the Basic Law).

**CONCLUSION**

The period between the Joint Declaration and the transfer of sovereignty was extremely important in defining attitudes, striking alliances, positioning for the new sovereignty, and in the development of social and economic forces both in Hong Kong and China. It was a messy period, filled with controversies that belied the conviviality of the signing of the Declaration.
The drafting of the Basic Law showed the divisions that had developed among the people of Hong Kong on the key question of democracy. These divisions were deepened by the Tiananmen Square massacre (even though it appeared at first as if it would remove them). Tiananmen Square also affected China’s relationship with Britain and the people of Hong Kong, propelling them towards a greater preoccupation with rights and democracy. Social welfare was put firmly on the agenda. It produced a more politicized society in Hong Kong than at the time of the Joint Declaration. It saw the birth of political parties under the stimulation of these circumstances as well as the new electoral arrangements.

These developments confirmed Chinese fears of the ungovernability of Hong Kong. Britain and China seemed to be locked in a combat for the hearts and minds (if not the soul) of Hong Kong. Britain was better placed to choose the public servants who would provide administrative leadership, while the PRC had an advantage over nominating political leaders (both as incoming authority and with the responsibility to institute the HKSAR through the Preparatory Committee). The politics of immigration in Britain, with its racial overtones, prevented Britain from bestowing one gift that above all would have won massive support in Hong Kong: full citizenship for its subjects. China’s anxieties led it to tighten the provisions of the Basic Law and into a particularly activist stance in Hong Kong. It claimed the right to be consulted over a whole range of policies and veto over certain key decisions. It set up alternative sites of opinion and influence, to undermine the administration as well as to coopt leading Hong Kong personalities, particularly in the business sector. The alliance with them forged during the drafting of the Basic Law was consolidated, helped by China’s claim of veto over decisions straddling June 1997. The transfer of loyalties had taken place before the transfer of sovereignty.

China’s withdrawal of cooperation slowed down progress on tasks necessary to ensure a complete legal system on the establishment of the HKSAR: the localization and adaptation of laws and the renegotiation of treaties. Sovereignty was wheeled in to reject a role in the process for the Hong Kong administration (although its assistance would undoubtedly be necessary at some stage). The active involvement of China in Hong Kong seemed also to undermine assumptions of the Basic Law, particularly in regard to its autonomy. While China may have claimed a surrogate role during the remainder of British administration, it appeared to produce habits on the part of many in Hong Kong of deference and subservience to Chinese officials, while a whole array of ‘off the cuff’ interpretations of the Basic Law bred confusion and uncertainty. The more deliberate decision on the establishment of a provisional legislature, widely recognized as
unconstitutional, damaged morale and cast doubt on China’s commitment to the Basic Law.

These developments were a response to the transfer, but they were also implicit in the system in the last period of colonialism — a maturing economy, the rise of the professional class, and greater political consciousness as a larger proportion of the people were born and educated in Hong Kong. The fluidity of economics and politics on the eve of the transfer of power was unlikely to fit into the new clothes of the Basic Law. Instead the Basic Law had to accommodate a rapidly evolving system in which many of its assumptions were questioned.

For China too the journey has been hard and even at times traumatic, with a constantly changing scenario. The journey began with optimism. China negotiated the Joint Declaration when it felt confident, forward looking with the divisions of the Cultural Revolution behind it; stability and a new order were emerging; legality had become a virtue; and the Communist Party was in control under the undisputed paramountcy of Deng Xiaoping. China was welcomed into the international community. The Basic Law was drafted when there were intense internal disturbances resulting in rejection or postponement of legality and democracy, high rates of inflation, increasing social divisions, the legitimacy of the Communist Party under a cloud — and the alienation of large sections of the Hong Kong people. The Basic Law began to be implemented when there appeared to be threats to the hegemony of the centre, the death of Deng and the struggle for succession. It was a time, if not of pessimism, at least of uncertainty.
INTRODUCTION

The chapter seeks to provide a framework within which the actual rather than merely the formal relationships between Hong Kong and its new sovereign are likely to develop. It examines the contemporary attitudes towards and practice of constitutionalism since these attitudes may inform the Central Authorities’ perception of the Basic Law. It provides a brief account of the constitutional and political system of the People’s Republic of China, examines the institutions of its Central Authorities that deal with the HKSAR, and assesses, in view of the general political system, how the powers of the Central Authorities are likely to be exercised. The Basic Law is an enactment of the National People’s Congress and is part of the constitutional and legal system of the PRC. Even though the Basic Law preserves the common law and Hong Kong ordinances, to understand the full significance of the Basic Law, it is necessary to locate it within the general norms and structure of the PRC system. Its interpretation is primarily the responsibility of the Standing Committee of the NPC which will, to a substantial degree, bring to the task the approaches and principles of interpretation that prevail in the PRC.

The relations between the HKSAR and the rest of the PRC are determined by legal instruments: the PRC constitution (particularly art. 31 which authorizes the establishment of special administrative regions), national laws applied in the HKSAR, and the Basic Law. Given the political realities of the PRC, in which the dominant role is played by the Chinese Communist Party (CCP), these constitutional and legal provisions do not capture the essence of the relationship between the HKSAR and the Central Authorities (and make no formal provision for the role of the Communist
Party which will no doubt influence greatly the relationship of the PRC with Hong Kong). Even if the Basic Law turns out to be ‘harder’ law than other PRC legal instruments, the nature and style of central authorities that deal with the HKSAR are not substantially determined by these instruments. The relationship between the Central Authorities inter se and other political constraints are likely to influence the stance that the Central Authorities adopt vis-à-vis the HKSAR.

The chapter also examines the changing nature of the Chinese economy, particularly the orientation towards marketization. Economic policies have brought the mainland and Hong Kong much closer than when the negotiations for the transfer of sovereignty started; these economic inter-linkages both complicate the relationship between them and provide points of influence and leverage additional to the formal provisions of the Basic Law. Marketization also affects attitudes towards authority and law on the mainland (and ultimately the role of the Communist Party) which may influence the approach of the Central Authorities to Hong Kong.

Two further issues which pertain crucially to Hong Kong’s relationship with China are examined: the modes and experience of autonomy on the mainland; and Chinese attitude to and experience of human rights and legality. In relation to autonomy, the chapter explores Chinese conceptions of autonomy and the mechanisms for dialogue and dispute resolution. As regards rights and legality, it reviews the philosophical basis of new laws and examines the extent to which they mark a departure from old practices.

THE CONSTITUTIONAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA

In few countries is a study of the text of a constitution by itself a reliable guide to the nature and operation of the political system or the manner of the exercise of political power. Political understandings or conventions develop around written rules; the growth of political parties affects the operation of rules; different groups wield unequal power in society and hence differ in their ability to mobilize or influence the formal state system. In some countries, especially those which borrowed their models wholesale from abroad, constitutions are far divorced from the realities of power, and serve merely as a facade for personal rule or patrimonialism or other forms of authority. Civil society is weak and unable to force state institutions into conformity with the constitution (for a review of the role of constitutions in different political systems, see Ghai 1993d). Even in the West, with developed traditions of constitutionalism, constitutions
only partially reflect the realities of the exercise of power, although they
do provide a framework for political competition and the political values
they espouse, like liberty, sanctity of private property and pluralism, have
resonances in society. They provide the medium of political discourse
and certain concepts, like the rule of law, the separation of powers and
the political neutrality of the state, act to legitimize political authority. In
order to obtain some understanding of the significance of the constitution
in the PRC and to contrast it with liberal-democratic orders, it is necessary
to provide a brief comparison of the theories of constitutions in liberal
and communist systems.

Theory of Liberal Democratic Constitutions

Liberal Western constitutional theory is based on the theory of the social
contract. Fundamental concepts of authority, jurisdiction, rights and
obligations, representation, obedience and resistance, accountability, and
so on have been developed within a contractual framework. Although the
terms of the contract that give body to the constitution may vary between
the key ideologies of the modern Western state (reflecting the contingencies
of the times), its underlying premise is the separation between state (as the
apparatus of government) and civil society (representing social and
economic institutions and processes autonomous of the state) (Shils 1991).
Captured in the concept of constitutionalism or the rule of law, the theory
is premised on the belief that the primary function of a constitution is to
limit the scope of governmental power and to prescribe the method for its
exercise, thereby preserving the autonomy of civil society. In its modern
form, the constitution performs these functions typically through the
separation of powers, the incorporation of democratic principles, and
some form of judicial review. The constitution validates certain fundamental
values and, subject to their overriding supremacy, establishes a framework
for the formation of government and the conduct of administration. These
values, oriented towards the market, emphasize individual civil, political
and property rights and the equality of all citizens under the law as well
as the generality of rules and their impartial administration to ensure the
predictability necessary for the capitalist economy.

1 A particularly useful study of the relationship between the state and constitutions in the
West is Poggi (1978). He examines how the growth of corporate power has fundamentally
changed the character of political systems, and with it the ability of constitutions to
capture or regulate the sites of power.
The imperative of the rule of law is closely connected with its other major function — as ideology. Both Marxist and liberal scholars agree that the dominant ideology of the liberal economic order is the rule of law. There is little doubt that it is a powerful means for the legitimation of Western regimes, and is carefully cultivated by their rulers. It masks the way in which power is exercised in these societies, gives the impression of pluralism and competitive political systems responsive to new interests and change, and emphasizes the primacy of state representative and judicial institutions, thereby mitigating the appeal of radical politics. Following Marx’s analysis of the masking functions of legal concepts and relationships, Poulantzas (1973) argued that legal ideology serves the interests of capitalism by procuring the economic isolation of individuals through emphasizing their separateness and autonomy while hiding the dominance of one class over others behind notions of equal and free citizens unified in the political universality of the nation state. Bourgeois legal ideology reinforces the notion that human beings are free and equal, and that the processes and application of the law are autonomous and impartial. The appearance of neutral autonomy is possible because the primary source of subordination is not the law itself but social and economic forces which rely upon equal and neutral legal concepts and rules to achieve that effect.

Theory of Socialist Constitutions

Socialist theory has two aspects. The first is an attack on bourgeois constitutions. The other aspect provides a rationale for the constitutions adopted by communist states. I have already touched upon some of the principal Marxist criticisms of bourgeois legality. Among these are a general criticism of laws and constitutions as instruments of class oppression and domination, and more specifically of the bourgeois legal form (see Poulantzas 1973, Miliband 1969). In traditional Marxian analysis, law is part of the superstructure of a society and serves to support and reinforce the underlying economic structure. Since most societies have historically been class societies, the law has been an instrument for oppressing subordinate classes or groups.

The theory of the socialist constitution is inspired by this view of the law and also by Marxian teleology. This has produced some tension in socialist views of the constitution. On the one hand, law and constitution are decried as instruments of class rule, and their abolition regarded as a precondition for a free and equal society. On the other hand, unlike bourgeois constitutions which (denying the dynamics of their history)
emphasize order and stability, socialist constitutions (inspired more by Lenin’s perspective than Marx’s) espouse as their mission the egalitarian transformation of society. In turn, this requires the dictatorship of the proletariat, the most progressive element in society with the greatest stake in egalitarianism, to break and appropriate the economic, social and political power of the bourgeoisie. Law and constitution are among the means of achieving this. While the bourgeoisie has for long periods used civil society to dominate the state, the proletariat has little alternative to the use of state power to change civil society.

The socialist theory of constitutions cannot, however, be fairly accounted for by this early form of constitution. Its instrumentalism is governed by Marxian theory of history and dialectics and the ultimate goals of communism (of a classless, egalitarian and participatory society). This means that constitutional arrangements must periodically be altered to reflect new socio-economic realities, and that progress must be made towards the ultimate aim of true democracy and equality.

It is possible to see a pattern in the changing constitutions of communist states (Kuan 1983, Cohen 1978). In the wake of the revolution, the first constitution tends to be strong on aspiration and weak on institutions since the aims of the revolution are clear but the methods are not. Much institution-building occurs outside the framework of the constitution as the economy is brought increasingly under government control and the political power of the Communist Party is established. The next constitution is often directed towards the consolidation of political and economic progress: it is more detailed, provides for a greater degree of institutionalization, and sets out more clearly than before the general principles of the economy. It mutes class struggles and emphasizes the more technical aspects of management. It is also used more consciously than before as an instrument for the legitimation of socialist principles and policies. Subsequent constitutions travel further along the same path, emphasizing the importance of legality and the rights of citizens, and the extension of full citizenship to the people, and begin to draw a boundary between state and civil society through the recognition of semi-private economic organizations and markets while paradoxically providing for a full blown state machinery. However, no communist constitution has moderated the extra-constitutional status of the Communist Party, its leading role, or the absence of its legal accountability, a factor that has constituted an important contradiction in constitutions claiming to be moving towards greater democracy and legality. As with liberal theory, there is a strong element of rhetoric in communist constitutional theory, and it must not be assumed that the decisions of the Communist Party are driven primarily by this theory.
Comparison of Liberal and Socialist Theories

Thus, there are obvious contrasts between the liberal and the communist constitutions. The former aims towards order and stability, the latter, at least in the earlier stages, towards state directed change. The liberal tends towards the protection of civil society, the latter towards state domination of it. The two forms of constitution reflect different concepts of power: the liberal a distrust of it, the communist an affirmation of its progressive potential. Partly to protect civil society and partly to ensure fairness in governance, liberal constitutions value pluralism, exemplified in the right of citizens to associate and form parties with which to compete for power and challenge government. Communist constitutions acknowledge (but need not provide for) the supremacy, and frequently the monopoly, of the Party. They also facilitate the transformative potential of political power by abandoning the separation of powers and the independence of the judiciary.

Another way in which the two forms are contrasted is through a distinction between normativeness (liberal) and instrumentalism (communist), although a liberal constitution has a strong instrumental bias as well. However, because civil society is an important source of power and the bias of the liberal constitution is towards the market, this instrumentalism is disguised. Values essential to the market are presented as universal norms and assume a detached appearance, above the conflicting class interests in civil society. On the other hand, because communist constitutions are intended to facilitate the transformation of society in pursuit of the teleological view of human destiny governed by historical materialism, their instrumentalism is overt. It is thus possible for the liberal constitution to base its legitimacy upon values (such as civil and political rights) and mechanisms (pluralism) internal to itself and thereby to become a major legitimizing device for state and society. The communist constitution (at least in the early stages, when coercion is printed on its face) must seek its legitimacy from elsewhere, namely socialist theory. This places the socialist constitution in a deep contradiction. The source of its legitimacy is external because it is dependent upon extolling the superiority of ‘scientific socialism’ and the adulation of the Party, and therefore on rhetoric rather than reality. The very emphasis on these external sources of legitimacy demonstrates the secondary and functional nature of the constitution, one not particularly appropriate to legitimacy.

The Chinese Constitutional System: A Brief Historical Excursus

Because communist constitutions are determined by a teleological view of
history, constitutions vary at different stages of the development towards communism, reflecting the circumstances and conditions of each stage. It is therefore important to try to locate the 1982 constitution within this teleological spectrum.

The first Chinese communist constitution was not a formal document, but a Common Programme of 1949. The first formal constitution, adopted in 1954, was heavily influenced by the concepts and structure of the 1936 Soviet constitution and until the 1982 constitution could be said to represent the high point of legality in China. There was a total breakdown of constitutional order during the Cultural Revolution, but its very arbitrariness and excesses emphasized the importance of procedures and legality. The end of the Cultural Revolution and the relative decline of its architect, Mao Zedong, provided the opportunity for a return to some form of constitutional rule. However, at first it was unclear what should be the basis of the new order; the Cultural Revolution had destroyed much of the structure of the Communist Party as well as of the administration. As in the early days of the communist regime, there seemed an urgent need to assert the dominance of the Party and its doctrines over the army and administration. Yet this task was not easy, as the regroupings of party leaders after the Cultural Revolution were unable to agree on goals and strategy or on the merits of the Cultural Revolution. The constitution adopted in 1975 was therefore brief and characterized by ‘high slogan content, minimal statement of goals and vague allocations of power’ (Cohen 1978:803), but it provided for (or more accurately recognized) the leading role of the Communist Party. It also paid lip service to the achievements of the Cultural Revolution; it declared among its goals to ‘put proletarian politics in command, combat bureaucracy, maintain close ties with the people’ (preamble). The rights to residence

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2 Article 2 stated that the Party is ‘the core of leadership of the whole Chinese People. The working class exercises leadership over the state through its vanguard, the Communist Party of China. Marxism-Leninism-Mao Zedong Thought is the theoretical basis guiding the thinking of our nation’. Article 16 stated that ‘The National People’s Congress is the highest organ of state power under the leadership of the Communist Party of China’.

‘Marxism-Leninism and Mao Zedong Thought’ refers to a compendium of ideas, doctrines and practices developed in China on the basis of the analysis of Marx and Lenin. The reference to Mao Zedong is not so much an acknowledgement of his personal ideas and strategies as of those collectively of the Communist Party. The preamble of the Constitution of the Communist Party (1992) states that Chinese Communists, with Comrade Mao Zedong as their chief representative, created Mao Zedong Thought by integrating the universal principles of Marxism-Leninism with the concrete practice of the Chinese revolution — it represents the crystallized, collective wisdom of the CCP. Considerable flexibility is purchased through this device, justifying China’s departures from Marxist orthodoxy.
and the change of residence were eliminated to facilitate programmes to send people to the countryside for manual labour as were the rights of scientific research and artistic creativity (as incompatible with proletarian politics) while the duties to maintain discipline at work, to maintain public order, and to respect social ethics were added.

However, the deaths in 1976 first of Zhou Enlai and then of Mao Zedong tilted the balance in favour of the ‘pragmatists’, who emphasized goals of economic development and stability. These goals were reflected in the 1978 constitution, which emphasized the need for modernization and the importance of production and scientific experiment. The preamble urged endeavour to create ‘a political situation in which there are both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and livelihood’. The statement of the Party control of the NPC was deleted and for the first time NPC deputies were to be elected ‘by secret ballot after democratic consultation’ (art. 21) The constitution preserved the 1975 protection of limited private economic activity, but increased the restraints on the power of executive, and gave the NPC and its Standing Committee greater authority to supervise it (restoring several provisions of the 1954 constitution). The emphasis on order was manifested in the admonitions against disrupting the economy, support for wage incentives and professional skills, and while the right to strike was maintained, it was qualified by the duty to preserve labour discipline, keep public order, and to respect social ethics (arts. 45 and 57).

The stress on order as well as legality was reflected in the restoration of the role of the procuracy — a typical communist device for the enforcement of the law, particularly criminal law, and the supervision of the observance of law by other institutions (including the police). The 1954 constitution provided for the Supreme People’s Procuracy and its local units to exercise ‘procuratorial authority over all departments of the State Council, all local organs of state, persons working in organs of state, and citizens to ensure observance of the law’ (art. 81). It acted as a prosecutorial authority as well as an independent watchdog of the legality of government action (being responsible only to the NPC). Effectively destroyed in the Cultural Revolution, with organs of public security taking over its functions so that the police exercised both investigative and prosecutorial functions, it was not reinstated in the 1975 constitution.

The 1978 constitution was replaced in 1982 to reflect the dominance of the pragmatists and modernizers. The 1982 constitution marks a new path in various ways (Kuan 1984; Weng, Byron 1982). The constitution is made binding on all institutions and persons (including the Communist Party) and there is unprecedented emphasis on the importance of socialist legality (the last paragraph of the preamble and art. 5). It gives a place of
pride to fundamental rights: they are brought forward (to Chapter 2 of the constitution) and are more detailed than ever before. A form of collective and individual responsibility of members of the State Council is introduced (arts. 86 and 90). The supervisory role of the NPC and of its Standing Committee over the executive is firmly established (arts. 62, 63, 67 and 92). A limit of two consecutive terms is established for key posts (arts. 79, 87, 124 and 130), in part to combat the dangers of personality cults.

The secret of communist constitutions does not lie in individual articles or even the sum of them (for, as is shown below, the omnipresence of the Communist Party broods over them). As Albert Chen has written:

The theoretical supremacy of the constitution may not however mean much in practice. Constitutions in communist states have traditionally been regarded as directives or guidelines for the legislature, so that the constitutional provisions are not directly enforceable in the absence of implementing legislation. This seems to be the case in China. More than 40 provisions in the 1982 constitution are dependent for their implementation on further enactment of ordinary legislation, and contain expressions such as ‘according to law’, ‘within the scope of the law’ or ‘subject to law’. Indeed it is doubtful whether the constitution can be said to have ‘direct legal effect’. Apparently courts are not allowed to rely on constitutional provisions directly in deciding a case and can only apply the ordinary legislation (if any) through which the constitution is implemented. Chinese courts do not of course enjoy the power of review of legislation with regard to its conformity to the constitution (Chen 1992:46, footnotes omitted).

The secret lies instead in the preamble. As, theoretically, a communist constitution reflects the progress towards the achievement of a classless and communist society, with each major step towards that goal a new constitution is adopted to consolidate the progress and to establish the framework for the achievement of the next stage. A preamble typically analyses the state of class conflict and struggle, in part to determine the imperatives of the dictatorship of the proletariat (e.g., which groups should be excluded from political rights) as well as to determine priorities for the next phase. The preamble provides more effective guidelines for state and other institutions than the actual provisions of the constitutions. The preamble to the 1982 constitution may therefore help us to determine its purposes and orientation more precisely than the actual text of the constitution. However, there is a danger in the preceding discussion of exaggerating the importance of ideology. While ideological factors have fashioned the structure and orientation of Chinese constitutions, they have not had much influence on practice, which remains dominated by considerations of the consolidation of the power of the elite.
There are at least two interpretations of the 1982 constitution. The first, which is also the official position (see for example the report to the NPC on the draft constitution by the vice-chairman of the constitution revision commission, Peng Zhen 1982), is that the constitution marks a decisive departure from the past, that it introduces new elements of democracy, consultation and decentralization, and greatly strengthens the legal order and legality, banishing earlier forms of arbitrariness. The other interpretation is that the new concern with legality was motivated by the need to establish the effectiveness of the state institutions and their control by Central Authorities after the total breakdown of order and authority in the Cultural Revolution and was largely restricted to commercial areas in pursuit of market strategy.3

The preamble contains several genuflections to nationalism and national unity. Sun Yat-sen’s revolution is acknowledged, although it is the role of the Communist Party in destroying imperialism, feudalism and bureaucratic-capitalism which is primarily applauded. The preamble then locates the contemporary situation in Marxist teleology. In a key passage, China’s transition from a new democratic to a socialist society is proclaimed, as is the general political, social and economic development of the country and its people. Exploiting classes are said to have been abolished. These gains are attributed to the work of ‘Chinese people of all nationalities’ under the correct leadership of the Communist Party and the guidance of ‘Marxism-Leninism and Mao Zedong Thought’. From this analysis it concludes that the primary task of the nation in the immediate future is ‘to concentrate its efforts on socialist modernization’ — particularly the modernization of industry, agriculture, national defence, and science and technology.

The preamble then prescribes the system and method of rule to achieve these aims. Determined by four principles: the leadership of the Communist Party, the guidance of Marxism-Leninism and Mao Zedong Thought, democratic dictatorship and the socialist road, the goals are to be achieved

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3 A typical example of the second position is McCormick’s statement that ‘the campaign to strengthen laws and institutions can be seen as an attempt by the Party center to increase its administrative capacity . . . the Cultural Revolution left in its wake pervasive networks of informal and personal authority, which are very difficult for central authorities to penetrate or control. Initiatives from the Party center, such as the Party’s new constitution, the new Party rules, the reestablishment of a hierarchy of discipline and inspection committees, and the recent campaign for Party rectification can be viewed as means of combatting the general diffusion of authority . . . While reform may reduce the Party’s autonomy, the Party has no intention of abandoning its “leading role”. Party spokesmen have emphatically rejected any intention of creating a Western-style democracy and continue to insist that the Party has a special capacity to lead society in a transition to socialism and therefore deserves exclusive privileges’ (1990:4–5).
through socialist democracy and the socialist legal system. Another technique is ‘a broad patriotic united front’ of intellectuals, democratic parties and people’s organizations and ‘patriots’ who support socialism and the re-unification of the motherland; the principal institution for united front work is the Chinese People’s Political Consultative Conference. However, even though exploiting classes have been abolished, ‘class struggle will continue to exist within certain limits for a long time to come’ and therefore ‘the Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China’s socialist system and try to undermine it’.4

It is clear from the preamble that the decision to adopt a freer political system and stronger legality is instrumental — the Party constitution makes clear in its preamble that it would oppose ‘bourgeois liberalization’. The contradictions in the preamble between democracy and legality on the one hand and ‘the people’s democratic dictatorship’ through the Communist Party on the other is reflected in the provisions of the constitution. While art. 5 proclaims the supremacy of the constitution and the ‘uniformity and dignity of the socialist legal system’, art. 1 states that 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’ and art. 3 says that the national as well as local people’s congresses (supreme organs of state power) are ‘responsible to the people and subject to their supervision’ — which means that the CCP claims the sole right to speak and act on behalf of the people. There are similar contradictions between decentralization

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4 The preamble of the constitution of the Chinese Communist Party also adopted in 1982 was even more detailed and may be consulted for an elaboration of the preamble to the state constitution. It reiterates that the ultimate goal of the party is the creation of a communist social system. (‘Communist’ is here used in orthodox marxist sense, meaning the period that follows socialism, which still has elements of the bourgeois state, requiring a coercive machinery and rewarding people according to their work, rather than need. A communist state would be completely classless and free of contradictions, and would not require any coercive powers. The reference in the preamble to the principle of ‘to each according to his work’ rather than to the principle of ‘to each according to his need’, as the ‘mainstay’ of the system of distribution indicates that in view of the CCP, China still has to achieve communism.) The preamble identifies as the principal contemporary contradiction the gap between ‘the peoples’ growing material and cultural needs, and the backward level of our social production’. Hence in ‘leading the socialist cause, the CCP must persist in regarding economic reconstruction as its central task, and all other work must be subordinated to and serve the central task’. In the preamble of a new party constitution adopted in 1992, the nature of the task of economic development is elaborated, as socialism with Chinese characteristics, which is a reference to the use of the market mechanism. This in turn was elaborated in a Decision of the CCP Central Committee on Some Issues Concerning the Establishment of a Socialist Market Economic Structure (adopted on 14 November 1993), to which references are made later.
and the authority of institutions at the national level; these are well captured in the last paragraph of art. 3 that ‘the division of functions and powers between the central and local state organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of central authorities’.

Similarly, although the Party is supposed to respect the law, it is essentially above the law as ‘representing’ the supreme will of the people. However, these ambiguities could help development towards a more open system. The commitment to market reforms and the legal superstructure that is perceived to go with it is likely to lead both to the greater legalization of state power, habits of legality generally, and the establishment of private centres of power. These are controversial matters which are discussed later. For the time being, it is necessary to precede the discussion of the political system under the 1982 constitution by a reminder that the role of the Party, not captured in its express provisions, governs their operations to a large extent.

THE CURRENT CHINESE CONSTITUTION

The 1982 constitution establishes economic and political systems which are at the heart of the regime of China and are relevant to the design of the Basic Law of the HKSAR. The PRC is described in the constitution as ‘a socialist state under the people’s democratic dictatorship led by the working class and based on an alliance of workers and peasants’ (art. 1). I discuss first the economic system — in keeping with Marxist emphasis on the primacy of the economy.

The Economic System of the PRC

The 1982 constitution was intended to reflect important changes of policy, particularly the modernization of the economy and the opening to the outside world. The years of isolation of China before and during the Cultural Revolution had seen its neighbours make spectacular economic growth, relying on the market mechanism with varying degrees of state intervention. China wished to take advantage of their policies (as well as their investments). However, the 1982 constitution (despite amendments in 1988 and 1993) fails fully to reflect this new orientation, and is increasingly less reflective of economic changes that have taken place since its enactment. The latest version of the CCP constitution which was adopted
in October 1992 provides a better guide, although it is to Party policy statements that one has to turn for an understanding of current policies (the report by Jiang Zemin, as secretary-general of the Central Committee of the Party at the 14th National Congress which adopted the new constitution is perhaps the clearest exposition of contemporary economic policies and their rationale, Jiang 1992). It is therefore unnecessary to provide a detailed account of the economic provisions of the PRC constitution; a brief analysis will suffice to give a flavour of its economic orientation.

The principal economic feature is the socialist economy (art. 1). The basis of the socialist economy is the public ownership of the means of production (art. 6) and the planned economy (art. 15). Although the basis of the planned economy is to be socialist public ownership (art. 15), the state’s functions of economic control and guidance extend to all sectors of the economy (see arts. 8, 11 and 18). The constitution divides the economy into four sectors, of which the principal is the state owned sector, ‘namely the socialist economy under ownership of the whole people’, which is described as the ‘leading force in the national economy’ (art. 7). This sector is regulated through the planning process and is run largely by state enterprises (art. 16). The next sector, also belonging to socialist economy, is ‘collective’ (art. 8); it consists of various forms of cooperative enterprise in rural as well as urban areas, being particularly important in agriculture, where the commune has been transformed since the Cultural Revolution into a purely economic entity. Ownership of assets of the enterprise is vested in the cooperatives, although individual members may be allocated certain rights of private use under prescribed conditions — which constitutes the basis for the ‘responsibility’ system under which agriculture has been largely privatized.

The third sector of the economy is a development of these privatized aspects of the collective economy. It is called ‘individual economy of urban and rural working people’ (art. 11). The reference to ‘working people’ presumably means that the individuals who own the enterprises must actually rely on their own labour or the labour of the household — which would be consistent with traditional Marxist teaching and socialist state practice which limits private initiatives only in so far as they involve the exploitation of the labour of others (see art. 6). The constitution establishes few rules for this sector of the economy, but makes clear that it is complementary to the socialist public economy, and that the ‘state guides, assists and supervises the individual economy by administrative control’ (art. 11).

The final sector of the economy — the private sector — was constitutionally recognized through an amendment of art. 11 in 1988, although it was implicit in the provision which allowed ‘foreign enterprises,
other foreign economic organizations and individual foreigners to invest in China and enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the law of the People’s Republic of China’ (art. 18). The constitution does not state what distinguishes the individual economy from the private economy. When the notion of individual economy was first accepted through an amendment in 1988 (after it had been operating for a few years without legal acknowledgment), there was resistance on ideological grounds to calling it private (for a history of the legal regime governing private enterprise in communist China, see Conner 1991). Originally the distinction was based on the Marxist notion that an enterprise which depended on the labour of others was capitalist, while one where the owner worked with his or her family was not. At one time the law provided that no more than seven persons might be employed in individual businesses (art. 2 of the State Council’s Provisional Regulations on Private Enterprises) — restrictions which do not apply to private businesses, some of which employ large work forces. Formally the system of control or supervision differs as to the two sectors of economy. In neither respect is there much difference in practice now, as the earlier ideological basis for a distinction has all but lost its rationale.

Fundamental to the introduction of individual and private economy is the system of property and property relations. The constitution departs from Marxist orthodoxy in recognizing a variety of types of property and laying the foundations for further legal reforms. In principle, the ownership of natural resources is still vested in the state (art. 9) as is urban land, but collectives are also permitted ownership of them (art. 10). Land in rural and suburban areas is principally owned by collectives. An amendment in 1988 to art. 10 introduces considerable flexibility in the disposition of rights over land by authorizing law to provide for the transfer of the right to the use of land. The General Principles of Civil Law defines the three types of ownership (state, collective and private, art. 71) and allows private persons to own the means of production (art. 75). The Civil Code also provides for the system of leasing state property to individuals, collectives and state enterprises, so that they may exploit them while ownership remains in the state (art. 82). This is characteristic of the move away from ‘ownership’ to ‘productivity’ which underlies economic reforms (Kraus 1991; Epstein 1991).

5 Article 18 also makes clear that foreign enterprises ‘shall abide by the law of the People’s Republic of China’ — which might seem redundant, but is undoubtedly inspired by hurtful memories of the system of extra-territoriality which lasted into the twentieth century under which foreigners claimed the right to be tried under their own national laws even when in China.
This basic change of orientation has promoted a vast array of legislation, to provide the legal infrastructure for private as well as more autonomous state economy (Epstein 1991; Potter 1994a; Kraus 1991). For the market economy (particularly for foreign investment in it), it has been necessary to introduce various concepts and regulations which are largely alien to the legal system of a planned economy: corporations and other economic enterprises, corporate securities, bankruptcies and liquidation, free employment practices, intellectual property based on private rights, a regime of voluntary contracts anchored in civil law, fair competition, arbitration and fair adjudication procedures, etc. These laws often draw upon market concepts, so that in some respects economic laws of the PRC and Hong Kong are converging — in sharp contrast to the situation when the Joint Declaration was negotiated. Laws about the planned economy too have been changed, to give state enterprises greater autonomy and to bring about increased productivity in agriculture. Decentralization of economic decision making, particularly through the establishment of special economic zones, has led to a proliferation of laws at local levels, with significant regional variations. There has also been a great deal of experimentation in securities and other forms of financing, often initially without a legal base. Although more and more areas of commerce and business are being brought under legal regulation, China provides an interesting dialectic between the dynamics of market economic growth and legal regulation, law quite often being left behind the frenzied growth and financial speculation of recent years.

The resulting legal regime is a patchwork of laws which combine elements of the market and the plan, laws which seek to traverse the two regimes, and laws which are both facilitative as well as restrictive and regulatory. This state of affairs arises from the lack of experience of the PRC with a well developed legal system, but it is also, and more fundamentally, a reflection of the ambiguities of Chinese economic policy as well as its uncertain consequences. The official justification for the new economic policy, as mentioned in the discussion of the preamble, is the imperative of economic modernization and development to overcome the primary contradiction between the needs of the people and low productivity. Its rationale, in terms of Marxist theory, is that China, being in the primary stage of socialism, has to pass through a stage of market economy before its economy is sufficiently developed to move to socialism and communism.6

6 The first detailed reasoned justification of the change of economic policy was announced by the then Secretary-General of the Central Committee of the CCP, Zhao Ziyang, at the 13th Congress of the Party in October 1987. His analysis was largely adopted by the present Secretary-General, Jiang Zemin, on whose address to the 14th Congress on 12 October 1992 the ensuing account is based (Jiang 1992).
The CCP rejects the notion that a market economy is peculiar to capitalism (calling its own brand of economy ‘socialist market economy’ and its strategy ‘socialism with Chinese characteristics’ — the ideological reasons for these formulations are obvious). The crucial task facing China is an understanding of the proper relationship between the plan and the market. While the sectors of the economy where the market had operated have developed in a ‘vigorous’ and ‘sound’ way, the market also had its ‘weaknesses’ and ‘negative aspects’. It was therefore important that the state should exercise ‘macro-control’ of the economy more effectively, with the leading role assigned to the public sector (as now provided in the 1993 amendments to art. 15 of the constitution for ‘macro-control’ and the prohibition of ‘the disturbance of society’s economic order’ instead of the earlier formulation, ‘social economy or disruption of the state economic plan’).

The following quotation from Secretary-General Jiang sums up the current position of the Party:

Establishing and improving a socialist market economy will be a long process, because it is a difficult and complex feat of social systems engineering. We must be prepared to make sustained efforts, but at the same time we should work with a sense of urgency. We must keep to the correct orientation, but at the same time we should proceed in the light of actual conditions. During the process of establishing the socialist market economy, the extent to which planning is combined with market regulation and the form the combination takes may vary at different times, in different places and in different sectors of the economy. We should be bold in exploring new ways, dare to experiment and constantly review our experience so as to expedite the replacement of the old structure with the new. The establishment of a socialist market economy involves many spheres of the economic base and the superstructure, and it therefore requires corresponding structural reforms and the readjustment of a series of policies (Jiang 1992: 18).

This quotation (as a general statement) is short on theory and long on pragmatism and experimentation. In practice production in the private sector is outstripping that in the public sector and most commodities of everyday use are produced outside the planning system. Key decisions of public enterprises at provincial levels and below are increasingly made outside that system and with a view to wider markets. Lieberthal (1995: 254–258) provides a succinct summary of the changes since 1978 when reforms were initiated:

The system of central planning has given way increasingly to indicative planning, which in turn has yielded increasingly to market allocation of goods and services. The practice of fixing prices administratively for all
goods has been replaced by a dual-price system for many items and a market-based system for many others. The highly centralised budget system based on state-enterprise profits has shifted to a quite decentralised budgetary system, which has left the leaders facing a chronic structural budget deficit at the national level. The banking system, once a vehicle to hand out funds, is beginning to itself concentrate capital and make decisions in its allocation. The commune system in agriculture gave way to the family-based ‘responsibility system’ and land has increasingly become a commodity. In urban areas, the former system of unified allocation of labour has nearly been abandoned, and the younger generation enjoys more room for individual initiative and fewer employment guarantees than did their elders. Strict residential controls have been eased, largely through the reduction in urban rationing, which permits greater personal geographical mobility. And China has shifted from its Mao-era posture of isolationism to one that seeks to be involved in the international market, and to combine its vast labour supply with foreign investment to sustain growth.

There is little doubt that China’s new economic policies have brought about a remarkable growth in production. But they have also altered the broader system in ways which might not have been anticipated and may not be wholly welcomed. Rapid economic changes always entail vast social and political changes, especially as people’s lives in the aggregate change faster than ‘the normative systems that sustain a society and give it meaning’ (Lieberthal: 244). My more limited concern is to show how they have affected the political system of the PRC and the modes of its legitimation in view of the previous reliance on the concentration of resources in, and their allocation by, the state. Lieberthal suggests that many of the economic and social problems that have arisen due to these changes are the result of the type of economy that is emerging, which is neither planned nor market. Rather it is a ‘semi-reformed’ economy, which is no longer subject to disciplined planning but one in which state officials continue to drive almost all significant decisions. ‘This mixed economy, which has made many state officials into business people, might best be termed a negotiated economy, in that economic outcomes are determined through negotiations involving local officials, who act without instructions from the Centre’ (1995:259).

Some issues facing Chinese leaders arise from the nature and logic of the market system. The development of the market depends on foreign capital and technology, and thus opens the people to external influences that the leadership would rather keep at bay. Integration into the international economy also requires the dismantling of some traditional controls over trade and opens Chinese industry to external competition. Domestically the reliance on the market necessitates the loosening of
central controls as the effective functioning of the market requires the
decentralization of decision making, a freer dissemination of information,
the mobility of labour, a stronger legal system and the reduction of
administrative discretion, greater individual and enterprise choice, the
drive for profit and competition which threatens the survival of the public
sector. Moreover, the market produces its own centres of power and
authority, coopting or replacing local party institutions and is justified by
its own ideology which dictates different political outcomes from Marxist
ideology. Other problems arise because this logic of the market is played
against a backdrop of Party control, plethora of administrative controls,
policies which thrust some regions in the forefront of development, and a
competing ideology. Provincial officials, particularly those belonging to
the more developed provinces along the eastern coast, acquire greater
bargaining power with the national authorities, and create their own
centres of economic development, frequently in competition with other
areas, thus hindering the growth of a national market. The key roles of
these officials in administering the economy also opens avenues to
corruption, which has characterized the new market economy. The ability
of regulatory instruments (including taxation) to govern the pace and
nature of change is diminishing — due to a complex interplay between
market and politics. Internal migration, due to uneven regional as well as
to rural-urban developments, has become problematic — and in other
ways too these disparities raise acute political difficulties, of both social
stability and national unity. These in turn give rise to sharp differences of
opinion among the leaders of the Party, aggravated by uncertainties over
succession to top leadership. At the same time these circumstances produce
diversity, openness, diffusion of power — which themselves become
problematic as the Party’s control over the country tries to defy the logic
of its market economy, and are seen to enhance the salience of the political
system.

**The Political System of the PRC**

It is obvious from the preceding discussion that the state plays a key role
in Chinese society. It provides guidance on normative and moral questions
and controls the economy, even when privatized. More resources are
channelled through the state and more decisions of all kinds are made by
it than is customary in most states. Formally, the Chinese political system
is made up of people’s congresses at the centre and at various levels down
to townships. Revived in the 1975 and strengthened in the 1982
constitution after their collapse in the Cultural Revolution, it is claimed
that they embody the power of the people, and consequently their power is plenary (art. 2). People’s congresses operate at all levels of government, the highest being the National People’s Congress, which is described as the ‘highest organ of state power’ (art. 57). The concentration of all power in the NPC and other congresses denies the premise of the separation of power; indeed the separation of powers was condemned both by Marx and Lenin as a device for bourgeois rule. However, the constitution provides for a degree of the functional differentiation of powers, albeit under the general supervision of the NPC (thus the State Council, the Supreme Court and the Supreme Procuratorate are appointed by the NPC, report to it and are responsible to it).

People’s congresses at lower levels perform similar functions in relation to state organs at their level of government. They are in turn controlled by the people’s congress at the next higher level. Most administrative and judicial institutions are supervised and can be controlled by their superiors at the next higher level — so that there is a double system of control.

This duality of control is a reflection of the principle of ‘democratic dictatorship’ which is a refinement of the Leninist concept of the ‘dictatorship of the proletariat’, and reflects the analysis in the preamble that there are no contradictions among the people, although there are a few ‘enemies’ of socialism. The reference to peasants is another Chinese refinement, consistent with Mao Zedong’s emphasis on the peasantry as a revolutionary class.

The underlying basis of the organization of state power is the doctrine of ‘democratic centralism’ (art. 3) which also has its roots in Leninist theory of the socialist state. The doctrine would seem to consist of two rules. The first is that decisions are made after consultations with various groups and organizations, but once made, they have to be strictly observed by all concerned. The second rule consists of four sub-rules (as explained in the Party constitution, art. 10): the individual should be subordinated to the organization; the minority should be subordinated to the majority; the lower level organ should be subordinated to higher-level organ; and the local authority should be subordinated to the central authority. This produces a pyramidal structure — replicated also in the Party — which means that the most powerful bodies are also the smallest.

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7 The Chinese refinement of this rule developed by Mao is the mass line which has been used to involve large numbers of people in consultations (as well as for other purposes, including control over the bureaucracy). Encapsulated in the phrase ‘from the masses, to the masses’, it required leaders to take the ‘scattered and unsystematic’ ideas of the masses and turn them into policies to be explained to and followed by the masses (Schram 1969:316–317).
Another feature emphasizing centralism is China’s status as a unitary state in the sense that there is no constitutional division of powers and competencies between different levels of government, and no areas to which the jurisdiction of the NPC does not extend — remarkable for such a large and complex country. However, the principle of some measure of delegation or devolution is recognized. There are two underlying bases for the delegation — one is ethnic or national (art. 4) and the other is economic (as in the free economic zones). The country is also divided into 23 provinces, 5 autonomous regions and 4 metropolitan areas for both legislative and administrative purposes. The three levels of local power recognized by the constitution are (a) provinces, autonomous regions, special administrative regions and municipalities directly under the Central Government; (b) cities and counties, and (c) townships (arts. 30, 31 and 95).

China is essentially a single party regime. Other parties are allowed — currently eight of them are recognized. But they are firmly under the control and tutelage of the Communist Party; their budgets are state funded and their staff are on governmental salaries (and pay scales). Their function is to promote united front policies and activities, the principal instrument for which is the Chinese People’s Political Consultative Conference — it is to consist of ‘the Communist Party of China, various democratic parties, non-party democratic personages, mass organizations, representatives of various minority nationality and all walks of life, representatives of compatriots in Taiwan, Hong Kong and Macau and of returned overseas Chinese, and other specifically invited people’ (Chen 1992: 65). As implied in its title, it is essentially a consultative body, although quite lively, consisting of persons of considerable personal achievement (suggestions that it might become a full member of the national legislature as a second chamber were rejected during the drafting of the constitution). China is a one-party regime not only in having a predominant party, but also in its control over all state organs as well as integration with state organs (as discussed below). The Party and the state control is extended to non-state sectors: employment, professions, trade unions, cultural activities etc.; until recently it made little sense to talk of civil society (Sun 1994).

Many of these basic features are likely to affect the attitude of the central authorities to Hong Kong and may impinge on the manner in which these authorities exercise their powers in Hong Kong under the Basic Law. For purposes of the operation of the Basic Law, the relevant institutions are what is referred to as ‘Central Authorities’. The principal central authorities are the NPC and its Standing Committee (NPCSC), the State Council or the Central People’s Government (CPG), the Central Military Commission, the Supreme People’s Court and the Supreme People’s
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Procuratorate. Only the NPC, the NPCSC, the CPG and (secondarily) the Central Military Commission are directly relevant to the HKSAR, and the discussion of the constitutional institutions will be largely restricted to them.

CENTRAL AUTHORITIES OF THE PRC

The National People’s Congress

The most important constitutional body is the NPC. The highest organ of state power (art. 57), it is the NPC through which the people exercise their supreme power (art. 2) — this role is largely symbolic, as the people have limited influence over its composition and work. Its functions are a mixture of legislative, executive and supervisory powers (these are set out principally in art. 62). In its legislative capacity it can amend the constitution by a vote of ‘more than two-thirds of all the deputies’ on a proposal from the NPCSC or ‘more than one-fifth of the deputies’ (art. 64) and ‘enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters’ (art. 62(3)). Given the vagueness of this formulation (there is no definition of ‘basic laws’ (jiben falu)), it is hard to establish the precise scope of the legislative competence of the NPC, and in particular to distinguish it from the competence of the NPCSC which may enact ‘laws’ (falu), for which term there is likewise no definition. However, it has been said that the term ‘basic law’ does not often present a practical problem, as it is generally accepted as referring to statutes, other than the constitution, which have a fundamental effect on the whole of society, while the statutes of the NPCSC (‘law’) are deemed to have an effect on only a particular aspect of society (Keller 1989:661).  

8 However, as Keller acknowledges, citing views of Chinese academics, the theoretical differences between ‘basic laws’ and other statutes are not always clear. He writes, ‘The statutes of the NPC include laws concerning criminal procedure and Sino-foreign cooperative joint ventures, which do not appear to be qualitatively different from many of the laws of the Standing Committee, such as those concerning civil procedure or foreign economic contracts. Nonetheless, in practice any law enacted by the NPC is a “basic law” by virtue of its enactment, regardless of the nature of its contents’ (pp. 661–662). He further points out that the term ‘law’ presents even a greater problem as it has a narrow as well as an extended meaning in Chinese legislation, the extended meaning referring to the entire corpus of Chinese legislation, including that enacted at local levels or within ministries. Yet another problem arises from the practice of the NPC and the NPCSC of issuing ‘resolutions’ and ‘decisions’ that create normative statements which have the force of law.
The NPC’s executive powers include the approval of the establishment of provinces, autonomous regions and municipalities directly under the Central People’s Government and the decision to set up special administrative regions. The NPC also examines and approves plans for economic and social development as well as the national budget. It decides on questions of peace and war. It elects (and can dismiss) the President and Vice-President of the PRC, the Premier of the State Council, the Chairman of the Central Military Commission, the President of the Supreme People’s Court and the Procurator-General of the Supreme People’s Procuratorate. It appoints other members of the State Council and the Central Military Commission on nomination by their chairpersons.

The fundamental basis of its supervisory power is the function to supervise the enforcement of the constitution. More specifically, it receives and reviews reports on the implementation of state development plans and budgets. It may alter or annul ‘inappropriate’ decisions of its Standing Committee, and reviews the NPCSC’s work, which itself covers a wide range of supervisory powers. It may establish committees of inquiry, conduct investigations and question the State Council or its ministries or commissions. Its powers of dismissal of senior officials are a useful adjunct to its supervisory role.

This brief description of the powers and functions of the NPC shows that it is not a legislative or supervisory body in the normal sense but is more in the nature of a grand national assembly which meets periodically to confirm decisions and resolutions made elsewhere. Its law making powers are confined to matters of fundamental national importance and its executive and supervisory powers are likewise restricted to some key institutions. These are deliberate, consonant with the symbolic role of the NPC, its composition and procedure. It is a large body (the number of deputies is not to exceed 3000, art. 13 of the Electoral Law). Deputies perform their duties on a part time basis. The NPC meets only in one session of about two weeks annually, and most of its work takes place in delegations from different parts, with limited plenary sessions. Although deputies can present bills for legislation and other motions, in practice the role of the NPC is to ratify bills proposed by state authorities rather than to engage in detailed legislative work (although it may remit bills to specialized committees and delegations of deputies — in which much of the work of the NPC is done). Nor is the NPC suitably constituted or organised to undertake the detailed supervision of other state organs (O’Brien 1988).

It has consequently been customary to say that the NPC is a rubber stamp of decisions made elsewhere, by the State Council and ultimately by the Communist Party. Such was indeed the traditional understanding
of the role of deputies of the NPC (and lower level congresses).\footnote{O’Brien states that the primary role of deputies is to represent public opinion and deal with the complaints of their constituents.} However, while this label is still largely correct, members of the NPC have made attempts to assert their powers (particularly under its former president Qiao Shi); it is certainly seen as one of the centres of power. Lively debates, by Chinese standards, have taken place recently and legislative drafts have been subjected to close and repeated scrutiny and amended (Tanner 1994 and 1995; O’Brien 1994). The resources given to the NPC have increased and its bureaucracies have become larger and more professional. However hard the members try and however propitious the circumstances, it is unlikely in the absence of changes to its structure that it could become an effective legislature, and indeed the responsibilities of a normal legislature are granted to its Standing Committee.

The Standing Committee of the National People’s Congress

The NPCSC consists of about 170 members and meets every second month for 10 days or more. Its members are for the most part resident in Beijing and work full time on its business (they are not allowed to be members of the executive, judiciary, or the procuratorship, art. 65 — a restriction which is also designed to ensure the proper supervision of these bodies) and make extensive use of specialized committees of the NPC. The NPCSC acquired its present role only under the 1982 constitution, in an attempt to make something of NPC’s legislative and supervisory functions. The NPCSC is described as the permanent body of the NPC (art. 57). Although its members are elected by the NPC from its own deputies, and the NPC has the power to correct the decisions of the NPCSC, in many ways the NPCSC is better viewed as a body with its own powers, functions and procedures (which are constitutionally vested directly in it) than as a committee of another institution. The powers of the NPCSC can be divided into those which are primarily its own responsibilities and those which it exercises on behalf of the NPC when
the latter is not in session (the powers are set out in art. 67). Powers under the second category are:
1. to 'partially supplement and amend' laws enacted by the NPC, provided that the 'basic principles of these laws are not contravened';
2. to review and approve partial adjustments to national development plans or the state budget 'that prove necessary in the course of their implementation';
3. to appoint, on nomination by the Premier, to ministries and commissions, and the Auditor-General and the Secretary-General of the State Council;
4. to appoint members of the Central Military Commission on the nomination of its chairman; and
5. to decide on the proclamation of war 'in the event of an armed attack on the country or in fulfilment of international treaty obligations concerning common defence against aggression'.

Its principal powers under the first category can be further sub-divided into various sub-groups (of which only the most important are touched on here). The first function is law making, the limits of which have already been noticed; the NPCSC cannot go beyond these limits even when the NPC is not sitting. However, in practice these limits are unimportant for the following reasons. There is no precise understanding of what are 'basic laws' which are restricted to the NPC. The NPCSC can amend or supplement the 'basic laws' when the NPC is not in session (which happens to be most of the year), and the proviso that amendments or supplementation may not contravene the basic principles of these laws is no real restriction due to the vagueness of the concept. Moreover, the NPCSC can interpret the basic laws, and as there is no firm distinction in the PRC jurisprudence between amendment and interpretation, it is hard to restrict its law making powers. The State Council, from which emanate most legislative proposals, prefers to use the NPCSC rather than the NPC for law-making as the process in the NPCSC is less cumbersome and more manageable. In practice the bulk of national laws are enacted by the Standing Committee.

The second function of the NPCSC is the supervision of the enforcement of the constitution. For this purpose it may annul rules or regulations of the State Council that contravene the constitution or law. It may exercise even wider jurisdiction over state organs in provinces, autonomous regions and municipalities directly under the Central Government, for its powers extend even to the annulment of 'decisions' for contravention also of the law or administrative rules and regulations (i.e., made by the State Council). Perhaps more importantly, it has the power of the interpretation of the constitution and national laws. Although this power has been little used, it
is of great significance as symbolizing the rejection of the separation of powers. It is also of crucial importance for Hong Kong as the NPCSC has the final powers of interpretation of the Basic Law (a detailed discussion of the system of interpretation is provided in Chapter 5).

Another responsibility of the NPCSC concerns the maintenance of law and order — as manifested in its responsibility for declaring war in case of aggression, ordering general or partial mobilization, and deciding on the imposition of martial law. It has also the primary responsibility for foreign affairs and decides on the ratification or abrogation of treaties and other important agreements and the appointment and recall of its ambassadors. The NPC may give it additional functions and powers, as it has to some extent in the Basic Law of the HKSAR.

**The State Council**

The State Council is described both as the executive body of the highest organs of state power (thus clearly indicating the superiority of the NPC over it) and the highest organ of state administration (art. 85). It consists of the Premier, Vice-Premiers, Councillors, Ministers, the Auditor-General and the Secretary-General (art. 86). The Premier has overall responsibility for the Council, while individual ministers are in charge of their portfolios (ministries or commissions). The Premier submits proposals for the organization of the Council into ministries and commissions for the approval of the NPC or its Standing Commission (art. 8 of the Organic Law on the State Council of the PRC, 1982), through which most of the work of the Council is conducted. But it has the power to establish agencies for specialized tasks directly under itself (art. 11 of the Organic Law). One of these specialized bodies is the Hong Kong and Macau Affairs Office which has handled most of the issues relating to the transition of sovereignty to China over Hong Kong and Macau and is expected to be the principal source of liaison between the Central Government and the Special Administrative Regions. The council meets in plenary sessions

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10 There have been two offices in Beijing with the title of the Office for Hong Kong and Macau Affairs. One of them belongs directly to the State Council and the other to the Ministry of Foreign Affairs. The latter deals with issues of the transition of sovereignty at a diplomatic level, and provides the Chinese members of the JLG and the Sino-British Land Commission. The former has been more extensively involved in Hong Kong affairs. It has three principal tasks: to report on politics and economics in Hong Kong as well as public opinion; to help to formulate Chinese policy towards Hong Kong; and to look after Hong Kong affairs in coordination with other departments of the Central People’s Government (CPG). It has a large staff, exceeding 100 (Davies, S 1990: 191).
(about once a month) and in executive session (twice a week) — the executive consisting of the Premier, Vice-Premiers, Councillors and the Secretary-General. All important issues have to be discussed and approved in either the executive or plenary meetings (art. 4 of the Organic Law).

The State Council is the government of the PRC, in charge of central administration and has a wide mandate in common with governments elsewhere — defence, foreign affairs, social and economic policies, etc. (art. 89 lists 17 specific functions, in addition to extra powers that may be conferred by the NPC or the NPCSC). Given the centrally planned nature of the economy, it has important responsibility for directing the economy, including the preparation of periodic development plans. It has the power to impose martial law in parts of provinces, autonomous regions and municipalities directly under the Central Government — as opposed to imposition over all parts, which must be done by the NPCSC — this was the basis for the State Council to impose martial law in parts of Beijing in 1989. It has also the responsibility for coordinating and controlling administration at all levels, and can annul decisions of lower level bodies. It is responsible for deciding on the delegation of powers to provinces, autonomous regions and municipalities under it, and to ‘exercise unified leadership’ over their work.

The State Council and its ministries and commissions play a central role in law making. A substantial proportion of legislative bills (over 70% in the last few years) that are submitted to the NPC or its Standing Committee are proposed and drafted by them. It has a Legislative Affairs Bureau which coordinates ministries and commissions in preparing legislative proposals. The State Council also has its own law making powers (the law being called administrative rules or regulations), and this is the source of most of the law enacted at the national level. A distinction is made between regulations made by the State Council and by its agencies. The regulation making powers of the Council are set out in the constitution — they must be exercised in accordance with the constitution and the law (i.e., the laws of the NPC and its Standing Committee) (art. 89(1)) — while those of its agencies derive from the Organic Law and must be within the limits of their authority and in accordance with the law and decisions of the State Council (art. 10).

**Central Military Commission**

The Central Military Commission is established to direct the armed forces. Its chairperson is appointed by the NPC, which also appoints other members on the nomination of the chairperson. The chairperson assumes
overall responsibility for the work of the commission (art. 93). It is responsible to the NPC and the NPCSC (art. 94). The armed forces are separately represented in the NPC (art. 59). These skeletal provisions scarcely do justice to the key role of the armed forces in the political system. There are close historical links between the armed forces and the Communist Party: for a long time during the struggle with the Kuomintang, the revolutionary army was the Party, and its control missions were responsible for administering liberated areas (Wang, James 1989; Cheng Hsiao-shih 1990). It was possible to centralize and consolidate political authority in China in the twentieth century only after the consolidation of military authority — and the military authority has remained essential for sustaining it. During the Cultural Revolution it almost replaced the Party, and a key aspect of the post-Cultural Revolution reforms has been the re-assertion of Party control over the armed forces. Both the 1975 and 1978 constitutions provided for the chairman of the Party Central Committee to be the commander-in-chief of the armed forces, and even though different provisions were adopted in 1982, the effective head of the Party (first Deng Xiaoping and then Jiang Zemin) has been the chairperson of the Central Military Commission. A great deal of effort goes into the management of the politics of the armed forces, especially until recently when most of the elder statesmen of the Party — with experience of action in the early armed struggles of the People’s Liberation Army — had support of factions in the forces. The armed forces are an independent political force, central to the stability of the country. No succession to leadership is secure unless it has the endorsement of the leadership of the armed forces (even with the turn to a more professional orientation in recent years, Lieberthal 1995: 227–228).

THE ROLE AND ORGANIZATION OF THE COMMUNIST PARTY

No understanding of the operation of the PRC constitution is possible without a knowledge of the influence and control over its institutions exerted by the Chinese Communist Party (CCP). The constitution itself acknowledges but does not explicitly provide for a role for the Party. The constitution of the Party (the latest version of which was adopted in 1992) is more explicit. In the preamble the Communist Party is proclaimed as ‘the vanguard of the Chinese working class, the faithful representative of the interests of the people of all nationalities in China, and the force at the core leading China’s cause of socialism’. The Party emphasizes that it has the
primary role in directing and guiding policies and administration of the country as well as in controlling the armed forces. The Party constitution sets out some of the techniques for the Party to fulfil these roles. First, the Party is organised along Leninist lines, which means that it is an elitist party, with tight qualifications and procedures for membership (see art. 5) and strict discipline, for the violation of which the ultimate sanction is expulsion from the Party (chap. VII). One of the key institutions of the Party is the Central Commission for Discipline Inspection which has the general responsibility for ensuring discipline (chap. VIII). The operating principle of the Party is democratic centralism which gives its central, apex committees the power to control all members and institutions of the Party (art. 10).

The principle of democratic centralism is reflected in the organization of the Party, which, as with the organization of the state, is hierarchical and pyramidal, so that real power is in the smallest group. This is the Standing Committee of the Political Bureau of the Central Committee. Formally the highest body is the Party National Congress, with a large membership, which meets once in every five years (art. 18); its principal responsibility is to ratify key changes of policy and orientation. Its major function is to elect the Central Committee which meets in plenary session at least once a year (art. 21). The Central Committee carries out the other functions of the National Congress when the Congress is not in session (art. 21) — which means most of the time. In practice the work of the Central Committee is discharged by the Political Bureau, its Standing Committee, and the general secretary of the Central Committee, all of whom are elected by the Central Committee (art. 22). Supreme power is held by the Standing Committee (of around six to eight persons, who are also the key power brokers). No provision is made for the Paramount Leader, who is frequently in effective charge of policy. However, even this account does not provide a full picture, for one it assumes a discipline and order that is occasionally missing, as I show later.

The Party exerts its control over state institutions in a number of ways. The most obvious is the interlocking of Party and state structures and decision making (Wang, James 1989: chap. 4; Lieberthal 1995: 208–218). Various efforts to separate state and party functions, as part of political and economic plans, have failed (and are unlikely to be attempted now in present circumstances when there is much question about the legitimacy of the Party). The Party’s organization is parallel to state institutions, as has been indicated above. At each level it is the Party body, and not the corresponding state organ, which makes the key decisions and supervises their implementation. There is a significant overlap of membership as well, which ensures the dominant role in state institutions to the Party leaders. In any case, various mechanisms exist to ensure that the membership of
state institutions has the prior approval of the Party leadership. Two devices for this purpose are discussed here — elections to the NPC and the *nomenklatura* system. Two further institutions are also discussed which serve to extend party control over organizations and localities.

**The Electoral System**

The number of deputies of the NPC and the method of their election are to be determined by law (PRC constitution, art. 59). The discussion here is based on the Election Law of the National People’s Congress and Local People’s Congresses of the People’s Republic of China enacted in 1979 and amended in 1982, 1986 and 1995. There is a separate law for the election of deputies from the People’s Liberation Army (1981). The law vests the conduct of elections in the case of direct elections in election committees, and in the case of indirect elections in the standing committee of the congress from which the deputies are to be elected (art. 7). The law makes a distinction between the recommendation and the nomination of candidates (although these terms do not seem to be used in any consistent manner; for example art. 29 talks of recommendation, while art. 31 talks of their ‘nominees’). The important question for present purposes is the procedure whereby a person’s name gets on the ballot paper, i.e., he or she becomes a candidate. According to art. 29 of the law, recommendations for candidates can be made by political parties, people’s organizations, or a group of at least ten voters or deputies. However, the nomination is not made by them. The procedure for nomination varies depending on whether the elections are direct or indirect. When the elections are direct, the ‘nomination’ is made by the voters. The previous procedure was that the election committee, ‘after repeated deliberation, discussion and consultation’ with ‘voter groups’ decided upon a formal list of candidates which was made public five days prior to the date of elections (old art. 28). When the elections were indirect, the process of consultation was with the deputies and was undertaken by the presidium of the congress from which the deputies to the next level were to be elected (old art. 28). Under the 1995 amendments, in the former case the list of candidates is determined by the committee ‘in accordance with the opinion of the majority of the voters’ and in the latter case a preliminary election is held to produce a list of official candidates (art. 31).

The principal device for the Party’s control of election lies in the preparation of the list of candidates to be voted upon (see Chen 1992: 67; Nathan 1985: chap.10, and McCormick 1990: 4 where the detailed procedures and practice are described). There is no independent electoral
commission for the conduct of elections. In the case of indirect elections, elections are conducted by the presidium of the congress (which means those already in office) and in the case of direct elections, by the election committees which are appointed by the standing committees (art. 7). A handful of candidates are thus picked out from thousands of ‘recommendations’. Until the reforms of 1986 the number of candidates equalled the number of vacancies, but now the law provides that when elections are direct, the number of candidates shall be ‘from one-third to double the number of deputies needed’ while for indirect elections, as for the NPC, the number of candidates should be ‘20 to 50 percent more than the number of deputies needed’ (art. 30). The members of the election committees and presidium are predominantly CCP members.

The system of indirect elections is chosen because it is easier for the CCP to control the voting. Citing Chinese sources, Chen says that the results of the higher people’s congresses are more tightly controlled than those of direct elections to the people’s congress at county level or below. In the former case, people’s congress deputies who are Party members will be mobilized if necessary to vote in accordance with the instructions of the party core group within the people’s congress (1992:68). Deputies of the NPC can be recalled by the constituencies that elected them (art. 47) and there is ample evidence that the Party has used these provisions to get rid of deputies of whom it comes to disapprove (two well known examples are a previous head of the Chinese News Agency in Hong Kong, Xu Jiatun, suspected of deviating from the Party line, and a former head of People’s Daily, Hu Jiwei for his pro-democracy activities). Despite the picture of a highly controlled system, it should be recognized that China has introduced reforms, and more are likely to come (based perhaps on an experiment for direct and free elections at the village level conducted by the Ministry of Civil Affairs).\[11\]

\[11\] In 1987 the NPCSC passed the Organic Law on Village Committees with the aim of providing competitive, democratic elections to ensure the rule of law and village self-rule. Candidates are nominated by the villagers themselves, instead of the previous practice whereby electors were presented by the party with a slate of candidates. There are more candidates than seats, and intense campaigning takes place. International help in the training of electoral officers and in the reform of election methods has been accepted. The law and, in some places, its vigorous implementation, has given the village community a sense of its rights and power. However, as one commentator has noted, the relationship between the village committee and the Party is vague, and where there is a powerful local Party secretary, the committees are less likely to be able to exercise their powers or demand accountability from officials (Oi 1996:140–141).
The Nomenklatura System

Nomenklatura refers to the system which was practised in most communist states whereby a large number of key positions in the Party, the legislature, the government, the judiciary, the military, schools and universities, enterprises, religious organizations, etc. (in fact all positions of real importance in the PRC, including elective offices) are reserved for appointment by the Party (Burns 1987). It is estimated, in the most authoritative study on the subject, that in the late 1980s there were over 8 million such posts (Burns 1989). Each core group (to be described below) (or at lower levels, party committee) has a list of nomenklatura posts which can only be filled with its approval. Lists and reserve lists are prepared of persons who may be appointed to these posts. The system gives the CCP great control over the government and other institutions. Unlike other controls described here, there is no authority for the system in either state laws or the Party constitution.

Primary Party Organizations

Primary party organizations are established in enterprises, rural villages, offices, schools and other educational and research institutions, People’s Liberation Army companies, city neighbourhoods, and ‘other basic units where there are three or more full party members’ (art. 29). They are described in the Party constitution as ‘militant bastions of the Party in the basic units of society’ (art.31). Their function is to propagate Party policies and act as ‘Party nuclei’, ensuring and supervising the implementation of party and state principles and policies by the management of enterprise etc. (art. 32). They establish the links of the Party with the ‘masses’ and help to penetrate social groups.

Leading Party Members Groups

There is a ‘leading party members group’ or ‘Party core group’ of the Party for each ministry, commission, offices and bureaux of the government, in the political-legal organs at the national and local levels, and in the leading organs of people’s mass organizations such as trade unions, women’s federations, and scientific and literary associations. Core groups have a small membership of Party members occupying leading posts in the organ or institution concerned (the average size of a group seems to be four — but the membership is secret). They are appointed by the Party committee at the
appropriate level. Their function is to ensure the implementation of Party policy in the relevant organ or institution and to review difficulties the institution may be facing. They are to guide the work of the institution and to make decisions on major issues in the institution (art. 46). Leading groups exist in all areas of policy and state action and are instrumental in infusing Party policy or directives into state institutions. There is a group for the judiciary, for example, which meets with judges, especially before trials in which the Party or the state has an interest and ensures that appropriate judgments are delivered (Chen 1992:119). There is also a Leading Group for Hong Kong, which consists of the most senior Party leaders.

**Conclusion**

As with the state constitution, the Party constitution does not give a reliable account of how the party actually works. A well known example is the dominant role, until recently, of Deng Xiaoping, in both government and Party well after he had ceased to hold any public or party post. Despite the intention in both the state and Party constitution to move away from personality cults, the system seems to need a Paramount Leader. The Party is not as well institutionalized as one would expect in a communist state with strong organization and a pervasive ideology. Politics have been highly personalized, and personal loyalty often sustained a career, enhancing prospects for promotion. Few leaders now command the kind of support that forms the basis of personal patronage and cliques. But these developments have not led to a greater role for Party institutions.

On the whole decisions are not made through formal rules or procedures, but through negotiations among top leaders who may or may not hold formal positions (and in which military leaders play a key role, the military being assigned special status in the NPC and the Party structure). Factionalism dominates Party politics at the top, and reverberates through the entire governmental system as well — it is one of the reasons for the difficulties China has always faced in succession over leadership. The Political Bureau is increasingly unable to reach a consensus on a range of policies. There are profound ideological differences among the top leaders, on the role of the market, the emphasis on material advancement, the shoring up of state enterprises, regional policies, and the general opening up to the outside world. These deadlocks sometimes allow lower level bodies to exert their influence, but they are unable to produce the coherence that in such a system can only be manufactured at the top.

The marketization policies have had a deep impact on the standing of the Party (for both practical and ideological grounds). They were intended
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China acknowledges itself as a multinational state, for although the
Han people (itself far from homogeneous) constitutes over 90% of its population, there are (officially) 55 other ethnic groups, numbering nearly 70 million people and occupying almost 60% of the land area of the country. The current policy and arrangements for autonomy are established in the state constitution and the organic law on Regional National Autonomy passed by the NPC in 1984; they mark a return to original Party policy of pluralism and gradual assimilation of minorities after the attempts at radical assimilation during the Great Leap Forward and the Cultural Revolution (for an account of policies of different regimes towards minorities in China, see Mackerras 1994). In a reversal of the policy of the Kuomintang, the CCP adopted a more liberal policy towards minorities in 1949 in the first ‘constitution’, the Common Programme. The claim in the law on regional national autonomy that policy towards national minorities is based on Marxist-Leninist principles is, however, not justified for the rights granted to them are much narrower. Autonomy for minorities is part of a broader package which is elaborated in art. 4 of the constitution — the equality of all nationalities, preferential treatment of minorities to accelerate their economic and cultural development, a minority’s freedom to the use and development of its language and the preservation or reform of its ‘folkways and customs’, and regional autonomy where minorities live in ‘concentrated communities’.

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12 Lenin developed the principles for dealing with minorities during the course of the revolution which overthrew the Czarist regime in Russia in order to secure the support for Bolsheviks among the numerous non-Russian peoples in the former empire (for a classic study of the Leninist approach to the question, see Connor 1984; see also Roeder 1990–1). It promised them self-determination, including the right to secede if they wished, but if they stayed, they would be granted significant autonomy for their regions to pursue cultural, linguistic and other policies. By according such prominence to ethnic considerations at the expense of the identity through economic interests, the theory was in basic conflict with the underlying premises of Marxism. Meant as a temporary concession to what was regarded as a passing force of nationalism, its implementation and practice were fraught with contradictions. Institutional and other policies (including the dominance of the Communist Party) were employed to attenuate self-determination and federalism, but ultimately they were the undoing of the federation (Ghai 1996).

Under the influence of the Soviet Union, the CCP did adopt Leninist policies in 1931 but they were speedily abandoned, principally due to the impact of foreign powers on China’s border regions where most minorities lived (Mackerras 1994: 72; chap. 4).

13 ‘Nationalities’ is used in the Marxist-Leninist sense, and should not be confused with citizenship — for while there are many nationalities in China, there is only one citizenship. The CCP has tended to adopt Stalin’s definition of ‘nationality’: ‘A nation is a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture.’ It seems that not all Chinese social scientists are happy with this definition (Mackerras 1994: 141).
Constitutional Provisions for Autonomy

An examination of the PRC constitution and the Law on Regional National Autonomy does not disclose a clear concept of autonomy. I first provide a brief account of the system of autonomous areas and then examine the nature and extent of autonomy. There are three principal types of autonomous areas: region, prefecture, and county (art. 30 of the constitution); and where within an autonomous area there is a town with the concentration of another minority, a nationality township may be designated for its benefit (art. 12 of the law). Such areas may only be declared where a minority is ‘concentrated’ — but no criterion for determining concentration is specified. The decision to so declare an area depends on ‘local conditions such as the relationship among the various nationalities and the level of economic development, and with due consideration for historical background’ (art. 12 of the law). The decision to establish an autonomous area is made by the State Council (art. 89(15)) on the recommendation of lower level state organs after relevant consultations, including with the minority concerned (art. 14 of the law). It would therefore follow that there are no hard criteria and that no minority can claim a right to autonomy. 14

The governing bodies of autonomous areas are called ‘organs of self-government’ (art. 95 of the constitution); they have all the powers of organs of government at local level, i.e., people’s congresses with their standing committees and people’s governments, but have some additional powers which constitute the primary element of their autonomy (art. 115 of the constitution), including the enactment of ‘autonomy regulations’ (art. 116), although this term is nowhere defined. One of their primary tasks is to implement state laws and policies by adapting them to local circumstances (art. 115) and if a resolution, decision or instruction of a higher state organ is unsuitable for the autonomous area, the organs of self-government may modify it or cease to implement it (art. 20 of the law). Within the general terms of state laws and plans, they may undertake a number of measures — like the allocation of resources, international trade, the exploitation of natural resources, etc. They have some fiscal autonomy, being free to determine the expenditure of money allocated to the area by the state (art. 117 of constitution and art. 33 of the law) and to allow larger exemptions from taxation than under the state law (art. 35 of the law). They may maintain local security forces for the maintenance

14 There are five autonomous regions at the provincial level (Inner Mongolia, Xinjiang of the Uygur, Guangxi of the Zhuang, Tibet, and Ningxia of the Hui), 31 autonomous prefectures, 105 autonomous counties, and about 3,000 nationality townships.
of public order (art. 120 of the constitution and art. 24 of the law). They
have a particular responsibility for the development of the culture,
languages and customs of the minority (art. 119 of the constitution and
art. 38 of the law) as well as for the economic and social development of
the area (arts. 25–28 of the law). Organs of state power at higher levels
are required to help to accelerate the development of autonomous areas
by various preferential policies and special grants (art. 122 of the
constitution and chap. VI of the law).

Both the constitution and the law attempt to ensure that the organs of
self-government as well as other state bodies in the autonomous area are
effectively under the influence of persons from the minority nationality
(through the chairs of organs of self-government as well as membership of
administrative services — arts. 113 and 114 of the constitution and arts.
16, 17, 23 and 46 of the law). In principle, the language of administration,
courts and procuracy should be that of the minority (art. 134 of the
constitution and arts. 21 and 47 of the law). Cadres of Han nationality
posted to the area ‘should learn’ the spoken and written language of the
areas and cadres from the minority nationality should learn Putonghua
(art. 49). However, in practice Chinese is the medium of instruction in
schools and the language of administration.

These provisions do not add up to a system of autonomy as generally
understood. ‘Autonomy’ is of course not a term of art, but it does imply
very significant powers of independent decision making, and independent
resources, particularly finance and public service, to exercise them.
Hanunum and Lillich (1981) have tried to establish some key features to
determine the presence of autonomy:
1. a locally elected legislature with defined and independent powers of
   law making;
2. a locally chosen chief executive;
3. an independent local judiciary, and some independent judicial
   procedure for determining disputes about the respective powers of the
   centre and the autonomous area; and
4. the absence of a general discretionary powers in the centre.

Various forms of power-sharing are not, in their view, inconsistent with
autonomy. By these standards the Chinese regional system would not
qualify as autonomous.

The discretion of the organs of self-government in the discharge of their
responsibilities is limited (Heberer 1989). Their policies and activities must
be conducted within the general framework of national laws (and there is
no indication that ‘autonomy regulations’ may contravene state laws).
Fundamentally, the broad framework within which the system operates
denies true autonomy of choice of policy, for the organs of self-government are bound by the key principles of the Chinese state system — socialism, democratic dictatorship and centralism, subordination to institutions at the next higher level, within the overarching domination of the CCP. Most regulations or policies require the consent of higher state organs, and in some cases of the State Council itself (as for establishing local security forces or engaging in international trade). They have to work ultimately under the unified leadership of the State Council (art. 15 of the law). Their financial and other resources depend on grants from the centre. There is no mechanism to resist encroachments on their powers by the centre. Any ‘autonomy’ given by the law can be negated through the directives or influence of the Party; for example key positions in autonomous areas are covered by the nomenklatura (and there is no requirement in the Party constitution that Party secretaries in these areas be members of their nationalities). The Party’s willingness to provide a higher degree of autonomy may have been tempered by the nearness of these areas to foreign states, with whom China has not always had an easy relationship (particularly Russia, India and Vietnam) as well as distance from Beijing.

**Special Economic Zones**

The concept of autonomy in special economic zones is clearly different from that in the special administrative regions, for the ‘autonomy’ of the latter lies in the preservation of their separate and distinct system of economy, politics and law. Thus it could be said that the Chinese constitutional system now operates with two broad types of autonomy — one within the contours of socialist policies and under the hegemony of the Party, and the other outside them (and thus approximating autonomy as generally understood). The special economic zones provide at first sight a middle ground; their rationale is experiments with new economic forms, providing a substantial role for foreign investment in the private economy, but within the framework of ‘socialist modernization’. However,

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15 This analysis is borne out by the Chinese refusal to consider the proposal of the Dalai Lama in 1982 that Tibet be granted the autonomy that had then recently been outlined by Ye Jianying for Taiwan, which included the retention of its armed forces and control over its internal affairs without control from Beijing. The Chinese position was that the formula of ‘One Country Two Systems’ could not apply to Tibet as, unlike Taiwan, it had already ‘completed democratic reforms and socialist transformation’ (Mackerras 1994: 185).

16 As of 1997, there were six special zones: Shenzhen, Zhuhai, Shantou, Xiamen, Hainan Province, and Pudong New District.
the autonomy they exercise is limited. To take the Special Economic Zone of Shenzhen (one of three such zones in Guangdong Province), it has been set up ‘in order to develop external economic relations and technical exchanges and support the socialist modernization programme’ (art. 1 of the Regulations on Special Economic Zones in Guangdong Province, 1980). It facilitates direct investments or joint ventures by ‘foreign citizens, overseas Chinese, compatriots in Hong Kong and Macau’ — primarily for export purposes, for domestic sales require special permission and attract custom duties (art. 9). Special facilities and fiscal and other concessions are offered only to investors in special zones (see for example, arts. 4, 5, 10, and chap. III)). An investment can only be made after it has been approved and licensed. Special laws may be enacted, establishing a different regime of laws, particularly commercial laws. However, the scope of policy and administrative decisions made by Shenzhen authorities is limited. The management of the zones comes under the authority of the Guangdong Provincial Administration of Special Economic Zones, which is to exercise ‘unified management of special zones on behalf of the Guangdong Provincial People’s Government’ (art. 3). Key functions in relation to the management are vested in this authority (arts. 7, 9, 11, and chap. V). Important policy decisions are made by the provincial authorities, who have to negotiate with and seek the approval of the State Council and in some instances, where regulations are concerned, of the NPC or its Standing Committee. However, in July 1992 Shenzhen authorities were granted powers of law making by the NPCSC. These laws may contravene national laws where Shenzhen policies deviate from national policies, although the scope of the law making powers is uncertain (Epstein 1993:211–213).

While the social and economic impact of special zones has been infinitely greater than of autonomous regions (and of far greater significance for Hong Kong), the former have little autonomy; they are merely instruments to carry out policy decided by the normal institutions of the state. In that sense they provide no precedents for the tensions that may arise from the exercise of autonomy and how the central authorities may handle them — this is not to say that policies pursued through special zones have not been the subject of acute controversies within the Party and the government.

**Tibet**

For these precedents we have to turn to the experiences of national autonomous regions. On the whole the autonomous areas have not been problematic from the Party’s point of view, and since 1979, they have
enabled minorities to enjoy their culture and customs without giving them a significant measure of self-rule. Two problematic areas have been Tibet and Xinjiang — and in both instances strong indigenous religious traditions (Buddhist in the first and Islam in the other) have been critical factors, aggravated by intolerance of them during the Cultural Revolution. The Tibetan situation is also complicated by disputes over the legal basis of Chinese sovereignty. China’s relationship with Tibet, in some form of suzerainty, is ancient but over the years the links had weakened. British influence over Tibet increased in the early part of the twentieth century, and Tibet operated largely as an independent state. It was only after the Communist victory over the Kuomintang that China started to assert its claims, deciding in 1950 to ‘liberate’ Tibet, motivated in part by considerations of defence as well as communist dislike of Tibetan theocracy. After preliminary talks between the Chinese and Tibetan authorities, Chinese troops invaded Tibet and captured the western part, Chamdo, representing one-third of historical Tibet. The governor of Chamdo was captured and taken to Beijing as a prisoner of war. Under threats of further violence, the Tibetan authorities, headed by the captured governor, negotiated a 17-point agreement with the Chinese on 23 May 1951 (‘Agreement on Measures for the Peaceful Liberation of Tibet’).

The agreement provided for the return of Tibet to ‘big family of the motherland — the People’s Republic of China’ and the presence of the PLA in Tibet to consolidate ‘national defences’. The PRC was to be responsible for all external affairs of Tibet. In return various guarantees were given to Tibetans:

1. the right of exercising national regional autonomy ‘under the unified leadership’ of the Central People’s Government;
2. the central authorities would not alter the existing political system in Tibet, including the status, functions and powers of the Dalai Lama;
3. respect for the religious beliefs, customs and habits of the Tibetan people and the protection of lama monasteries;
4. and the development of the spoken and written language and school education of Tibetans.

The following account is concerned with questions of autonomy and does not deal with Tibet’s claims to and Chinese denial of Tibet’s independent statehood. The second question turns on Tibet’s history as an independent state, the shadowy concept of suzerainty, the effect of the 1951 agreement (an unequal treaty?) and its breach by China or repudiation by Tibet, the suppression of Tibetan culture, and the modern principle and doctrines of self-determination. These issues are canvassed in ICJ 1959: 75–99; McCorquodale and Orosz 1994; van Walt van Praag 1987; and Josephs, Harvey and Langeragan 1995; all authors reach the conclusion that Tibet had the attributes of an independent state before the Chinese invasion, and is now entitled to self-determination.
It was also agreed, as regards reforms, that there would be no compulsion by the Central Authorities, and that the ‘local government of Tibet should carry out reforms of its own accord, and, when the people raise demands for reform, they shall be settled by means of consultation with the leading personnel of Tibet’ (art. 11). The question of reform (and the associated question of the status of monasteries) was fundamental, since ‘reform’ was regarded by many Tibetans as implying the introduction of elements of communism and threatening the separate way of life of the Tibetans — as late as 1956 Zhou Enlai assured the Indian government that China did not intend to force communism on Tibet (ICJ 1959:8).

A committee was to be set up to ensure the implementation of the agreement, consisting of personnel from the CPG and ‘patriotic elements’ from various sectors in Tibet, although the Preparatory Committee for the Tibetan Autonomous Region was not established until October 1955. The agreement failed to resolve differences between the Chinese and the Tibetans. For a while attempts were made to govern Tibet in accordance with it, but there were conflicts of aims and interpretation. There was increasing resentment among large sections of Tibetans at what they perceived to be direct Chinese rule and an assault on their way of life. The agreement was formally repudiated on 11 March 1959 by a declaration of independence by the Dalai Lama and his government. The Chinese began a siege of the Potala Palace where the Dalai Lama lived and bombarded it and other monasteries. The Dalai Lama escaped to India, which weakened the forces of secession and resistance to China. China further integrated Tibet into the regular administrative system of China and pushed through ‘reforms’. In 1965, the Tibet autonomous region, under the general scheme for minorities, was established.

The Tibetan and Chinese versions of why the agreement failed are diametrically opposed (both versions are set out in detail in ICJ 1959). The Tibetans accused the Chinese of the total disregard of the agreement. They said that China ignored provisions for the internal autonomy of the Tibetan government; refused to support its proposals for reform while at

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18 Scholars are also divided in their assessment. For example Mackerras says that the declaration of independence was prompted by a ‘trivial incident’ involving a Chinese invitation to the Dalai Lama to a theatrical performance at their military headquarters (1994:151). Other scholars accept the contemporaneous version given by the Dalai Lama and his supporters (ICJ 1959: 13–14) that the invitation specified that he was to come unaccompanied by any of his ministers or bodyguards, ‘a most unusual request’, at a time when allegedly several senior monks had been killed or imprisoned after similar invitations. When people heard of the invitation, they surrounded the Potala Palace and refused to allow the Dalai Lama to go.
the same time pressing Chinese reforms in the face of local opposition; that the Preparatory Committee, despite significant Tibetan membership, acted to rubber-stamp Chinese decisions; that the local public service was taken over, the dominance of Chinese army was established, and communist ideology was propagated. A study of laws passed by various organs of ‘self-government’ provides no evidence of any meaningful exercise of autonomy; indeed it shows that Tibet, and autonomous areas generally, enjoy less autonomy than ordinary provinces (Keller 1994b).

There was a migration of Han people to Tibet while Tibetans were moved to other parts of China, thus diluting their numbers in Tibet (and autonomous prefectures were established for them elsewhere). Monasteries were raided, their income taken away, and religious texts destroyed — as part of a general onslaught on their religion and social system. The Dalai Lama’s position was constantly undermined (and ‘puppets’ coopted) — and with it the general structure of Tibetan society. In all these ways the political system was transformed contrary to the guarantee in the agreement. Tibetans questioned China’s interpretation of the territorial extent of Tibet, for parts of what they regarded as traditional lands, Kham and Amdo, were excluded from the scope of the operation of the agreement and divided into Sichuan, Qinghai and Kansu. There were allegations of widespread violation of the rights of Tibetans, including large-scale killing of monks, the suppression of the freedom of expression and association, and the use of forced labour. China was also accused of genocide, because of its suppression of Tibetan religion and culture and migration policies.

The Chinese riposte was that the Dalai Lama and his government had refused to cooperate with the Chinese authorities in accordance with the agreement; that ‘people’ wanted reforms, requiring the Central Government, in accordance with the agreement, to consult them in order to effect them (the Tibetan interpretation being that it was the Tibetan government which had to undertake the consultation); and that various ‘reactionaries’ under the influence of ‘imperialists’ had attempted to undermine Chinese authority. To complete the story, attempts were made by Deng Xiaoping to start a dialogue with the Dalai Lama, but no agreement could be reached on the terms for his return, particularly on the scope of autonomy to be enjoyed by Tibet. Tibetan resentment at Chinese rule has continued; various protests against it have been staged and have received wide international publicity. The most serious of these were in March 1989, a combination of ethnic and economic dissatisfaction, to which China reacted with great ferocity and imposed martial law, thus ending another, more attenuated, stage of autonomy. Although both sides have expressed willingness to talk, the terms for a meeting have eluded them.
Xinjiang

The story of Xinjiang is less dramatic, but potentially no less explosive (as is demonstrated by violent clashes between secessionists or autonomists and the Chinese military authorities in 1995, 1996, 1997 and 1998). Dominated by the Uygur, who constitute 80% of the population, it has a largely Muslim population with kin across the boundary in what was the Soviet Union but are now Kazakhstan and Tajikistan. Various groups have tried to secede from China throughout the twentieth century, either as independent republics or to join with Turkey (with which some have linguistic connections). For a short while an Eastern Turkestan Republic was established, centring largely around three districts in the far north-west of Xinjiang. China has dealt with secessionist tendencies and attempts through armed suppression as well as negotiations — and through its diplomacy with the Soviet or the Russian Federation. For example the Eastern Turkestan Republic was attacked by Soviet troops in 1934, both China and Russia having a common interest in suppressing Islamic irredentism. In 1946 the Kuomintang government made a peace agreement with the Eastern Turkestan Republic promising self-government. Under it the people of Xinjiang would have the right to elect officials, with one of the provincial vice-chairmen to come from one of the three troubled districts. Discrimination on the basis of religion would be punished and primary and secondary schools would teach in the language of the local nationality (in addition to courses in Chinese). The culture and arts of the nationalities would expand freely, and there would be freedom of publication, assembly and speech (see Benson 1990:185–187, for full text of the agreement).

China did not honour the agreement. Mackerras (1994: 66–67) concludes:

The central government continued to push to extend its control in Xinjiang, while the Chinese military interfered continually in the region’s civil affairs. They aimed to prevent the reforms required by the agreement. Naturally enough, local Han bureaucrats were fearful for their own power if autonomy took root, and they were quite happy to cooperate with the military. A coalition government led by Zhang Zhizhong [Han chairman of Xinjiang] was supposed to have a 70:30 ratio of minority nationalities to Han Chinese but it was never put into effect. Chinese-appointed bureaucrats remained firmly in control of Xinjiang, and as they were in other provinces in China.

When the Communist Party came in power, they also tried to negotiate (by which time relations had worsened due to the disregard of the earlier agreement). Xinjiang was made a province in 1955, and some leaders of the Turkestan Republic were persuaded to join the new administration. It
was subsequently brought under the regime of national autonomy, but sporadic protests against Chinese rule have continued, especially during the period of Sino-Soviet tension. The breakup of the Soviet Union has led to a resurgence of Islamic consciousness and identity (as in other parts of the world) — and this has clearly worried China. Large numbers of troops (and other Han civilians) have been stationed in Xinjiang, for domestic and external reasons, and this too has aggravated the situation. Due to restrictions on the entry of journalists and foreigners, it is hard to form a clear impression of the present situation, but there are occasional reports of unrest and its armed suppression.

Conclusion

From this brief discussion of two experiences of ‘autonomy’, the following tentative conclusions may be drawn. The first is that there is no consistent theory of autonomy, for the Marxist-Leninist formulations, never significant in their place of origin, have never really been adopted despite the rhetoric. The meaning ascribed to ‘autonomy’ is somewhat different from its normal significance. Autonomy generally means arrangements for governance in which a particular community or locality has substantial powers of decision making regarding policy and administration, and control over fiscal resources. Specific institutional structures are necessary to exercise this autonomy, including an impartial machinery for adjudication which maintains the boundaries that define autonomy. It would seem that the Chinese authorities understand autonomy to refer to arrangements which recognize the distinctiveness of culture of particular communities, promote their economic and social development, and allow for a measure of participation of the community in the affairs of the locality. These arrangements have to operate within a central regime of laws, policies and institutions which serve to place severe limitations on the discretion of the community or locality. There is no independent mechanism for boundary keeping, so that there are no safeguards against inroads into ‘autonomy’. The Party maintains its overall control; and here there is no requirement of local participation or discretion.

Secondly, autonomy is conceived of in ethnic terms; it is to combat Han chauvinism and to recognize the cultural distinctiveness of minorities. The emphasis, somewhat superficially, is on language and folklore, rather than the deeper springs of ethnic identity, like religious or historical traditions. Both Tibetan Buddhism and Xinjiang Islam provide an alternative world view to that of Chinese communism, and therefore cannot be easily accommodated within the wider PRC system. This
immediately alerts us to the limitations of autonomy, which is not only that there has to be an ethnic claim to autonomy (Hong Kong and Macau of course do not fit this model — this aspect is explored later), but that autonomy stands constantly subordinate to the interests of the state as defined by the CPG. The current emphasis on economic development has eroded autonomy and threatens the way of life of these communities — as the natural resources of their regions are exploited, frequently with the introduction of Han workers, and the environment spoiled. Each time the implications of autonomy in terms of a measure of self-government or restrictions on central policies and initiatives become obvious, autonomy is suppressed — allegedly against the wishes of the local communities. The legal form or terms of autonomy agreements or legislation are disregarded when it suits the centre. The legal system of the PRC is still relatively underdeveloped and there is, apart from the political imperatives, considerable confusion as to who has what power and what regulations are in force. Autonomy seems to be tolerated only in so far as it does not affect the project of the CCP, even though in the first place autonomy is granted only to the weak and the peripheral. Autonomy is tangential to the national system, and hence its impact in terms of theory and doctrine is small. China has been more concerned to elaborate theories of sovereignty and national unity (and external non-intervention) than local autonomy or self-government.

Consequently, China has not developed any sophisticated mechanism to deal with assertions of autonomy that it finds distasteful, and thus denies the very premise of autonomy. There are no institutions for dialogue, mechanisms for defining issues between parties, or procedures for negotiations or adjudication. There is a tendency to use extreme measures — the use of armed force which does little to solve the underlying issues but serves only to aggravate them and escalate the conflict. This approach is remarkable considering that China is in such a dominant position vis-à-vis communities which are promised autonomy. On the other hand, it has to be acknowledged that in general, China has had considerable success in dealing with its minorities, and unrest or challenges to its authority have been limited. The overwhelming dominance of the Han of course helps in this regard; but all over the world ethnic protests and demands for self-government have achieved a very high degree of salience (tearing countries

19 In this regard one may compare Canada’s long, patient and tortuous attempts to find accommodation with the francophones or separatists in Quebec (Russell 1993) or the establishment of the Swiss canton of Jura to meet the demands of a French speaking community (Aubert 1983). Even India, with its numerous, serious ethnic problems, tries discussions and negotiations before taking military action (Brass 1990).
apart), and it is not unrealistic to assume that China’s border communities may bestir themselves in the near future. There is also the growing ‘regionalization’ of Han China, which might limit the capacity of the centre to deal with ethnic disputes unless better procedures — and a higher degree of tolerance — are developed.

**RIGHTS AND LEGALITY**

**Rights**

The lack of a clear framework for autonomy is in part a function of the state of the legal system in China. In the same way the enforcement of human rights is, at least in part, dependent on the state of the legal system. It has already been shown that most provisions of the constitution are not self-executing but require implementation through legislation — and the enforcement of that legislation. Thus, there are close connections between legality and rights. China has undoubtedly made important strides in both these matters, although a great deal more needs to be done. I discuss rights first.

The 1982 constitution intended to accord a special status to rights. Rights appear as the second chapter, emphasizing their eminence, although it confers few rights which have not been mentioned in one of the previous constitutions (and omits some which have previously been protected, like the right to strike). Rights are conferred on three categories of persons: foreigners (whose only specific right mentioned is eligibility for political asylum; otherwise the reference is to their ‘lawful rights and interests’ when in China), overseas Chinese nationals residing abroad or returned to China, the state undertaking to protect ‘their legitimate rights and interests’ (art. 50) and citizens (who are the principal beneficiaries of rights).

In keeping with socialist tradition, both civil/political and cultural, economic and social rights are protected; equally, duties are imposed on citizens. Civil and political rights include the right of all nationals to citizenship and the equal rights of all citizens (art. 33) (in contrast to earlier constitutions when various classes or groups of people were labelled as bourgeois or otherwise as ‘enemies of the people’ and denied political rights). The rights to vote and to contest elections are given to all citizens of the age of 18 or over (art. 34). Citizens have the right to criticize state organs and functionaries, to make complaints against them which must be investigated, and compensation paid for violations of their civil rights
Civil rights include those of speech, press, assembly, association, procession and demonstration (art. 35); religion, although hedged with qualifications and restrictions (indicating the fear of authorities of alternative world views and bases of social organization, art. 36); and a series of personal rights like privacy of residence (art. 38) and correspondence (art. 40); protection against arbitrary arrest or detention (art. 37), and personal dignity, particularly through protection against insults, libels and false accusations (art. 38). There is to be gender equality and the protection of ‘marriage, the family and mother and child’, including the freedom to marry (art. 49).

In the other category of rights, citizens may engage in research and cultural pursuits (art. 47); and have the right to education (art. 46), employment, rest and vacations (arts. 42 and 43), and social welfare for retired persons (art. 44) as well as for the old, ill or disabled (art. 45). The state has undertaken various obligations in relation to these ‘positive’ rights.

There is no discernible pattern as to the limitations or qualifications on rights, nor is there any indication of what rights might be derogated from during an emergency. Some important rights (speech, association, assembly and demonstration) are totally unqualified, others (deprivation of electoral rights, privacy, compensation for violation of rights, protection against arrest or detention or personal searches) are to be in accordance with ‘law’ or equivalent expression. A few rights have specific limitations: the exercise of religious beliefs is prohibited if it disrupts public order, impairs the health of citizens or interferes with the educational system of the state and religious bodies may not be subject to ‘any foreign domination’ and the privacy of correspondence may be disregarded for reasons of state security or criminal investigation. Moreover, there is the overarching requirement that in the exercise of their rights and freedoms, citizens may not ‘infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens’ (art. 51). It is also clear that rights can only be exercised within the framework of the ‘Four Basic Principles’ mentioned in the preamble: the socialist road, people’s democratic dictatorship, leadership of the CCP, and Marxism-Leninism-Mao Zedong Thought (Chen 1992: 53).

Other limitations may be implied in some duties that are placed upon citizens — ‘to safeguard the unification of the country and the unity of its nationalities’ (art. 52), ‘to keep state secrets, protect private property, observe labour discipline and public order and respect social ethics’, and ‘to safeguard the security, honour and interests of the motherland’ and ‘not commit acts detrimental to the security, honour and interests of the motherland’ (art. 54). Other duties are: to receive education (art. 46), to practise family planning and take care of children or parents (art. 49), pay
taxes (art. 56), abide by the constitution and law (art. 53), and defend the
motherland (for example by doing military service) (art. 55).

There is little point in examining in detail either the rights or limitations
on them, since the rights are not enforceable as such, nor is the legislation
giving (or not giving) effect to them judicially reviewable. It is therefore to
specific legislation (e.g., on press or assemblies, or the codes of criminal
law and procedure) that we must turn for the extent of the protection of
rights. There is no space to undertake such an enquiry (for which see Kent
1993; Keith 1994; Edwards, Henkin and Nathan 1989; Epstein 1994a) but
it is clear that there are numerous restrictions on rights. Of greater interest
as far as Hong Kong is concerned, is the general attitude of Chinese
authorities towards rights and their enforcement. In part the attitude is
evident from the formulations in the constitution, and in part from the
discussions and exchanges in which China has engaged in recent years
(including White Papers in 1991 and 1995) in the UN and other forums.

Nathan (1985: 107–133) provides a useful summary of the attitudes
of Chinese authorities to rights. Rights are not regarded as inherent, but
bestowed by the state — and therefore susceptible to change. They have
to be exercised with a clear sense of obligations to society; and therefore
the collectivist rather than the individual aspects of rights is emphasized.
The function of rights is to strengthen the state by winning the commitment
of the people to it (and hence, for this and the preceding reason, the stress
on duties). Rights are programmatic — that is, to be concretely provided
as and when the state can, not necessarily immediately; and therefore they
are not directly enforceable but only through legislation. They do not
serve to limit the competence of the state. Further aspects of Chinese
attitudes are set out by the Chinese government itself, particularly in two
documents on rights already referred to. These documents, although issued
to rebut international criticism of its human rights record, suggest a Chinese
willingness to enter into a discourse on rights and to contribute to East-
West debates on the subject which achieved some salience during the
World Conference on Human Rights in 1993 (Ghai 1994).

Acknowledging the world-wide concern with human rights, the 1991
paper on Human Rights in China endorses international instruments for
human rights protection, particularly the Universal Declaration of Human
Rights. However, it goes on to make several points which question the
universality and indivisibility of rights as well as the responsibility of the
international community for the supervision of the protection of rights. It
states that:

the evolution of the situation in regard to human rights is circumscribed
by the historical, social, economic and cultural conditions of various
nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken different attitudes towards the relevant UN conventions. Despite its international aspects, the issue of human rights falls by and large within the sovereignty of each country, and foreign governments or even international organizations have no right to comment on or interfere in a state’s human rights situation. Equally, a country’s human rights situation should not be judged in disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region.

The framework that the Chinese papers provide is broad and controversial, but the bulk of the papers is a fairly straightforward account of the progress that China has made under communist rule. They do not discuss the trade-offs between civil/political rights and economic/social, Asian values or the cultural matrix of Chinese society. A particular emphasis is placed upon economic constraints on the enjoyment of rights, and the primacy of basic needs, but there is nothing in the papers that suggest that for these reasons the Chinese are unable to enjoy civil and political rights. Indeed the picture that is offered of the enjoyment of these rights would indicate that China is wholeheartedly committed to them. It is clear that the papers provide neither an accurate account of the state of human rights in China (not even in regard to economic rights which have deteriorated with the dominance of market relations, Kent 1993: 111–133) nor of its ideological perspectives. The practice does, however, make evident that human rights are not held in high regard and are not allowed to compromise the imperative of communist control of society.

**Legality**

The enforceability of rights cannot be separated from the general question of legality, for it is in the interstices of practice and procedure that we can truly glean the reality of rights. For present purposes I include a constellation of ideas and practices in the notion of legality, from the extent of the coverage by laws of economic, social and political matters, the system of making and enforcement of law, the status and independence of the judiciary, the means as well as the scope of judicial redress, and the independence of the legal profession to official and popular perceptions of the role and ideology of law. This wide spectrum of issues cannot be covered briefly, especially as the picture has been changing and is not free from confusion or controversy as to its interpretation.
It is not possible as yet to make a definitive assessment of legality in China. Quite apart from the fact that ‘legality’ is not a static situation anywhere (in one sense the West had more ‘legality’ albeit in a narrow sense in the nineteenth century than today, where there is a more overt inter-meshing of law and policy), China is in a period of transition from the ‘law-less’ as well anti-law period of the Cultural Revolution to the objective of constitutional supremacy and legality proclaimed in the 1982 constitutions of the state and the Party. All one can do is provide a balance sheet. The legal landscape is fundamentally different from that in 1978 when China’s present journey to legality may be said to have begun.

There has been an enormous expansion in the volume of legislation. Major codes were promulgated after 1978, such as criminal law and procedure, civil law, administrative litigation, and commercial laws including foreign investment (Chen 1992: 152–206). The shift to the market has also opened up another source of law, away from the previous socialist sources, and the qualitative differences in the law of the market from the law of the plan has produced more detailed, carefully drafted legislation with a greater attention to its implementation. The very process of agreeing on and drafting legislation has become more political and professional, involving a variety of interest groups, attesting to the importance of laws as a framework for policy and administration (Tanner 1995).

However, the profusion of laws has generated its own problems. A large number of organizations are involved in law making, including not only people’s congresses at lower levels, but also administrative bodies, from the State Council and its numerous agencies downwards. This reflects partly the emergence of various sites of power and authority as well as the underdevelopment of legal science. As we have seen, there are no clear definitions of the legislative competence of these bodies, particularly as between the NPC and the rest. There is no clear hierarchy of laws, at least subject-wise, nor a clear distinction between laws and regulations. At the moment there is no satisfactory way to deal with laws which are overlapping or contradictory. Much of this law is hard to locate, although the earlier practices of deliberately keeping laws secret are being abandoned. The rules as well as processes for the interpretation and construction of laws are indeterminate. The system of laws lacks order and coherence (Keller 1994a).

Another positive development is the increasing application of laws to the acts of the administration, a significant move away from the more restricted traditional and communist view of law as merely a means of controlling citizens and society. The centre piece of this is the much researched Administrative Litigation Law enacted by the NPC in April 1989 (e.g., Finder 1989; Epstein 1989; Chen 1992:176–184; Potter 1994).
The act built on earlier legislation which had provided for judicial review of administrative actions in specific areas, particularly the Security Administration Punishment Regulations of 1986 which enabled persons who had been penalized under the regulations to appeal to a higher public security organ and eventually to the courts. The new law is more general, covers a wide variety of administrative acts, and enables access to courts without having to exhaust administrative remedies. Administrative review itself has improved with the enactment of the Regulations on Administrative Review in 1990 by the State Council.

These laws have led to much litigation and review; and the courts have established special administrative divisions. They establish the principle that the government is not above the law and have enhanced the role of courts in securing legality. They have stimulated people’s consciousness of rights. However, they suffer from various problems, jurisdictional as well as political. Communist Party conduct cannot be reviewed. The following acts of the state organs are excluded from review: acts of state (a concept somewhat lacking in precision, see Chapter 7), administrative regulations (which means in effect that the administration in most cases can give itself additional jurisdiction even if there is no legal foundation for it), decisions or orders that have normative effect, or affect the personnel of the administration, and administrative acts that the law provides to be final and conclusive. In most cases the authority given to administrative bodies is broad so that it is difficult to establish whether they have overstepped their powers. There is some confusion between administrative and civil litigation. The political problem arises from the intervention by Party officials in the conduct of review (under this and other laws) which are deemed to have a political dimension. Thus, in cases against security organs by ‘dissidents’, it is extremely unlikely that a fair and impartial hearing will be provided (Alford 1993). This is part of the wider issue of the role and independence of the judiciary to which I now turn.

The role of the courts is increasing and their jurisdiction is expanding into sensitive areas. They have become institutions which deal with the relations of citizens with the state, among citizens themselves (particularly in protecting their voluntary economic arrangements), and between local organizations and foreign entities, all innovatory. The constitution acknowledges the independence of the judiciary. However, there are both technical and political problems with the courts. The lack of rules both for determining the hierarchy and for the construction of laws leads to what Dicks has called ‘legal fragmentation’ with different institutions, crossing geographical and departmental boundaries, interpreting the same provisions differently and independently (Dicks 1995). Clarke makes a similar point when he notes the inability of courts to assist in the general
applicability of laws, which he considers crucial to the development of a market economy, to establish uniform conditions of production and exchange — in a word, fair competition (Clarke 1995). Both refer to the inability of courts to cut across bureaucracies and territories, to provide order and integration through the law. These difficulties arise from the low professional training of judges, of whom only a small minority have formal legal education. This reinforces the low status of judges in China.

A further weakness of the courts is their inability to enforce their judgments. According to Clarke, as many as 50% of judicial decisions are not enforced. It is likely that in many other cases the courts refuse jurisdiction anticipating that their judgments would not be enforced. He offers several reasons for the lack of enforcement: enforcement has not traditionally been the concern of courts, there are pressures to compromise, and plaintiffs in a planned economy might not have had incentives to secure enforcement. He mentions two further points which connect the courts to China’s political economy. Courts are dependent on local governments, which appoint and pay them, and in the decentralized but fragmented markets, the courts are coerced into local protectionism, so that judgments or their enforcement against local enterprises or officials are hard to secure. The second point, which has been underscored by several others (e.g., Dicks 1995, Finder 1993; Epstein 1994b; Chen 1992: 117–125; Alford 1993), is the control of the courts by the Communist Party through its local work committees and the leading groups, prominently the Leading Politico-Legal Group at the top which includes some of the most important Party and state leaders. The Party itself is outside the purview of the courts, and takes a keen interest in court cases where there may be a political element, issuing instructions to judges as to the conduct of the case and the decision when necessary.

The legal system is not the sum total of legislation and other laws. The vast output of laws has an instrumental purpose of promoting economic and social change. Epstein has argued that legality will be established in China only when law ceases to be merely instrumental but becomes ideological by which he means that it enters into everyday relations of people, that ‘legal ideology is experienced in its material form’ (1994b:35; see also Epstein 1993). The materialization of law in this sense has been greatest in the economy, with the shift to market relations. Epstein shows how civil disputes are increasingly being mediated through a regime of legal rules:

The legal expression of new economic relations is couched in terms of rights and obligations. This is most clear in the Chinese law of obligations, which began with contract law but has been extended to the protection
of personal and property rights in tort. Parties to a dispute participate in
the legal process through lawyers and other legal bureaucrats. Thus, the
parties begin to experience their relations with each other in legal forms,
including contractual forms and process, in the hope ultimately of settling
their disputes as efficiently as possible. In ideological terms, formal dispute
resolution has become a material form of the new legal consciousness.
(1994b:39)

The political acceptability of the market has also facilitated intense
academic research and debates on rights and the rule of law (Chen 1993a
and 1996b). The market economy is being analysed as ‘legal-system’, ‘rule of
law’ or ‘rights based’ economy. It is argued that the development of a sound
legal system is a necessary condition for building a socialist market economy.
Legal rights are essential to vindicate one’s entitlements in the economic
order without which the market could not function. Chen writes that:

Maine’s thesis of the move from status to contract is apparently even
more often quoted in the contemporary literature produced by Chinese
legal philosophers than the views of Marx himself. The Chinese writers
unanimously understand this move as a kind of historical progress. In
particular, they read into the idea of the contract the whole story of
modernization, freedom, autonomy, equality — in short, the collection
of the aspirations of humankind in modernity. (1996b: 9–10)

All these are straws in the wind and hold the promise of greater
respect for law and of a mature legal order. However, while professional
standards may improve, with the establishment and improvement of legal
education since the end of the Cultural Revolution, and the rise of a
professional group of lawyers with a certain (but incomplete)
independence,20 the standards and ethos of legality, of the primacy and

20 There has been a remarkable growth in the size of the legal profession, from about 3000
in 1978 to an estimated 150,000 by the end of the century. Lawyers are organized in
state firms, where they have the status of employees, or in enterprises where they have
greater control over work and pay, and in collectives which are the most autonomous.
However, all of them are controlled in some way or another by the government; the
Ministry of Justice is responsible for admission and discipline; and work plans have to
be submitted for its approval. There are professional associations but they play no role
in the regulation of the profession, and in any case tend to be headed by officials. Most
firms are generalists but there is the beginning of specialisation under the impetus of the
market. Ethical standards are still low, and lawyers can be used to fix deals with the
bureaucracy, but lawyers now enjoy more prestige and influence than before, and some
have become very rich. Whether lawyers will in due course become a force for the rule
of law (other than in a narrow commercial sense) is hard to tell — the record elsewhere
is not encouraging, ideology not withstanding (Ghai 1993b). My account here is drawn
enforcement of the law, are unlikely to be fully and securely established without changes in the wider political system, especially the role and status of the Communist Party.

**CONCLUSIONS**

I now draw out, briefly, the implications of the preceding analysis for the relationship between HKSAR and the Central Authorities and indicate ways in which the Chinese system, values and approaches might influence the operation of the Basic Law. One should not overlook the possibility that the HKSAR systems might also effect the mainland, introducing new ideas and methods. We should not forget that the Basic Law is as much of a challenge to China as it is to Hong Kong. Moreover if there are differences between the two systems, there are also points of convergence. There is a ferment of new ideas and explorations of constitutional and political possibilities in China that would have been impossible even a few years ago. On a more material basis, new forces have been generated and unleashed whose logic is yet to unfold. Accordingly the following discussion is necessarily speculative.

The substantive and institutional autonomy that Hong Kong is promised in the Joint Declaration and the Basic Law is unique, at least in modern times, in Chinese history. The arrangements for autonomy were arrived at after careful deliberations. But Chinese jurisprudence, dominated as it is by rigid ideas of sovereignty, does not seem easily to accommodate the concepts that underlie autonomy. Nor are her experiences of autonomy encouraging. On the other hand, if Hong Kong’s autonomy can be accommodated within China’s constitutional and political system, it would help China to deal with regional problems on the mainland, and in due course find a framework more congenial to Taiwan, Tibet and Xinjiang. In this way national unity will be strengthened rather than undermined by autonomy.

China’s understanding of other concepts, such as rights and judicial review, are different as well. The wording of the Basic Law on these points is such that one cannot confidently assume that the common law approach will be applied (and subsequent controversial interpretations by some Chinese officials have served merely to reinforce these doubts). The differences of political tradition and jurisprudence are so fundamental that it would not be easy to determine the body of rules and the doctrines of construction in which the Basic Law would be embedded. If in recent years there has been a tendency in Hong Kong to ‘legalize’ political issues
and present them to the courts for resolution (a result undoubtedly of rather fragmented political authority in the transition period, Ghai 1996), the style on the mainland is to ‘politicize’ legal issues and deal with them through or under the Party or the administration. An area where it does seem likely that the Chinese approach would be applied, albeit in a modified form, is in the notion of elections, particularly the process of nominating candidates through a committee, which can detract from the representativeness of the Chief Executive or others if applied to them.

China’s embrace of the market has produced additional layers of intersection between the mainland and Hong Kong. China is now the largest investor in Hong Kong, with a formidable presence in the property and commercial markets, while much of China’s industrialization, particularly in the south, is being fuelled by Hong Kong capital and entrepreneurship (Sung 1991). This has produced links between Hong Kong capitalists and Chinese political leadership at the highest levels, with a considerable stake in Hong Kong enterprises by the children of key Party and state officials. These relationships, which may be subject to the vagaries of Chinese politics, complicate the already complex relationships between the Central Authorities and Hong Kong. These relationships, and the role of the Communist Party in the relationship between the mainland and Hong Kong or indeed in the administration of the HKSAR, are not provided for in the Basic Law, but are unlikely for that reason to be uninfluential.

It is important to end with a general point, that, when the Joint Declaration and the Basic Law were concluded, Hong Kong was passing through a crucial phase of economic and social change; so was China. Therefore in both instances these instruments, particularly the Basic Law, have failed to capture the dynamics of change. This chapter has attempted to indicate the great social, economic and political changes that have taken place in China since the end of the Cultural Revolution. The result of economic liberalization, to a more limited extent political liberalization, and the uncertainty about the succession to power is a more pluralistic system, with de facto decentralization of power and growth of regional consciousness, and competing factions. However, this process is largely unregulated, compounded by the decreasing legitimacy and authority of the Communist Party, the negotiation of complex international political and economic relations, but above all uncertainty about the future course of political development, worries about the integrity of the country, and the lack of consensus as to how to deal with these problems. The politics of control, always implicit in the communist regime, becomes more imperative in these circumstances, even if less feasible: Hong Kong is thrown into the lap of China at this moment of uncertainty and anxiety,
and its fortunes are inevitably tied to contingencies of change and struggles for authority. Inevitably the terms of the Basic Law will be bent to, or overridden by, these exigencies.

Under these circumstances, scholars of constitutional law can but try to contribute to the proper implementation of the Basic Law by uncovering its fundamental basis and essentials and suggesting a way, through interpretation, to give form and reality to them. This is the task I have set for myself, particularly in the next two chapters.
Sovereignty and Autonomy:
The Framework of the Basic Law

INTRODUCTION

The purpose of this chapter is to provide a brief overview of the nature of the regime set up under the Basic Law. The system established by the Basic Law has been variously described as ‘federal’ or ‘autonomous’ and the Basic Law is generally referred to as a ‘mini-constitution’ (although the function of the prefix is unclear, except perhaps to indicate that the HKSAR is subject to the PRC constitution). Others have denied these conclusions, tending to regard the Basic Law as an ordinary statute and the regime largely as an administrative delegation of limited authority. Because of the uniqueness of the arrangements established by the Basic Law, it is not easy to categorize the nature of its legal or constitutional regime. However, in order both to understand and guide the development of institutions and policies as well as the relationship of the HKSAR to the rest of the People’s Republic of China, it is necessary to conceptualize the nature of the regime of the Basic Law. This becomes particularly necessary as many provisions of the Basic Law are abstract and vague (and do not have the benefit of definition clauses). Moreover, the Basic Law text exists in two official languages, Chinese and English, and sometimes there is no easy textual way to reconcile the differences between them. Although in case of conflict, the Chinese text will prevail, it is important to find a way to ensure the maximum harmonization of the texts. This will be facilitated by a theoretical understanding of the nature of the Basic Law regime. Chinese leaders, particularly Deng Xiaoping, have referred to the potential of the Basic Law as a precedent to solve
various problems in other parts of the world;⁠¹ and to examine that potential it is likewise necessary to move to some degree of abstraction.

The chapter examines the extent of the autonomy of Hong Kong and explores the difficulties of defining the range and scope of its powers. There is also a discussion of the division of powers between Central Authorities and Hong Kong, including the method employed to provide for the division. It is argued that the concept of autonomy needs to be supplemented by that of the ‘separation of systems’, for implicit in the notion of separation are limitations on regional autonomy. The Basic Law is as much concerned with separating off various ‘systems’ of China from Hong Kong, as it is concerned with giving it autonomy. The chapter therefore also discusses some of the devices and techniques for the separation. These are illustrated by a brief examination of the provisions dealing with the economy, political structures and the legal system (which are examined more extensively in Chapters 6, 7, 8 and 9). The provisions for citizenship and residency are also examined; they are essential to the maintenance of the separation and to the implementation of the principle of ‘Hong Kong people ruling Hong Kong’, which is a necessary adjunct of the policy of ‘One Country Two Systems’. To complete an overview of the system, there is a brief discussion of the procedure for the interpretation of the Basic Law and the resolution of differences that may arise in its operation (but a detailed discussion is left for the next chapter). The chapter analyses the relationship between the Basic Law and the PRC constitution, in order both to clarify further difficulties involved in determining the scope of the powers of the HKSAR and to examine the degree of the entrenchment of the Basic Law and the security of the system it establishes. Finally the regime of the Basic Law is placed in a comparative perspective to briefly explore its distinctiveness.

THE OBJECTIVES OF THE BASIC LAW

The regime of the Basic Law arises out of the transfer of sovereignty over Hong Kong to China after nearly 150 years of British colonial rule when

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¹ Deng told a delegation of business people from Hong Kong that the successful settlement of the Hong Kong question may provide useful elements for the solution of international questions (23 June 1984). He elaborated on this theme when he talked to Geoffrey Howe, the British Foreign Secretary, on 31 July 1984. He said that he was confident that the ‘One Country Two Systems’ formula would produce a favourable reaction and would serve as an example for other nations in settling disputes history has bequeathed to them, and ‘help eliminate flash points and stabilize the world situation’. Deng 1993: 9 and 14 respectively.
a society distinctive from the rest of China, in its economy, political institutions and values, legal system, and world view, had arisen in Hong Kong. It is driven in large measure by the need to preserve its distinctiveness, while at the same time accommodating the sovereignty of the PRC.

The HKSAR is authorized by the NPC to exercise ‘a high degree of autonomy’ (art. 2). It is authorized to use its own regional flag and emblem, the emblem being a bauhinia in the centre highlighted by five star-tipped stamens (art. 10). The Basic Law prescribes that a socialist system and policies will not be practised in the HKSAR; instead capitalism shall prevail for 50 years (art. 5). The rights and freedoms of the residents are laid down. Executive, legislative and judicial bodies are established, with the important principle, at least for the first two, that they would be composed of long-term residents of the HKSAR. The underlying law is the common law, and the bulk of the law to be applied is either laws carried over from the previous regime or enactments of the HKSAR legislature, subject to the supremacy of the Basic Law itself. Its financial, monetary and trade systems are to remain separate from those in the mainland: and it will continue to operate its currency separately from the Chinese currency. Chinese sovereignty is preserved by reserving the HKSAR’s foreign and defence affairs to the Central Authorities of the People’s Republic of China.

It will be clear from this brief review that although the Basic Law secures the autonomy of the HKSAR, another fundamental characteristic of the Basic Law regime is the separation of the socialist system of the mainland from the capitalist system of the HKSAR. The autonomy that the HKSAR exercises will therefore be circumscribed by that guarantee. In general capitalism is a flexible system — it has a hard but limited core of principles and rules, and can encompass a variety of political, social and even economic systems and arrangements. A government required to preserve capitalism would enjoy great flexibility in deciding social, economic and political policies and the institutions to adopt and execute them; in brief it would be bestowed with a high degree of autonomy. But the Basic Law goes on to prescribe many of the details of the capitalist system that Hong Kong must preserve; and thus erodes the autonomy that the HKSAR might otherwise have enjoyed.

That a fundamental purpose of the Basic Law is the preservation of a special kind of capitalism is evident from the provisions for political institutions of the HKSAR. Political institutions and arrangements are a key determinant of the scope and viability of autonomy. In the Basic Law regime, these are drawn from the logic of the special kind of capitalism prescribed for the HKSAR — or what is assumed to be its logic (which works against democracy and favours a powerful executive), rather than
from the logic of general autonomy or self-realization. Political principles and arrangements are also reflective of Chinese sovereignty (and of the subordination of the HKSAR). Political institutions therefore suffer from a double-bind; and may not be well placed for the preservation of autonomy.

Thus we are brought back to the heart of the Basic Law: One Country Two Systems. The autonomy of the HKSAR has to be found principally within the interstices of the economic system established for it. The economic system of the mainland impinges less directly or substantively on the HKSAR regime, as it is the Chinese constitution and not the Basic Law which bears the burden of preserving the socialist system on the mainland.² Autonomy is an imperative of the economic system — in that sense the basis of HKSAR’s autonomy is different from many other examples where it is founded in the accommodation of social, cultural or ethnic diversity. If the logic of the Basic Law circumscribes the autonomy of the HKSAR in the cause of the preservation of an economic system, it also limits the authority of the Central Authorities in the HKSAR for the same purpose and to the same effect. Thus it is not surprising that the separateness of systems has sometimes been mistaken for autonomy. This is not to deny that there may indeed be considerable scope for autonomy within the economic order.

Deng argued that it was essential to the economic development of China that the reunification should be brought about by peaceful means. Peaceful reunification required that the people of Hong Kong be assured that their economic and social system would be preserved.³ This would ensure Hong Kong’s prosperity and stability. Peaceful reunification would mean that China would continue to benefit from Hong Kong’s contribution to the modernization of China as well as to provide the stability that China itself needed for its new policies. If a small injection of the market

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² However, art. 23 of the Basic Law requires legislation to prohibit any act of ‘treason, secession, sedition, subversion against the Central People’s Government’. Its implications are discussed in Chapter 10.

³ He told Mrs Margaret Thatcher, then the British Prime Minister, in December 1984, ‘If we had wanted to achieve reunification by imposing socialism on Hong Kong, not all three parties would have accepted it. And reluctant acquiescence by some parties would have led to turmoil. Even if there had been no armed conflict, Hong Kong would have become a bleak city with a host of problems, and that is not something that we would have wanted’ (1993:42).

Consistent with his general approach (his daughter Deng Rong once said, ‘Father is a man of few words’), and his pragmatism (Goodman 1994:126), Deng has not provided any lengthy or learned disquisition on One Country Two Systems. Most of his pronouncements have been made in speeches to visiting delegations. These have been collected in a short booklet (in English translation), Deng Xiaoping On the Question of Hong Kong (1993) on which the following account is based.
would be good for socialism in China, it was equally the case that it was only the persistence of socialism (and of the Communist Party of China) that would guarantee capitalism in Hong Kong (Deng 1993:51). This dialectic between the two systems was part of the essence of socialism with Chinese characteristics (and was also a guarantee for the policy of One Country Two Systems).

On the whole, the ‘Two Systems’ have been seen largely in economic terms, socialism on the mainland and capitalism in Hong Kong. However, while capitalism is viewed only as a system of economic organization, socialism has been perceived within the integuments of Chinese Leninist political system. Indeed, political values and institutions which might elsewhere be regarded as essential or important to capitalism are seen as antithetical to the prosperity and stability of Hong Kong, and are to be avoided in favour of an outdated colonial political order under the cover of ‘current systems’. There is thus a curious but deliberate imbalance in One Country Two Systems: a dying socialist economic system clothed with a strong communist political apparatus and a vibrant capitalism clad in a restrictive political order.

The imbalance is reinforced by the second aspect of the theory, that of ‘One Country’. Chinese sovereignty is at the heart of it (a more detailed examination of the Chinese notion of sovereignty is contained in Chapters 2 and 10). It gives China the right to determine who in Hong Kong is eligible for leadership: patriotism or loyalty to the ‘motherland’ is a pre-condition for leadership in the HKSAR (Deng 1993:10–11). China has the right to intervene in the affairs of Hong Kong in various circumstances: when there are serious disturbances in Hong Kong or there are threats to China and its system from Hong Kong (Deng 1993: 17, 20, 57). Sovereignty also justifies the stationing of Chinese troops in Hong Kong. However, since a primary purpose of One Country Two Systems was to reassure the people of Hong Kong, the emphasis was essentially on the separateness and maintenance of capitalism, and little was said about the One Country dimension — at least not until towards the closing stages of the drafting of the Basic Law. The high point of One Country Two Systems was the Joint Declaration with autonomy as one of its central themes. By the time of the drafting of the Basic Law, political circumstances had changed due to the Tiananmen Square massacre, and the imperative of political control had overshadowed autonomy. But the primacy of capitalism had remained undimmed.

However, the regime of the Basic Law is not restricted to the economy alone. Hong Kong benefited from the fact that the principles of One Country Two Systems were first enunciated in respect of Taiwan, with a more developed political system, a strong economy and a significant independent international stature — all suggesting that an autonomy with
substantial political elements would have to be on offer. The Joint
Declaration and the Basic Law secure several of these matters to the
HKSAR. As this chapter will show, the fact that a specific matter is
within the jurisdiction of the HKSAR does not mean, as it might in other
autonomy systems, that the HKSAR authorities have full powers of policy
making in that area. It is particularly important in relation to the Basic
Law to examine the precise degree of discretion that the HKSAR can
enjoy in relation to a matter that is nominally within its jurisdiction. But
it does mean that the Central Authorities cannot intrude on that matter
either; and so one can look upon it as a kind of negative autonomy.

**THE DURATION OF THE HKSAR**

Before turning to the nature and scope of autonomy, it is necessary to
consider the duration of the existence of Hong Kong as a special
administrative region. No where does the Basic Law specify that the
HKSAR shall exist as such only for 50 years. What it does say is that
socialism shall not be practised there for that period, and ‘previous capitalist
system and way of life shall remain unchanged’ (art. 5). In the Joint
Declaration China promised that its basic policies regarding Hong Kong
(contained in art. 3 of the Declaration as elaborated in Annex I) ‘will
remain unchanged for 50 years’. Basic policies are broader than the
preservation of capitalism, and include promises of (some form of)
democracy, rights, and the common law. Section I of Annex I repeats
China’s promise to establish an SAR in Hong Kong under art. 31 of the
PRC Constitution and that ‘after the establishment of the Hong Kong
Special Administrative Region the socialist system and socialist policies
shall not be practised in the Hong Kong Special Administrative Region
and that Hong Kong’s previous capitalist system and life-style shall remain
unchanged for over 50 years’. ‘Life-style’ presumably covers other aspects
of the basic policies. The final (this time indirect) reference to 50 years
occurs in Annex III (dealing with land leases) when the British Hong
Kong government is authorized to renew leases, which expire before the
transfer of sovereignty, for a period ‘expiring not later than 30 June
2047’. There is no provision which directly restricts the duration for
which the HKSAR may grant leases; art. 7 of the Basic Law grants the
HKSAR the responsibility to manage land and natural resources in Hong
Kong, including the lease or grant of land ‘to individuals, legal persons or
organisation for use of development’. The practice of the HKSAR is to
grant leases running beyond 30 June 2047.
The HKSAR is established under art. 31 of the PRC Constitution which provides little guidance on duration. Two points are worth noting. The first is that SARs are to be established when ‘necessary’. The power of the NPC to establish an SAR is contained in art. 62(13). There are no formal provisions for the dis-establishment of an SAR, but presumably the power to dis-establish may be implied from the power to establish. The second point is that the system to be instituted in an SAR are to be decided by the NPC ‘in the light of specific conditions’ (art. 31). Here the reference is to systems at the time of the establishment, but since specific conditions can change, perhaps the power to change systems is not confined to the time when the SAR is first established. If there are no ‘specific conditions’ which require an SAR, the rationale in relation to that part of the country lapses. This proposition may be seen to strengthen the argument that the power to dis-establish an SAR may be implied in the Constitution.

However, in relation to the HKSAR, the scheme of the Constitution (and the flexibility inherent in it) has to be qualified by China’s undertaking in the Joint Declaration. There are two undertakings. The first is to establish an SAR under art. 31. The second is to apply the basic policies for (at least) 50 years. As far as China’s obligations under the Declaration are concerned, it may abolish both the SAR and the basic policies after 30 June 2047. It could presumably continue the SAR with some measure of autonomy, but establish a new framework for policies and systems. Here too, however, there may be a problem stemming from the Basic Law itself, which provides in art. 159, dealing with the amendment of the Basic Law, that the NPC may not, in changing the Basic Law, ‘contravene the established basic policies of the People’s Republic of China’. Presumably a purposive interpretation could be applied here to read the article as restricting the NPC only for 50 years after 1 July 1997.

THE NATURE AND SCOPE OF AUTONOMY

The HKSAR would have enjoyed considerable autonomy under the regime of the Joint Declaration. The Declaration states that ‘The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People’s Government’ (art. 3(2)), which leaves all internal matters to the HKSAR. Even in foreign

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4 This interpretation is not accepted by all Chinese scholars. Wu Jianfan (an eminent PRC legal academic who was a member of the Drafting Committee of the Basic Law) writes
affairs, the HKSAR is given some powers, principally in relation to
economic and cultural relations, in which area it may negotiate treaties
with states and international organizations (art. 3(9) and (10)). It is also
given the power to issue passports and travel documents of the HKSAR
(art. 3(10)) and to control immigration (Annex I, section XIV). It is
expressly vested with the responsibility of maintaining order in the HKSAR
(art. 3(11)) — perhaps to clarify that this matter does not fall within
‘defence affairs’. Although the Joint Declaration does not have schedules
of the powers of the region and/or the centre as is customary in
constitutional arrangements for autonomy, it provides a reasonably clear
division of powers between the Central Authorities and Hong Kong.

The Joint Declaration does not define ‘high degree of autonomy’ (for
which there was no reference point in Chinese law or practice). Unless it
is a mere rhetorical device (to emphasis the expansiveness of the powers of
the HKSAR), it could mean one of two things: first, that in the areas within
the jurisdiction of the HKSAR, it is bound by certain prescriptive rules (of
which there are several, e.g., that while it is in charge of its currency, it must
remain convertible, art. 3(7), which are discussed below). The other
interpretation is that there is some authority in the Central Authorities over
these matters. However, the Joint Declaration gives no indication of the
extent of that authority or how it may be exercised (especially in view of
the provision that only the HKSAR legislature may legislate for the HKSAR,
Annex I, section II). This second explanation would fly in the face of the
general purpose of the Declaration to separate the economic, social and
legal systems of the HKSAR from those of the rest of the PRC. It would
also create great uncertainty about the respective powers of the Central
Authorities and the region as well as how the powers in relation to a matter
(e.g., monetary policy) are divided. Uncertainty would undoubtedly lead to
disputes and conflicts and thus undermine the stability and prosperity of
the HKSAR — a primary objective of the Declaration. The first explanation
would therefore seem to be more consistent with the general thrust of the
Declaration as well as One Country Two Systems.

that the Declaration ‘only says that foreign affairs and national defense shall be managed
by the Central Government. It does not say that the affairs managed by the Central
Government are limited to foreign affairs and national defense’. He gives two examples
from the Declaration to show that other powers are vested in the Central Government:
the appointment of the Chief Executive and his or her principal officials; and the
‘power’ to formulate the Basic Law (1988:67–68). The first example is not an instance
of ‘power’ in the sense used here (i.e., powers over a substantive matter or policy of
legislation or administration), and the second is more like PRC’s obligation to ensure
that the machinery necessary to provide for HKSAR’s autonomy under the PRC
constitution is established.
Having specified the powers of the HKSAR, the Declaration establishes the outlines of the economic and social systems to be established, principally by reference to existing laws or practices. These are specified in considerable detail (e.g., on aviation and shipping or the role of religious and other non-governmental organizations in education and social welfare). In so far as these systems have to be maintained, they qualify the autonomy of the region. The same may be said for the provisions for the protection of rights and freedoms, although these are now standard and are not normally regarded as infringing upon autonomy.

That the HKSAR was not to be, despite its name, a mere administrative unit is emphasized by the statement that it would be vested with executive, legislative and independent judicial power, including that of final adjudication (art. 3(3)). That these powers are to be exercised autonomously is evident from the provision that the government of the HKSAR will be ‘composed of local inhabitants’ (art. 3(4)). The legislature is to be ‘constituted by elections’ (Annex I, section I), and although the Chief Executive is to be appointed by the Central People’s Government, this is to be done ‘on the basis of the results of elections or consultations to be held locally’ (art. 3(4)). Except for a few senior officials whose appointments require the formal approval of the Central Government, the organization of the administration is a matter for the region.

The Declaration provides briefly for the relationship of the HKSAR authorities with the Central Authorities. The same paragraph which grants high autonomy to Hong Kong also says that the HKSAR ‘will be directly under the authority of the Central People’s Government of the PRC’. The concept of being directly under the CPG was already known to the PRC constitution, which provides for certain municipalities to be directly under the CPG (at that time there were three: Beijing, Shanghai and Tianjin, Chongqing being added in 1997). These cities enjoy something of the status of a province, and are not subject to the jurisdiction of the provinces in which they are located. Thus to be directly under the CPG might be regarded as being elevated rather than diminished although its suitability for a more autonomous SAR might be questioned. There are a number of decisions of the HKSAR which have to be conveyed to China for ‘the record’ (which means for information) — the enactments of the legislature (Annex I, section II), the appointment and removal of principal judges (Annex I, section III), and the budget and financial accounts of the government (Annex I, section V). Authorization from China is necessary for certain external affairs of the HKSAR but other matters can be dealt with by itself (Annex I, section XI). These provisions do not add up to a regime of tight control by and accountability to the Central Authorities, and serve merely to emphasize the autonomy of the region.
‘Autonomy’ suffered something of a sea change in the transformation of the Declaration into the Basic Law. The neat division of powers between the PRC (‘defence and foreign affairs’) and the HKSAR (all internal affairs) became blurred. Hong Kong is described as a ‘local administrative region of the PRC’ although the formula of ‘high autonomy’ is preserved (art. 12). However, the expression ‘high autonomy’ is no longer juxtaposed to ‘except in foreign and defence affairs which are the responsibility of the CPG’. Instead China’s responsibility for foreign affairs and defence is expressly stated (arts. 13 and 14). The foreign affairs powers of the HKSAR in relation to economic and cultural relations, as foreshadowed in the Declaration, are provided for (chap. 11). The Central People’s Government acquires some powers over public order in the HKSAR which are not mentioned in the Joint Declaration. If there is turmoil which, in its opinion, endangers national unity and the HKSAR government cannot deal with, it may declare an emergency in the HKSAR and apply ‘relevant national laws’ in the region (art. 18).

Under art. 2, the NPC authorizes the HKSAR to ‘exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law’. Four points are worth noting at this stage about this article. The first is that regional authority is the result of an NPC decision — in manifestation of Chinese sovereignty. Second, the powers of the region are not merely administrative, as its title would suggest, but include policy and discretion as well as a separate machinery for enforcement of its laws and decisions. Third, a distinction is made between executive and legislative powers on the one hand and judicial on the other, the latter being ‘independent’, and perhaps therefore more autonomous (although the intention may have been to make courts independent from other HKSAR institutions, Central Authorities play no role in the appointment or dismissal of judges or in the conduct of their duties). The fourth is that the powers of the region are to be gleaned from other provisions of the Basic Law — this being in the nature of a General Principle.

The powers of the region are not delineated in a clear or comprehensive way. The usual way to do this in arrangements for autonomy in other states is to provide lists of powers of the centre or the region, or just of the region or the centre, with unspecified matters belonging to the other. A list of regional executive powers\(^5\) was included in the 1988 draft but

\(^5\) The list was: public finance, monetary matters, economy, industry and commerce, trade, taxation, postal service, civil aviation, maritime affairs, transport, agriculture and fishery, civil service, home affairs, labour, education, medical and health services, social welfare, recreation and culture, municipal facilities, urban planning, housing, real estate, public
dropped in the 1989 draft (apparently the task proved difficult). Such a list would have to have been exceedingly long to cover the powers necessary to maintain Hong Kong’s economic, political and social system.

It is now necessary to construe and piece together various provisions to draw up a picture of the powers of the HKSAR. The task, though difficult, is extremely important for stable and orderly administration in the HKSAR as well as for its relationship with the rest of the PRC. Some very specific consequences hang on the division, for the following matters, among others, are determined by the allocation of powers between the Central Authorities and the HKSAR: the accountability of the Chief Executive to Central People’s Government (art. 43), the application of national laws in the HKSAR (art. 18), the veto of the Standing Committee of the NPC over regional laws (art. 17), and the powers of the HKSAR courts to interpret the Basic Law (art. 158). There is no general vesting of powers. Various powers are expressly specified, e.g., to establish juridical relations with other parts of China (art. 95), provide for local lawyers and lawyers from outside Hong Kong to practise in the region (art. 94), formulate monetary or financial policies (art. 110), policies for the development and improvement of education (art. 137), or for the development of Western and traditional Chinese medicine (art. 138). Other powers are to be implied from the general nature of a particular policy or system to be applied in Hong Kong — the broadest of them being a General Principle that the previous capitalist system and way of life shall remain unchanged for 50 years (art. 5).

Proceeding therefore to compile a list of the HKSAR powers by reference to individual articles which either expressly permit or require the HKSAR to do something or to articles which establish or recognize a policy or institution, we end up with a most impressive list. It covers, for example, the use and management of state resources (art. 7), law and order (art. 14), social welfare (arts. 36 and 145), marriage and family (art. 37), electoral law (art. 68), public service (art. 48), the Independent Commission Against Corruption (art. 57), the judiciary (arts. 83 and 88), land (art. 7 and 123), shipping (art. 124), civil aviation (art. 128), education (art. 136), medicine (art. 138), science and technology (art. 139), culture and intellectual property rights (art. 140), professions (art. 142), religious organizations (art. 141), sports (art. 143), labour (art. 147), immigration

order, entry and exit controls, meteorology, communications, science and technology, sports and other administrative affairs (art. 15 of the 1988 draft).

The relevant article of the Basic Law reads, ‘The HKSAR shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law’ (art. 16).
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(art. 154), finance (art. 106), currency (art. 111), taxation (arts. 107 and 108), customs (arts. 116 and 117), trade (art. 115), manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and environment (art. 119). Although this is an impressive list, it does not contain all the powers that are currently exercised by the Hong Kong administration. There is for example no express mention of local transportation, power or electricity, water supply, telecommunications (unless these are deemed to be covered by ‘utilities’ referred to in art. 119), postal services, housing, marine development, and meteorology which are matters of particular public and private concern. Are we to regard the explicit powers as examples of a wider genre, put there \textit{ex abundanti cautela} or are they exhaustive and imply that the distinction between ‘defence and foreign affairs’ and ‘internal’ is no longer the ruling principle? Looking at the powers that through one formula or another are vested in the HKSAR and the flexibility of some concepts (like ‘utilities’, ‘commerce’ and ‘science and technology’), the inference is that Hong Kong was indeed intended to have autonomy over all matters other than foreign affairs and defence.

We are thus brought back to the question of the status of residual powers. The Basic Law mentions some specific powers of both the Central Authorities and the HKSAR. The question then arises as to which entity belong powers not expressly dealt with. Here the Chinese advisers have taken a somewhat formalistic line — the clearest expression of which is to be found in an article by Wu Jianfan (1988). He argues that the concept of residual powers is appropriate only in federations where previously independent entities merge and give up some of their powers to the centre, retaining the residue for themselves. Since Hong Kong has never been sovereign and China is a unitary state, there can be no residual power with the HKSAR.\footnote{Rejecting the claims put to the Drafting Committee for residual powers to be vested in the HKSAR, he wrote, ‘This confuses the special administrative region with a province or state of a federation and completely turns on its head the origin of the special administrative region’s power. Obviously, this is something that we cannot accept’ (1988:74).} Notwithstanding this constitutional principle, he concedes that the HKSAR could statutorily be provided with residual powers but considers this unwise.\footnote{‘... the powers conferred on the Hong Kong SAR are already very broad. It is very difficult to imagine what other powers must supplement those already conferred for the Hong Kong SAR to be able to implement a high degree of autonomy... If the need arises where the appropriate powers are found to be lacking, then new powers can be conferred on the Hong Kong SAR by the highest organs of authority in the state or by the Central People’s Government. This cannot become a problem, so the people of Hong Kong should not be worried’ (1988:74).} Instead, art. 20 was adopted which
enables the grant of ‘other powers’ to it by the NPC, its Standing Committee or the Central People’s Government. The difficulties with the concept of (unspecified) residuary powers lying with the Central Authorities were demonstrated in the claim that it justified the setting up of the provisional legislature instead of an elected legislature in terms of the Basic Law — on the ground that such power belonged to the NPC since the Basic Law made no provision for a provisional legislature!8

However, this does not solve our immediate problem, although it suggests residual powers are indeed not with the HKSAR. On the other hand it may also be regarded as an example of an excess of caution for if all internal affairs and a considerable measure of external affairs have already been conferred on the HKSAR, what remains that may reasonably be granted? The reference here may be to the delegation of the administrative responsibilities of the Central Authorities or the discharge of some diplomatic or defence functions in the region.

The picture has become somewhat clearer with the adoption of laws on the establishment of the HKSAR when the NPCSC had to decide which existing Hong Kong laws, if any, are inconsistent with the Basic Law clearer (see Appendix Six). A General Principle provides that the previous laws of Hong Kong are to be maintained, subject to any amendments by the HKSAR legislature. ‘Previous’ laws provide for a vast panoply of powers in Hong Kong’s official and quasi-official bodies and deal extensively with a whole range of subjects (even to some extent defence and foreign affairs). It is clear that some of these laws were caught by the proviso for the repeal of laws which are incompatible with the Basic Law (art. 160), but the operation of the proviso depended in considerable part on the view taken by the NPCSC of the powers of the HKSAR. By repealing only a tiny fraction of previous laws (few of them dealing with substantive areas of ‘powers’), the NPCSC endorsed an expansive view of the powers of the region — obviously a sensible view in order to ensure that there are no serious gaps in the law. The Central Authorities themselves cannot legislate for the HKSAR but the NPCSC can extend through local enactment or promulgation national laws ‘relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law’ (art.18).9 Since most

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8 This argument was presented in the People’s Daily (Beijing) 9 May 1996, reported in the SCMP 10 May 1996. It escaped the People’s Daily that by specifying the composition and mode of election of the first legislature, the Basic Law precludes the possibility of a provisional legislature (see the discussion in Chapter 7).

9 As stated in the Chinese version of the Basic Law, ‘national laws’ (falu) means laws passed by the NPC or the NPCSC.
national laws derive from different economic, political and legal traditions from Hong Kong’s, it would seem that ‘outside the autonomy of the HKSAR’ should be narrowly defined.

Perhaps it might help if the division of powers can be founded on principles and concepts (instead of relying on the ‘austerity of tabulated legalism’, to use an expression coined in a different context). The search will appropriately begin with the Preamble and the General Principles of the Basic Law which reflect the Basic Policies in the Joint Declaration. These refer to the HKSAR as being an inalienable part of the People’s Republic of China (art. 1), but also to the high degree of autonomy of the HKSAR (art. 2). A General Principle guarantees the preservation of Hong Kong’s capitalist system and way of life, prohibiting the introduction of socialism (art. 5). Another two protect the system of civil liberties and the principles and substance of Hong Kong’s laws and institutions (which are different from those in China) (arts. 4 and 8). That key decisions about Hong Kong must be made by its residents is clear from the principle that its executive and legislative authorities must be composed of permanent residents (art. 3). The use of English as an official language is authorized (art. 9). The government of the HKSAR is the executive authority for the HKSAR (art. 59) while the Legislative Council is its legislature (art. 66). These, the dimensions of One Country Two Systems, suggest that the conceptualization of the powers of the HKSAR is to be derived from the integrity of the ‘Hong Kong’ system in which capitalism plays a key but not exclusive role. Many powers which are not expressly granted to the HKSAR are ancillary to the operation of the market economic system (for example the stock exchange) or the administration of Hong Kong (like a water or power supply system). These clearly must be deemed to be vested in the HKSAR.

On the other hand, sovereignty over Hong Kong lies with the Central Authorities (and there is a separate economic, social, political and legal system on the mainland). The Basic Law makes provision for this sovereignty by stating the Central People’s Government’s responsibility for foreign affairs and defence (including dealing with acute internal disorders) as well as certain supervisory powers. Clearly in this context

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10 As is well known, this expression was used by Lord Wilberforce to urge a broad and generous interpretation of human rights provisions in Minister of Home Affairs v Fisher [1980] AC 319, at 329. The use of the quotation marks suggests that these were not his own words, and on being questioned some years later by Sir Robin Cooke as to the source of the ‘quotation’, Lord Wilberforce confessed to a bad memory. Sir Robin’s view, expressed in an aside in his Peter Allan Memorial Lecture at the University of Hong Kong on 28 October 1994, suggested that it was probably Lord Wilberforce’s own expression.
sovereignty cannot be given the broad general meaning that it sometimes carries (particularly in the Chinese view) for that would effectively negate the separate system of the HKSAR. Chinese authorities have sometimes given the impression that ‘sovereignty’ is a repository of a vast array of powers and immunities, brooding over the Basic Law, and justifying extensive intervention in the region (a view endorsed, at least partially, by the HKSAR courts). There is the additional difficulty that the two specific manifestations of sovereignty provided for in the Basic Law, defence and foreign affairs, are themselves capable of considerable expansion, as for example when China enters into new treaty obligations or its relationship with other states is renegotiated, whether leading to greater cooperation or hostility (see Chapter 11).

A way must therefore be found to limit the operation of Chinese sovereignty in the region. Since the recognition of Hong Kong’s separate systems is itself an exercise of Chinese sovereignty, the logic of those systems must also prescribe operational limitations on that sovereignty. The powers necessary for the operation of Hong Kong’s systems are thus a mirror image of the limitations on Chinese sovereignty. In this conceptualization, there is little scope for the notion of ‘residual powers’. I do not pretend that this form of conceptualization would always be an easy task. Similar exercises in conceptualization are not uncommon in autonomy arrangements which are less abstract than the Basic Law, a particularly troublesome case being the penumbra of ‘inter-state commerce’ in federal systems. In Hong Kong’s case, it would undoubtedly be facilitated by a convention that powers exercisable previously by Hong Kong, when its autonomy was more limited than under the Basic Law, are integral to its systems.

If this procedure helps us towards a broad division of powers, it does not fully indicate the scope of HKSAR’s discretion in powers ascribed to it. Various provisions give rise to problems. Firstly, many of the basic policies of the Declaration which described the systems to be established in the HKSAR (and which were then seen as limitations on Chinese power) are now presented in an imperative form, as the obligations of the HKSAR, e.g., the duty to maintain the convertibility of the Hong Kong dollar (art. 112), and create an appropriate economic and legal environment for keeping Hong Kong as an international financial centre (art. 109). Some of these provisions may be regarded merely as the reformulation of the terms of the Declaration without difference in substance but the restrictions on systems that the HKSAR must maintain have now been tightened, e.g., the issue of Hong Kong currency must be backed by a 100% reserve fund (art. 111), the budget must be balanced (art. 107) and the tax policy must be based on low taxes (art. 108) (further examples are provided in a later section). The question here is not merely that these
qualifications represent a further erosion of the autonomy of the HKSAR but that they may directly involve the Central Authorities in its internal affairs through its supervision over what may now be looked upon as the mandatory requirements of the Basic Law. (This complicated matter depends on the scheme for the interpretation of the Basic Law and is discussed in detail in Chapter 5.) In the Declaration, provisions for the maintenance of particular systems might have implied limitations on the competence of the HKSAR but they were also seen as devices to exclude the Central Authorities’ involvement in the internal affairs of Hong Kong, establishing ‘no go’ areas. The Basic Law may have fundamentally changed the nature of these qualifications and relationships.

The second difficulty is to establish the precise scope of HKSAR’s powers of decision making. The problem is to determine the status of formulations which appear to impose restrictions on policy making, particularly whether these are binding or guiding. The Basic Law (following the Declaration) makes various references to ‘previous systems’ or ‘previously practised’. Furthermore, when a specific power is sometimes given to the HKSAR, the formulation is that the region may exercise these powers ‘on its own’. While this may suggest a plenitude of discretion, that this is not always the case is revealed by other provisions surrounding the particular subject (for example art. 108 authorizes the HKSAR to enact its own laws on taxes, but at the same time it provides that the ‘low tax policy previously pursued in Hong Kong’ shall be taken as reference). There is also the question whether the absence of this formulation indicates an intention to impose some restrictions.

The restrictions on the power of the HKSAR over matters which are clearly within its responsibilities occur most frequently in the section on the economy, rights and the legal system. The restrictions on economic matters, rights and the legal system are examined in subsequent chapters. But at this stage a brief reference must be made to ‘previous system’ and ‘previous practice’ to examine the limitations that they import. The PRC stated in the Joint Declaration that ‘the laws currently in force in Hong Kong will remain basically unchanged’ (art. 3(3)) and that ‘the current social and economic systems in Hong Kong will remain unchanged, and so will the life-style’ (art. 3(5)). While in the Declaration these could be regarded as assurances to the residents of Hong Kong (and thus restricting the exercise of Chinese sovereignty over them), the formulation in the Basic Law may have changed their nature, turning them into fetters on the HKSAR in a way that may not have been originally envisaged. The Basic Law has several references to the maintenance of previous laws and systems (e.g., arts. 5, 8, 18, 19, 40, 65, 81, 86, 87, 91, 94, 144, 145). The Basic Law has itself preserved expressly many features of the ‘previous
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system’ (especially in providing a powerful executive, and in the economic and social systems). References to ‘previous laws’ or ‘systems’ are used in the Basic Law with varying effects: in some instances they are intended to entrench a previous law (as with the rights in civil and criminal trials, art. 87); in other instances they are to provide guidance to the HKSAR (e.g., 108, low tax policy); sometimes they are to indicate broad parameters of policies or relationships (as with education or the role of NGOs). Nor is the Basic Law a charter for total conservation of old laws and institutions. It establishes, for Hong Kong, an ambitious political agenda whose implementation requires fundamental changes from the old colonial system both during and after the transitional period. More generally, it is important to distinguish essentials from mere matters of detail as to change, and the essentials are to be gleaned from the General Principles in the Basic Law and China’s Basic Policies regarding Hong Kong from the Joint Declaration. It is therefore clear that in some instances the reference to ‘previous laws or policies’ does restrict the competence of the HKSAR, while in others it is in the nature of guidance.

THE ECONOMIC SYSTEM

I now turn to the economic system to make a preliminary assessment of the autonomy of the HKSAR (a detailed account of the economic system is contained in Chapter Six). The intention was to entrench the previous capitalist system and to separate it from the socialist economic system on the Mainland. In one sense the HKSAR has been given complete control over its economy. It has its own currency (art. 111). Its fiscal system is separate from that on the Mainland and no public revenue may be transferred from Hong Kong to the rest of China in the form of taxes (art. 106). It controls its own external economic relations, including the negotiation of trade agreements, Hong Kong being a separate customs territory (art. 116). It may negotiate investment protection and other economic agreements (arts. 118 and 151). It may be a member of international economic institutions which are open to non-states (art. 152).

However the codification of previous laws and practices resulted in a number of restrictions on economic policies and decision making in Hong Kong. Thus its currency must be convertible and backed one hundred per cent by reserves of foreign currency (art. 111). It must follow low tax policies, must balance its budget and public expenditure must be commensurate with the rate of economic growth (arts. 107-108). It must
retain Hong Kong’s status as a free port (art. 114) and as an international financial centre (art. 109). The HKSAR is obliged to follow free trade policies (art. 115).

This brief account of the economic regime of the Basic Law shows that the HKSAR is a strange mixture of a local government (which has to be told in detail what it may or may not do) and a political entity with sovereign and quasi-sovereign powers. The difficulty that this regime poses for the classification of the HKSAR in traditional categories of autonomy is compounded when one turns to other ‘systems’ — legal, political and social — that the Basic Law establishes for Hong Kong.

THE INSTITUTIONAL FRAMEWORK FOR AUTONOMY

An analysis of institutional arrangements provides further insight into the regime of One Country Two Systems. Autonomy has the notion of ‘self-government’ — who is the ‘self’ in the HKSAR? Are the HKSAR institutions likely to provide a secure basis for the exercise and preservation of autonomy? How separated are they from the mainland institutions? Are there specific mainland institutions which are mandated to preserve the autonomy of the HKSAR? I first discuss who the ‘self’ is before turning to other aspects of the institutions for autonomy.

Nationality and the Right of Abode

The way in which the Basic Law deals with the question of nationality and residence illumines both the complexities of the past and the imperatives of One Country Two Systems. The imperative of One Country required that Chinese nationality laws should apply in the HKSAR. At the same time the distinctiveness of the HKSAR could, for two reasons, only be maintained if a different regime of quasi-nationality were established for Hong Kong. The first is connected with autonomy (particularly its special characteristic in the HKSAR of ‘Hong Kong people ruling Hong Kong’), which necessitated a distinction between Chinese nationals on the mainland and Chinese nationals with an established link with Hong Kong (as well as some measure of control over influx of mainlanders to Hong Kong). The second reason is connected with the cosmopolitan character of Hong Kong, where people of different nationalities live and work and for the most part the law made no distinction among them (including in the right to vote or stand for public office). This required that Chinese
nationality as such could not be the basis of rights and obligations. These points (and the difficulties of achieving them) are elaborated below.

China’s isolation from most of the rest of the world, especially since 1949, emphasized the ‘nationalistic’ or even the chauvinistic aspect of nationality, sharpening the distinction between citizens and foreigners. The very origins of the nationality laws in China lie in the assertion of a broad concept of Chinese sovereignty, to prevent ethnic Chinese from falling under foreign dominion — the first nationality law was enacted in 1909 to resist attempts by the Netherlands to compel Chinese living in Java to become Dutch subjects. It provided for the transmission of nationality through descent (jus sanguinis) and prohibited the divestment of a Chinese of his or her nationality except with the permission of the Chinese government. Although in the 1950s this stance was modified by giving overseas Chinese the right to choose to become citizens of the country of their residence, in China itself nationality is used to distinguish foreigners from nationals in a number of ways, as Edward Epstein has demonstrated.11 He argues that nationality is an important means of political control in the way China treats foreign visitors and residents differently from Chinese nationals, particularly by isolating foreigners from residents. Nationality is also used as a basis to promote nationalism and patriotism, especially in the use of the common expression ‘compatriots’.12

By contrast, Hong Kong has achieved its cosmopolitanism by negating, for the most part, the principle of nationality, especially once a person had been admitted to the territory. For a long time, for entitlements to reside in Hong Kong birth in the territory was more important than nationality. There was little discrimination in commerce and industry on the basis of nationality, and not much in politics. This is not to deny that preference was given in some respects to British or other white Commonwealth citizens — and special advantageous terms in public and

11 He says, ‘Almost the entire system of trade and investment is based on the distinction between foreign and domestic interests. There is one law for domestic economic contracts and another for foreign ones. There is one regime of corporate legislation for domestic enterprises and another for foreign joint venture or wholly foreign enterprises . . . In criminal cases, arrest or detention of a foreign national in China must first be approved by the Supreme People’s Procuracy. The first hearing must be held at no lower level than the Intermediate People’s Court. Civil cases involving a foreign party are also governed by special provisions . . . China’s new Copyright Law is also governed by a “nationality principle” which gives only works of Chinese nationals automatic copyright protection.’ (nd: 44–45)

12 As has been pointed out by Johannes Chan (1992) and Martin Lee (nd), the term simply means ‘fellow country men’ and therefore in many contexts where it is used, it is tautologous.
private service — and in immigration to mainland Chinese for long periods. These distinctions became less important just at the time that they proliferated, in the 1980s and the 1990s as Hong Kong people went in search of foreign nationalities and foreign investors flooded in. Residence was a more important determinant, for social welfare or housing, for example, than nationality. In this, Hong Kong approximated to a number of other countries, especially in Europe, and Australia, where distinctions of citizenship gave way to those of residence for a minimum period, and in some respects went beyond these (as in the right of franchise).

The necessity to marry these contrasting attitudes was complicated by doctrinal differences between the UK and China on the status of nationality under British rule, stemming from the British assertion and the Chinese denial, of British sovereignty. Therefore while the UK conferred British nationality on those Chinese who had been born in Hong Kong during the British regime or naturalized there, the PRC regarded all Chinese in Hong Kong as Chinese nationals bound by its Nationality Law. These differences precluded a Sino-British agreement on nationality in the Joint Declaration. While not irrelevant, they were not of major significance to the arrangements for the future, particularly as the UK had, since the 1960s, gradually detached those who were British nationals by virtue of their connection to Hong Kong from the general scheme of United Kingdom citizenship. Thus while the nationality matter is dealt with in separate

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13 Under traditional British doctrine, there would be little doubt about the eligibility of the residents of the ceded parts of Hong Kong and Kowloon to British nationality. The situation of leased territory was unclear, especially as the residents of protectorates (with whom the analogy is closer) were regarded only as British Protected Persons. However, the New Territories was treated on a par with Hong Kong as far as jurisdictional questions were concerned. These doubts were removed by the British Nationality Act, 1981. See White (1989).

14 At first, British nationals by virtue of connection with Hong Kong (i.e., birth or naturalisation) enjoyed the full rights of UK citizens, including the right to enter and live in the United Kingdom (and like them were known as Citizens of the UK and Colonies — CUKC). However, starting in 1962, restrictions on the right to enter and live in the UK were imposed on all UK citizens except those who were classified as 'patrials', i.e., those who were born in the UK, or those with one of their ancestors born in the UK (which excluded most citizens by connection with Hong Kong). British legislation which came into effect in January 1983 systematized the changes which had been taking place through a series of laws since 1962, and hived off the status of people in the dependencies from those in the UK. Henceforth they were classified as British Dependent Territories Citizens (BDTC), but enjoyed the right of entry and residence only in the dependency with which they were connected, under the law of that dependency. The rules for the acquisition of BDTC also became more stringent under the 1981 legislation since mere birth was no longer sufficient; one parent at least had to be a BDTC or settled in Hong Kong. Thus from being part of the broad, imperial status of British citizens, signifying the unity of the empire, British nationals were split in different ways, tied narrowly to
memoranda (outside the framework of the Joint Declaration) by the UK and the PRC, signalling formal differences, agreement was reached in the Declaration on the rights and obligations of residents of different nationalities (Annex I, sec. XIV).  

The right of abode

Following the Joint Declaration, the central concept in the Basic Law is the right of abode, which distinguishes the permanent residents of Hong Kong from other residents. The only relevant nationality is that of China; in the Joint Declaration its primary importance lay in its connection with establishing the right of abode for certain groups. However, due to Chinese resentment at British proposals for a British nationality scheme policing particular geographical entities and with varying rights. It is obvious that the category of BDTC was created for Hong Kong, presaging the end of British sovereignty. There are many accounts of this history of nationality changes — for example, see White 1988 and Chan 1992.

The memoranda would appear to have no legal effect as they are unilateral statements of intention. Nevertheless they are not devoid of some legal significance, particularly in interpretation of provisions of the Declaration. Article 31(2) of the Vienna Convention on Treaties (dealing with the interpretation of treaties) provides that recourse may be had to any agreement relating to a treaty which was made between the parties to it in connection with its conclusion. The British Memorandum (which was declared first) states the intention to discontinue the status of the BDTC of those persons who have it by virtue of connection with Hong Kong and not to grant it after 30 June 1997. However, it would allow them an ‘appropriate status’ ‘without conferring the right of abode in the United Kingdom’ which would entitle them to use passports issued by the UK. They would also be entitled, upon request, to receive British consular services and protection when in third countries. This unusual measure, prompted by pressure from the Chinese members of the Hong Kong Executive Council, was essentially a device to provide travel documents for Hong Kong people, and necessitated a new form of nationality, British National (Overseas) — BN(O) (The Hong Kong (British Nationality Order) 1986, s. 4). Such a provision was not only unusual for Britain, but also offensive to the PRC who had refused to accept any British status for Hong Kong Chinese even during the British regime. In the end China went along with the proposal as it realized that it would help to maintain confidence in Hong Kong (Roberti: 110–111). But it would go against the grain to put the point in the Joint Declaration. The Chinese Memorandum carefully preserved its doctrinal position, saying that under its Nationality Law all Hong Kong compatriots, whether they held a BDTC passport or not, were Chinese nationals. However, ‘[T]aking account of the historical background of Hong Kong and its realities’, the PRC would permit these nationals to use travel documents (avoiding the use of expression passport which the PRC associates with nationality) issued by the Government of the UK for purposes of travel to other states and regions (but presumably not to China). Furthermore these Chinese would not be entitled to British consular protection in the HKSAR or the PRC (thus cleverly evading the issue of such protection elsewhere).
Chinese nationality assumed a greater significance, certain offices being restricted to nationals. Questions of Chinese nationality are not determined by the Basic Law, but by the Chinese Nationality Law 1980. Its application to Hong Kong is more problematic than may have been initially realized, as I discuss later. The concept of the right of abode originated in the UK with the delinking of nationality from the right to enter the UK through the notion of patrials, who had the right of abode there. The original equivalent of it in Hong Kong was the concept of ‘Hong Kong Belongers’ established at about the same time (Immigration Ordinance 1971). ‘Belongers’:
1. had the right to land in Hong Kong;
2. could not be made subject to conditions of stay; and
3. could not be removed or deported from Hong Kong.

Thus, although the Joint Declaration does not define the term ‘right of abode’ (a concept equally unknown in Chinese law), it was probably deemed to consist of these three entitlements (and presumably covered also the right to leave, although in the Joint Declaration that right is qualified — ‘unless restricted by law’, Annex I, sec. XIV). This

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16 Following the drop in confidence in the future of Hong Kong after the Tiananmen massacre, the act was promulgated to grant UK citizenship to 50,000 persons who were settled in Hong Kong and had some form of British nationality and their families, according to a scheme to be devised by the Governor. The stated purpose of the act was to encourage persons crucial to the success of Hong Kong and their families, according to a scheme to be devised by the Governor. The stated purpose of the act was to encourage persons crucial to the success of Hong Kong to stay on in the territory by the grant of a status which would enable them to leave later if necessary. However, the PRC interpreted the scheme as a way to perpetuate British influence in Hong Kong beyond the transfer of sovereignty. Epstein considers that the PRC opposition was due to its fears that it would be unable to exert control over HKSAR officials if they had the option of an escape through British citizenship (nd: 53).

17 All British subjects (i.e., any Commonwealth citizens) born in Hong Kong were belongers. Chinese who were not covered by this formulation and had been ordinarily resident in Hong Kong for a continuous period of seven years were given most of the rights of Hong Kong belongers except that they were liable to deportation if convicted for an offence punishable with two or more years’ imprisonment or the deportation was considered by the Governor in Council to be conducive to the public good. The third category with substantial rights were CUKC by connection with the UK who had all the rights of Hong Kong belongers, except for liability to deportation on a number of grounds related to the public or security interest. For a historical survey of Hong Kong’s immigration law up to 1987, see Albert Chen 1988a.

18 The drafters might have had in mind the Hong Kong legislation like the District Court Ordinance (s. 52E (1)(a)) which permits a judgment creditor to obtain a stop order to prevent the debtor from leaving Hong Kong. After the Bill of Rights Ordinance was passed, which defines the right of movement as including the right to leave Hong Kong, the Court of Appeal held that this section did not offend the right since the Bill of Rights did not cover private actions (Tam Hing-yee v Wu Tai-wai (1991) 1 HKPLR 261).
understanding seems to be confirmed by the 1987 amendments to the Immigration Ordinance (in a partial attempt to bring the law into conformity with the guarantees in the Joint Declaration) which defines the right of abode as the right:
1. to land in Hong Kong;
2. not to have imposed any condition of stay in Hong Kong;
3. not to be deported;
4. not to be removed.

The Basic Law refers to those persons who would have the right of abode as ‘permanent residents of the HKSAR’ (art. 24). The status of permanent resident is basic to the exercise of rights and duties as well as the exercise of power. While rights under the Basic Law are granted to all residents (i.e., those given permission by the immigration authorities for ordinary residence), rights to vote and stand for elections as well as employment in the public services are restricted to permanent residents. Certain posts (the Chief Executive, the Chief Justice, the Chief Judge, the President of the legislature, membership of the Committee for the Basic Law and top officials) can only be held by permanent residents who are also Chinese nationals and have lived in Hong Kong for specified minimum periods, while 80% of the membership of the legislature and all the Hong Kong members of the Basic Law Committee is confined to permanent residents who are Chinese nationals. In neither case should these persons have the right of abode in a foreign country. In this way various objectives are met: the assertion of sovereignty by confining positions of power and authority to Chinese nationals, ‘Hong Kong people ruling Hong Kong’ by requiring substantial connection with Hong Kong, and accepting a degree of cosmopolitanism. 19

Broadly, there are two categories of persons who qualify for the right of abode (i.e., permanent residency), Chinese nationals and others; the conditions for the acquisition of the right vary as between them. Chinese nationals acquire the right of abode in one of three ways:
1. if they were born in Hong Kong before or after the transfer of sovereignty (art. 24(1));
2. if they have ordinarily resided for a continuous period of not less than seven years before or after the transfer of sovereignty (art. 24 (2); or

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19 When presenting the draft Basic Law to the NPC, Ji Pengfei justified the restriction as it helps to ‘define state sovereignty and reflects the principle of managing Hong Kong by Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong.’ (1990)
3. if they were born outside Hong Kong to persons covered by the two conditions above (art. 24(3)).

It will be obvious that none of the persons in these categories need have any no real or continuing connections with Hong Kong. The Basic Law will thus grant the right of abode to various groups who did not enjoy it before, of which the most prominent is the children born to illegal Chinese immigrants between 1982 and 1 July 1997.

Who is a Chinese national for the purposes of this article will be determined by the Chinese Nationality Law. Although the Chinese Memorandum to the Joint Declaration states that all Hong Kong Chinese are ‘compatriots’, the situation appears to be less clear-cut (even assuming the PRC position that Chinese sovereignty over Hong Kong remained undiminished over 150 years of British rule). There are two principal provisions for the acquisition of Chinese nationality:

1. birth in China of at least one parent who is a Chinese national; or
2. birth outside China of at least one parent who is Chinese, provided that neither of the parents has settled abroad and the person himself or herself has not acquired a foreign nationality on birth (art. 5).

Since more than 50% of the Chinese now in Hong Kong were born there under British regime (as British subjects) of parents who had settled there, if Hong Kong were to be regarded as an overseas place, a large section of the people of Hong Kong would not be Chinese. Equally, their parents, even if born in China, had settled in Hong Kong and acquired British nationality by naturalization (which is a necessary and sufficient condition for the loss of Chinese nationality under art. 9). These difficulties are overcome if British sovereignty and the consequences of British legislation on nationality are disregarded as in the Chinese position.

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20 Many instances have been reported in recent years of pregnant women from the mainland coming to Hong Kong (largely illegally) for the delivery of their children so as to ensure the children’s right of abode. Similarly children born to Hong Kong Chinese who may have moved overseas may also acquire the right of abode (given the provisions of the Chinese Nationality Act discussed later).

21 However, some other problems with the Nationality Law which would render many Hong Kong Chinese non-nationals of the PRC cannot be so easily overcome. Article 17 states that ‘The nationality status of persons who have acquired or lost Chinese nationality before the promulgation of this law remains valid’. It is necessary to examine the legislation preceding the 1980 legislation to see who might or might not have been Chinese nationals at the time, able to pass on Chinese nationality through descent or \textit{jus sanguinis}. Johannes Chan summarizes the position as follows, ‘If one’s parent lost his Chinese nationality under the previous nationality law, his descendants in Hong Kong,'
However, there are still numerous Hong Kong Chinese who have acquired Canadian, Australian, New Zealand, US or other nationality after settlement in these countries and who would therefore have ceased to be Chinese. The statement in the Memorandum therefore has to be qualified by the terms of the Nationality Law. Whether these persons have the right of abode will consequently depend on the provisions governing non-Chinese nationals to which I now turn.

There are three categories of ‘others’ who would have the right of abode:

1. persons who entered Hong Kong with valid travel documents, have ordinarily resided there for a continuous period of seven years and have taken Hong Kong as their place of permanent residence before or after the transfer of sovereignty22 (art. 24(4));

though of Chinese origin, would not be Chinese nationals. For instance, under the 1909 Act, a Chinese woman who acquired her husband’s nationality by marriage lost her Chinese nationality. Her descendants in Hong Kong would not necessarily be Chinese nationals. Any Chinese national who held foreign government office or served in foreign armed forces without the prior permission of the Chinese government would lose his Chinese nationality under the 1914 Act. A child born to an alien father who acknowledged him would also lose his Chinese nationality under the 1929 Act. As a result of an agreement with Britain in the early 1930s, certificates of de-nationalisation were issued, notably in Shanghai and Guangzhou. Furthermore, it has been suggested that, in Imperial times, a Chinese could withdraw his allegiance to the Emperor if the name of his ancestor was expunged from the register of his district. The picture is further complicated by the lack of any nationality law between 1949 and 1980, during which time it was very difficult to determine when Chinese nationality was acquired or lost.’ [footnotes omitted] (1992: 491).

22 The Basic Law follows the Joint Declaration faithfully (although the categories are more disaggregated in the Basic Law), except for the requirement of having entered Hong Kong with ‘valid travel documents’. Over the years large numbers of Chinese mainlanders have entered Hong Kong without valid travel documents, but this part of the article applies only to non-Chinese. Presumably it was intended to exclude Vietnamese refugees in Hong Kong, who first started coming in 1975, although the magnitude of the problem may not have been perceived when the Joint Declaration was drafted. If so, it may have been unnecessary since the Vietnamese were accepted for re-settlement and so would not be ‘ordinarily resident’ (Immigration Ordinance, part. III(A)). No requirement of valid travel documents is specified for Chinese nationals who have to satisfy seven years residence (art. 24(2)). Chinese who came without valid travel documents would presumably be illegal immigrants — for long periods amnesties were granted to them, but were effectively stopped from 1980s (see Chen 1988a). Since ‘ordinarily resident’ means lawfully resident (AG v Cheung Kam-ping [1980] HKLR 602), it would seem that even Chinese nationals would have to produce evidence of lawful entry. But if the PRC is prepared to disregard the impact of British rule for the purposes of nationality, why balk at the borders — a Chinese national entering Hong Kong without travel documents in breach of British Hong Kong law can hardly be regarded as a delinquent. The twist may lie in the Provisional Regulations for Chinese Citizens Travelling to Hong Kong and Macau passed by the PRC which would make their entry and stay illegal. See below.
2. children under 21 years born in Hong Kong before or after the transfer of sovereignty of a person in the above category\(^{23}\) (art. 24(5)); and
3. those who had the right of abode in Hong Kong only before the transfer of sovereignty and do not acquire it under any of the preceding categories (art. 24(6)).

While the right of abode might be as defined in previous laws, those entitled to it are not necessarily co-extensive with those under the previous arrangements. Only in the last of the categories will reference be made to the previous laws (Sch. 2(1) of the Immigration Ordinance). Many, indeed the majority, of those in this category will have a right of abode elsewhere and so will not qualify for the right in the HKSAR.\(^{24}\)

**The scope of art. 24(3)**

The seemingly straightforward provisions of art. 24(3) have given rise to a great deal of debate and litigation. Article 24(3) confers the right of abode to children born outside Hong Kong of Chinese citizens who are permanent residents of the HKSAR. Some short period before the resumption of sovereignty, it was realised with great anxiety by British and Chinese governments (and certain so-called pro-China politicians) that this provision would let in thousands of children on the Mainland who then had no right to enter Hong Kong for settlement (although their right to enter Hong Kong from 1 July 1997 was acknowledged several years earlier in the Joint Declaration). It was alleged that the burden on social, educational, housing and services of their integration into Hong Kong society would be enormous. Consequently Britain and China agreed to impose limitations on art. 24(3).

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\(^{23}\) As William Clark has pointed out, it is odd to regard these persons as having a ‘right of abode’ if it lapses after they reach a particular age. Nor would they necessarily qualify under art. 24(4), for they could not be regarded as having entered Hong Kong with valid travel documents (nd).

\(^{24}\) See William Clark (nd) for a discussion of groups who would lose under the Basic Law their previous Hong Kong right of abode; these include: (a) minority groups, although a large section of the biggest group, people of Indian origin may, contrary to Clark and popular perception, retain their right of abode, as their ancestors came to Hong Kong before the nationalities of independent countries in the sub-continent were established; (b) children of expatriates born in Hong Kong before 1 January 1993, and in relation to those born later, if either of their parents had been granted unconditional stay; (c) British expatriates with the right to land; and (d) returned emigrants, principally Chinese who left Hong Kong for foreign states and acquired citizenship there.

The last group has caused the greatest concern, to the group itself, their relatives in Hong Kong and to the PRC government. A solution, devised to help them, is discussed below.
As I show below, legislation passed by the provisional legislature restricted the rights of such persons by requiring additionally that one of their parents must have been a permanent resident at the time of their birth. What was claimed to be a further restriction on their right was made in the Immigration Ordinance (Amendment No. 3) 1997 passed by the provisional legislature on 10 July 1997 and deemed to come into effect on 1 July 1997. It provided the procedure whereby a person who claimed the right of abode by virtue of the permanent residency status of one of their parents could establish that claim. Essentially, a person has to prove that he or she had a valid travel document and a valid certificate of entitlement issued to him or her and affixed to the travel document (sec. 2AA(1)). The application for the certificate of entitlement has to be made to the Director of Immigration in a manner that the Director may specify. The right of abode arises only after a certificate has been issued (sec. 2AB). The Director provided that those who resided in mainland China would need to apply through the Public Security Bureau which handled exit and entry matters. However, even the issue of a certificate of entitlement did not enable them to exercise the right of abode. They needed in addition an exit permit from the Public Security Bureau in accordance with mainland legislation.

This legislation was challenged by a number of persons who were already in Hong Kong on 1 July 1997, under a variety of circumstances, on the grounds that the requirements for applying for a certificate of entitlement and an exit permit violated their right of abode under art. 24(3). The Court of First Instance (Keith J) dismissed the challenge on the basis that the rules about a certificate of entitlement established a reasonable procedure for establishing the applicant’s right to abode (Cheung Lai Wah v Director of Immigration [1997] 3 HKC 64). The justification for an exit permit lay in paragraph 4 of art. 22 (henceforth art. 22(4)) which states that the mainlanders wishing to enter Hong Kong must ‘apply for approval’. It is not specified whose approval, but the court held that it meant the approval of the PRC authorities in accordance with Mainland laws that applied before 1 July 1997. These findings of Keith J were upheld by the Court of Appeal (its decision is reported under the same name in [1998] HKC 617).

Both courts purported to apply a purposive approach. With respect, the application of the purposive approach was rather selective. On the face of the Basic Law, art. 22(4) and art. 24(3) were in conflict. As the court read art. 22(4), it gave the Central Authorities the power to prevent any mainlander from entering Hong Kong. On the other hand, art. 24(3) gave those mainlanders who satisfied its terms the right of abode in the HKSAR, which includes the right to enter and stay in Hong Kong. The
courts resolved this conflict ‘in favour’ of art. 22(4) by reference to past practice whereby all mainlanders who were not residents or belongers of Hong Kong required an exit permit. Such an approach fails to take account of the Basic Law itself, which conferred on certain mainlanders the right of abode in Hong Kong which they did not have before. They were thereby assimilated by art. 24(3) to those persons in the mainland who were ‘belongers’. By the courts’ reading, the right under sec. 24(3) is negated by art. 22(4) (since it would no longer be a right if it depended on the unfettered discretion of an administrative agency on the mainland). On the other hand, art. 22(4) has substance even when this new category of permanent residents is exempted from it (they have, it would seem, constituted only a minority of persons allowed exit permits since 1984).

This approach is a more natural way to reconcile these two articles than that of the court. It is also a fairer approach, since it does not derogate from an individual’s right. Perhaps the authority most cited by the Hong Kong courts on purposive and generous interpretation in the context of a constitution is Lord Wilberforce’s statement in Minister of Home Affairs v Fisher [1980] AC 319. He argued for a generous approach for the purpose of ‘giving full recognition and effect’ to fundamental rights and freedoms (p. 328). In Cheung Lai Wah, the courts have applied the purposive and generous approach to deny the fundamental right of abode to those who are entitled to it under art. 24(3).

A purposive approach is applied in order to give effect to the intention of the legislature (Carter v Bradbeer [1975] 1 WLR 1204). Here there was no guide to legislative intent which supports the decision of the court (as Keith J recognised at first instance, p. 24). The formulation in the Joint Declaration which Chan CJHC relied on is in no way different from that in the Basic Law, and by the test propounded by Keith J at first instance, it can provide no guidance (see Chapter 5 for a discussion of the use of the Joint Declaration in the interpretation of the Basic Law). It was also stated that if it was intended that those who qualified under art. 24(3) were to be exempt from art. 22(4), this would have been stated in either of these articles. One can argue, with greater plausibility, that if they were to be subject to art. 22(4), this would need to have been stated clearly. Article 24(3) makes no distinction between its beneficiaries on the basis of their prior residence, whether on the mainland or elsewhere. They have equal rights which have been denied to some by the immigration ordinance amendments and now by the decision of the court.

So far as regards legislative intention, it went the other way. The rush to enact the Immigration (Amendment 3) Ordinance suggests strongly that art. 22(4) was not seen to govern art. 24(3), for otherwise there would have been no need for it. It was not at that time justified, as it later
was, in terms of implementing art. 22(4). Instead it was justified in terms of regulating and phasing the entry of persons qualified under art. 24(3) so as to ease the pressure on educational and other social services in Hong Kong — an altogether different proposition, which provides no legal justification for the restriction of a constitutionally guaranteed right.

In further challenges to legislative or administrative restrictions on art. 24(3), courts have upheld two challenges and rejected two. A successful challenge in *Cheung Lai Wah* concerned the effect of the retrospectivity of the 10 July amendment. At first instance Keith J held that the law was in fact not retrospective since by virtue of art. 22(4) the applicant had no right which was taken away by the amendment (nor, he argued, did art. 12 of the ICCPR prohibit the retrospective criminalization of conduct, merely its punishment). The Court of Appeal was divided on this issue. Chan CJHC disagreed with Keith J, holding that the right under art. 24(3) comes into effect on satisfactory production of evidence of parentage, although its exercise may be postponed pending an exit permit. But if such a person was already in Hong Kong before the 10 July amendment, he or she was entitled to the right under art. 24(3). The amendment purported to deprive such a person of a right of abode given under the Basic Law and was therefore unconstitutional (pp. 643–644). Nazareth J reached a similar conclusion but only in relation to those persons who had entered Hong Kong before 1 July 1997 since art. 22(4) came into effect only on that date (pp. 655–665). Mortimer LJ considered that the amendment was valid in all aspects of its retrospectivity (pp. 664–665). Chan CJHC disagreed with Keith J on the effect of art. 12 of the ICCPR, holding that it prevented the retrospective criminalization of conduct (Nazareth and Mortimer LLJ preferring Keith L’s position).

The second defect which the courts have discovered in the legislation is in the definition of the relationship of father and child. The legislation provided that the right of abode accrued only if the child was born in wedlock or, if out of wedlock, he or she was subsequently legitimised by marriage of the parents (paragraph 1(2) of Schedule 1). At first instance, Keith J held that the wording of art. 24(3) in no way restricted the relationship as required by the legislation (and accordingly did not have to consider its compatibility with Chinese Nationality Law under which legitimacy is not based on marriage or with international conventions.

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25 Chan CJHC said, ‘It is quite obvious that these children cannot all come to Hong Kong at the same time. Nobody can dispute that it is necessary to have an orderly and gradual programme of settlement for these children . . . It is under these circumstances that the Government proposed and the Provisional Legislative Council enacted the No. 2 and No. 3 Ordinances’, p. 631.
applying to Hong Kong, pp. 91-2). Chan CJHC, while agreeing with Keith J, considered that the amendment also fell foul of the right to equality, irrespective of status, guaranteed under art. 1(2)(b) of the ICCPR (p. 648). He was also of the view that the Chinese nationality law did not apply ‘since this case is not concerned with the nationality status of Chinese residents’ (per Chan CJHC at p. 650).

Courts have upheld legislative attempts to restrict the right of abode of a person under art. 23(4) if neither of his or her parents was a permanent resident at the time of his or her birth. On the repeal by the NPCSC on 23 February 1997 of the definition of permanent resident of Hong Kong, the provisional legislature replaced it with a new Schd. 1 of the Immigration Ordinance (by Immigration Ordinance (No. 2) 1997 (122 of 1997)). It followed the scheme of art. 24 of the BL except that (i) art. 24(1) was altered to read that a Chinese citizen born in Hong Kong before or after the establishment of the Region would have the right of abode only if one of his parents had the right before the birth or at any time later; and (ii) art. 24(3) was altered to say that a child born to a person who has the right of abode in Hong Kong would have the right of abode only if the parent had the right at the time of the child’s birth.

This formulation in the Immigration Ordinance significantly reduced the rights of persons in these two categories. So far there has been no challenge to alteration to art. 24(1), but the alteration in relation to the art. 24(3) was successfully mounted in Chan Kam Nga (an infant) v Director of Immigration (Keith, J) [1998] 1 HKC 16, at first instance. The court held that there was no requirement in art. 24(3) that a parent of the child who claims the right of abode should have acquired his or her right of abode prior to the child’s birth. The emphasis was primarily on descent, not the time of birth (at p. 23). However, the Court of Appeal disagreed with Keith J, holding that a person could establish a sufficient connection with Hong Kong only if one of his or her parents was already a permanent resident of Hong Kong at his or her birth (Director of Immigration v Chan Kam Nga (1998) 2 HKC 405).

A further instance of a narrow reading of art. 24(3) is the holding of the court that only natural children, not step-children, qualify for the right of abode under art. 24(3) (Lui Sheung Kwan v Director of Immigration [1998] HKC 717), judgment of Chan CJHC on 27 February 1998. The court emphasized that the words used in art. 24(3) were ‘born of’, which referred to the permanent resident, and therefore entitled only a natural born child.
Consular protection

These provisions of the Basic Law raise a number of issues, of which only two will be examined here. The first concerns the availability of consular or diplomatic protection to the Hong Kong people who have a foreign nationality. The statement in the British Memorandum had promised the holders of an appropriate status (i.e., BN(O)s) diplomatic protection in third countries (i.e., outside the UK, HKSAR or the mainland PRC). The Chinese Memorandum stated that such persons would not be entitled to British protection in the HKSAR or other parts of the PRC, which could be interpreted to mean that they could obtain British protection elsewhere. However, this is unlikely to be the PRC position as it is inconsistent with the PRC non-recognition of any British nationality in relation to ethnic Chinese in Hong Kong.\(^{26}\) It is also unlikely that under international law Britain could claim to extend diplomatic protection to them since they will cease to have any effective link with Britain (this would not apply to those who were granted British citizenship under the 1990 British Nationality (Hong Kong) Act, since they have the right of abode in the UK).\(^{27}\) However, China has not maintained this position either in relation to Hong Kong Chinese who obtained UK citizenship through connection with the UK\(^{28}\) or who obtained other foreign nationality after an appropriate period of residence there. This conclusion follows from art. 9 of the Chinese Nationality Law under which a Chinese national loses his or her nationality only on settlement and naturalisation abroad.

The second issue concerns the position of those Hong Kong Chinese people who have taken foreign citizenship in Hong Kong or have gone and acquired a foreign citizenship abroad (many of whom may wish to return to Hong Kong). Would they be able to secure the diplomatic protection of their states of citizenship? Secondly, do they enjoy the right of abode in Hong Kong? Both questions depend on whether in these

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\(^{26}\) This was confirmed by Lu Ping, then Head of the PRC Hong Kong and Macau Affairs Office, in a speech in Hong Kong on 12 April 1996 (SCMP 13 May 1996, p. 6).

\(^{27}\) The Nottebohm case (*Liechtenstein v Guatemala* 1955 ICJ 5) is authority for the requirement of an effective link. The Hague Convention on Certain Questions Relating to Conflicts of Nationality Law (1930) provides that a third country faced with competing assertions of nationality should apply either the test of ‘habitual and principal residence’ or ‘most effective connection’ (art. 5). Even when China did not intervene, a third country may be able to resist British demands on the basis of the *Nottebohm* case.

\(^{28}\) It may of course not be possible to distinguish these UK passports from those issued under the 1990 legislation without further enquiry, and consequently impossible to identify those whom China would seek to deny British consular protection (without the records in the Immigration Department — the PRC has claimed that all Hong Kong government records should be transferred to it, but the claim was resisted by the British).
circumstances they have ceased to be Chinese nationals, for if they are still Chinese, diplomatic protection cannot, at the least, be invoked against China\textsuperscript{29} and they would in all probability have the right of abode under either art. 24(1) or art. 24(2) of the Basic Law.

Chinese law does not recognize dual nationality for any Chinese national (art. 3). Most countries which have a similar rule provide that their nationality is lost automatically on the acquisition of a foreign nationality. Under Chinese law, however, two conditions have to be satisfied before Chinese nationality is lost: settlement abroad and the acquisition of a foreign citizenship through naturalization or some other voluntary act (art. 9). Those who have acquired foreign citizenship in Hong Kong (for what is generally referred to as ‘passports of convenience’) therefore remain Chinese and will presumably retain the right of abode.\textsuperscript{30} Others will lose their Chinese nationality only if they are regarded as having settled abroad. The nationality law does not provide a definition of ‘settled’; usually it would mean that the foreign place had been chosen for habitual and relatively permanent residence, and presumably the requirements necessary for the acquisition of a foreign nationality would normally amount to ‘settlement’. However, many of these persons maintained links with Hong Kong as well and their real intention may have been to secure the foreign nationality as an insurance policy.\textsuperscript{31}

Obviously no generalization is possible and the matter would have to be decided on a case by case basis taking into account individual circumstances and intentions. There is little doubt that some persons had indeed ‘settled’ abroad (in which case they would have lost their Chinese nationality) but then decided to return to Hong Kong or might so decide in the future. Being no longer Chinese nationals they would not be covered by the Basic Law provisions regarding the right of abode of Chinese nationals. Instead they would be covered by art. 24(4), and would have to

\textsuperscript{29} The Hague Convention of 1930 mentioned above provides that a dual national may not be represented by one of his or her states against the other (art. 4).

\textsuperscript{30} This conclusion has no bearing on whether they have validly acquired the foreign citizenship, which question depends on the nationality laws of the foreign country. International law gives great flexibility to states to devise their nationality laws, and has developed some basic rules to deal with situations of dual or multiple nationalities in the Hague Convention mentioned above. See Chan 1992.

\textsuperscript{31} Martin Lee has argued that as these persons had emigrated with a view to residing there for the maximum period of time so as to acquire a foreign passport and then immediately return to Hong Kong they could not be regarded as having ‘settled’ there for the purposes of the Chinese nationality law (nd: 37). Certainly there were accusations against them in the host countries that their interest was solely of this opportunistic kind. And many did return, but the decision to do so may have been made due to recession and limited economic opportunities in the host countries.
establish ordinary residence for seven years continuously before qualifying for the right. Equally they would be entitled to the consular protection of their new states.

‘Returnees’

It is clear that the former conclusion (i.e., the requirement to serve a fresh period of seven years to acquire the right of abode) was inconvenient to what are termed ‘returnees’ and the latter (i.e., their entitlement to consular protection of their new states) to the PRC. Much anxious thought was given to how the return of migrants could be facilitated by granting them the right of abode. The Preliminary Working Committee (many of whose members hold foreign passports) recommended that if a migrant returned before 1 July 1997, he or she would be treated as having the right of abode (without stating any legal basis for it); this view appears to have been accepted by the Hong Kong and Macau Affairs Office. However, the Preparatory Committee broadened the recommendation and removed the deadline of 1 July 1997 (again, it would seem, without any careful analysis of the legal provisions). It proposed to the NPCSC that if a migrant or indeed an ethnic Chinese resident in Hong Kong with a foreign passport did not declare his or her foreign nationality to the Immigration Department in Hong Kong (and if they did not use the foreign passport for entry to or exit from the HKSAR or other parts of the PRC) they would be regarded as Chinese nationals and would retain their right of abode. But the corollary is that they would have to give up their right to foreign consular protection — something China has been particularly anxious to ensure. The NPCSC adopted an interpretation of the Nationality Law to give effect to this recommendation on 15 May 1996.

The interpretation restates that all Hong Kong residents of Chinese race born in China (including Hong Kong) ‘who satisfy the requirements

32 Under the colonial law they would have been able to return with the right of abode intact.

33 That those who have settled abroad and acquired a foreign nationality are to be deemed to remain Chinese nationals flies in the face of art. 9 of the Chinese Nationality Law. If this interpretation is valid, it would seem that the only way they would be able to divest themselves of Chinese nationality would be to apply for renunciation under art. 10 (for which the grounds are: ‘(a) they are close relatives of aliens; (b) they have settled abroad; or (c) they have other legitimate reasons’). Article 10 does not give an automatic right of renunciation, and China may not accept as ‘legitimate reason’ that an applicant wishes to secure consular protection of a foreign state!

34 Interpretation on Several Questions Relating to the Implementation of the Nationality Act of the PRC in the Hong Kong Special Administrative Region (I am indebted to Johannes Chan for a translation of the Interpretation).
for Chinese nationality as prescribed by the Nationality Act’ are Chinese
citizens (art. 1). It recognizes the right of those Chinese nationals who
have BNO passports to travel on them (art. 2) but does not recognize the
British status of those who acquired UK citizenship through the ‘British
nationality scheme’ (art. 3) (although it would seem that such persons are
deemed for the purposes of electoral laws to have the right of abode in
the UK, sec. 37(e) of the Legislative Council Ordinance 1997). It authorizes
Chinese citizens in Hong Kong who have a ‘right of abode in a foreign
state’ to use ‘travel documents’ issued by that state for travel to ‘other
states and regions’ but does not give them the right to consular protection
in Hong Kong or other parts of China (art. 4). In the most elliptical of
provisions in an elliptical interpretation, it says that Chinese citizens of
the HKSAR ‘may report with valid documents to the organ’ in the HKSAR
responsible for nationality matter ‘any change in their nationality status’
(art. 5) and identifies the Hong Kong Immigration Office as such an
organ (art. 6). If the purpose of an interpretation is to clarify the law, this
interpretation is not entirely successful; indeed it would be hard to
understand what it is all about except in the context of the detailed
explanation by Lu Ping as to how China intended to deal with the question
of ‘returness’. The wording of the interpretation does not support the
‘rules’ built on it.35

Even if the interpretation might achieve the right of abode for foreign
citizens of ethnic origin, it is unlikely to deprive them of foreign consular
protection since under international law consular protection is a right of a
state and not of its citizens, and therefore not something that they can
barter away.36 However, this is not generally realized and the PRC offer
may be regarded by those who acquired foreign nationality to remove
their liability to what they feared might be arbitrary PRC treatment and
to leave Hong Kong, as a poisoned chalice. Deprived of foreign consular
protection, they may have little protection against acts in Hong Kong or

35 The recommendation of the Preparatory Committee was presented at length by Lu Ping
in a public speech in Hong Kong on 12 April 1996 (and reported in full in the local
press the following day, see SCMP 13 April 1996). He justified this by ‘a flexible
interpretation’ of the legal provisions. In fact neither the Basic Law nor the Chinese
Nationality Law could reasonably be so interpreted. Lu did not deal with any of the
difficulties and complexities arising under either Chinese domestic law or international
law or the domestic law of other relevant states, that have been noted here.

36 When the proposals were first announced, diplomats allegedly warned their fellow-
citizens of the dangers of waiving consular protection — they might be conscripted for
military service and might need to obtain an exit permit for overseas travel. They also
questioned its feasibility and manageability (SCMP 23 March 1996, p. 5). If the remarks
were indeed correctly attributed to the diplomats, they seem somewhat unfamiliar with
the Basic Law.
other parts of the PRC violating their rights. Equally, it would seem that they can leave Hong Kong only on HKSAR or PRC travel documents if they wish to be considered Chinese nationals, and although the Basic Law recognizes the right to leave the HKSAR, it also seems to envisage either that the person has a valid travel document or special authority. The right to leave is also subject to law (art. 30). How far the Basic Law gives permanent residents the right to HKSAR travel documents and so in a sense to leave the HKSAR is discussed in Chapter 10, but on the face of it there is sufficient ambiguity to cause some hesitation in opting for the status of a Chinese national under the NPCSC’s interpretation.

In conclusion, it should be stated that some of the assumptions of the Joint Declaration about the cosmopolitan character of Hong Kong and the potential of Hong Kong people ruling Hong Kong have been attenuated, first in the departure from the Joint Declaration in the Basic Law and secondly in the interpretations placed on the provisions of the Basic Law. As to the first, the reservation of particular posts to Chinese nationals will exclude foreign residents who have traditionally played an active role in the life of the city. The further confinement of some of these posts to those without the right of abode in a foreign country will exclude many Chinese with long-term connections with Hong Kong. Restrictions relating to the right of abode in a foreign country were introduced in response to the British granting of UK citizenship on a number of Hong Kong people through the 1990 legislation as well as the acquisition by Hong Kong Chinese of other nationalities. Unlike Britain, other countries do not have the concept of the right of abode. Following the British concept of the right of abode, the reference in the Basic Law must be to a status which enables one to enter and leave a country at will, and would thus cover those with the ‘green card’ in the US and with permanent residency in Canada, Australia and New Zealand. It is thus wider than nationality and may cover a large number of Hong Kong people. It is not clear how far the NPCSC ruling regarding foreign nationality will affect the returnees in this regard.

The result is that the key policy makers will be Chinese nationals who are permanent residents without any significant connections with foreign states. They would not enjoy, at least in Chinese view, foreign consular

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37 Lu Ping said in his Hong Kong speech already referred to that those who acquired British citizenship under the 1990 scheme would be deemed to have a right of abode in the UK, even though China does not recognize the nationality which is the basis of that right. He said that if they renounced the right of abode, the disqualifications for particular offices would be removed. The only way for them to renounce the right of abode in Britain would be through the renunciation of UK citizenship, which China does not recognize! Clearly the PRC authorities have in mind that under British law these persons have the right to enter the UK and that therefore their loyalties might be divided.
protection, which some Hong Kong people might regard as increasing their
dependence on the HKSAR and Central Authorities. These developments
and considerations are likely to affect the autonomy of the HKSAR.

**Immigration from China**

Another way in which the HKSAR is maintained separate from the rest of
China is through rules for immigration and the movement between them.
The HKSAR authorities are authorized to apply its own immigration
controls on entry into, stay in and departure from the region (art. 154).
However, the control extends to foreigners, and it is not clear how far
similar controls may be exercised against Chinese nationals. The Joint
Declaration had provided that the entry into Hong Kong of persons from
other parts of China ‘shall continue to be regulated in accordance with
the present practice’ (Annex I, Part XIV). Under that practice, after a
daily quota had been agreed between China and the Hong Kong
administration, the Chinese authorities would issue the necessary permits
(in 1996 the daily quota was 150). The holders of the permit would then
be admitted by the Hong Kong immigration office. There is very
considerable demand among the mainlanders to settle in Hong Kong; and
some sort of control is necessary, as the legislation discussed next states,
‘in order to protect and maintain the economic prosperity and social
stability of Hong Kong’. We have already seen that, contrary to original
expectations, controls also apply to those persons on the Mainland who
are entitled to the right of abode in the HKSAR under art. 24(3).

In 1986 the State Council approved measures to control the movement
of nationals between Hong Kong and the mainland. 38 A Chinese national
has to apply to public security authorities for a permit to enter Hong
Kong, whether for a visit or settlement. Settlement is allowed only for five
specified reasons (art. 7):

1. the applicant has a spouse in Hong Kong from whom he or she has
   been separated for ‘many years’;
2. the applicant has an aged parent in Hong Kong who requires to be
taken care of by him or her;
3. the applicant, being young or elderly, depends on a relative in Hong
   Kong for care;

38 Provisional Measures for the Control of Chinese Citizens Entering and Leaving the
Regions of Hong Kong and Macau for Personal Reasons, which were based on art. 17
of the NPCSC Law of the PRC for the Control of Chinese Citizens Entering and Leaving
the Country (1985) authorizing the relevant departments of the State Council to formulate
rules governing for travel to or from the mainland to Hong Kong and Macau.
4. without the applicant his or her relative in Hong Kong would die without an heir; and  
5. the applicant has special circumstances for taking up residence in Hong Kong.

A decision has to be made within 60 days. A permit cannot be granted to a person who is engaged in litigation in China or is a suspect or accused in a criminal matter, is serving a sentence, undergoing reform through labour, or is deemed by the authorities ‘as liable to endanger national security or cause great losses to state interests on leaving the country’ (art. 13, referring in turn to art. 8 of the parent Law).

Under Hong Kong’s immigration law, it was necessary for those wishing to enter the territory to apply to an immigration office. In practice those who had been given a permit by Chinese authorities were admitted automatically. So effectively Hong Kong had no say on which persons or types of persons may be allowed (and so could not relate Chinese immigration to the needs of its economy or social policies, for example).

However it is not clear how far the Basic Law has in fact captured this system. Article 22 states that the number of persons from other parts of China who are accepted for settlement is to be determined by ‘the competent authorities’ of the Central People’s Government ‘after consulting the government of the Region’. This considerably reduces Hong Kong’s role in this decision as from the previous system. It is also provided that those wishing to enter Hong Kong ‘must apply for approval’, but it is not stated to which authorities the application must be made. As we have seen, under the previous system applications had to be made to both the Chinese and Hong Kong authorities, although in practice the Hong Kong authorities had little discretion. However, given that the general thrust of art. 22 is the preservation of the autonomy of Hong Kong, it may be assumed that the application must be made at least to its authorities. Under Chinese regulations discussed above, an application to leave the mainland for Hong Kong must be made to Chinese authorities. Presumably if an application is then made to the Hong Kong immigration office, it would have the discretion to say no. It remains to be seen how far this interpretation or the ‘previous practice’ would in fact prevail. It seems that before granting an exit permit, the mainland authorities refer the application to the Hong Kong immigration authorities.

Hong Kong ‘compatriots’ in China

Mention must finally be made of the special regulations which govern various aspects of Hong Kong Chinese on the mainland. In various
regulations, Hong Kong compatriots are treated as a special category, different from both local nationals and overseas Chinese. Under the State Council law mentioned above, they can travel freely to the mainland after they have secured a special passport, called Home Return Permit. However, if they wish to settle on the mainland, they must make a special application to the public security authorities of the place where they intend to settle. More importantly, they are treated as foreigners as regards special rights granted to foreign investors. There are separate rules for civil litigation, and in many ways Chinese courts treat Hong Kong cases as foreign-related cases. These rules were based on the reality that while under Chinese law Hong Kong Chinese are Chinese nationals, they had settled in Hong Kong which was under British administration. With the transfer of sovereignty, these special provisions may be reviewed, although the Chinese authorities have indicated that the privileged position of Hong Kong investors would not be affected (for a detailed examination of the differences in the treatment of Hong Kong compatriots on the eve of the transfer of sovereignty, in many respects a very technical area, see Finder 1996).

Institutions for Autonomy

Before turning to the political arrangements for the governance of the HKSAR, which are likely to have the major impact on the effectiveness of autonomy, I provide a brief summary of other ‘systems’ to establish the context. First the legal system, which is based largely on the previous regime; the foundation of the law is the common law and most former ordinances continue in effect in the new regime. In certain areas, particularly foreign affairs, national laws will also apply. The courts are independent and have extensive jurisdiction to review executive acts and to interpret the Basic Law (although as discussed below, the body for the final responsibility for its interpretation is the NPCSC). There is an independent legal profession. The Basic Law is itself supreme law within the region, and it is a function of the courts to ensure that the regional authorities act in accordance with its provisions. The ultimate responsibility for maintaining the boundaries between the Central Authorities and the region lies with the NPCSC, which it does in a variety of ways, including the review of legislation passed in Hong Kong and the interpretation of the Basic Law. The relationship between the HKSAR and the NPCSC is complex; successful implementation of the Basic Law depends on how well they are able to cooperate and how imaginative they are in the meshing of the legal rules and traditions of China and Hong Kong.
There are many guarantees of rights and freedoms. These are underpinned by provisions to implement locally the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and a number of labour conventions. There is also, as indicated in the previous section, a rich civil society, with the constitutional protection of non-governmental organizations, professions, educational authorities and religious organizations. All these provisions are intended to maintain the social system under the previous regime.

Hong Kong has its own executive and legislature in which are vested the executive and legislative functions of the region. They are to be staffed by permanent residents of Hong Kong, with senior posts held by those among them who are also Chinese nationals without a right of abode in a foreign state. The government is headed by the Chief Executive who is vested with very considerable powers, in an attempt to perpetuate the previous system of an ‘executive led political system’. The office of the Chief Executive is completely separate from that of the legislature. The Chief Executive has the power to veto legislation passed by the legislature, although the powers to initiate legislation lie largely with the Chief Executive. The Chief Executive also has the power to dissolve the legislature in case of conflict; the legislature cannot, however, remove the Chief Executive on a vote of no confidence, although it may initiate the process for his or her impeachment. The presence of national authorities in the region is limited; the Basic Law recognizes explicitly for this purpose only an office of the State Council for dealing with foreign affairs (art. 13) and the military garrison of the People’s Liberation Army (art. 14).

However, the Hong Kong institutions are neither fully representative of its permanent residents nor fully independent of the Central Authorities. The Chief Executive is appointed by the Central People’s Government after local elections or consultations, which are highly controlled processes designed to ensure the key influence of the Central Authorities in the appointment. The Central People’s Government can ignore the resolution of the legislature impeaching the Chief Executive. There are other ways too in which the Chief Executive is dependent on the CPG; the appointment or dismissal of all principal officials require the approval of the CPG, and the CPG may give instructions to the Chief Executive, to whom she or he is also accountable. The legislature consists of different kinds of membership, with a bias towards those elected in small constituencies principally by commercial and professional groups in an effort to slow down the mobilization of people and the democratization process. The rules for its procedure display a similar bias, perhaps in the expectation that these groups would support conservative and pro-China policies, and thus buttress a similarly oriented executive. This general bias in the institutional
organization is reinforced by specific rules which require the permission of the CPG for specific acts or policies of the HKSAR as well as the right to scrutinize and in certain cases to disallow laws passed in Hong Kong.

It is also possible that the Central People’s Government may wish to intervene in the relations between the Chief Executive and the legislature. In some respects it would be within its rights to do so. The Chief Executive must implement the directives issued by it in respect of ‘relevant matters’ (art. 48(8)) and he or she is also accountable to it (art. 43). I have already indicated that the division of powers between the Central Authorities and the HKSAR is far from clear, and that the former may claim the right to correct the HKSAR when it goes beyond its autonomy. Of the three principal Central Authorities, it is the CPG which has the most direct and extensive contacts with the HKSAR, particularly in relation to foreign affairs. Intervention by the Central People’s Government, if arbitrary or based on a narrow view of the powers of the region, could seriously undermine the autonomy of the region. Can it be protected against that?

The answer would depend on one’s view of the role of the NPC and its Standing Committee. The Basic Law was enacted by the NPC and the Standing Committee has been given key functions in holding the HKSAR to the scheme of the Basic Law, particularly the legal regime established by the Basic Law. But since the Basic Law also applies to mainland authorities, the NPCSC has the responsibility to ensure that they too (including the CPG) respect it. Its authority over the CPG is not spelled out in the Basic Law. For that we have to turn to the PRC constitution which authorizes the NPCSC to supervise the CPG (or the State Council, its other name) and to correct its incorrect or inappropriate directives and decisions (see Chapter 3). Presumably this authorization applies also in relation to the functions of the CPG under the Basic Law. Similarly, although the Basic Law makes no mention of the supervision by the NPC over its Standing Committee, one may assume that its general authority over the Standing Committee extends in relation to the Basic Law. If so, the NPC and the NPCSC would be umpires over the regime of the Basic Law and would hold the balance between the CPG and the HKSAR.

However, for two reasons the NPCSC may not be able to play that role. The first is that it may end up as partisan itself, particularly in relation to its central function as umpire — the interpretation of the Basic Law, for which it has the ultimate responsibility. However, powers to interpret provisions within the autonomy of the region are delegated to the courts of the HKSAR (art. 158). But whether jurisdiction on a particular matter belongs to these courts would depend on a ruling of the NPCSC. There may thus be some competition between the NPCSC and the courts.

Secondly, given the political system of the PRC, the State Council is in
practice more powerful than the NPC or its Standing Committee — in an inversion of the formal constitutional position which makes the NPC the organ of highest state power, and gives it the power to appoint and dismiss the Premier of the State Council. The real repository of power is the Communist Party of China; the senior members of the State Council are invariably senior members of the Party. The Communist Party played a key role in China’s policy towards Hong Kong in the colonial and transitional periods, and is likely to continue to do so.

Finally, it is necessary to qualify the earlier statement that the HKSAR has little control over the design of its institutional structures as it is given limited powers of initiative or actual amendment of certain provisions relating to the appointment of the Chief Executive and the election of the Legislative Council and its procedure — in a procedure different from that in art. 159. After the year 2007, it will be possible for the Legislative Council by the support of at least two-thirds of all its members, and the approval of the Chief Executive, to propose amendments to the method for the selection of the Chief Executive to the NPCSC (which makes the ultimate decision, Annex I, art. 7)). However, in the case of amendments in relation to the Legislative Council, all that is necessary is to report the amendments to the NPCSC for ‘the record’ (Annex II, Part III). At one stage during the drafting of the Basic Law, it seemed as if these changes could be initiated or effected by referenda, but this option was rejected (no doubt because it smacked too much of ‘democracy’). It is also worth noting that the region has no power to alter the formal relationship between the executive and the legislature, although undoubtedly the changes that are possible would alter the effective relationship between them.

**LEGAL FOUNDATIONS OF THE BASIC LAW AND THE AMENDMENT PROCESS**

Even if the above issues could be resolved satisfactorily, the constitutional status of the powers of the HKSAR will remain in doubt. The difficulties about the respective powers of the Central Authorities and the HKSAR are compounded by uncertainties about the relationship between the Basic Law and the Chinese constitution. The Basic Law is enacted on the authority of art. 31 of the Chinese constitution which gives a wide discretion to the NPC on the establishment and systems of a special administrative region. Unfortunately it has no provisions on various matters pertaining to the relationship between the legal instrument establishing
the region and the constitution (see the discussion in Chapter 2). On the face of it, several provisions of the Basic Law, such as the preservation of capitalism and the restrictions on the power of the NPC to amend the Basic Law, are inconsistent with the constitution (see the detailed discussion in Chapter 5). As has been stated in Chapter 2, the proposal during the drafting of the Basic Law that the constitution should be amended to assure the validity of the Basic Law despite these inconsistencies was rejected. Instead the NPC adopted a Decision that the Basic Law was constitutional.

While this may set aside doubts about the validity of the provisions of the Basic Law, it does not provide an answer to another difficulty that was perceived during the drafting of the Basic Law, namely what provisions of the constitution apply in the HKSAR. The proposal that the constitution should specify which of its provisions apply to Hong Kong was also rejected by the Chinese authorities. It is clear that some constitutional provisions do apply in Hong Kong, e.g., about the powers and composition of the Central Authorities (but even here there are doubts about the precise scope).³⁹ In the absence of a clear answer to the question, it would always be open to the Central Authorities to invoke the plenary powers of the NPC (or the powers of other central institutions) under the constitution to exercise authority in Hong Kong outside the framework of the Basic Law (as in the decision to set up a Provisional Legislature). There would appear to be no effective way in which the HKSAR can challenge such assertions of authority; they would be outside the provisions of the Basic Law and it may be that they could not be questioned under it (although the ordinances of the provisional legislature may be challenged in the Hong Kong courts). There appears to be no method of challenging the assertion of jurisdiction by the NPC under the constitution, while other institutions are subject to political rather than judicial controls.

In addition there may be problems about the status of the Basic Law vis-à-vis other organic or basic laws adopted by the NPC. Theoretically they be regarded as being on a par with the Basic Law, so that a subsequent Law would impliedly repeal the Basic Law (and indeed it has been so argued, see Chapter 9 for further discussion). The status of the Basic Law and its relationship to the PRC Constitution and the Central Authorities were raised on 3 July 1997, on the first sitting day of the courts after the resumption of sovereignty. The courts decided to answer these questions in a challenge to the validity of the provisional legislature (HKSAR v Ma

³⁹ A colourful analogy was provided by a Chinese member of the BLDC that the constitution was like the sun and the Basic Law like an umbrella; the constitution applied outside the shade provided by the Basic Law (Consultative Committee for the Basic Law 1988: 4.7.4). This formulation seems to make the Basic Law the controlling document, but a study of the Basic Law shows that this alleged answer merely restated the question.
The issue was whether the common law and indictments under the previous regime survived the end of British sovereignty. As important constitutional issues were considered to arise, the matter was referred by the District Court to the Court of Appeal. The case could have been disposed off without going into the validity of the provincial legislature (which had passed legislation continuing the common law and previous indictments, see Chapters 8 and 9), but the Court of Appeal chose to pronounce on it. It was contended by the respondents that the NPCSC had no authority to establish a legislature that did not conform to the terms of the Basic Law. Although the court held that the provincial legislature was within the terms of the Basic Law and the relevant NPC Decisions at the time of its adoption, it considered also whether, on the assumption that it was not sanctioned by the Basic Law, it could be validly established by the NPCSC. The events leading to the formation of the provincial legislature are described in Chapter 7. In essence the question was whether the NPC or the NPCSC could authorise a procedure and a legislature which did not conform to the provisions in the Basic Law for the first legislature of the HKSAR.

The Court recognised the multiple status of the Basic Law, as implementing an international treaty, serving as the constitution of the HKSAR and dealing with HKSAR’s relations with China (per Chan CJHC, who called it ‘the most important piece of law in the land’ (p. 325). Nevertheless it held that the NPC or bodies authorised by it could do whatever it wished, even if they were against the Basic Law. It was prepared to hold that even if the act by the subordinate body was against the Basic Law and was not authorized by the NPC, it would be rendered lawful by the subsequent ratification by the NPC (however oblique the ratification, as in this case). The HKSAR courts had no jurisdiction to question any acts of the NPC or its subordinate bodies. The decision on the question of the jurisdiction of the HKSAR vis-à-vis the acts of the NPC was based on the assumption that regional courts cannot question the acts of central authorities. It was also based on a specific reading of art. 19 of the Basic Law which provides that the jurisdiction of the HKSAR courts is qualified by restrictions that applied previously. The court held that just as during the colonial period, the Hong Kong courts could not question acts of the sovereign (i.e., the British Parliament or the government), they could not now question the PRC.\footnote{No clear authority was produced to show that colonial courts could not question acts or regulations of the British government. Indeed there is considerable authority to the contrary. See an expert opinion submitted by the author to the Court of Appeal in Cheung Lai Wah (on file with the author).} If the judgment
stands, it would mean that there is no legal protection against any infringement of the Basic Law by the NPC and its bodies. It amounts to saying that the HKSAR has no guarantee of autonomy.

In the judgment there is no explicit discussion of the relationship between the Basic Law and the PRC Constitution. However the court’s decision was based on the status of the NPC ‘as the highest state organ of the PRC which is the Sovereign of the HKSAR’ (Chan CJHC at p. 340). The NPC’s status as the highest state organ of the PRC of course derives from the PRC Constitution (art. 57). But there is no authority for the proposition that the PRC is the sovereign of the HKSAR. This suggests a colonial relationship, while the truth is that the HKSAR is part of the PRC. The relationship between the HKSAR and the Central Authorities as well as between the PRC Constitution and the Basic Law can only be established by a detailed and painstaking analysis of these two instruments and the history and purposes of the principle of One Country Two Systems which underlies the Basic Law.

Among the factors that the court did not take into account was the Decision of the NPC of 4 April 1990 declaring the Basic Law ‘constitutional’ and therefore presumably governing the validity of all acts in Hong Kong. The NPC did not reserve to itself any powers outside the framework of the Basic Law and indeed clearly provided that only those national laws which satisfied the criteria established in art. 18 of the Basic Law would apply in Hong Kong.

Nor did it take into serious consideration the provision in art. 159 for the amendment of the Basic Law. The Basic Law can be amended by the NPC (art. 159). No majority is specified, so a simple majority would be sufficient. Proposals for an amendment may be made by the NPCSC, the State Council or the HKSAR. Proposals from the HKSAR can only be made if they have the support of two-thirds of Hong Kong deputies to the NPC, two-thirds of the Legislative Council, and the Chief Executive. No procedure is established for this process (other than that the proposals have to be submitted by Hong Kong deputies of the NPC); presumably the initiative could come from the Legislative Council (despite the rule in art. 74 that its members cannot propose a law relating to political structure or the operation of the government, for which see Chapter 7). However, there is no provision for consultation with any institution (much less the people) of the HKSAR if the proposal originates with the NPCSC or the State Council.

This scheme might suggest that, unlike most regimes of autonomy which provide for the participation of the region in the process of amendment, there is no effective constitutional guarantee for the autonomy of Hong Kong. However, there are two safeguards against amendments
which significantly diminish the autonomy of the region. First, proposals for amendment have to be referred to the Basic Law Committee for its views before they can be presented to the NPC. The basis on which the Committee considers the proposals is not specified (see Chapter 5); presumably one of its primary functions is to examine the legality of the proposals (all of its functions are related to the making of a legal type decision by the NPC or the NPCSC).

Secondly, art. 159 states that no amendment to the Basic Law ‘shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong’. This is a very substantial limitation on the powers to amend the Basic Law. For the most authoritative statement of the basic policies, one has to turn to the Joint Declaration, as is acknowledged in the preamble to the Basic Law itself. The Basic Law restates the basic goals in Chapter I (General Principles, but not comprehensively). As has been indicated in Chapter 2, the scheme of the Joint Declaration is that the broad principles of the basic policies are set out in the main text, while their elaboration is provided in Annex I. These together constitute the basic policies (the preamble of the Basic Law refers to the Joint Declaration where the basic policies have been ‘elaborated by the Chinese Government’). Under this view, most provisions of the Basic Law would be covered by the basic policies — and for that reason would be unamendable.

Even if the view were taken that only the core of the basic policies is preserved in this way (and how the core is to be determined is extremely difficult), art. 159 makes clear at least that no legislation (organic laws) by the NPC can supersede the Basic Law unless it has followed the procedure outlined above. But there remains of course the more fundamental difficulty of determining whether an amendment which follows the procedure is nevertheless invalid for contravening the basic policies. The only mechanism for this determination under the Basic Law is the power of interpretation of the NPCSC, which can scarcely be expected to overrule its parent body, the highest source of formal power in the land.

There are signs that the courts may be trying now to claw back some of its doctrines in Ma. An opportunity for this was presented when the legality of the provisional legislature was raised again in Cheung Lai Wah. The Court of Appeal, although it consisted of the same judges as in Ma, agreed to hear the issue again. There is evidence that the courts are trying to elaborate the distinctive status of the Basic Law. They have assumed, without argument, that the HKSAR courts have the jurisdiction to determine the constitutional validity of laws, relying on art. 11 of the Basic Law. They have struck down legislative provisions which contravene the Basic Law. They have invoked the rights and freedoms provisions and in particular recognised the superior status of the ICCPR through art. 39.
In this way they have emphasised the moral values implicit in the Basic Law. They have also attempted to protect the Basic Law from erosion by national laws, unless the national laws are applied under the framework of art. 18 (in which case they would presumably test their validity against the Basic Law).

In Cheung Lai Wah, in denying the argument of counsel for the government that courts should uphold the requirement of affixing the Certificate of Entitlement to a travel document as recognition and respect of the law of the Sovereign, Nazareth LJ said, ‘What he contends for could result in denying recognition and respect to the very law enacted by the Sovereign inter alia to regulate the application of the laws of the Mainland to the HKSAR, i.e., the Basic Law’. He referred to the scheme in art. 18 of the Basic Law for the application of national laws, and drawing, albeit tentatively, that ‘there is no room for application of such laws otherwise than in the manner provided’ (pp. 655). They have also refused to dilute rights guaranteed under the Basic Law by agreements between Britain and China in the JLG as in Cheung Lai Wah (see Chapter 5).

However, courts have been unwilling fully to explore the implications of the Basic Law for all purposes and tend to rely too much on previous ‘precedents’, e.g., as regards the scope of art. 19, or the necessity of exit permits for those covered by art. 24(3) of the Basic Law, or the Chief Executive’s ‘prerogative power’ to regulate the public service (see Chapter 7). They have yet to overcome their fear of ‘sovereignty’.

CONCLUSION

I attempt in conclusion to place the scheme of the Basic Law in the general categories of constitutional autonomy, through the comparative method to draw attention to some of its salient features. To determine where, if at all, the regime of the Basic Law falls within current categories of spatial devolution, it is useful to advert to the various possibilities for this and their typical features. At one end is a confederation, where the centre is a coordinator of some specific functions and at best a forum for some decision making, with key state powers retained by its constituents, including the right to withdraw from it (Forsyth 1981). Confederation is rare now, with the Commonwealth of Independent States a contemporary example; earlier instances are confederations in Switzerland and what is now the USA.

The next category is federation when a country is divided into a number of constituent units (variously called states, provinces or regions).
Certain powers are vested in the national or central government and others are vested in the governments of the units (henceforth ‘regions’), each government being supreme within its own prescribed fields. The existence of the regions and their institutions and powers are provided and guaranteed in the constitution, which cannot normally be amended without the participation of governments or people at the centre as well as the regions. An independent institution, usually the judiciary, settles disputes about powers and jurisdictions of various governments, frequently as part of its normal functions of interpreting and applying the law (Wheare 1963; Elazar (ed.) 1984).

Another concept is ‘autonomy’. A federal system provides a measure of autonomy for the regions, but the expression ‘autonomy’ usually refers to constitutional arrangements whereby one or more parts of the country enjoy special powers not available to other parts (and which are exercised by the national government in relation to them). In this sense autonomy can exist in a federation when a region has more powers than other regions (as Quebec in Canada or Kashmir in India); these arrangements are sometimes referred to as asymmetrical federations. Autonomy is sometimes used to refer also to arrangements where powers are given to all the regions equally but the constitutional or legal protection of these powers is not absolute, and their maintenance may depend on the national government, such as in Papua New Guinea (Ghai and Regan 1993) and Sri Lanka (Bastian (ed.) 1994). Sometimes these arrangements are also called ‘devolution’. But the more usual situation of autonomy is where the country may be largely unitary but some part of its enjoys a special system which is protected by the constitution (examples being Zanzibar in relation to Tanzania, Åland in relation to Finland, and Greenland in relation to Denmark). In both federalism and autonomy each region enjoys a significant measure of powers to determine and execute policies for the region (for several case studies, see Dinstein (ed.) 1981 and Hannum 1990).

Next are a variety of arrangements which are referred to as ‘decentralization’. Sometimes decentralization is merely administrative, when a measure of responsibility for specified decisions is vested in field officers of the national government posted to the regions (the classic case of this being the French prefecture). Sometimes the field officers are required to consult with local advisory bodies, but qualitatively different are arrangements whereby field officers take orders from local representative institutions. The latter category differs from ‘devolution’ or ‘autonomy’ only in the lesser degree of legal protection for regional powers as well as in the absence of a substantial public service employed by and accountable to the regional authorities (Cheema and Rondinelli 1984).
As will be obvious, these categories are not exclusive and often a firm distinction is hard to make. It is difficult to draw distinctions additionally because legal provisions may not be a sufficient guide to practice; and it is possible in a tolerant and pluralistic society that even decentralization may give the local population more opportunities for making policies (and exacting accountability from government) than devolution in a state which has strong centralizing tendencies. Moreover, in all these instances the national constitution provides the fundamental values (normally in the shape of a bill of rights and directives of state policies) which are binding on all governments (although the Canadian constitution gives provinces limited powers of opting out of some of them). These arrangements cannot survive unless there is a broad acceptance of certain core political and moral values.

On the other hand, a part of the justification for spatial distribution of powers is to enable regions to accommodate and encourage diversity and pluralism, especially when these are connected to differences in race or culture. In these circumstances, the integrative force of the economy, through either a free market or a command economy, is particularly important; and indeed in federal or other devolutionary arrangements in countries with market economies, a great deal of jurisprudence has developed to maintain and strengthen the national market by removing regional barriers to the movement of capital, labour and goods. It will be clear from an examination of the regime of the Basic Law that it has certain similarities to as well as differences from, the frameworks which have been sketched here, and that it has certain distinctive features of its own.

The primary purpose of the Basic Law, which is to preserve a particular kind of economic and political system in Hong Kong, differs from other instances of autonomy. Autonomy is secondary, and is contingent on the other, larger aim. This is not to deny that the majority of the people would support such a system or that within it there is not considerable scope for policy, but it highlights the fact that several powers of the HKSAR which are characteristic of sovereign powers are included in the Basic Law only because they were considered essential to the maintenance and functioning of the economic system of Hong Kong. This factor points to an important distinction between autonomy in Hong Kong and almost anywhere else: the purpose of autonomy elsewhere is to safeguard religious or ethnic traditions of a minority (India, Sri Lanka, Cyprus) or to accommodate a pre-existing sovereign entity (as in older classical federations or Zanzibar in Tanzania). In these circumstances the provisions on economy are less important than those on culture, religion, education, and political institutions of self-government, as well as the participation
of the autonomous unit in national government. The moral basis of autonomy is weak if its justification is economic, unlike religion, culture, or ethnicity (especially as the economic paradigms of the two parts of China converge increasingly). However, from the point of view of the people of Hong Kong, the basis for autonomy is more than economic; it is also different political and cultural values, and indeed on a distinctive Hong Kong identity. But the pervasiveness of ‘Chineseness’ weakens the identity argument; and it will be increasingly hard to advance it when there is such an emphasis on ‘compatriotism’ (with its ambiguities), and the distrust in Beijing of regional differences.

There are other ways too in which the mainland-HKSAR relations differ from other autonomy arrangements. The first is that the two parts are driven by quite different values. The basic normative values of the mainland, those of socialism, are explicitly excluded from their application to the HKSAR, while the mainland is sedulously insulated from values recognized in the Basic Law — fundamental rights of speech and association, democracy and public accountability, a civil society and a private economy.

Secondly, normally once powers are given to a region, their exercise is largely a matter for it, subject to broad national principles like a bill of rights or the preservation of a national market. In the exercise of its considerable powers, the HKSAR is, however, circumscribed in several ways indicated above. Indeed we note a curious paradox here: HKSAR has more powers than any autonomous region or federal unit, but their exercise will be subject to closer scrutiny and supervision than powers elsewhere. Similarly, although the HKSAR will have its own institutions and they are for the most part separate from the central institutions, regional institutions will have much less autonomy than in most other arrangements. Yet the national authorities have no power to make laws directly for Hong Kong, and in the limited scope for national laws, the modality of their application is regional enactment or promulgation. Nor does the mainland have any administrators in the region, except for defence and foreign affairs matters. The paradox is only partly resolved by saying that the real purpose of the Basic Law is the preservation of ‘Two Systems’ and not autonomy as such.

Thirdly, various other features follow from the separation of ‘systems’: no common currency, no common taxation or fiscal transfers, separate foreign economic relations, including the membership of international organizations, separate systems of laws (not comparable to say, the French based civil law in a largely common law Canada as the underlying basis of the laws are fundamentally different here), no free internal mobility of citizens across the boundary between the two parts.
Fourthly, there is no independent machinery for the settlement of disputes between the two entities or the interpretation of their legal relationship. In most autonomous arrangements, these matters are left to courts, and even if the final court is appointed by the centre, strong traditions of independence of the judiciary serve to ensure that each side gets a fair hearing and that decisions are unaffected by bias in favour of one or the other side. Under the Basic Law the final interpretations are made by the Standing Committee of the NPC — as political and controlled body as one can find. One of the contestants is also the umpire. Except that the Central Authorities would not dignify the HKSAR by regarding it as contestant, for that might imply a measure of autonomy that it refuses to acknowledge in the HKSAR. So the curious blend of substantive powers and little institutional autonomy, of being treated in some respects as a local authority which needs to be constantly guided and supervised and in others as a quasi-sovereign, is unique and poses not inconsiderable problems in trying to fit One Country Two Systems in hitherto recognized categories of autonomy or decentralization.

These negative points notwithstanding, the HKSAR starts off with the advantage that it has a well developed system of economy (with considerable financial resources), law and administration, a vibrant civil society, a large legal profession, an influential business community, variegated international contacts, and significant foreign involvement. This compares very favourably with other contexts where the systems of autonomy had to be built through the disaggregation of highly centralized administration (as for example in Kenya, Uganda and Papua New Guinea on their independence). Another asset may be the usefulness of Hong Kong to the mainland, which may counsel respect for its autonomy. The very fragility of the economic prosperity of Hong Kong (and the ability of its entrepreneurs to move out of Hong Kong) may likewise promote self-restraint on the part of the mainland authorities. The very vulnerability of Hong Kong may thus become its strength. But this form of speculation itself shows that many people are uneasy about the lack of both the clarity and security of the law.

A clear and imaginative idea, that of One Country Two Systems, has been blurred and confused in the process of its translation into law. Nor has the law provided a sufficiently secure foundation for whatever autonomy can be gleaned from its provisions. However, it is unclear how far formal, legal provisions will determine the effective relationship between the Central Authorities and the region or the autonomy of Hong Kong. It will require very considerable change of philosophy and habits on the part of the Central Authorities to accept the Basic Law as ‘hard law’ with the capacity to govern relationships that are widely perceived by them as
between a sovereign entity and a local administration. So it is not improbable that Hong Kong’s autonomy will be contingent upon the same vagaries of pragmatism as led to its conception. Much will depend on political and economic developments on the mainland, the politics concerning Taiwan, the utility of Hong Kong, and the tactics of concessions that marked the period of the transition to Chinese sovereignty. New instruments of influence and control have emerged, independently of the Basic Law, which may have more potency than the legal regime of One Country Two Systems. These factors are compounded by the context in China of rapid change, fluidity of policies, diminishing legitimacy of the Communist Party and the government, and the uncertainties of succession, in which the resumption of sovereignty is taking place.
CHAPTER FIVE

Interpretation of the Basic Law

THE IMPORTANCE OF INTERPRETATION

Nowhere are the unique characteristics (and consequent contradictions) of the Basic Law as an enactment of the socialist, civil law oriented and somewhat authoritarian People’s Republic of China, for the purpose of safeguarding capitalism and preserving of the common law, more evident than in its provisions for interpretation. They are manifest both in the institutions for and in the approach to and procedure for interpretation. The importance of the question of the interpretation of the Basic Law arises in part from its status as a kind of fundamental law. Article 11 provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law. The Basic Law is a detailed document, with several (and frequently vaguely worded) normative provisions which limit the competence of the legislature and the executive of the region. Furthermore, the Basic Law establishes the relationship between the Central Authorities of the People’s Republic of China and the HKSAR; some of these provisions are obscurely worded, necessitating their elaboration through interpretation. The precise demarcation of powers between the Central Authorities and the HKSAR is uncertain, and yet the operation of many provisions of the Basic Law depends on a clear understanding of the division of powers. A crucial task of interpretation must be to maintain the boundaries between the economic, social and political systems of the HKSAR and the rest of China.

The interpretation of the Basic Law also play’s a key role in determining how much of the existing law of Hong Kong is received into the HKSAR and therefore how ‘complete’ a system it has (for the reception is subject to compatibility with the Basic Law, art. 8, and the NPCSC has been
given explicit authority in art. 160 to determine, on the establishment of the HKSAR, which existing laws contravene the Basic Law). These decisions, and the approach and method of interpretation generally, will have a significant effect on the continuity of laws and obligations as well as on the political and economic systems and prospects of Hong Kong.

Interpretation will also have a profound effect on the role and independence of the HKSAR courts. The exact extent of their constitutional jurisdiction is unclear, and a narrow interpretation would detract from what has increasingly become one of their major functions in Hong Kong. Similarly many reversals of their rulings by the NPCSC would damage their prestige and consequently perhaps their independence. If the primary mode of interpretation is administrative or political as opposed to judicial or quasi-judicial, this will derogate from the authority of the HKSAR courts. Connected with this factor is the centrality of the rule of law in determining the competence of the HKSAR institutions and their relationship with the Central Authorities.

The mode of interpretation could play a key role in the integration of the laws of the mainland and the HKSAR. By and large the Basic Law separates their laws. The separation is also enhanced by the fact that the laws on the mainland are in the civilian tradition while those of the HKSAR are in the common law tradition — with both doctrinal and institutional implications. Although the PRC has gradually moved away from its socialist economic laws and its new economic laws are increasingly influenced by common law approaches, differences of method still persist. The Basic Law provides relatively few points of intersection, one of them being the accommodation of certain national laws within the legal regime of the HKSAR (art. 18). A major point of intersection occurs in the provisions for the interpretation of the Basic Law, on which the principal article is 158. It is clear that the two systems of law cannot continue to co-exist in isolation for ever, and it may fall to the mode of interpretation to harmonize them in specific instances. The influence may also be in method, and it may be here that the HKSAR practices will have a significant impact on the mainland.

For a variety of reasons, the task of the interpretation of the Basic Law is unlikely to be easy. As is discussed in detail below, the jurisdiction to interpret the Basic Law is divided between the HKSAR courts and the NPCSC (within the overarching authority of the latter). The HKSAR

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1 Albert Chen (1996a) has argued that the Chinese legal system is moving into the Romano-Germanic family of legal systems and that some of the fundamental concepts introduced by legislation in recent years can only be properly understood in the civil law tradition and are wholly alien to lawyers trained in the common law tradition.
courts will be common law courts and are likely to bring to the interpretation of the Basic Law the approaches of the common law to constitutional interpretation. The NPCSC is likely to adopt methods that it uses in the interpretation of the Chinese constitution and legislation (as mandated under the Chinese constitution, art. 67(1)). This is unlikely to promote harmony of interpretation. These differences are already evident from the decisions of these bodies.

A fundamental question to be resolved is the provenance of the Basic Law: whether it is to be treated as Chinese law requiring the application of Chinese rules of interpretation or as an instrument embedded in the common law given that the underlying law of the HKSAR will be the common law. Many differences of approach and meaning may arise from this duality. This point may be illustrated by reference to the requirement that certain rights and freedoms of residents may only be restricted in accordance with the law — as in art. 31 in relation to the right to leave Hong Kong or more generally in art. 39. There is now a well-developed understanding of what is meant by ‘law’ for this purpose, which is adhered to by many common law courts as well as international tribunals, and has been adopted in Hong Kong in the interpretation of the Bill of Rights Ordinance (*R v Sin Yau-ming* (1991) 1 HKPLR 88). It means that the law must be reasonable, rational and proportional to the purpose of the restriction. It is not clear that China adopts a similar approach to the concept of ‘law’. It may well be that some parts of the Basic Law will more sensibly be interpreted according to the common law (particularly those concerned with economic questions or rights and freedoms) since they have to be read in the context of common law doctrines and legislation, while others may be subject to Chinese rules of interpretation (as with provisions respecting matters within Chinese responsibility or applied national legislation). This proposed solution is not without its difficulties and it is clearly necessary for the coherence of the Basic Law that some uniform and fundamental principles of and approaches to interpretation be adopted.

In a fundamental sense, interpretation is necessary to ‘complete’ the Basic Law, to explicate its reach and parameters. Mention has already been made of the need to establish what body of ‘previous laws’ is to form part of the laws of the HKSAR and to determine what precisely is

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2 Would the Interpretation and General Clauses Ordinance of Hong Kong apply to the interpretation of the Basic Law? In theory, the answer must be in the negative as the Basic Law is Chinese legislation (yet many of the terms used in the Basic Law are derived from the laws of Hong Kong). There appears to be no Chinese counterpart of the ordinance.
the role of the NPCSC in this process. The significance of art. 39 (regarding the impact of international human rights instruments mentioned there) which has already become a matter of great controversy, must be clarified as the regime of the protection of rights and freedoms depends on it. Another area where clarification is crucial is the scope of the application of the PRC constitution or the powers of the NPC in the HKSAR (on which hang, for example, questions of the legality of the provisional legislature).

The vagueness of the language of the Basic Law does not help to tackle these tasks, and this very vagueness necessitates a purposive approach to interpretation. I have discussed in the previous chapter the difficulties of determining the division of power between the Central Authorities and the HKSAR. A related difficulty lies in the ambiguity of the concept of the ‘Relationship between the Central Authorities and the HKSAR’ which is central to the jurisdiction of the NPCSC and the legislative and executive powers of the region. Nowhere is this concept defined, although Chapter II of the Basic Law carries this expression as its title. It cannot be the case that every provision under it constitutes an element of this relationship. The executive, legislative and judicial powers of the HKSAR are provided for in this chapter; so if the scope of these powers in all respects was to be determined by the NPCSC, little would be left of regional autonomy, and the courts would be denuded of most of their constitutional jurisdiction. That this conclusion cannot have been intended is obvious from art. 17 (which appears in Chapter II of the Basic Law), as it restricts the NPCSC scrutiny of the legislation passed by the HKSAR legislature to specific matters, as well as from the scheme of art. 158.

A further example is a series of provisions which refer to previous laws or practices in Hong Kong. Illustrations are art. 5 which says that the previous capitalist system and way of life (themselves complex concepts) will remain unchanged for 50 years; art. 8 states that laws previously in force shall be maintained; restrictions on the jurisdiction of Hong Kong courts previously in force shall be maintained (art. 19); the previous system of advisory bodies shall be maintained (art. 65); the tax legislation is to take ‘the low tax policy previously pursued in Hong Kong as reference’ (art. 108); and welfare policies are to take as their ‘basis’ the previous social welfare system (art. 145). It is clear that not all references to ‘previous’ laws or systems serve the same purpose — some act as guidance, others are more binding, yet others offer a measure of flexibility. The wording may provide some help in interpretation, but even more compelling may be the context and the underlying premises of the Basic Law. Fraught as many of them are with political connotations, the task of interpretation is not easy.
THE NECESSITY OF INTERPRETATION

It may be useful to recapitulate briefly the circumstances in which the Basic Law would have to be interpreted. The Basic Law mentions some specific instances. The first occasion will be on the establishment of the HKSAR, when the NPCSC had to determine which existing laws are inconsistent with the Basic Law and therefore lapse (see below). It does not mean, however, that any existing law not so identified at the time of the resumption of sovereignty is given a clean bill of health, for it is provided in art. 160 that if ‘any laws are later discovered to be in contravention of the Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law’. It is not absolutely clear what this procedure is. The most likely interpretation is that the article refers to a compendium of procedures under the Basic Law. The NPCSC is given no powers to repeal previous laws except at the time of the transfer of sovereignty. If the question of the validity of a previous law arises subsequently, it would have to be dealt with under art. 158. If doubts about the validity of the law arises from its inconsistency with a provision of the Basic Law which deals with the responsibilities of the Central Authorities or their relationship with the HKSAR, the determination would be made by the NPCSC; for inconsistency with other provisions, the determination would be made by the HKSAR courts (see below for a detailed analysis of art. 158). However, neither the NPCSC nor the HKSAR courts have the power to amend the law (beyond a declaration of invalidity), and if their determination requires the reformulation of the law, it would be for the HKSAR legislature to do so.3

A second instance is when a law passed by the HKSAR legislature is presented to the NPCSC in accordance with art. 17. The NPCSC has to decide whether the law is in ‘conformity with the provisions of this Law regarding affairs which are within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region’. If it is not in conformity with the Basic Law, then it may be returned to the HKSAR without amendment and thereby invalidated as from that moment. It should be noted that the NPCSC has to make at least two, if not three, determinations under this article. It has first to decide that the law falls within one of the two categories mentioned; and it has then to decide whether it is compatible with the Basic Law. These are both

3 However, as I show below, the NPCSC, acting under art. 160, has amended some previous laws in addition to declaring others invalid. Effect has been given to the terms of the NPCSC Decision by legislation of the HKSAR, principally the Hong Kong Reunification Ordinance 1997 (which is discussed in detail in Chapter 9).
questions of interpretation. The third determination, if it exists, is more of a policy question. As it appears in the English translation, the NPCSC has a choice whether or not to declare the law invalid if found to be inconsistent, so that it may authorize it even in these circumstances. A nice question would arise if the NPCSC authorized it and its legality were subsequently questioned in the courts. Article 11 says that all laws must be consistent with the Basic Law, but the ultimate power to decide whether a law is consistent with it, especially in the two categories mentioned here, belongs to the NPCSC. Having allowed such a law to stand, could it then later hold that it is inconsistent with the Basic Law and therefore void? Just to pose the question like this suggests that the better interpretation is that the NPCSC has no option under art. 17 but to declare the law invalid.

A specific act of interpretation is also required when a national law is to be applied in the HKSAR. An initial list of national laws to be applied in the HKSAR appears in Annex III. Additional laws may be added to the list but only if they relate ‘to defence and foreign affairs as well as matters outside the limits of the autonomy of the region as specified by this Law’ (art. 18). It is interesting to compare this formulation of the demarcation of jurisdiction with that used in art. 17 discussed above — here there is a specific reference to defence and foreign affairs, and a phrase which occurs for the first time in documents relating to Hong Kong’s future status, ‘matters outside the autonomy of the region’ (as discussed later, there is no substantial difference.)

A fundamental issue of interpretation would also arise in the event that the Basic Law were to be amended. It is unnecessary for the purpose of this chapter to go into the details of the amendment procedure (which is established by art. 159 and is discussed in Chapter 4) — it is sufficient to state that the amendments are made by the NPC. The scope of permitted amendments, however, raises a question of interpretation which must be pursued here. The ability to amend the Basic Law is governed by the last paragraph of the article which says that ‘No amendment to this Law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong’. These basic policies were first formally enunciated by the PRC in the Joint Declaration and a general statement of some of these policies is to be found in Chapter I: General Principles, of the Basic Law. The Preamble of the Basic Law contains an explicit reference to the basic policies of the PRC towards Hong Kong set out in the Joint Declaration. These policies, especially as elaborated in Annex I of the Joint Declaration, are pervasive and touch upon most facets of life in Hong Kong. Indeed in one sense one can say that the whole of the Basic Law is an implementation of the basic policies — a position which finds support in its Preamble. The task of determining what provisions of the
Basic Law constitute basic policies is therefore a difficult one — but also fundamental, for on it rests ultimately the security for the HKSAR of its autonomy and distinctive way of life.

Apart from these specific instances, the need for a formal interpretation would arise in the course of litigation when a provision of the Basic Law is involved. The initial responsibility lies with the HKSAR courts but, in relation to certain provisions, the matter must subsequently be referred to the NPCSC for a ruling (art. 158). It is also possible for the NPCSC to interpret any provision of the Basic Law in the absence of litigation (presumably if it considers that its meaning needs to be clarified, art. 158).

**THE SCHEME FOR INTERPRETATION UNDER ART. 158**

**Institutions Responsible for Interpretation**

In one sense all kinds of people have to interpret the Basic Law: civil servants and other administrators and lawyers in their day-to-day work, legislators to ensure that their legislation and motions are consistent with it, the State Council, the NPCSC, even private parties since some provisions affect private acts. Questions of interpretation will arise in the courts as particular laws and policies are challenged. Almost any provision of the Basic Law could become the occasion for an interpretation, and some might raise sensitive questions of the relationship between the HKSAR and the Central Authorities (e.g., as to whether circumstances justifying the application of emergency laws of the mainland exist, art. 18). Here we are concerned with institutions which have the authority to make formal and binding rulings on interpretation. Some indication has already been given of the formal occasions when the NPCSC would have to interpret the Basic Law. It is now time to turn to art. 158 which is the principal provision on interpretation. This is a complex provision which itself raises several acute problems of interpretation.

Article 158 divides the responsibility for interpretation between the NPCSC and the HKSAR. A third body, the Committee for the Basic Law (‘CBL’), assists the NPCSC whenever it has to interpret the Basic Law (except on the review of previous laws on the transfer of sovereignty). The general structure and role of the NPCSC has already been examined in Chapter 3, while the HKSAR courts are discussed in Chapter 8. The CBL was established by a Decision of the NPC taken at the same time as the adoption of the Basic Law; its functions are also specified in the Basic
Law itself. The CBL is a major modification of the Chinese system of interpretation as it applies in Hong Kong. It is a concession to ‘One Country Two Systems’; more specifically, an attempt to marry two different legal traditions. A committee of the NPCSC, it consists of twelve members, six each from the mainland and the region, and includes those legally qualified; the appointments are for terms of five years. The Hong Kong members are nominated jointly by the Chief Executive, the President of the Legislative Council and the Chief Justice of the Court of Final Appeal (CFA) for appointment by the NPCSC (no provision is made for the nomination of mainland members; presumably they are appointed directly by the NPCSC itself; how the committee works would depend greatly on who its mainland members are). Of the HKSAR members, only three are lawyers, of whom one is an academic, another an official with considerable experience as a private practitioner, and a politician who played an important role in the PWC and the PC. Others are politicians and business persons. On the Chinese side, there are two academic lawyers, who have been involved in the resumption of Chinese sovereignty since the negotiations on the Joint Declaration (one of whom is also a member of the NPC), two officials (including one from the HKMAO) and and three from the NPC (including the Chairman of the NPCSC).

Its function is to advise the NPCSC on questions involving the interpretation of the Basic Law, specifically on the determinations under arts. 17, 18, 158 and 159 (in all these cases the NPCSC being required to consult with the CBL before making its decisions). No role is assigned to the CBL in relation to the determination by the NPCSC of the validity of previous laws at the establishment of the HKSAR since it does not come into existence until after that date.

Neither the NPC Decision setting up the CBL nor the Basic Law specifies the functions of the CBL when consulted in this way. The Decision merely states that its function is to ‘study questions’ arising from the implementation of these articles, while the Basic Law merely says that the NPCSC has to consult it before giving its own decision or interpretations. Presumably the CBL was established to assist the NPCSC in a task for

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4 There is some ambiguity about whom the CBL advises on proposed amendments to the Basic Law. Article 159 merely says that before a bill for amendment is put on the agenda of the NPC, the CBL ‘shall study it and submit its views’, which suggests that the views are to be presented to the NPC directly. However, the NPC Decision establishing the CBL provides that its views under art. 159 as under other articles is to be submitted to the NPCSC.

5 In practice the NPCSC was assisted by the Hong Kong and Macau Affairs Office of the State Council, which in turn was assisted by the Preliminary Working Committee and the Preparatory Committee.
which the NPCSC might have been considered not fully qualified. Accordingly, the CBL could serve a number of functions. Its members from Hong Kong would provide views of the HKSAR on matters under consideration. The intention behind the CBL (whose establishment is owed to the initiative of Hong Kong drafters) was to safeguard competencies, institutions and relationships established by the Basic Law and consequently to protect regional autonomy through the rule of law. It was also to provide a mechanism to fashion a new jurisprudence, straddling or linking diverse legal traditions. But there is no indication that its task is confined to advice on legality, for only some of its members need be professionally qualified. It may also become involved in questions of the desirability of particular decisions, e.g., as to the extension of a national law or a proposed amendment to the Basic Law. In other areas, there is no scope for such judgments, since the NPCSC has to act in accordance with the provisions of the Basic Law, dealing with the division of powers.\(^6\)

In principle, it is undesirable that the CBL should become involved in these wider questions; they are matters of policy which are best dealt with in direct negotiations between the central authorities and the representatives of the region. Such broad issues would tend to politicise its work and might detract, or even derogate, from the concern with legality. It is by sticking to the question of legality that the CBL will ensure that the views of the State Council are not automatically accepted by the NPCSC. A broader political role would lend credence to the fears of some commentators that, consistent with tactics of the Central Authorities in Hong Kong (as evident for example in the composition and function of the Preliminary Working Committee and the Preparatory Committee), the CBL could become another instrument for the cooptation of Hong Kong members, and serve to legitimize inroads into autonomy — although of course there is no guarantee that even if its task were clearly confined to legal questions and all its members were lawyers, the CBL would not be politicized.

So far there has been a limited role for the CBL. It met in Beijing immediately after the resumption of sovereignty for consultation on the addition of new national laws to Annex III (which was largely a formality). It has met another time to discuss its procedures, but apparently without much progress. The need for procedures is urgent to ensure that it performs its duties in appropriate ways. In so far as its functions under art. 158 are

\(^6\) The ambiguity of the precise function of the CBL is manifest in the report of Ji Pengfei (1990) to the NPC on the draft of the Basic Law. He said that the CBL would enable the NPCSC to ‘heed fully the opinions of the people from all walks of life in Hong Kong’ on whether the matter in question ‘conforms’ to the provisions of the Basic Law.
concerned, for the most part they would follow upon a reference to the NPCSC by the HKSAR Court of Final Appeal and it would have the benefit of the ‘case stated’ (including presumably a history of the litigation and the briefs of counsel and judgements of lower courts). Its role is as a part of the judicial process. On other matters, it may not have the benefit of argumentation and may need to develop some procedure for apprising itself of the issues relevant to the matter on which it is asked to advise. It would seem that the Central Authorities do not envisage an active role for the CBL, so long as they are prepared to accept a broad view of the scope of the HKSAR autonomy and the primary responsibility of the HKSAR courts for the interpretation of the Basic Law.

**Interpretation and Adjudication**

The general power of interpretation is vested in the NPCSC, which has two kinds of powers. One is plenary in that it covers all the provisions of the Basic Law; this power may be exercised in the absence of litigation. The second is on request from the Hong Kong courts, during the course of litigation, on certain provisions on which they are not authorized to make final interpretations. Hong Kong courts have a more limited power of interpretation; and they may exercise it only during the course of litigation. The NPCSC is required to authorize Hong Kong courts to interpret, ‘on their own’, provisions within the autonomy of the region. It would seem that no formal act of authorization is necessary; the article is sufficient authority for the purpose. The HKSAR courts may also interpret other provisions (for which authority is provided directly by the article, not authorisation from the NPCSC), but may make no final decision in relation to provisions dealing with affairs which are the responsibility of the Central Authorities or the relationship between them and the region before securing an interpretation from the NPCSC.

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7 Paragraph one reads, ‘The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress’.

8 The English version makes it obligatory for the NPCSC to authorize the HKSAR courts (‘shall authorize’); it is puzzling that the Basic Law does not directly confer this power upon them (but this mode of conferring power is not inconsistent with the Chinese drafting style). The Chinese version, however, makes clear that the jurisdiction of the Hong Kong courts does not require an explicit authorization from the NPCSC. There are several other similar provisions (e.g., art. 16 which says that the HKSAR ‘shall be vested’ with executive authority or, as in art. 17, ‘shall be vested with legislative authority’), whereas art. 13 states that the CPG ‘authorizes’ the HKSAR to conduct relevant external affairs on its own in accordance with the Basic Law.
In order to follow the division of responsibilities between the NPCSC and Hong Kong courts, it is necessary to refer to a preliminary distinction between interpretation and adjudication. Adjudication means the hearing and disposing of a case by applying the law. It does not include the making of interpretation. Interpretation means determining the meaning of a provision of the law. The Basic Law vests the power of final adjudication in the HKSAR courts (art. 2) which means that the Central Authorities have no role in the hearing of cases, the weighing of evidence, or the application of the law. For these purposes the rules and procedures for trials under the HKSAR law will apply. ⁹

While the conceptual distinction between interpretation and adjudication is clear, it normally has no particular significance for common law courts which decide both these issues in the course of their judgment. It is important to distinguish between the two bases of jurisdiction of the NPCSC. Common law courts are reluctant to provide an interpretation in circumstances similar to the first basis, that is outside the course of litigation. The US Supreme Court refused at an early stage to give advisory opinions on the grounds that an interpretation given in the abstract, ungrounded on facts and controversies, was unlikely to be sound. A decision by a court, when various parties present their views and the court itself may invite amici curiae, is likely to yield a more considered view of the law. ¹⁰

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⁹ This does not necessarily mean that Basic Law issues may not arise in appropriate cases in courts on the mainland. The Basic Law is binding on the mainland and places several restrictions on institutions which operate there.

¹⁰ See the discussion in Lawrence Tribe (1988: 73–93). There are several US cases to this effect. See Muskrat v US 219 US 346 (1911) and Alabama State Fed. of Labor v McAdory 325 US 450 (1945). The US position is based in part on the phraseology of the US Constitution, which extends judicial power to ‘cases’ and ‘controversies’ (Art. III, sec. 2). A complex case law has developed as to what is a case or controversy for this purpose, the courts refusing to consider an issue unless it is ‘ripe’ and not ‘moot’. The courts have justified their position also on the basis that judicial determinations are best made in the context of specific disputes as interpretations depend on fact situations.

The English position is similar. In Russian Commercial Bank v British Bank for Foreign Trade [1921] 2 AC 438, Lord Dunedin defined as follows the conditions which must be satisfied before declaratory relief (which provides for most extensive access to courts) is granted: ‘The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought’ (at p. 448).

It is of interest that, although the application of the Bill of Rights Ordinance was postponed for a year in respect of six listed ordinances so that the legislature could amend them in order to ensure compatibility as well as to avoid piecemeal changes that might undermine the integrity of the legislative scheme (and indeed some amendments were made), the preferred position of the administration was that it should be left to the courts to determine which parts of the pre-existing legislation were incompatible with the Ordinances.
However, it is not unusual now for constitutions (as in India, Papua New Guinea and Nepal) to provide for advisory or binding jurisdictions of their Supreme Courts on points of law only (there is a similar jurisdiction in the International Court of Justice). These instances differ from the Chinese practice in that the court would only provide an opinion on the request of a prescribed party and interested parties are allowed to make legal representations in public hearings.

There are also common law analogues with the second source of the NPCSC jurisdiction. Some common law systems (as of many former British colonies) provide for a reference by a subordinate court to superior courts on a point of interpretation while retaining responsibility for the adjudication of the case. Indeed in Hong Kong as in other common law jurisdictions it is not unusual for a superior court, having pronounced on points of law, to refer the case back to the lower court to dispose of the case accordingly (this is the basis on which the HKSAR Court of Appeal made its ruling in the Ma case, see below). Under the European Union system, national courts have to refer a question of the interpretation of European treaties to the (European) Court of Justice before proceeding to adjudication; indeed the PRC drafters referred to the European system as a precedent for the scheme of the Basic Law. In all these cases, the court which decided the point of law has the benefit of full argumentation by the parties. No procedure is prescribed for the exercise by the NPCSC of its jurisdiction under either source.

There was no clear basis for the distinction between adjudication and interpretation in the Joint Declaration. Article 3(3) states that the HKSAR will be vested with ‘independent judicial power, including that of final adjudication’. Annex I, elaborating this general principle, states that the judicial system previously practised in Hong Kong shall be maintained

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11 It is not unusual for example to require that when an issue involving the violation of human rights arises in a subordinate court, that court must refer the legal point to a superior court for a ruling on the constitutional issue. When the Bill of Rights Ordinance was being enacted in Hong Kong, a deliberate decision was taken to vest all courts with authority to interpret the ordinance. There are advantages in that approach in terms of access to courts and the involvement of all judges in issues of the ordinance. However, there is also the problem of conflicting decisions which may not be resolved by the Court of Appeal for a long time and of the uncertainty of the invalidity of laws when that is pronounced by a lower court — both of which problems Hong Kong has experienced.

12 There are of course important distinctions between the European system and the scheme of the Basic Law, in terms of the rationale of the system as well as its operation. The rationale is the need for the uniform interpretation of treaties which are binding on its member states and their residents, and the European court is an independent judicial body consisting of senior jurists from the member states, a description that does not fit the NPCSC.
‘except for those changes consequent upon the vesting in the courts of the HKSAR of the power of final adjudication’ (section II, 1st para). The next paragraph says that judicial power in the HKSAR shall be vested in the courts of the HKSAR, while the fourth paragraph says that the power of final judgment shall be vested in the Court of Final Appeal in the HKSAR ‘which may as required invite judges from other common law jurisdictions to sit on the court of final appeal’. There was no indication that the Basic Law might incorporate the distinction familiar to the PRC constitutional system between the powers of interpretation (and indeed the distinctions between legislative, judicial and administrative interpretations) and adjudication.

These provisions were widely understood in Hong Kong as giving the HKSAR the powers of interpretation of the Basic Law just as the Hong Kong courts were then free to interpret the Letters Patent and the Royal Instructions — constitutional instruments for colonial Hong Kong. This view was reinforced by another provision in the Joint Declaration that the current laws would remain basically unchanged (art. 3(3) and Section II para 1 of Annex I), including the common law under which courts would interpret constitutional instruments.

In the early drafts of the Basic Law, the powers of the HKSAR courts were largely restricted to adjudication while those of the NPCSC were confined to interpretation. The HKSAR courts were to have no general powers of interpretation but were allowed a limited competence for this in the context of actual litigation. The 1988 draft stated that the HKSAR courts might, ‘in adjudicating cases’ interpret a provision of the Basic Law unless it concerned ‘defence, foreign affairs and other affairs which are the responsibility of the Central Government’. When an article concerned such cases the courts would have had to seek an interpretation from the NPCSC before making their final judgement (draft art. 169). It is unnecessary to go through the different permutations of this article; an interesting history is provided by Martin Lee (1988) who played a key but only partially successful role in its amendment. Suffice it to say that the initial proposals met with considerable opposition from Hong Kong drafters as well as members of the legal profession, principally on the ground that such arrangements threatened the rule of law and the integrity of the Basic Law as the NPCSC was not a judicial body. The draft provisions

13 Putting it this way does not do justice to a complex situation. The court of final appeal was the British Privy Council meeting in London (although it is of course an independent judicial body) and the power of the UK government to legislate for Hong Kong or amend the Letters Patent remained plenary. These mechanisms provide the ‘correctional powers’ that China was much exercised to retain over the judicial process in the HKSAR.
were partially amended in response, giving all the powers of adjudication to the Hong Kong courts, and dividing the responsibility for interpretation.

The Interpretation Powers of the NPCSC and the HKSAR Courts

There are two ways in which the NPCSC might become involved in the interpretation of the Basic Law. The first is on its own initiative, perhaps to clear doubts that may have arisen about the reach of a provision in order to provide guidance to relevant authorities or to correct what it deems a wrong interpretation of the HKSAR courts. Following Chinese terminology, one may call this the ‘legislative’ power of interpretation (Kong 1991). There is no explicit provision for any official body or private party to request an interpretation from the NPCSC, although Martin Lee (1988: 312–313) has expressed the fear that a private party may urge it to make an interpretation in advance of his or her litigation in the expectation of a ruling favourable to his or her position. The second instance is on request from the HKSAR. When a HKSAR court has to interpret a provision which concerns the ‘responsibility of the Central People’s Government’ or ‘the relationship between the Central Authorities and the Region’ and that interpretation would affect its judgment, it has to seek the interpretation of the NPCSC through the Court of Final Appeal (art. 158 para. 3). As this interpretation is directly connected with litigation, we may call it ‘judicial’ interpretation. However, such a reference is necessary only when there can be no appeal from the court seeking it.

It is therefore evident that the HKSAR courts have some jurisdiction to interpret the Basic Law. The extent of this jurisdiction is unclear (although it is obvious that this power would arise only in the context of adjudicating a case). It is provided that the NPC ‘shall authorize the courts of the HKSAR to interpret on their own . . . the provisions of this Law which are within the limits of the autonomy of the region’ (2nd paragraph). The next paragraph goes on to say that they may also interpret other provisions, but as explained above, if the provisions concern matters within the responsibility of the Central Government or the relationship between it and the HKSAR, it may have to be referred to the NPCSC in the circumstances already described. Thus there are no provisions which the HKSAR courts may not interpret at some stage of the proceedings of a case (although presumably if a provision on the relevant point has already been determined by the NPCSC it cannot enter into a fresh exercise of interpretation). However, it is unclear at what stage it must divest itself of the task and go to the NPCSC. In order to unravel this matter, it is necessary to examine the various bases for the interpretation jurisdiction of the HKSAR courts.
Three bases are explicitly mentioned in art. 158. The first relates to provisions ‘within the autonomy of the Region’. The second consists of those provisions which relate to the responsibilities of the Central Authorities and their relationship with the HKSAR. The third is ‘other provisions’. It would seem that in relation to the first and third categories, there is no need to refer to the NPCSC. Even in the second category there is no need for a reference if the interpretation would not ‘affect the judgment’ — meaning presumably that the case can be resolved without resorting to constitutional interpretation. Although this suggests a straightforward scheme defining the interpretation jurisdiction of the HKSAR, there are in fact several uncertainties. First (as I discuss in detail in Chapter 4), it is not always easy to state with confidence what provisions relate to the autonomy of the region. Similar and related difficulties arise in connection with the concept of the responsibilities of the Central Authorities or their relationship with the HKSAR. The category of ‘other provisions’ (i.e., other than the provisions within the autonomy of the region, or the responsibilities of the Central Authorities or their relationship with the region) is introduced for the first time, with no explanation or guidance as to what it covers. It is also the first time that a HKSAR institution has been given authority for a matter outside the limits of its autonomy, although it is hard to imagine what matters remain at large after the other three categories.

Nor, with regard to the second category, is it easy to determine that interpretation would not affect the judgment (presumably the issue would normally arise only if a party brought it up), until one made some attempt at interpretation. A court could conceivably ‘oust’ the NPCSC by adopting the position that the interpretation was irrelevant. Furthermore, whether a matter falls within categories one and three on the one hand and two on the other, may itself be a matter for the NPCSC (although this is not specified) and any litigant could presumably force a reference to it by making that an issue. Finally, consistent with my earlier view, there would appear to be no reason to conclude that the NPCSC cannot make an interpretation on provisions which the HKSAR courts are authorized to decide since there is no exclusive grant of the jurisdiction to the latter (the expression ‘on their own’ presumably meaning only that they do not need to refer to the NPCSC).

Comments on the Scheme of Art. 158

A few comments may be offered on the general scheme of the article. The first is that it is extraordinarily hard to establish the interpretation
jurisdiction of the HKSAR courts, since there is no clear demarcation of powers and responsibilities that are vested in the region. This issue cannot be explored in detail here but the following account will give an indication of the difficulties (for a more detailed account see Chapter 4). Various formulae are used to distinguish the HKSAR sphere of powers from those of the Central Authorities. Article 2 promises a high degree of autonomy, but does not state in relation to what matters. Article 13 vests foreign affairs in the Central Authorities and art. 14 does likewise in relation to defence. This might suggest that all other matters belong to the HKSAR, and this is in one sense the scheme of the Joint Declaration. Article 17, which gives the NPCSC the power to supervise the legislative acts of the HKSAR, mentions two sets of provisions for this purpose: responsibilities of the Central Authorities and the relationship between the Central Authorities and the region, without specifying what constitutes either. In describing national laws that might lawfully be extended to the region, art. 18 refers to defence and foreign affairs ‘as well as other matters outside the limits of the autonomy of the Region as specified by this Law’. What is outside these limits is not expressly specified but has to be gathered from the whole corpus of the Law, but without any guidance in the Basic Law towards this end.

A further complication arises from the modes of formulation of different provisions of the Basic Law — sometimes the language is mandatory, sometimes optional and occasionally hortatory — and the allocations of responsibility may depend on the style. The matter is further complicated by the fact that though in principle, as we have seen, foreign affairs are the responsibility of the Central People’s Government, very extensive powers to conduct external relations, especially in the economic field, are given to the HKSAR in chap. V. By the time we turn to art. 158, the confusion is compounded by its own categorisation of the provisions of the Law, now four-fold:

1. ‘limits of the autonomy’,
2. ‘affairs which are the responsibility of the Central People’s Government’;
3. ‘the relationship between the Central Authorities and the Region’; and
4. ‘other provisions’.

Difficult though these matters are, they are crucial to the scheme for interpretation and I revisit them in the final section where I suggest an approach to the interpretation of the Basic Law.

The second general comment is that since the judgments of the Court of Final Appeal are unappealable, the highest court of the HKSAR will
never, unlike the lower courts, be able to express its opinion on the meanings of provisions within the responsibilities of the Central Authorities or which relate to their relationship with the HKSAR; lower level courts would be able to do so since their decisions are appealable (there is no provision which precludes even the lowest courts from reviewing constitutional issues). It is unfortunate that the NPCSC should not have the advantage of the considered analysis of the CFA. Depending on the jurisdiction of the CFA, it may be that in many instances final decisions would lie with the Court of Appeal so that even that court will be precluded from analysing these provisions. If the Court of First Instance is going to be effectively the final HKSAR court for these provisions of the Basic Law, there would be problems regarding the precedential value of their decisions, since one Court of First Instance does not bind another (which may necessitate intervention by the NPCSC to resolve conflicts).

It would therefore be sensible to provide that appeals should lie to the CFA in all instances where a question of the Basic Law arises to ensure that at least the opinion of the Court of Appeal is available to the NPCSC. The Court of Final Appeal Ordinance does not so provide (see Chapter 8 for a discussion of the jurisdiction of the CFA). Its civil jurisdiction is confined to cases:
1. where the monetary value is $1,000,000 or more or
2. where the Court of Appeal or the CFA certifies that the appeal involves a question of great general or public importance (sec. 22).

The criminal jurisdiction of the CFA depends on its own discretion — presumably the point of general or public interest would be relevant here also. In general it does not take account of all aspects of the Basic Law, as it was enacted before the transfer of sovereignty, and may need to be amended.

It is therefore possible that all questions which involve the Basic Law would be appealable to the CFA, but the dependence on the discretion of the courts for leave to appeal creates uncertainty about the application of art. 158. How is a court whose decision is final but for the exercise of discretion by other judges, to regard its jurisdiction — final or not — for the purposes of a reference to the NPCSC? Moreover, may a court invoke the assistance of the CFA in seeking a reference from the NPCSC even when it is not mandated under the Basic Law, i.e., when its decision is appealable, and what are the rights of parties before it? It may also happen that a decision of a court is not final and so no reference has been made to the NPCSC but in fact no appeal is taken. In that case the decision of a HKSAR court on a provision touching on responsibilities of the Central Authorities or their relationship with the region would stand.
It is of course possible for the NPCSC to make a contrary interpretation, but unless it does so the status of the court decision would remain in some doubt — nor could one draw an inference of NPCSC support of it in the absence of a contrary interpretation. Thus, to some extent courts or litigants may be able to influence the frequency of interpretations by the NPCSC.

It is unclear if the CFA has any substantive role in the submission of the request for interpretation to the NPCSC. Does it act merely as a post office (as the terminology of the article might suggest), or could it persuade or even order the lower court to withdraw the request on the ground that the decision does not depend on the interpretation of the Basic Law or that a previous interpretation of the NPCSC adequately covers the point at issue? There may be some advantage in terms of order and coherence if the CFA exercised the latter role, but to perform it satisfactorily, it will have to have heard the arguments in the lower court, so some sort of interlocutory hearing might be required before the CFA, though there is no explicit provision for this.

Finally and most importantly, there is (as has already been pointed out) a clear division of responsibilities between the NPCSC and the HKSAR courts. The primary responsibility of the NPCSC is to maintain the boundaries between the HKSAR and the Central Authorities, in this way both protecting the autonomy of the HKSAR and preventing its own invasion of the powers of the Central Authorities. The Basic Law does so by assigning to the NPCSC the task of determining questions which relate to affairs which are the responsibility (or in other words, the powers) of the Central Authorities or the relationship between them and the region. There is a remarkable consistency in the scope of the jurisdiction of the NPCSC, in the various provisions which require it to make an interpretation (although the language in these provisions varies, sometimes specifying the components of the responsibilities of the Central Authorities as in art. 18 or using a more composite formula as in art. 17, and not withstanding the confusing language of art. 158). This role is premised on the NPCSC’s constitutional rule in the national constitution whereby it is superior to the Central People’s Government, has authority to supervise its work as well as that of the Central Military Commission (art. 67(6)), and to annul their administrative rules and regulations, decisions or orders that contravene the constitution or statutes (art. 67(7)). As, under the Basic Law, it is the State Council (and to a very subsidiary extent the Central Military Commission) which deal with and may instruct the HKSAR authorities, the NPCSC may of course be well placed to protect the autonomy of the region (certainly better placed than the Hong Kong courts).

However, the realities of the Chinese political system are such that the
government (representing the will of the Chinese Communist Party) is more powerful than the NPCSC (for a detailed analysis see Chapters 3 and 4). In recent years, due to conflicts within the Party and its loss of legitimacy, the NPC and its Standing Committee have become a little more independent, but only relatively so. However, since the precise scope of application of the PRC constitution in the HKSAR is unclear, it is hard to establish whether the NPC has any correctional jurisdiction over interpretations of the Basic Law, as it would under the Chinese constitution — no supervisory role over the Standing Committee being provided under the Basic Law. In either event it is likely that these arrangements will be seen by the people of Hong Kong as less than impartial and not as any real protection against the mainland government if it is determined to interfere in their affairs.

A further difficulty is that the NPCSC may be asked to determine the validity of its own decisions taken in another capacity. For example, a challenge may be made to the validity of a national law in Hong Kong; the issue would initially be raised in a Hong Kong court, but would need to be referred to the NPCSC at some stage for a definitive ruling (under art. 158). However, the original decision to apply the law would have been made by the NPCSC (under art. 18) and it may be hard to believe that it could bring a dispassionate mind to bear on the question.

The function of the HKSAR courts, on the other hand, is to ensure that the HKSAR institutions respect the limits on their competencies within areas of their autonomy and that they observe the Basic Law. The CFA will be able to play a full role in this function (unless there are restrictive rules on appeals to it, which is presumably a matter for the region itself to determine). Here the key issues may be the relationship between the executive and the legislature (e.g., art. 50 allows the Chief Executive to dissolve the Legislative Council if it refuses to pass an ‘important bill’ introduced by the government), the validity of legislation and the compliance by official bodies with the rule of law — monitoring of which will require an independent and competent judiciary, especially as these are matters in which the Central Authorities will no doubt take a keen interest.

**Meaning of ‘Interpretation’**

In order to establish fully the significance of the roles of the NPCSC and the HKSAR courts, it is necessary to grasp the meaning and function of ‘interpretation’. Its meaning and function in the common law, combined with the rule for *stare decisis*, are normally unproblematic. But the situation
in Chinese law is more complicated and it is to that we must now turn. The main rules are contained in the ‘Resolution of the NPCSC Providing an Improved Interpretation of the Law’ adopted in 1981 in an attempt ‘to improve the socialist legal system’. It distinguishes between the interpretation powers and functions of the NPCSC, the Supreme Court and the Supreme People’s Procuratorate, and the State Council. Although the terms are not used in the Resolution, the three forms of interpretation are called respectively ‘legislative’, ‘judicial’ and ‘administrative’. Different rules apply to each; suffice it to say that the widest powers are vested in the NPCSC. When necessary, it may provide an interpretation of laws and decrees, and in doing so it may either clarify the meaning of the law or extend it, thus negating the distinction known to the common law (and most other systems of law) between interpretation and law making. In practice the NPCSC (and its counterparts at lower levels) have preferred to provide guidance in the form of new provisions rather than straightforward interpretation. Unlike the NPCSC which gives its rulings in the abstract, interpretations by the other institutions are given in concrete cases during the discharge of their functions (what the Resolution calls ‘the specific application of laws and decrees’). If the interpretations given by the Supreme Court and the Supreme Procuratorate conflict, the matter has to be referred to the NPCSC. Presumably it can also correct faulty interpretations by the State Council as part of its general supervision of the State Council under the constitution.

A few points about the Chinese system of interpretation are relevant for our present purposes. First, interpretation is not related to the justiciability of legislation, nor does it imply the power to declare legislation invalid. There is no authority in any institution to question laws passed by the NPC. The NPCSC may annul regulations made by other bodies in excess of their powers under its constitutional powers and presumably its own laws are subject to legislative review by the NPC (see Chapter 3 for further discussion). It is not possible to scrutinize legislation in this sense in judicial proceedings.

Secondly, only the NPCSC is expressly given the power to ‘make stipulations by means of decrees’, i.e., to extend the scope of the law, although in practice all other three institutions have issued regulations or directions, presumably under the 1981 Resolution. The 1982 constitution, following the Resolution, confers interpretation powers only on the NPCSC, but it seems to be assumed that the Resolution still provides sufficient authority for others.

Thirdly, only the interpretations of the NPCSC are binding on others. Interpretations by others apply only within their own domains. These interpretations are not available generally, although in recent years some
limited general publication has begun. And since the Chinese legal system does not follow the rule of *stare decisis*, decisions of the courts or the procuratorate are not binding as precedents, the role of interpretation being to dispose of the particular case.

It is not clear how far these rules and restrictions will affect the work of the HKSAR courts in the interpretation of the Basic Law. The NPCSC has authority to make not only ‘legislative’ but also ‘judicial’ interpretations. Presumably its ‘legislative’ interventions would be stated in a general way, almost in the form of a statute, as with the interpretation of the Chinese Nationality Law discussed in the previous chapter (although in order not to erode the autonomy of Hong Kong they should be stated in narrow terms). However, its decisions on a reference from the HKSAR courts would need to be specific. These interpretations would presumably then have to be incorporated into the common law scheme of precedent (to avoid repeated references to the NPCSC on the same point), so that the courts may have to approach some interpretations as if they were statutes, and others more as a common law judicial decision. Article 158 says little about the effect of decisions by the HKSAR courts. Since the common law is to be the underlying basis of the legal system of the HKSAR, it might have been assumed that the doctrine of *stare decisis* would attach to judicial judgments under art. 158, but equally, it could be argued that the specific scheme of judicial interpretation under China law is incorporated in art. 158 and so under arts. 8 and 11, the common law would be modified. For reasons I sketch out in the last section of this chapter, I do not consider the latter view appropriate. The Court of Appeal has had occasion to consider how far it is bound by its previous decision. The issue arose in a constitutional case, which involved an interpretation of the Basic Law and associated decisions of the NPC (*Cheung Lai Wah v Director of Immigration* (CACV203/1977, judgement dated 20 May 1998). The Court, making no distinction between constitutional or other decisions, held that it is bound by its previous decisions (subject to some exceptions).

However, the precedential value of judicial decisions may be undermined by two considerations. First, in so far as the provisions dealing with matters outside the autonomy of the HKSAR are concerned, they are likely to be either resolved at less than the highest judicial level in the HKSAR as discussed above, or overturned by the NPCSC (and if confirmed, their future authority will lie in the interpretation by the NPCSC). The second consideration would arise if the other implication of the Chinese system is followed, i.e., that the process of interpretation cannot invalidate legislation (as has been argued by a Chinese scholar, Zhou 1993). For various reasons this argument is untenable. The most important reason relates to the unique status of the Basic Law that distinguishes it from
other laws in China (I explore this reason in the concluding section of this chapter). Another is that the courts in the HKSAR operate through common law principles and concepts, and under the common law courts have the power of legislative review. As the classic statement in *Marbury v Madison* 5 US 137 (1803) observes, it is the function of courts to enforce the law, and when two laws conflict, the court has to decide which is to prevail. Article 11 provides expressly that no law may contravene the Basic Law and thereby makes the Basic Law superior to ordinary legislation.14 The NPCSC has been given the power to enforce art. 11 as regards legislation which affects the responsibilities of the Central Authorities or their relationship with the HKSAR, but, except in some ultimate sense, it has not been mandated to review legislation which affects areas within the autonomy of the region (except at the time of the transfer of sovereignty). Unless the HKSAR courts scrutinise this type of legislation, there is no effective way of holding the Legislative Council to its proper powers or maintaining the balance between the legislature and the executive (which is different from the relationship between similar institutions on the mainland) (for a detailed discussion of this issue, see Chapter 7, and Chen 1993b).

One further point needs to be examined, and this is whether in its interpretation of the Basic Law, the NPCSC may ‘make stipulations by means of decrees’. Although it is frequently stated that ‘interpretation’ includes the making of these additional stipulations, the 1981 Resolution (allegedly the authority for this proposition) makes a distinction between interpretation which is ‘further defining’ a legal provision and the making of additional stipulations. It does not, for example, give the Supreme Court or the State Council the latter power (whatever the practice might be). Article 158 gives the NPCSC only the power of interpretation, by implication ruling out the other power. Nor could it give it that additional power for the Basic Law has very detailed and careful provisions for its own amendment which would be rendered nugatory if interpretation were understood as including legislating (see Chapter 4). However, the way in which the NPCSC has interpreted the Nationality Law in its application to the HKSAR (examined in Chapter 4) and its Decision under art. 160 on the continuity of laws (examined in Chapter 9) does not suggest that

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14 It may be of interest to note that in civil law systems which do not expressly provide for judicial review of legislation, such as Macau, courts refuse to apply laws which they consider contravene the constitution, although they do not declare them unconstitutional. If such an approach were applied in Hong Kong, the effect would be that the refusal of a superior court to apply a particular legislative provision would act as a precedent, and the effect would not be substantially different from declaring it invalid.
the NPCSC accepts the narrower view of its powers (see the discussion below). Both these decisions were made before the establishment of the HKSAR. It may be that with the establishment of the HKSAR, the NPCSC would regard a narrower view of its powers as more compatible with the scheme of the Basic Law.

THE PROBLEMS OF THE INTERPRETATION OF THE BASIC LAW

The Basic Law and the system of laws that it constitutes lie between legal traditions as well as involving a combination of them. The Basic Law is a Chinese constitutional law, which requires the use of the common law. At one extreme its most authoritative interpretations are to be made by the NPCSC, and at the other the highest court in the HKSAR which has the ultimate powers of adjudication is empowered to appoint to itself judges from other common law jurisdictions (art. 82), and all courts may refer to foreign common law precedents (art. 84). Much of the legislation passed in the region will be on the underlying basis of the common law and in its style, including laws which are to implement the provisions of the Basic Law (including relevant international human rights conventions, tax policies, investment protection, etc.). But also to be applied in the HKSAR are various national laws (which despite their local enactment are expected to retain the style and flavour of national legislation). External influences will be felt not only through the resort to foreign common law precedents and judges, but also through approaches to international instruments which apply in the region, particularly but not solely human rights conventions. Such a plurality of law regimes is of course of the essence of ‘One Country Two Systems’ — but does not diminish the difficulties of interpretation.

A further difficulty — or asset — which follows from the preceding discussion is the availability of two traditions for the interpretation of the Basic Law. It is an asset given the duality of laws (because no single legal system is likely to provide answers to all questions), but, since at various points laws lodged in different traditions interact or even merge, the two systems may cause conflict and confusion. This is a particular danger given that this duality is not merely that of legal techniques, but is also rooted in fundamentally opposed notions of authority and governance. Sometimes the differences between the two systems as representing alternative world views are exaggerated but there is no doubt that their political tendencies may lead in different directions. It is important to
avoid a situation when the two systems are locked (or are seen to be locked) in a struggle for the soul of Hong Kong; instead the struggle must be towards coherence. All these considerations argue strongly in favour of a special and distinctive approach to jurisprudence of the Basic Law. Later I suggest approaches that might promote coherence but it may be useful to describe briefly the essential principles of the two traditions.

In comparing systems there is a tendency toward an exaggeration of differences, and the statements that follow should be read subject to this proviso. Nevertheless, the approaches of the two systems to the question of interpretation are strikingly different. Interpretation lies at the heart of the common law, based on precedent and the ultimate custody by courts of the meanings of legal terms. A great deal of science and art has developed around it; traditional legal education largely centres on it. Authoritative interpretations are publicly available and are easy to locate. In China, on the other hand, the science of interpretation is relatively undeveloped, and until recently (especially with the growth of economic laws) there has been no clear distinction, at least in practice, between interpretation and legislation. There seem to be few rules for interpretation. The importance of interpretation in the common law both reflects and reinforces the significance of rules, and influences the style of drafting, which tends to be both prolix and specific. The hardness of rules combined with the canons of interpretation tends towards a sharpening of the distinction between law and policy, and gives an appearance of neutrality of the judicial process and a high measure of predictability — constituting the bedrock of the rule of law. The importance of predictability leads to the narrowing of sources that may be used in interpretation, at least in the English tradition of the common law (although the controversial decision in Pepper v Hart [1993] AC 593 may have started a contrary trend).¹⁵

By contrast, the lack of a clear distinction between interpretation and legislation in China has resulted in a different style of drafting, which is brief, general and vague. Predictability was less important than flexibility in the early stages of the communist legal system, law being seen primarily as an expression and instrument of policy — generality serving this purpose.

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¹⁵ Pepper v Hart (applied in Hong Kong in, for example, Canon Kabushiki Kaisha v Green Cartridge Co. [1995] 1 HKC 729, 744), allows reference to some aspects of the legislative history of the legal provision in question. However, the exact scope of the rule is still uncertain; for this reason some jurisdictions have established statutory rules or guidelines for the reference to extrinsic materials. The Law Reform Commission of Hong Kong (1996) has recommended a statutory basis for the rule (in a wide ranging report which canvasses the relevant case law from a number of jurisdictions). In general Pepper v Hart encourages a more purposive approach, and for reasons I discuss below, would be suited to the interpretation of the Basic Law, various difficulties notwithstanding.
better than specificity. Although laws have become more detailed and specific, the close link of interpretation to policy has remained (Kong 1991; Chen 1992: 95–103). It would be idle to deny that such links exist in the common law, but it may be said that links between policy and law making are stronger than between policy and interpretation, and that even there policy links are mediated through a set of rules or conventions (and in fact consist in its manipulation). But these links are clearly more central in the Chinese system. Because the science of interpretation in the sense of the common law is less developed, there is a tendency towards legislating rather than interpreting, and indeed the role of interpretation is seen as limiting or extending the ambit of previously legislated rules (as is explicitly recognized in the NPCSC Resolution of Providing an Improved Interpretation of Law (1981)). Such latitude in practice is only allowed to what is called legislative interpretation — restricted to the NPCSC (although in reality practised by judicial and administrative bodies as well).

These technical differences between the common law and Chinese rules and practices are reflective of more profound social and political differences, and of perceptions of the nature and purpose of law. At a superficial level, they demonstrate the importance of the separation of powers in the common law and a combination of all state power in the NPC in China. But the NPC and the judicial and administrative bodies under it are instruments of the Communist Party, and as their primary function is the implementation of its policy, there has been little reason to develop the science of autonomous legal interpretation. Indeed a well developed science of interpretation would undermine the political supremacy of the Party. In China politics has been in command, interpretations have changed to suit political exigencies, and legislation is not reviewable as such. 16 In the common law, the function of law, especially constitutional law, is seen as that of regulating the relations among state organs, between them and citizens, and the protection of individual and corporate rights. Because the constitution imposes limits on public power, review of the validity of legislation is a key judicial function. Responding to these impulses, common law judiciaries have expanded their constitutional review jurisdiction and have adopted what has been called a purposive approach to constitutional interpretation by which is meant that they would give a broad meaning to fundamental rights and other

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16 Kong Xiaohong (1991: 492), noting the connection between politics and the law, says, ‘One of the most important methods used is an emphasis on the flexibility of law. The judicial and legislative entities coordinate their power with political organs, and therefore the interpretation of law necessarily becomes the basic means of embodying the flexibility of law and guaranteeing that the law is coordinated with the political situation’.
constitutional mandates (as typified in Hong Kong by the decisions in *Chiu v AG* [1992] 2 HKLR 84 and *R v Sin Yau-ming* [1991] 1 HKCLR 127). The independence and the consequent prestige of the judiciary in the common law reflect the importance of autonomous interpretation to these purposes of the law.

It is because both the people of Hong Kong and the Chinese authorities are conscious of these differences in legal traditions (and their consequences) that there was so much controversy over the provisions for the interpretation of the Basic Law. Hong Kong people saw the Basic Law as the legal guarantee of their autonomy and rights and of the capitalist economy, and an independent judicial system with the powers of the enforcement of the Basic Law as a primary means of underwriting that guarantee. The Chinese authorities saw judicial review as a restriction on its powers as sovereign as well as complicating its overview of the HKSAR. It preferred a system whereby the mode of interpretation was more political and flexible. Indeed in the short period between the adoption of the Basic Law and the transfer of sovereignty, Chinese authorities offered interpretations of several provisions which demonstrate their predilection for a more free wheeling approach than is compatible with the common law judicial style. Nor have they been happy with the notion of judicial review of legislation.

It will have been clear from the earlier discussion of the scheme of interpretation in the Basic Law that it represents a compromise between these positions. The Basic Law is therefore saddled with contradictions in one of its key elements. Difficult and complex questions of interpretation will have to be tackled by this contradictory mechanism, its constituent parts perhaps pulling in different directions although there is no space to explore this interesting area.

A major difficulty arises from the uncertainty as to the applicability of the PRC constitution in Hong Kong and its relationship with the Basic Law (this point is discussed in detail in Chapter 4). There are two kinds of conflict between the constitution and the Basic Law: one involves two economic and political systems (one-party socialism versus multiparty capitalism) and the other the constitutional powers of key central institutions, particularly the NPC. As examples of the former, the PRC constitution requires the socialist system to be the basis of the economy and for political power to be exercised through ‘people’s democratic dictatorship’ (art. 1) while the Basic Law expressly prohibits a socialist system for the HKSAR (art. 5), which has been promised a greater extent of more traditional type of democracy (art. 45 para 2 and art. 68 para 2). As to the latter, the NPC is the highest organ of state power under the PRC constitution (art. 57). It exercises legislative power of the state and
may amend the constitution, the first by a simple majority and the second by a two-thirds majority (art. 64). Yet the Basic Law severely restricts the application of national laws in the HKSAR, and even these do not apply by their own force, but through regional enactment or promulgation (art. 18). The process for the amendment of the Basic Law is more complex than that for other organic laws or even the PRC constitution. The provisions for the interpretation of the Basic Law fetter the discretion of the NPCSC in a way not applicable to the interpretation of the constitution. How is this conflict to be resolved?

Then there is the related question of the applicability of the constitution in the HKSAR. Under general principles, since the HKSAR is a region of the PRC and under its sovereignty, the constitution should apply. However, on the assumption that the Basic Law is valid, some parts of the constitution cannot apply, e.g., the provisions for socialism and people’s dictatorship. The status of many provisions will be left unclear even by this mode of reasoning, and here again the Chinese, while acknowledging that not all of the constitution would apply to Hong Kong, refused to list provisions that would not apply in the HKSAR. Unless this matter is resolved, we shall not understand the true meaning of the Basic Law.

As I have argued in Chapter 4, the courts have not developed clear rules for determining the relationship of the Basic Law to the PRC Constitution. The view of the Court of Appeal in *Ma* was that as the NPC was the supreme organ of state power in the PRC (‘the sovereign’) under Chinese Constitution it could makes any laws or decisions affecting Hong Kong even if it was in contravention of the Basic Law. This effectively denies any special status to the Basic Law. This judgement was criticised by academics and practitioners (see Ghai 1997a and 1997b; Chen 1997; Chan 1997). In its first judgement in *Cheung Lai*, the Court expressed some doubts about its bald statements in *Ma*. However, when given an opportunity to review its views in *Ma* in the second *Cheung Lai* decision, it refused to grasp the issue, disposing of the case on another point, only Chan CJHC expressing some guarded reservation about the *Ma* doctrine (see Chapter 4).

Another related problem arises from the difficulty of placing the Basic Law in the hierarchy of laws applicable in the HKSAR, apart from the issue of the PRC constitution already referred to. Here a word should be said about applied Chinese laws. Such laws are applied through their integration in the HKSAR legal system by local legislation or promulgation (the NPC does not legislate directly for the HKSAR under the Basic Law). What is the relationship of these applied laws to the Basic Law and the acts of the region? Since the applied laws are introduced in accordance with procedures and restrictions set out in the Basic Law, they ought to
be subject to it — otherwise the autonomy of the region would be under threat. On the other hand, art. 11 which establishes the supremacy of the Basic Law does so only in relation to laws enacted by the HKSAR. In so far as national laws are introduced through local legislation, presumably they will be caught by this provision. The position is less clear when it is introduced by promulgation, which has been taken to mean its gazettal by the Chief Executive (there is no definition of promulgation), although on principle there is a greater reason for such a law to conform to the Basic Law as it has not been considered by the legislature.

A strong case can be made for the proposition that when another mainland basic or ordinary law conflicts in its application in the HKSAR with the Basic Law, the Basic Law prevails. To hold otherwise would be to accept that another mainland law may amend the Basic Law, which is not permitted under art. 159 without following a particular procedure, and even then is subject to severe limitations. To allow such laws to prevail over the Basic Law (or even Hong Kong laws) would be a denial of the autonomy of the HKSAR. Fortunately the HKSAR courts have adopted a more robust attitude in the defence of the Basic Law in this regard than in relation to the PRC Constitution.

In Cheung Lai, the courts had to consider the effect of a mainland law which affected the rights of persons entitled under the Basic Law to the right of abode (see Chapter 4 for detailed discussion of the case). The mainland Law on the Control of the Exit and Entry of Citizens (1985), and regulations under it, require any Chinese national who wishes to enter Hong Kong from the mainland to obtain an exit permit from the PRC Public Security Bureau. Could this legislation be applied to those who are entitled to the right of abode in the HKSAR in such a way as to negate or curtail that right? The government stated that although the mainland Law did not apply in Hong Kong (not having been listed in Annex III), it could not be ignored. It argued that if the mainland laws restricted the number of its nationals who could settle in Hong Kong, it would be wrong for inconsistent laws to be enacted in Hong Kong (see [1997] 3 HKC p. 82-83). In the Court of Appeal the government argued that any ‘Hong Kong law calling for compliance with PRC laws cannot be regarded as unconstitutional’ ([1998] 1 HKC at 636). The plaintiffs argued that to apply the mainland law would result in the denial of the autonomy guaranteed to Hong Kong in the Basic Law.

Keith J, at first instance, seemed prepared to disregard the mainland law as it would ‘have meant that people living in mainland China who were accorded the right of abode by art. 24 [of the Basic Law] needed the permission of the Chinese authorities before they could enjoy that right’. Effectively the exercise of the right would depend on an ‘authority outside
the HKSAR, and over which the HKSAR has no control’. This would 
dermine the ‘high degree of autonomy’ of the SAR (all quotations 
appear in [1997] 3 HKC at p. 83). Keith J’s position was supported in the 
Court of Appeal by Chan CJHC and Nazareth V-P. The Chief Judge was 
not prepared to accept that a right under the Basic Law could be nullified 
by a mainland law, saying that while ‘it is accepted that the PRC 
immigration laws should be recognised and respected, I do not think that 
this alone can justify the deferment of the exercise of the right of abode 
which is clearly conferred on that person under the Basic Law’ ( [1998] 1 
HKC at p. 637). Nazareth V-P presented an additional reason for rejecting 
the mainland law, as not conforming to the Basic Law enacted by the 
‘Sovereign’ for regulating the application of national laws in Hong Kong 
(at p. 655). However both at first instance and on appeal, the courts 
upheld the application of the mainland law on the basis that it was 
justified by art. 22 of the Basic Law (see Chapter 4).

A further point may be raised in connection with applied basic statutes. 
These statutes are subject to the usual national rules of interpretation 
which gives NPCSC the authority to interpret them as well as to add 
stipulations. Such creative acts of interpretation may affect the meaning 
of provisions of the Basic Law. An example is the 1996 interpretation by 
the NPCSC of the PRC Nationality Law which has effectively amended 
art. 24 of the Basic Law (the details are discussed in Chapter 4). It would 
have been more natural to have amended art. 24 to achieve the results 
aimed at by the amendment to the Nationality Law. The legal views of 
HKSAR representatives would have been obtained and the implications 
for the rest of the Basic Law more closely examined (although it should 
be noted that the views of the Preparatory Committee were considered). 
Also, distortion of the Nationality Law would have been avoided. However, 
the principal point I want to make is to query whether such interpretations 
of related legislation should be applied in the HKSAR when their purport 
isa effectively to amend the Basic Law.

What about the relationship of applied national laws to HKSAR 
legislation? The answer requires a recognition that, with the possible 
exception of national emergency laws (art. 18, fourth paragraph), the 
applied laws and local acts are supposed to cover different fields and 
therefore the question is less one of inconsistency than of maintenance of 
boundaries. However, it must be recognized that the notion of the 
responsibilities of the Central Authorities is flexible and expandable, so 
that, for instance, in the case of foreign affairs China could, through a 
regional or international treaty for the protection of the environment, 
agree to regulate extensively industries, urban planning, preservation of 
marine life, public parks, etc. If China decides to extend the treaty to
Hong Kong (as it is entitled to under art. 153, for which see Chapter 11), many national laws would be applied in Hong Kong which cover matters otherwise within its autonomy and on which there are Hong Kong laws. One way to resolve the conflict would be by determining whether the subject matter should be classified as ‘foreign affairs’ or ‘land’ or ‘planning’ etc. (which are within Hong Kong’s autonomy). This is not the place to analyse complex jurisdictional questions that arise from this approach, it is enough to note that they constitute yet a further difficulty in interpretation (for further discussion, see Chapters 8 and 11).

AN APPROACH TO THE INTERPRETATION OF THE BASIC LAW

In view of the differences in the technique of interpretation between mainland and regional legal systems, it is important to adopt an approach which can transcend the differences. The first step towards establishing an appropriate approach to and framework for the interpretation of the Basic Law is to recognize the policies underlying it. The next step is to acknowledge the special and unique character of the Basic Law, which is different in fundamental respects from other basic statutes enacted by the NPC, and indeed from the PRC constitution. It establishes a very distinct relationship between the Central Authorities and a region of China that has no parallel under the Chinese constitutional system, as neither autonomous regions nor provinces enjoy the degree of autonomy that the HKSAR has been granted. Other parts of China have to conform to the principal philosophy and features of the PRC and in no other parts of China except the special administrative regions are the plenary legislative powers of the NPC qualified. On the other hand, for special administrative regions, the constitution (art. 31) authorizes fundamental departures from the basic principles of the constitution and the key tenets of the Chinese Communist Party. The Basic Law goes to great lengths to entrench the different economic, legal, political and social systems of Hong Kong and to preserve its autonomy against encroachments by the Central People’s Government and other agencies on the mainland.

The second general point, which follows from the preceding discussion, is that the application of the PRC constitution in Hong Kong should be strictly limited. The length and complexity of the Basic Law, very different from most Chinese legislation, is evidence of the intention of the NPC to establish as self-contained a constitutional instrument as possible. National laws are to be applied only in limited cases, and even then they have to be
woven into the fabric of the region’s legal system. Hong Kong is given its own well established economic and political systems, relationship between the executive and the legislature, methods of dispute settlement, its own modalities of dealing with outside economic forces and its own conception of rights and freedoms, whose integrity depends on protection from intrusion or impulses from systems based on different philosophies and practice. This approach is entirely in keeping with art. 31 of the constitution which authorizes for special regions their own systems. Doubts about the scope of the application of the PRC constitution will increase uncertainties about the integrity of the systems of Hong Kong which is mandated by art. 31 of the constitution, the Basic Law and the Decision of the NPC on the Basic Law of the HKSAR (4 April 1990).

It is necessary also to recognize the international provenance of the Basic Law, from which follow various consequences. China undertook in the Joint Declaration to give effect to its provisions on the future status and powers of Hong Kong in a Basic Law. The Joint Declaration sets out in considerable detail the regimes of law, politics, rights, economy, and international relations for Hong Kong. China’s international obligations can be honoured only if the provisions of the Basic Law are strictly adhered to. With its considerable detail, the Joint Declaration can also serve as an invaluable extrinsic aid to the interpretation of the Basic Law. As the Basic Law was drafted by a committee whose papers and deliberations were secret and confidential, it is hard to construct a reliable legislative history (limiting the scope for the application of Pepper v Hart were that considered appropriate). But the Joint Declaration does provide an authoritative background document that, both under Chinese law and the common law, may be referred to for the interpretation of legislation implementing a treaty (see Chapter 2). The Joint Declaration should, under normal rules of the Chinese legal system, prevail over a conflicting provision of domestic law (such as the Basic Law). It is also a principle of international law that treaties should be interpreted to give effect to their purposes.

There is another dimension of the Basic Law which compels towards its strict observance — that it is a compact between China and the people of Hong Kong. This view may not fit in with China’s view of history and the status of the people of Hong Kong, but it is consistent with the involvement of the people of Hong Kong in the drafting of the Basic Law.

17 In terms of Pepper the obvious source as legislative history is the report by Ji Pengfei to the NPC on the draft of the Basic Law (1990). The speech is largely a summary of the principal provisions of the Basic Law, but the report takes a broader view of the powers and autonomy of Hong Kong than some subsequent statements by Chinese officials.
Both these international and domestic dimensions are acknowledged in art. 159 of the Basic Law which states that no amendment may be made to it which would contravene the established basic policies of the PRC regarding Hong Kong, first authoritatively set out in the Joint Declaration and supported by the people of Hong Kong.

For the Basic Law to serve its purposes, it must be treated as ‘hard law’ in the common law tradition. It will therefore be necessary to modify some features of the Chinese system of interpretation in relation to the Basic Law. It is probable that the NPCSC will play an active role in interpretation unlike the present practice in China (its interpretation of the Nationality Law of the PRC in May 1996, the first formal interpretation of a basic statute, is already a pointer). I have indicated that it is questionable whether the provision under the NPC Resolution on Interpretation whereby the NPCSC may limit or extend legal provisions as part of the process of interpretation would be justified if the integrity of the Basic Law is to be maintained. It is also necessary to provide for a greater degree of ‘judicialization’ of the procedures of the NPCSC, with amicus representations by counsel for the HKSAR and other interested parties, perhaps to the CBL.

Some persons are unhappy that final decisions on the Basic Law are vested in a non-judicial institution which for reasons of politics or technical competence may be unable to protect the autonomy of the HKSAR as stipulated in the Basic Law; they have suggested various ways to ‘judicialize’ the system. One is that the NPCSC should accept, as a matter of principle, interpretations adopted by the courts on provisions touching Chinese responsibilities and the relationship between the Central Authorities and the region. Another is a ‘convention’ that the NPCSC would not make any legislative interpretations on those provisions within the autonomy of the HKSAR. A third suggestion is that the NPCSC should always accept the opinion of the CBL. It would also be useful if a convention were

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18 These proposals were made after suggestions for more substantive provisions for an independent, joint body to interpret the Basic Law or to determine the classification of its provisions so as to establish the respective jurisdiction of the NPCSC and the HKSAR courts were rejected (Fung 1988 and Liu 1988).

19 The parallel here might be with the practice of the European Court of Justice which is assisted by an Advocate-General who presents a considered view of the law and facts to the court after the hearing and which frequently forms the basis of the decision of the court. An Advocate-General has the same qualifications as a judge of the court. His or her role is to be ‘the conscience of the court’. He or she is required to make ‘reasoned submissions in open court, with complete impartiality and independence’ on a case before the court (art. 166 of EEC Treaty). The task is threefold: to propose a solution to the case before the court; to relate that proposed solution to the general pattern of existing case law; and if possible, to outline the probable future development of the case.
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established that the NPCSC would interpret a provision only after it has been considered by the HKSAR courts. These last two ‘conventions’ would ensure that the NPCSC is fully apprised of legal arguments and analysis, by parties which are not partisan. In some ways the analogy of the House of Lords or the Privy Council is apt here. The House of Lords, a large body which is part of the legislature, is also the final appellate court in Britain, but its judgments are made by law lords especially appointed to the House for this purpose; their judgments are formally the judgments of the House, though members other than the Law Lords have played no part in them since the nineteenth century. Similarly, the origins of the judicial authority of the Privy Council lie in the personal prerogatives of the Crown to do justice. Over the course of time, the Crown was advised by specialized officers, whose ‘advice’ became binding by convention. This discussion suggests that considerable thought needs to be given to the role and procedure of the CBL, and how it could most effectively assist the NPCSC to maintain a regime of legality. With these preliminaries I turn to the suggested approach. 20

An approach that is suitable to the interpretation of the Basic Law must suggest ways to:

1. balance the sovereignty of the PRC with the autonomy of the HKSAR;
2. bring coherence to the various powers and functions of the HKSAR which appear at the moment as so many particular instances; and
3. allow for the capacity to respond to changing conditions and circumstances in Hong Kong. 21

20 For a stimulating discussion of the approach to the interpretation of the Basic Law, see Denis Chang (1988).

21 This approach may seem to be in line with the broad and purposive approach that under many legal systems is adopted for the construction of constitutional instruments (and has for the most part, at least in theory, been adopted in Hong Kong for the Bill of Rights Ordinance). The approach is less problematic (although it gives no automatic answers) in relation to rights, where the issue is seen largely in terms of balancing the rights of citizens against the claims of state or society. It is certainly more problematic in other contexts, as Wesley-Smith has noted (1993b: 68).

Nevertheless some agreement on the principal objectives of legislation is a good starting point. Were it to be agreed that the primary purpose of the Basic Law is to safeguard the systems and autonomy of Hong Kong, it would then be possible to argue that the provisions which confer autonomy on the HKSAR should be generously interpreted. However, the goals are more complex, including China’s intention to preserve much of Hong Kong’s previous system, as I have tried to discuss in this and the previous chapter.
More specifically, some means must be found to establish the meaning of expressions like ‘outside the limits of autonomy’, ‘responsibilities of the Central Authorities’, ‘previous systems’, etc. For this purpose it is necessary to establish a philosophical or conceptual view of the nature and status of the Basic Law. It is clear from my preceding discussion (and Chapter 4) that it has a special constitutional status. At one time some influential Chinese scholars argued that the Basic Law was not a ‘constitution’ (Zhang 1988), there appears to be little support for this view now and it is generally recognized that it enjoys a special status under the Chinese constitution. Another Chinese scholar and official adviser has argued that since the nature of the relationship between the PRC and the HKSAR is not ‘federal’, there can be no question of residual power in the region and so its powers have to be garnered from specific articles (Wu 1988). Both these statements deny or at least question the possibility of a conceptual approach. However, if one looks at the background to the Basic Law, a philosophy does emerge, which may help towards conceptualization.

If a satisfactory theory is to be found, it will not be through the concept of sovereignty as these scholars argue (especially when, as happens all too often, the international and domestic aspects of sovereignty are conflated by them). Unification of Hong Kong with China has been widely seen as expressing the sovereignty of China and in that sense a primary function of sovereignty was accomplished in July 1997. The process of the change in Hong Kong’s status is referred to as the transfer or resumption of sovereignty. But that very phrase is interesting, reminding us that a key dimension of sovereignty is the relationship between states. Accordingly the Central Authorities have reserved to themselves defence and foreign affairs, which are clear manifestations of sovereignty (which of course may be shared with lower entities, as indeed the Basic Law itself does). Beyond that the internal distribution of powers and responsibilities is a matter for national decisions and legal instruments. So if one is not to be trapped by either the confused language of sovereignty or the misleading analogies of federalism, how is one to capture the essence of the Basic Law?

Here the answer must lie in the background to art. 31 of the Chinese constitution which authorizes the establishment of special administrative regions and in the philosophy underlying the relationship of the HKSAR to the PRC. Article 31 grants the widest possible discretion to the NPC in designing the powers and structures of special regions, which is to be exercised in ‘the light of specific conditions’. This was undoubtedly intended to free special regions from the shackles and restraints of the mainland political and constitutional system. The philosophy which underlies the Basic Law, and which was envisaged when art. 31 was adopted, of ‘One Country Two Systems’ was first formally declared by China in the Sino-
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British Joint Declaration. The article talks of ‘systems’ that may be established in special regions, and in the case of Hong Kong these are economic, political and social systems separate from those in the rest of China. The Basic Law, particularly in its General Principles (as well as the Joint Declaration) catches the essence of these systems — a high degree of autonomy, a democratic political order (at least in the fullness of time), independent judicial powers, rights and freedoms of residents, the capitalist system and the Hong Kong way of life, the common law, and an autonomous civil society.

It is from the logic of these systems that the precise scope of powers of the HKSAR and its relationship with the Central Authorities when the Basic Law provisions are unclear should be drawn. If we were to follow Wu’s arguments about residual powers, we would find that Hong Kong would lack powers essential to the management of urban life — the provision of sewage disposal, the maintenance of a fire service, weather forecasts and measures against damage from typhoons — to mention a few of numerous examples. Under his scheme the systems that the NPC has tried to establish for Hong Kong would collapse in confusion and immobility.

It is thus not to simple considerations of autonomy but the complex logic of systems that we must turn. Capitalism and particularly Hong Kong’s role as an international economic and financial entity mandated by the Basic Law can only be sustained by the ability to respond to global changes. In the political sphere the Basic Law sets out an ambitious agenda of reform (despite its shortcomings), turning Hong Kong from its present administrative and bureaucratic state with the centralisation of power in an imperially appointed Governor to a democratic system with more accountability of the executive to the legislature. It makes promise of key human rights, recognizing the application of important international instruments, particularly the International Covenant on Civil and Political Rights. The large area of autonomy of the HKSAR is indicated by the need to manage its complex social and economic system, the relatively limited scope of applied national laws (and even then their local enactment), and the inability of the Central Authorities to carry policy and executive functions in Hong Kong where the administrative structures are to be operated by its own residents.

To summarize, while sovereignty over Hong Kong lies with the PRC, the mainland has a separate economic, social, political and legal system. The Basic Law makes provision for this sovereignty by stating the Central Authorities’ responsibility for foreign affairs and defence (including acute internal disorders) as well as certain supervisory powers, and recognizes the distinctiveness of the PRC systems by penalizing attempts at their disruption (art. 23). Clearly in this context sovereignty cannot be given
the broad general meaning that it sometimes carries (particularly in the Chinese view) for that would effectively negate the separate system of the HKSAR and erode its autonomy. A way must therefore be found to limit the operation of Chinese sovereignty in the region. Since the recognition of Hong Kong’s separate systems is itself an exercise of Chinese sovereignty, the logic of those systems must also prescribe operational limitations on that sovereignty. As stated in the last chapter, the powers necessary for the operation of Hong Kong’s systems are thus a mirror image of the limitations on Chinese sovereignty.

**CONCLUSION: THE APPROACH OF THE NPCSC AND THE COURTS TO INTERPRETATION**

A number of difficult and interesting issues arose for interpretation in the very first year of the coming into force of the Basic Law. I explore some aspects of approaches to interpretation adopted by the NPCSC and the HKSAR courts, judged particularly against the method I have argued for above. The NPCSC has not provided any interpretation of the Basic Law since the resumption of sovereignty. However, it made three important interpretations before the transfer of sovereignty which apply in the HKSAR. The first was its Decision of 31 August 1994 in which it concluded that the electoral arrangements for the Legislative Council and regional and district boards adopted by the Legislative Council on proposals from Patten ‘contravene’ the Joint Declaration, the Basic Law and the NPC Decision on the Formation of the First Government and the First Legislative Council of the HKSAR. The second was the interpretation of the PRC Nationality Law, to deal primarily with the case of ‘returnees’ (discussed in Chapter 4). The third was its Decision under art. 160 of the Basic Law on the adoption of laws (discussed in Chapter 9) (all three Decisions are reprinted in 27 *HKLJ* 415-431).

There is an obvious contrast in the method and scope of interpretation by the NPCSC and the Hong Kong courts foreshadowed in preceding sections of this chapter. The NPCSC does not explain the basis for its decisions, while the courts enter into elaborate discussions on reasons for their conclusion. The NPCSC does not indicate the approach it has taken to interpretation, unlike the courts which expound the principles and rules of interpretations they are adopting. The NPCSC gives a strong impression that it reaches the conclusion that it desires politically. It does not engage in any analysis of the law that it is supposed to apply or interpret. The courts seek to emphasise their openness and impartiality by
justifying their conclusions by a detailed analysis of the law (and thus hide the political motivations of their decisions). The NPCSC has, in all instances, modified the law rather than interpreted it. In several respects the decisions of the NPCSC are directly contrary to the law it is supposed to interpret (as I have tried to demonstrate in my examination of the substance of the decisions in other chapters). The decisions of the NPCSC are not arrived at objectively, after listening to all the sides of the argument; rather they have given effect to partisan decisions recommended by the Preparatory Committee at the behest of the HKMAO. Its decision under art. 160 was concerned more with continuing its fight against Chris Patten than with explicating the Basic Law. In the courts all parties are heard through their legal representatives who provide extensive arguments on points of law. The decisions of the NPCSC consequently provide no basis for predicting how it might interpret the Basic Law in future. The method of the courts is intended to establish general ground rules for interpretation (although whether that ensures any safe predictions is questionable).

The HKSAR courts has had to consider weighty matters such as:
1. the legality of the Provisional Legislative Council;
2. the relationship of the Basic Law to the PRC Constitution;
3. how far the Central Authorities, particularly the NPC, are bound by the Basic Law;
4. the relationship of the Basic Law to mainland laws;
5. the cut off date for the reception of previous laws;
6. the procedure for the adoption of previous laws;
7. continuity of rights and obligations after 1 July 1997;
8. the rights of persons entitled to the right of abode under art. 24;
9. the competence of the Chief Executive to issue executive orders with legislative effect; and
10. the effect of art. 39.

The court expounded its approach to the interpretation in the following way. In Ma the Court of Appeal held that the Basic Law was the constitution of the HKSAR. Chan CJHC explored the complexity of the Basic Law, as based on an international treaty, a national law of the NPC, and the constitution of the HKSAR. Consequently no single approach would be justified for the interpretation of all its provisions. In that particular case, however, he adopted a generous and purposive approach (pp. 323-4). Mortimer V-P supported more strongly a generous and purposive approach, quoting with approval Lord Diplock’s statement in A-G of the Gambia v Jobe [1984] AC 689 at 700 and Lord Wilberforce’s statement in Minister of Home Affairs v Fisher [1980] AC 319 at 328 to the effect that such an approach is to be used to interpret a constitution
This approach has been endorsed in all subsequent decisions on the Basic Law. In particular, it has been held to be particularly appropriate when human rights are concerned. It also finds echoes in Keith J’s statement in *Chan Kam Nga* that he would be prepared to find against a construction which produced anomalies, since anomalies were unlikely to have been intended (p. 24–5).

The essence of the purposive approach is to give effect to the intention of the legislature, even if this is achieved by disregarding the literal meaning of the terms of the legislation (through what is called a ‘strained’ meaning) (see Bennion: 1997, pp. 731–750 for a discussion of ‘purposive approach’). Lord Diplock set three requirements before the purposive approach could be applied (*Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105). The first is the intention of the legislature should be apparent from the provisions of the legislation; second, that the failure to give effect to the intention is due to inadvertence of the draftsman, and third, that it is possible to state with certainty what additional words would have been used to give effect to the intention. The requirement of the third condition is challenged by Bennion, 1997:304 and indeed there appears to be little authority for it. It would also seem that the purpose of the legislation may be gleaned from materials other than the actual terms of the legislation; Lord Diplock was speaking before *Pepper v Hart*.

Notwithstanding the unanimity of Hong Kong judges on the appropriateness of the purposive approach, there have been difficulties in applying it to the Basic Law. There are difficulties in applying a purposive approach since there is no reliable guidance to the intentions of the drafters. The primary background material is the records of the Basic Law Drafting Committee which are confidential. In *Chan Kam Nga v Director of Immigration* [1998] 2 HKC 16 at p. 24, Keith J referred to the difficulties of applying a purposive approach when the *travaux preparatoires* are not publicly available or may not exist. He was prepared to give effect to intentions of the drafters by applying a generous and purposive approach, but could find no evidence of such intention.

In *Cheung Lai Wah*, the government introduced evidence of the intention of the Drafting Committee through an affidavit of one of the mainland members, Professor Xu Chongde, who relied on ‘his recollections of the views of fellow members’. Keith J refused to take these views into account (p. 85). He gave no reasons for his refusal, but it could have been based on the absence of documentary evidence. Even if documentary evidence is produced, it is doubtful if it should be admitted if only one party has access to it — as would be true in cases where a private party confronts the HKSAR.

Courts have also refused to accept an agreement in the JLG as evidence
of how an article of the Basic Law was intended to be interpreted. A subsequent agreement was not evidence of the intentions of the drafting committee or the NPC which adopted it. It may be no more than the way that the two governments would like to see the article implemented. In Chan Kam Nga Keith J refused to apply a JLG agreement to read words of limitations into art. 24(3) so that a person born outside Hong Kong would be entitled to the right of abode only if one of his or her parents was a Chinese national who had the right of abode at the time of the person’s birth. Keith was influenced by the fact that the agreement was reached well after the promulgation of the Basic Law (p. 23). In Cheung Lai Wah Chan CJHC took an even more robust line, arguing that the Basic Law not only reflected an international agreement but was also a constitution which gave rights to residents of Hong Kong. Nor did he accept that international law required any subsequent agreement to be always taken into account in the interpretation of a treaty (p. 649). He said, ‘I do not think that, short of any amendment to the Basic Law, the “agreement” of the JLG for the implementation of the Joint Declaration should be allowed to qualify or even take away what is clearly given under the constitution’ (p. 650).

The courts have relied heavily on the Joint Declaration to establish the purpose and meaning of provisions of the Basic Law. It was used in Ma to confirm the conclusion that the previous laws were to have effect after 1 July 1997 (per Chan CJHC at p. 327 and Mortimer V-P at p. 361). Even greater reliance was placed on the Joint Declaration by Keith J at first instance and on appeal by the Court of Appeal in Cheung Lai Wah, where it was used to determine the relationship between arts. 22 and 24(3) (per Keith J at p. 85 and per Chan CJHC at pp. 638–9). However, it was held in Chan Kam Nga that the Joint Declaration would be of little assistance when the Basic Law merely reproduced its language (implying that it would be different if there were travaux preparatoire which explained the meaning of expression as used in Joint Declaration, per Keith at p. 24).

In applying the purposive approach, the courts have tended to look to specific provisions of the Basic Law or the Joint Declaration. However, the purpose of the Basic Law cannot always be drawn from a narrow focus on one or more provisions. What the courts have failed to do is to examine the broad functions of the Basic Law, which is to grant a high degree of autonomy to the HKSAR. This point is illustrated most clearly in Ma. The court concentrated on specific articles such as art. 19, instead of looking at the overall purpose of the Basic Law, which is to grant a high degree of autonomy to the HKSAR. In the result it more or less denied any possibility of autonomy by holding that the ‘sovereign’ could
do what it wanted in Hong Kong regardless of the Basic Law. A similar criticism can be made of Keith J’s approach in the *Expatriate Civil Servants* case, where a rather mechanistic reading of art. 103 threatens to undermine the scheme for the separation of powers established by the Basic Law (see Chapter 7). Both in *Ma* and this case, the courts, in pursuit of the theme of continuity, have used colonial analogies to negate the forward looking orientation of the Basic Law. This broader approach which looks to the overall purpose of legislation before turning to specific provisions is consistent with the English Court of Appeal’s stance in *Re Stern, ex. p Keyser Ullman Ltd v The bankrupt* [1982] 1 WLR 860.

Another area where the courts have failed to live up to their claims is in giving a generous interpretation to articles conferring rights on individuals. Rights were the context in which Lords Diplock and Wilberforce made their statements which the Hong Kong courts have endorsed repeatedly. It was clear in the right of abode cases that provisions conferring rights were narrowly interpreted and those authorising restrictions were generously treated. However, the courts have looked to international human rights for guidance on interpretation which would reinforce certain provisions of the Basic Law, although its record of adopting generous interpretations is uneven. In *Chan Kam Nga* the Court of First Instance relied on art. 23 of the ICCPR to find that art. 24(3) of the Basic Law did not intend to restrict the right to children born out of wedlock, since this would be to split the family which is recognised by the ICCPR as ‘the natural and fundamental group unit of society and is entitled to be protected by society and the State’ (p. 24–5). The Court of Appeal in *Cheung Lai Wah* relied upon the ICCPR provision on equality to reinforce its decision that illegitimacy was irrelevant to art. 24(3) (pp. 647–8).

When making an interim overall assessment, it can be stated that after an inauspicious start in *Ma*, the courts have made efforts to preserve the integrity of the Basic Law. They have held on to the Joint Declaration (which provides a favourable starting point for a broad interpretation of the autonomy of Hong Kong) in the face of attempts to water it down by reference to JLG ‘agreements’. They have refused to allow selective ‘readings’ from the Basic Law Drafting Committee ‘records’ to detract from the natural meaning of the Basic Law. They have held that Chinese legislation cannot detract from the provisions of the Basic Law (unless it is expressly authorised in the Basic Law). They have also stated that all questions of the interpretation of the Basic Law are matters for them to decide, rather than be argued via expert opinions on foreign law. Chan CJHC showed in *Ma* awareness of the difficulties stemming from different legal traditions implicit in the Basic Law (p. 324) but Mortimer V-P was
less troubled by that. He did not envisage any inherent difficulty arising between the two traditions, as the ‘common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to purposively interpret the plain language of this semi-constitutional law’ and that the ‘influence of international covenants had modified the common law principles of interpretation’ (p. 364).

Courts have assumed without debate that they have the right to review the constitutionality of legislation (after a perfunctory reference in *Ma* to art. 19 which defines the jurisdiction of courts by reference to previous practice). They have tried to provide a detailed framework for the interpretation of the Basic Law. In doing this they have adopted common law principle of interpretation, ignoring the fact that the Basic Law is PRC law. Keith J in *Cheung Lai Wah*, when confronted with expert opinions on Chinese nationality law in relation to art. 24, said that he did not ‘regard the proper construction of art. 24(4) as being a question of foreign law, which I must decide as an issue of fact’. He therefore treated their views in the same way as submissions of counsel (at p. 85). This view was endorsed by Chan CJHC in the Court of Appeal, who did not regard Chinese nationality law relevant since the case was concerned with the interpretation of the Basic Law and status under Hong Kong law, and not the nationality status of Chinese residents (p. 650).

A similar tendency is evident in the way that the courts have treated the Chinese text of the Basic Law. The Chinese text is the one that was passed by the NPC. An NPCSC Decision authorises an English text but it must give way to the Chinese text in case of conflict. Therefore the logical way would be to start with the Chinese text. Instead the courts and counsel have used the English text, and when counsel tried in *Ma* to introduce the Chinese text as providing a clearer meaning, Chan CJHC said that it was not necessary to rely on the Chinese at all as the English text ‘is already quite clear and without ambiguity’ (p. 329). A similar view was expressed by Nazareth V-P (p. 347). That is hardly the stance required by the NPCSC Decision. In *Cheung Lai Wah*, counsel for appellants sought to rely on the Chinese text of art. 22(4), which referred to ‘people belonging to other parts of China’ as opposed to people from other parts of China, the suggestion being that persons with a right to abode in Hong Kong could not be said to belong to other parts of China. Nazareth LJ disallowed this reference to the Chinese text, saying ‘I am unable to accept that approach to the meaning of words that seem to me to be quite plain. It could only be warranted by compelling reasons, which are wholly absent’ (p. 654).

In these ways the courts have tried to give a certain self-contained character to the Basic Law. They have been assisted in this endeavour by
the abstension of the NPCSC from any involvement in the interpretation of the Basic Law. The Basic Law has thus become very much the child of the common law, which has helped in its general integration with the ordinary law of Hong Kong. Whether the modes of reasoning and interpretation taken by the Hong Kong courts prevails will depend on how the first reference to the NPCSC under art. 158 is made and how it disposes of it. It is a apt commentary on the state of One Country Two Systems that no body, perhaps most of all the Central Authorities, are looking forward to the first reference.
The economic provisions of the Basic Law have to be understood in the context of the principal purpose of the doctrine of One Country Two Systems. According to this doctrine, the resumption of Chinese sovereignty would not lead to any change in the economic and social systems of Hong Kong, at least for 50 years. The preservation of the economic system was the highest priority in the general scheme of maintaining Hong Kong’s ‘systems’. Both in Joint Declaration and the Basic Law, it is the economic system which has been carefully and most completely preserved. The concern to ensure the continued prosperity of Hong Kong and its ability to promote modernisation in China is reflected in the Joint Declaration which is largely concerned with economic policies. Out of the eleven basic policies that China undertook to apply in the HKSAR, six are directly connected with the economy, while the rest are indirectly supportive of these policies. The dominance of economic questions is even more marked in Annex I which elaborates the basic policies. Indeed it may be argued that the changes to other systems, particularly the political system, have been made in order to ensure the continuation of the economic system.

The interests of key parties converged on the preservation of Hong Kong’s economy. Britain had major investments in Hong Kong for which it wanted continued opportunities. Any shift away from Hong Kong’s market economy would have triggered off a massive emigration, with many people seeking a home in Britain — anathema to British politicians! Influential sectors in the territory itself, centring around the business community and professions, were the great beneficiaries of the economic system. China saw considerable advantages to its modernisation and
economic reforms in the preservation of the market in Hong Kong. It would have made little sense for it to bring Hong Kong under the system of planning that China was in the process of modifying, eventually even dismantling, when Hong Kong could become the super Chinese economic zone and the engine of Chinese economic growth.

The preservation of Hong Kong’s economic system required at the least that it should be kept separate from the economic system on the mainland, which at the time of the Sino-British negotiations on the transfer of sovereignty, was still centrally planned with only the most tentative moves towards a market economy. But the Basic Law does more than separate Hong Kong’s economy from that on the mainland. It ‘establishes’ at length the principles and, occasionally, the details of the system. Since, unlike the previous legal, administrative and political systems, there was relatively little provision in law for the structure or operation of the economy, the Basic Law codifies what were believed to be the essential elements of the economic system. Codification introduced a large measure of rigidity in the economic system and by the same token restricted the autonomy of the HKSAR to manage and direct the economy.

The Joint Declaration specifies the principal features of the Hong Kong economic system — its market economy with the protection of human and economic rights, like the protection of property and foreign investments, a separate customs and taxation regime, independent and convertible currency, free port and an international financial centre, and extensive global trade and economic relations and agreements. All these features are to be maintained but laws and policies in relation to them were to be made independently by the HKSAR authorities.¹ There is sometimes reference to the maintenance of ‘previous’ practices or policies (as in shipping or the regulation of financial institutions) and it is clear that the HKSAR is obliged to operate within the basic economic framework of the Declaration, so that, for example, it has to maintain the convertibility of its currency and allow the free movement of capital in and out of Hong Kong, and operate a free port. These broad policies were generally acceptable to the people of Hong Kong and the framework would have provided HKSAR with considerable flexibility and discretion. It would indeed have a high degree of autonomy.

However, the translation of these policies into the Basic Law was

¹ For example the HKSAR is to deal ‘on its own’ with financial matters, including the drawing up of the budget (section V of the Annex); it is to decide its economic and trade policies ‘on its own’ (section VI); it may establish trade missions abroad (being required only to report the fact to the CPG) ((section VI); and it may decide monetary and financial policies ‘on its own’ (section VII).
accompanied by some embroidery — in the form of restrictions on the competence of the HKSAR. These restrictions owe themselves to the influence of the business community (or certain sections of it) which had established good rapport and indeed common purpose with the PRC. The principal political institutions were designed (again under pressure from them) to promote conservative policies (see below). However for many of them this institutional bias for the free market was not enough. They wanted the Basic Law to entrench the philosophy of economic liberalism. While there was general acceptance of the virtues of the market system, there was disagreement on how far the Basic Law should entrench it and on the particular brand of economic liberalism that was proposed.

The proponents of extreme economic liberalism drew their inspiration from the US theorists of what has come to be called constitutional economics, like James Buchanan (Buchanan: 1990). The basis of this doctrine is classical liberal theory (whose modern gurus are Hayek and Milton Friedman), under which the function of the state is to establish the conditions for the operation of a free market by limiting the role of the state to the provision of a legal system to protect individual rights, particularly of property. However, constitutional economics goes beyond this. It is opposed, for example, to the Keynesian version of the market, where the state intervenes to balance supply and demand to even out the fluctuations in the market, on the grounds that such intervention would aggravate the problem and distort the market. Keynesianism is rejected because it is deemed to lead to an increasing role for the state and to excessive public expenditure, imposing extra burdens on economic actors in the market. According to the proponents of this doctrine, the tendency towards this kind of state profligacy increases as the political system becomes more democratic since politicians buy popular support through the dispensation of state largess. Among other consequences, this leads to inflation and budget deficits. They argue that the only way to stop this situation is to limit government expenditure — through a constitutional requirement of balanced budgets. For the more ardent adherents of this doctrine, even balanced budgets will not do, for they merely invite the government to increase taxes to balance increased public expenditure. Consequently they insist on the constitutional entrenchment of low tax policy as well. To encourage state financial prudence, they also advocate constitutional provisions for sound currency policies, so that the government can issue currency only if it backed by adequate reserves. They would also prefer to see constitutional limits on the competence of governments to regulate wages and prices.

The Buchanan school found powerful support from the business community of Hong Kong, and proposals based on his theories (going in
some respects beyond Buchanan himself) were presented to the Basic Law Drafting Committee. These proposals were very influential, although the final provisions are a somewhat toned down version. They were seen as consecrating the previous Hong Kong economic system, especially in the face of increasing political democratisation, but it is clear that they go beyond the basics of the previous system.

THE PRINCIPLES OF THE ECONOMIC SYSTEM

The underlying principle of the economic system is laid down in article 5 of the Basic Law as follows, ‘The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years’. An elaborate set of rules and institutions is built on this principle. Indeed in one sense it is possible to see the whole of the Basic Law as structured around the market economy, for the organisation of the of the legal and political systems is justified on their imperative for the market economy. Similarly the large autonomy that Hong Kong enjoys in the economic area is based on the need to operate the market without being tied up with a very different system on the Mainland.

The economic provisions of the Basic Law serve four principal purposes:
1. separate the economic system of the HKSAR from the economic system on the mainland;
2. provide a framework for the operation of a capitalist market;
3. maintain Hong Kong’s status and role as an international trade, transport and finance centre; and
4. establish key elements of constitutional economics.

Separation of Hong Kong and Mainland Economies

The Basic Law provides for a firm separation of the economy of the Mainland from that of Hong Kong. I have already referred to article 5 which separates off Hong Kong’s market economy from the socialist

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3 For example there were 21 budget deficits out of 45 since 1946/47. See Tang, ibid., p. 288.
economy of the Mainland. Various factors bring about this separation. HKSAR is guaranteed its ‘independent finances’; its revenue is to be utilised exclusively for its own use, and it may not be handed over to the Central Authorities (art. 106). Nor may the Central People’s Government levy taxes in the HKSAR (art. 106). Hong Kong is guaranteed an independent taxation system (art. 108). The HKSAR has the authority to establish its own monetary and financial system (art. 110). It is to have its own separate currency, the Hong Kong dollar, which it may issue on its own (art. 111). It shall also manage the exchange value of the dollar (art. 103). The HKSAR will constitute a separate customs territory, enabling it to conduct its own commercial and trading policies (art. 116). It may retain independent membership of relevant international organisations and international trade agreements (such as the GATT, now WTO, or agreements regarding international trade in textiles). Export quotas, tariff preferences and other similar arrangements that it may secure ‘shall be enjoyed exclusively by the Region’ (art. 116). It may issue its own certificates of origins for the purposes of international trade (art. 117). Within wide margins, the HKSAR may pursue independent shipping (art. 124) and aviation (art. 128) policies and management. It may enter into independent trade and economic relations and treaties with foreign states, regions and international organisations in, inter alia, economic areas (art. 151). It may also retain its membership of international economic organisations of which China is not a member, and would enjoy a special status ‘in an appropriate capacity’ in those international organisations of which China is a member (art. 152).

These provisions are supplemented by laws of the Mainland or the HKSAR which treat the other economy as foreign for the purposes of investment, taxation, etc. (see Chapter 4 for the treatment of the economic activities of Hong Kong residents on the Mainland). A particularly striking example of the way the Mainland and Hong Kong are treated as separate economies is the avoidance of double taxation agreement between them which was signed in February 1998. The agreement is made between the Finance Bureau of the HKSAR and the State Administration of the PRC. There are provisions for consultation between the two authorities to remove

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4 Certificates of origin are evidence of the fact that the product in question has been manufactured in the region and may be exported to another country freely or subject to specified duties or quotas, in accordance with bi-lateral or multi-lateral arrangements. The amount of local value added necessary for a product to qualify as of regional origin varies with particular arrangements. Certificates of origin would be important when the HKSAR and the rest of China have separate and different trade regimes with other countries (as is currently the position). When China joins the WTO, some of these differences would become less salient.
any difficulties or doubts as to the interpretation or application of the arrangement (art. 5). Either side may terminate the agreement after giving appropriate notice to the other party (as stated in the joint memorandum). The agreement is given effect in Hong Kong under the Inland Revenue Ordinance by an order of the Chief Executive which recites that the agreement has been ‘with the Government of a territory outside Hong Kong’ (s. 1 of the order, LN 126 of 1998).

Preserving Hong Kong’s Market Economy

The framework for a market capitalist economy is constituted by a number of provisions. A fundamental factor is the recognition of private property and the protection of rights in it, held by individuals or legal persons (arts. 6 and 105). The Basic Law also recognises and promises to protect intellectual property rights, so essential to modern capitalism (arts. 139 and 140). The management of land and other natural resources is vested in the HKSAR, although they are owned by the PRC (art. 7). Land rights, especially those connected with leases that would operate beyond 1997, are secured (art. 120). Provision is made for full and prompt compensation in case of lawful deprivation of property (art. 105).

The HKSAR has been vested with control over labour which is an essential factor in the economy. It shall on its own formulate laws and policies relating to labour (art. 147). Hong Kong is authorised to apply immigration controls on entry into, stay in and departure from Hong Kong of foreigners (art. 154). Such immigration controls have been instrumental in regulating labour and in fashioning policies about foreign labour, which has played a key role in the economic and social life of Hong Kong. However, Hong Kong has limited control over migration from the Mainland, which is determined primarily by the Central People’s Government, although after consultation with the HKSAR (art. 22; see Chapter 4).

Other provisions of the Basic Law, like the requirement of a sound currency, are also beneficial to the market (arts. 111 and 113). The government has to ‘safeguard the free operation of financial business and financial markets’ (art. 110). The Basic Law also seeks to provide the general social and economic environment where capitalism may flourish. The government of the HKSAR has to provide ‘an economic and legal

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5 The Basic Law does not define when deprivation of property may be lawful. Presumably courts will have regard to the common law as well as international law rules, which on this point have the status of customary law. See Albert Chen (1993).
environment for encouraging investments, technological progress and the development of new industries’ (art. 118) as well as to formulate ‘appropriate policies’ to promote and co-ordinate the development of various trades such as manufacturing, commerce, etc (art. 119). The Basic Law also provides authority for the continuation of ‘private shipping businesses and shipping-related businesses and private container terminals’ to ‘operate freely’ (art. 127) and recognises the role of private enterprises in the international aviation rights of the HKSAR (arts. 134 and 135). A series of provisions concerning social and educational policies recognise the role of various services required by a market economy, including those of professionals, who are authorised to maintain their powers to regulate their profession (article 142).7

Many of these provisions are also aimed at maintaining a distinct sphere of civil society,8 which limits the extent of the powers of the government, and so are considered conducive to entrepreneurship. In the same category may be included a number of human rights, like association, expression, privacy, protection against arbitrary searches, and freedom to choose one’s occupation,9 although it must be said that capitalist development both in the west and third world countries has taken place without some of these rights.

**Maintaining Hong Kong’s Status as an International Trade, Transport and Financial Centre**

The government of the HKSAR is required to ‘provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre’ (art. 107). Investments from abroad will be protected (art. 105). The Hong Kong dollar is to be freely convertible,10 there are no foreign exchange controls and the free flow of capital within, into and out of the HKSAR shall be safeguarded

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6 This article may suggest more of a directing role for the government than would be consistent with provisions establishing constitutional economism discussed below.

7 Article 94 is authority for lawyers from outside Hong Kong to work and practise in the Region (see chap. 7).

8 See for example arts. 136 and 137 (on educational policy and academic freedom), art. 141 (religious freedom and activities), arts. 144, 146, 148 and 149, (role of non-governmental organisations in education, culture, sports, social work, etc).

9 Chapter III of the Basic Law deals with fundamental rights, but human rights are also mentioned and protected in other parts of the Basic Law (as for example various property rights already mentioned).

10 The Exchange Fund Ordinance defines ‘freely convertible’ as follows, ‘with respect to money, means that it may be traded on the international foreign exchange markets’.
by the government. Markets for ‘foreign exchange, gold, securities, futures and the like shall continue’ (art. 112). Hong Kong’s status as a free port is to be maintained and no tariffs are to imposed ‘unless otherwise prescribed by law’ (article 114).

The Basic Law commits the HKSAR to a policy of free trade and the safeguarding of the free movement of goods, intangible assets and capital (art. 115). Its independent status as a separate customs territory, the membership of economic organisations like the WTO and ability to negotiate its own trade concessions (art. 116) and providing its own certificates of origin (art. 117) enhance possibilities of maintaining and strengthening its position by freeing it from a more closed and protective market of the mainland. There is a presumption in favour of general access of ships to the ports of the HKSAR (arts. 124 and 125).

The government of the HKSAR ‘shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation’ (art. 128). It may (with the authorisation from the CPG) negotiate air service agreements on its own (arts. 133 and 134). The HKSAR has been delegated wide powers relating to foreign affairs in order to pursue its policies to promote its status as a financial and trading centre (e.g., arts. 33, 150–57). These include membership of international organisations as well as the conclusion of treaties (see Chapter 11 for further discussion).

The Basic Law protects the right of travel in and out of the Region and enables the HKSAR to issue its own passports (art. 31 and 154) — a factor of vital importance for an international economic centre. It is empowered to follow an independent immigration (in so far as it concerns persons of foreign states) (art. 154, para 2) — again important for the management of its status as an international centre. The cosmopolitan character of Hong Kong has facilitated its role as an international centre; the provisions on culture and non-governmental organisations that we have already examined will help to maintain that character. In an unusual constitutional provision, the Basic Law allows that up to 20% of the members of the legislature may be non-citizens (art. 67), grants the right of abode to non-citizens (art. 24) and permits the HKSAR to employ non-citizens in the public service (arts. 100 and 101).

Key Elements of Fiscal Conservatism

As for a conservative market economy, the principal provision is the requirement imposed on the HKSAR of ‘keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal
balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product’ (art. 107). It entails not only a balanced budget, but also imposes a limit on rates of taxation, since it has to be commensurate with the rate of its gross domestic product. But if the rates of growth are high, it does not follow that high taxes would be valid, for another article establishes guidelines for low taxes, for the government has to take ‘the low tax policy previously pursued in Hong Kong as reference’ in determining types and rates of taxes (art. 108). Fiscal ‘prudence’ is also imposed by the requirement that ‘the issue of Hong Kong currency must be backed by a 100 per cent reserve fund’ (art. 111), providing thus for a currency board mechanism for the management of the currency. The issue of currency, which may be delegated to banks, should be ‘soundly based’ with the objective of ‘maintaining the stability of the currency’ (art. 111). The Exchange Fund is to be managed ‘primarily for regulating the exchange value of the Hong Kong dollars’ (art. 113).

LEGAL AND POLITICAL FRAMEWORK FOR THE OPERATION OF THE MARKET

That the primary concern of the Basic Law is the entrenchment of a laissez-faire economy is evident not only from the above provisions but also from provisions dealing with key legal and political institutions and relationships. The legal system is based on the Weberian notion of the role of law in a market economy. Weber argued that a rational economic system like capitalism required a rational legal order (for a detailed discussion of Weberian analysis and its application to the Basic Law, see Ghai 1993). Weber argued that a rational economic system like capitalism required a rational legal order. Capitalism, with its orientation towards profit making, needs predictability and calculability. It is necessary to assess, and reduce, the risks of business transactions, and such calculability is facilitated, among other factors, by clear rules of property and its ownership. The more absolute the ownership and the more alienable property is, the more transactions can be made, thus enhancing calculability (as well as the rational utilization of economic resources).

11 In the absence of a central bank, most funds of the government are held in an Exchange Fund established under the Exchange Fund Ordinance. Its main function is to use foreign exchange reserves to maintain the stability of the external value of the Hong Kong dollar, but the legislation gives the Financial Secretary considerable discretion as to how to achieve this purpose. The Fund has been used, for example, to bail out commercial banks as well as to support the Hang Seng Index Futures after the 1987 crash.
The notion of exchange lies at the heart of capitalist transactions; a key rule for the law is to provide guarantees for the exchange process. Predictability, crucial because so many business decisions relate to happenings in the future, is achieved by established rules which attach specific consequences to particular acts or agreements. Rules of contract are especially important to bind others and to plan for the future; the wider the scope of the freedom of contract, the more the contingencies that can be planned for (thus reducing risks). It is naturally important that these rules be enforced competently, fairly and impartially. A capitalist legal system achieves this result by requiring a minimum of prescribed qualifications for judicial office, the independence of the judiciary and an appellate system. The judges are to be guided solely by the rules, eschewing external considerations or pressures.

This type of legal system replaces other forms of security and predictability (like community pressures or ties of family, clan or friendship). It establishes a regime of impersonal laws, on the whole universal in character. At the centre of it is the individual, the bearer of rights and obligations, whose engagement with the market is based on rational, economic considerations and calculations, in a society where economic calculations and transactions have been abstracted from their social matrix.

A complex market economy needs a variety of legal mechanisms to facilitate its operation. It requires, for example, a concept of legal personality in order to aggregate the resources of a number of individuals and other means of raising finance, to separate the assets of these individuals from those of their business firm, and to provide a structure for the organization and management of an enterprise. It also requires rules for the distribution of gains and risks in a business venture. It has need of rules to facilitate and conclude various kinds of transactions like sales, pledges and settlements.

The emphasis on the protection of property alerts us to another dimension of legal rules. The market economy is a private economy, and the need for rules which bind others (and the machinery for their enforcement) arises from transactions among individuals and corporations. In those States where the government enters the market as an entrepreneur, the tendency is to treat public enterprises as if they were another economic corporation. One burden of the rule of law therefore is to subordinate these enterprises to the normal rules and discipline of the market.

Historically, the earlier burden of the rule of law has been to circumscribe the scope and role of the State as the regulator of the market. The law is intended both to limit State intervention and to make it predictable. It is by no means the case that the business community prefers
a passive state. The State (and for the most part the state alone) can provide the infrastructure of the market (for example, the provision of legal tender, weights and measures, protection of property, the legal system, law and order and social consensus). However, the dependence of the market on calculability and predictability necessitates that the form of State intervention and the State itself be governed by a regime of rules, and, in appropriate cases, limited (so that they do not arbitrarily discriminate among business firms or undermine the private basis of the economy). This balance is said to be maintained through the rule of law.

The common law and most other constituents of the previous legal system are protected in the Basic Law. A well developed, private market oriented legal system, geared towards the security of transactions, the minimisation of risks, and predictability, is provided by the preservation of the existing laws and judicial system of Hong Kong (e.g., arts. 8 and 18). Most of Chinese law is excluded from application to Hong Kong; stringent requirements must be satisfied before national laws are applied (they must relate to foreign affairs, defence and other matters outside the autonomy of Hong Kong; and the Committee for the Basic Law must be consulted, art. 18). Special guarantees are provided for the right to confidential legal advice, access to courts, choice of lawyers for ‘timely protection’ of lawful rights, and to judicial remedies, including against ‘executive authorities and their personnel’ (art. 35). The autonomy and independence of the legal profession are guaranteed, as well as the previous rules for the right of foreign lawyers to practise in Hong Kong (arts. 94 and 142, see Chapter 8).

The Basic Law places a particular emphasis on the maintenance of law and order (even if this is achieved by reliance on PRC troops) (art. 14). Although foreign affairs are retained by the Central Authorities, as integral to the sovereignty of the PRC, there is a considerable delegation of it to Hong Kong in order that it may engage in the international economy. Consequently it may make treaties, be a member of international organisations, and enter into arrangements with other states for judicial co-operation, for instance for the reciprocal enforcement of judgments and arbitral awards, taking of evidence, and the surrender of fugitive offenders (see Chapter 11).

A striking bias in favour of market economics is manifest in the design of the political system of Hong Kong. In one sense the Basic Law is a compact between the Central Authorities of China and the business community of Hong Kong. The alliance between them was sealed during the drafting of the Basic Law, which provides for an exceptionally privileged position for business and professional groups. Various provisions attest to the alliance and the strong position for business. Democracy, which would
have both diluted the special position accorded to business leaders even under the British and set up demands for a more just economic system, was rejected in favour of a more controlled political system. The system was to be ‘executive led’ in which the Chief Executive, widely expected to be a business person, would be appointed by the Central People’s Government following whatever procedure it chose (art. 45). The Chief Executive is not responsible to the legislature, and thus the most influential of political parties which might be more responsive to popular demands, would be muted. The scope for the initiation of policy or legislative proposals by the legislature is severely restricted, so that its role is essentially that of the ratification of policy or bills made elsewhere (art. 74). The legislature itself provides for a dominance of business groups through functional constituencies, which would constitute half of the membership until the foreseeable future (Annex II, para 1). Members elected by an Election Committee are also likely to be dominated by business groups. Procedures for voting in the legislature would also give this already privileged group a veto over popular initiatives. Government proposals are voted on by the legislature voting as a body, while proposals of members (including proposed amendments to government proposals) are voted separately by the functional constituency members on the one hand, and other members on the other (Annex II, sec. II). Effectively through this system both the Chief Executive and the business community have a veto over any initiatives of more popularly elected members — who might be tempted to temper the rigours of the laissez-faire economy of Hong Kong. If all this was not enough, the Basic Law restricts the scope for redistribution by the strict rules for budgets and the limits on expenditure for welfare, as has been shown above.

**CONCLUSION**

The requirement for the maintenance of the market economy provides considerable support for the autonomy of the HKSAR. It necessitates independent membership of Hong Kong of a large number of international and regional economic organisations. It requires Hong Kong to establish rules and standards for the regulation of financial and other markets which are in accordance with international norms in capitalist economies — and thus act to fend off Mainland laws and standards. The prerequisite of the maintenance of the market economy in Hong Kong is the self-restraint of the Central Authorities in intervening in the affairs of the HKSAR.
However, the Basic Law may not be able to guarantee the autonomy of Hong Kong. Some of its assumptions are no longer realistic. One such assumption was that Hong Kong and mainland economies would remain separate. In fact Hong Kong companies are the largest foreign investors in the mainland, operating under PRC law and Chinese companies are now the biggest ‘overseas’ investors in Hong Kong, operating under Hong Kong law. In these circumstances the two economies cannot be separated, nor perhaps can Chinese companies be brought entirely under the influence of the market, being state owned. This has raised doubts about whether the ‘level playing fields’ under the legal regime in Hong Kong can be maintained for long, when a major Chinese company has an interest in the matter.

There are other ways too in which the economic provisions may not work in the way stated in the Basic Law. While the Joint Declaration and the Basic Law talk of the high degree of autonomy of the HKSAR, the above analysis shows that there are serious restrictions on the competence of the HKSAR authorities to decide on and implement policy. Not only can Hong Kong not decide to move away from capitalism, it cannot even modify the essentials of a rather old fashioned and rigid market system (see Chapter 4). However, not all of the provisions on the economy are mandatory — some are clearly written in the form of guidance rather than prescription. One task that is likely to confront the courts is whether a provision is mandatory or directory. For example, art. 108 states that the HKSAR ‘taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation’. Even under this more permissive formulation, suggestive of being directory, it may be hard to decide whether the HKSAR may lawfully increase taxes by any significant amount over previous rates.

Even when mandatory, these provisions may be hard to observe. All major and minor economies are being rapidly forced into even further integration on a global basis. There are major changes in technology and communications, and with the opening of national markets through removal of restrictions on capital and trade, key decisions on restructuring of economies are made daily. The restructuring requires a measure of flexibility that may not be feasible within the Basic Law. Quite apart from the impact of globalisation, Hong Kong’s economy has been undergoing dynamic changes. It is also having to confront the economic crisis of East Asia which has already shown the limitations of the provisions regarding the budget. A further straitjacket is the political structure which seeks to limit the influence of democratic forces, many of which are also in support of greater welfare, itself ruled out implicitly by the Basic Law. It would
seem that Hong Kong’s economy would continue to be successful only if it is able to adjust to changing configuration of global forces as well as build a social consensus around it, not be frozen in time as to some extent is done in the Basic Law.
INTRODUCTION

This chapter examines the framework for politics and administration, particularly with a view to assessing the degree of democracy and the prospects for the exercise of the autonomy granted to Hong Kong by the Basic Law. Most commentators are agreed that the two questions are inter-related; but they disagree on the nature of the relationship. Some consider that strong democratic institutions and practices in Hong Kong are essential to preserve its autonomy, others regard them as undermining it because they provoke and upset China. I also examine the relationship of institutions to the maintenance of prosperity and stability (which, rather than democracy, is proclaimed as the principal objective of the Basic Law). Two dimensions of these arrangements are analysed: the relationship of the Central Authorities with Hong Kong institutions, and the relationships of Hong Kong institutions inter se, particularly the relationship between the executive and the legislature. The chapter also looks at the structure of government (including the public service), local government and advisory boards.

At the time of the negotiations on the transfer of sovereignty, Hong Kong enjoyed a high degree of civil rights, the rule of law, and an independent judiciary. There was an exuberant private economy, which provided considerable scope for the initiatives and activities of entrepreneurs and corporations. There was a well developed civil society. As we have seen, the aim of all the parties to the discussions on future constitutional arrangements was to consolidate these positive features through codification and legal guarantees. Hong Kong was a prime candidate for democracy, with high literacy rates, ethnic homogeneity, economic prosperity, social
consensus, an active non-state sector, a large and vigorous press, a cosmopolitan and plural society, and a small, compact land area. However, Hong Kong was not democratic during the colonial period, the executive being appointed by and accountable to the metropolitan power and the legislature nominated by the Governor. The dilemma was that this model could neither be preserved nor replaced by a full blown democracy.

Discussions on democracy were conducted within a specific, and relatively narrow, framework, with the focus on the principle of elections and secondarily the relationship between the executive and legislative bodies. The question of economic power and relations, the scope and status of civil society, and the principle and effectiveness of legality were recognized as important, but their connections to democracy were less clearly perceived. So, while the debate on the forms and mechanisms of democracy was somewhat circumscribed, there was at the same time a wider context to it since the recognition of the reluctance of China with respect to democratization and the supposed imperatives of the market lent a highly instrumental dimension to it (in contrast to other former British colonies where the goal of democracy on independence was unproblematic, even though its specific form might be contested when the population was multi-ethnic).

Another difficulty about discussing democracy in Hong Kong is that Hong Kong will be not independent but a subdivision of China. It will enjoy considerable autonomy (particularly in relation to the maintenance of a market economy) and a substantially separate political system, but it will also be linked, and subordinated, to an undemocratic and authoritarian system. The provisions and prospects for democracy must therefore be located within this wider framework, a curious amalgam of the liberal and democratic on the one hand and the dictatorial and capricious on the other. As has already been made clear, the analogy of federal models is of limited use in these circumstances.

For a proper understanding of the purpose, scope and future of democracy in Hong Kong, it is necessary to start with the basic philosophy and strategy of ‘One Country Two Systems’, in which the central aim was

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1 In a recent survey of the public’s perception of democracy, Kuan Hsin-chi and Lau Siu-kai (1995) found that while a majority were in support of further democratization, there was no coherent set of political beliefs as to what constituted democracy.

They found that support for rule by civil servants and elites co-existed with support for an increase in the number of directly elected members of the legislature. The largest single group favoured the notion of democracy as ‘government which consults the people’. ‘Purer’ views of democracy, where the elective principle is central to both executive and legislative powers, are held by a number of politicians and their (largely) middle class supporters.
the preservation of Hong Kong’s distinct economy (see Chapter 6). The preservation of the market economy in Hong Kong was a primary concern in the design of new constitutional arrangements, and whatever legal and institutional adjuncts might be necessary for it. The overarching theme was the ‘stability and prosperity’ of Hong Kong, and the scope and methods of democracy were to be determined accordingly.

A further preliminary point is that, in any discussion of democracy in Hong Kong, one is dealing with moving targets. This is due not only to the fact that the constitutional arrangements for Hong Kong have built in a phased transition to democracy, but that Hong Kong and China are now subject to vast social and economic changes that have profound implications for the development of their political systems. These changes will have a greater influence on prospects for democracy than formal constitutional provisions, especially as the latter are so contingent on events in China where the constitutional path is uncharted. If our knowledge of the connections between democracy and marketization were better than it is, conjectures about the future might be more profitable.

**THE BACKGROUND: DEBATING DEMOCRACY**

I explore here the positions of the parties to the negotiations on Hong Kong’s new constitutional order. Unlike the codification of economic, legal and social systems which was unproblematic, there was considerable controversy about the political system. From China’s point of view the colonial political system with the over-arching powers of the Governor and relatively little accountability to the legislature and the public, was particularly congenial. In fact Deng commented favourably on the legal position of the Governor, which he saw as a model (Segal 1993: 88). But it was not feasible to freeze the colonial political system in view of the likely negative attitude of the UK Parliament, the support for democracy in Taiwan and growing pressures in Hong Kong for greater democracy. In facing these demands of political reform, China was confronted with similar dilemmas as at home — the juxtaposition of economic and political reforms.

Although China’s options were limited, its strategy was to say little about the political system in the Joint Declaration. Of the 11 substantive basic policies listed in the main text of the Declaration, only two relate to the political system, and in Annex I over 90% of the text is taken up with economic questions. China attempted to codify the essentials of the colonial political and administrative system through the incorporation of the principle of what has come to be known as ‘an executive-led system’,
under which executive authority is vested in a chief executive who is separate from and largely independent of the legislature. The main text of the Declaration speaks only of the chief executive, the government and the public service; nothing is said about the composition or powers of the legislature. However, skeletal provisions about the legislature are set out in Annex I, which states that it shall ‘be constituted by elections’ and the executive is to be ‘accountable’ to the legislature. The previous role of, and accountability to, the legislature in the raising and expenditure of public funds in Hong Kong were to be maintained.

This bare framework of government had to be filled out in the Basic Law. If the framework did not promise much, it did not close many avenues either. Despite the emphasis on the chief executive, the Declaration did not explicitly rule out a parliamentary system, although the fact that the only reference, among the members of the executive, was to officials rather than ministers (seemingly based on the colonial system), did not lend support to it. Nor did the provision that the chief executive would be appointed by China on the basis of ‘elections or consultations’ held locally presage a parliamentary system. The relationship between the executive and the legislature would depend significantly on the meaning and scope of ‘accountability’, of which the Chinese had a more restricted understanding than the British. Unfortunately the British did not make public the more restricted Chinese meaning of the term, nor of the term ‘elections’, a word which might suggest a more democratic system than the Chinese had in mind, thereby raising public expectations which were unlikely to be met.

The task of elaborating these principles fell to the Basic Law Drafting Committee. A great deal of the debate there centred around the question of democracy. Britain ruled Hong Kong through the vast powers of the Governor who effectively appointed all the senior officials as well as a majority of members of the legislature, and ran the administration in close relationship with the business community. In anticipation of the transfer of power (and even before the Joint Declaration was concluded), Britain began the process of democratization. It had difficulty securing a firm basis for this in either the Declaration or the Basic Law, and its earlier optimistic promises (especially in the Green Paper of 1984) were effectively jettisoned under pressure from China (see Chapter 2). Britain’s wish to democratize Hong Kong therefore faced formidable problems; and opposition was offered additionally and in a sense more effectively by the very constituency that Britain had so carefully nurtured — the business elite.

If one determinant of the future political system was the colonial model, another was the attitudes of the people and of China towards democracy. China opposed democracy as it feared that it would reduce its leverage over Hong Kong and that democracy might bring instability and
even chaos to Hong Kong. Democratic politics might force Chinese Central Authorities to enter the political fray in Hong Kong and to intervene to support the executive. It might also heighten a sense of self-government in Hong Kong. Were democracy to be successful in other ways, it would present an example of a functioning Chinese democracy that would strengthen the pro-democracy movement on the mainland.

As far as Britain was concerned, there appeared to be no great support for democracy as such, but a democratic future for Hong Kong would have served to solicit parliamentary support in the UK for the transfer of sovereignty, and it would have enabled Britain to leave gracefully, having discharged its colonial ‘mandate’ of democratization. On the other hand, it was fearful that democratization in the transitional period would complicate the administration of Hong Kong and its relations with China, as is evident from the readiness with which it agreed to the doctrine of ‘convergence’ which undermined the programme of political reform. The British agenda seemed to change with the appointment of the last Governor, but the support for democratization in Whitehall remained lukewarm.

The business elite considered that democracy would harm the economy by decreasing the political importance and privileges of business and increasing the pressures for welfare. It considered that it was only by maintaining a strong economy that Hong Kong could fend off intervention by China; democracy would destroy the foundations on which the economy had been built. The instrumental view of liberals or democrats was the exact opposite. They saw democracy alone as standing between China and Hong Kong’s autonomy. In the absence of democracy, the political system, especially with the extensive powers of the executive to be appointed by the CPG, would be open to manipulation by China. The business leaders would be coopted and other groups ignored as under the British. Democracy would also help to reinforce the sense of identity of the Hong Kong people — another basis for valuing and maintaining autonomy. But they also valued democracy on the basis of thinking exactly opposite to that of the conservative group; they saw democracy as modernizing the economic system of Hong Kong. It would help to ensure a more equitable balance between capital on one hand and labour and consumers on the other. Only in this way would there be a firm commitment to the economic system, and thus a guarantee of its survival.

Despite these opposing views, there was an implicit understanding shared by all that the ultimate goal must be some form of recognizable democracy and some progress towards it had to be registered on the establishment of the SAR. The debate was therefore more about the pace of reform, each party pressing its view of change (principally in terms of the balance between directly elected members on universal suffrage and
functional constituency members or others through restricted franchise), and finding institutional structures that would promote or retard the effects of democratization.

**THE POLITICAL STRUCTURE: PRINCIPLES**

**The Franchise**

This section discusses the major principles that underlie the political structure and provides the framework within which specific institutions and relationships can be examined. The most important issue is that of the franchise, for it provides a clue to the degree of democratization on the establishment of the HKSAR and its subsequent development. The Basic Law guarantees to all permanent residents ‘the right to vote and the right to stand for election in accordance with the law’ (art. 26). Another provision promises all residents equality before the law (art. 25). As I demonstrate, the right to vote by itself does not necessarily guarantee a fully democratic system nor equality in rights regarding the franchise, whether in relation to the election of the executive or the legislature. The Basic Law provides for different categories of members in the legislature elected under different and discriminatory rules, and allows for no direct public participation in the appointment of the Chief Executive. In these respects it falls short of the International Covenant on Civil and Political Rights, whose provisions were incorporated in the Bill of Rights Ordinance in Hong Kong. Some legal issues raised by these discriminatory provisions were dealt with by the courts before the resumption of sovereignty and may now be deemed settled. But they by no means dispose of all the issues, particularly the validity of provisions which deny genuine democracy in the appointments of the Chief Executive and the legislature.

The Bill of Rights Ordinance introduced the general principle that all permanent residents shall have the right and the opportunity, without discrimination on a variety of grounds, and without unreasonable restrictions, to:

1. take part in the conduct of public affairs, directly or through freely chosen representatives;
2. vote and to be elected at genuine periodic elections by universal and equal franchise and by secret ballot ‘guaranteeing the free expression of the will of the electors’; and
3. have access, on general terms of equality, to public service in Hong Kong (art. 21).
When ratifying the International Covenant on Civil and Political Rights for Hong Kong, Britain had entered a reservation exempting itself from the obligation to establish an elected legislature or executive; this reservation was reflected in sec. 13 of the ordinance. As far as the Legislative Council is concerned, the reservation may be regarded as ‘spent’, since both the previous electoral law and the Basic Law provide for a fully elected legislature as well as universal right of franchise. However, there still remain questions as how freely the law can provide for discrimination in electoral rights, which are implicit in the different categories of membership and unequal voting rights under the pre-transfer electoral law and the Basic Law (particularly as regards functional constituencies, details of which are provided later in the chapter).

There are two legal problems with the system of functional constituencies:
1. as functional constituencies were organized on the basis of occupation, those who were not in formal employment were discriminated against in favour of those who did (who consequently enjoyed two votes, the other being in a geographical constituency); and
2. as the size of functional constituencies varied from a handful (the smallest being 39) to thousands (the largest being 487,000), the value of the vote of some functional constituency voters was greater than of others.

On the first at least of these points, there was a divergence of views between the Human Rights Committee under the ICCPR (for which see Chapter 10) and the Hong Kong courts. In the committee’s opinion (expressed in its fourth periodic report in respect of Hong Kong (CCPR/C/79 Add. 57 of 3 November 1995, para 9), functional constituencies were a violation of arts. 21, 25(b) and 26 of the ICCPR as they gave undue weight to the views of the business community and discriminated unreasonably and disproportionately between different classes of voters. This illegal discrimination appears to have been recognized by the British government which amended the Letters Patent to confer on persons of a particular description an entitlement to vote which was in addition to a vote in respect of a geographical constituency (art. VII(3)). In spite of this amendment a legal challenge to the validity of functional constituencies was mounted in Hong Kong courts. Both the High Court and the Court

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2 The British reservation, incorporated in s. 13 of the ordinance, says, ‘article 21 does not require the establishment of an elected Executive or Legislative Council in Hong Kong’.

3 Articles 21 and 26 guarantee equality of rights, and art. 25(b) guarantee equal rights to all to vote and stand for elections.
of Appeal dismissed it as the legislation was covered by the amendment. The Court of Appeal gave the impression that the law might be upheld even in the absence of the amendment, on the ground that the discrimination would be justified if three conditions were met:

1. sensible and fair-minded people would recognize a genuine need for some difference of treatment,
2. the difference embodied in the particular departure selected to meet that need is itself rational; and
3. such departure is proportionate to such need.

It also upheld differences in the size of the constituencies as necessary and inevitable; sensible and fair-minded people would not regard them as irrational or disproportionate (Lee Miu Ling and Law Oui v Attorney-General (1995) 5 HKPLR 23) (for a criticism of this rather loose standard, see Ghai 1997).4

These issues lost their salience when the Basic Law came into effect, as it makes express provision for different types of membership. The consequence is that, depending on arrangements that are enacted, some residents will be able to vote in three types of elections (the third being elections by the Election Committee), many in two, and the rest only in geographical constituencies. However, the compatibility of these provisions with Chinese or HKSAR international obligations under the ICCPR would be a relevant issue given the opinion of the Human Rights Committee.

Apart from the discrimination implicit in the system of constituencies under the Basic Law (which is discussed in detail below), there are other distinctions which provide for differential electoral rights. The first distinction is between political rights in the HKSAR and those in relation to the PRC. The latter are confined to residents who are also Chinese citizens (art. 21). They alone are ‘entitled to participate in the management of state affairs according to law’. However, the only right expressly given them is to elect local deputies to the National People’s Congress (‘the highest organ of state power’).

4 Another issue that has been litigated in relation to the pre-transfer electoral laws will still be relevant if the previous provisions for the length of residence necessary to stand as a candidate are retained. The Electoral Provisions Ordinance (cap. 367) requires 10 years ordinary, continuous residence immediately before the date of nomination as a candidate (sec. 18(2)). This provision was challenged as an unreasonable restriction on the right to contest elections (art. 21 of the Bill of Rights and art. 25 of the ICCPR). Since the legislation was enacted after the Bill of Rights Ordinance, it was challenged for the infringement of the ICCPR (see Chapter 9). The court did not deal with the issue, as it held that the plaintiff was in fact ordinarily resident for the requisite period despite his physical absence (he had been arrested and imprisoned in China for counter-revolutionary crimes for 10 years) (Lau San-ching v Apollonia Liu (1995) 5 HKPLR 23).
Within the HKSAR, political rights are available to all permanent residents, who are to have the ‘right to vote and the right to stand for election in accordance with law’ (art. 26). However, while the right to stand for election to the legislature is available to all permanent residents, the number of members who are not Chinese nationals or who have the right of abode in a foreign country may not exceed 20% of total membership (art. 67). In the ‘election’ to the Provisional Legislature in December 1996, the members of the Selection Committee could not cast more than 12 votes for candidates in this category. The Legislative Council Ordinance 1997, which established the legal framework for the first elections in the HKSAR, restricted candidacy of foreign passport holders or others with a right of abode in a foreign state to 12 designated functional constituencies (sec. 37). A principal objective seems to have been to disqualify them from standing in geographical constituencies; some popular politicians with foreign passports would have poor chances in a functional constituency. There are considerable doubts about the constitutionality of this mechanism for restricting the candidacy of foreign passport or right of abode holders as it violates the right to equality before the law (art. 25 of the Basic Law), but it was not challenged.

Otherwise the Basic Law does not provide for any restrictions on the right to vote and contest elections (for example the age of voting, disqualifications due to criminal record, etc.) but presumably so long as they are reasonable, they may be imposed in the electoral law to be enacted by the Legislative Council (Annex II, para 2). What restrictions are reasonable will be determined in part by the express provisions of the Basic Law and in part by relevant international standards. However, as far as the post of the Chief Executive is concerned, eligibility is restricted to residents who are also Chinese citizens without the right of abode in any foreign country (art. 44). Although these discriminatory features were not pre-figured in the Joint Declaration, the general provisions for political rights are eminently reasonable and recognize both the contribution to and (the limited) stake in Hong Kong of foreign communities.

5 There seems no rational distinction between constituencies in which such persons may stand and those where they cannot. Thus the legal constituency is open to them but not the medical, and the Import and Export constituency is open to them but not Textiles and Garments (sec. 37(3)).

6 One such person is Ms Emily Lau who gave up her British passport in order to run for a geographical constituency.

7 Although these restrictions are inconsistent with the Joint Declaration, Ji Pengfei, the chairman of the BLDC, justified them (as well as restrictions based on nationality for other specified posts) on the grounds that only ‘in this way can those maintaining the posts . . . hold themselves responsible to the State, the Region and the people of Hong Kong’ (1990).
Special electoral rights also accrue to the representatives of various occupational groups and to members of the Legislative Council, Hong Kong members of the NPC, the Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference, and the representatives of district organizations by virtue of their membership of the Election Committee in respect of ‘elections’ of the Chief Executive, and of 10 and 6 members respectively of the first two legislatures. However, the right of franchise is seriously qualified by the form and systems of representation, to which I now turn.

The Principles and Forms of Representation

The Basic Law provides for three principal forms of representation: in elections to the National People’s Congress, election/appointment of the Chief Executive and the elections to the Legislative Council. In no case is the modality for representation specified in its definitive form, being left to further elaboration or development. The system of voting or the computation of votes has been left to be determined by ordinary legislation.  

National People’s Congress

The first form of representation is in the national system through membership in the NPC. The Basic Law merely states that the number of seats to be allocated to Hong Kong and the method for election would be specified by the NPC (art. 21). Presumably these matters would be governed in accordance with the national law on elections to the NPC (outlined in Chapter 3), although it contains a number of provisions which are unusual for Hong Kong. As indicated there, provinces, autonomous regions and municipalities directly under the Central Government and the military are represented, through indirect elections in which the electorate are their people’s congresses (except for the military). The PRC constitution does not provide for representation from special administrative regions (see art. 59) and the national law on elections is not specified in Annex III of the Basic Law which lists national laws applying in the HKSAR. However,  

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8 For example, no voting age is specified. Hong Kong provided for voting on and after 21 when the Joint Declaration was concluded, and early drafts of the Basic Law had incorporated it. One of Governor Patten’s reforms was to lower the voting age to 18, by s. 7 of the Electoral Provisions (Miscellaneous Amendments) Ordinance No. 10 of 1994. This age has been maintained in the Legislative Council Ordinance (sec 29). A candidate, however, must be at least at 21 years old (see 37(a)), except of course for corporate members.
an amendment to the national Electoral Law in 1995 stipulates that the number of NPC deputies from the Hong Kong and Macau SARs and the manner of their elections ‘shall be formulated separately by the NPC’ (art. 15). The principles for the election of Hong Kong members to the NPC were formulated by the NPC in March 1997 and the detailed regulations were enacted by the NPCSC in November 1997. They provided for 36 deputies who were to be elected by an Election Council to be nominated by the NPCSC. The Election Council consisted of the Selection Committee (whose 400 members had been established earlier by the NPCSC for the nomination of the Chief Executive and the election of the provisional legislature), Hong Kong deputies to the NPC, and representatives of the Hong Kong members of the Chinese People’s Consultative Conference. Due to some overlap of members among these categories (and that some members of the Selection Committee were not Chinese nationals), a total of 424 members were appointed, drawn largely from the business sector. The regulations provided that the number of candidates should be 20–25 percent more than the deputies to be elected; in the end 54 candidates were allowed to be nominated through a first ballot. Elections were to be by secret ballot. They were to be conducted by a presidium of eleven members chosen from the Election Council under the direction of the NPCSC. Tung Chee-hwa, the Chief Executive, was chosen to head the presidium.

They were few rules to govern the conduct of candidates. Although only Chinese citizens without the right of abode in a foreign state could stand, no attempt was made to verify the status of candidates or their criminal record.9 Nor were there any rules prohibiting unfair practices, like bribery. These matters are covered in national legislation but that legislation was not applied in Hong Kong (perhaps because the Committee for the Basic Law considered it outside the scope of art. 18 of the Basic Law). There were criticism of the lack of transparency of the election procedure; information about candidates, even the names of their proposers, was not available to the public. A large number of candidates were themselves members of the Election Council. It was another example of ‘small circle’ elections. It is doubtful if the elections met the test of art. 20 of the Basic Law which gives to ‘Chinese citizens among the residents of the HKSAR’ the right to elect Hong Kong deputies to the NPC.

Only Chinese citizens who are residents of the HKSAR are entitled to vote in or stand for elections to the NPC (art. 21). On the one hand this

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9 Tung stated that ‘Chinese citizens’ included those who had the right of abode in foreign countries but did not declare foreign nationality after the establishment of the SAR (Hong Kong Standard 13 November 1997).
excludes non-Chinese national permanent residents who are eligible to take part in Hong Kong’s election. On the other hand, it entitles Chinese citizens who do not satisfy the requirements of a voter or candidate in Hong Kong’s election (not being permanent residents) to represent Hong Kong in the NPC. There is considerable merit in this scheme, for it seems unfair to Chinese nationals (who are not permanent residents) living in a part of China from being deprived the right to participate in national affairs, just as it would be unorthodox to allow non-nationals to so participate. However, when it was announced that the head of Xinhua, Jiang Enzhu, was to be a candidate and the likely leader of the Hong Kong delegation, there was some public criticism. It was feared that he would impose on the Hong Kong deputies the position they should adopt, reflecting the policies of the Chinese Communist Party. He remained a candidate, winning the largest number of seats, but did not compete for the leadership as ‘he was not a permanent resident of Hong Kong’ (South China Morning Post 4 March 1998).  

The role of the Hong Kong deputies to the NPC or the CPPCC is not defined in the Basic Law. The general purpose of art. 21 in which the people of Hong Kong are given seats in these two bodies is to give them the right to ‘participate in the management of state affairs according to law’. For the most part ‘state affairs’ are distinguished from Hong Kong affairs, and it follows that Hong Kong deputies could not raise specific Hong Kong issues outside the remit of Central Authorities in the NPC. However, this was not the view of some deputies, who may have considered that their influence on Hong Kong institutions was limited or might become marginal in the future with more democratic elections. The issue was

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10 Jiang Enzhu would thus become a member of the Selection Committee for election of the Chief Executive and specified members of the Legco (art. 1 of Annex I). Since in his role as the head of Xinhua he commands considerable authority in Hong Kong on behalf of the Central Authorities and the Communist Party, his participation may be seen to be inconsistent with the principle of ‘Hong Kong people ruling Hong Kong’. There is no express requirement that members of the Selection Committee should be permanent residents, with or without Chinese nationality. However, under art. 26, only permanent residents have the right to vote or stand for elections. It would therefore seem that Jiang would not be able to vote even if he was a member of the Selection Committee.

11 However, Hong Kong deputies have sought in other ways to enhance their role in Hong Kong. They asked for the establishment of an independent office for deputies in Hong Kong. The request was rejected by the NPCSC, which decided that Xinhua would continue to act as the office, as an NPC office would undermine the authority of the HKSAR government. It was up to the Hong Kong legislature, not the NPC, to monitor the SAR government. Nor would, it was stated, co-ordination by Xinhua undermine the independence of deputies (SCMP 4 March 1998). They also asked to see the Chief Executive on a regular basis for representation and briefing.
brought to a head when a deputy of the CPPCC announced his intention to raise the question of the independence of the Radio Television Hong Kong (‘RTHK’) which he considered was often critical of the government whereas it should be supporting the government. Chinese President Jiang Zemin not only did not support this call, but laid down guidelines for the role of deputies which should be restricted to mainland affairs. He told the NPC deputies during the 1998 session, ‘Deputies from Hong Kong will only take part in the management of national affairs on behalf of the Hong Kong comrades. There should not be any interference with affairs of the SAR Government’ (South China Morning Post 10 March 1998). 12

It was suggested at one time that Tung Chee-hwa would be appointed a deputy, as is customary with heads of provincial governments. He did not in fact stand, perhaps on the assumption that this would detract from, rather than increase, his authority. Instead the NPC invited him, ‘as an expression of courtesy’ to its opening and closing ceremonies, and its spokesperson said that he or his successor would continue to be invited (South China Morning Post 4 March 1998).

**Chinese People’s Political Consultative Congress**

There is no formal provision for the representation of Hong Kong in the CPPCC, although Annex I makes Hong Kong deputies to the CPPCC members of the Selection Committee for the Chief Executive and specified members of the legislature. In January 1998 115 deputies were appointed from Hong Kong, including officials of Xinhua. Most of them had served on the Preparatory Committee (South China Morning Post 24 January 1998).

**Chief Executive**

The methods for other forms of representation are also less than fully democratic. In both instances the Basic Law states as the ultimate aim selection or election through universal franchise (arts. 45 and 68). However, as far as the Chief Executive is concerned, a ‘broadly representative’ committee would first decide on the nomination of candidates and the

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12 He also took the opportunity to reiterate the autonomy of Hong Kong by stating that ‘no department, places, individuals would be allowed to interfere with the affairs within the area of SAR’s self-autonomy.’ ‘Hong Kong people administering Hong Kong’ and a high degree of autonomy were not mere slogans or temporary policies (as quoted in SCMP 10 March 1998).
The final appointment would be made by the Central People’s Government. The Basic Law does not specify if the Central People’s Government has a veto; the language of art. 45 would suggest that it does not, and no procedure is provided for in case a veto is exercised. The better interpretation is that the role of the CPG is purely formal (important nevertheless for signifying Chinese sovereignty), for otherwise there would be potential for a major conflict between the people of Hong Kong and the Central Authorities which cannot have been intended (although this interpretation is not universally accepted). If it wishes to intervene, China may seek other ways of influencing the elections, such as in the composition and procedure of the committee to nominate candidates (as traditionally on the mainland).

There is no definite timetable for the transition to fully democratic selection or elections. The general principle in both instances is that of ‘gradual and orderly progress’ in the ‘light of the actual situation’ in the HKSAR. As discussed in Chapter 4, the systems provided for the transitional period are inviolate for 10 years (i.e., until the year 2007). Thereafter the procedures may be changed if they have the endorsement of two-thirds of all the members of the legislature and the support of the Chief Executive (Annexes I and II). However, any change to the procedure for the selection of the Chief Executive would require the approval of the NPCSC. This chapter therefore discusses only the franchise and the procedure for the first 10 years of the HKSAR.

During that period there will be no automatic right to stand or vote for the election to the office of the Chief Executive, the most important public post in the HKSAR. Except for the first appointment, an 800 member Election Committee will present a candidate to the CPG, elected from a list of candidates each nominated by at least 100 of its members (Annex I). The Election Committee will be appointed by the CPG (although as with the appointment of the Chief Executive, and for the same

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13 Article 45 says that the ‘Chief Executive shall be selected by election . . . and be appointed by the Central People’s Government’ (emphasis added). The terminology in the Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region is different. It says, ‘The Selection Committee shall recommend the candidate for the first Chief Executive through local consultations or through nomination and election after consultations, and report the recommended candidate to the Central People’s Government for appointment’ (para 4). Even here it would seem that the role of the CPG is formal.

14 For the appointment of the first Chief Executive, the Committee (called Selection, rather than Election, Committee) consists of half the number of subsequent committees, but the proportions of interest groups in it are the same. However, all its members were appointed by the Preparatory Committee, so that the organizations within the different interest groups had no direct role in choosing their nominees.
reasons of sovereignty, this may be a formal act, for the law will provide for the composition of the Committee). Members of the Election Committee will be drawn in equal proportion from the following four interest groups: 1. industrial, commercial and financial sectors; 2. the professions;\(^{15}\) 3. labour, social services, religious and other sectors; and 4. members of the Legislative Council, representatives of district based organizations, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the National Committee of the Chinese People’s Consultative Conference.

Most members of the last group will be self-evident (some selection for district organizations being necessary); in the case of other groups, the delineation of the various sectors and the organizations in each sector eligible to return members will be prescribed by a Hong Kong law, to be enacted ‘in accordance with the principles of democracy and openness’. The representatives will be elected by corporate bodies as prescribed by law. The system of voting within the Election Committee for the Chief Executive is yet to be prescribed (again in a Hong Kong law). This will necessarily restrict the number of nominations, and inevitably lead to a lot of pre-nomination lobbying and politicking, although ensuring that only mainstream candidates have a chance to contest the election.

**Legislative Council**

The Basic Law provides expressly for only one kind of elections — to the Legislative Council (art. 68). The elections is through a mixture of geographical, functional and ‘election committee’ members. The proportions among them vary over a period of time (the Basic Law

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\(^{15}\) Professions which qualify are not specified in the Basic Law but would need to be specified in the electoral law. There is no definition of a profession, although art. 142 allows for the recognition by the HKSAR government of new professions and professional organizations. ‘Professions’ is not a term of art and there is no easy way to distinguish a profession from other forms of occupation (e.g., lawyers from plumbers). However, in social sciences, a profession is regarded as an occupational group which requires a substantial period of training to acquire specialized skills, holds itself as offering its services (over which it has a monopoly) to the public, and has considerable autonomy in certifying the training programmes and qualifications for the practice of the profession as well disciplinary control over its members. Interestingly, the Basic Law recognizes that monopolies are a grant from the government. See Chapters 8 and 10 for further discussion of professions. It is quite likely that provisions for membership in the Election Committee and the privileged position of professions safeguarded in art. 142 would stimulate some rivalry among established and aspiring ‘professions’.
providing explicitly for the first three legislatures). The first Hong Kong legislature would have 20 directly elected members from geographical constituencies, 10 elected by the Election Committee (established for the selection of the Chief Executive) and 30 elected by functional constituencies. At the next two elections, the directly elected members increase to 24 and then 30, those elected by the Election Committee decrease to 6 and then cease, while the number of functional members remains constant.\(^{16}\)

The term ‘functional’ is not defined; presumably it is to be understood by reference to previous practice (although it may be hard to establish a consensus on the principles underlying previous practice). Functional constituencies were first established in Hong Kong in 1985 as part of the initial, tentative steps towards greater representativeness. They replaced in part nominated members who had for decades been appointed by the Governor from business and professional sectors. The functional constituencies have represented this bias: five of the original 12 constituencies were given to business sectors, and the other seven went to professions (most of whom, like lawyers and engineers, were expected to ally with business — only two went to labour).\(^{17}\) By 1991 their number had increased to 21, largely by subdividing business and professional constituencies and increasing their importance. Thus the electorate in most constituencies became even smaller, so that the total eligible voters in all of them were 104,609 (of whom only 69,825 had registered) — less than 2% of the population! Small electorates, based for the most part on corporate membership, meant disproportionate power to the larger firms with several subsidiaries; it has been estimated that about seven business groups controlled more than 25% of functional constituencies (Moser 1991). Such a system necessarily produced allies of a conservative government, but if the government were doubly anxious to ensure support, it could easily influence the small electorates.

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\(^{16}\) However, in a major departure from the Joint Declaration and the Basic Law, China decided to appoint a legislature on the establishment of the HKSAR through the mechanism of the Preparatory Committee. The decision to set up an interim legislature to be appointed by the Selection Committee allowed the Central Authorities to determine the electoral system for the first elected legislature of the HKSAR. There was widespread criticism that the electoral system was designed to favour pro-China forces (for example by moving away from single member constituency, first-past-the-post-system to a system of proportional representation which favours minority political groups).

\(^{17}\) The government justified the introduction of functional constituencies as a way of giving ‘full weight to representation of economic and professional sectors which are essential to future confidence and prosperity. Direct elections would run the risk of a swift introduction of adversarial politics, and would introduce an element of instability at a critical time’ (Hong Kong 1984: 9.)
There is no doubt that the Chinese and the business community favoured functional constituencies in the Basic Law for these reasons — although the Basic Law does not specify the nature of functional constituencies, the dominance of business and professional sectors and the provision of small electorates were underlying assumptions. The item of Governor Patten’s constitutional proposals of 1992 (enacted in 1994 for the 1995 elections) that the Chinese took most objection to was the broadening of the electorates for some of the existing constituencies (by shifting entitlement to vote from corporations to individuals) and by creating nine new constituencies with enormous electorates, thus upsetting the entire balance of the political system under the Basic Law.18

The changes introduced by Patten and approved by the legislature in 1994 (Electoral Provisions Ordinance) were declared void by the NPCSC on 23 February 1997 because they were held to be inconsistent with the Basic Law (no reasons were given for this conclusion — on their face, they conformed to the terms for the composition of the first legislature under the Basic Law). The Legislative Council Ordinance 1997, enacted by the provisional legislature, selected by the Selection Committee which in turn was appointed by the Preparatory Committee, established a new framework for constituencies and elections. The Ordinance was based on principles laid down by the Preparatory Committee. For the directly elected members, instead of the previous system of single member constituencies choosing their member by a plurality (‘first past the post’), there are five geographical, multi-member constituencies (s. 18), returning between three and five members (s. 19). Voting is by list system of proportional representation, with each voter entitled to cast one vote for a party list of candidates — a system which was seen to have been chosen to disadvantage the Democratic Party.

The rules for the 30 functional constituencies were also altered. Functional constituencies are used for the representation of professions (8), industrial and business groups (15), trade unions (3), sports and culture (1) and local government organisations (3). For the most part they

18 A government secretary said at a university seminar that Patten was appalled when he first came across functional constituencies, which he likened to ‘rotten boroughs’. Initially there was little competition for these seats, but with increasing politicization in the wake of the Basic Law, there was considerable manipulation of votes and voters (Moser 1991). Under his amendments, the voting in the established functional constituencies was changed from a corporate to an individual basis, and the nine new constituencies were very broadly constituted so that all the workers in the various economic sectors which form their basis were given a vote (and so established large constituencies, diluting, though not eliminating, the dominance of commercial elites) (see Albert Chen 1996c for an account of the electoral system which governed the 1995 elections).
are narrowly based, with limited number of voters (it is estimated that 200,000 persons constituted the total electorate for all the seats). For the professional constituencies voters are individual members (except for the social welfare, where corporate members are allowed in additional to individual workers), while for the industrial, business groups and trade unions, voting is by corporate members (except for information technology where both types are allowed). In 24 constituencies voting is by plurality and in 6 by preferential elimination. These restrictive rules were justified by reference to the original purpose of functional constituencies as representation of elite groups.

The Selection Committee (for the election of 10 members) consists of 800 members who are elected by those entitled to vote in specified sectors established for this purpose (overlapping significantly with functional constituencies) (Schd. 2). Each member of the Committee has ten votes and the system of voting is plurality.

The Separation of Powers

The design of the institutions and the relationship among them is based on the principle of the separation of powers (despite Deng’s opposition to this Montesquieuan concept of the organization of government (1993: 55), and contrary to the fundamental principles of the PRC constitution). The incorporation of this principle represents an important change from the system of government during much of the colonial period, when the Governor was not merely the head of the executive, but also the head of the legislature (in addition to determining its composition) and responsible for the appointment and dismissal of the judiciary. To some extent through conventions and the final appellate jurisdiction of the Privy Council, the independence of the judiciary was reasonably well established in practice, but except in the dying days of colonialism, the executive remained dominant over the legislature, with little institutional separation between the two. Such incipient separation of powers as emerged before the transfer of sovereignty could potentially be negated through the supervening authority of the British government (see Chapter 1). The executive in Britain could direct the Governor in the exercise of his enormous powers as well as legislate for Hong Kong through Orders in Council. Relations between Hong Kong and Britain were mediated through the office of the Governor and the Colonial (and later the Foreign and Commonwealth) Office of the British government. The UK Parliament was theoretically superior to the government and could (and occasionally did) legislate directly for Hong Kong and hold the government accountable for its
administration of Hong Kong. In practice, however, the powers of the British government over Hong Kong were largely unsupervised.

Under the Basic Law, there is a clear and sharp separation between the executive and the legislature in Hong Kong (although the decision of the Court of First Instance that the Chief Executive has some legislative power blurs the line separating executive and legislative functions, see *Association of Expatriate Civil Servants of Hong Kong v Chief Executive* [1998] 2 HKC 138, discussed below). The separation (which owes more to the presidential than the parliamentary system) is reflected in the method for their appointment or election, in their personnel, and in their relationship; it is qualified by the possibility of some members of the legislature being appointed to the Executive Council (this is discussed later, and the point made that the system may operate rather differently than would appear at first sight). Moreover, different interests are likely to be pre-dominant in the executive and the legislature, with somewhat untidy rules for the coordination of these interests or the resolution of conflicts that appear to be endemic (so that the separation of powers may be even more evident in practice than in the provisions of the Basic Law and despite attempts to establish the dominance of the executive). The separation of the judiciary from the executive and the legislature (and its independence) is secured through various devices (which are discussed in Chapter 8). The jurisdiction of Central Authorities attenuates the separation of powers (for ultimately all power is concentrated in the NPC), although it is hard to say precisely how as it is not self-evident how far the directives of the Central Authorities to the Chief Executive may override the reluctance or intransigence of the legislature with regard to these directives.

The relationship between Chinese authorities and Hong Kong is more complicated than previously between Britain and Hong Kong, and requires a careful analysis of both the powers that Central Authorities have over Hong Kong and how and by whom they may be exercised. China’s own institutions which have the power to direct or intervene in Hong Kong are even less governed by the principle of the separation of powers than the British.

The doctrine of the separation of powers can accommodate many configurations of the relationship among state institutions. Therefore the interesting question is not whether there is a separation of powers, but the balance and the relationship between the institutions. The separation of powers is supplemented by what is sometimes seen as its negation — checks and balances. These are particularly evident in Hong Kong, resulting in somewhat contradictory provisions; while a key function of the legislature is to supervise the executive, the Chief Executive has power to dissolve the legislature, and, in the legislative area, the basic responsibility
for the initiation of legislation lies with the executive although its enactment requires the consent of the Legislative Council with a veto in the Chief Executive. Checks and balances are also built into the relationships between Hong Kong and the Central Authorities. Nevertheless, Hong Kong’s political structure was carefully designed to achieve particular results. These issues will be explored after an account of the structure of the executive and the legislature.

**Centralized and Consultative Government**

The Basic Law requires a centralized system of government within the HKSAR. It permits the establishment of district organizations but only in so far as they are ‘not organs of political power’ (art. 97). There is no definition of ‘political power’, but some guidance may be obtained from the specification of the functions which district organizations may perform: they may be consulted by the HKSAR government on district administration and other affairs, and they may provide services in such fields as culture, recreation and environmental sanitation. These are largely ‘municipal’ type functions, with limited policy implications, important principally for delivery of services. These arrangements are largely in conformity with the previous system, under which there were an Urban Council and a Regional Council (the latter covering the New Territories and the former the rest of the HKSAR) and a District Board for each of the 18 districts, all of them elected, statutory bodies.¹⁹ The reference to district organizations is presumably intended to cover both the councils and the boards, although previous practice had distinguished between them and for the most part, only the councils performed the specific tasks mentioned in the Basic Law, rather than the district boards, which were a forum for public consultation and participation in the administration of districts (Miners 1991: chap. 11).²⁰ In May 1998 the government issued a Consultation

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¹⁹ These bodies used to have appointed or largely appointed members, but as part of the Patten reforms, all appointed membership was eliminated. In 1984 all the members of the district boards were elected from single member constituencies by majority voting; 32 members of the Urban Council were elected from geographical, single seat constituencies; and each of the nine district boards within its area elected one member. The Regional Council had 27 members elected from geographical, single seat constituencies, nine from the district boards (one each) and there were three ex-officio members, the chairperson and two deputy chairs of the Heung Yee Kuk. China objected to the elimination of appointed members and re-introduced the system of nominated members.

²⁰ The Basic Law says nothing about another device of decentralization of government, i.e., the corporatization of public functions. Public corporations, which are juridically
Document on Review of District Organisations, canvassing different options, including the merger of Regional Councils.

However, the Basic Law by reference to previous practice requires a consultative form of government (art. 65 requires the continuation of advisory boards). A frequent claim by the previous administration was that while Hong Kong might not have had democratic elections for much of the colonial period, the government consulted the community widely and sought the best possible advice on which to base its decisions. The consultation was done through advisory bodies (either statutory or administrative) which were to be found in almost all branches and departments (although some committees operated at local or neighbourhood levels). Some committees had executive functions as well. There were over 300 such bodies. The membership consisted of government officials and members of the public, the latter chosen allegedly on the basis of their expertise or specialized knowledge or public service. The official version of the vibrancy and value of public consultation and participation has been questioned, it being argued that the committees were devices of cooptation and for making decisions for which the government wanted to avoid responsibility; and that they depended for research and advice on public servants who presented only official views, and that in any event most committees were dominated by official members and the lay members were appointed by the government, largely from the commercial and other groups with narrow, vested interests (e.g., Miners 1991: 106–111).

Since the advisory bodies were instituted to make up for the democratic deficit, their rationale and effects in the more democratized system of the Basic Law may be queried. Policy is to be made by the elected legislature on the initiative of a ‘partially’ elected executive. The government may choose to appoint to advisory committees persons who have failed to be elected to the legislature or the regional or district organizations (as political patronage has been an important but unstated goal of the system). This separate from, and substantially independent of, the government have been used in many states for the conduct of state-owned commercial enterprises. Given Hong Kong’s laissez-faire economic policy, there has been limited role for such corporations (but cf. the Kowloon-Canton Railway Corporation and the Mass Transit Railway Corporation). In recent times, corporations have been used to hive off more central government functions, both to ensure greater accountability and openness (and public participation) and sometimes to introduce elements of the market principle. Examples of this approach in Hong Kong include the Hospital Authority and the University Grants Committee. The attempts of the previous administration to corporatize further government activities or functions were stifled by the Chinese who were suspicious of its intentions (as with Radio-Television Hong Kong).
will not only give them undeserved privileged access to government, but could also undermine policies which are more democratically arrived at, setting up unrepresentative committees in opposition to elected bodies. They could also complicate the task of the government, which is now accountable to the Legislative Council (and in a more general way, to the public). It has been argued that the effect of the system of advisory boards and committee was to insulate administrative decisions and policies from political scrutiny; it involved important politicians but weakened political institutions; it provided alternative sites of influence; and it required (and justified) a re-centralisation of authority (particularly at the level of policy branches and secretaries) (Lau 1988: 9–10). On the other hand, in so far as the committees are genuine vehicles for the participation of the people in the implementation of policy and administration, they enhance democracy and accountability.

The Rule of Law

The rule of law defines an important aspect of Hong Kong’s political system. This is evident first of all in the independence of the judiciary (see Chapter 8), but its importance as far as the system of government is concerned lies in the rule that the executive authorities have at all times to act in accordance with the law, and their policies and administrative practices have to be based on the law. Policies and decisions of executive authorities can be challenged in courts for violation of the law. This concept of legality is based on the general principles and procedures of the common law, reinforced by the entrenchment of rights and freedoms (which the Basic Law guarantees, Chapters 9 and 10). In the run up to the transfer of sovereignty, some reforms were introduced for the review of administrative decisions by independent tribunals, instead of by higher levels of bureaucracy or the Governor in Council (see Chapter 10). The Basic Law underlines the practice of legality through several specific provisions. One of the functions of the Chief Executive is the implementation of laws (art. 48(2)). The government is required to abide by the law (art. 64). Hong Kong residents are assured of the right to institute legal proceedings against the acts of the executive authorities and their personnel (art. 35).

The Basic Law does not, however, entrench an institution which has become an important means towards the rule of law, broadly understood as legal and reasonable conduct by government officials, namely the Commissioner for Administrative Complaints (renamed ‘Ombudsman’ under a 1996 ordinance) which was established in 1988, perhaps because
it was seen as detracting from the ‘executive led’ nature of the political system, although it is expected that the office would remain as the ordinance setting it up would continue in effect. The commissioner, appointed by the Governor for a period of five years, which may be renewed, could only be removed by the Governor with the approval of the legislature for inability to discharge the functions of office or misbehaviour (sec. 3 of the Ombudsman Ordinance). His or her powers are to investigate administrative acts or omissions, recommendations or decisions for maladministration. Maladministration is defined as inefficient, bad or improper administration and includes unreasonable conduct, abuse of power which is unreasonable, unjust, oppressive, improperly discriminatory, or is based wholly or partially on a mistake of law or fact. The terms also cover procedures that are unreasonable, unjust, oppressive or improperly discriminatory (sec. 2 (1)). The commissioner may investigate complaints which allege an act or omission of maladministration on reference by a complainant or a member of the legislature (but there are various statutory exceptions) and make recommendations for the redress of wrongs committed. Originally complaints had to be channelled through a member of the Legislative Council on the UK model, but since 1994 members of the public have been able to complain direct, a change which has increased the work of the office — from 173 complaints in 1993–94 to 2784 in 1995–96 (COMAC 1996:T.2). It is also now possible for the office to initiate complaints on its own initiative (Ordinance s. 7(1)(b)). Quite apart from the powers of the commissioner (which in many respects fell short of the powers of ombudsmen in other jurisdictions, Clark and McCoy 1993: Chapter 3, though they have been substantially increased since), the definition of maladministration establishes the standards of conduct that government officials must observe.

**Civil Society**

The principles of consultation and the rule of law are reinforced by an explicit recognition of private institutions and the limitations on the power of the government. The Basic Law, reflecting previous practices in Hong Kong, has extensive provisions on social and cultural rights and the role of non-governmental organizations in their implementation (see Chapter 9). Educational institutions are guaranteed autonomy and the right of academic freedom, including the right to recruit teachers, and use teaching materials, from abroad. Students may choose their schools and pursue studies abroad. Rights and autonomy of religious institutions reinforce the freedom of belief; they provide religious education in their schools,
run seminaries, and organize hospitals and welfare services. Community organizations may provide welfare services, like education and health. Their role in sports is recognized. For this purpose they will be entitled to subventions in accordance with previous practice. They may develop and maintain relations with their counterparts in foreign countries. The autonomy of the professions to regulate their qualifications and entry into the profession, on the basis of the present system, is guaranteed.

The recognition of civil society is the more striking since China itself has relatively few autonomous institutions. However, one must keep the importance of non-governmental organizations in perspective. There are numerous organizations of the type mentioned above, in addition to several kinship and clan groups and neighbourhood committees. They do involve a large number of people in their activities, and give them a measure of control over their immediate environments and in the pursuit of their hobbies or social work. But through subventions and policy directives from the government, they become integrated into its framework, which seeks legitimacy from their existence and activities. As one commentator has argued, non-government welfare organizations are in reality camouflaged quasi-government organizations, their programmes largely reflecting government policies (Nelson Chow: 1990). On the other hand, one must not overlook the institution traditionally regarded as central to civil society — the market economy, which in Hong Kong is the site of enormous private power and influence on the government. It is unclear how the relations between the market and state would develop in the future, and since they would have a major bearing on the progress of democracy and the feasibility of rights and freedoms, the issue is taken up briefly in the conclusion.

THE POLITICAL STRUCTURE: INSTITUTIONS

The Executive

An overview

I begin the discussion with a brief account of the principal features of the executive. The government of the HKSAR is described as ‘the executive authorities of the Region’ (art. 59). The government consists of the Chief

21 As an example, the government subvention to NGOs for social welfare in 1989–90 was HK$933,100,000. See Veronica Pearson (1992).
Executive as its head and ‘a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions . . .’ (art. 60). An important institution of the government is the Executive Council. It is described as ‘an organ for assisting the Chief Executive in policy-making’ (art. 54). Its members, who must be permanent residents, Chinese citizens without the right of abode in a foreign country, are appointed and removed by the Chief Executive (there being no requirement of approval by China as there was previously by Britain), although other persons may be invited to attend its meetings. The Chief Executive appoints them from among his or her principal officials, members of the legislature and public figures (art. 55). He or she\(^\text{22}\) has to consult with it before making ‘important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council’; the only exemption from consultation is in relation to the appointment, removal and disciplining of officials and the ‘adoption of measures in emergencies’ (art. 56).\(^\text{23}\) The assumption of the Basic Law appears to be that the Chief Executive would normally accept the advice of the Executive Council (as became the practice or even a convention with the Governor during the colonial period), for it is provided that in case of refusal, the Chief Executive would put ‘the specific reasons on record’ (art. 56).\(^\text{24}\) It is a little hard to place the Executive Council in the constitutional scheme of the Basic Law. Its colonial origins are understandable; a Governor coming from outside the colony and having no elected bodies to work with would find such a body a convenient way to associate senior members of the public with his administration and as a useful source of information and a sounding board for his ideas. With an elected legislature and other elected

\(^{22}\) The language of the Basic Law is splendidly non-sexist, always referring to the Chief Executive in both genders.

\(^{23}\) The Basic Law does not mention one of the key functions of the Executive Council during the colonial period — at least one which absorbed a great deal of its time — the review of administrative decisions. As noted above, many of these functions began to be transferred to administrative tribunals or courts shortly before the transfer of sovereignty, and although some ordinances still provide for review by the Executive Council (or more accurately the Chief Executive-in-Council) it is unlikely that this would remain an important responsibility of the council.

\(^{24}\) It is not immediately obvious what the purpose of putting on record is. It follows a similar provision in the Letters Patent, where the minutes of the Executive Council were sent to the British government, and the device might have acted as a check on the Governor. The minutes were confidential and the public was not aware of divisions within the council. It is unlikely that the ‘record’ mentioned in the Basic Law is to be public, in which case the purpose and value of the provision is dubious. It would tend to undermine Hong Kong’s autonomy if the minutes were sent to Beijing; at the least they would inhibit the frank expression of views on matters which the Central Authorities are deemed to find sensitive.
consultative bodies, its rationale is less obvious. There would be little justification for the convention that the Chief Executive should accept the advice of the council, since unlike the Governor, the Chief Executive is accountable to China and the Legislative Council and may have to negotiate difficult and complex issues with them.

The Chinese authorities seem to assume a minor role for the Executive Council since the appointment of its members does not require the approval of the CPG as for senior officials. However, the Executive Council now works in a different constitutional framework than under the colonial regime; and its role is likely to evolve depending on the exigencies of the political system. The Chief Executive, facing an elected legislature, may wish to use the Executive Council not only for advice but also for their public support and lobbying for his policies. Such a development is likely to create tension, if not conflict, in their relationship with senior officials who might consider that they are responsible for policy and administration. Should the Executive Council assume major policy making functions without initiatives from or consultation with senior officials, officials would not relish having to defend policies in public. The relationship between the Chief Executive, the Executive Council and senior officials will depend on whether the political system tends towards presidentialism or parliamentarianism as I discuss later in this chapter.

The Chief Executive and government

Although the relationship between the Chief Executive and the government is not clearly specified, the Chief Executive is the lynchpin of the political system. He or she is the head of the HKSAR and represents the region (art. 43). This appears to be a titular and formal position, in diplomatic relations and perhaps in contacts with Central Authorities (important nevertheless for that). Additionally the Basic Law vests extensive and often quite specific powers in the Chief Executive.25

To be eligible for appointment to the post, a person must be a Chinese citizen of at least 40 years of age who is a permanent resident of the

25 Unlike most constitutions, powers of institutions of government, particularly the executive and the legislature, are expressed in detail (usually the functions of executive and parliamentary institutions are normally assumed rather than spelled out). This style may have been adopted to indicate the subordinate status of the HKSAR, but equally it could be seen as a reflection of the Chinese style of drafting as in the PRC constitution where the powers of the NPC, the NPCSC and the State Council are spelled out in some detail (in which case there would be no reason to assume that the executive or the legislature may not perform functions not expressly granted, provided they were within the general category of powers typically within the scope of these institutions).
HKSAR with a continuous residence of not less than 20 years residence and has no right of abode in a foreign country (art. 44). The Chief Executive must also be a person of ‘integrity, dedicated to his or her duties’ (art. 47). This provision is intended to emphasize the public nature of the responsibilities of the Chief Executive; and reinforces another provision which requires a person on assuming the post of Chief Executive to declare her assets to the Chief Justice of the Court of Final Appeal, whereupon it is ‘put on record’ (art. 47) (although there is no provision for its publication, which would deem essential if the purpose of ‘recording’ is to be achieved). These provisions, intended to ensure general, particularly financial, probity are specially important when persons from the business community are likely to be strong contenders for office (with a high risk of a conflict of interests). The provisions for integrity could also enable China to, at the least, query the credentials of a candidate submitted to the CPG for appointment (although in practice it is unlikely to need this).

The appointment is for five years, and the post may not be held for more than two consecutive terms (art. 46). It is possible that a Chief Executive may serve less than five years of a term (apart from death in office, or for inability to discharge the functions of the office due to serious illness or other reasons, art. 52). As is explained below, a Chief Executive may dissolve the legislature to resolve a conflict with it; in some circumstances the office becomes vacant on dissolution (art. 52). The early termination of office can also come about through impeachment, although as explained below, the process is weighted in favour of the Chief Executive and the final decision lies with the CPG (art. 73 (9)). If the Chief Executive is unable to discharge his or her duties for a short period, these duties would be assumed for that duration by the Administrative Secretary, the Financial Secretary or the Secretary of Justice in that order. However, if the office becomes vacant, it must be filled within six months of the vacancy arising (art. 53).

The Basic Law sets out in some detail the powers and functions of the Chief Executive, which may be categorized by reference to his or her relationship with other institutions. As the head of the executive, the Chief Executive decides on government policies and issues executive orders; nominates senior officials for appointment by the CPG and recommends their removal; appoints and removes other officials in accordance with the law (art. 48); and appoints and removes members of the Executive Council (art. 55). Secondly, in relation to the legislature, the Chief Executive is responsible for the implementation of the Basic Law and other laws, signs bills passed by the legislature and promulgates laws (presumably by publication in the Gazette), may prevent the discussion of motions regarding public revenue or expenditure by withholding consent to their introduction
in the legislature, and determines, ‘in the light of security and vital public interests’, if officials may testify before the legislature (art. 48). The Chief Executive may refuse to sign bills passed by the legislature, in which case there are elaborate provisions for resolving the conflict, as there are when the legislature refuses to approve expenditure proposals of the government (arts. 49–52, see below). He or she may also ask the President of the legislature to call it in emergency session (art. 72(5)). He or she may attend meetings of the Legislative Council to deliver policy addresses (art. 73(4)).

In relation to the judiciary and the administration of justice, the Chief Executive appoints and dismisses judges ‘in accordance with legal procedures’ (art. 48(6)); for the most part this is a formal role, although in relation to judges of subordinate courts, it may be substantive (see Chapter 7). The Chief Executive may pardon persons convicted of criminal offences or commute their penalties (art. 48(12)). He or she also appoints the six Hong Kong members on the Committee for the Basic Law (jointly with the President of the Legislative Council and the Chief Justice of the Court of Final Appeal in accordance with the NPC Decision of 4 April 1990). In relation to China, the Chief Executive has to implement directives of the CPG ‘in respect of relevant matters provided for in this Law’ (art. 48(8)) and to conduct external affairs and other affairs as authorized by the Central Authorities (art. 48(9)). Finally, as far as the public is concerned, the Chief Executive handles petitions and complaints (art. 48(13)).

The Court of First Instance has interpreted the power of the Chief Executive to issue ‘executive orders’ (art. 48(4)) as authorizing the Chief Executive to make laws. In the Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR, Keith J held that the Chief Executive could lawfully enact laws to provide for the recruitment and discipline of the public service. He relied on art. 103 to reach this conclusion. Article 103 states that the ‘previous system’ in respect of these matters ‘shall be maintained’. The court held that since previously rules for recruitment and discipline were established through Letters Patent, Colonial Regulations and regulations by the governor, not requiring the legislature, no such approval was necessary in the HKSAR. With respect, there is little justification for this conclusion. The reference to previous system in art. 103 is clearly to substantive provisions (including the role of the Public Service Commission), not the method of enactment (as is evident from its last clause which prohibits privileged treatment of foreign nationals). The method of enactment must be determined from the general scheme of the Basic Law for the separation of powers, which makes the Legislative Council the ‘legislature’ of the HKSAR and which defines clearly the specific role of the Chief Executive in the legislative process. The judgement does not specify that ‘executive order’ may have legislative effect
only in relation to art. 103. If a reference to ‘previous system’ is to be treated in this expansive manner, this approach, given numerous other references to ‘previous system’, would seriously undermine the principles of the Basic Law in favour of different colonial laws or practices.

The powers of the Chief Executive overlap considerably with powers which the Basic Law vests in the government of the HKSAR, although in some respects they are more extensive and in others narrower. The powers of the government are to:
1. formulate and implement policies;
2. conduct administrative affairs;
3. conduct external affairs as authorized by the CPG;
4. draw up and introduce budgets and final accounts;
5. draft and introduce bills, motions and subordinate legislation; and
6. designate officials to sit in on the meetings of the legislature and represent the government (art. 62).

The government has the responsibility to implement laws, to answer questions by members of the legislature and to secure its approval for taxation and public expenditure (art. 64). The relationship between the powers and responsibilities vested personally in the Chief Executive and those in the government is unclear. Some key functions or powers of the executive, e.g., dealings with the Central Authorities or the relationship with the legislature, including its dissolution, are vested personally in the Chief Executive. However, some of the functions are more general (e.g., formulating and implementing policy) and overlap with those vested in the government. If we assume that the powers vested in the Chief Executive are personal and those in the government are collective, what happens when they overlap? Is there a different mechanism for the exercise of powers, depending in whom they are vested? Are there different systems of accountability for their exercise?

Can these ‘personal’ powers be delegated by the Chief Executive? Clearly some can be (and indeed may have to be, e.g., the conduct of external affairs or the implementation of policies or directives from the CPG). Some clearly cannot be (e.g., nominations for the appointment or recommendations for the removal, of principal officials, or the dissolution of the legislature, the signing of legislative bills). Some others probably are delegable (e.g., handling of petitions and complaints or the giving of pardons). Following the general common law principle, it could be argued that as the principal repository of these powers, the Chief Executive can delegate them unless the specific language of a power can be deemed to rule it out. For similar problems under the Letters Patent, see AG v Chiu [1992] 2 HKLR 84 where the Court of Appeal reversed an earlier interpretation that the Governor could not delegate his powers under the Letters Patent as these powers had been delegated to him by the Queen.
Some guidance on this matter may be obtained from an analysis of the nature of the executive system established by the Basic Law. The Chief Executive is the head of the government. He or she is responsible, essentially, for the appointment and dismissal of the senior officials of the government. Some of these senior officials are also the Chief Executive’s principal advisers, as is the Executive Council (whose membership the Chief Executive also controls). The Basic Law provides no rules for decision making within the government, except to state that the Executive Council is to assist the Chief Executive in policy making (art. 54). However, none of these provisions suggests that the Chief Executive is bound to take the advice of officials or Executive Councillors or that the Basic Law provides for collective decision making, as in a parliamentary system. The executive therefore is more akin to a presidential system, with the ultimate responsibility for policies and implementation in the Chief Executive. The government falls with the impeachment of the Chief Executive. It is therefore unnecessary to make subtle distinctions between the powers of the Chief Executive and those of the government; ultimately they must all be exercised at the discretion and direction of the Chief Executive, although no doubt the views of the Executive Councillors and officials would be invaluable to him or her in assessing administrative constraints and political expediency or acceptability before committing the government to a course of action.

Public service

Given the importance of the public service as the principal agency for the executive, the Basic Law provides in no comprehensive way for its organization. It makes no provision for the structure of government, except to require the establishment specifically of three departments (Administration, Finance and Justice) and more generally, ‘various bureaux, divisions and commissions’ (art. 60). Except for these three departments, the government is free to re-organize its internal structure; unlike some continental systems, there is no general legislation which establishes the structure of government. As with previous practice, some re-organization can be effected purely administratively, but in case of departments or offices which are established or recognized in an ordinance, legislative amendments may be necessary. However, the Basic Law directly provides for two executive bodies, a Commission Against Corruption (art. 57)

27 The Independent Commission Against Corruption was established in 1974 to fight corruption and for the more effective implementation of the Prevention of Bribery Ordinance and the Corrupt and Illegal Practices Ordinance. The legislation contains a
broad definition of corruption and covers the conduct of both public officials and private parties. The commissioner has wide powers of investigation of offences under the Prevention of Bribery Ordinance, and may impose various restrictions (including the surrender of travel documents) on persons suspected of having committed an offence (some restrictions, as to the reporting of investigations, are placed more generally). The commissioner has powers of arrest. In certain instances the burden of proving particular facts is placed on the accused. The commission was called independent because the Governor appointed to the office directly, and the commissioner was not responsible to any person other than the Governor. Appointments to the staff of the commission were made by the commissioner; the establishment was decided by him with the approval of the Governor. Presumably the framework established by these ordinances for the office and functions and powers of the commission continue in force.

and a Commission of Audit (art. 58). One reason for express provisions for these is to specify that they are to ‘function independently’. As mentioned earlier, it is assumed that the third major independent body previously established for the purpose of accountability, the Commission for Administrative Complaints, though not explicitly mentioned, is to continue operations under its ordinance. There is no requirement that the departmental organization of the government shall be the same as ‘previously’ (there were no bureaux before), but the assumption of a large element of continuity is evident in the retention of the triumvirate of the Administrative Secretary (though replacing the previous nomenclature of the Chief Secretary), the Financial Secretary and the Secretary of Justice (replacing the Attorney-General, see Chapter 7). It establishes the procedure and qualifications for the appointment of the principal officials of the government, but does not identity definitively who these officials are.

The principal officials are nominated by the Chief Executive who ‘reports them to the Central People’s Government for appointment’, and who may also initiate their removal by recommending their removal to the CPG (art. 48(5)). It is unclear whether the appointment or removal by the CPG is a formality (the view of the first Chief Executive was that the CPG has a veto). A CPG veto would represent a significant inroad into the autonomy of the HKSAR and could undermine the authority of the Chief Executive and prevent him or her from developing a coherent administration with officials in whose judgement and loyalty he or she has confidence. It would seem, as with some other provisions, this procedure is adapted from the Letters Patent. Constitutionally the British government was justified in approving these appointments since it had the right to exercise complete jurisdiction in Hong Kong, the Governor being merely its agent. The relationship between Chinese Central Authorities and Hong Kong is different, and such provisions erode the autonomy of Hong Kong and may make its administration more problematic.
No person can be appointed as a principal official unless he or she is a permanent resident as well as a Chinese citizen without a right of abode in a foreign country and who has resided for a continuous period of 15 years in Hong Kong (art. 61, most of these criteria are repeated in art. 101). The officials to whom these provisions apply are Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Director of Immigration and Commissioner of Customs and Excise (arts. 48(5) and 101). There is no definition of Departments and Bureaux, but presumably these are intended to be understood in the context of the organization of government before the transfer of power. However, the terminology in the Basic Law does not correspond with the nomenclature used previously. There is little problem with respect to the new titles of Secretary for Administration and Secretary of Justice. Other principal officials under the previous regime were not Secretaries of Departments, but of Branches (with policy and coordinating functions, under each of which were a number of departments which were responsible for implementing policy (Miners 1991: chap. 7). The chiefs of departments were not known as Secretaries but Heads. Nor was the expression Bureau in general use. It could be that Departments as used in the Basic Law refer to policy Branches (of which there were 14) and Bureaux refer to Departments (which were numerous). The structure of government was not provided under the law but determined by administrative means (which ensure great flexibility in re-organization).  

If previous practice were followed, new branches (departments) or departments (bureaux) could be established administratively, and the number of principal officials would be large.  

While the Basic Law does not specify if the previous organization of administration is to be maintained (perhaps because the organization was not regulated by law), it does expressly provide that the ‘previous system of recruitment, employment, assessment, discipline, training and management for 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’ (art. 103). The overall objective is stated to be the appointment and promotion of public servants on the basis of ‘their qualifications, experience and ability’

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28 However, in some instances departments were set up under an ordinance or their functions were prescribed in the law (e.g., the Education, Police and Immigration Departments).

29 The previous administration had a narrower view of ‘principal officials’, for under its estimates there would be only 23 such officials (Hong Kong 1996: 26).
(art. 103). The reference cannot be to all aspects of the previous system, since the Letters Patent vested the right to determine all appointments and promotions in the public service in the Governor (Clause XIV), and the Civil Service Regulations specified various senior posts appointment to which required the approval of the British government. Appointments to some of these senior posts now, under the Basic Law, are made by the CPG after nomination by the Chief Executive.

It is therefore to other public servants that art. 103 applies. Appointments to junior posts (determined by the salary attached to them, below point 30 of the master pay scale) were made by the head of the relevant department under delegation from the Governor. Appointments to other posts were made by the Governor on the advice of the Public Service Commission (established under the Public Service Commission Ordinance). The commission consisted of a full time chairperson and several part time members. Considerable powers in relation to recruitment were delegated to departments or branches, with the commission exercising a largely supervisory role. For example, advertisements for vacancies were prepared by departments but reviewed by the commission, and appointment and promotion boards were constituted by departments in conjunction with the Civil Service Branch of the Government Secretariat (although occasionally a member of the commission might sit as an observer). The commission reviewed the files of departmental committees before making recommendations for appointment to the Governor (who, almost as if by convention, accepted the recommendation, Miners 1991: 92–95). The commission was authorized to advise the Governor on all matters relating to the disciplining and dismissal of public officers, and had to be consulted if an officer was not deemed suitable for appointment after a period of probation or passing an efficiency bar, or if an officer was allowed to serve beyond the statutory retirement age. Despite these provisions, appointment and dismissal remained the prerogative of the Governor. The relationship of public servants with the government was contractual (the Civil Service Regulations constituting the framework for the contract, Choi Sum v AG [1976] HKLR 609), but they could be dismissed at will (Letters Patent Clause XVI).

30 In other British colonies, similar commissions, which were merely advisory to the Governor, were made executive on independence to ensure an independent and competent public service. The same results may effectively be achieved in the HKSAR if the previous ‘convention’ whereby the Governor always accepted the recommendation of the Public Service Commission were to be continued. It is interesting that art. 103 talks of ‘previous system’ rather than ‘previous laws’ regarding recruitment, promotion, etc.
The current legal basis for the public service

The provisions of the Basic Law on the public service were supplemented by the Public Service (Administrative Order) 1997. The purpose of the Order was to provide the legal foundations for the recruitment to and control over the public service as the previous legal basis was principally prerogative and imperial instruments which lapsed on 1 July 1997. The Order was deemed to come into effect on 1 July 1997 to maintain continuity although it not made until 9 July 1997 and was gazetted only on 11 July (sec. 1). It was made by the Chief Executive under section 48(4) of the Basic Law, which states one of the powers and functions of the Chief Executive ‘to decide on government policies and to issue executive orders’.

The Order gives wide powers to the Chief Executive over the organisation of, recruitment to, discipline within and dismissal from the public service. The Order gives the Chief Executive the power to appoint public servants (other than those officials whose appointments are the responsibility of the CPG, sec. 3). The Chief Executive has the power to dismiss, suspend and discipline public servants (sec. 5). These powers are to be exercised after such inquiries as the Chief Executive may prescribe in regulations which he or she is authorised by the Order to make (sec. 21). The procedures to be followed depend on the gravity of the penalty to be imposed. In principle, the Chief Executive must consult with the Public Service Commission before imposing any penalty (sec. 18). The Chief Executive is also empowered to require a public officer to retire in the public interest (sec. 12). He or she may interdict an officer from the exercise of the functions of his or her office (sec. 13). The Order had also provided that an officer who was under interdiction could not leave Hong Kong without the permission of the Chief Executive (although this provision was declared as invalid by the High Court in The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive (by Keith J in 1997 AL No. 90) as a violation of the right of the freedom of movement under art. 8(2) of the Bill of Rights (interestingly art. 31 of the Basic Law which covers the same right was not invoked). The ground for invalidity was that the restriction on the right was not ‘provided by law’.31

31 Public Service (Disciplinary) Regulation under the Order (Gazette No. 2 of 1997) provide for inquiries and investigations into the conduct of an officer as well as the delegation of functions to the secretary of the Public Service Commission. Reg. 8(3)(a) prohibits the representation of a person whose conduct is under investigation from representation by a lawyer. This regulation was challenged unsuccessfully in the Court of First Instance as a breach of art. 21(c) of the Bill of Rights (‘equal access to public service’) as giving public officer lesser rights than police and judicial officers, in the above mentioned case.
The Legislature

The composition

The Legislative Council is described as the legislature of the HKSAR (art. 66). As indicated above, there are 60 members, representing three different types of constituencies. However, once elected, they have the same rights and duties (although they might be expected to look primarily after the interests of their constituents, whose interests might diverge), with the exception in voting for bills, amendments and motions introduced by a member. When voting on motions or legislative proposals by the executive, the entire legislature votes together (a simple majority being necessary), but when voting on motions or proposals by a member (including amendments to government proposals), the functional constituency members vote separately from the other categories of members, and a majority of each type is necessary (Annex II, part III). Given the assumption that the functional constituency members are likely to be conservative, these rules favour the government (which would also be conservative given the rules for its appointment).

The normal life of the legislature is four years (as opposed to five for the Chief Executive) (art. 69). There may be two exceptions to this rule. The first is more in the nature of transitional arrangements, relating to the first legislature which has a tenure of two years. This period was determined at a time when it was assumed that the last legislature before the transfer of sovereignty (then about half way into its normal life) would continue for another two years. With the decision of the Chinese authorities to dismantle the pre-transfer legislature and select a provisional legislature, it might have made more sense to elect the first genuine legislature for the regular four years, but this would have required an amendment of the Basic Law. Such an amendment would have affected the timetable in Annex II for the composition of subsequent legislatures and postpone the progress towards more democratic forms of representation. It may therefore be desirable if an amendment to the tenure of the first elected legislature is made to speed up the stages to full universal franchise.

The second exception is when the life of a legislature is terminated prematurely through a dissolution of the legislature by the Chief Executive. The rules governing dissolution are complicated (art. 50) and are discussed below when reviewing the relationship between the legislature and the executive. When a legislature is so dissolved, fresh elections must be held within three months of the dissolution (art. 70); there is no provision for fresh elections when the regular term of a legislature expires (this would need to be provided in the electoral law, presumably by analogy with the
rule in art. 70). An individual member may lose his or her seat before the end of the legislature for a number of specified reasons (art. 79):
1. inability to discharge his or her duties caused by serious illness or other reasons;
2. absence for three consecutive sessions without valid reason or the consent of the President of the Legislative Council;
3. the loss or renunciation of status as a permanent resident;
4. accepting a government appointment and becoming a public servant (art. 79);
5. becoming bankrupt or failure to comply with a judicial order to repay debts;
6. being convicted and sentenced to more than one month’s imprisonment for a criminal offence within or outside the HKSAR; and
7. censure by the legislature for misbehaviour or breach of oath.

Of these reasons the first five are automatic, and the last two depend additionally on a vote of two-thirds of the members voting. The last reason is rather vaguely worded and no procedure is provided for investigation of complaints or allegations against the member, and it could conceivably be used to get rid of a person the authorities disapprove of (on analogy with the procedure for the recall of a member on the mainland). To a lesser extent, similar dangers lurk in the sixth reason where a longer sentence or a requirement of moral turpitude could have been specified. It is also unclear in both cases whether the legislature votes as a whole or the functional constituency members vote separately from others; the former seems the more natural meaning.

**The president of the Legislative Council**

The head of the Legislative Council is its president who is elected by the members of the council from among themselves. Only a member who is Chinese citizen of at least 40 years of age, without a right of abode in a foreign country and who has ordinarily resided in Hong Kong for at least 20 years is eligible for election to the presidency (art. 71). The powers and functions of the president include presiding over the meetings of the council, deciding on its agenda (but giving priority to government bills) and the time of the meetings of the council, and calling special sessions, including emergency sessions at the request of the Chief Executive (art. 73 (1)–(5)). The president appoints, jointly with the Chief Executive and the Chief Justice of the Court of Final Appeal, the six Hong Kong members on the Committee for the Basic Law (in accordance with the Decision of the NPC on 4 April 1990). The president may also exercise other powers and
functions prescribed in the rules of procedure of the council (art. 72 (6), see below).

The **powers and functions of the Legislative Council**

*Legislation* The most obvious function of the Legislative Council is to enact laws. Although its legislative powers are stated in wide terms (art. 73), there are various restrictions on these powers; nor is the council the sole law-making body. First, bills passed by the council do not become law until they have been signed by the Chief Executive (art. 76); and the Chief Executive may refuse to sign if he or she considers that it is ‘not compatible with the overall interests of the Region’ (art. 49). The veto can be overcome in some circumstances, but the advantage lies with the Chief Executive (as discussed below). Second, the scope of the law-making powers of the council is limited by the Basic Law; the laws must be compatible with the Basic Law, both as regards the division of authority between the HKSAR and the Central Authorities (see Chapters 4 and 5) and as regards the limitations even within the areas where the council may validly legislate (see Chapter 4 and, for restrictions arising out of the protection of rights and freedoms and social policies, Chapter 9). Thirdly, national laws may be applied in Hong Kong without the intervention of the council, when they are brought into effect by promulgation or directly by the CPG in emergency situations (art. 18). Fourthly, legislation in the form of subordinate legislation may be made by the executive (art. 62(5)) or other bodies authorized under an ordinance. The council is able to control the content of subordinate legislation both by prescribing its scope in the parent legislation and by stipulating its prior consent or subsequent disapproval of subordinate legislation.\(^{32}\)

The most important restriction is not in the scope of its jurisdiction as in the procedure for initiating legislation. Members of the Legislative Council are not allowed to introduce bills ‘which relate to public expenditure or political structure or the operation of the government’.\(^{33}\)

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\(^{32}\) Under the Interpretation and General Clauses Ordinance, all subsidiary (i.e., subordinate) legislation has to be laid before the Legislative Council, which may within 28 days amend or repeal such legislation ‘in any manner whatsoever consistent with the power to make such subsidiary legislation . . .’ (sec. 34). It is also possible for the council to provide in the ordinance authorizing the making of subsidiary legislation that it would not come into effect unless approved by the council (which may amend it before the approval is given, sec. 35). See Wesley-Smith (1994b: 163–168) for an account of the scope of, and controls over, subsidiary legislation.

\(^{33}\) The Basic Law states this rule rather obliquely. It says, ‘Bills which do not relate to public expenditure or political structure or the operation of the government may be
Nor may they introduce bills ‘relating to government policies’ without the written consent of the Chief Executive (art. 74). Although the restrictions relating to public expenditure are found in some countries (but the prohibition is not absolute as the restrictions can be waived by the executive, as indeed in Hong Kong during the colonial period, Royal Instructions XXIV(2) and Standing Order 23), the other restrictions appear to be unprecedented (and have no parallel in China itself). The scope of restrictions is extremely unclear — what is political structure or operation of government or government policies? The last of these is very wide ranging, and potentially could cover all matters, totally negating the powers of the legislature to initiate legislation. Further hurdles in the way of initiatives of members lie in the system of voting on them, which require separate voting by functional constituencies members on one hand, and other members on the other (the significance of which is discussed below).

It is assumed that the executive would be the principal source of legislative proposals, in which case the major role of the Legislative Council is that of scrutiny and review of governmental proposals. The council is seriously handicapped in the performance of these functions by the rules on voting (which seek to fragment the responses of its members) and the consequences of an adverse vote by the legislature (discussed below), which is evident also in the role of the council in the control and review of public finance examined next.

Public finance  In common with most legislatures, the Legislative Council plays an important role in the regulation of public money. The Basic Law incorporates the general principle that no collection or expenditure of public revenue can be made without authority from the council. This is a crucial power of the council since the operations of the government cannot be carried out without the supply of money; and it might be seen to be introduced individually or jointly by members of the Council’. The president of the provisional legislature held that provisions relating to qualifications to vote concern the political structure, when she refused to allow the introduction of a bill to amend the qualifications for election in the social welfare functional constituency.

34 The Basic Law does not state who is to determine whether a bill contravenes any of the restrictions. The previous Standing Orders (in SO 22) had provided for the President of the Council to return a motion which he or she considered to be ‘out of order’ to the member proposing it. In the period shortly before the transfer of sovereignty, a number of bills proposed by members were deemed by the government or other public authorities to have fallen foul of the restriction on public expenditure. The ruling by the president could have been challenged through proceedings for judicial review, although there was no instance of such a challenge. Presumably the same procedure would apply under the Basic Law (which gives the President the power to ‘decide on the agenda’, art. 72(2)), with the amenability of the ruling to judicial review.
The Political and Administrative System

adverse to the ‘executive led’ nature of the political system. Consequently the Basic Law establishes a delicate balance between the powers of the council and the needs of the administration, and provides mechanisms to ensure supply of money.

The first principle (carried over from the British Westminster as well as the colonial system) is that the primary responsibility for planning the collection and expenditure of public money lies with the executive (on the assumption that the members of the legislature would, somewhat irresponsibly, increase expenditure for social or other services to win or maintain the support of their constituents). Members of the legislature cannot, as we have seen, introduce any proposals (including amendments to government proposals) which relate to public expenditure (art. 74), although the prohibition does not extend to taxation (i.e., the collection of money for the public purse). However, the proposals of the executive have to be approved by the legislature (art. 73(3)). The council may not, as indicated, amend government proposals for expenditure, but it can reject them. If the council rejects the proposals, the Chief Executive may request it to approve provisional appropriations (art. 51), although it would seem that the council is not obliged to accede to the request. The other course open to the Chief Executive is try to reach agreement with the council (in which case the council could try to persuade the Chief Executive to change the rates of taxation or expenditure) and presumably subsequently present fresh proposals. If no consensus is reached, then the Chief Executive may dissolve the council (art. 50). On dissolution, the Chief Executive may approve provisional short term appropriations ‘according to the level of expenditure of the previous fiscal year’ (art. 51). The matter does not rest there, for as we have seen, new elections have to be held within three months, and fresh negotiations will have to be held between the new legislature and the government, in which round the Chief Executive would have to compromise as he or she cannot dissolve the legislature again.

Supervision of the executive The Basic Law has various provisions for the accountability of the executive to the legislature. Government policies, especially when they require new legislation or fresh funds, need the approval of the Legislative Council; although, as we have seen, the ability

35 The council may not formally amend or seek to amend the proposals from the government, but as indicated below, by rejecting the proposals, it may be able to force the government into a compromise, and thus informally accept its views. But see art. 48(10).
36 The Basic Law restricts the competence of both the executive and the legislature as regards the amounts of taxation and expenditure (arts. 107 and 108, see Chapter 4).
of the members to amend these policies is limited, they can secure changes through their right to veto them. More specifically, the council debates policy addresses of the Chief Executive. It may debate any issue concerning public interests, through presumably the normal parliamentary procedure of adjournment and other debates. It may question government officials on policy or administration and seek information from them (art. 72); however, the Chief Executive may prevent the council from seeking information from any official if he or she considers that it is against the public interest (art. 48(11)). Under these general powers the council may supervise the expenditure of public money, although no specific authority or procedure is provided for this purpose. Traditionally, the legislature undertakes financial scrutiny with the help of the auditor-general, who is seen primarily as an agent of the legislature. The Basic Law establishes a Commission of Audit, but it is seen as an appendage of the administration; the appointment of its director is recommended by the Chief Executive, and although the commission is said to be independent, it is made accountable to the Chief Executive (art. 58). 37

The Basic Law does not specify the functions of the commission; presumably they would be as set out in the Audit Ordinance. The director has to ‘examine, inquire into and audit the accounts of all accounting officers in respect of public moneys, stamps, securities, stores and any other Government property’ (s. 8). The director is to satisfy himself or herself that all legal provisions relating to the collection or expenditure have been observed and that the rules and procedures which are applied are adequate to secure an effective control over expenditure, so that the director’s remit includes review of both legality and efficiency. The director is given wide powers to discharge these tasks, which are based on accounts submitted by the government. The audit of public accounts, including a review of any irregularities, is submitted to the president of the Legislative Council who tables them before the Legislative Council (s. 12). With the assistance of the audit and further assistance from the director, the council undertakes its scrutiny of public accounts, principally through the Public Accounts Committee. The director may issue other reports, particularly when he or she comes across an instance of gross waste, irregularity or inefficiency. The director is regarded essentially as an officer of the

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37 Similar provisions for ‘independence and accountability’ are made for the Commission Against Corruption (art. 57). This device comes from the colonial period, where for some curious reason the Governor was supposed to be above politics, factions, etc. and was able to ensure the independence of institutions. It is regrettable that the opportunity was not taken at the transfer of sovereignty to provide a genuine system of independence, as in many other former colonies with procedures for appointment by independent commissions and security of tenure.
legislature; through the director’s own activities, and the assistance to the legislature, a careful scrutiny over public funds can be achieved.

**Impeachment of the Chief Executive**  The council has no power to pass a vote of confidence which would lead to the dismissal of the Chief Executive. According to a mainland drafter, the provision for a vote of no confidence (which is the principal device for a legislature’s control over the executive) was ruled out on the grounds that it would produce frequent changes of government, and would be bad for economic prosperity and social stability (Xiao 1988). Presumably the continuity of the executive was rated more highly than the continuity of the legislature since the Chief Executive has been given limited powers to dissolve the Legislative Council. The assumption was that while a certain amount of checks and balances was desirable, it was more important to provide for coordination between the legislature and the executive so as to avoid an impasse (Xiao 1988), although it is not clear how coordination is to be achieved.

Although the legislature cannot remove the Chief Executive through a vote of no confidence, it may be able to do so through an impeachment procedure (art. 73(9)), which is however weighted in favour of the Chief Executive. The procedure is initiated by a motion by one-fourth of the entire membership of the legislature charging the Chief Executive ‘with serious breach of law or dereliction of duty’. If the Chief Executive refuses to resign and the council passes the motion, the ‘Council . . . may give a mandate’ to the Chief Justice of the Court of Final Appeal to form and chair ‘an independent investigation committee’. If the committee finds the allegations substantiated, the council may pass a motion of impeachment by a two-thirds majority of all its members. However, the adoption of the motion does not necessarily lead to the removal of the Chief Executive, since it has to be reported to the CPG ‘for decision’. This form of wording indicates that the final decision is with the CPG, which might wish to shield the Chief Executive, although it is hard to see how the CPG could disregard the overwhelming majority of the legislature (and the procedure preceding its vote) without causing a major crisis in Hong Kong and in the relationship of the Central Authorities with its residents.

**Judiciary**  The legislature has a limited role vis-à-vis the judiciary, consistent with the separation of powers and the independence of the judiciary. The appointment or the removal of the judges of the Court of Final Appeal as well as the Chief Judge of the High Court requires its approval (arts. 73(7) and 90). Although the purpose of these provisions is to ensure the independence of the judiciary, it may be wondered whether it is strictly necessary as the Basic Law already provides sufficient guarantees
of fairness and impartiality in the appointment and removal of judges (see Chapter 7). This is a new responsibility for the legislature in Hong Kong, and there is consequently no guidance from previous Standing Orders on the procedures that might be followed (as for example whether there would be public hearings by the relevant committee as in the United States Senate). This may be resisted on the ground that it would tend to politicize the judiciary, and discourage some good lawyers from seeking judicial office. The Standing Orders of the previous legislature provided that a court decision or a case pending before a court should not be commented on during question time (SO 18(g)) and that the conduct of judges or other persons performing judicial functions should not be raised during the proceedings of the council (SO 13(9) — a rule which now needs to be amended when the question of the appointment or removal of a judge is being debated).

**Redress of grievances** One of the functions of the legislature is to ‘receive and handle complaints from Hong Kong residents’ (art. 73(8)). This is one of the traditional functions of legislatures, although it is seen as an aspect of the relationship between an individual member and his or her constituents. A common way of handling a constituent’s complaint is by taking it up with an official of the government and exceptionally with the head of the department or minister. Such specific and individual complaints are sometimes raised in the legislature, when informal approaches produce no results, and especially when a point of public importance is involved. From the point of view of a member, dealing with constituents’ problems is a useful way to demonstrate his or her commitment to the constituency as well as his or her ability to secure redress (so strongly do members feel about this function in the UK that it constituted a major source of opposition to the establishment of an ombudsman in that country, and when eventually the office was set up, complaints to it had to be channelled through parliamentarians, as indeed originally in Hong Kong as well). However, individual complaints had not until recently been a serious part of the work of a member in Hong Kong. Members were appointed and had no constituency responsibilities, and had indeed no constituencies. A collective mechanism, in the form of the Omelco Office (to service non-official members of the Legislative and Executive Councils), was set up in 1970 to receive and deal with complaints in order to counter pressures to set up an ombudsman. Staffed by officials seconded from the administration, it dealt with a number of specific complaints against administration as well as broader policy questions, including legislative proposals. Members took turns to be at the office to offer advice and information. Complaints which could not be dealt with in this way were
referred to the relevant committee or panels of the legislature. Members acted in some respects as an ombudsman, with access to government officials and files, and close connections with the administration (Dunn 1989). When the ombudsman’s office, Office of the Commissioner for Administrative Complaints, was established in 1989, complaints had to be channelled through members, but that rule has now been abolished (see above). However, the impetus to members to intensify the work dealing with complaints increased with the introduction of elections and the formation of parties, and this function is likely to be important, notwithstanding other avenues of redress; members of the council operated a roster system to receive public complaints. However, the Standing Orders had no formal procedure for receiving directly such complaints, and all petitions to the Legislative Council had to be presented by a member (SO 13).

**Powers and privileges of members of the legislature**

The Basic Law provides for only two specific privileges for members of the legislature (necessary for the proper discharge of their functions and duties). The first is that members would be immune from legal action in respect of their statements at meetings of the council (art. 77) and the other is that no member may be arrested when attending or on his or her way to a meeting of the council (art. 78). These privileges fall well short of the powers and privileges granted under the Legislative Council (Powers and Privileges) Ordinance (which was enacted in 1985). The ordinance gives additionally the power to the council and its committees to regulate the admittance of persons other than its members and staff to its precincts (s. 8); to order the attendance of witnesses (ss. 9 and 10), if necessary by the issue of warrants (s. 12); to examine witnesses on oath (s. 11) and to compel them to answer questions or produce papers (s. 13). Breach of these orders is an offence punishable in courts (ss. 17–20). It is unclear whether these broader privileges and powers of the Legislative Council (which are usual for legislatures elsewhere) will be deemed beyond the Basic Law, and therefore be curtailed. The Chinese authorities have in the past expressed their dissatisfaction with moves to strengthen the machinery of the Legislative Council, as being inconsistent with the ‘executive led’ nature of the political system and threatened to disallow them after the transfer of sovereignty.38 However, many of the powers in the ordinance

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38 In 1991 when the members of the legislature discussed how the legislature’s committee system should be reformed, Chinese officials argued that the standing committee system being advocated would usurp the power of the government, transform the ‘executive
pre-date the Basic Law and are not obviously inconsistent with it. The legal subgroup of the Preparatory Committee did not, contrary to expectations, propose its repeal (although s. 13 might be deemed to be inconsistent with art. 48(11) of the Basic Law which gives the Chief Executive the right to prevent the questioning of an official by the council on specified grounds), and the NPCSC did not require it under art. 160 (see Appendix 6).

**NATURE AND CONSEQUENCES OF THE POLITICAL SYSTEM**

**Objectives of the Political System**

In order to analyse the political system, it is necessary to examine constitutional institutions in Hong Kong and their relationship with the Central Authorities. It is clear that China and its associates in Hong Kong gave careful thought to the design of the political system (particularly after the reaction in Hong Kong to the Tiananmen Square massacre suggested to them the hazards of an open political system). From the preceding sections, it may be said that the Chinese authorities had the following objectives:

1. The principal concern seems to have been to ensure overall Chinese control over policy and politics in Hong Kong. This aim was to be secured through two sets of provisions; first, the formal powers of participation and intervention in ‘Hong Kong’ affairs, and the second, informal influence on local Hong Kong institutions and processes. The interaction between the two sets of provisions is best illustrated by the influence of the Central Authorities over the office of the Chief Executive (and his or her principal officials). China has the formal power to appoint the Chief Executive and principal officials as well as the power to disregard the vote of the Legislative Council impeaching the Chief Executive. But the Central Authorities would also be able to influence the process of the selection of the Chief Executive due to the interests which are ensured dominance in the Election Committee (particularly business and the professions) and by

led’ nature of the political system to ‘legislature led’, and bring confrontation between the executive and the legislature (SCMP 14 December 1991), and warned that the standing committee system would be abolished in 1997 (SCMP 17 December 1991). Chinese opposition had a dampening effect on reform; and the Standing Orders of the Legislative Council provide for panels instead of standing committees.
the electoral process (which requires the support of one hundred members for the nomination of candidates). Particularly striking is the veto that has been reserved to the CPG over the impeachment of the Chief Executive. It highlights the high degree of dependence of the Chief Executive on the CPG, already evident in the other provisions just mentioned as well as in art. 43 under which the Chief Executive is accountable to the CPG.

While CPG control, or at least influence, over the Chief Executive is central to the design of the political structure, the Central Authorities would have considerable influence over the Legislative Council. The system of functional constituencies (in terms of the representation of interests and the electoral system) is intended to secure the dominance of political and economic groups likely to support the CPG. Similar results are likely to be achieved through members elected by the Election Committee. However, the CPG would probably have less influence on the members of the Legislative Council than on the executive, and accordingly, as discussed below, the executive is made more central than the legislature in the governance of Hong Kong.

In the event that these provisions do not achieve the objective of CPG control, two other mechanisms can be deployed. The first is to remove the issue in contention to the NPCSC for its determination by making it ‘constitutional’. The other, in *extremis*, is to invoke emergency powers under national laws (art. 18).

2. The political structure is designed to ensure the dominance of the business and professional classes, the principal devices being the system for the appointment of the Chief Executive, functional constituencies, and the system of voting in the legislature which seeks to give the business community a veto over initiatives of more democratically elected members. As I suggest below, the drafters of the Basic Law assumed an alliance between the Chief Executive and the business community, which would reinforce the influence of the CPG in Hong Kong.

Central to the Chinese strategy for the management of Hong Kong is its alliance with the business community (so evident in the PWC, the Preparatory Committee and the Selection Committee). The predilection for the capitalist class by a government which claims to be socialist arises out of what is perceived to be a significant convergence of the interests of the two parties in the maintenance of Hong Kong’s previous economic system (with minimal provisions for welfare), preventing democratization, and in maintaining ‘stability’. The CPG must have, additionally, considered that its prospects of exerting its influence were better where the business community rather than other groups was concerned, arising out of the readiness of the business community to forge collaboration with the colonial
authorities and its increasing investments in China which would similarly dispose them to support (and seek the support of) the Central Authorities.

3. The two preceding objectives are contingent on a third objective: the slowing down of political and democratic mobilization. The objective is secured through limitations on democratic rights, at least until 2007. But it is also secured through specific provisions for elections and the functioning of constitutional bodies. For example, the effect of functional constituencies is not only to secure the dominance of conservative, economic interests, but to influence the development of the political system away from open and party politics (political parties being the main means in modern politics to mobilize and represent the people). The small electorates for business and professional constituencies can be influenced through personal contacts or by relying upon corporate muscle, and political parties may even be counterproductive given the attitudes of several leading businesspeople. It is possible, under the arrangements of the Basic Law, for a group of politicians to compete and operate without a political party, and indeed without popular support. Since, in some functional constituencies at least, the CPG will effectively be able to decide on the winning candidates, the politics of nomination (refined into a high art by the British colonial authorities) will persist, disabling those who seek to mobilize public support.

By creating different bases of support and representation, the Basic Law, as is the intention, will fragment the political community and weaken the Legislative Council’s ability to provide an effective challenge to the administration. The electoral system is geared towards ensuring that no individual or party emerges with the mandate of the people. The system may also consequently fail to attract some talented people to politics, for popular politics will not be an avenue to power until there is a change in the electoral system — and Hong Kong provides alternative openings, particularly in business, for them. However, the geographical constituencies will provide an incentive and base for party politics (as I discuss below), although labour, a primary impetus for political organization in most contemporary societies, may be unable to provide a suitable base as trade unions are divided among the supporters of China and those who want more democracy and welfare.

Even more fundamentally, the development of parties would be retarded by the system for the appointment of the Chief Executive. The highest office is not open to a truly competitive electoral politics (as in the US where parties are important primarily for presenting presidential candidates). Senior members of the government would be drawn from the public service, not politics.
The aim to slow down political mobilization is evident also in the rules for the initiation and enactment of legislation. Restrictions on the powers of members of the legislature to initiate legislation, and the control by the executive, or the ‘veto’ by functional constituency members over initiatives by geographical constituency members, would make it impossible for democratically elected members to use the legislative process to respond to or stimulate popular demands, thus discrediting the political process. The continuation of advisory boards and committees will also detract from the significance of the members of the legislature. The limited accountability of the executive to the legislature and to other groups is also designed to de-politicize social processes.  

4. The main institutional forms for the implementation of these objectives are the Chief Executive and the Legislative Council which may be best exemplified in the relationship between them (which, based on the logic of the above objectives, follows no recognizable form of government, being neither parliamentary nor presidential). The Chief Executive and the Legislative Council represent, to some extent, different interests. The Chief Executive is selected and appointed independently of the legislature (the members of the legislature representing a minute proportion of the Election Committee). The interest groups that participate in the electoral or consultative process leading to the nomination of the Chief Executive are differentiated and fragmented, but would operate under the hegemony of the business and commercial interests (especially so long as they are able to maintain a common front with the Central Authorities). The interests in the legislature are even more diffuse, and although the functional constituencies are perceived as providing a base for a solid block of business interests, the prospects of a hegemonic group are weak. This bias in favour of the Chief Executive (who would be expected to be able to rely on the support of most functional constituency members) is reinforced by various provisions regarding the Chief Executive’s relationship to the legislature.

The office of the Chief Executive is intended to be very powerful, dominating over the legislature. This is evident in the vesting of executive powers in one individual (seen by the business community as protection against vacillating policies and uneasy compromises). It is also evident in

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39 In the same vein was the rejection by China that progress towards fuller democratisation after 2007 should be determined by periodic popular referenda (Roberti: chap. 19). Instead, the legislature has to approve any proposal for change by a two-thirds majority of all its members, giving a de facto veto to the business community, in addition to the formal veto given to the Chief Executive (Annex II, Part III).
the asymmetry in the relationship between the Chief Executive and the legislature. The Chief Executive has the primary responsibility for the initiation of policies and legislation. The rules for voting in the legislature strength the Chief Executive’s hands vis-à-vis its democratically elected members. Moreover, the Chief Executive may prevent members of the legislature from initiating or amending legislative proposals on most significant issues, and may dissolve the legislature in case of serious differences with it. The extent of the accountability of the executive to the legislature is severely limited. The Chief Executive may be protected against impeachment by the legislature by the CPG.

**Contradictions in the Political System**

Despite the thought that went into the design of the political structure, it may fail to achieve its objectives. Given the countervailing pressures for democratization and autonomy, the political system reflects various contradictions. It is to the examination of these contradictions that I now turn.

1. It is unlikely that the political structure will be able to prevent the democratic mobilization of politics or, at least, some growth of parties. The geographical constituencies would provide a basis and incentive for the organization of parties (as will the elections to local government bodies). The electoral system for geographical constituencies, the party list proportional representation, will increase the importance of party politics and party organization. In turn the growth of parties may influence at least the larger functional constituencies. Politicians who reach the Legislative Council through party support and popular elections will have both an organizational base and a claim to legitimacy which may be used to challenge the government, especially as the Chief Executive may lack a popular mandate. The significance of these councillors will be the validity they provide to democratic principles.

2. One may also question how long the alliance between the Central Authorities and the business community would last. Various factors could strain the relationship. There could be a shift away from the market to a more planned economy on the mainland or the eruption of factionalism

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40 Ji Pengfei’s justification for the dual system of voting was that it takes ‘into consideration the interests of all social strata and will prevent endless debates over the government bills, thus helping the government work with efficiency’ (1990).
as part of the process of succession to the leadership of the Communist Party which may diminish the importance of mainland leaders with whom the Hong Kong business community have collaborated. The increasing democratization in Hong Kong mentioned above may call in question the legitimacy of the business community, especially if it becomes obvious that it is cultivating its own selfish interests and obstructing the implementation of popular policies. The Central Authorities may find its alliance with the business people a liability.

3. Despite the way in which the dice are loaded in favour of the Chief Executive, the system may fail to secure a strong government. The Chief Executive would need to mediate between the Central Authorities and the Hong Kong legislature, and can do so successfully only by conceding, at least to some degree, to both. The method of appointment to the office does not necessarily require the Chief Executive to establish a mass base; indeed that might be a disqualification. At best the Chief Executive might be a surrogate for the business community who would discourage broadening of popular appeal. Within the Legislative Council too, the Chief Executive would probably depend on the support of the functional members, as indicated above, but will also need to conciliate geographical constituency members because of their popularity in the community. These members might command more legitimacy (and a greater claim to represent the public interest) than the executive. The Chief Executive would be unable to bring effective pressures on the bureaucracy which has a great capacity to frustrate policy initiatives. And then there is a large number of civil society institutions with whom the Chief Executive would need to negotiate aspects of his or her policy.

4. Connected with the previous point are doubts about the stability of administration that has been such a central concern of the Chinese Authorities. Although the legislature’s powers of policy initiatives are greatly restricted, it does have a kind of negative power and the ability to frustrate the adoption or the implementation of executive policies. Moreover, there is no adequate method for settling disputes between it and the executive.

If the Chief Executive vetoes a bill passed by the council (on the grounds that it does not represent the overall interests of the region), the council may resubmit the bill to him or her if it is passed by a two-thirds majority. The Chief Executive has then the option of signing the bill or dissolving the council. The council can also be dissolved if it refuses to pass a government bill or the budget. However, if the bill which the Chief Executive rejected is passed again by the new council, he or she has either
to sign it or resign. The power to dissolve the council is available to the
Chief Executive only once in each term of office (art. 50).

This mechanism for referring the issue to the interest groups relevant
in the electoral process (it would be inaccurate to say to the people!) is
tilted in favour of the executive, since the initial penalty is paid, as it
were, by the councillors. But there are other considerations too which
seem to favour the executive. The very threat of dissolution often serves
to ensure compliance by members of legislatures. Secondly the executive
can, to a substantial extent, control the introduction of a bill by a member,
as we have seen. Thus the chances that any great issue of public importance
would be involved is remote, and the Chief Executive would lose little by
allowing the veto to be overridden. Thirdly, the need for a veto in the first
instance would arise only if the executive lost the support of both classes
of members (since private bills are voted on separately — an element of
bicameralism that survived from the far reaching proposals of a
businessman, presented with the support of the Chinese, as a further tilt
towards conservatism (see Chapter 2)).

However, the Chief Executive’s decision to dissolve the legislature is
not without serious risks. The very fact of dissolution would be a sign of
a crisis that the administration would not wish to highlight. Moreover,
the Chief Executive would be gravely injured if the fresh elections returned
most of the members who had opposed him or her (especially if they
represented geographical constituencies), for that would amount to
repudiation by the public. Since the legislature can be dissolved only once
in the term of the Chief Executive, the powers of executive veto are
limited, being able to veto only once bills passed by a subsequent council.
However, once the Chief Executive has played the master card of
dissolution, although it does not now have to worry about being dissolved
again, the only effective possibility from the point of view of the council is
to obstruct new policies of the executive (including by refusing to grant
the budget); it cannot take positive initiatives. This could make deadlocks,
stand-offs, and the immobilization of policies the norm of political life. It
also opens up the possibility of the legislature ultimately forcing the Chief
Executive to a test of public opinion. The very lack of institutional power
of the elected members would highlight the oddities of the political system,
and perhaps ultimately its unworkability (unless the public turned its
back on ‘politics’ and supported the administration, as it had for much of
the British rule).

The executive may consequently be forced into operating the political
system in less of a presidential and more of a parliamentary style (although
the options for doing so are unclear). The simplest and least formal way
would be to operate on a convention under which the government
recognized the primacy of the views and policies of the largest party and its allies. Secondly, the Chief Executive could appoint to the Executive Council those members of the Legislative Council who come from the largest party or coalition. This would not only establish effective links between the executive and the legislature, but also recognize the credentials of the more representative of the councillors. Thirdly, it may also be open to the Chief Executive to appoint senior policy makers from the Legislative Council, chosen from the leading party or coalition of parties. Under the Basic Law such persons are called ‘principal officials’ and are currently in charge of various policy areas. However, a legislator loses his or her seat on accepting a government appointment and becoming a public servant (art. 79(4)). But this suggests that a government appointment by itself does not disqualify a member, and there is nothing which explicitly requires a principal official to be a public servant (though the fact that the citizenship requirements — that principal officials must permanent residents who are Chinese citizens without the right of abode elsewhere — are set out in the section on Public Servants suggests that they are to be regarded as such). Here again there would be need to accept certain conventions about collective responsibility since the Basic Law vests executive power in the Chief Executive.41

Even if this option is open, whether it would be taken up depends in large part on the background of the Chief Executive. If the Chief Executive has been a public servant, the chances of his or her appointing political principal officials are small. In any case such a scenario is somewhat hypothetical since a Chief Executive might see his or her authority diminished if the principal officials are politicians with independent bases of their own rather than career public servants. Moreover the Chief Executive would have to be satisfied that nominations for principal officials were acceptable to China (whatever the legal position regarding their appointment), and China is not likely to be disposed towards politically oriented councillors (probably representing geographical constituencies)

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41 The matter is complex but reasons of space prevent its exploration. Suffice it to say that collective responsibility would not only bind the Chief Executive but also the principal officials, who may find this difficult to reconcile with their role as legislators, unless a clear majority is available. Patten opted against having politicians in his Executive Council, on the basis that this would clarify the respective roles of the Executive and Legislative Councils, and would improve transparency of the policy-making process and sharpen the accountability of the government to the legislature (his address to the Legislative Council, 7 October 1992). However, Patten’s own thinking was less than transparent; the British government was accused of having submitted to the Chinese on this, as the United Democrats won most of the geographical constituencies, and the presence of its leader Martin Lee in the inner sanctum of the Governor would have been anathema to them.
and any system which gives prominence to, and thus encourages, political parties. The China factor is important here as in many other instances, and it is time now to examine how it affects responsiveness and accountability of the executive.

5. Were serious conflicts to arise between the executive and the legislature, the Central Authorities would be tempted to intervene in Hong Kong affairs and the dependence of the Chief Executive on the CPG may increase. The intervention of the Central Authorities may be invited by other groups, both in Hong Kong and the mainland. The precedent established in the terminal stages of colonial rule by various groups in Hong Kong, principally among the business community, of invoking Chinese support in case of differences with the local administration, may persist, while the now extensive mainland commercial interests in Hong Kong may be tempted to use their connections to secure favoured treatment.

The Basic Law allows various specific forms of intervention: in the appointment and dismissal of the Chief Executive and senior officials (by the CPG), reviewing legislation enacted by the SAR legislature (NPCSC), and interpretation of the Basic Law by the NPCSC. It also allows the CPG to give directions ‘in respect of relevant matters’ (art. 48(8)), particularly in foreign affairs, and to determine the number of mainlanders who may enter Hong Kong for settlement, after consulting the Hong Kong government (art. 22). However, no framework is provided for relevant consultations on these matters. Equally the Central Authorities would be able to exert influence on the electoral process, lean on some legislators, use the economic muscle of their enterprises in Hong Kong and pressure on Hong Kong enterprises on the mainland owned and managed by key figures in Hong Kong.

Intervention by the Central Authorities would have various implications. It would emphasize the various links that have developed between Hong Kong and the mainland, through public and private channels, highlighting the increasing unreality of ‘Two Systems’. The Central Authorities would increasingly be seen as the decision maker for Hong Kong (here again continuing the pre-transfer practices), ousting the framework of governance of the Basic Law. This would run contrary to the original Chinese intentions to restrict itself largely to influence on and directions to the Chief Executive (a modern version of indirect rule). Apart from undermining the autonomy of Hong Kong (and doing so publicly), this situation would also highlight another aspect of the relationship between mainland and Hong Kong institutions.

Institutional relationships in most schemes of autonomy are concerned with the coordination of policies or the resolution of differences. They are
also intended to provide representation for the autonomous area in national institutions (and so some influence on national policies). The assumption is that the autonomous region is an integral part of the wider national system. This model cannot fully be applied in relation to the HKSAR, if the logic and practice of ‘Two Systems’ is to be adhered to. The pressures on institutions in Hong Kong are likely to be very different from these on the Central Authorities. Institutions in Hong Kong would probably have to resolve the confrontation between those espousing liberal, democratic values and those opposed to them. The institutions are unlikely to enjoy much autonomy from these forces (as I have tried to show above) and would therefore be compelled to respond to them within the framework of Hong Kong (although I have also pointed to the temptations of some groups to secure mainland involvement). On the other hand, the Central Authorities are unlikely to view Hong Kong issues purely in terms of the regional context, but are likely instead to locate them within the wider issues affecting mainland politics. Although there would be various interest groups in Hong Kong and on the mainland lobbying them, the Central Authorities are likely to be more autonomous of these interests (although the increasingly diverse nature of Chinese economy and politics would place a premium on the powers and skills of the CPG to coordinate these interests, art. 22 notwithstanding).42

The frameworks for decision making for the two sets of institutions are therefore quite different. Mainland intervention would in many instances not be determined by the logic of ‘Two Systems’, but by the imperative of ‘One Country’, in which political control dominates. (If Hong Kong was economically and politically less important than it is, the logic of two systems might have prevailed.) The interests of the Central Authorities may in some instances differ from those of all the groups in Hong Kong; in other cases they may have more of a balancing role. It is not the function of the Central Authorities, under the Basic Law, to intervene in Hong Kong’s affairs either to bolster the Chief Executive or to balance the interests of various groups. These matters are the responsibility of internal Hong Kong institutions; Chinese intervention would undermine the autonomy of the special region. Nothing illustrates the tensions that would result better than the unrest that would inevitably follow the refusal of the CPG to endorse the decision of the Legislative

42 Article 22 says, ‘No department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law’. It also requires any of these mainland institutions which need to establish an office in Hong Kong to secure the permission of both the CPG and the HKSAR government.
Council to impeach the Chief Executive. Autonomy would crumble into
dust; and the logic of the political structure of the Basic Law would be
laid bare.

A high degree of the separation of the two political systems, essential
to the autonomy of Hong Kong, is unlikely. Efforts are likely to fit the
Chief Executive into the hierarchy of officials in the PRC, for protocol
and political reasons. Key Hong Kong politicians and business people will
have seats in the NPC or the CPPCC. In this way they will be drawn into
the system on the mainland and become the means by which the policies
and preferences of the Central Authorities are transmitted and effectuated
in Hong Kong. Above all there is the role of the Communist Party. The
Communist Party has been active in Hong Kong for a number of years,
operating out of the offices of the New China News Agency (Xinhua) and
in recent years through party cells in the large number of Chinese
commercial organizations in Hong Kong or in Hong Kong institutions
which employ a sizeable number of mainlanders (Ching 1996). There is
little evidence of ‘infiltration’ of the Party in the public service of Hong
Kong; and indeed even Hong Kong deputies to the NPC are in general not
members of the Party. Undoubtedly the Party would seek to influence
policy and developments in Hong Kong through whatever Party
mechanisms are open to it. It is also expected that the Ministry of Foreign
Affairs office would maintain a large staff, and that the head of the office
would be a significant person in the mainland system, with direct access
to the top leadership. Fears have consequently been expressed that, although
the Central Authorities will have a limited administrative presence in
Hong Kong, the head of the office would overshadow the Chief Executive.
While in one sense the limited presence of the Central Authorities may be
seen as enhancing autonomy, the fact that the policies of the Central
Authorities are implemented by Hong Kong authorities on directives from
Beijing may undermine the autonomy and distinctiveness of Hong Kong
authorities.

It has also been suggested that for Hong Kong to negotiate the constant
renewal or preservation of its autonomy, it would need a senior mainland
personality, possibly a retired senior Party cadre, as an interlocutor. This
would be in line with the practice of mainland provinces which need to
maintain a presence in Beijing, and indeed in line with similar practices in
other states, particularly federal. Hong Kong is authorized to establish an
office in Beijing (art. 22) and has decided to do so. But strategies of this
kind, on both sides, would lead to an intermeshing of the political and
administrative systems of the mainland and the region in ways which fly
in the face of their, at least partial, separation which underlies the doctrine
of One Country Two Systems. Nor does an active presence of the
The previous analysis remains a matter of speculation, for the simple reason that the political system of the Basic Law did not come into operation until after the general elections of 1998. As is well known, the NPCSC decided against the continuation of the 1995 legislature and the Preparatory Committee appointed a Selection Committee which in turn chose a provisional legislature in December 1996, but without regard to the provisions in the Basic Law for the composition of the legislature by different categories of members. The provisional legislature began its work before the resumption of sovereignty (for a detailed account of the procedure for the establishment of the interim body, showing the close control that the Central Authorities maintained over the process and the attempt to exclude politicians not in their favour, see pp. 272–280 of the first edition of this book). An attempt to secure an injunction to prevent it from functioning failed in the Hong Kong courts on the grounds, inter alia, that as it met in Shenzhen, these courts had no jurisdiction (Ng King Luen v Rita Fan (1997) 7 HKPLR). Another challenge to the legality of the provisional legislature was made in HKSAR v Ma [1997] 2HKC 315 (see also Chapters 4 and 5). The Court of Appeal held that the provisional legislature was valid as it was established by the Preparatory Committee in accordance with Annex II of the Basic Law and the NPC Decision of 4 April 1990 on the method for the formation of the first legislature of the HKSAR. Alternatively it was valid as its establishment was ratified subsequently by the NPC (for criticisms of the decision, see Chapter 5).

In the result the Democratic Party and other democratic groups were excluded from the provisional legislature and the executive policies and legislative proposals was not really tested or scrutinised in the legislature. In the absence of an opposition, there was a considerable degree of harmony between the legislature and the executive. However various questions touching on the nature of the political system, particularly the relationship between the HKSAR and the Central Authorities, arose during this period. The principal controversy concerns the role of the New China News Agency (Xinhua) which is briefly explored below.

**Xinhua**

The fears that the mainland authorities might interfere in Hong Kong affairs relate not so much to the attitude of the branch of the Ministry of Foreign Affairs, as to those of Xinhua. These fears were expressed when Xinhua breached the Privacy (Data Protection Ordinance) in respect of a request from Emily Lau. The criticism that this appears to place Xinhua
above the law was intensified when in the adaptation of the General Clauses and Interpretation Ordinance, the presumption of the exemption from laws previously enjoyed by the ‘Crown’ seemed to be extended to Xinhua (see Chapter 7). Some disquiet was also expressed when its head, Jiang Enhzu, became a Hong Kong candidate for the NPC and was tipped to become the leader of the deputies.

Suspicions about the role of Xinhua stem in part from its activities before the resumption of sovereignty and its opposition to democratic reforms. Moreover it is seen as an outpost of the Chinese Communist Party, working in considerable secrecy. The change was seen as putting the Party above the law. There is little support for the Communist Party even within Mainland’s friends among the business and professional elites of the HKSAR. Another reason may be that in many respects it is a shadowy body, with little public knowledge of its role and legal status. From the response of the officials of the Department of Justice whether Xinhua satisfied all the criteria under the General Clauses and Interpretation Ordinance for exemption from the laws of the SAR, it was evident that the government itself was far from clear on its role and functions (and would not say definitively whether it satisfied all the criteria, although the Solicitor-General, Daniel Fung was more forthright in a RTHK interview in stating that Xinhua was exempt, see report of the interview in *Hong Kong Standard* 9 April 1998). The director of Xinhua himself had described four functions of Xinhua in October 1997, as:

1. communication with Hong Kong citizens;
2. management of state enterprises in Hong Kong;
3. assistance in the exchange of information between Hong Kong and the mainland; and
4. handling of Hong Kong-Taiwan relations.

If these are indeed the only functions of Xinhua now, they represent a considerable reduction in its role from before 1 July 1997 (see Burns 1994 for an account of the structure and role of Xinhua during the colonial period, one of its principal functions having been united front politics, a more direct intervention in Hong Kong affairs being hard to imagine).

**CONCLUSION**

The essence of the political system is a powerful Chief Executive who is not popularly elected and who owes little effective accountability to the legislature. Consequently he or she would be highly dependent on China,
which sees the office as the basis of its influence and control in the territory. The public service will continue to enjoy wide powers of policy making and administration. The legislature itself will be only partially directly elected, and many other provisions will weaken its capacity to speak for the people or to take initiatives on their behalf, or to put pressure on the executive. There may be little focal point for political organization or parties, and public leadership may remain fragmented. Western-style democracy is not on the cards for the foreseeable future; and meanwhile the political structure which is an uneasy blend of democracy and authoritarianism, the former reflected in the legislature (albeit in an attenuated form) and the latter in the executive and the national interventions, is burdened with contradictions which compromise both democracy and autonomy.

The reluctance with regard to democratization in Hong Kong highlights a number of paradoxes. The problem of democratization is generally that of establishing social and economic conditions in which democracy may flourish. Here, where these conditions already exist, democracy is seen instead as a threat to them. The market economy, with a bourgeois class wedded to rights, is widely regarded elsewhere as the guarantee of democracy. Here the need to sustain the market economy is used as an argument against the introduction of democracy and the bourgeoisie emerges as the champion of authoritarianism. Democracy has been valued in recent times as an invaluable support for the rule of law, but here it is said that the rule of law will be stronger in the absence of democracy.

These notions are not dissimilar to views of democracy held by some other Asian governments (particularly in Malaysia, Singapore and Indonesia, Ghai 1994). But they flourish in Hong Kong because of the peculiar position of the business community. The raison d’être of Hong Kong is, uniquely, commerce and trade. It is widely perceived that without economic success it loses all importance. This has given the business community a special purchase on the political system, and has not only enabled it to maintain many features of nineteenth century capitalism, but also to deflect pressures for political reform. The political institutions that will be established on the transfer of sovereignty over which the business leaders have had a key influence, will not only retard democratization, but will also threaten the liberal politics and culture that Hong Kong has long enjoyed.

The views of the business leaders have prevailed because they have converged with the needs and perceptions of China. China believes that capitalism can be incubated in the womb of the state, and that authoritarianism is a necessary condition. This is in line with the belief of Chinese communist leaders in the primacy of politics, which has led it to
the design of the Basic Law in which China will establish a firm control over the political system. But as the economic relations between China and Hong Kong develop further, China will acquire additional levers over them (see Chapter 3). Even discounting the element of rhetoric in the ‘laissez-faire’ economy of Hong Kong, there is little doubt that the private sector was largely free of state pressure and in fact had considerable influence on public policies. But, due to the pervasive Chinese participation in the economy and the attractiveness of China to entrepreneurs from Hong Kong, Hong Kong may be entering a stage of state capitalism or markets dominated by state regulation and manipulation. In that case the dominance of the market over the political system may persist but the interaction between state authority and the market will be more complex.

How will the role of the government (‘state’) change? The Basic Law entrenches a highly liberal economy and civil society, and these would tend towards keeping the role restricted as before. On the other hand, dealing with China will be a more complicated task and process than dealing previously with Britain. Moreover, Chinese interest in Hong Kong is of a different order than Britain’s, both more pervasive and more ‘antagonistic’. Both these factors suggest a more activist role for the government. The economy of Hong Kong is undergoing important structural changes, which requires a guiding and supportive role of the government (e.g., better securities regulation, integration into regional and world economy). The political system will become more complex: more interests to mediate and balance, at the same time as the political and perhaps even the administrative ability to do so decreases.

For the elite on the mainland, political authority will be a way to economic power, and the Hong Kong business leaders would facilitate that path. There is a great increase in graft in the territory which is already not known for commercial probity. The implications of the new symbiosis between state and market, and popular opinion and the rule of law may be quite different from the past. Large firms and professions which are regarded as the bulwarks of liberty will easily buckle in to authority in a system where state patronage to business becomes decisive. Their transformation (as indeed of foreign and domestic press magnates) to subservience will be swift — such is the nature of state dominated capitalism.43

43 The pace has been set by that doyen of libertarians, Rupert Murdoch who took the BBC off his STAR satellite system as China objected to its documentary on Mao. Turner of CNN said in 1993 in Hong Kong that he would be agreeable to (Chinese) censorship on his channel in order to ensure his market on the mainland. There is widespread self-censorship in the Hong Kong and Macau media as well as under pressure from China. (see Chapter 10).
This chapter analyses the structure of the courts and the role of legal personnel, including the judiciary; the language of the law; and some aspects of the relationship of Hong Kong’s legal system with the Chinese legal system. In principle the intention, as expressed in the Joint Declaration, was to maintain the major elements of the previous system of justice. Some changes were inevitable, as the previous final court of appeal, the Privy Council, would not be acceptable to the People’s Republic of China. Provision also had to be made for the determination of the respective powers of the Central Authorities and the region. It was also necessary to acknowledge the superior status of the Basic Law in Hong Kong. It was desirable, in view of the co-existence of two legal traditions, to find some way to manage the points of their intersection.

For these purposes, a key role was provided for the NPCSC, in the review of legislation of the HKSAR and the interpretation of the Basic Law, and a new body, the Committee for the Basic Law was established to advise on points where the two system interacted. The role of these bodies is not discussed in detail in this chapter, as it has been addressed elsewhere in this book (particularly Chapters 4 and 5). The focus here is on other legal institutions of the HKSAR, although it is always necessary to keep in mind the role of these other bodies since that will be crucial for the legal system.

The relationship between the legal systems of Hong Kong and the rest of China changed fundamentally with the transfer of sovereignty, as the assumption on which many rules of cooperation between the two legal systems were based, namely China as a foreign state, ceases to be valid.
The importance of adequate and reliable methods of legal cooperation has been highlighted by the intensification of the interaction of the economies of Hong Kong and the rest of China. The details of the new methods of cooperation have still to be fully worked out; this chapter indicates the kind of issues that have had to be addressed.

If the relationships between Hong Kong and the Central Authorities are to be based on a regime of laws and if Hong Kong is to maintain the relatively effective rule of law that it had under the previous administration, the burden on the institutions discussed here will be enormous. Apart from the many technical questions that have been highlighted throughout this book, there will be a constant necessity for these institutions to make decisions which are essentially political, as to the scope and nature of their intervention or judgments. More will be said about this in the conclusion of the chapter. As the centrepiece of the legal and judicial systems is the judiciary, I begin with an examination of the role assigned to them in the Basic Law and the rules for their appointment, independence and immunities to facilitate the discharge of that role.

**THE ROLE OF THE JUDICIARY**

The judiciary is defined as the ‘courts of the Hong Kong Special Administrative Region at all levels’ (art. 80). (I discuss later some definitional and jurisdictional issues that arise from this definition in combination with some other articles.) The essential role of the judiciary (in conjunction with the NPCSC and the Basic Law Committee) is to maintain the principles and parameters of the Basic Law. This involves not only ensuring the boundaries and mechanisms that preserve the two systems through the doctrine of ‘One Country Two Systems’ but also the broad (and sometimes, the specific) provisions that constitute the ‘system’ in Hong Kong. As Chapter 5 has attempted to demonstrate, this task is both crucial and difficult. In addition, the courts have to dispense justice in accordance with the law, safeguard the rights and freedoms of Hong Kong’s residents, provide remedies for unlawful acts of the government, and ensure the fairness and predictability that underpin most systems of private economy.

The general principle is that courts continue to perform the roles they had before the transfer of sovereignty. They have jurisdiction over all cases in accordance with ‘the legal system and principles’ in force before the transfer of sovereignty (which means for example, and the point is expressly stated, that the jurisdiction is qualified by the doctrine of act of
JUDICIAL REVIEW OF LEGISLATION

The power to review the constitutionality of legislation is regarded as inherent in the process of the enforcement of the law, for when two laws are in conflict, the court has to decide which to enforce (the classic statement of this proposition is that of the US Supreme Court in *Marbury v Madison* 5 US 137 (1803)). British and New Zealand courts have not exercised this jurisdiction in relation to parliamentary legislation because of the doctrine of parliamentary sovereignty, but in recent years with the accession of the UK to the European Union with its regime of supranational legislation, even British parliamentary legislation has come under scrutiny (Bradley 1989; Lasok and Bridge 1991: 422–435). The New Zealand courts, particularly during Sir Robin Cooke’s presidency of the Court of Appeal, have asserted jurisdiction to review legislation, based on the values and principles of the common law (see Chapter 1). Otherwise in all common law jurisdictions the courts review legislation and administrative policies and acts by reference to the constitution.

Under the colonial system in Hong Kong, the courts had the power to determine the constitutionality of legislation, primarily by reference to the Letters Patent. This was important for conceptual reasons — as indicating the reach of judicial functions — rather than in substantive terms, since
the scope for challenge allowed by the Letters Patent was severely limited, as it contained few normative provisions until the 1991 amendment which incorporated the International Covenant on Civil and Political Rights (ICCPR).¹ Like the Letters Patent, the Basic Law is supreme law and no law of the HKSAR may contravene it (art. 11). The courts are to exercise the jurisdiction they had previously (art. 19). The courts are given the power to interpret the Basic Law (art. 158), which implies the power to review. The courts are common law courts enforcing the principles and rules of the common law (art. 8 and 81). It is of course possible to argue that the Chinese principle of the non-reviewability of legislation applies, and this has indeed been argued (Zhou 1993), but the evidence from within the terms and structure of the Basic Law would seem to displace that assumption. The role of the NPCSC for the protection of the regime of the Basic Law will essentially be limited to provisions concerning the relationship between the Central Authorities and the region, leaving a clear role for the courts. The HKSAR courts have assumed the jurisdiction to review the constitutionality of legislation, relying on art. 19, without any objection from the government (Ma).

The scope of review under the Basic Law is much greater than in the previous system. It is a more normative instrument, with many guarantees of rights and freedoms. It is also more regulatory than the Letters Patent, particularly as regards the economy and social policies (see Chapters 4 and 10). Thus questions of fiscal policies, education, the organization of professions, the freedom of religious groups, civil aviation, the protection of pensions of civil servants, the protection of intellectual property — just to give a few examples — can be constitutional questions. In addition, the courts will have a preliminary, but not the final, responsibility for protecting the autonomy of the HKSAR. However, it is not clear whether all the provisions of the Basic Law are justiciable; many are not written in a language that would easily lend itself to judicial interpretation (e.g., low tax policy or creating an environment conducive to investments, etc), and there may be other areas where the courts might themselves regard judicial intervention as inappropriate (e.g., whether a bill presented by the Chief Executive to the Legislative Council is sufficiently ‘important’ to justify him or her dissolving the Legislative Council if it rejects it, art. 50). To some extent it will be for the courts themselves to determine how far they

¹ Some important cases concern the power of the Governor to delegate his power to appoint magistrates to the Chief Justice (Attorney-General v David Chiu [1992] 2 HKLR 84), to delegate his powers over grants of land (Ho Po Sang (No. 2) v Director of Public Works [1959] HKLR 632), and the various challenges to legislation or policy since the enactment of the Bill of Rights Ordinance 1991.
The Legal and Judicial System should become involved in all these issues. In a number of countries, courts have developed the notion of ‘political question’ under which they decline jurisdiction over certain issues. The rational for the political doctrine question is that some kinds of issues or controversies are not appropriate for judicial settlement. This may be because, arising from considerations of the separation of powers, the issue involves something which is peculiarly within the domain of another state institution, particularly the legislature, or raises questions for whose resolution there are no clear rules or criteria but only, for example, general policy guidance, or which cannot satisfactorily be solved by a judicial decision (since complex restructuring of institutions, etc., may be necessary to solve them). However, the contemporary trend is towards the expansion of judicial jurisdiction, and any issue which involves the interpretation of the constitution is likely to be taken up by the courts, even if it cannot be dealt with definitively.²

While the courts have assumed broad jurisdiction to review Hong Kong legislation, they have been less forthright when it comes to review of Mainland legislation which is intended to be applied in Hong Kong. In *Ma* the court held that Hong Kong courts have no jurisdiction over acts of the NPC or subordinate bodies authorised by it. It based this view on art. 19 of the Basic Law which imposes the same restrictions on the jurisdiction of courts. It held that colonial courts could not challenge any acts of the British parliament or ministers and so they could not now challenge acts of the new ‘sovereign’ which had replaced Britain. With respect, this represents a mechanistic rather than a purposive interpretation. The relationship between Hong Kong and the Central Authorities is fundamentally different from that which existed between the Hong Kong and Britain. These colonial analogies do little justice to the high degree of autonomy granted to Hong Kong or the special status of the Basic Law. Nor is it true that colonial courts could not review legislative or executive acts of Britain (e.g., *Abeyeskera v Jayatalike* [1932] and *Sammut v*

² As an illustration, would the courts be free to question the procedure followed by the HKSAR legislature in the making of laws? It is sometimes said that courts cannot or should not interfere with the procedure in the legislature, since the power of law making has been assigned to it, that the legislature is at least coordinate with the courts, and the respect that the courts owe it. However, the Privy Council has held that the courts may issue an injunction to prevent the Legislative Council from proceeding with the enactment of a bill if it would unlawfully deprive a person of his or her rights, even though, once enacted, it could be challenged for *vires* (*Rediffusion (HK) Ltd. v AG* [1970] AC 1136). This decision is consistent with a Privy Council decision from Sri Lanka (*Bribery Commissioner v Ranasinghe* [1965] AC 1972) and the South African case of *Harris v Minister of the Interior* [1952] 1 TLR 1245. British courts have been more circumspect towards the UK Parliament for historical reasons as well as the principle of parliamentary sovereignty that applies to it.
Strickland [1938] AC 678). The Ma doctrine had the potential to undermine the status of the Basic Law and with it, the autonomy of the HKSAR. It came under severe criticism (Ghai 1997; Chan 1997; slightly more guarded, Chen 1997).

Courts have tried to qualify the doctrine (see Chapter 5). Keith J said that in Cheung Lai Wah that Hong Kong courts are not barred from reviewing all PRC legislation and was willing to disregard the Chinese law on exit permits but for art. 22. His position gets support from Chan CJHC in Chan Kam Nga. The Chief Judge qualified his statement in Ma about the lack of competence of the HKSAR to question laws and decisions of the NPC. He said, ‘It would seem that my analogy with the colonial courts in the David Ma case might not have been entirely appropriate. It may be that in appropriate cases, apart from the matters to which I have referred on page 781 in the David Ma case, the HKSAR courts do have jurisdiction to examine the laws and acts of the NPC which affect the HKSAR for the purpose of, say, determining whether such laws or acts are contrary to or inconsistent with the Basic Law which is after all not only the Constitution of the HKSAR, but also a national law of the PRC’ (Cheung Lai Wah v The Director of Immigration CACV203/1997, 20 May 1997, p. 14 of the typescript record of the judgment).

It is necessary to refer to a restriction on legislative review of legislation by the HKSAR courts (discussed in detail in Chapter 5). While they may interpret all provisions of the Basic Law, they must refer provisions concerning the responsibilities of the Central Authorities and their relationship with the region to the NPCSC for final interpretation. The courts may both interpret other provisions and adjudicate cases dependent on them. The NPCSC may also interpret these other provisions (although not in the course of litigation); its interpretation would bind courts in subsequent cases. Other provisions they may dispose of by interpretation and the adjudication of cases dependent on the interpretation. As the provisions of art. 158 (which establishes this scheme) are not entirely free from ambiguity, the precise jurisdiction of the HKSAR courts as to review will be determined by the NPCSC. The jurisdiction of and the approach to and the mechanism of interpretation by the NPCSC and the nature and modalities of assistance to be offered by the Basic Law Committee therefore constitute important elements of the HKSAR legal system.

‘Judicial Power’

This provision (art. 80) has no counterpart in the English (or Chinese) system, but has resonances with the Australian and US constitutional
provision vesting judicial power in the courts. The concept of judicial power is difficult (Lumb and Moens 1995: 352–373). In Australia, where the issue has been much litigated, the High Court said:

The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstances that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgements, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they can also be elements in the exercise of administrative and legislative power (Brandy v Human Rights and Equal Opportunity Commission (1994–5) 127 ALR 1, per Deane, Dawson, Gaudron, and McHugh, JJ at p. 17).

What distinguishes judicial power from these other powers is that it determines existing rights and duties and does so according to the law.

That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of administrative discretion . . . , judicial power consists of ‘the giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct’ (Brandy, p. 17).

Another element, although not peculiar to the judicial function, is that the decisions are authoritative and enforceable through the process of the law. However, what is peculiar is that judicial decisions are final, in the sense that while they may be subject to appeal to or review by a superior court, they cannot be reviewed or set aside by administrative or legislative bodies (British Imperial Oil Co. v Federal Commissioner for Taxation (1926) 38 CLR 153).

The concept of judicial power is particularly important in a system of divided jurisdictions (such as a federal system), as a means to keeping each jurisdiction within its proper powers and from trespassing onto those of another. In the HKSAR one would think that this would be important as well, but as has been explained, here the responsibility for boundary keeping is with the NPCSC, a political body. However, there are a number of implications of ‘judicial power’ for the administration of justice and the structure of administration which would be relevant in the HKSAR. First, the formula reinforces the separation of powers, at least so far as the judicial functions are concerned, from the executive and the legislative. It means that other institutions cannot be vested with judicial functions, and that courts cannot be asked to exercise legislative or
administrative functions. If members of a tribunal are not appointed and their tenure secured in accordance with the Basic Law provisions it will not be regarded as a court, and cannot therefore be given judicial duties. This rule can create particular problems for the structuring of the administrative process, for it is customary to set up special fact-finding enquiries and adjudicative tribunals as part of the administration. Even if these bodies have to follow judicial-type procedure, e.g., give a right of hearing to affected parties, many of their functions may be struck down.

Courts in Australia and the US have consequently developed various principles to avoid this result. For example, fact finding by a tribunal is allowed if it is only a small part of its overall functions. Likewise courts may be given administrative powers if they are incidental to the discharge of judicial functions, and judges may be appointed to hold wide-ranging enquiries if they are appointed in their personal capacity (Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 (Australian Federal Court decision)). Similarly, decisions of the tribunal based on social policies or the specific circumstances of the case, even if these have to be made within the parameters of the law, are not regarded as judicial; in other words a wide discretion or a loose legal framework for decision making will immunize the matter from attack. A good example of the distinction is to be found in the Australian case of Silk Brothers v State Electricity Commissioners (1943) 67 CLR 1. Fair rent tribunals were set up by statute to (a) order recovery of premises by landlords in appropriate cases; and (b) to fix fair rents. The High Court held that the former was judicial (and hence outside the competence of the tribunals), since it involved a decision in a controversy between two parties, in accordance with definite criteria, and was binding, while the second was administrative, being based on economic and social considerations, hence discretionary. Furthermore, the doctrine imposes restrictions on ouster clauses, that is provisions which seek to immunize administrative decisions from judicial review; by the same token judicial type decisions taken administratively may be acceptable if the matter can be considered de novo by the courts (the absence of which possibility was one of the reasons for invalidity in Brandy). Similarly boundaries have to be erected between the legislature

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3 A related issue arose in Chu Keng Lim v Minister for Immigration (1992) 176 CLR, where the High Court (Australia) held invalid a provision which stated that a court could not order the release of a detained non-citizen arriving by boat.

4 This result is similar to that achieved in Hong Kong under the Bill of Rights Ordinance in R v Lift Contractors’ Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd (1994) 4 HKPLR 168. Article 10 of the ordinance provides, inter alia, that ‘In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent,
and the judiciary, especially to prevent usurpations of the judicial function by the former, as in what are called Bills of Attainder, whereby legislation identifies persons to be punished, or uses criteria which effectively identifies a class of persons for who they are, not what they have done.

If the Basic Law intended to use the expression ‘judicial power’ in this or a similar sense,\(^5\) then a number of tribunals which operated before the transfer of sovereignty, such as the Land Tribunal, the Labour Tribunal, the Inland Revenue Board, and the Obscene Articles Tribunal, and the Insider Dealing Tribunal (established after the promulgation of the Basic Law), would become invalid. They decide on rights and obligations under pre-existing law, yet do not satisfy the criteria of courts — in the appointment and qualification of their members, procedures, etc. Nor are their procedures always consistent with judicial procedures. In this respect even the Small Claims Tribunal is vulnerable for it does not allow parties to be represented by legal practitioners (contrary to the guarantee of legal representation in the courts in art. 35). There are undoubtedly several administrative bodies which offend against the rule restricting the exercise of judicial power by non-judicial bodies.

As an illustration, take the Labour Tribunal, which is established by the Labour Tribunal Ordinance as a ‘court of record’. Its jurisdiction covers labour disputes (s. 7 and schedule to the ordinance). All proceedings are heard and determined by the presiding officer sitting alone (s. 3). The presiding officer or officers are appointed by the Governor (Chief Executive after June 1997), and appointments may be made with retrospective effect (s. 4). The Governor also appoints tribunal officers (s. 5) whose job is to present the tribunal with a statement of facts relating to a claim that is independent and impartial tribunal established by law’. Due to the negligence of the Otis Company, a person fell to death in a faulty lift. Charges were brought against the company before the Disciplinary Board under the Lift and Escalators (Safety) Ordinance (cap. 327) by the Director of Electrical and Mechanical Services, who was also the chair of the board. The High Court upheld a challenge by the company arguing a violation of art. 10 since there was no fair trial, but was reversed by the Court of Appeal on the ground that the decision of the board was appealable to the High Court, which would conduct the hearing de novo. See Johannes Chan (1996) for a comment on this case, and the general principle.

\(^5\) It is possible that the expression was not intended in this sense. The PRC constitution uses a similar expression in relation to the mainland courts. Article 123 refers to courts as ‘judicial organs of the state’ while art. 123 says that people’s courts shall exercise ‘judicial power independently’, but China does not apply the expression in the way I have suggested. On the other hand, the language of the Basic Law seems more emphatic, vesting the judicial power of the region in the courts. However, it is unlikely that the Chinese drafters of the Basic Law were familiar with Australian or US understanding of the expression, much less that they would have wished to adopt it.
filed before it, indicating those points on which the parties are agreed and those where they are not (s. 14). A tribunal officer has considerable powers to require the production of books, documents etc. He or she cannot compel a person to answer questions but may record the refusal to answer. It is also the officer’s duty to bring about a reconciliation between the parties before proceedings may commence in the tribunal.

Parties to a hearing are not allowed to be represented by a lawyer (s. 23). The tribunal is not bound by the rules of evidence (s. 27). The tribunal may on its own review an order or award within 14 days and on such review may ‘re-open and re-hear the claim wholly or in part and may call or hear fresh evidence and may confirm, vary or reverse’ the previous order or award (s. 31). A party may appeal to the High Court but only on points of law or excess of jurisdiction (s. 32). It is thus clear that the tribunal fails to meet several tests of a court for the purposes of the exercise of judicial power.

Whether the Labour Tribunal and other similar bodies are covered by these requirements, it is necessary to determine how an institution is to be identified as a court. The Basic Law provides various criteria: it has to be established by law (art. 83); the exercise of its powers has to be independent and free from interference (art. 85); its members have to be chosen on the basis of their judicial and professional qualifications (art. 92), to be appointed on the recommendations of an independent commission (art. 88), and to be dismissable only for inability to discharge the judicial function or for misbehaviour (art. 89). Article 81 recognizes ‘other special courts’ which would accommodate the Small Claims Tribunal, the Coroners Court, the Juvenile Court, the Labour Tribunal and the Obscene Articles Tribunal. However, it is not clear how far these other courts are subject to the provisions for the membership and procedures of regular courts.

Support for the view that they are preserved ‘intact’ may be found in arts. 81 and 91. The former says that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal. Article 91 maintains the previous system of appointment and removal of ‘members of the judiciary other than judges’. In the previous system, there was no clear distinction between different members of the judiciary, although in practice the term would have been restricted to members of the District Court, the High Court and the Court of Appeal, while members of the Labour Tribunal or the Obscene Articles Tribunal or the Inland Revenue Board would not have been referred to as the ‘judiciary’. Article 91 could have intended to make a distinction between members of the magistrates courts and upwards on the one hand and members of other tribunals on the other. Or it might have been intended to distinguish between members
of the judiciary who sit and decide in court and those who help them (e.g., registrars — the appointment of the registrar, deputy registrar and the assistant registrar of the Supreme Court were covered by the Judicial Service Commission Ordinance). If the former interpretation is correct, then the Basic Law makes no explicit provision for the appointment or tenure of the junior judiciary, leaving it to ‘previous’ laws. Unfortunately there has been no consistent pattern in previous laws. While the Judicial Service Commission advised on the appointment of magistrates, coroners, members of the Land Tribunal, adjudicators of Small Claims Tribunal, and the presiding officer of the Labour Tribunal, only the judges of the District and Supreme Courts were protected in their tenure (through the Letters Patent). Other judicial officers could be dismissed in accordance with Colonial Regulations, which, treating them rather like civil servants, gave the Governor wide powers to direct them to other duties and to dismiss them in certain circumstances. Some attempts at legislation to improve their status and tenure around 1993 appear not to have been followed through (see Wesley-Smith 1994b: 148).

The contrary view, that the Basic Law was intended to do more than just preserve the old system in all its details, is supported by the very specific provisions regarding procedures of and rights in courts. Article 35 protects the right to representation by lawyers in the courts; the independence of all courts is protected (art. 85); and all members of the judiciary are equally immune from legal action in the performance of their judicial functions (art. 85). Even if art. 91 is taken to make a distinction between superior court judges and members of other judicial bodies, the distinction relates to their appointment and removal. Nor is it obvious that all the tribunals which under the previous system determined a person’s rights and obligations are necessarily regarded in the Basic Law as ‘courts’. Further support might be found in the Basic Law provisions which protect residents’ rights and freedoms, particularly through the incorporation of the International Covenant on Civil and Political Rights. Under the Bill of Rights Ordinance, the issue of the jurisdiction and procedures of tribunals has already arisen (see footnote 4, supra), and it is clear that major reforms are necessary in many cases. Therefore if previous tribunals are to continue to exercise the ‘judicial power’ in the HKSAR,

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6 This point has been recognized by the establishment of an independent Administrative Appeals Board in 1994 (Administrative Appeals Board Ordinance) which hears a wide range of appeals against certain administrative decisions. Its members include persons with legal expertise or other experience. It may exercise all the powers of the original decision makers, and may reverse or vary their decisions. Hearings are conducted in public and the appellant has the right to legal representation. The board must state the reasons for its decision in writing.
amendments would be needed to be made to various laws (see Wesley-Smith 1994b: 149–151 for a discussion of these issues).

The Appointment and Tenure of the Judiciary

The special eminence of courts (and judicial power) in the common law system as well as their increased responsibilities is recognized in the Basic Law. Judicial power is to be ‘independent’ (in contrast to legislative and executive powers which have no such protection, art. 2, reflecting art. 3(3) of the Joint Declaration); this is the only instance where the Central Authorities are involved merely in a formal role. Appointments and dismissals of a judge of the Court of Final Appeal (CFA) or the Chief Judge of the High Court (art. 90) have to be reported to the NPCSC ‘for the record’. The independence of the judiciary is secured through several provisions.  

Judges are to be chosen on the basis of judicial and professional qualities (art. 92); there is no requirement of residency or citizenship (except for the Chief Justice and the Chief Judge, see below) and judges may be recruited from other common law jurisdictions (art. 92). Judges are to be appointed by the Chief Executive on the recommendations of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors (art. 88) (the judges of the Court of Final Appeal and the Chief Judge of the High Court (previously the Supreme Court) have additionally to be endorsed by the Legislative Assembly (art. 90)).

A commission to satisfy these criteria would have to have executive powers and be significantly more independent than the colonial Judicial Services Commission which was merely advisory to the Governor, whose powers of appointment came from the Letters Patent (art. XIV). It consisted of the Chief Justice as chair, the Attorney-General and seven other members — two judges, one barrister and one solicitor, and three persons not connected in any way with the practice of law (s. 2). The Governor appointed the members of the commission (apart from the ex-officio members). The Governor had to consult with the Bar Council and the Law Society regarding the appointment of their members, but was not bound by their advice (s. 2(1A) and (1B)).

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7 It is necessary to caution against making too much of this point, since the PRC constitution also refers to the mainland courts as exercising judicial power ‘independently’ (art. 126); it is well known that the practice there does not come up to the standards of a truly independent judiciary.
Although the Court of Final Appeal Ordinance (reflecting the recommendation of the Political Sub-Group of the Preliminary Working Committee) has renamed the Judicial Service Commission the Judicial Officers Recommendation Commission, it is clear that further changes are necessary. It must be specified that its recommendations are binding on the Chief Executive, and its membership should be genuinely independent, which means that the decisions on appointment should not rest ultimately with the executive (the legal members for example being nominated by the professional bodies and the judges by the Chief Justice) and the Attorney-General (or the Secretary of Justice under art. 60) should cease to be a member. The tenure of members should also be protected — under the current legislation no provision is made for dismissal, so presumably the Governor can dismiss at will (without cause) (in accordance with s. 42 of Interpretation and General Clauses Ordinance, cap. 1). The Basic Law protects the security of tenure of judges by the provision that no judge may be removed except for inability to discharge his or her duties or for misbehaviour; and then only on the recommendation of a tribunal of at least three judges appointed by the Chief Justice; in the case of the Chief Justice, by a tribunal of at least five judges appointed by the Chief Executive (art. 89). In addition the dismissal of any judge of the CFA or the Chief Judge requires the endorsement of the Legislative Council (art. 90). Members of the judiciary who are in service at the time of the transfer of sovereignty are guaranteed their employment and seniority ‘with pay, allowances, benefits and conditions of service no less favourable than before’ (art. 93), an implied qualification being that a person who was previously Chief Justice of the Supreme Court may not continue as the Chief Judge of the High Court (as the same court will be known under the Basic Law) unless he or she is a permanent resident with Chinese citizenship and has no right of abode in a foreign country (as required by art. 90). The same article protects pension rights of those in employment at that time or who had retired by then. However, there are no guarantees.

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8 See the criticisms by Henry Litton, QC (now a judge of the Court of Appeal) of the Attorney-General’s membership of the JSC (1991) and Albert Chen (1988).

9 The PWC recommended the repeal of the Judicial Service Commission Ordinance but their reasons for the repeal or proposals for its replacement are not known (the Preparatory Committee rejected the recommendation).

10 In December 1994 Lu Ping stated that previous judges would have to be reappointed after 30 June 1997 if they were to continue in office. He modified his position subsequently, under criticism from the Governor and after a somewhat confused debate in which the Attorney-General and the Solicitor-General offered their own interpretations or views of the controversy. China seems to have resiled from Lu’s position. (See SCMP 12 December 1994 on Lu Ping’s statements, and 30 May 1996 on reassurance from the Chinese Premier).
that salaries or other benefits of subsequent appointees would not be reduced (as is the case in some constitutions, as part of the scheme for the protection of judicial independence).

**Judicial Immunity**

 Courts are to exercise their judicial power ‘independently, free from any interference’ and members of the judiciary ‘shall be immune from legal action in the performance of their judicial functions’ (art. 85). The justification for the immunity was given by the English Court of Appeal in *Sirros v Moore* [1975] 1 QB 118, quoting from Lord Tenterden CJ in *Garnett v Stansfield* (1827) LR 3, to the effect that the immunity is given ‘by the law to the judges, not so much for their own sakes as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who administer justice ought to be’.

 The formulation of immunity from legal action, however, seems to go beyond the common law, unless ‘judicial functions’ is understood in a narrow and specific sense. In the first place, the immunity under the Basic Law applies to all members of the judiciary. In the common law, a distinction was made between inferior and superior courts, with much narrower immunity for the former. The distinction was later adopted in legislation (for a historical account, see the judgment of Lord Bridge in *McC v Mullan* [1984] 3 All ER 908) and is reflected in the Hong Kong Magistrates Ordinance, which gives only limited immunity to magistrates. Following English statutory principles, a distinction is made between a magistrate acting within jurisdiction and acting outside jurisdiction. If an action is brought for an act done within jurisdiction, the plaintiff has to expressly allege that such act was done ‘maliciously and without reasonable and probable cause’ and prove it at the start of the trial (s. 125). If the act was done in absence or excess of jurisdiction, it is not necessary to prove malice or the want of reasonable cause (although the defence may establish the absence of these as a defence) (s. 126).

 There are other safeguards for the magistrate against whom a complaint is made; these are amendments to the original rule of liability, and their enactment reflects a modern tendency towards the greater protection of

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11 What is ‘within jurisdiction’ for the purpose of this provision is a vexed question. As Lord Bridge mentions in *McC v Mullan* [1984] 3 All ER 908, at p. 912, there are few words in common usage in law which ‘have been used with so many different shades of meaning and in different contexts or have so freely acquired new meanings with the development of the law as the word ‘jurisdiction’.
magistrates. The rationale for the distinction between superior and inferior courts was that inferior courts, unlike superior courts, had limited jurisdiction and immunity would only apply when they acted within jurisdiction, and that judges of inferior courts were not fully trained in the law. But as Lord Denning remarked in *Sirros*, if the justification for the rule is that judges should be free to discharge their duties, it applied equally to magistrates as to judges of the highest court. The Basic Law thus follows the trend in equating judges at all levels as regards immunity for acts performed in the course of their functions.

What is the scope of judicial immunity under the Basic Law? The immunity is provided to judges ‘in the performance of their judicial functions’. Is acting maliciously or carelessly within jurisdiction covered? Is acting in the absence or excess of jurisdiction covered? In so far as the general principles of the common law govern the situation, the answer is far from clear. In *Sirros* the court held that there is immunity only for acts done in a judicial capacity, the majority (Denning MR and Ormrod LJ) holding that the immunity applied even if the acts were outside the jurisdiction of the judge, so long as they were done in good faith. Lord Denning could find no case where a judge of a court of record had been held liable, and cited *Miller v Scare* (1772) 2 Wm. Bl. 1141 that ‘The protection given to superior courts is absolute and universal . . .’. He argued that expressions like ‘acting judicially’, ‘doing a judicial act’, or ‘acting as a judge’ are much wider than the expression ‘when he is acting within his jurisdiction’. ‘I think that each of the expressions means that a judge is protected when he is acting in the *bona fide* exercise of his office and under the belief that he has jurisdiction, even though he is mistaken in his belief and may not in truth have any jurisdiction, — and it does not matter whether the error is of law or fact’. However, Buckley LJ held that the immunity might be lost if the judge acted outside jurisdiction, ‘though in a conscientious belief that it was within his jurisdiction if that belief is due to a careless ignorance or disregard of relevant facts or to a mistake of law as to the extent of his jurisdiction’ (p. 140).

Similar differences of view emerged in the House of Lords in *McC v Mullan* [1984] 3 All ER 908, which involved provisions somewhat similar to those in the Magistrates Ordinance. The case concerned the meaning of acting ‘outside jurisdiction’. While affirming that the lack of jurisdiction which might justify the quashing of a sentence passed without jurisdiction might not be sufficient to lead to judicial liability, the Lords held that the passing of a sentence without regard to important procedural safeguards could be such ‘lack of jurisdiction’ as to expose the magistrates to liability. In the leading judgment, Lord Bridge disapproved of Lord Denning’s statement in *Sirros* that no distinction existed between judges of superior
and inferior courts in this regard — the argument of Lord Bridge and his colleagues being based on the presence of statutory provisions which governed the position of magistrates, a factor which would not determine the law in Hong Kong as the Basic Law would supersede inconsistent statutory or common law provisions. However, Lords Bridge, Elwyn-Jones and Templeton held (though the point was not relevant and not argued, and therefore obiter) that the common law action against a magistrate for acting within his jurisdiction but maliciously and without reasonable and probable cause was now obsolete — a position questioned by Lords Keith and Brandon.

**Act of State**

In principle the restrictions on the competence of the courts are to be the same as in the previous system (art. 19). However, having stated this principle, the Basic Law goes on specifically to exclude the jurisdiction of courts over acts of state (art. 19 para 3). This has raised the question whether the reference to, and the specific formulation for, acts of state is intended to increase the scope of acts of state. The article excludes jurisdiction ‘over acts of state such as defence and foreign affairs’ and leaves the final decision on ‘questions of fact concerning acts of state’ to the Chief Executive after the approval of the Central People’s Government. The Court of Final Appeal Ordinance (1996) substantially repeats this provision (at the insistence of the Chinese). It has been the subject of grave criticism by the Bar Council and the Democratic Party (particularly its leader, the barrister Martin Lee) as extending significantly the common law immunity of government under the doctrine of act of state as well as being in contravention of the general scheme of the Joint Declaration and the Basic Law as exemplified in various articles in the Basic Law that the jurisdictions of the courts will be the same as previously (arts. 19, para 2; 8; 81, para 2; 84; and 87, para 1).

In fact it is possible to interpret art. 19, and s. 4 of the CFA Ordinance, as consistent with the common law doctrine of act of state. Article 19 does not preclude the courts from considering cases which involve acts of state; it merely says that they would have no jurisdiction over acts of

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12 For the legislative history of art. 19, see Martin Lee (1988). Lee, who was then on the Drafting Committee, opposed the attempt to codify the common law restrictions ‘because the common law is always developing’. However, due to his efforts the proposed immunity for all ‘executive acts of the Central People’s Government’ was removed.

13 The Agreement Between the British and Chinese Sides on the Question of the Court of Final Appeal in Hong Kong (para 3) (JLG 9 June 1995).
state, in other words they are not justiciable, which is the common law position. Nor does an executive certificate oust the jurisdiction of the courts, for the certificate is conclusive only on points of fact relevant to the act of state (as is made explicit in art. 19 and s. 4) — a position quite consistent with the common law practice — leaving it to the courts to determine whether on the basis of these facts, there is indeed an act of state. Nor is it clear that the doctrine is extended by the use of words ‘such as’ after defence and foreign affairs. This argument would be valid only if acts of state under the common law were confined to defence and foreign affairs, but in fact although these are the most common instances of the act of state, they are not the only ones (other examples being the appointment and dismissal of ministers).14 There is of course a danger of conflating an act of state with a prerogative power, which in principle is justiciable. However, the general references to the ‘previous jurisdiction of courts’ as well as the continuance of the common law as the fundamental basis of the legal system of the HKSAR should be enough to ensure that the restrictions on the jurisdiction of the courts under the doctrine of the act of state are no more extensive than customarily in the common law. Nor is there any reason for the courts to hold that all acts of the Central Authorities that are carried out in Hong Kong are immune from judicial scrutiny.15

14 The House of Lords has left open the categories of acts which would qualify as acts of state (Nissan v A G [1970] AC 179).

15 The conclusion that the restrictions that flow from the acts of state provision are narrower than is sometimes suggested also follows from a study of earlier drafts of what is now art. 19. Much of the public and professional discussion took place on the 1988 draft, which provided, ‘Courts of the HKSAR 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 HKSAR 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 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 NPC or the State Council’. The present formulation of art. 19 shows that the criticisms of the 1988 draft that would have made acts of state all acts of the Central Authorities and many of those of the HKSAR were taken into account and resulted in considerable narrowing of the concept. A proposal in the 1989 draft that would have more clearly reflected previous principle (but is not different in its import from the present article) failed to be adopted, receiving only 35 votes, two short of the necessary two-thirds — the formulation there being, ‘Courts of the HKSAR shall have no jurisdiction over acts of state. Courts of the HKSAR shall obtain a statement from the Chief Executive on questions concerning the acts of state whenever questions arise in any legal proceedings. This statement shall be binding on the courts. Before issuing such a statement, the Chief Executive shall obtain a certificate from the Central People’s Government’.
However, it is necessary to discuss whether the definition of act of state might be broader if it is determined in accordance with Chinese law (on the general question of whether Chinese or Hong Kong laws govern the interpretation of particular provisions of the Basic Law, see Chapter 5). In many ways the Chinese concept is similar to the common law: act of state is exceptional, referring to a decision to exercise rights in the name of the state by the central government in foreign affairs, and in domestic matters to exercise rights of dominion. Acts of state possess distinctive features, involving high-level decision making, are directed at important matters, and have special procedures. Acts of state are not justiciable in the courts (the Administrative Litigation Law expressly ousts suits in respect of ‘acts of state in areas such as national defence and foreign affairs’). However, there appears to be a greater emphasis on internal affairs than in the common law (acts of state seem to cover public security organs). In particular they may involve the implementation of the policies of the government of the day. Some fears expressed about the formulation of art. 19 may be justified if the Chinese concept of the act of state is deemed to be imported by the article.

THE STRUCTURE OF COURTS

The Joint Declaration set out the principles to govern the structure and exercise of judicial power. The basic principle is that the previous judicial system is to be maintained, ‘except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication’ (Annex I, sec. III) (the reference here being to the abolition of appeals to the Privy Council). The Basic Law elaborates the principles of the Joint Declaration.

It provides that the structure, powers and functions of the courts shall be prescribed by law (art. 83). The courts to be established are specified in art. 81: the Court of Final Appeal, the High Court (to comprise the Court of Appeal and the Court of First Instance), district courts, magistrates’ courts and other special courts. The jurisdiction of these courts is not specified, except that the power of final adjudication is to be vested in the Court of Final Appeal (art. 82). However, the requirement to maintain ‘the judicial system previously practised in Hong Kong’ (art. 81, second paragraph), indicates that the jurisdiction (as well as the

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This account of act of state under Chinese law is taken from Huang Jie (ed.) (1993). I am grateful to Michael Palmer for the translation.
procedure) of the courts would be the same as in the pre-transfer period, except for the replacement of the Privy Council by the Court of Final Appeal. There is, however, some change of terminology — previously the ‘Supreme Court’ consisted of the High Court and the Court of Appeal (Supreme Court Ordinance 1975), now it is replaced by the ‘High Court’ and the previous High Court is designated the ‘Court of First Instance’ (as it was assumed, mistakenly, that it had no appellate jurisdiction).

Only a brief summary of most of the ‘previous’ courts is provided here; there is a more extended discussion of the only new court, the Court of Final Appeal, the provisions of which were the subject of considerable controversy, preceded by a brief account of its predecessor, the Privy Council.

**Magistrates’ Courts**

The lowest level of court is the magistrate’s court (Magistrates Ordinance). It has almost entirely criminal jurisdiction. Its primary criminal jurisdiction is over summary offences. It can also deal with some indictable offences on a summary basis (Part V) or hold a preliminary inquiry with a view to committing the case for trial in the High Court (Part III). There are some limitations on the sentencing power of magistrates, but the prosecution may require a case to be transferred to the District Court, if it considers that a heavier sentence than a magistrate can impose is justified (Part IV). Appeals go to the High Court, which may be either by way of case stated, when it is restricted to points of law (sec. 105) or ordinary appeal (sec. 113). The Chief Executive may also refer a conviction for review by a judge (sec. 113A).

**District Courts**

The next court is the District Court (District Court Ordinance). It was established in 1953 to take the load off the High Court. Its civil jurisdiction extends to contractual or tortious actions for $120,000 (sec. 32). It can also entertain actions in connection with property with a rateable value of up to $100,000 (sec. 35) and equitable actions (i.e., connected with trusts and the like) where the interest is not in excess of $120,000 (sec. 37). However, the District Court may not entertain any action that must be instituted in the Small Claims Tribunal. Its criminal jurisdiction is restricted to cases transferred from the magistrates courts (and thus excludes serious offences like murder and treason, see Second Schedule Part III of the
Magistrates Ordinance) and specified labour disputes (sec. 74). Appeals lie to the Court of Appeal (sec. 63).

The High Court

The Supreme Court consisted of the High Court and the Court of Appeal. The civil jurisdiction of the High Court (now the Court of First Instance) is defined by reference to the jurisdiction of the High Court in England, in addition to that expressly conferred by any law (The Supreme Court Ordinance, sec. 12(2)). It also has the jurisdiction which in the UK is exercised by the Lord Chancellor and judges of the Supreme Court in relation to the Mental Health Act 1983 (sec. 12(4)). It also has admiralty jurisdiction (sec. 12A). It tries the most serious criminal offences, when the court sits with a jury which decides questions of fact. The court has a particular responsibility for ensuring fair administration, and thus has jurisdiction to grant mandamus, prohibition or certiorari (sec. 21I), as well as judicial review (sec. 21K) and habeas corpus.

The Court of Appeal

The Court of Appeal has no original jurisdiction. In civil matters it hears appeals from the High Court, the District Court and from other bodies as specified by law (sec. 13(2)) — these include a number of statutory disciplinary bodies (as for legal or medical practitioners). Its criminal jurisdiction covers appeals from the High and District Courts (including case stated by the latter), and references by the Attorney-General on points of law or sentence (sec.13(3)). For the most part appeals lie as of right (sec. 14).

The Court of Final Appeal

Apart from the Judicial Committee of the Privy Council (appeals to which ceased on 30 June 1997), the courts above continue in effect with largely the same jurisdiction though with some changes in nomenclature. Some changes are made to accommodate the role of the NPCSC under art. 158, discussed in Chapter 5, and to alter the Judicial Service Commission (to be known as the Judicial Officers Recommendation Commission — see below) to make it executive rather than advisory. A new court, the Court of Final Appeal, replaces the Privy Council. As it is a new court, its prenatal history, composition and jurisdiction are described in some detail.
It is necessary first to provide a brief account of the Privy Council which the Court of Final Appeal replaces. It has jurisdiction over appeals from British colonies, but a number of former colonies continue to provide for appeals to it. The members of the Privy Council are usually Lords of Appeal in Ordinary (i.e., members of the House of Lords in its judicial capacity), but distinguished judges from Commonwealth countries also sit sometimes. Technically the Privy Council ‘advises’ the Queen (or the head of state when not the Queen), but in practice it is for all practical purposes a court and operates as such. When hearing appeals from Hong Kong, it acted as a Hong Kong court.

Appeals to the Privy Council lay from the Court of Appeal. Appeals were by right only in civil cases if the matter in dispute was worth at least $500,000. Otherwise the leave of the Court of Appeal or the Privy Council was necessary; leave was granted only if the question involved was of great general or public importance (as indicated below, leave was rarely granted) 17.

The Basic Law provides few details on the structure, composition, or jurisdiction of the Court of Final Appeal, other than that the Chief Justice of the CFA must be a Chinese citizen who is a permanent resident of the HKSAR without the right of abode abroad (art. 90). Its jurisdiction would be established by analogy with that of the Privy Council. Even here the matter is not straightforward as the final interpretation of the Basic Law is not with the Court of Final Appeal but the NPCSC (see Chapter 5). However, the Basic Law does envisage two types of members, permanent and ad hoc, the latter under art. 82: the court ‘may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal’ (art. 82). This provision reflects the agreement in the Joint Declaration, when China was extremely conciliatory, dropping its original proposal that the CFA should sit in Beijing and agreeing to overseas judges. It was realized that judges of the highest calibre would be necessary to replace the Privy Council, and that the presence of overseas judges would reassure the business community as well as enable Hong Kong to

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17 This is not an appropriate place to provide an assessment of the record of the Privy Council. The cessation of appeals to it has been widely lamented by the legal, political and business community, particularly in the context of the legislation on the Court of Final Appeal. The judges of the Privy Council are no doubt eminent and appeals to it enable the latest developments in the common law to be applied to Hong Kong. However, its contribution to the development of public law, which is the only area I am competent to assess, has been undistinguished, when not actually negative. As a court with one of the world’s largest appellate jurisdiction over human rights, few of its decisions are memorable. See Ewing 1991. For a general historical background to the imperial jurisdiction of the Privy Council, see D. B. Swinfern 1987. For an assessment of the role of the Privy Council in relation to the Bill of Rights Ordinance in Hong Kong, see Ghai 1996.
Hong Kong’s New Constitutional Order

keep up with developments in the common law. It was also considered by some people that the participation of eminent overseas judges would enhance the court’s prospects of independence.\(^{18}\)

The Hong Kong government was anxious to establish the CFA well before the transfer of sovereignty in order to ensure continuity (but also undoubtedly so as to influence decisions on its structure and jurisdiction). Discussions began in the JLG in 1987 but it was only in September 1991 that an agreement was reached (after British Prime Minister Major’s visit to Beijing when the signing of the Memorandum on the Airport unlocked an impasse between the two governments that had held up other issues as well). It provided that the CFA would consist of five judges — the Chief Justice and three permanent members of the court, and an additional judge appointed \textit{ad hoc} from one of two lists, of Hong Kong retired or serving judges, and overseas judges from common law jurisdictions. The text of the agreement was not published (and later, under pressure to release it, the government replied that no formal text existed and the agreement was to be found in the records of JLG meetings — although the JLG was meant to be consultative rather than an ‘organ of power’). The agreement came under severe criticism from both branches of the legal profession (with which there was no effective prior consultation) which issued a joint public statement that the agreement was inconsistent with the Joint Declaration and the Basic Law (13 October 1991) as under it, it would be perfectly possible that no overseas judge would sit on a case, the autonomy of the CFA to decide on overseas judges would be undermined, and the independence of the members would not be adequately secured.\(^{19}\) There was also considerable public disquiet, particularly among politicians. The agreement could only be implemented through an ordinance, enacted by a legislature in which the government had lost its automatic majority after the September elections (which for the first time provided for a direct constituency elections). In December the Legislative Council rejected the agreement.

However, in 1994 the government revived the proposals and prepared a draft bill. The Bar Council maintained its opposition but the majority of the members of the Law Society changed their earlier opinion and supported the bill (even though most of them took the view that it was not entirely consistent with the Joint Declaration and Basic Law).\(^{20}\) The government

\(^{18}\) This information comes from Martin Lee, then a member of the Basic Law Drafting Committee, given at a public seminar of the Bar Council in October 1994. It was apparently at his suggestion to a Vice-Director of Xinhua that these proposals were accepted. Lee would have preferred three overseas judges. See also \textit{SCMP} 1 November 1994.

\(^{19}\) A legal opinion by Sir William Wade, the eminent public lawyer in Cambridge, substantially supported the position of the profession (24 October 1991).
carried out one of its most intensive campaigns and lobbying. However, it agreed to some changes in the draft to accommodate several points raised by the Preliminary Working Committee (demonstrating that the government was more concerned to placate the PRC than the people of Hong Kong). The government argued that the bill was consistent with the Joint Declaration and the Basic Law and issued a legal opinion of the UK government in support (its author was not identified in the opinion). But the government relied less on legal arguments than on the necessity to have a court functioning before the transfer of power — ‘to avoid a legal vacuum’ — using the hoary claim that it was ‘difficult to overestimate the contribution of a respected, efficient and impartial common law system to the overall success of Hong Kong as an international commercial, financial, and services centre’, any erosion of which ‘such as by the avoidable creation of a judicial vacuum, is likely to upset the delicate balance which maintains business and investor confidence in Hong Kong in the run-up to 1997 and beyond.’ 21 The bill was passed after a tense debate in the Legislative Council and signed into law in August 1995.

The Hong Kong Court of Appeal Ordinance (No. 79 of 1995) is a curious law for though it was justified as necessary to establish the new appellate system as soon as possible, it did not come into effect until after the transfer of sovereignty.22 Moreover, curiously, the terminology is

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20 There was widespread feeling (supported by a rebel faction of the Law Society) that the change of opinion among solicitors was motivated by the desire of several large firms to maintain friendly relations with the PRC in view of increasing legal work that they did on or in relation to the mainland.

21 Introductory Paper on the Draft Hong Kong Court of Final Appeal (nd, Attorney-General’s Chambers). The argument about the calamities of ‘legal vacuum’ (which means really a delay in setting up the Court of Final Appeal) seems somewhat overdrawn considering that the Privy Council determined on average four to five cases a year from Hong Kong.

22 ‘This Ordinance shall not come into operation on or before 30 June 1997 and the following day shall be the day for the coming into operation of the Ordinance, which shall be amended as necessary to ensure that it is in full conformity with the Basic Law’ (s. 1(2)). The original draft bill had provided for the effective date to be determined by the Governor and had allowed the possibility of different provisions coming into effect on different dates. The change was made on the insistence of China. It was also originally assumed by the Hong Kong government that the ordinance would be amended before the transfer to make it consistent with the Basic Law and the drafts of such amendments were prepared. The changes were now to take effect after the transfer of sovereignty. Some commentators have consequently argued that the ordinance will not be valid law on 1 July 1997 as it would not be a law in force ‘previously’ within the terms of art. 8. It is of course not unusual to pass a law but postpone the date of its commencement, but in another context (an ordinance requiring bus drivers to wear seat belts), the Chinese government and the legal subgroup of the Preparatory Committee argued that a law which was not effectively in force before 1 July 1997 would not be valid after that date (SCMP 28 June 1996).
relevant only to pre-transfer constitutional system, with references, for example, to the Governor and the UK government. The appointment of judges would therefore be made only after the HKSAR had been established, in accordance with the Basic Law. They would be appointed by the Chief Executive on the recommendation of an independent commission — the Judicial Officers Recommendation Commission — composed of local judges, persons from the legal profession and eminent persons from other sectors (art. 88) (although, as shown below, a different procedure would be adopted for the first appointees). Permanent judges (a minimum of three), may be appointed from the previous Supreme Court or from persons who had served on it in the past, or from legal practitioners with at least 10 years experience in Hong Kong (s. 12(1) and (2)), thus ruling out appointments from outside Hong Kong which were demanded by the Bar Council (which argued that merely upgrading judges from the lower courts would not ensure a strong court and rendered the exercise meaningless). The restriction of judges to those in Hong Kong would also seem to contravene art. 92 which allows the HKSAR to recruit judges from other common law jurisdictions (art. 92). Non-permanent Hong Kong judges may be drawn from past members of the Court or past or present members of the Court of Appeal or legal practitioners with at least ten years experience in Hong Kong; they need not be ordinarily resident in Hong Kong (s.12(3)). The list of overseas judges will be drawn from judges or retired judges of courts of unlimited jurisdiction of either civil or criminal jurisdiction, who have had no previous judicial appointment in Hong Kong and are non-residents (s. 12(4)). Both lists, whose membership is not to exceed 30, were to be drawn up by the Governor on the recommendation of the Judicial Officers Recommendation Commission; their appointments are for three years (watered down from the original proposals of five, a concession to China). Which of them is asked to make the fifth member in a case (and under the Ordinance there would have to be such a fifth member) would depend on the Chief Justice (s. 16). So far every substantive case heard by the CFA has had a distinguished overseas judge on it (of which there were eight in 1998, drawn from the UK, Australia and New Zealand).

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23 What is one to make of a provision like, ‘The permanent judges of the Court shall be appointed by the Governor acting in accordance with the recommendation of the Judicial Service Commission’ (s. 7(1)), since the ordinance did not come into effect until after the office of the Governor had been abolished?

24 Until the Supreme Court (Amendment) Ordinance 1995, solicitors were not eligible for appointment to the Supreme Court. See sec. 9 of the Supreme Court Ordinance for eligibility to be a judge of the Supreme Court.
In only one instance is there an appeal as of right to the Court of Final Appeal — in civil matters where the disputed question involves $1,000,000 or more (raised from the Privy Council rules of $500,000) (s. 22(1)(a)). In other civil matters leave has to be obtained from either the Court of Appeal or the CFA if in its view the ‘question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court’ (s. 22(1)(b)). All criminal appeals are by leave of either the CFA or the lower court from which the appeal is to be taken; the criterion, stated negatively, is that no leave is to be granted unless ‘a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done’ (s. 32) — somewhat more restrictive provisions than for civil appeals. The CFA has defined its criminal jurisdiction as concerned primarily with establishing general principles of criminal justice rather than being a general appeal court on criminal cases (Zeng Liang Xin v HKSAR [1997] 3 HKC 1). Only the permanent judges decide on applications for leave (s. 18). Under the previous system the Court of Appeal and the Privy Council gave leave restrictively (in the years 1990–94, there were 73 applications, of which only 22 were allowed), and it is feared that the narrow terms of the ordinance may mean that there would not be enough work for the CFA.

So what have the British and Hong Kong governments gained through securing the passage of the ordinance, in return for giving up the flexibility inherent in art. 82? The principal gain as seen by them is that the ordinance would avoid a ‘legal or judicial vacuum’, and thus maintain the rule of law and reassure the business community (somehow it is always the business community rather than the general public for whose benefit the UK and Chinese governments want to promote the rule of law). It is doubtful if these ‘gains’ are of any great significance, especially if one considers the price paid for them (not only in terms of the lack of flexibility of the composition of the CFA). For the avoidance of the ‘vacuum’ is less the result of the passage of the ordinance than of the agreement between the UK and China of 9 June 1995 under which the UK accepted the eight points of the Political Affairs Sub-Group of the Preliminary Working Committee, particularly in relation to the appointment of the judges of the CFA. The Basic Law provisions for the appointment of the CFA judges are that they are to be appointed by the Chief Executive on the recommendation of an independent commission (art. 88) and the Chief Justice has additionally to be endorsed by the Legislative Council (art. 90). This attempt at independent appointment of the judges is undermined by the recommendations of the PWC which provide for a key role for the Chief Executive designate in appointments to the CFA. It was subsequently
agreed that he would appoint members of the Judicial Officers Recommendation Commission designate and would chair the first session of the commission at which the Chief Justice would be appointed. Thereafter the Chief Justice would chair the commission which would proceed to appoint other judges. The nomination of the Chief Justice would be endorsed by the Provisional Legislature. The appointments of judges of the CFA and the Chief Judge of the High Court were confirmed in the Reunification Ordinance after these steps were followed.

## Juries

The jury was one of two forms of public participation provided under colonial law and is expressly preserved in the Basic Law (the other, assessors, were abolished in 1995 by Administration of Justice (Miscellaneous Provisions) Ordinance). The purpose of the jury includes testing the conduct of the accused by the reaction of his or her peers, bringing to court the realism of the world, helping the court to deal with issues of fact, providing a measure of security against possible oppression by the government, educating the public in the processes of the law, and conferring a degree of legitimacy upon the legal system through public participation in its processes.

The Basic Law provides that the ‘principle of trial by jury previously practised in Hong Kong shall be maintained’ (art. 86). This provision raises the familiar problem of what elements of the previous system are entrenched by the Basic Law. Is it the actual rules governing the system of jury trial or some essential principles which justify jury trials; and if the latter, which principles? This question is best tackled after a brief description of the jury system. The system of a jury trial was first introduced in Hong Kong in 1845, and has been modified in several respects since then (the current legislation is the Jury Ordinance 1887, as amended). Only Hong Kong residents are eligible for service; property qualifications have been abolished, a juror now needs to be a ‘good and sufficient person’ (the disqualification of women was abolished only in 1947). However, large categories of persons are exempt from jury service, which renders the group from which the jury is drawn both small and

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25 For a history and the contemporary system of juries, see Peter Duff, Mark Findlay, Carla Howarth and Chan Tsang-Fai (1992). Their study provides the first and so far the only empirical data on the operation of the jury system in Hong Kong. The following account relies heavily on this study.
Until shortly before the change of sovereignty an important disqualification was ignorance of the English language — understandable in view of the fact that legal proceedings had until recently to be in English, but the consequence is that a large number of Chinese residents have been excluded, building an expatriate bias into the jury system. The result is that the jury list comprises only about 3% of the population.

The size of the jury is seven (although a court may empanel up to nine members if the trial is likely to be lengthy); a decision is made by at least five jurors agreeing, except for offences when unanimity was required (capital punishment which was one such example has now been abolished). An accused is allowed five peremptory challenges to potential jurors (i.e., challenge without showing cause), and both the accused and the prosecution are allowed unlimited challenges for cause.

The incidence of jury trials is relatively small. Jury trials are held only in the High Court, and therefore do not apply to the overwhelming bulk of trials in Hong Kong (an estimate is that only in 0.1% of all criminal cases is there a trial by jury, Duff et al.: 42). The conclusion drawn by Duff and his colleagues is that jury trials play a minimal role in the criminal justice system in Hong Kong, and that the jury trial is significant more on an ideological than a practical level (p. 9). It was due to ideological reasons that the government’s proposals in 1985 to eliminate jury trials in complex commercial cases were defeated — as tending to weaken the importance of the jury.

So what is it that the Basic Law seeks to protect? The test of the English language ability was scarcely compatible with Chinese as the official language (and its increasing use); nor was it politically justifiable. ‘Principle’ does not mean detail, although of course sometimes the detail is the heart of the matter. In so far as the principle is constituted by the justifications for the jury mentioned at the beginning of this section, the scope of its use should be greatly increased. The intention must be that its scope cannot be decreased, but may be increased (not withstanding the need to adhere to ‘previous laws’).

26 Persons who are exempt include members of the Executive Council, Legislative Council and lower level councils, judicial officers, the police, legal practitioners, clergy, doctors, pharmacists, veterinarians, members of the armed forces, immigration, customs and excise officers, and diplomats and their families.
In keeping with the importance accorded to the legal system, the role of the legal profession in its fair operation is recognized in the Basic Law. The principal provision states that the system for the work and practice of local and outside lawyers will be on the basis of ‘the system previously operating in Hong Kong’ (art. 94). Presumably ‘lawyers’ includes those in private practice as well as public (i.e., government) service; as we shall see these are differently organized. Presumably also the reference to ‘work and practice’ includes the organization of the legal profession, including the considerable degree of autonomy and monopolies that the profession enjoys. Even if one accepts this broad framework for the provision, it is difficult to extract its implications. Does the ‘basis of previous system’ include only some general and fundamental principles or does it also cover the details of the present organization (including the divisions of the profession into its various branches), qualifications to practice, and monopolies? The question is particularly pertinent since the organization and practice of the legal profession has undergone significant (and bitterly contested) changes (with more on the way) since the Joint Declaration (Annex I, sec. III, para 7) and the Basic Law which incorporated this principle. The answer to this question may lie in the justifications presented for retaining the ‘previous system’, which frequently take the form of extolling the virtues and necessity of the rule of law and the central role that lawyers play in maintaining it. Additionally, the key role that lawyers play in fashioning business decisions and helping to resolve disputes that arise from business transactions — and thus in creating business confidence — is invoked (with the underplaying of the role of lawyers in protecting civil liberties).

Some business people do believe that the law is important for business. In November 1995, the Hong Kong American Chamber of Commerce polled its members on their confidence in the future. The members ranked ‘maintenance of the rule of law’ as the most important factor affecting Hong Kong’s business environment ahead of the 1997 transition. According to its spokesperson, what most executives had in mind when talking about the rule of law was ‘a clear, transparent, well-enforced, corruption-free legal system that ensures the maintenance of commercial transactions in a proper, legal way’. (Eastern Express 24 November 1995). Nevertheless, despite considerable doubts in Hong Kong about the PRC commitment to the rule of law, in China today or in the HKSAR, business firms declared overwhelming confidence in both China and Hong Kong.

The Law Society’s paper, The Future of the Legal Profession in Hong Kong (June 1993) says for example that in the times of change that Hong Kong is going through, ‘it will be particularly important that the role of the law and its institutions is clearly defined and understood within a developing society. A reliable, predictable legal system can
Lawyers also benefit from the ideology of professionalism: lawyers, trained after years of hard work in skills that are difficult to master, exist to serve the public interest. They can best serve this interest if they are independent, i.e., they determine the qualifications (and in former times provided the training) a person must have to enter the profession, they administer the affairs of the profession through an organization of their own — including to some extent the fees to be charged for their services and the complaints against and the discipline of its members, etc. To some degree these arguments can be made for other professions as well — engineers, dentists, accountants, architects, doctors, etc. (and to some extent this is recognized by art. 142). But lawyers claim an additional reason for their autonomy: that they operate in the interstices of the state, mediating between the citizen and the government, or between private parties of unequal strengths, and that they are administering a body of regulations which ensure stability and justice and whose proper discharge requires the independence of the practitioner. Governments do not, for example, they may well argue, restrict the public’s access to dentists, but many of them do or would like to restrict access to lawyers.\footnote{Another reason for explicit guarantees for an independent legal profession is that the profession is differently organized in the PRC, where for the most part lawyers are state employees, and access of the accused to lawyers is severely restricted. See Chapter 3.}

There is of course a large measure of humbug in these claims (Ghai 1993b); this has been increasingly recognized as the restrictive practices of lawyers which have been exposed in the general shift to the application of market principles to more and more aspects of life. Nevertheless this model provide much needed stability at society’s core in times of transition. It goes without saying that the rule of law will guide and steady us. There will need to be sufficiently large corps of well-educated and committed legal professionals to ensure a predictable legal system.’ (p. 1). Although the Bar Council was opposed to the proposals (for the fusion of the two branches of the profession), it was at one with the Society on the importance of law. ‘Hong Kong people are not only concerned about maintaining prosperity and stability, they are also anxious that the life style in Hong Kong will continue unchanged. In this regard, the rule of law and the independence of the judiciary are fundamental to maintaining confidence in the future of Hong Kong’ (para 11, \textit{The Future Development of the Legal Profession: A Discussion Paper} (August 1993).

The former Attorney-General Jeremy Mathews echoed these sentiments. ‘Our legal system is at the heart of Hong Kong’s way of life.’ He also praised the idealism of lawyers, ‘When we chose the law as our profession as young men and women we did so not with a cynical view to amassing wealth or status but because, no matter how formed or defined, there was within each one of us an ideal: the concept of the law with its strengths, its nobility of aspiration, its majesty, captured in our imaginations as a cause to serve’. It is only fair to add that he thought that this idealism was frequently replaced by the cultivation of the self-interest of the profession (Speech by the Hon J. F. Matthews at the Opening of the Legal Year on 11 January 1993).
of professionalism still provides the basis of the regulation of the legal profession. But does it constitute a suitable basis under the Basic Law?

To a considerable extent it does. There are two principal, and some subsidiary, provisions which deal with the legal profession (of which art. 94 has already been commented on). Article 142 provides the general scheme for all professions (and would, for lawyers, supplement the provisions dealing specifically with them). Article 142 does not define or categorize the professions to which it applies. On the basis of ‘previous systems’, the qualifications for professional practice and the organization of the profession are to be provided for. Professional organizations prior to the establishment of the HKSAR will continue to be recognized; and these organizations may, ‘on their own, assess and confer professional qualifications’. Those who had professional qualifications prior to the HKSAR, ‘may retain their previous qualifications in accordance with the relevant regulations and codes of practice’ (meaning presumably that they may continue to practise the profession). The professions are therefore entitled to determine the qualifications for entry to the profession and to make arrangements for the conferring of the qualifications (e.g., through their own examination systems). The provision does not go so far as to state that membership of a profession shall be determined by its professional organization, nor does it specify the degree of autonomy of the profession or its organization. In one sense art. 142 goes beyond existing regulations (in that qualifications are frequently specified in legislation rather than left to the determination of the profession) but in others falls short of them (e.g., in discipline over membership).

Various aspects of the work of lawyers are implicitly or explicitly recognized in the Basic Law. The role of lawyers in providing confidential legal advice is protected in art. 35 (albeit as the right of residents); the same article protects residents’ right of access to courts and ‘choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts’. ‘Previous principles’ of civil and criminal proceedings, including the rights of parties thereto, are to continue (art. 87); lawyers play a central role under them. The HKSAR is enjoined to provide an appropriate legal environment for the maintenance of Hong Kong’s role as an international financial centre (art. 109) as well as for the encouragement of investments, technological progress and the development of new industries (art. 118) — all of which might be seen to require a well developed and independent legal profession. (There are relatively few provisions on government or public lawyers; see discussion below).

The various provisions on the legal profession could be read to require a system substantially similar to the ‘previous’ rules. However, the system
has undergone major changes since the ratification of the Joint Declaration and the promulgation of the Basic Law.\textsuperscript{30} Although unlike some other legal changes, these have not been objected to by the PRC authorities, it is necessary to try to establish precisely what it is that the Basic Law provides in the way of the operation and regulation of the legal profession, and how far changes from the 1990 system might lawfully be made. Here it would be necessary to distinguish what may be regarded as points of principle from matters of detail. A brief description of the ‘previous’ and evolving system may provide a useful basis for drawing such distinctions.\textsuperscript{31}

**Government Lawyers and the Organization of Government Legal Services**

A large number of lawyers service the needs of the government, which requires lawyers to advise on legal policy; to manage specific departments and units whose work involves a major component of law, such as land and company registries; to provide legal advice to the government on commercial and other civil law matters; to draft legislation and advise on law reform; and to advise on and undertake prosecutions. A number of statutory bodies also have a specific need of legal advice and services, particularly the Ombudsman, the Commission Against Corruption, and the Securities Commission. In general, in the previous regime the legal work for the government was provided by the Legal Department, which was described as the largest law firm in Hong Kong (although some other departments may have had their own lawyers).\textsuperscript{32} Lawyers within

\textsuperscript{30} It is not intended to provide a detailed account of recent changes or proposed changes. Changes have been stimulated by the pressure from foreign lawyers to provide within their firms advice on Hong Kong law (to which the government responded by *Government’s Proposal on Foreign Law Firms*, January 1989 and evoked the opposition of the Law Society, *Hong Kong’s Legal System Endangered!* January 1989), the adoption of new international principles for services under the General Agreement on Trade and Services (GATS), the pressure from the Law Society for the right of audience for its members in all courts (June 1993), and the application of market principles to the delivery of legal services initiated by the government (*Consultation Paper on Legal Services*, 1995).

\textsuperscript{31} The regulation of the private legal profession is covered by the Legal Practitioners Ordinance (Cap. 159). See Sandor and Wilkinson (1996) for an account of the admission to and the organization of the private legal profession.

\textsuperscript{32} The internal organization of the work of the Legal Department reflected this array of responsibilities. There were six principal divisions under the Attorney-General: Prosecutions, Civil Division (dealing with civil litigation and commercial work), Law Drafting, Legal Policy (which, under the Solicitor-General, also specialized in public law), International Law, and Administration.
the Legal and other government departments have to be legally qualified (although not necessarily licensed to practise in Hong Kong). Their powers and duties are regulated by the Legal Officers Ordinance. They are authorized to exercise the rights of barristers and solicitors, including the right of audience in courts and tribunals, in relation to a large number of matters. The Attorney-General may delegate any of his functions to any of them.

The Head of the Legal Department was also called, and usually referred to as, Attorney-General (but unlike other departmental heads, he was directly responsible to the Governor and chaired the Chief Secretary’s Legal Affairs Policy Group). He was in fact one of the three principal officers of the government, an ex-officio member of the Executive Council (and until September 1995 of the Legislative Council) as well as of the Judicial Service Commission. The appointment was made by the Secretary of State in consultation with the Governor. No formal qualifications were provided although in practice only a lawyer would be appointed. The Attorney-General was chief legal adviser of the government. He had also a general responsibility for ensuring the observance of and respect for the law. He had the principal responsibility for prosecutions (and prosecutions for various offences required his express consent). In connection with prosecutorial powers, he could stop the trial of an indictable offence by entering a *nolle prosequi* and grant immunity or amnesty to witnesses. He was the defendant in all civil cases against the government. As guardian of the public interest, he could make applications for judicial review to enforce legal rights. He could intervene in any case where the prerogatives of the government were involved or in any matter of great public interest. He represented the public interest as counsel to Tribunals of Inquiry. As the Protector of Charities, he had to be joined as a party in all actions to enforce charitable or public trusts. He was the titular head of the Hong Kong Bar and as such had the right of audience in all courts (*Re C F W Reece* [1963] HKLR 326). He was deemed to possess all the prerogative powers of the Attorney-General in England (*Cheung Sou-yat v R* [1979] HKLR 630). In addition, he was a member of a number of statutory bodies, including the Operations Review Committee and the Complaints Committee of the Independent Commission Against Corruption and the

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Not all prosecutions were undertaken by qualified lawyers in the Attorney-General’s chambers. Except where an complicated point of law was involved, prosecutions in magistrates courts were conducted by lay prosecutors appointed by the Attorney-General under sec. 13 of the Magistrates Ordinance and trained by his staff. It was also customary to brief out prosecution to barristers in private practice, although the high costs of such prosecutions led to considerable public criticism as well as in the legislature.
Police Complaints Committee, and was the Chairman of the Law Reform Commission.

The office of the Attorney-General was therefore powerful, in relation to which two issues are worthy of comment. The first is the conflict in its roles: on the one hand, as the chief legal adviser of the Governor and the government more generally, and on the other, his obligation to ensure the proper observance of the law and the power to prosecute (the latter of which require total independence). As far as the power to prosecute is concerned, the problem was solved through a convention whereby the Attorney-General acted entirely on his own discretion (a guidance note from the Secretary of State for Colonies had emphasized this point in 1963, Wesley-Smith 1994b:130). Whether in practice an Attorney-General can so easily divorce the role of the prosecutor from his more general role as the chief government lawyer may be doubted, and certainly recent trends in the UK show that it is indeed not easy.

This brings me to the second issue, which concerns other kinds of control over the Attorney-General in the exercise of his prosecutorial powers. The older theory seems to have been that prosecutorial powers were not amenable to judicial control since they were prerogative powers. (This view still holds, *Keung Siu Wah v AG* [1990] 2 HKLR 238.) In recent years the courts have been more willing to control them if there was a gross abuse of the legal process (*Chan Ching-cheung v R* [1977] HKLR 83; *Tang Yee-chun v AG* [1988] HKLR 408; *Re Egan* [1991] 1 HKLR 679; *George Tan Soon-gin v AG* [1990] 2 HKLR 408; *R v Harris* (1990, Cr. no 72); *R v Li Wing-tat* (Magistracy Appeal No. 1286/90); for a commentary on some of these cases, see Clark & McCoy 1993: 425–436; Wesley-Smith 1994b: 258–260). Questions or criticisms by members of the legislature might likewise be regarded as undermining the independence of prosecutions, although this did not prevent them from criticism of the Attorney-General’s conduct in these matters.

The role of the chief legal adviser to the HKSAR is even more fundamental than that of the colonial Attorney-General. All the powers of the Attorney-General are vested in the Secretary of Justice. The NPCSC Decision under art. 160 provides that all references in previous laws to ‘Attorney-General’ shall be construed as references to ‘Secretary of Justice’ (although this provision is not reproduced in the Reunification Ordinance). Key questions of law will arise as to the proper scope of the region’s powers; and many legal questions will arise in determining Hong Kong’s relationship with the Central Authorities. Thus both legality and autonomy will be his or her special responsibilities. The Basic Law does not expressly establish the office of the legal adviser to the government, nor does it
continue the office of the Attorney-General. It provides specifically for a Department of Justice (art. 60). Its functions are not specified, other than as may be gathered from its name, and the powers of criminal prosecution in art. 63 which states that the Department of Justice ‘shall control criminal prosecutions, free from any interference’. There is no reason under the Basic Law why the previous arrangements for the Legal Department and the separate organization of other law-related departments or offices should not continue. The Basic Law provides considerable flexibility in the organization of departments and other divisions of government.

It is possible to have the office of the Attorney-General separate from the Secretary of Justice, the former being responsible for the common law and statutory functions performed by the Attorney-General under previous laws carried over and the Secretary of Justice being responsible for the administrative affairs of the department, or to combine the two posts (as in the previous system). Each option has advantages and weaknesses. The combination of posts would provide greater coherence in administration and eliminate inevitable tensions over who has authority for what. On the other hand, the separation of offices might free the Attorney-General from administrative and policy issues to concentrate on legal questions and make it easier to offer impartial legal advice. Many former British colonies provide for the Attorney-General to be an independent officer, with a secure tenure, by analogy with the judiciary. Otherwise one may be thrown back on British practice or conventions which are little understood elsewhere, depend on traditions that are hard to export, and which appear to be breaking down in the UK itself.

In particular, it is important to ensure total independence for the direction of prosecutions. If the Attorney-General is a key member of the government, running a large department with the responsibility to look after the legal affairs of the administration, it may be hard to divorce prosecution decisions from the politics of the government — and even harder to dispel public impression that prosecution decisions are so influenced. The power to prosecute implies the discretion not to prosecute (and thus grant immunity) or to stop a prosecution (nolle prosequi). These powers can be the basis of negotiations in relation to the prosecutions of particular offences or alleged offenders, and are thus potentially sensitive. The previous basis for the prosecutorial independence of the Attorney-General was not well protected; the power derived from the prerogative, and was acknowledged in the Criminal Procedure Ordinance (sec. 15). However, as was mentioned above, the independence of the Attorney-General was based on a convention and political understandings, which may have been intended to be codified by art. 63 of the Basic Law. But the article vests prosecutorial powers in the Department of Justice, not in
an officer equivalent to the Attorney-General, and this diffuseness itself weakens the independence of the function. Here again the Basic Law could with profit have followed constitutional provisions in a number of former British colonies of separating the office of the Director of Public Prosecutions from the Legal Department, providing for an impartial method of appointment, protecting it with a secure tenure and prohibiting interference with its functions.33

There were various other offices offering specialist legal services, which continue under the Basic Law regime. The Intellectual Property Department is responsible for the administration of legislation on trade marks, patents and designs. The Legal Advisory and Conveyancing Office, as part of the Lands Department, provides legal service to that and other departments on land matters and ordinances as well as handling the conveyancing for the sale and purchase of government properties. The Official Receiver’s Office provides in-service insolvency management services connected with the administration, realization and distribution of assets in insolvent estates to creditors, is in charge of bankuptcies, including prosecutions, supervises private sector compulsory liquidations, and acts as trustee or liquidator of last resort. The Land Registry administers the Land Registration Ordinance, maintains the Land Register, and facilitates public access to

33 Two decisions of the Secretary of Justice have already been the subject of considerable public controversy. The first was the refusal to prosecute the New China News Agency for failure to abide by the Privacy (Data Protection) Ordinance. No reason was given, despite a recommendation by the Privacy Commissioner to prosecute. Later the Chief Executive described the breach as a technicality. Private prosecution was brought by Ms Emily Lau; it was the agency’s failure to respond in time to her request as to whether it had a file on her which constituted the offence.

The second was the refusal to prosecute Ms Sally Aw Sian, chairman of Sing Tao Holding, a major media corporation. After intensive investigations, the ICAC had concluded that there was enough evidence to justify prosecuting Ms Aw and three of her senior staff for false accounting and for conspiracy to defraud advertisers by boosting circulation figures. The Secretary of Justice decided not to prosecute Ms Aw, but to charge the others for conspiring with her. There was widespread criticism of her decision, especially as it was rumoured that the Director of Public Prosecutions had favoured prosecuting her. It was alleged that the Secretary of Justice’s motives were political since Ms Aw was a member of the Chinese People’s Political Consultative Conference and was a close associate of the Chief Executive, who was a director of her company prior to his appointment as Chief Executive. The Department of Justice denied that the decision was in any way improper, claiming that it was made in accordance with well established guidelines on prosecution. The statement failed to allay public opinion since it was couched in general terms and unrelated to the specifics of the case (as indeed it could not be at that stage as the case was sub judice, SCMP 20 March 1998). Subsequently Ms Elsie Leung, the Secretary of Justice, admitted that the DPP had differed from her decision not to prosecute, but said that the evidence against Aw was ‘inadequate’ (SCMP 25 March 1998).
it. Finally the Companies Registry incorporates and registers companies or other incorporated bodies, houses public search documents, records and annual returns filed by companies, maintains various registers of companies and trusts, and takes enforcement action such as striking off defunct companies and prosecutions for late filing of returns.

The provision of legal aid — publicly funded legal advice and representation for those unable to afford it — is an area in which independence from government influence may be crucial, since some such litigants may have interests opposed to those of government, a matter which has been of increased concern since the passage of the Bill of Rights Ordinance, and also with the growth in judicial review. The coming into force of the Basic Law enhances these concerns. In Hong Kong the Legal Aid Department has been a department of government (under the Legal Aid Ordinance), with funding from government, although services are provided by private practitioners as well as by staff of the Legal Aid Department itself. A step towards greater independence from government was taken in 1996 with the passing of the Legal Aid Services Council Ordinance (No. 17). The new council’s functions are to oversee the administration of the Legal Aid Department, to make arrangements to ensure the efficient and economical discharge of the Legal Aid Department’s functions, though not to interfere in individual cases, and to advise the Governor. The council consists of ten persons, half lawyers and half not: the Director of Legal Aid, and two barristers and two solicitors holding practising certificates and appointed by the Governor after consultation with the appropriate professional body in each case (though the Chief Executive may appoint someone not recommended by that body), while the Chairman and the four others are not to be in any way connected with the practice of law, and the Chairman is not to be a public officer either (s. 5). Some had hoped that this legislation itself might set up a truly independent legal aid administration, but it was not possible to reach agreement and there was concern that if it did not get on the statute book in 1996 it might never happen (South China Morning Post 2 May 1996) (a review of the organization of legal aid has since been undertaken, with a view to strengthening its independence). The ordinance as passed creates a less strong body than originally envisaged (the bill spoke of the council giving policy directions to the department, and of the department being accountable to the council). The council is enjoined specifically to advise on the feasibility and desirability of establishing an independent legal aid authority (s. 4(5)). The council has no power over the Duty Solicitor scheme which is administered by Council of the Law Society and the Bar Council, and not by government, and covers magistrates courts which are not included in the Legal Aid scheme.
There is another important official legal service that needs to be separate from the Legal Department, the law advisers who (as part of the separate administrative service of the Legislative Council) work for the Legislative Council. The need for independent legal advice to the president and members of the Legislative Council is even greater under the Basic Law than before. There is now more distance between the executive and the legislature, there are more stringent controls over the legislative initiative of members, the legislature has greater control over the executive, including the power of impeachment, and there are likely to be more conflicts between the executive and the legislature (see Chapter 6). The post of Legal Adviser to the council has existed since 1985, responding to the desire of members for independent advice. The office expanded substantially after the creation of the Legislative Council Commission (by Cap. 443 originally passed in 1994). The office of the Legal Adviser is funded by government, and staff are recruited mainly from the Legal Department. However, the advice is provided to the council and its members, and relates, *inter alia*, to legal issues underlying government bills, on the drafting of amendments, and on the legal technicalities of legislative proposals emanating from members, including how these will mesh with the existing law.

**Private Legal Practitioners**

**Hong Kong lawyers**

There are three major branches of the private legal profession: barristers and solicitors who are admitted to practise Hong Kong law and foreign lawyers who are allowed to practise only foreign law. The distinction between solicitors and barristers (and their professional organizations) follows largely the English system. Barristers are the more specialized branch of the profession — in 1997 there were approximately 570 barristers to nearly 3500 solicitors, although some leading firms of solicitors are able to provide sophisticated corporate, securities and investment advice. Only barristers are allowed to represent clients in the

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34 It is noticeable that since the elections of September 1991 and, more so, September 1995, there have been several conflicts between members and the executive over the former’s power, particularly about their right to initiate legislation (principally on what constitutes ‘levying a charge on the revenue’ for which the permission of the Governor was required) or the right of the executive to withdraw a Bill after amendments which were opposed by the government.
Several archaic rules regarding legal practice have recently been abolished, principally under pressure from the government: barristers may be instructed directly by members of certain professions (e.g. accountants) in some circumstances; barristers need not be accompanied by a solicitor when interviewing clients or witnesses, or conducting a case; senior barristers (previously known as Queen’s Counsel) may appear without a junior. These monopolies of the two branches (not only vis-à-vis the other branch but also in relation to the rest of community) are protected by law, which makes it an offence for a non-qualified person to practise as a barrister or solicitor (Part V of Legal Practitioners Ordinance). If monopolies are determined by the law, restrictive practices are the decisions of the professions themselves, and both have made the profession unpopular.

Solicitors have more freedom in regulating qualifications for their profession than barristers, but paradoxically the conditions to become a barrister are more restrictive than for a solicitor (which for the latter were relaxed in 1995 as a result of pressures from overseas lawyers, barristers being less subject to such pressures). The qualifications to become a barrister are set out in the Legal Practitioners Ordinance. In the case of solicitors, the qualifications are to be prescribed by the Law Society (representing solicitors), but an applicant must have been resident in Hong Kong for at least seven years (or at least 180 days each in the previous seven years), although there is no requirement as to nationality or

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35 Several archaic rules regarding legal practice have recently been abolished, principally under pressure from the government: barristers may be instructed directly by members of certain professions (e.g. accountants) in some circumstances; barristers need not be accompanied by a solicitor when interviewing clients or witnesses, or conducting a case; senior barristers (previously known as Queen’s Counsel) may appear without a junior.

36 An automatic right was previously given only to those who, inter alia, have been admitted to the English or Northern Irish bars or as an advocate in Scotland, or obtained an LLB and a Postgraduate Certificate in Laws in Hong Kong (or just the certificate provided the applicant is a permanent resident of Hong Kong or a Commonwealth or Irish citizen who has been resident in Hong Kong for seven years) or a Hong Kong solicitor with at least three years practice, the residence requirement being necessary also for those who are admitted in the UK (s. 27). British qualified lawyers have now lost this privilege, as have Commonwealth citizens. It is possible for the Chief Justice to admit certain other categories of lawyers who have qualified in specified common law countries with a heavy bias towards ‘white’ jurisdictions (thus Australia, New Zealand and Canada are covered, in addition to Zimbabwe, still with a significant number of white practitioners, and Singapore) (s. 27A. and Sch. I).
permanent residency (s. 4). In the case of both branches, the applicant has to have served a form of apprenticeship — pupillage (barrister) or traineeship, previously called articles (solicitor) — for which the rules are established by the professional bodies.

**Foreign lawyers**

The third category of lawyers is ‘foreign lawyers’, that is lawyers trained in a foreign jurisdiction, who are registered in Hong Kong to practise only foreign law. The formal registration of foreign lawyers became possible only after amendments to the Legal Practitioners’ Ordinance in 1994, after much resistance by the Law Society. For some time before then, it was possible for a Hong Kong solicitor to employ a foreign lawyer to provide services in foreign law (and thus able to offer an international practice), but foreign lawyers could not practice on their own even in foreign law. However, after 1972 foreign firms were permitted by the Immigration Department to operate in Hong Kong after they had negotiated with the Law Society and undertaken not to advise on Hong Kong law or enter into partnerships with Hong Kong solicitors (Conner 1992). Under pressure from foreign, particularly US, lawyers, in 1988 the government announced proposals for the statutory registration of foreign firms and partnerships with or employment of Hong Kong solicitors (which foreign firms were keen on to establish ‘one stop’ practices) (Hong Kong 1989).

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37 The Council of the Law Society has passed the Trainee Solicitors Rules prescribing the qualifications — Part II examination or Solicitors’ Final Examination set by the Law Society of England and Wales, the Legal Practice Course recognized by that Society, or the Postgraduate Certificate in Laws (Hong Kong). For those who have qualified from other common law jurisdictions, the rules are to be found in the Overseas Lawyers (Qualifications for Admission) Rules. The rules are too complicated to be summarized here. In principle someone who has practised in a common law jurisdiction for five or more years, has to pass a special examination in Conveyancing, Commercial and Company Law and Accounts and Professional Conduct, unless given an exemption, while those with shorter practice have additionally to pass an examination in Civil and Criminal procedure. As regards those from a non-common law jurisdiction, an applicant with five or more years’ practice has to pass all the five subjects, while an applicant with less has to complete one year full-time study in Contract, Torts, Property, Criminal Law, Equity and Constitutional and Administrative Law and then the Postgraduate Certificate in Laws — in addition to appropriate apprenticeship in either the foreign jurisdiction or in Hong Kong.

38 Barristers (Qualifications) Rules and Trainee Solicitors Rules respectively; the period of a training contract is two years and pupillage is one. The rules contain much detail on the instructions and supervision to be provided to the novice.

39 In 1984 the Law Society issued provisions on application for foreign firms, *Foreign Law Firms Establishing Themselves in Hong Kong: Guidelines to Applicant.*
The Law Society issued a sharp criticism of the proposals (The Law Society of Hong Kong 1989) and in due course produced its own scheme, which eventually formed the basis of present statutory provisions (and in the organization, regulation and supervision of which the Council of the Law Society has a major role). 40

There are three principal provisions in the ordinance. The first provides for the registration by the Law Society of foreign lawyers, the legislation making a distinction between the registration of foreign lawyers and foreign firms — the former cannot hold a practising certificate as a solicitor or barrister in Hong Kong (s. 39A), while for the latter, all the partners or the sole practitioner of which intend to practise in Hong Kong are foreign lawyers (s. 39B). 41 This means that foreign lawyers or firms cannot practise Hong Kong law; this is clearly provided in the Foreign Lawyers Registration Rules. 42

40 See Part IIIA of the Legal Practitioners Ordinance. At the same time provisions were enacted for the admission of foreign qualified lawyers as Hong Kong solicitors, as discussed above.

41 For the exercise of its powers to register, the Law Society has prepared detailed regulations, Foreign Lawyers Registration Rules, Foreign Lawyers Registration (Fees) Rules and Foreign Lawyers Practice Rules. For a foreign lawyer to be registered, he or she must be a person of good standing in the foreign jurisdiction in which he is qualified to practise; must satisfy the Law Society that he or she is a fit and proper person to be registered; and be covered by a professional indemnity insurance. As regards firms, a distinction is made between a firm which is a branch of an overseas firm and other firms. In the case of the former, all partners intending to practise in Hong Kong must be registered as foreign lawyers; the overseas firm must lawfully carry on the practice of law in the foreign jurisdiction; the overseas firm must be in good standing in every jurisdiction in which it has during the previous five years carried on the practice of law; at least one of the partners in the firm which intends to practise in Hong Kong must be (a) a partner of the overseas firm; (b) have been associated with it for the preceding 12 months in that capacity, and for another 12 months in the preceding four years; and (c) have been in legal practice for at least five years; and the firm must intend to have a place of business within two months of registration. The last condition as well as the requirements of individual lawyers to be registered as foreign lawyers, also applies to other firms, in addition to the following conditions: (a) its partners who intend to practice in Hong Kong must be of good standing in the foreign jurisdiction in which he or she is qualified to practise and in every jurisdiction in which he or she has practised law within the previous five years; (b) one of the partners (intending to practise in Hong Kong) is of substantial reputation in the foreign jurisdiction the law of which he or she is qualified to practise or in a jurisdiction in which he or she has practised law during the preceding five years; and (c) each of the partners intending to practise in Hong Kong must have been in practice of the law of a foreign jurisdiction in which he or she is qualified to practise for not less than three years.

42 Rule 12 (‘Prohibition on the practice of Hong Kong law’) provides as follows:

(1) Except as provided in subsection (2), a foreign lawyer shall not provide or offer any legal service which, having regard to all the circumstances of the case, can
The second principal provision is that a Hong Kong firm may employ a foreign lawyer (s. 39D); but Law Society regulations impose various restrictions. The foreign lawyer may not be employed as a partner; and the number of foreign lawyers employed or associated with the firm must not exceed the number of resident principals and solicitors employed in the firm. As with foreign firms, such lawyers cannot offer services to the public as a solicitor.

The third provision allows the registration of an association of a Hong Kong firm with one or more foreign firms, an arrangement under which they share fees, profits, premises, management or employees (s. 39C) — as a compromise between the claims of foreign lawyers to practise Hong Kong law and the resistance of the Law Society. Although a Hong Kong firm may form an association with more than one foreign firm, a foreign firm may not team up with more than one local firm, and the number of foreign lawyers associated with the firms in such an association cannot exceed the number of solicitors associated with the Hong Kong firm — both these restrictions may be waived with the consent of the Council of the Law Society (Rs 8 and 13(3) respectively of the Foreign Lawyers Registration Rules). The provisions fall well short of a merger; and do not imply any relaxation of the prohibition against foreign firms employing or taking into partnership Hong Kong solicitors to practise local law.

Chinese mainland lawyers

Finally mention must be made of a special category of ‘foreign lawyer’ which is unregulated so far (the following account is based on Epstein 1991a). In 1987 a ‘law firm’ was established in Hong Kong by the incorporation of a Hong Kong company by various Chinese official groups. Although it seems inappropriate to practice law through a limited liability company, the Law Society gave it permission to practise law as a foreign firm. Most directors of the firm have some legal training in China, and the firm provides advice on a wide variety of legal matters, especially those involving China’s foreign economic laws, as well as acting as an intermediary between clients and Chinese government and quasi-government organs. Another vehicle for mainland lawyers is mainland commercial firms in Hong Kong, where it would seem that they provide
general advice on Chinese law. A somewhat specialised firm is the China Patent Agent (Hong Kong) Ltd, incorporated in 1983. It has not sought approval from the Law Society, nor do its articles of association refer to legal services, but presumably some of its work must be connected with the giving of legal advice. Thirdly, a number of PRC trained lawyers (often with supplementary qualifications from a common law country, principally the US) are employed by Hong Kong solicitors’ firms, although not in the formal capacity of a legal practitioner, and therefore not subject to the law on legal practice. It is likely that these forms of practice will in due course be regularized, as pressures build up from mainland lawyers for certification to practise in Hong Kong (and as the volume of China-Hong Kong legal transactions increases even further). It is sometimes argued that mainland lawyers are no longer ‘foreign’, and so should be certified to practise in Hong Kong. However, ‘foreign’ in this context refers not to nationality but to legal qualification.

**Self-regulation**

An important aspect of the organization of professions in modern, Western type states is the degree of control that the profession enjoys over the regulation and discipline of its members; this aspect is well represented in the organization of the legal profession in Hong Kong. The Law Society is the representative body of solicitors, and the Bar Association that of barristers. They have a number of functions under their constitutions — for which the basis is a contract among members. These functions include maintaining professional standards, standards for admission to the profession (like training contracts for solicitors and pupillage for barristers), and discipline of members. In addition, each body (particularly the Council of the Law Society, secs. 73 and 73A of the Legal Practitioners Ordinance) has been vested with statutory powers (including significant powers of making regulations) that reinforce their control over the profession.

The Council of the Law Society has statutory powers to determine the system of training (sec. 6) as well as the scheme for continuing legal education (sec. 73B) and to issue practising certificates (sec. 4). It has important roles in the supervision of and disciplinary control over solicitors; it can examine their annual accounts (sec. 8) and other documents, as well as their general fitness to practise (with the help of inspectors if necessary, sec. 8A). It regulates the scheme of indemnity to clients of solicitors whose assets are stolen or otherwise lost through the conduct of solicitors or their employees, by a contributory scheme (sec. 73A). It plays a key role in disciplinary proceedings; the Solicitors Disciplinary Tribunal is appointed by the Chief Justice, consisting of solicitors and lay people
(sec. 9), and complaints in respect of a solicitor may be referred by the Council to the Tribunal (sec. 9A) and it may also be represented at the hearings of the Tribunal (sec. 9B). The council may also strike a solicitor off the roll of solicitors (sec. 19).

The Council of the Bar Association has fewer powers — in part due to the different structure of that branch of the profession, in part due to the fact that barristers are not, in principle, approached direct by clients but through a solicitor, and do not handle clients’ assets. The council is responsible for issuing practising certificates and play a role in the discipline of its members similar to that of the Law Society in relation to solicitors (there is a separate Barristers’ Disciplinary Tribunal, secs. 34 and 35).

**Legal aid**

The cost of legal services in Hong Kong has often been commented upon. There is some, not very generous, provision for public funding of legal aid and legal advice, and some schemes for channelling *pro bono* efforts (see above for the administration of public legal aid). The legal aid scheme is modelled on the English scheme and involves consideration of the means of the applicant in terms of income and capital, criteria based on the merit of the applicant’s case, a possibility of a contribution from the assisted person on a sliding scale, and the possibility of a charge on property recovered, for the benefit of the scheme. Although most accused persons in criminal cases receive legal aid, the limits of the civil scheme are demonstrated by the fact that many industrial accident victims are ineligible (*South China Morning Post* 17 June 1996). In some respects the schemes are a little more generous where infringements of the Bill of Rights or the International Covenant on Civil and Political Rights may be involved. The Duty Lawyer scheme covers magistrates court proceedings, and services are provided by some 870 private practitioners on a roster basis, at a cost of $300 to the assisted person. Eligibility is based on a means test (annual income below $180,000) and a test of merits similar to those in the English scheme — including the need for representation because, for example, there is a risk of loss of liberty, or a substantial question of law, or that there will be the necessity to examine and cross-examine witnesses. There are also some privately provided legal advice services, through the profession or other bodies. The future organization of legal aid, including the establishment of a separate cooperation, is under review.

**Conclusion**

From the above account it is hard to say what may be regarded as the
previous system on the basis of which the legal profession must be organized in the HKSAR. There have been important changes since the Joint Declaration and the Basic Law, and there are proposals for even greater changes, covering matters of internal organization (e.g., the fusion of the profession), role within the legal system (e.g., appointment to the judiciary from among solicitors and their right of audience in higher courts), and relations with clients (e.g., scale of fees for conveyancing (Legal Services Legislation (Miscellaneous Amendments) Bill 1996. Article 94 cannot be regarded as preventing these changes; its purpose, given the scheme of the Chapter where it appears, is to ensure that lawyers are able to protect the interests of their clients, in particular in criminal trials, and that the public interest is not unduly damaged by the conduct or practices of the profession, and that only those who are suitably qualified in the law are able to practise. Here, however, it is necessary to turn to art. 142 (the general provision on professions) which gives professional organizations the right to assess and confer professional qualifications, which may be seen to be more favourable to the legal profession than the ‘previous’ statutory scheme. In so far as the autonomy of the profession is necessary for the discharge of its functions and responsibilities, its preservation can be regarded as mandated by the Basic Law. The difficulty is that the profession is notorious for making extravagant claims about its indispensability for justice, fairness and the rule of law, where they serve little other purpose than to further its own self-interest, which sometimes makes it hard for the uninitiated to separate the wheat from the chaff (Ghai 1993b). In that sense the profession may turn out to be its own worst enemy so far as the preservation of principles essential to its important role in the legal system is concerned.

THE LANGUAGE OF THE LEGAL SYSTEM

For most of the colonial period, the language of the law and administration was English. The main sources of the applicable law, the common law and UK statutes were in English, and legislation enacted in Hong Kong was also in English. Such elements of Chinese customary law as applied were also enforced in English. On the other hand, the Basic Law, following the Joint Declaration, makes Chinese, if somewhat obliquely, the official language, but authorizes the use of English as well.43 It is unclear whether the official Chinese is to be in the Cantonese version or Putonghua

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43 Article 9 reads, ‘In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the HKSAR’.
Almost 95% of the residents of Hong Kong speak Cantonese and therefore in many ways it would make sense if Cantonese were the official language (the written form of the language is also different, Hong Kong using the classical characters and China the simplified). On the other hand, state policy in China is to promote the use of Putonghua and it is certain that communications between China and the HKSAR will be in that language. Even if Putonghua is the official language, there will still be extensive use of Cantonese, in both administration and court proceedings, although increasing numbers of Hong Kong residents will start to learn Putonghua. As for the use of English, the Basic Law seems to leave it to the policies of the HKSAR to determine the scope of its use, as well as the pace of change to the exclusive use of Chinese. It is likely that for the foreseeable future, English will continue to be used, at least for the purposes of the law, although Chinese will gradually become the dominant language.

The Hong Kong administration had foreshadowed these developments by initiating new language policies in the 1970s (the following account is based principally on Yen 1996 and Chen 1985). A committee was appointed to make recommendations concerning the official use of the Chinese language. Its reports, although not accepted in their entirety, formed the basis of the new language policies. In early 1974 the Official Languages Ordinance was passed. It provided for English and Chinese to be the official languages for the purposes of communication between the government and the public (sec. 3(1)). Both languages were to 'possess equal status and, subject to the provisions of this Ordinance, enjoy equality of use' (sec. 3(2)). The progress in the use of Chinese for the law was slower, as the administration considered that the resources for translation of laws and for the use of it in judicial proceedings were lacking. The ordinance therefore provided for every ordinance to be enacted and published in English, although it did not preclude the publication of a translation of any ordinance into Chinese (sec. 4). Advantage was taken of this proviso to initiate informal translations of some key laws for general guidance, which provided valuable experience in legal translation.

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44 Article 19 para 5 of the PRC constitution says, ‘The state promotes the nationwide use of Putonghua (Common Speech based on Beijing pronunciation)’. Although in the national autonomous areas of the PRC, ‘in performing their functions, the organs of self-government of the national autonomous areas, in accordance with the autonomy regulations for the respective areas, employ the spoken and written language or languages in common use in the locality’ (art. 121), it is unlikely that the HKSAR will be regarded as a national autonomous area for this purpose, being largely Han.

45 It is unlikely that art. 9 of the Basic Law gives a resident the right to demand the use of English; it seems to leave the decision to public authorities.
A formal change of policy took place after the Joint Declaration, and in 1986, after the feasibility of the Chinese version of laws was investigated, the Royal Instructions were amended to authorize the enactment of laws in English or Chinese (the new clause XXV), paving the way for the Official Languages (Amendment) Ordinance 1987 and the Interpretation and General Clauses (Amendment) Ordinance 1987. The former replaced section 4, now providing that ‘All ordinances shall be enacted and published in both official languages’, and authorized the procedure whereby the translated Chinese texts of the 500 odd ordinances previously enacted would be declared authentic by the Governor in Council after consultation with the Bilingual Advisory Committee established by the Ordinance (sec. 4C). Very considerable progress has been made in the translation of previous ordinances; by the transfer of sovereignty, all statutes had an authentic Chinese text.

The amendments to the Interpretation and General Clauses Ordinance provide for the English and Chinese texts of an ordinance to be equally authentic and that the provisions of an ordinance are ‘presumed to have the same meaning in each text’ (sec. 10B). It goes on to state that ‘Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation do not resolve, the meaning which best reconciles the texts, having regard to the objects and purposes of the Ordinance, shall be adopted’ (sec. 10B (3)). This provision excludes exclusive reliance on the text of one language if the text in the other is ambiguous. Hitherto the English text has been normally the controlling version, for both legal and practical reasons. The Interpretation Ordinance provides that where an expression of the common law is used in the English language text and an analogous expression is used in the Chinese text, ‘the Ordinance shall be construed in accordance with the common law meaning of that expression’ (sec. 10C). The practical reasons are two-fold. Drafts of ordinances are first prepared in English (because instructions from government departments are in English and most draftspeople are not familiar with Chinese); and so the Chinese version is derivative. Secondly, most judges and legal practitioners, even Chinese, are more at home with legal English than legal Chinese.

Advances have also been made in the use of Chinese in judicial proceedings. Originally the Official Languages Ordinance provided that proceedings in the Court of Appeal, the High Court, the District Court and any other non-scheduled ‘court’ must be conducted in English (sec. 46). There is also a provision, although not made in the context of language policy change, that ‘Chinese words and expressions in the English text of an Ordinance shall be construed according to Chinese language and custom’ (sec. 9).
5). In scheduled ‘courts’ — magistrates’ courts, inquiries by a coroner, juvenile court, labour tribunal, and immigration tribunal — proceedings could be in either language, at the discretion of the court. The reason for the distinction was that higher courts had to contend with complex questions of law, which would be problematic in Chinese, but that in other courts important issues were factual and evidentiary, which could be satisfactorily (and in fact better) handled in Chinese. Some use was made of Chinese in these courts and tribunals, but initially at least a major constraint was that most presiding officers were expatriates unacquainted with Chinese. With the localisation of the judiciary at all levels, and with increasing number of local lawyers, the situation has improved, which has even enabled the ban on the use of Chinese in higher courts to be lifted (Official Languages (Amendment) Ordinance 1995) and the first trials in the High Court were held before the change of sovereignty (where it was clear that the plaintiff would be unable to follow proceedings in English).

The statutes of Hong Kong are subject to the Basic Law. The Basic Law was of course enacted in Chinese. There may be some difficulty in judging the consistency of these statutes — originally drawn in English — against the Chinese text of the Basic Law. There is an official version in English of the Basic Law, which the NPCSC has decided may be used in parallel with the Chinese text. However, a proposal that if the two versions conflict, the interpretation that best harmonises the two texts should be used, was rejected in favour of the superiority of the Chinese text. It is likely that for at least the first few years after the transfer of sovereignty, the HKSAR courts will rely on the English text, while the NPCSC will undoubtedly use the Chinese text. Although unavoidable, this will raise problems in interpretation since there are numerous differences of nuance between the two texts. There is little doubt that in the long run, the formal superiority of the Chinese text of the Basic Law will also tilt the language bias of the Hong Kong legal system towards Chinese.

47 This did not of course preclude the submission of evidence in Chinese (sec. 5(3)).
48 These amendments augur well for the increasing use of Chinese in the law. However, progress will be slow unless instruction is provided to law practitioners and students in the use of Chinese in law. The law faculties of the University of Hong Kong and the City University have taken various steps to prepare students for this purpose. There are increasing translations of common law materials in Chinese (and vice versa). The legislature now operates largely in Chinese, and the administration predominantly so, and it may be expected that its greater use in the law will follow.
RELATIONSHIP WITH THE CHINESE LEGAL SYSTEM

The legal system of the HKSAR is separate from that of the rest of China in a number of important ways already sketched in this chapter: it has a separate and different regime of laws and separate courts which will follow their own procedures, it has a different system of legal profession and representation, a different legal language, the application of Chinese law and procedures is severely circumscribed in Hong Kong, etc. These factors suggest that the legal regime to regulate the inter-action of the two legal systems (e.g., in enforcement of judgments, service of legal documents, conflict of laws, and extradition) should be based on accepted international conventions or practices or those which are applied in states with multiple jurisdictions (e.g., the United States or Australia). However, under the Basic Law the HKSAR is in a unitary relationship with China, and given China’s well known sensitivities on the question of sovereignty, it is unlikely that the PRC will accept this solution; instead it will seek to deal with this matter through ‘domestic’ arrangements. At a practical level, this is a matter of considerable importance since economic and social relations between Hong Kong and the PRC have increased exponentially in the last decade or so, and are set to widen further.

The Basic Law itself provides little guidance on this matter. Article 95 authorizes the HKSAR, ‘through consultations and in accordance with law’, to ‘maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other’. It is clear from art. 96, under which the HKSAR may ‘with the assistance or authorization of the Central People’s Government . . . make appropriate arrangements with foreign states for reciprocal juridical assistance’ that a separate regime is intended for arrangements between the HKSAR and the PRC. Article 95 allows the HKSAR to make independent arrangements with judicial organs on the mainland, but the scope of cooperation is unclear since it must be ‘in accordance with the law’. There is currently no national law on this matter dealing with internal court procedures for cooperation and presumably the reference is to a Hong Kong law to be made for this purpose.

It is unclear whether the use of the word ‘juridical’ in the English version is meant to distinguish it from ‘judicial’, but it is suggested that it was not so intended.50 ‘Judicial assistance’ is a term of art in Chinese law, but ‘juridical’ seems not to be (‘judicial’ appears to be the Chinese version, and the Basic Law for Macau uses only the expression ‘judicial assistance’).

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50 For a contrary view, which argues that juridical is broader than judicial and might have been advisedly chosen, see Brabyn 1988, esp. at pp. 170–172.
arts. 93 and 95). Judicial assistance is used for all acts of mutual assistance between courts and other designated organs of judicial administration in independent jurisdictions (the account of judicial assistance in this paragraph is taken from Edward Epstein 1991b). In a narrow sense, judicial assistance refers to a court or judicial administration serving on parties within its jurisdiction judicial documents such as a writ of summons, acknowledgement of service, power of attorney, judgment or ruling in connection with a court proceeding in another jurisdiction, as well as the service of extrajudicial documents such as a certificate in proof of marriage or adoption, or a protest of dishonoured bill of exchange. In a broad sense, judicial assistance encompasses further acts of assistance not limited to the service of documents, such as the taking of evidence in civil and even criminal matters as well as the mutual recognition and enforcement of court judgments and rulings. These matters are of special significance for Hong Kong since they are essential to its role in international trade and finance, and the maintenance of the robustness of its legal system.

During the colonial period the arrangements for many of these matters rested either on normal international practice or special procedures in view of China’s non-recognition of British sovereignty. For example, in relation to the service of documents, the Chinese would not accept any direct communications between Hong Kong and mainland courts (and to some extent relied on direct postal service, with somewhat mixed results). It was only in 1988 that, exceptionally, an agreement was made between the Guandong Higher People’s Court and Hong Kong’s Supreme Court for the service of documents. These arrangements were not superseded when China signed the 1965 Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1991, which the UK had extended to Hong Kong in 1970. It is unclear whether service under the Hague Convention survives the transfer of sovereignty, since the convention applies only between different countries. It will be necessary to make arrangements under art. 95 for substitute arrangements.

A similar analysis may be made of other conventions which provided the previous basis for judicial cooperation. Both China and the UK on behalf of Hong Kong have accepted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), under which arbitral awards are mutually enforceable. These arrangements are particularly important to Hong Kong, both in relation to its direct investments in China (and the other way round) and for Hong Kong’s mediation of external trade and commercial relations of China — most disputes regarding China are settled through arbitration rather than litigation — as well as Hong Kong’s aspirations to become one of the
world’s major arbitration centres. After 30 June 1997, the convention ceases to be the basis for mutual enforcement, and it is significant that contracts negotiated in Hong Kong, while providing for arbitration in Hong Kong up to that date, provide for arbitration in a third country thereafter (Chief Secretary Anson Chan to a LawAsia meeting, see *South China Morning Post* 29 March 1996).

Even when arrangements for judicial cooperation depend on Hong Kong and Chinese legislation (as for example in relation to the taking of evidence and the reciprocal recognition and enforcement of judgments), the arrangements will need to be renegotiated or legislation amended since the latter assumes a foreign jurisdiction. Similarly, more broadly, the general rules of private international law (conflict of laws) will no longer apply as previously since they too are in principle based on the assumption of different national jurisdictions.

**Notarization for China in Hong Kong**

A peculiarity of the relationship between the two legal systems is the PRC appointed notary in Hong Kong (Leung, Elsie 1991; Epstein 1991a). The first appointments took place in 1981, when social and economic relations between Hong Kong and the mainland began to open up, with the consequent increase in legal transactions between the residents of Hong Kong and the rest of China. Hong Kong residents began adoption proceedings to reunite family members in China and there was an increase in marriages between the residents of Hong Kong and China. Under the system of notarization in China, documents have to be notarized, as for example to attest to the marital status of a party. Notarized documents are accepted as prima facie evidence of facts and the legality of acts by the PRC courts. Although there are relatively few instances of mandatory notarization in Chinese law, wills, documents of title, powers of attorney, some contracts and family relationships for the purposes of inheritance, marriage and adoption, are regularly notarized (Epstein 1991a:11–12).

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51 In 1990 the Arbitration Ordinance was extensively revised, to bring it into line with UNCITRAL Model Law for international arbitration. Through the convention, arbitration awards made in Hong Kong can be enforced in over 90 countries which have signed it. These developments have increased the importance of the Hong Kong International Arbitration Centre which was established in 1985 as a non-profit company limited by guarantee, and financed by the government as well as the business community. Government contracts for the Airport Core Programme Construction provide a tiered approach to dispute settlement, in which mediation and arbitration play central roles — in line with the general tendency to avoid litigious dispute settlement.
Under the Provisional Regulations of the PRC on Notarization, Chinese embassies and consulates overseas are authorized to handle notarial work (art. 15). China had not considered it appropriate that any Chinese agency in Hong Kong should exercise this function, nor that documents notarized by Hong Kong notaries should be accepted. The principal reason for the former view is that as Hong Kong is part of China, there could be no embassy or consulate to carry out notarization; and in any case it would be inconsistent with Chinese sovereignty to follow this procedure on Chinese soil. For somewhat similar reasons, notarization by Hong Kong notaries would be tantamount to the acknowledgement of British sovereignty, complicated by the fact that such notaries were appointed by the Archbishop of Canterbury. Nor did China trust Hong Kong attorneys, its impression being that in a capitalist society ‘lawyers would do anything for gain’ (Leung 1991: 2).

The solution therefore was to authorize certain Hong Kong lawyers whom China trusted to notarize documents for use on the mainland (as of 1992 there were 25 such notaries, but the number was expected to increase as in 1996 there were public announcements inviting Hong Kong lawyers to apply for appointment). Since 1981 the procedure for notarization has been regularized; and in order to avoid forgeries or other forms of fraud, a copy of the documents notarized is sent directly by the lawyer to the relevant agency in China. The criteria for appointment have also been clarified: ten years practice; familiarity with the situation in China and its law; ability to prepare documents in Chinese; and willingness to abide by regulations prescribed by the PRC Ministry of Justice. The scope of their work was also clarified in a directive issued by the Ministry of Justice in June 1985. These include the notarization of any legal act, facts and documents that take place in Hong Kong; certification of bank reference or guarantee, business registration, authorization of signatory to economic contracts, income tax situation, etc; defence, opinion, authorization and other documents relating to marriage and property disputes of Hong Kong and Macau compatriots for use in litigation in the People’s Courts; and certificates of incorporation and authorization of representatives and other relevant materials for use in disputes arising from economic contracts involving Hong Kong companies and enterprises for use in People’s Court. The notaries tend to use the procedures for certification under Hong Kong rather than Chinese law, for example relying less on oral evidence than on documents, and not undertaking any investigation of their own.

The future of this system of notarization is in doubt as Chinese assumes

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52 Hong Kong now has its own system of locally appointed public notaries (by the Chief Justice). See Legal Practitioner (Amendment) Ordinance (no. 27 of 1998).
sovereignty and no doubt the archaic function of the Archbishop is eliminated! In any case, as Leung (herself a PRC notary) has pointed out, notarial work is connected with jurisdiction, not sovereignty (1991:9). The Hong Kong authorities (including the Law Society) were not consulted on this system; and there has been criticism of the patronage involved in the system of appointment. An association of authorized notaries has been set up, in part to enhance the standard and ethics of their work. Most members of the Law Society would like any notary qualified under Hong Kong law to be able to notarize for the purposes of mainland law (which might also remove doubts about the applicability of the solicitor’s indemnity scheme to such practice). The Basic Law recognizes the legal profession of Hong Kong, and it would be logical to accept their notarial work, as is done in numerous other jurisdictions.

**Extradition**

Another matter which is covered by ‘judicial assistance’ is extradition. No satisfactory arrangements exist between China and Britain on extradition, in large part due to the former’s denial of British sovereignty (the following account is based principally on Brabyn 1994). In 1843 an agreement was made for the surrender to China, if requested, of Chinese subjects found in Hong Kong or on board British ships (art. IX of the Supplementary Treaty). Legislation was passed to implement it, of which the latest version is the Chinese Extradition Ordinance 1889. The ordinance was used regularly before 1948, but the communist regime refused to request extradition under it due to references in it to the unequal Treaty of Tientsin 1858. Nor was extradition to or from China regulated under Hong Kong’s statutory scheme for international extradition (discussed in Chapter 10). However, exchanges of fugitives and wanted persons took place frequently between China and Hong Kong. This was done in part through the use of immigration laws, especially for those Chinese who were illegal immigrants — those wanted by China were simply deported and arrested across the frontier. The procedure was also been used for the repatriation of political dissenters. In some cases, it would seem, Chinese authorities entered Hong Kong and abducted fugitives — on the basis that Hong Kong is part of China (similar abductions from Macau have received higher publicity, as one of them involved an ethnic Chinese citizen of Australia). Similarly China returned fugitives from Hong Kong, on request, using police and immigration procedures.

These informal procedures caused considerable disquiet, as they were clearly abuses of immigration for extradition purposes, thus denying the
fugitives the benefits of the safeguards associated with extradition schemes.\textsuperscript{53} Such irregular extraditions may also jeopardize Hong Kong’s extradition relations with third countries, due to fear that extradited persons may end up in China, with a legal and political system that does not command universal approval. Consequently Hong Kong refused extradition in some well publicized cases.\textsuperscript{54} It is clear that negotiations will be necessary to establish a system of rendition (as the system of extradition within a single state is known), especially with the repeal by the NPCSC of the Chinese Extradition Ordinance of 1889. It seems that there is a Sino-British understanding in the JLG that rendition is covered under art. 95. However, little progress has so far been made towards such an arrangement, perhaps because the traditional bi-lateral arrangements are considered unsuitable between two parts of the same state.

\textbf{Conclusion}

There may be several problems in reaching satisfactory arrangements for judicial assistance. At a theoretical level, there may seem to be a strong case for treating Hong Kong as a legal jurisdiction separate from China: this is after all guaranteed in the Basic Law which provides for separate laws and judicial institutions, as well as a separate and different economic system, for Hong Kong. On the other hand, China’s sensitivities in regard to sovereignty may rule out that option (especially as these arrangements may also be linked to ‘Greater China’, thus involving relations with Taiwan as well). Another difficulty is the relative underdevelopment of China’s legal system, especially in regard to commercial matters which does not provide a sufficiently reliable framework for mutuality (and here the PRC political interference in judicial work is an additional concern). Yet

\textsuperscript{53} The standard safeguard is speciality, under which the extradited person cannot be tried for an offence which is not the subject of extradition unless he or she has been given an opportunity to leave the jurisdiction (except for a lesser offence established on facts proved for the purpose of securing his or her return). Extradition is normally granted only after a \textit{prima facie} case has been established in the country from which extradition is sought, and it is established that the person would get a fair trial. Some countries refuse extradition if the person could be liable to the death penalty.

\textsuperscript{54} A recent example is the refusal to send one of the persons accused of piracy in connection with a $10 million robbery on a ferry between Macau and Hong Kong. The person was convicted in Hong Kong and sentenced to 20 years imprisonment. His accomplice was arrested and tried in China, and sentenced to death. The Hong Kong government resisted ‘extradition’ on the grounds that the accused ‘has offended laws in Hong Kong. And offending against Hong Kong laws in areas within the rule of the territory should result in trial in Hong Kong’ (\textit{SCMP} 17 February 1996, p. 4).
satisfactory arrangements are necessary for Hong Kong’s relations with China as well as for Hong Kong’s status as an international commercial and financial centre. The Hong Kong administration had hoped that arrangements might be in place before the transfer of power. A committee identified the issues that needed to be tackled and proposed solutions, which were referred to the JLG where it was expected that an agreement would be reached in good time. Unfortunately the deterioration of Sino-British relations provoked China to claim that these were matters within its sovereignty and were best dealt with after 30 June 1997.

CONCLUSION

While the basic intention in the Joint Declaration was to preserve most of the legal system intact, the logic of ‘One Country’ has meant that the legal system under the Basic Law is more complex. This is not only because the system has to accommodate the relationship between Hong Kong and the rest of China (which is more complex than that previously between it and the UK), but also because each part has its own system and tradition of law. One of the most interesting and challenging tasks facing the HKSAR judiciary is the intermeshing of the two traditions of law. The common law has a stronger tradition, and a more developed jurisprudence, especially on questions of autonomy, due to experiences in Australia, India, Canada and the US, but the political forces behind the socialist/civil traditions are more powerful. The outcome may depend to some extent on how successfully the NPCSC can be ‘judicialized’.

The Basic Law places a heavy responsibility upon the courts. They are responsible for upholding the rights and freedoms of the people of Hong Kong and maintaining legality. They have a primary responsibility for the intermeshing of the two legal traditions; the role of the legislature in this respect will not be primary. To perform these tasks the judges will need skills, imagination and independence.

Another factor which might affect the common law and the judiciary which administers it is the changeover to the Chinese language. The common law is so much embedded in the English language (which also facilitates the use of foreign precedents) that its character in Hong Kong is bound to be affected by its mediation in the Chinese language. It is hard to tell what the effect of it will be, and whether it might tend towards some ‘civilianization’ under the influence of Chinese legal expressions which may derive from civil law. The greater use of Chinese will also compel movement towards a more rapid localization of the judiciary (and
the legal profession) and weaken Hong Kong’s links with the rest of the common law world. On the other hand, the increased availability of the principles and doctrines of the common law in the Chinese language would enhance the knowledge as well as the influence of it on the mainland, and thus establish the foundations on which a sensible intermeshing of the two systems might be built.

The legal profession is also likely to be affected by the general changes in the legal system (in addition to the ways mentioned above). On the one hand, there is the liberalization of rules to practise in Hong Kong, suggesting a more international profession. On the other hand, the trend towards the use of Chinese as well as the increasing salience of Hong Kong–China legal work would mean that skills in the Chinese language and knowledge of Chinese law will be crucial, acting to narrow the national base of the profession. Practice in Hong Kong would depend increasingly on familiarity with the legal systems of Hong Kong and China, and this fact may also help towards the inter-meshing of the systems. But Hong Kong is likely also to continue its international role, in trade, investment and the provision of legal services, which would sustain an international profession. The result might be the rise of different streams of the profession.

The localization of the profession and the dependence on Chinese related legal work could undermine the ‘independence’ of the profession. This may be more clearly reflected in the role of solicitors and has been evident in the change of views among some of its leading members on issues which concern Chinese positions in Hong Kong. Thus the Law Society changed its views on the Court of Final Appeal in 1995 from its position in 1991; and a number of leading firms were unwilling to take on the case for Martin Lee when he wished to sue a supporter of the PRC for defamation, the reason (overtly or covertly) being the reluctance to upset Chinese commercial firms with whom they might have had relations (the Lee ‘affair’ is discussed in various contributions in Wacks (ed.) 1994). It is also increasingly recognized that business success in China depends on connections, so that accommodations to Chinese positions are likely to be made by the profession.
INTRODUCTION

One of the least controversial issues during the negotiations for the Joint Declaration was the continuation of the legal and judicial systems of Hong Kong. Nor was there any contention on this point in the drafting of the Basic Law, except for the question of its interpretation. This ready acceptance of the Hong Kong system was no doubt based on the view (which the British side urged) that the legal system, and the principle of the rule of law underlying it, were the bedrock on which the economic success of Hong Kong was built. China was itself at this time modernizing its laws, and to a large extent looked to the system in Hong Kong as a model, at least in the special economic zones (Epstein 1993).

However, if there was wide agreement on the continuation of the previous systems, the method employed for it was complicated. This was due largely to Chinese preoccupation with sovereignty, which was considered to be affronted by a wholesale adoption of previous laws as some of these would be British laws (although logically China should also have objected to the continuation of laws made in colonial Hong Kong). The matter was also complicated by the technique that the Basic Law provides for the scrutiny of previous laws for consistency with the Basic Law. Another factor contributing to the complexity of the scheme was that the previous laws of Hong Kong had to be fitted within the Chinese legal and constitutional system, and since, given the scheme of the Basic Law, the PRC could not simply be substituted for the UK. The problems of continuity of the legal system could not therefore be handled quite as
easily as they were in former British colonies at independence.\(^1\) Ironically, the method China preferred required close and extensive cooperation with its adversary, Britain, if the system was to be made ready for operation on 1 July 1997. The principal vehicle for this cooperation was the Joint Liaison Group and the institution for reformulating the law was to be the Hong Kong legislature. Unfortunately the breakdown of Sino-British cooperation following Governor Patten’s constitutional reforms in 1994 meant that there was little progress, although there was no contention, for the most part, about the amendments that needed to be made. The pro-democracy complexion of the legislature elected in September 1995 also made the principal institution for doing so less acceptable to China.

Apart from the continuation of laws and judicial institutions, it is useful, if stability and prosperity are desired, to provide for succession to the territory and government (and therefore continuity of rights and obligations). Typically this has been done in former British colonies by a series of transitional provisions — the holders of offices are deemed to have been appointed or elected in accordance with the new constitution; the property and assets of the old government are vested in the new state; the rights, liabilities and obligations (including contractual) of the old government are made those of the new government; the jurisdiction of the courts in the new state are, subject to the new constitution and any law for the time being, to be exercised in accordance with the law which governed that jurisdiction before independence; all legal proceedings pending at the time of the transfer of sovereignty are continued; and all judgments given before independence enjoy the status of decisions of the corresponding court established by the new constitution. This method is not followed in the Basic Law, where there are explicit provisions for specific continuities, as for civil servants or judges, or for transactions.

This chapter examines the sources of the law in the HKSAR and discusses its continuities and discontinuities. It explores the difficulties that have arisen in the implementation of procedures envisaged for the transition of laws and institutions. It concludes with some speculation on the prospects of the survival of the of the common law.

The Basic Law provides for the laws that apply in the HKSAR. However, it is unclear whether the Basic Law establishes a complete

\(^1\) Typically all the laws (including relevant UK statutes) continue in force, with a proviso that they shall be ‘construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity’ with the new constitution. The head of the new state is given temporary powers to make minor and formal changes in the laws to bring them in conformity with the constitution. This way there are no gaps in the law. By and large it is left to the new legislature to reform and ‘indigenise’ the law if that is considered desirable.
regime of applicable laws. Chapter 4 examined the extent of the application of the Chinese constitution. It was argued that while the constitution must be the supreme law throughout the country, its application in the HKSAR is nevertheless determined by the terms of the Basic Law. The logic of ‘One Country Two Systems’ dictates that the constitution, enacted for a specific socialist economy and a one party communist political regime, should not apply except as provided in the Basic Law, the legal instrument for ‘One Country Two Systems’. For the same reason, it was argued that the validity of particular provisions of the Basic Law should not depend on the constitution; indeed as indicated earlier, the NPC has taken the same position.

Even if this difficulty can be cleared away, there remains some uncertainty as to the applicability of specific sources of law. This arises in part because of the overriding requirement that no law which is inconsistent with the Basic Law shall be valid and in part because of the modalities of the adoption of existing law. These difficulties will become apparent after the sources of the applicable laws have been described.

THE SOURCES OF LAW

The Basic Law

The sources of law are set out, principally but not exclusively, in art. 18. The highest source of law, apart from the Chinese constitution which is discussed later, is the Basic Law itself. Indication has already been given in Chapter 4 of the range of issues and matters dealt with in the Basic Law. The Basic Law is not only a source of law in itself, but it also regulates other sources, as it is the supreme law and ‘no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law’ (art. 11). Since many provisions of the Basic Law are open-ended or ambiguous, it is likely, as experience shows, that the provisions will be the subject of considerable discussion and litigation (for further discussion, see Chapter 5).

‘Laws Previously in Force’

The second source of the law is ‘the laws previously in force as provided for in Article 8’ (art. 18). Article 8 defines them as the common law, rules of equity, ordinances, subordinate legislation and customary law. This is
of course not a full definition of laws that applied in Hong Kong under British rule; however these are the laws that will be received in the HKSAR (on colonial sources of law, see Wesley-Smith 1994c to which the following section is heavily indebted). In order to examine the scope of previous laws that will apply, it is necessary to examine the manner and the scope of the reception of English law in Hong Kong.2

English law was formally received (or applied) in Hong Kong in 1844 by the Hong Kong legislature which was established in 1843, but a prior declaration had already applied elements of English law (Wesley-Smith 1988). However, the definitive statutory provision for the reception of English law was enacted in 1846 and substantially re-enacted in 1873 in section 5 of the Supreme Court Ordinance; it lasted for nearly a century, being replaced by the Application of English Law Ordinance in 1966. It provided that:

[s]uch of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.

Wesley-Smith has drawn attention to various aspects of this formula. It made no distinction between statutes, common law or rules of equity. The applicability of all of these laws was subject to them being not ‘inapplicable to the local circumstances of the Colony or of its inhabitants’, a matter presumably to be resolved by the courts. Changes to the common law or equity made by legislation before 1843 were received in Hong Kong but not those afterwards unless the legislation was expressly applied to Hong Kong. Post-1843 British statutes would not automatically apply, although as the common law is considered — according to the declaratory theory — to be merely revealed by court decisions, judicial changes in the understanding of the rules of common law would be applied. The formula empowered the local legislature to amend or repeal the received law, it being held that ‘modify’ covered both possibilities (R v Wong King-chau [1964] DCLR 106). The effect of the formula, therefore, was to provide a framework for the laws of Hong Kong, incorporating a vast amount of English law, but leaving it to the courts to decline to apply some law as unsuitable to local conditions, and more importantly, empowering the legislature to modify the received law and to develop the Hong Kong legal

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2 It is customary to refer to the establishment of English law in the colonies as ‘reception’. Reception suggests a willing assumption by the host community, as with German law in Japan or Western law in Turkey or Ethiopia. A more accurate term in the colonial context would be ‘imposition’.
system on these foundations. In due course a large corpus of local legislation, known as ordinances and regulations under them, was enacted.

The Application of English Law Ordinance, in an attempt to simplify the legal position and facilitate identification of applicable UK legislation, provided a new basis for the application of English law. Unlike the previous formula, it treated common law and equity differently from imperial statutes. The common law and rules of equity, which now no longer had even an apparent cutoff date, were to be in force subject to three conditions: 1. so far as they were applicable to the circumstances of Hong Kong or its inhabitants; 2. subject to such modifications as these circumstances may require; and 3. subject to any statutory amendment (whether imperial or local).

This gave the courts the power not only, as previously, to determine whether a rule of English common law or equity was applicable, but also to adapt it to local circumstances.

This formulation raised some doubts as to whether British statutes not applicable to Hong Kong could by their own terms modify the common law or equity that applied to Hong Kong, since presumably the courts had to apply the English common law. After it was held in Gensburger v Gensburger [1968] HKLR 403 that the common law is so modified, an amendment to the ordinance reversed the decision (Ordinance 58 of 1971). The formulation did not solve the problem of the effect on the common law of those pre-1843 statutes which were not listed in the schedule of the 1966 ordinance. It could be argued that a rule of the common law which was repealed or modified by a statute which is omitted is resuscitated as thereby part of the common law to be applied in Hong Kong. Such a conclusion, which would cause both confusion and inconvenience, was avoided by the Court of Appeal in Oceania Manufacturing Co. v Pang Kwong-hon [1979] HKLR 445, which held that a common law rule which had been abolished or modified by statute did not revive on the repeal of the statute. Thus, although there was no cutoff date for the reception of the common law under the ordinance, it was not easy to

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3 Imperial statutes were defined as ‘an enactment of the Parliament of England, the Parliament of Great Britain or the Parliament of the United Kingdom’ (sec. 2) — attesting to the historical sweep of imperial legislation.

4 Unlike as in the case of legislation, the ordinance does not specify that the common law and equity is to be English. However, the Interpretation and General Clauses Ordinance (1966, cap. 1) specifies that ‘common law’ means the common law of England (sec. 3).

5 For a discussion as to how far the courts applied the provisions for inapplicability as well as modification, (and the date for the applicability test) see Wesley-Smith 1994b: 131–140.
determine in a particular case what rule of the common law applies, contrary to the intentions of the promoters of the 1966 ordinance. Problems arose from the close inter-mingling of the common law with statute, as well as from the source of common law which is still England but not necessarily the current law.

Imperial legislation was divided into two principal categories. The first consisted of enactments, or parts of enactments, listed in the schedule to the ordinance; these were all pre-1843 statutes which were deemed to be necessary for Hong Kong (sec. 4(a)). This replaced the general incorporation of all ‘applicable’ pre-1843 statutes under the previous formula. The legislature could, by resolution, delete or amend any item in the schedule or add to it from any pre-1843 enactment or part of it (sec. 5). The acts were to be applied subject to such modifications as the circumstances of Hong Kong required (sec. 4 (a)). This constituted a particularly flexible regime for dealing with pre-1843 enactments; the scheduled items had already been reduced to 29 from 70 in 1966.6

The other imperial acts were those which applied by virtue of an Order in Council, any express or implied provision in an imperial act, or by an ordinance (sec. 4(1)(b)). Although there was no provision for their modification to suit the circumstances of Hong Kong as with scheduled acts, these enactments could be amended by an order, act or ordinance. (Presumably acts applied by an order or an act could not be modified previously by an ordinance unless covered by the Hong Kong (Legislative Powers) Orders of 1986 and 1989.) For the purposes of the Basic Law, as is shown below, it is important to make a distinction between imperial statutes which apply by virtue of an imperial instrument and those which apply by virtue of an ordinance.

**Imperial enactments**

Article 8 makes clear that not all previous laws are to be preserved. Somewhat anomalously the article refers to ‘laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subsidiary legislation and customary law’. This formula excludes an important source of laws in the ‘previous system’ — imperial acts or prerogative instruments. A considerable part of the law of Hong Kong was traditionally in the form of acts of the UK Parliament extended to Hong Kong or legislation

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6 They included the Habeas Corpus Acts 1679 and 1816, Charities Procedure Act 1812, Apportionment Act 1834, Libel Act 1792, various sections of Landlord and Tenant Acts, Fires Prevention (Metropolis) Act 1774 (secs. 83 and 86), sections of the Gaming Act 1710.
promulgated by the Queen (i.e., the UK government). There were various reasons for the use of imperial legislation. Many aspects of Hong Kong’s international relations were the responsibility of the UK and for this, as well as the additional reason that the legislature of Hong Kong was not deemed competent to legislate extra-territorially, matters like extradition, maritime matters, admiralty jurisdiction, merchant shipping, and civil aviation were dealt with through imperial legislation. Much imperial legislation was concerned with giving effect to treaties. The constitutional status and structure of the colony also needed to be provided for in imperial legislation. A third category included UK acts where it was deemed necessary to have an empire-wide policy (e.g., official secrets, extradition arrangements, etc.). In some instances it was just a matter of convenience. Altogether about 300 enactments fell into this category.

The result was that imperial legislation was woven into the fabric of Hong Kong law, so that Hong Kong’s legal system depended on it for its coherence and completeness. The decision to exclude imperial legislation from the corpus of the laws of the HKSAR was undoubtedly motivated by China’s dislike of reminders of imperialism as well as a concern with its sovereignty. Other former colonies have frequently decided to retain previously applied imperial legislation, not seeing in its continued application a derogation from their new sovereignty. The Chinese decision to exclude this category of legislation was taken at the time of the Joint Declaration, when it seemed that there would be ample time to ‘localize’ in the form of Hong Kong ordinances such imperial legislation as was deemed necessary. To facilitate this task, the UK Parliament passed an act in 1985 to enable the Queen to authorize the Hong Kong legislature by an Order in Council to repeal or amend any imperial legislation applying to Hong Kong as well as to make laws having extra-territorial operation (Hong Kong Act 1985, para 3 of the schedule). Three Orders in Council were passed under this act. The first is the Hong Kong (Legislative Powers) Order 1986 (SI 1298) which authorized the Hong Kong legislature to:
1. repeal or amend any imperial enactment ‘so far as it is part of the law of Hong Kong’ and
2. to make laws having extra-territorial operation if they related to civil aviation, merchant shipping or admiralty jurisdiction.

The second Order in Council (SI 153) was promulgated in 1989 and provided that the Hong Kong legislature ‘may, to the extent required in order to give effect to an international agreement which applies to Hong Kong, and for connected purposes:

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7 See Basic Law Consultative Committee, Reference Paper (1).
1. repeal or amend any enactment so far as it is part of the law of Hong Kong; and
2. make laws having extra-territorial operation’.

The third, in 1993 (SI 3145) added four topics to those in the 1986 order: fugitive offenders, intellectual property, protection of trading interests and outer space (see Wesley-Smith 1994b: 62–65 for a discussion of the act and the orders).

A special unit on the localization of laws was set up in the Legal Department in 1986; its remit was extended to the adaptation of laws after the Basic Law was promulgated. It was assumed that the powers to localize imperial legislation would be exercised in consultation with China through the Joint Liaison Group, although there is no legal requirement for it. A number of enactments were identified for localization in collaboration with the Chinese. About 150 acts were regarded as outdated and allowed to lapse. Proposals on the localization of numerous other acts were prepared by the Hong Kong government and submitted to China. A number of enactments were localized soon after the 1986 order, covering admiralty jurisdiction, merchant shipping, civil aviation and coinage, but progress on securing Chinese consent to subsequent proposals was slow from 1991 onwards due to difficulties in Sino-British political relations. Consequently it could not be stated with confidence that all the necessary legislation would have been localized before the transfer of sovereignty.\(^8\)

Apart from legislation expressly extended to Hong Kong by an imperial instrument, there were a number of UK enactments which applied in whole or more frequently in part. There are two bases for their application in Hong Kong. One of them is the Application of English Laws Ordinance which established a new basis for the reception of English law. The second basis was a large series of local ordinances and other instruments which incorporate provisions of UK acts;\(^9\) they also derived authority from the 1966 ordinance (sec. 4 (b)). Until the 1986, 1988, and 1993

\(^8\) It would have been possible in those circumstances to list them in the schedule to the Application of English Law Ordinance 1966 as part of the law of Hong Kong. See discussion of the ordinance below. However, this is not the path taken by the NPCSC (see Appendix 6).

\(^9\) Examples include the ‘law in force in England relating to jurors’ incorporated by sec. 37 of the Jury Ordinance, Courts Act 1971 by sec. 59(4) of the Evidence Ordinance, Naval Prize Act 1864 by the First Schedule to the Crown Proceedings Ordinance, Limitation Act 1980 by sec. 4(7) of the Limitation Ordinance, Insurance Companies Act 1974 by sec. 50(2) of the Insurance Companies Ordinance, the Army Act 1955 by sec. 2 of the Royal Hong Kong Regiment Ordinance, Offences against the Person Act 1828 by sec. 6 of the Offences against the Person Ordinance, Patents Acts 1949 and 1977 by sec. 2 of the Registration of Patents Ordinance and the Copyright Act 1956 by the Copyright Ordinance.
Orders in Council, the Hong Kong legislature could not amend or legislate contrary to the provisions of imperial legislation applied directly to Hong Kong, but it could modify or repeal legislation applied by reference. It would seem that since the latter statutes apply by virtue of a Hong Kong ordinance or other instruments, they could continue to apply without localization, although some of their provisions may be held inapplicable for inconsistency with the Basic Law (although the view of the NPCSC is that the Application of English Laws Ordinance itself is inconsistent with the Basic Law, see Appendix Six). Plans to review and localize the necessary acts before the change of sovereignty did not make much progress, although in 1993 (by Ordinance number 89) sec. 77 of the Interpretation and General Clauses Ordinance was amended to cut-off reception of British amendments after 1 January 1994.

The common law and rules of equity

Since the Basic Law preserves the common law and equity that existed ‘previously’, it could be argued that it is common law and equity as applied in England that becomes part of the HKSAR laws. As long as most of the common law was adjudicated under the supervision of the House of Lords and the Privy Council, it was possible to assert that there was a unified common law. The courts in the United States set off on a trajectory of their own after its independence, and the gradual abolition of appeals to the Privy Council from other parts of the former British empire led to a multiplicity of ‘common laws’. Although decisions of the House of Lords and the Privy Council command high respect in former colonies, it is no longer possible to talk of a universal system of the common law.

The question therefore arises as to what common law and equity will apply in the HKSAR? The Basic Law preserves the ‘common law and equity’ and not expressly the English law on these sources. However, the reference to ‘previously in force’ means that it is English law that applies. The Application of English Law Ordinance (now repealed by the NPCSC), applied the common law and equity, presumably of England, although that is not expressly stated (sec. 3). However, the Interpretation and General Clauses Ordinance defined ‘common law’ to mean the common law of England (sec. 3) (‘equity’ is not defined but in practice common law includes equity, especially since the merger of courts in England which previously administered the two systems of law separately). In

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10 The Privy Council held that the relevant law was English law, and consequently it (and therefore courts in Hong Kong) would be bound by the decisions of the House of Lords on points of English law (Tai Hing Cotton Mill v Liu Chong Hing Bank [1985] 2 All ER 945).
April 1998 the definition of ‘common law’ was changed to the common law in force in Hong Kong (Adaptation of Laws (Interpretative Provisions) Ordinance). In itself this does not change the previous position. Nor can it alter the effect of art. 8 of the Basic Law. Does this mean that decisions of superior English courts (including the Privy Council) will bind the HKSAR on a continuing basis? (For an erudite examination of this question, see Wesley-Smith 1993a.) The Basic Law authorizes the courts to ‘refer to precedents of other common law jurisdictions’ (art. 84) and enables judges to be recruited from other common law jurisdictions (art. 92) and to be invited to sit on the CFA (art. 82). Here there is clearly an intention to broaden the base of the common law (consistently with pre-transfer practice), but art. 84 also makes clear that decisions are to be made in accordance with the law as specified in art. 18, which indirectly refers to the English common law, the common law of other jurisdictions being only persuasive. Therefore it could be argued that the Basic Law establishes the English rules as the source of common law (this is the position taken by a District Court judge, Y v Y [1997] 3 HKC 43, although, as discussed below, it does not have the support of the CFA).  

This may not have been the intention of the drafters of the Basic Law, who wanted Hong Kong to have an independent base for its common law. Article 84, which allows reference to precedents of other common law jurisdictions, may be cited to show that the Hong Kong common law was intended to be contrasted with other systems, including the English. The practical consequences of the two position may not, however, be different for, as I argue below, the Court of Final Appeal, as the highest court of the HKSAR, would be free to depart from English precedents.

There are various factors that suggest that Hong Kong courts would be bound less rigidly by English precedents than before the transfer of sovereignty. First, the change of sovereignty may be seen to be inconsistent with continued subservience to outside courts; this seems incompatible with the establishment of a new legal order, even though it is the new order which decrees the persistence of previous rules. However, there is no reason to believe that only English courts can interpret the English common law or that they stand in a hierarchy over the Hong Kong courts. Second, the CFA

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11 There is also the question of the effect of the repeal of the Application of English Laws Ordinance on the definition of ‘common law’. The Ordinance was declared void by the NPCSC in its Decision under art. 160. The Court of Appeal in Ma held that the repeal had no effect on the substantive position since the legal basis for the application of the common law was much older. With respect the older bases were replaced by the Ordinance. The Court did not discuss the effect of the repeal on definition of the common law, but presumably since the older sources it referred to also referred to English law, the position remain the same as under the Ordinance.
will become the court of ultimate appeal (with the partial exception of the NPCSC). Most common law jurisdictions now provide for the highest court to depart from its previous decisions, if on mature consideration they are deemed to be wrong. Hitherto the Privy Council performed that role for Hong Kong; now the new final court must assume that responsibility, with the corollary that it is not strictly bound by any previous decisions.

Third, the English common law and equity was to be applied subject to three provisos:
1. so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
2. subject to any modifications as such circumstances may require; and
3. subject to any statutory amendments (sec. 3 of the Application of English Laws Ordinance).

Moreover, under the Basic Law common law is subject to the terms of the Basic Law. Privy Council or the House of Lords decisions from other jurisdictions will not have been based on these specific Hong Kong considerations, and therefore should not bind the HKSAR. It will be for the Hong Kong courts, and ultimately for the CFA, to fashion the common law to suit Hong Kong’s conditions. 12

As with the Basic Law, it is not customary on the transfer of sovereignty or the abolition of appeals to a particular court (as in relation to the Privy Council in a number of former British possessions) to regulate the effect of precedents binding in the previous regime by statutory provisions. 13 The rules on the binding effects of precedents are developed or adopted by the courts themselves. It is therefore useful to turn to the experience of countries which obtained independence or abolished appeals to the Privy Council to examine the options for the HKSAR and the likely response there (Wesley-

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12 The Privy Council has held that the courts in the countries from which it hears appeals must be given the power to develop the law to suit local conditions, of which they are the best judges. In an appeal from New Zealand, it upheld the decision of the Court of Appeal to depart from a decision of the House of Lords. The Privy Council said that when the New Zealand Court of Appeal was purporting to apply settled principles of English common law, it was its task to ensure that the law was applied correctly. But when the New Zealand Court was consciously departing from English case law, it was entitled to do so. It said, ‘The ability of the common law to adapt itself to the circumstances of the countries in which it has taken root, is not a weakness, but one of its strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other’ (Invercargill City Council v Hamlin [1996] 3 WLR 367 at 376).

13 A partial exception is Ghana which in 1960 made clear that the common law was not restricted to English rules (Interpretation Act 1960, sec. 17). The Papua New Guinea constitution provides that only English rules and principles of common law and equity immediately before independence would be applied in Papua New Guinea (Sch. 2.2).
In Africa, the new states have regarded as binding the decisions of the Privy Council or the House of Lords rendered before independence, but those afterwards as only persuasive (Allott 1970; Cottrell 1973). In Australia, after the abolition of appeals to the Privy Council, decisions of the Council were no longer regarded as binding by the High Court (the highest Australian court, *Viro v R* (1976–8) 141 CLR 88), on the basis that an existence of an appeal is inherent and essential to the doctrine of precedent. The High Court already asserted its right to disagree with the House of Lords, and been upheld by the Privy Council for its right to do so (*Geelong Harbor Commissioners v Gibbs Bright and Co.* [1974] AC 810). The reasoning of the Privy Council is interesting and pertinent to Hong Kong. It said that if the legal process is to retain the confidence of the nation, the extent to which a court exercises its right not to adhere to previous decisions must be consonant with the consensus of the opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as law makers — which the local courts were best able to assess. In Canada, likewise, the courts regard themselves no longer bound by the Privy Council or the House of Lords since the abolition of the appeal to the Privy Council (*Reference re the Agricultural Products Marketing Act* (1978) 84 DLR (3rd) 257). In Papua New Guinea the dominant judicial view is that the House of Lords decisions post-independence are binding if they overrule or modify a rule in existence at the time of independence, but not if the decisions create new law (*The State v Bisket Urangquae Pokia* [1980] PNGLR 97; *Re Petition of M T Somare* [1981] PNGLR 265; and *The State v Allan Woila* [1978] PNGLR 99) — a distinction which may be hard to sustain in practice but which shows at least that the Papua New Guinea courts feel the responsibility to establish their own rules.

It is therefore open to the HKSAR to regard only the pre-transfer decisions of the Privy Council and the House of Lords as binding, but with the right of the CFA to depart from them if it considers them wrong, and to regard future decisions as persuasive only. In this way the distinction between common law decisions from England and other common law jurisdictions will cease to be of much importance and the HKSAR will be able to draw upon a wide variety of sources to develop a uniquely Hong Kong common law.\[^{14}\]

\[^{14}\] In *Tang Siu Man v HKSAR* [1998] 1 HKC the CFA departed from a House of Lords decision. It assumed rather than argued that it was no longer bound by its decision. It discussed policy questions and and canvassed precedents from Australia and New Zealand before reaching its decision. Bokhary JA who dissented did so, not on the basis that the CFA was bound by the English decision (in fact he expressly stated that it was not) but on the cogency of the English rule (p. 405).
**Precedent Under the Hong Kong Common Law**

The primary responsibility for the adaptation of the common law to Hong Kong would rest with the Court of Final Appeal. In keeping with the practice of precedent, lower courts should follow decisions of higher courts. Unless the CFA refuses to follow a rule of the common law derived from English precedents, the lower courts (including the Court of Appeal) should be bound by them. Otherwise there would be considerable uncertainty as to the common law to be applied in Hong Kong. In other respects presumably the previous rules of precedent would apply. Thus judges of the Court of First Instance would be bound by decisions of the Court of Appeal but not by a decision of another Court of First Instance judge; *mutatis mutandis*, the District Court. The Court of Appeal would be bound by its own decisions, except for the exceptions under the rule in *Young v Bristol Aeroplane* [1944] KB 718, especially now that the Court of Final Appeal would be resident in Hong Kong (on the position as regards precedent in Hong Kong before the transfer of sovereignty, see Wesley-Smith 1994c: chaps. 4 and 5).

The Court of Appeal has followed the pre-transfer of sovereignty decision that the Court should regard itself bound by its previous decisions (*Ng Yuen-shiu* [1981] HKLR 352). In *Cheung Lai* (20 May 1998) the Court held that it was bound by its previous decision in *Ma*. Chan CJHC said that even if the Court were to change its mind on the correctness of a previous decision, it would still be bound by it (subject to certain exceptions which did not apply in that case, pp. 13–14). Nazareth V-P spelled out the circumstances in which the Court of Appeal would depart from a previous Court of Appeal decision, relying on *Young v Bristol Aeroplane Co. Ltd* [1944] KB 718). These are:

1. if there are two conflicting decisions, the Court may decide which one to follow;
2. it must refuse to follow the decision which, although not expressly overuled, cannot, in its opinion, stand with a decision of the Court of Final Appeal or a pre-July 1997 decision of the Privy Council; and
3. the court is not bound to follow a decision if it is given per *incuriam* (p. 21).

**Customary law**

Chinese customs and laws have always been part of the Hong Kong legal system, but the legal basis for their application has been less clear than that of the common law (Evans 1971; Wesley-Smith 1994c:205–224; Selby 1991; Strickland 1953). The sources of the application of Chinese
law are to be found both in the general imperial laws on dependencies and the specific provisions established for Hong Kong. The general imperial laws provide that for colonial dependencies that are ceded to the Crown (as Hong Kong and related territories were) the laws previously in force would continue to apply, unless changed by the laws of the incoming sovereign *(Campbell v Hall* (1774) 1 Cowp. 204 and *Sammut v Strickland* [1938] AC 678; Roberts-Wray 1966: 541–542). In that sense the earliest local authority for the application of Chinese law was perhaps unnecessary. When Captain Elliott took possession of Hong Kong in January 1841 pursuant to the Convention of Chuenpi, he issued two proclamations regarding the application of Chinese laws. In the first, native persons residing in Hong Kong were assured of the ‘free exercise of their religious rites, ceremonies and social customs’ and pending Her Majesty’s further pleasure, they would be governed ‘according to the laws, customs and usages of the Chinese (every description of torture excepted)’. The second proclamation was essentially a repetition of the first, stating that the ‘natives of Hong Kong and all natives of China thereto resorting’ shall be governed according to the laws and customs of China (‘every description of torture excepted’). Nevertheless, the proclamations were an emphatic pronouncement on the preservation of Chinese laws and even if Elliot’s power to issue them has been questioned (Evans 1971; Wesley-Smith 1994:207–208), the courts referred to them as authority for the application of Chinese laws (*Ho Tsz-tsun v Ho Au-shi* (1915) 10 HKLR 69). Elliot’s proclamations were not only consistent with the imperial rules about the preservation of indigenous laws on cession, but also in keeping with the British practice in other parts of Asia and Africa.

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15 For texts of these proclamations, see *Laws of Hong Kong*, revised ed., App. IV.
16 The exact status of Elliot’s Proclamation has apparently not been determined. The question is not without bearing on the application of Chinese customary and statutory law. In general, as discussed above, indigenous laws continues to apply in ceded territories until the new sovereign makes different provisions. However, there is some authority to the effect that the sovereign cannot disregard the terms of a capitulation or cession treaty which are ‘sacred and inviolable’ — *Campbell v Smith* 1 Cowp. 204 (1774); *Cameron v Kyte* (1835) 3 Knapp 332; *Sammut v Strickland* [1938] AC 678. The formal treaties between the UK and China in relation to Hong Kong, Kowloon and the New Territories did not contain any reservations for Chinese law, indeed the Treaty of Nanking gave Britain authority to govern Hong Kong by ‘such laws and regulations as Her Majesty the Queen of Great Britain etc. shall see fit to direct’ (art. III) and the Convention of Peking gave Britain ‘sole jurisdiction’ over the New Territories (with the exception of Kowloon City) (para 2) — although some specific land rights were preserved. However, this aspect of the *Campbell v Smith* doctrine goes against another well established aspect of imperial law — that the Crown is not bound by its treaty undertakings in respect of jurisdiction in ceded territories — examples of which in Hong Kong are furnished by *Re Wong Hon* [1959] HKLR 601 and *Winfat Enterprise (HK) v Attorney-
As has been indicated, a more definitive regime of law was established when a legislature for Hong Kong was established in 1843, providing for the reception of English law except so far as it was "inapplicable to the local circumstances of the Colony or its inhabitants, and except so far as they have been modified by laws passed by the legislature". Under this formula Chinese law, as pre-cession law, would apply only when English law was held inapplicable — a shift from the more positive approach of Elliot. This formula (and its subsequent modifications) has been the juridical basis for the application of Chinese law. This was the authority for retaining most of the indigenous law on personal matters, including family and property relations. Apart from this general formula (under which the scope for the application of Chinese law was likely to shrink progressively), there are specific provisions for the application of Chinese law. The best known of these is the New Territories Ordinance (originally enacted in 1910), section 13 of which provides that in any proceedings in the District or High Court in relation to land in the New Territories, ‘the court shall have the power to recognize and enforce any Chinese custom or customary right affecting such land’. Other instances of specific recognition of the application of Chinese custom and law include the Protection of Children and Juveniles Ordinance, the Adoption Ordinance, the Fatal Accidents Ordinance, the Law Amendment and Reform (Consolidation) Ordinance, the New Territories Leases (Extension) Ordinance, the Marriage Reform Ordinance, and the Legitimacy Ordinance.

The reference to pre-cession rules is frequently in the form of words ‘Chinese law and custom’ but sometimes to ‘custom’ or ‘customs’ only as well as ‘usages’. For the most part no significance has been placed upon these distinctions. When the UK acquired Hong Kong or the other territories that came under British rule, Chinese law consisted of Qing...
Codes as well as customary law or practices. The latter varied from place to place while the Codes applied throughout the Chinese Empire. On the whole, the Codes were concerned with matters of public law and punishments, while what we would call private law was the domain of custom.24 The courts have held that Chinese law and custom would be enforced only if it existed in the particular locality at the time Britain acquired the territory where it was situated. (For a discussion of the temporal aspects of Chinese law and custom, see Wesley-Smith (1994:218–222).) Such a date is necessary to establish Chinese statutory law, but its application to customs rests, it would seem, on a misunderstanding of the nature of custom. The approach taken by the courts ossifies custom as at the time of the acquisition of territory by the British, while the essence of custom is change and adaptability to new circumstances. The Marriage Reform Ordinance strikes a curious compromise: while it defines custom as that which would have been applicable immediately prior to 5 April 1843 (sec. 2), it also provides that a customary marriage shall be deemed to be in accordance with Chinese law and custom if was celebrated in ‘accordance with the traditional Chinese customs accepted at the time of the marriage as appropriate for the celebration of the marriage . . .’ (sec. 7(2)). In practice, accepted custom at the time of the transaction has been taken as valid.

For the most part, however, the legislature, rather than the courts, has been the primary agency for the adaptation of Chinese law and custom. Over decades of colonial rule, the life-style of the Chinese in Hong Kong changed so drastically that only legislation would provide a satisfactory basis for adaptation. Major changes were made to the scope of the application of Chinese law and custom during legislative reforms in 1971, principally the Marriage Reform Ordinance which abolished prospectively Chinese customary marriages, the Adoption Ordinance, the Married Persons Status Ordinance, the Matrimonial Causes (Amendment) (No. 2) Ordinance (1972) and the Matrimonial Proceedings and Property Ordinance (1972), the Intestates Estates Ordinance, and the Deceased Family Maintenance Ordinance. These ordinances displaced Chinese law by concepts and principles of English law, introducing monogamy and the Western idea of family (Evans 1973:11–13). Thus today it is only in the New Territories that Chinese law and custom is important, and that mainly

24 See, however, the case of In re the Estate of Ng Shum (No.2) [1990] 1HKLR 67 where the High Court (Liu J) held that even though treating the second wife as equal to the first was justified by custom in southern China, it was contrary to the Qing Imperial Code, and therefore the second wife could not be treated on the same basis as the first wife under Hong Kong law of intestacy. This appears to be the only reported case on the conflict of Chinese customary and statutory laws.
in relation to land. Even there legislative inroads have been made recently, especially with the abolition of the rule which disentitled women to succeed to land rights (New Territories Land (Exemption) Ordinance 1994).

The Basic Law appears to give a new lease on life to Chinese law and customs. However, it is important to note that the Basic Law preserves ‘customary law’ rather than ‘Chinese law’, so that remnants of the Qing imperial codes would cease to apply. Apart from the general provision of art. 8, customary law is expressly preserved in art. 40 which says that the ‘lawful traditional rights and interests of the inhabitants of the “New Territories”’ shall be protected by the HKSAR’, which would need to be determined by reference to customary law or administrative practices.

The recognition of customary law in the Basic Law and the fact that Hong Kong will become Chinese territory suggests that, at least theoretically, the mode of proof of customary law may also change. Currently Chinese law is proved as foreign law, that is, it has to be proved as a matter of fact, principally with the help of expert witnesses and recognized texts. This method may seem inappropriate after the transfer of sovereignty. However, for practical purposes the difference may not amount to much, for two reasons: most judges will continue to be untutored in customary law and may need ‘expert’ assistance, and even under the present system, judicial notice may be taken of a rule which has been frequently adopted by the courts.

The Scope of the Reception of Previous Laws

Definition of ‘previously’

Before we proceed to look at other sources of law, it is necessary to establish precisely what part of the acceptable sources of previous laws actually apply. Three matters need to be considered. The first is the meaning of the expression ‘laws previously in force’ which appears in arts. 8, 18 and 160. Its most natural meaning would appear to be the laws which applied on 30 June 1997. However, various arguments have been advanced by either the Chinese authorities or the members of the Preliminary Working

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25 Wesley-Smith has argued that even customary law, which became applicable in Hong Kong due to the general British imperial rule that pre-cession law remains unless displaced, will cease to have effect since there will nor longer be the reception of English law. But the basis of the application of customary law in art. 8 is its applicability ‘previously’, and so it would survive the explicit abolition of the reception of English law (as Wesley-Smith concedes; 1988:176–177).

26 See Chapter 10 for a discussion of what these rights are.
Committee and the Preparatory Committee that the reference is to earlier dates. At least two other contenders are the time of the conclusion of the Sino-British Joint Declaration (1984) or the adoption of the Basic Law (1990). These arguments have been made most explicitly (although not exclusively) in the context of the debate about the survival of the Bill of Rights Ordinance and associated legislation (see below) beyond 30 June 1997 (Wu 1995). This discussion will therefore focus on that issue.

One Chinese argument against the validity of the Bill of Rights Ordinance (BORO) is that it has affected fundamental changes in the legal and political system of Hong Kong. Various laws have been held to be invalid as a consequence of its enactment, and some key legislation has been amended to remove administrative controls over rights of assembly, procession and association, and to regulate the powers of the Independent Commission Against Corruption.27 The BORO has also altered the balance between the judiciary on the one hand and the legislature and the executive on the other. It has been alleged that these changes violate the provision (and understanding) of the Joint Declaration that ‘the laws currently in force in Hong Kong will remain basically unchanged’ (art. 3(3)) and that ‘the current social and economic systems in Hong Kong will remain unchanged, and so will the life-style’ (art. 3(5)). The Basic Law also has several references to the maintenance of previous laws and systems (e.g., arts. 5, 8, 18, 19, 40, 65, 81, 86, 87, 91, 94, 144, 145). The strongest evidence that the Chinese authorities have presented for fixing the laws as in 1984 is art. 3(3) of the Joint Declaration, where the word ‘currently’ is used. The word currently should, however, be read in the overall context of art. 3(3), which is the establishment of the HKSAR (and suggesting 30 June 1997 as the more appropriate date). Moreover, the elaboration of that general principle in Annex I, section II reinforces this interpretation. The expression there is ‘previously’, as in the formulation that ‘After the establishment of the Hong Kong Special Administrative Region, the laws previously in force . . . shall be maintained’.

A related allegation is that the BORO and its consequences have seriously weakened executive authority, and thus violate the Basic Law principle of an ‘executive led’ political system. A special concern with the weakening of the executive is that it would threaten the ‘prosperity and

27 One can trace the development of this through the Bill of Rights Bulletin, edited by Andrew Byrnes and Johannes Chan (started in 1991). See also Byrnes 1997.

Laws passed in order to achieve compliance with the Bill of Rights include: Crimes (Amendment) Ordinance 1991; the Police Force (Amendment) Ordinance 1991; the Independent Commission Against Corruption Ordinance 1991; Societies (Amendment) Act 1991; Crimes (Amendment) Ordinance 1993; and Public Order (Amendment) Ordinance.
stability’ of Hong Kong, aims identified both in the Joint Declaration and the Basic Law.\textsuperscript{28}

These arguments are not very persuasive. The Basic Law has itself preserved expressly many features of the ‘previous system’ (especially in providing a powerful executive, and in the economic and social systems). ‘Executive led’ is not a term of art, and its structure and implications are to be gathered from the specific terms of the Basic Law, rather than from other modes of interpellation or arguments from principles. References to ‘previous laws’ or ‘systems’ are used in the Basic Law with varying effects: in some instances they are intended to entrench a previous law (as with the rights in civil and criminal trials, art. 87); in other instances they are to provide guidance to the HKSAR (e.g., art. 108, low tax policy); sometimes they are to indicate broad parameters of policies or relationships (as with education or the role of non-governmental organizations).

The provision in the Joint Declaration for the preservation of laws ‘currently’ in force is a guarantee that the Central Authorities would not upset these laws, not that the Hong Kong legislature may not alter them. Nor is the Basic Law a charter for the complete conservation of old laws and institutions. It establishes, for Hong Kong, an ambitious political agenda whose implementation requires fundamental changes from the old colonial system both during and after the transitional period. More generally, it is important to distinguish essentials from mere matters of detail, and the essentials are to be gleaned from the General Principles in the Basic Law and China’s Basic Policies to Hong Kong from the Joint Declaration. It will be clear from them that the protection of human rights is fundamental to both. The Basic Law guarantees many rights and entrenches the ICCPR (art. 39). The enactment of the Bill of Rights Ordinance and the revision of various laws, far from undermining the logic of the Basic Law, is in strict conformity with and furtherance of its objectives. It may be that the implications of the Joint Declaration and the Basic Law in this regard were not fully appreciated at the time (the Chinese may have been misled by traditional British claims that the ICCPR

\textsuperscript{28} It is unclear how far it is argued that laws which do not contribute to ‘prosperity and stability’ are void. If this position were maintained, it would contribute to uncertainty about the validity of laws. Some governments in Asia, particularly China, consider that stability comes from authoritarianism, but others think that stability comes from democracy and rights. An analogy may be drawn with the Letters Patent which grant the legislature the authority to make laws for the ‘peace, order and good government’ of the territory (sec. VII (1)). It is well recognized that no law may be challenged on the basis that it does not contribute to these goals. See Roberts-Wray: 369–370 and Riel v R (1885) 10 App. Cas. 675 and Croft v Dunphy [1933] AC 156.
was already implemented through the common law and ordinances), but that is a different kind of argument.

The argument that the decisive date is 1984 (or even 1990) will place Hong Kong in a strait-jacket which is hardly appropriate for a changing and dynamic society. A great many laws of the most fundamental nature — e.g., amendments to the securities legislation, privacy, equality — have been made without eliciting much Chinese opposition. If these laws are valid, then what is the basis for deciding on the validity of post-1984 laws? If the test is whether the laws have ‘basically changed’, it will provide no real guidance, and introduce a large element of subjectivity. Since there is also some doubt about the modality of determining whether a law is inconsistent with the Basic Law, the uncertainties are greatly aggravated — hardly an appropriate basis on which to found the legal system of the HKSAR.

China has also sometimes argued that post-1984 laws on which China has not been consulted are suspect and liable to be repealed on the transfer of sovereignty. The juridical basis for this claim is unclear. It might have been good political practice for Britain to consult China on legislative proposals, especially on matters which China was likely to regard as sensitive, but there is little legal authority for the proposition that such legislation would be invalid after 30 June 1997. There is indeed provision for consultations between China and Britain on the implementation of the Joint Declaration and ‘matters relating to the smooth transfer of government in 1997’, for which purpose a Joint Liaison Group (‘JLG’) is set up (art. 5 and Annex II). Although the issues for the JLG are not exhaustively stipulated in the Annex, one of its principal concerns is to ensure that the HKSAR succeeds to treaties that Britain has signed for or extended to Hong Kong. Questions of the adaptation and localization of laws have also been discussed. But there is no provision that such consultations are necessary to the validity of legislation, and the Joint Declaration clarifies that the responsibility for the administration of Hong Kong (and that must include the legislative function) remains with the United Kingdom until the transfer of sovereignty (art. 4). Nor does the Basic Law make consultations on post-1984 legislation a pre-condition for validity beyond 1997. On the other hand, as the HKSAR Court of Appeal has recognized, an agreement in the JLG cannot by itself change the Basic Law (see Chapter 5).

It cannot be said that the position is clear now, a year after the resumption of sovereignty. In *Ma* the Court of Appeal held that the date of reception of previous laws is 30 June 1997. Chan CJHC, dismissing a contrary argument by the respondents, said ‘this point is beyond argument’. He went on to say, ‘The cut-off date cannot be the date of the Joint Declaration. It was only a treaty and a declaration of intent. It cannot be
date of the promulgation of the Basic Law since it was then stated to take effect on a future date’. ([1997] 2 HKC 315 at p. 329).

Although the decision of the Court of Appeal is eminently sensible, it is not easy to square it with the opinion of the NPCSC. Although in its decision under art. 160 (see below), the NPCSC did not specify a cut-off date, its repeal of some of the laws (e.g., sections of the Bill of Rights, Public Order and Societies Ordinances) could only be justified on the presumption of a cut off date earlier than their enactment. Such a view is consistent with the pre-transfer position of Mainland officials discussed in preceding paragraphs. The Hong Kong Reunification Ordinance passed to give effect to the NPCSC Decision does not clarify the position; it merely repeats the wording of art. 8 of the Basic Law (s. 7).

Consistency of previous laws with the Basic Law

The second main issue regarding the survival of ‘previous’ laws concerns their consistency with the Basic Law (art. 8), for laws inconsistent with it are invalid and may be declared repealed by the NPCSC on the establishment of the HKSAR or subsequently in accordance with the Basic Law (art. 160). This proviso applies to all elements of previous laws, including the common and customary law. It is likely to be significant since the Basic Law defines in some detail the ‘systems’ for the HKSAR, covering not only the rights of residents, but also numerous economic and social policies. In addition, the scope of laws that may legitimately be made by the Hong Kong legislature is uncertain as the division of responsibilities between it and the PRC is unclear (a detailed discussion of these issues is contained in Chapter 4). Although the scope of customary law has been narrowed, there may be laws in the New Territories that offend the Basic Law, particularly its guarantees of equal rights since the position of women is subordinate to that of men under many rules.29 The task in relation to the common law and equity is even more daunting. At one stage it was proposed by the PWC that every rule of the common law would be scrutinized before the transfer of sovereignty so that the NPCSC would be able to declare void the offending ones — although the project was abandoned in view of the enormity of the task (personal information).

It is in relation to statute that the proviso is likely to be most significant. Hence the need for the adaptation of ordinances and regulations that has

29 It is unlikely that art. 40 which protects the ‘lawful’ traditional rights and interests of the indigenous people of the New Territories would preserve discriminatory rules as they have to be ‘lawful’, which perhaps make them subject to the general principle of equality (art. 25).
already been discussed. Many of the necessary changes are technical, replacing colonial titles etc. with designations under the Basic Law, but some have policy implications and others depend on a proper understanding of the respective responsibilities of the HKSAR and the PRC. There were four basic tasks in the adaptation of laws:
1. removing any implications of British sovereignty;
2. removing anything that infringes Chinese sovereignty, as for example when China is referred to as a foreign state;
3. inserting Basic Law terminology in place of Letters Patent terminology, as for example replacing references to the Governor by Chief Executive; and
4. recognizing institutional changes, for example titles of judges, names of courts, etc.

The initial review of the compatibility of laws was undertaken by the Preliminary Working Committee in 1994 and 1995 which took a much broader view of ‘compatibility’ than merely legal validity. It recommended that 26 ordinances should be repealed in their entirety and 12 partially. These included six amendment ordinances that had been passed to bring the primary ordinances into conformity with the Bill of Rights Ordinance, although the Bill of Rights Ordinance was to be kept except for provisions dealing with its effect on other legislation. No reasons were given why the PWC considered that these ordinances were inconsistent with the Basic Law. Looking through the ordinances, it is clear that the PWC was more concerned with policy issues than with establishing inconsistencies with the Basic Law. Indeed it was clear that the PWC had not fully examined the consequences of its recommendations, which would cause serious gaps in the law and procedures. The legal sub-group of the Preparatory Committee (whose membership was broadly similar to that of the legal sub-group of the PWC) reduced the list to 16 ordinances for total repeal and 9 for partial. Among those listed for total repeal were the Public Order and Societies Ordinances, and three sections of the Bill of Rights Ordinance. As with the recommendations of the PWC, these recommendations, essentially politically motivated, showed little understanding of the Basic Law or the laws that were targetted for repeal. The recommendations ran into considerable public criticism, locally as well as abroad, particularly in relation to the protection of human rights. The subsequent responses of the Chinese authorities as well as their supporters in Hong Kong were confused and could not be supported in terms of either the Joint Declaration or the Basic Law. The consensus that seemed to be emerging was to keep most of these laws intact, and leave it to the provisional or the first legislature to decide on future policy.
The NPCSC made its decision under art. 160 on 23 February 1997 following the advice of the Preparatory Committee (the Decision is reproduced in Appendix Six). It was somewhat surprising that a decision should be made so much in advance of the resumption of sovereignty, but the timing may have been influenced by the need to give the Provisional Legislative Council time to make the necessary adjustments in the law to come into effect on 1 July 1997. The Decision does more than repeal laws; it also provides some kind of a framework for the modification of laws which are adopted. It contains a great deal more than one might have been expected when art. 160 was drafted, principally due to the slow progress on adoption and localisation of laws before the resumption of sovereignty due to the unwillingness of the Chinese government to use the mechanism of the JLG for this purpose.30

The Decision starts by adopting previous laws. It then states how far the previous laws are to be qualified. It lists ordinances that are to be repealed in their totality (Annex 1) or in respect of which some sections only are to be repealed (Annex 2). Thirdly, it establishes a general rule that when there is a conflict between national laws applied in Hong Kong and a Hong Kong law on foreign affairs, the national law shall prevail (art. 4(1)).

Fourthly, it provides some general principles for the modification of laws or itself modifies some laws (art. 4(2)-(5)). It states that previous laws are to be ‘applied subject to such modification, adaptation, limitation or exceptions’ as are in line with Hong Kong’s new status or are necessary to conform to the relevant provisions of the Basic Law. It goes on to say, ‘For example, the New Territories Land (Exemption) Ordinance should comply with the above principles in its application’.

Fifthly, the Decision enacts some rules for the interpretation of laws which are adopted (art. 4 and Annex 3):

(a) It repeals provisions conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions relating to reciprocal arrangements between Hong Kong and them.
(b) It adopts any provision relating to the rights, exemptions and obligations of British military forces stationed in Hong Kong which do not contravene the Basic Law and the Garrison Law and applies them to PRC military forces stationed in Hong Kong.

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30 The Chinese delegate to the JLG defended the Chinese refusal to discuss the adaptation of laws by saying that the adaptation was a matter of sovereignty; it was ‘entirely an internal matter’ which should be ‘solved by China on its own’ (Mr Guo Fengmin quoted in SCMP on 25 October 1994).
(c) It states that laws which may give a superior status to the English language over the Chinese language ‘are to be construed as providing that both English and Chinese languages are to be official languages’.
(d) It authorises continuation of any provision applying any English law ‘as a transitional arrangement’ pending amendment by the HKSAR, so long as it is not ‘prejudicial to the sovereignty’ of the PRC or inconsistent with the Basic Law.

Sixthly, it sets out some rules for the substitution of ‘names, terms and expressions’ which appear in adopted law; the rules are set out in Annex 3 and are for the most part straightforward (e.g., ‘Governor’ being replaced by ‘Chief Executive’). However, less clear is the provision whereby references to ‘Her Majesty’, ‘Crown’, ‘British Government’ or ‘Secretary of State’ or similar expressions are to be replaced either by Central People’s Government or appropriate PRC authority, or by the Government of the HKSAR, depending on which of them has responsibility for the matter in question.

**Repealed Laws**

These are discussed briefly since they define the scope of previous laws which are adopted (for a more detailed discussion, see pp. 491–498 of the first edition of this book). 14 ordinances are repealed in their totality. It is possible to provide only a brief summary of the consequences of the repeal of the more important of the ordinances. The effect of the repeal of three ordinances dealing with elections (items 12–14 in Annex I) is to remove all provisions relating to the machinery for elections, providing a clean slate for the Preparatory Committee and the provisional legislature.

So far as the legal system is concerned, the repeal of the Application of English Law Ordinance is particularly significant (although the Court of Appeal did not think so in *Ma*). Another aspect of the decision about the Ordinance concerns the repeal of the English/British acts listed in its schedule. Many of the acts have little significance today, but two of them were still relevant. They deal with the writ of *habeas corpus*. However, their repeal does not eliminate redress against unlawful detention, since the Basic Law and the Bill of Rights provide relief against unlawful detention. In anticipation of the repeal of *habeas corpus* acts, the Hong Kong administration sponsored the passage of the Supreme Court (Amendment) Ordinance which has localised the provisions of these acts.

More serious are the repeal of specific sections of Hong Kong ordinances and regulations in Annex II, of which there are ten. Four concern provisions relating to elections to District and Municipal Councils, three of which implemented the Patten reforms, and the fourth established
rules against corruption in these elections. Some diminish protection for rights (which are discussed in chapter 10).

**General Comments**

The Decision does not succeed fully in its task, which is to clarify the scope of the application of previous laws. Its language is vague and it uses concepts (like sovereignty) whose precise meaning or reach is not self-evident, yet the operation or modification of laws is dependent on them. So one cannot be sure how some laws are to be modified. There appears to be no consistency of principle. Article 4(5) of the Decision continues in force English laws which are incorporated by reference by other ordinances but repeals those incorporated by the Application of English Law Ordinance. Again, the substantive provisions of the Bill of Rights are maintained, but changes in some laws which were intended to bring them into conformity with the Bill of Rights have been repealed.

The second general comment is that the NPCSC appears to have exceeded its jurisdiction under art. 160. Its function is to declare if any laws are inconsistent with the Basic Law, not to add to these laws or to modify them. Yet the NPCSC has modified various laws. The task of modifying the law is the responsibility of the HKSAR legislature only.

Thirdly, no reasons are given for declaring laws invalid, either in the Decision or an accompanying statement. It seems clear that many of the laws declared invalid are not inconsistent with the Basic Law. It would appear that they have been declared invalid simply because Chinese authorities do not like them. Indeed it could be argued that some of the repeals are themselves against the Basic Law (particularly those dealing with rights). Because the bases of particular repeals are not stated, the Decision is no guide for determination of questions regarding the validity of adopted laws that may arise in the future. For example, the justification for the repeal of some laws (especially those relating to rights) is that they were passed after 1984, thus violating the stipulation that ‘previous laws will remain basically unchanged’. This ruling puts into doubt many other laws passed after 1984 and which represent fundamental departures in the system as at that time. That the NPCSC considers that not all laws identified for repeal in the Decision are necessarily valid is implicit in art. 6 which repeats the Basic Law provision that if they are later ‘discovered’ to be in contravention of the Basic Law, ‘they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law’.

Fourthly, the Decision suggests that the NPCSC or their advisers may not have fully understood aspects of the common law or the principles of
the previous legal system (as for example in its view of the superior status of certain ordinances).

Finally, many issues of applicable laws or the extent of adopted laws are left open. The NPCSC was unable to make up its mind about the New Territories (Exemption) Ordinance (which removes certain discriminations against women in the New Territories due to competing lobbies), and consequently chose to place it in art. 4, which requires laws to be applied subject to modifications, etc., thereby leaving the question of its validity unresolved. Other laws are made subject to ‘Chinese sovereignty’, which does little to clarify matters. The Decision repeals ‘major amendments’ to Societies and Public Order Ordinances without identifying these amendments. The HKSAR has tried to remove the resulting uncertainty by specifying in the 1997 ordinances repealing some of the earlier amendments that, subject to the provisions of amending ordinances, the ordinances shall ‘continue to have legal effect’, s. 17 of the Societies (Amendment) Act 1997 and s. 15 of the Public Order (Amendment) Act 1997 — although the effect of such clarification is itself uncertain. Some laws are adopted in so far as they do not contravene the Basic Law, which is equally unhelpful as there is no identification of the contraventions (which presumably was the task of the NPCSC under art. 160). It is therefore possible to view the Decision, at least in part, as providing the general framework for further work on adaptation and localisation. Indeed several laws have been passed by the HKSAR to implement the Decision.

The Hong Kong Reunification Ordinance

Effect to various parts of the NPCSC Decision was given in the Hong Kong Reunification Ordinance passed by the Provisional Legislative Council in the early hours of 1 July 1997. Even before its passage, the Provisional Legislative Council had enacted or amended several ordinances, such as the Societies and Public Order Ordinances, to remove or replace provisions which the NPCSC had declared void. These were adopted in the Reunification Ordinance to remove any doubts about their validity since they were enacted before the resumption of Chinese sovereignty over Hong Kong.

The Reunification Ordinance reproduces the NPCSC rules on the modification of laws and on the construction of particular terms (in Part IV). Since then the legislature has continued the task of adaptation of laws (see for example the Adaptation of Laws (Courts and Tribunals) Ordinance, the Adaptation of Laws (Crown Land) Ordinance, and the Adaptation of Laws (References to Foreign Country, etc), all in 1998). Major progress was made with the enactment of the Adaptation of Laws
Sources of Law

Modality of preserving ‘previous laws’

The third issue is the modality for preserving ‘previous’ laws. The first question is whether a formal act of ‘reception’ of previous laws is necessary. Article 160 says that ‘laws previously in force’ shall be adopted. Some scholars suggested that a formal act is necessary (Wesley-Smith, 1988: 174; and Wacks 1993: 152–153) (and the Preliminary Working Committee impliedly endorsed this interpretation in its suggestion for a proclamation by the NPC). Under art. 160 the NPCSC has the power, upon the establishment of the HKSAR, to declare certain laws invalid if they are inconsistent with the Basic Law. Although for this purpose the NPCSC is not advised by the Basic Law Committee of the NPC, the power to declare a law invalid is limited to the laws inconsistent with the Basic Law, that is, not just because the NPCSC disapproves of them. (This may not be immediately clear from the ambiguous language of the article which says that ‘laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee declares to be in contravention of this Law’.) However, the second sentence of the article (‘if any laws are later discovered to be in contravention of this Law’) makes evident that an objective test of inconsistency is intended.

It would seem that there is no requirement of an express adoption of previous laws by the NPCSC. Articles 8 and 18 are quite explicit on this point; they provide for the automatic continuation of these laws, subject to their consistency with the Basic Law. Article 160 deals with the narrower

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31 One provision of the last mentioned adaptation ordinance caused a major controversy. Under the previous laws, legislation was not binding on the Crown unless it provided for application to the Crown expressly or by necessary implication. The Crown covered the British government as well as the Hong Kong government. The word Crown was now replaced by State (s. 66). State is defined to include Chinese President, Central Authorities and subordinate organs of the Central People’s Government exercising executive functions on its behalf. This amendment was criticised as it was deemed to exempt the New China News Agency (Xinhua) from a large number of laws. The government was able to secure the approval of the provisional legislature on the condition that it would review those laws which did not bind the ‘State’ with a view to removing the exemption when appropriate.

32 The NPC has authorized the establishment of a standing committee of its Standing Committee (consisting of an equal number of members from the mainland and the HKSAR) which must be consulted by the Standing Committee before it declares any law passed by the HKSAR to be invalid on grounds of inconsistency with the Basic Law (the committee will be appointed only after the Basic Law has come into force) (art. 18). (For details see Chapters 4 and 5.)
question of how to establish inconsistency. This misinterpretation, in my view, arises from the use of the word ‘adopt’ in art. 160 in the English version. The Chinese version makes it clear that no formal adoption is required. The Court of Appeal has now held, in the Ma case, that no formal act of adoption is necessary as arts. 8 and 18 make clear that the Basic Law itself makes previous laws part of the laws of the HKSAR. While this is undoubtedly correct, it is not clear that the NPCSC takes the same position. Its Decision under art. 160 expressly adopts previous laws (art. 1). It may be that the NPCSC was merely reiterating the effect of art. 8, rather than making a decision of its own on this point (as Nazareth V-P, quoting an article by me, considered in Ma). However the Decision says clearly that the NPCSC ‘decides’ to adopt previous laws. The inclusion in the Reunification Ordinance of a provision maintaining previous laws (s. 7) may reflect the view of the HKSAR government that the Basic Law had not intended to provide for automatic adoption.33

It would also seem that the NPCSC must make this decision at the time of the transfer of power. After that the repeal (‘cease to have force’) or amendment of laws inconsistent with the Basic Law must be in accordance ‘with the procedure as prescribed by this Law’ (art. 160, second sentence). It could of course be argued that ‘procedure as prescribed by this Law’ refers to art. 160 itself. But this would be an awkward way to state that intention as reference could be made to the preceding sentence, or indeed the preceding sentence could have been differently and comprehensively worded. Nor is this view sound on policy grounds, for it would produce a continuing uncertainty about the status of ‘previous’ laws, regardless of their subject matter. Furthermore, such continuing power for the NPCSC would be incompatible with the general purpose of the Basic Law to provide a high degree of autonomy of the HKSAR and to put firmly in place a new legal order. It may also be incompatible with art. 158.

33 There has also been some controversy about the continuity of rights and obligations from the previous regime. One issue in Ma was whether the indictment under which the respondents were charged during the British period was valid in the HKSAR. Article 160 states ‘Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid . . .’. The court held that a principal theme of the Basic Law (and the Joint Declaration) was continuity and stability, which was reflected in art. 160. There is no doubt about the correctness of this decision, but China itself had cast doubts on the validity of certain obligations, particularly contractual, of the government persisting beyond 30 June 1997. Perhaps the government of the HKSAR shared this apprehension also as the Reunification Ordinance provided for the continuity of legal proceedings and of the judicial system more generally (see Part VI). The Basic Law is less than systematic in its provisions for continuity and succession from the old regime (see pp. 497-8 of the previous edition).
After the establishment of the HKSAR, the determination of invalidity would therefore be governed by the normal procedures for declaring a law, once fully enacted, invalid. That procedure is set out in art. 158 which deals with the interpretation of the Basic Law (and has been examined in detail in Chapter 5). A question of inconsistency of a law with the Basic Law will of necessity involve an interpretation of one or more of its provisions. Article 158 divides the responsibility for the interpretation of the Basic Law in such a way that, broadly speaking, the NPCSC will be concerned with the validity of laws that concern the relationship between Hong Kong and Central Authorities while the HKSAR courts will look after laws that are within the autonomy of the region. In general, the issues of the validity of particular laws will arise in the context of actual litigation, a mode of interpretation that suits the common law style.

**The power of the HKSAR legislature to deal with ‘previous’ laws**

In accordance with the Joint Declaration (sec. II, Annex I), the Basic Law provides that previous laws remain in force subject to any amendment by the HKSAR legislature (art. 8). It is thus clear that these laws can be changed. The scope of permissible amendment may in some cases be determined by other provisions of the Basic Law, e.g., guarantees of rights or prescription of fiscal policies. But it may be, and has been, argued that the word ‘amendment’ means that laws cannot be repealed, merely altered. It may be possible to distinguish amendment from repeal (and there is some common law precedent on this distinction). Moreover, it should be noted that in art. 73, which deals more generally with the powers of the Legislative Council, a distinction is made between ‘enact, amend or repeal’ laws, suggesting that ‘amend’ has a restricted meaning in art. 8. This conclusion might be deemed to be consistent with the statement in the Joint Declaration that ‘laws currently in force in Hong Kong shall remain basically unchanged’ (art. 3(3)) which China has used to justify its planned emasculation of the Bill of Rights Ordinance (see above). However, even if there is a distinction, it can hardly mean that a particular ordinance or rule of the common law or customary law cannot be repealed. Otherwise courts would have to determine whether amendments to an ordinance were so fundamental as to amount to a repeal. At most the provision could mean that the legislature could not repeal common law or customary law as a source of law, and, in the case of customary law, the scope of which is both limited and challenged, even this interpretation would impose serious restrictions on the ability of the legislature to bring the law into

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line with fundamental social changes (and it would create for common law and customary law a status which they did not enjoy in the colonial period, when they could be abrogated by an ordinance). Such an interpretation of ‘amend’ would place most serious restrictions (in scope and consequence) on the law-making powers of the HKSAR. 35 However, some rules of the common law (and statutes) are expressly entrenched in the Basic Law, like the guarantees of fair trial in arts. 86 and 87, or the confidentiality of legal advice (art. 35) etc., and therefore do have a protected status, as opposed to others which may be both modified and repealed by virtue of art. 8.

Thus, while the broad framework for the reception of previous laws is clear, there were several uncertainties about its scope and the modalities of reception. These also have serious implications for the legislative power of the HKSAR and its ability to reform the law. Unfortunately political differences between China and the UK, which have upset earlier understandings as to the procedure for bringing the law into a state where reception would be simple and straightforward, promoted somewhat convoluted interpretations of relevant provisions of the Basic Law. It would appear that the seriousness of these uncertainties was not sufficiently appreciated, perhaps because China has a different tradition as to the centrality of law in regulating political, social and commercial relationships and transactions. The HKSAR government and courts have had to deal with some of the difficulties caused thereby, trying to bring some order into the uncertainties created by the Basic Law but more fundamentally by the NPCSC. They have tried to fit in NPCSC decisions about nationality, adoption of laws, and the establishment of the provisional legislature into the common law traditions of legality. They have achieved considerable success in difficult circumstances, including a provisional legislature whose own legitimacy, if not legality itself, was questioned by many people in Hong Kong and abroad, and whose scope for law making was never clarified.

Laws of the HKSAR Legislature

The procedure for law making

The primary source of law in the future will be legislation passed by the legislature. The procedure for law making by the HKSAR legislature has

35 In R v Wong King-chau [1964] DCLR 106 it was held that the word ‘modify’ includes repeal. The Interpretation and General Clauses Ordinance defines ‘amend’ to include ‘repeal, revoke, cancel, add to or vary . . .’ (s. 3).
already been discussed (see Chapters 4 and 7). Briefly, law-making powers are vested in the Legislative Council and the Chief Executive, the latter’s consent to and promulgation of bills being a necessary part of the process, with a limited veto over bills passed by the Legislative Council (arts. 48(3) and 49–50). Moreover, the initiative to start the process of law making lies primarily with the Chief Executive, with severe restrictions on the ability of members of the Legislative Council to propose legislation or amend that introduced by the executive (art. 74). On the other hand, if the Legislative Council fails to approve bills proposed by the executive, it stands to be dissolved by the Chief Executive (art. 50) (see Chapter 6). The procedure for voting on legislative proposals is weighted against proposals or amendments introduced by members, since they have to pass the gauntlet of double voting — once by functional constituencies, secondly by other members (Annex II Part II). It is thus evident that the legislature plays a secondary role to the executive in the making of laws. Subsidiary (or delegated) legislation in the future (which is not mentioned expressly, as ‘previous’ subsidiary legislation is, as a source of law, but which is implied since its authority is primary legislation) will essentially be made by the executive. The NPCSC is also involved in the law-making process, for all legislation has to be sent to it ‘for record’. However, if the NPCSC considers that the legislation is ‘not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region’, it may invalidate the legislation after consulting the Committee for the Basic Law (art. 17). There may be doubts about the validity of laws passed by the Provisional Legislature, at least for those who question the legality of that body.

**Restrictions on capacity to make law**

It is necessary to begin with a preliminary point. The legislative capacity of the HKSAR is vast. But not all of it may be exercised on its own, i.e., autonomously. Sometimes it must be exercised on directions from the Central Authorities. Another distinction is between provisions which give

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36 It is likely that there will be some role for the Legislative Council in the scrutiny of subsidiary legislation as in the pre-transfer period, if the relevant provisions of the Interpretation and General Clauses Ordinance are deemed consistent with the Basic Law (there seems to be no reason why they should not). These provisions require the laying of draft subsidiary legislation on the table of the Legislative Council and enables the Legislative Council to amend them within 28 days (sec. 34). Express approval of the Legislative Council (or some other body) is necessary when the primary legislation provides for it (sec. 35).
a discretion to the HKSAR whether to legislate or not, and those which require it to make laws (as with art. 23, discussed in Chapter 9). These questions are intimately connected with the autonomy of the HKSAR and are discussed here and in other chapters (especially Chapter 4).

The authority of the HKSAR legislature comes from the Basic Law. Since it is a subordinate legislature (in terms of the constitutional system of the PRC), it cannot amend the Basic Law itself. The power of amendment is vested in the NPC; if the initiative for change comes from the HKSAR, at least two-thirds of the members of the Legislative Council must support it (in addition to other parties, art. 159). However, in relation to two sets of provisions, the Legislative Council plays a more prominent role. After the year 2007, it may endorse the amendment of the procedure for the selection of the Chief Executive, but for the proposals to be successful it must have the consent of the Chief Executive and the approval of the NPCSC (Annex I, clause 7). As far as changes to the composition of the Legislative Council itself and the system of voting are concerned, it seems to suffice that both the Chief Executive and two-thirds of the Legislative Council support it (Annex II, Part III). The relationship of these provisions to art. 159 is not specified, but presumably they are independent of it (on this and other aspects of these provisions, see Chapters 4 and 7).

The second major limitation is that no laws of the legislature may contravene the Basic Law (art. 11). This apparently straightforward provision contains a number of difficulties. It raises not only the issue of what are the restrictions on the law-making powers of the Legislative Council but also that of its competence to legislate on particular matters. The first issue concerns the restrictions that arise from specific provisions like the guarantees of rights and freedoms of HKSAR residents and a host of articles about the economy (e.g., the obligation to follow a low tax policy, art. 108, or to provide an economic and legal environment for encouraging investments, technological progress and the development of new industries, art. 118). Some of these restrictive provisions are reasonably specific, but others, like art. 118, are general and exhortatory, of a type which in some other constitutions are declared to be non-justiciable. The approach that will be taken in relation to the HKSAR has yet to be clarified (this matter is discussed in Chapters 4 and 10).

The second issue concerns the areas of the competence of the HKSAR — a number of factors complicate the picture (for a detailed discussion, see Chapter 4) The Basic Law does not provide a clear demarcation of powers and responsibilities as between the Central Authorities and the HKSAR. The view taken by influential Chinese scholars and officials is that the powers of the Central Authorities are not confined to foreign and defence affairs; on the contrary, it has competence for all matters that are
not expressly vested in the HKSAR. Some matters are clear, as with most economic matters, but in general it is hard to determine what matters are vested in the HKSAR, in the absence of a general or specific formula for this purpose. The Basic Law uses concepts like ‘high degree of autonomy’, ‘matters within’ or ‘outside the limits of the autonomy of the Region’ (arts. 158 and 18 respectively’). A further difficulty is that ultimately these questions will have to be resolved by the NPCSC (art. 158), while those who have to make initial decisions on competence will in most cases be the HKSAR authorities — and tendency to get prior clearance from China will undoubtedly undermine autonomy.

It should also be noted that the legislative capacity of the HKSAR legislature to enact laws on its own may expand or shrink depending on the treaties and other international engagements that the Central Authorities undertake. Foreign affairs is a flexible concept, and as the international community enters into more and more arrangements to deal with issues of common interest regionally or globally, the scope of powers under the category of foreign affairs increases. Similarly, the needs of defence change from time to time, depending for example on exigencies of relations with neighbours or the development of arms technology (see Chapter 11).

However, the HKSAR legislature is not precluded from legislating on matters which are the responsibility of the Central Authorities or concern their relationship with the HKSAR. It is assumed that national laws which apply in Hong Kong will be introduced through legislation by the HKSAR legislature (art. 18). If the authority for this legislation is regarded as a decision of the NPCSC under art. 18, a broader competence may be assumed under art. 17, which seems to prohibit legislation on these matters only if they are not in conformity ‘with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region’. Thus, for example, the HKSAR may legislate on external affairs under its powers in chapter VII, but as these are delegated by the CPG (art. 13), and therefore presumably fall within the relationship between it and the HKSAR, the NPCSC may review them for vire. Indeed since the NPCSC has no powers, at least under the Basic Law, for direct legislation for the HKSAR, that responsibility must fall primarily on the HKSAR legislature (there is the alternative of promulgation by the Chief Executive). Given the broad legislative competence of the HKSAR legislature, there is no scope for the application of restrictions associated with limitations regarding extra-territorial jurisdiction. There may arise the question of what to do if such laws conflict with national laws; this matter is dealt with in the next section.
Application of National Laws

There was no indication in the Joint Declaration that any national laws would apply in the HKSAR, although since the autonomy of the region was to be limited, it might be implied that some would apply. Since powers over the HKSAR are divided between the Central Authorities and the region, it follows that national laws would apply in Hong Kong in matters which are the responsibility of Central Authorities. Secondary questions relate to the method of the application of national laws, the limits subject to which national laws may be applied, and the mechanism for the review of the validity of the application of national laws (including when they conflict with HKSAR laws). These procedural matters are dealt with some care, but as has been argued several times (particularly in Chapter 4), there is no easy way to establish the respective powers of the Central Authorities and the region, leaving in considerable doubt the precise scope of national laws (no doubt to be dealt with in ad hoc manner).

Given this basic difficulty, the Basic Law attempts to delineate with some precision the scope of national laws to be applied in the HKSAR, after the formulation in the 1987 draft was criticized for being both broad and vague. It will always be clear at any time which national laws apply in the region as they would be listed in Annex III (even if the scope of potential changes to the list is unclear), subject to two exceptions, regarding emergency and military law, noted below. The basic principle is that national laws will not apply in the HKSAR unless they relate to ‘defence and foreign affairs as well as other matters outside the autonomy of the Region’ (art. 18). The Chinese language version makes clear that it is only the laws enacted by the NPC or the NPCSC which would be applied in Hong Kong. The laws which are to apply on the establishment of the HKSAR are listed in Annex III of the Basic Law. These are: Resolution on the Capital, Calendar, National Anthem and National Flag.

37 The original version was as follows:
‘The Laws enacted by the National People’s Congress and its Standing Committee shall not apply in the HKSAR except for the following:
1. laws concerning defence and foreign affairs;
2. other laws relating to the expression of national unity and territorial integrity which, in accordance with provisions of this Law are outside the scope of the high autonomy of the HKSAR.’

38 The expression used is falu, which is used for legislation passed by these bodies, and would thus exclude laws made by the State Council, which is far more voluminous than that passed by the legislature. See Keller 1994.
of the People’s Republic of China; Resolution on the National Day of the People’s Republic of China; Order on the National Emblem of the People’s Republic of China Proclaimed by the Central People’s Government; Declaration of the Government of the People’s Republic of China on the Territorial Sea; Nationality Law of the People’s Republic of China; and Regulations of the People’s Republic of China Concerning Diplomatic Privileges and Immunities. Of these the most important — and one having the most impact on the residents of the HKSAR — is the nationality law; others would have little direct relevance to the residents. Since the resumption of sovereignty, five additional laws have been applied to Hong Kong. They are the laws on the national flag, the national emblem, the territorial sea and contiguous zone, garrison law for the HKSAR, and the consular privileges and immunities.

The Basic Law establishes the procedure for subsequent additions to or deletions from the list and provides safeguards against extensions of national laws which would not be justified under the Basic Law or might otherwise be undesirable. The first is that the changes to the list must be made by the NPCSC (the original proposal would have left the decision to the State Council, which as an executive body might have had more of an incentive to extend its authority over the HKSAR). Second, the HKSAR has to be consulted before the change. Thirdly, the Committee for the Basic Law has also to be consulted (it would presumably advise on the legality of the proposed addition).

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39 A 1949 Resolution of the Chinese People’s Consultative Conference established Beijing as the capital of the republic, adopted the Gregorian calendar, and chose the ‘Volunteers’ March’ as the national anthem. The national flag is red with five stars.
40 The national day is 1 October, and 1 and 2 October are national holidays (by CPCC Resolutions of 1 October and 2 December 1949 respectively).
41 The national emblem shows the national flag, Tiananmen, a cogwheel and ears of grain (adopted by the People’s Consultative Conference on 18 June 1950).
42 The NPCSC endorsed on 4 September 1958 the Statement of the PRC on Territorial Sea, which declares that the breadth of China’s territorial sea shall be 12 nautical miles, determined by the method of straight baselines. This statement also applies to the islands of the republic.
43 The Nationality Law was adopted on 10 September 1980; it is discussed in Chapter 4.
44 This law was adopted by the NPCSC on 5 September 1986 and to a large extent follows the 1961 Vienna Convention on Diplomatic Relations, of which China is a signatory. Since the British legislation is based on the same convention, there should be no major changes in the privileges and immunities enjoyed by the diplomatic community in Hong Kong after the transfer of sovereignty. The one change would be that the old provision whereby diplomats might carry on commercial activities in their private capacities and without the benefit of diplomatic privileges would disappear since the Chinese law does not permit it. The NPCSC Decision under art. 160 provides in both cases of conflict for the supremacy of national law. This is now stated in the Reunification Ordinance through its amendment of Interpretation and General Clauses Ordinance (s. 5).
National laws are to be given effect in the HKSAR ‘by way of promulgation or legislation by the Region’ (art. 18 para 2). These terms are not defined, but presumably promulgation refers to an executive act (perhaps a notice in the Gazette) while legislation refers to an ordinance of the HKSAR legislature (there is no indication which method is to be chosen in particular cases). The advantage of local legislation is that it facilitates the proper incorporation of national laws in the legal system of the HKSAR (and provides the method for its implementation, e.g., powers to make subsidiary laws, indictments and methods of prosecution, etc., especially as Chinese legislation tends to be broad and general). Presumably, in the event that the HKSAR proved un-cooperative, the Chief Executive could be given directives by the Central People’s Government (in accordance with art. 48(8)); the Chief Executive could dissolve the legislature if it proved recalcitrant — although the Chief Executive could not do much in the event of refusal by the new legislature. These turns of events would invite direct intervention by the national authorities, which could upset the balance in the autonomy of the HKSAR and create a major crisis. The Basic Law does not clarify whether regulations under the applicable national laws and their interpretations are also to become part of the laws of the region. As indicated in Chapter 3, there is a vast amount of subsidiary regulations in China, often made by administrative bodies. The full reach of national laws can only be established by the application of regulations and interpretations. To deem them not to apply in Hong Kong would defeat the full purpose of extending them to Hong Kong; on the other hand if they were to be applied, there would be problems in establishing precisely what they were, and how they were to be adapted to Hong Kong.45

There are two types of national laws for which local re-enactment is not necessary. The first is national laws which apply to the military stationed in the HKSAR (art. 14). It is unclear whether all national laws or only laws (i.e., military laws) which are peculiar to the armed forces are intended (if analogy with the British laws applied to British garrison in Hong Kong is relevant, it would appear that the reference is to military laws). These laws are not of general application in the HKSAR, and it may be that no further authority is required for the obligation of the military to abide by them. There appears to be no single code of military law under Chinese law; there are several statutes, but for the purpose of criminal law the most important is the Interim Regulations on the

45 So far all but two national laws have been given effect to through promulgation. The exceptions are the laws on the national flag and the national emblem. Apparently they were given effect to through local ordinances at the direction of the CPG (personal information).
Punishment of Soldiers in Breach of Their Duties 1981. The entry by the army into commercial activities necessitated further legislation, principally in the form of circulars from the Supreme Court, the Supreme Procuratorate, the Ministry of Public Security and the General Political Department of the People’s Liberation Army. The scope of the Chinese military laws is more extensive than in most countries, affecting many personal matters.

Members of the Chinese garrison shall also be subject to the laws of Hong Kong (and presumably to the jurisdiction of its courts, although that jurisdiction would be qualified by the doctrine of the act of state, art. 19). As some acts may constitute offences under both the applicable national law and local law, it would be helpful to devise rules as to which jurisdiction is invoked first. The jurisdiction of Hong Kong courts could be established by analogy with the jurisdiction of civilian courts on the mainland over military personnel. However, some local enactment may be necessary if it is intended to use Hong Kong courts for the enforcement of national laws.46

The NPCSC dealt with these issues in the Law of the Garrison of HKSAR which was passed in December 1996 (and promulgated in Hong Kong through LN 386 of 1997). It is to be interpreted by the NPCSC. The duties of the garrison are defined as ‘the safeguarding the sovereignty, unity and the territorial integrity of the State and the security of Hong Kong according to law’ (art. 1), although when the duties are specified in detail, the reference is to defence against invasion and to protect the security of Hong Kong; assume ‘defence activities’, manage military facilities and ‘assume conduct in relevant external military affairs’ (art. 5). It is also their duty to discharge tasks in accordance with national laws that might be applied to Hong Kong in the event of turmoil under art. 18 of the Basic Law (art. 6; see Chapter 9 for a discussion of national laws that could be applied in Hong Kong in these circumstances). These duties represent an extension of the Basic Law, which describes the role of the military forces as ‘defence’ and prohibit them from interfering in the local

46 The position of British troops in Hong Kong was covered by the United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965. The members of the garrison were subject to British military law. They were also subject to Hong Kong law, although various ordinances contained exemptions or qualifications in respect of them (as in the Crown Proceedings Ordinance, s. 8). The general position was that if an offence was alleged to have been committed by a member of the British garrison against another member or in respect of property belonging to the British government, the case would have been tried by a Court-Martial. In other criminal or civil matters, the trial would have taken place in Hong Kong courts in accordance with Hong Kong laws, except when the person concerned was acting in an official capacity.
affairs of Hong Kong (art. 14), since these duties could encompass the suppression of dissenting views or the criticism of the Central Authorities. The military forces are composed of land, naval and air forces of the People’s Liberation Army (art. 2 of the law). The garrison and its staff are prohibited from engaging in ‘profit making’ business activities or other activities not commensurate with duties of military personnel (art. 18) (as compared to, then, a less restricted view of the commercial role of the PLA on the mainland).

Weapons and equipment, such as aircraft and warships and supplies for the garrison as personnel and vehicles on duty are not subject to examination, search and detention by the law enforcement authorities of the HKSAR (art. 7). When a suspect arrested by the Hong Kong law enforcement authorities turns out to be a member of the garrison, he or she has to be handed over to the garrison, and tried by the relevant authorities in accordance with the rules for jurisdiction over such personnel (art. 21).

Members of the garrison are subject to the jurisdiction of military judicial authorities in respect of criminal offences, except where the offence is against the personal or property rights of persons other than the personnel of the garrison, in which case they are subject to the jurisdiction of Hong Kong courts. However, cases may be transferred from the jurisdiction of the military judicial authorities to the Hong Kong courts and vice versa if the authority which has the original jurisdiction considers, after consultation with the other authority, that the other is more appropriate to deal with the matter. If a non-garrison person is involved jointly with a member of the person in a crime, he or she would be subject to the jurisdiction of Hong Kong courts (art. 20).

The position is less clear in relation to civil actions (art. 23). When damage is caused by acts against non-members of the garrison, the general rule is that the jurisdiction is with the Hong Kong courts, except when the act occurs in the course of duty, when the matter is ‘governed by the jurisdiction of the Supreme People’s Court of the People’s Republic of China’. However, Hong Kong’s laws apply as regards compensation. Contractual disputes involving the garrison and non-garrison parties come under the jurisdiction of Hong Kong courts, if they are not solved by consultation or conciliation or if there is no arbitration clause (art. 24).

Judgments against garrison authorities must be executed by these authorities, but the courts are not allowed to impose any form of mandatory enforcement in relation to weapons, equipment, supplies or other property of the garrison (art. 27). Nor do the courts have jurisdiction over acts of state of the garrison in matters such as national defence (art. 24). The question whether a person is a member of the garrison or
the offending act occurred during the course of duty is also to be resolved by a certificate of the garrison, ‘unless there is evidence that establishes the contrary’ (art. 25).

The second instance of the application of ‘relevant’ national laws is when the NPCSC has declared a state of war or ‘decided’ that ‘by reason of turmoil within the HKSAR which endangers national unity or security and is beyond the control of the government of the Region’ that the region is in a ‘state of emergency’ (art. 18 para 4). In these cases national laws apply by an order of the Central People’s Government. There are few safeguards for the autonomy of Hong Kong: the decision is made by the CPG and not the NPCSC; there is no requirement to consult the Basic Law Consultative Committee or the government of the HKSAR; and there is no limitation on the national laws that can be so applied. Thus not only the national emergency laws of the PRC but even its ordinary laws, providing for administrative detention\(^\text{47}\) or the laws dealing with the broadly phrased laws dealing with counter-revolutionary offences,\(^\text{48}\) and the harsh penalties that attach to them, including the death penalty, could apply in the region.\(^\text{49}\) Given the gravity of this situation, it is important to establish whether there are any limits on the national laws that might validly be applied in Hong Kong. Unfortunately the concept of national security is vague; it could include protection against espionage, promotion of secession, the overthrow of the political system by forcible means, and undermining the effectiveness of the armed forces. However, in the present context it is connected with physical disturbances. Under China’s National Security Law 1993, national security is limited to external interference (art. 4), although threats to national unity may not be so restricted (see discussion in Chapter 10).

In general it can be argued that the national laws which are applied in Hong Kong must be compatible with the Basic Law. Those laws which are given effect through the HKSAR legislature have to be consistent with the Basic Law, for art. 11 prohibits any laws enacted by it from contravening the Basic Law. But laws which are directly applied or through promulgation would not seem to be caught by this provision. However, even those laws would be caught by art. 39 which provides that restrictions on the rights and freedoms of HKSAR residents shall not contravene the ICCPR, the ICESCR and international labour conventions as applied to

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\(^{47}\) The relevant regulations are translated into English in a special issue of *Chinese Law and Government* (September-October 1994) edited by Edward Epstein (Epstein 1994a).

\(^{48}\) See Part II Chapter I of the Criminal Law of China (1979).

\(^{49}\) However, it is the view of the officials of the Legislative Affairs Bureau of the NPC that only emergency laws may be applied under this paragraph (personal interview).
Hong Kong. Since extensive rights are provided under these instruments, there would be serious limitations on the applicability of national laws even if directly applied. The provision in the law on national flag — penalizing the desecration of the national flag — has already been challenged for breach of the guarantee of the freedom of expression in the ICCPR (this case is discussed in Chapter 10). If members of the Chinese garrison are regarded as residents (and it would seem that under art. 24 they would be), then the national laws which apply to them would also have to meet the standards of art. 39 (for a discussion of — and controversies about — the reach of art. 39, see Chapter 10).

Finally, the PRC constitution applies in some respects in Hong Kong. The question of the applicability of the constitution has already been discussed in Chapter 4; it was pointed out that the scope of its application is unclear, since many of the provisions of the Basic Law are intended precisely to dis-apply its various provisions. Provisions about the institutional structure, e.g., the composition of the NPC and the Council of State, etc. are relevant, but it is doubtful if the institutions enjoy the full extent of powers that they do on the mainland. Indeed it could be argued that when the Basic Law and the constitution are in conflict, the Basic Law must prevail. This statement may sound like heresy but can be justified authoritatively — as the Basic Law is intended to set up a separate regime from the primary systems established by the constitution, and the NPC has already determined that the Basic Law is constitutional.

**The Hierarchy and Conflict of Laws**

In other areas where the laws of the PRC and the HKSAR conflict, the conflict cannot be resolved by establishing a hierarchy of laws (as is suggested by Zhou Wei 1993). The Basic Law is an organic law of the NPC, and therefore of the highest standing. No other body can legislate in contravention of it (even the NPCSC can merely supplement or amend an organic law but may not contravene its basic principles, art. 67(3) of the Chinese constitution). However, as between different organic laws, there is no hierarchy, presumably all of them being of equal standing (nor does there seem to be a clear rule that a subsequent law overrules an earlier one). Since the purpose of the Basic Law is to a large extent to take Hong Kong out of the normal systems in the rest of the country, it makes little sense to talk of a system of hierarchy in a general way. Moreover, as discussed in Chapter 4, for a provision of another organic law to prevail over an inconsistent provision of the Basic Law would amount to an amendment of the Basic Law, which is only possible if the procedure
under art. 159 is followed. The Court of Appeal, however, did not take this position in *Ma*. It held in effect that any national law which the NPC made for Hong Kong would prevail over the Basic Law. Since then the courts have resiled from this extreme position and have tried to build a fence around the Basic Law, treating it increasingly as a self-contained document and unaffected by national laws unless they are enacted or promulgated under art. 18 (see Chapter 4).

As the Central Authorities have given Hong Kong only limited powers, the question of the validity of its laws must be determined by reference to its legislative powers as given in the Basic Law. If the laws are within its powers, there can be no question of its invalidity due to a conflict with a national law. Strictly speaking, there are no concurrent powers of law making under the Basic Law (with possible exception of foreign affair, see Chapter 11). It is true that Hong Kong can make laws on areas which fall within the responsibility of the Central Authorities, but this is either to implement national laws or under express or implied authority from the Central Authorities. The test of its validity then is not whether it clashes with a national law, but whether the HKSAR has exceeded its legislative authority.

In general it is unnecessary to decide whether a local law clashes with a national law. The question becomes important only when there is a conflict between a local law and a national law which has been applied in Hong Kong through local legislation or promulgation. In such a case the national law would prevail if it concerned foreign affair or even perhaps more generally, unless its application did not satisfy the criterion laid down in art. 18. The judge of this matter would of course be the NPCSC under art. 158.

**CONCLUSION**

The task of establishing the regime of laws of the HKSAR turned out to be more complicated than was assumed to start with. The task was not without its technical challenges even without the political difficulties, but the political difficulties changed the nature of the exercise and aggravated the difficulties associated with the discontinuity consequent on the relinquishment and the resumption of sovereignty. The provisions for the continuity of laws and the validity of legal transactions were less than clearcut in the Basic Law, but now they are even more problematic. The courts may have to play a greater role in ensuring a smooth transition than is assumed in the Basic Law.
Even more challenging is the task of meshing the two legal systems and the multiplicity of laws applicable in Hong Kong. There are problems, as we have seen, of the division of powers, the layers of hierarchy, different traditions of interpretation, different training of the legal profession.

Even if the transition to the new legal system is smooth, it remains to be seen how the common law will flourish in its new environment. The continuation of the market economy and Hong Kong’s expanding regional role may necessitate a vibrant legal system, based on the common law. But the nature of the market economy may change, moving towards a more relational rather than transaction-based capitalism, with personal or political factors dominating access to and exploitation of resources and opportunities (Ghai 1993).

It is not as if the common law will have to fight off another strong system of law, but the resilience of the common law may be tested in changed political circumstances. The political dimensions of the common law have already begun to be muted, and are likely to be curbed further. The common law may come to be seen as alien, an unwelcome reminder of colonialism, a restriction on the new sovereign order. The gradual change of the law to the Chinese language will also have its effect; the common law in Chinese will be a new and interesting phenomenon, testing as much the resilience of the English language as the system of law it nurtured. In all these respects the experience of the common law in a changed political context and its co-existence with a socialist and civil law, itself trying to establish its own autonomy, will be a source of great fascination for comparative lawyers everywhere.
INTRODUCTION

Next to economic systems, the factor generally perceived to distinguish Hong Kong most sharply from China was different perceptions and practices of human rights. According to the official Chinese view, rights are entitlements of citizens which are conferred by positive law (and are therefore variable), while the view which prevailed in Hong Kong (drawing largely upon Western traditions) is that rights are inherent in individuals, whether derived from some higher law or as essential to human dignity (and are therefore universal and inalienable). In Western traditions, these rights are frequently called human rights, while in China there are referred to merely as rights and freedoms. China’s record of human rights had been poor, with numerous violations of rights, harsh and arbitrary punishments, wide discretion vested in officials over matters like administrative detention, and a weak and uncertain legal system. The preservation of the rights and freedoms of the residents of Hong Kong after the transfer of sovereignty therefore acquired considerable ideological and practical importance. The Joint Declaration provides a reasonable basis for the protection of rights enjoyed under the colonial system, but the harsh action of Chinese authorities in dealing with student protests in Tiananmen Square in 1989, which was also widely perceived to be unconstitutional, reinforced doubts about China’s commitment to rights and freedoms. It led to demands for some immediate measures to ensure the protection of human rights, in particular the enactment of a bill of rights, and called in question the effectiveness of the then laws of Hong Kong to protect rights. Hong Kong laws came under domestic and international scrutiny, and it was clear that in many respects they fell short of internationally recognized standards.
Under these pressures, the Hong Kong administration secured the enactment of the Bill of Rights Ordinance in 1991 and undertook to bring the law into conformity with it. This provoked strong protests from China, and was received less than enthusiastically by some people in Hong Kong (mostly the business community). The issue of rights and freedoms was thus highly politicized, with China questioning the future validity of the ordinance, and with doubts about China’s international obligations regarding rights and freedoms in Hong Kong. The politicization has not been congenial to a close textual examination of the provisions of the ordinance or the Basic Law relating to rights.

It is ironic that it is the alien, colonial power which is now seen as the champion of rights, while the new sovereign, to whom the residents of Hong Kong are tied by history and ethnicity, is regarded as threatening their rights and freedoms. British colonial rule has in most places been marked by authoritarianism and the denial of rights. The British record in Hong Kong, particularly in the last decade or so, was better than in most other colonies — but to keep the matter in a perspective, it is necessary to point out that fairly draconian laws were enacted when colonial authority was challenged, as most dramatically in the mid 1960s. The factors which accounted for the relatively benign colonial rule were discussed in Chapter 1; to these should be added other circumstances: a resurgent, twentieth century China which would not have tolerated blatant abuses of Hong Kong people (whatever its own domestic practices might be) and a local community which, being largely political or economic refugees from the mainland, were content to accept British authority, for the alternative was mainland rule rather than independence.

This chapter discusses the guarantees of the protection of rights and freedoms in the HKSAR, examining both domestic and international sources of the guarantees. It discusses the controversy about the compatibility of the Bill of Rights Ordinance (BORO) with the Basic Law. It also explores social and cultural rights and policies in the Basic Law, which together with its guarantees of political and civil rights, provide a more balanced and satisfactory framework than the ordinance. The focus of the chapter is on the structure of the system for the protection of rights and social policies, so it looks at matters like the sources of law and the relationship between them, the techniques of interpretation, the limitations on and the suspension of rights, the beneficiaries of rights, etc., rather than at the substance or the interpretations of individual rights.
THE GENERAL FRAMEWORK FOR THE PROTECTION OF RIGHTS AND FREEDOMS

The basic framework to facilitate the exercise of rights was established in the Joint Declaration. The elements of this framework have been sketched elsewhere in this book; it consists of regional autonomy, a market economy, some separation of powers, an independent judiciary, a measure of democracy, civil society, and the common law. On the whole the Basic Law preserves this general framework, although in somewhat weaker form. Hong Kong’s autonomy is narrower and less clear; and there is considerable room for the application of national laws. The Central People’s Government can intervene in the region for various reasons, and in a number of ways, including the preservation of law and order. The final arbiter of the meaning of the Basic Law is the NPCSC. The legislature is weaker (and the executive stronger) than one would have expected from the Joint Declaration. The Basic Law requires the HKSAR to impose a number of restrictions on rights and freedoms of its residents in order to prevent challenges to the mainland system (art. 23). It is not yet clear how these modifications would operate to undermine the autonomy of the HKSAR, the principles of democracy or the rule of law, but the broad framework of the Basic Law is supportive of rights and freedoms. Through its supremacy clause (art. 11), the Basic Law attempts to ensure that no laws would contravene the rights provided under it.

INTERNATIONAL SOURCES OF RIGHTS

The Basic Law is the principal source of the rights and freedoms of the residents of Hong Kong. However, other instruments will also be relevant, some of which are expressly recognized in it. Broadly, it is possible to distinguish between ‘domestic’ and ‘international’ sources of rights, the former comprising laws that operate directly in Hong Kong, and the latter the treaties applicable in Hong Kong. The distinction is hard to sustain always, for some treaties are expressly made part of the Hong Kong law by the Basic Law, and thus operate both as domestic law and as part of the international regime. The first of the international instruments is the Joint Declaration which commits China to preserving and promoting a number of rights and freedoms, principally those which existed under the colonial regime. Secondly, in accordance with the Declaration, the Basic Law stipulates that the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social
and Cultural Rights (ICESCR) and international labour conventions, all ‘as applied to Hong Kong’, ‘shall remain in force and shall be implemented through the laws of the HKSAR’ (art. 39). The chapter focuses on international instruments applied by the Basic Law, although it should be pointed out that a number of other human rights treaties have been applied to Hong Kong (by Britain as the sovereign), including the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the Convention on the Rights of the Child. These treaties continue to apply despite the change of sovereign. In addition China has adhered to a number of rights treaties for the mainland, and these might well be applied in Hong Kong as part of the territory of China (for a general discussion of the provisions governing the application of mainland treaties in Hong Kong, see Chapter 11).

Under the common law as it applies in Hong Kong, treaties do not become part of domestic law. However, the provisions of many of them have been incorporated in local law, the outstanding example being the ICCPR through the Bill of Rights Ordinance in 1991 (the ICCPR thus enjoying various incarnations in Hong Kong). Other examples of such legislation include the Sex Discrimination Ordinance (1995) which seeks to give effect to some provisions of the CEDAW, and the Torture Ordinance (1993). Even without local implementation, treaties bind the government to ensure that the rights are observed and promoted and to report periodically to the international committee set up under the treaty on the implementation of treaty obligations. Given the focus on rights in Hong Kong in view of the transfer of sovereignty to a state which is deemed to be hostile to political and civic rights, those international committees have taken a special interest in Hong Kong, and under their impetus (as well as for other reasons), there has been a remarkable improvement in the legal regime for the protection of human rights since 1991.

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In recent years national courts in many countries have begun to take notice of international human rights treaties even if they are not so incorporated, principally as a guide to interpretation of national laws (and in this indirect way a limited effect can be given to the treaties, even if not incorporated into local law). Senior judges of the Commonwealth supported this approach in what has come to be known as the Bangalore Principles (Commonwealth Secretariat 1988 and 1989). The Hong Kong Court of Appeal adopted this approach rather belatedly in AG for the UK v South China Morning Post [1988] I HKLR 143, at 148, and Hong Kong courts have made frequent references in the interpretation of the Bill of Rights Ordinances to foreign jurisprudence based on international human right treaties (see below, Ghai 1996 and Chan 1996a).
The Joint Declaration

The Joint Declaration requires the HKSAR to protect rights and freedoms, ‘including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, to strike, of choice of occupation, of academic research and of religious belief’ as well as of ‘private property, ownership of enterprises, legitimate right of inheritance, and foreign investment’ (art. 3(5)). In principle the rights and freedoms ‘provided for by the laws previously in force in Hong Kong’ are to be continued, as stated in Annex I, which adds to the above list the ‘inviolability of the home’, the right ‘to form and join trade unions’ and ‘the freedom to marry and raise a family freely’ (Sec. XIII). Some specific legal rights are also guaranteed: confidentiality of legal advice, access to the courts, representation in the courts by lawyers of one’s choice, and judicial remedies, including those against the executive. The rights of religious groups and believers to maintain contacts with counterparts elsewhere and to run schools and welfare organizations as well as their autonomy from similar mainland organizations are guaranteed. The provisions of the ICCPR and the ICESCR as applied to Hong Kong are to remain in force. These rights are to be secured to the ‘inhabitants and other persons’ in the HKSAR. Categories of persons who would have the right of abode are set out (Annex I, sec. XIV). Employment and pension rights of public servants and judges in office on the transfer of sovereignty are also protected (Annex I, sec. IV). The autonomy of religious and social organizations is to be respected as is also the freedom of students to choose their ‘education’, and to pursue education outside the HKSAR (Annex I, sec. X).

While the Joint Declaration is a legally binding treaty, no provision is made for its enforcement. It was intended principally to provide the framework for the Basic Law. It is unclear what remedies for its breach might be available to the people of Hong Kong or to the UK as a party to it. The High Court held in the pre-transfer period that the Declaration did not by itself give any rights to individuals or corporations in Hong Kong, on the common law principle that treaties must be incorporated locally for this purpose (Tang Ping-hoi and Attorney-General [1987] HKLR 324 and The Home Restaurant Ltd. and the Attorney-General [1987] HKLR 237) (see Chapter 2).²

² On a visit to Hong Kong in January 1996, the then British Foreign Secretary, Malcolm Rifkind, said that if China breached the Declaration, Britain would take it to the World Court (SCMP 9 January 1996). In fact even if Britain were inclined to do so, it would not be able to proceed against China since China has not accepted the compulsory jurisdiction of the International Court of Justice.
The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR and ICESCR, the centre pieces of the international system for the protection of rights, were adopted by the General Assembly of the United Nations on 16 December 1966, and came into force on 23 March 1976 (and have been signed by over 130 states, making them the most widely ratified instruments). The United Kingdom ratified them on 20 July 1976 both for itself and Hong Kong. The ICCPR has therefore applied to Hong Kong for over 20 years. However, it was incorporated into Hong Kong law only in 1991. The British position was that the common law and legislation already ensured the ICCPR rights. But absent the incorporation of the ICCPR, it was not possible to challenge legislation for violation of these rights, and there was no way to test the British claims in the courts.

Rights as applied to Hong Kong

The overriding principle of both the ICCPR and the ICESCR is self-determination, by virtue of which a people ‘freely determine their political status and freely pursue their economic, social and cultural development’ (art. 1). It obliges, in particular, states to promote self-determination in their colonies. More specifically, the ICCPR guarantees:

3 The UK did not have the option to exclude its dependencies from the application of the ICCPR, as unlike some other treaties, there is no provision for the exclusion of any territories under a state party’s jurisdiction. Article 1 requires each signatory state to ensure rights to ‘all individuals within its territory and subject to its jurisdiction’. This provision was reinforced by a resolution of the General Assembly that the covenant would be equally applicable to a signatory metropolitan state and all the territories administered or governed by it. See Vratislav Pechota 1981.

On the other hand, it was then accepted that a state could modify the ICCPR in relation to a territory through reservations, for, there being no special provision on reservations, general principles of international law were deemed to apply (the subsequent contrary opinion of the Human Rights Committee is mentioned later). Reservations were used by the UK to temper the covenant to its perception of the realities, and the future development, of Hong Kong.

4 In its first report to the UN Human Rights Committee in relation to Hong Kong (10 November 1978), the UK said, ‘The International Covenant on Civil and Political Rights does not itself have the force of law in Hong Kong. The obligation assumed under art. 2(2), which leaves each high contracting party free to decide the method by which it gives effect to the rights recognized in the Covenant, is fulfilled there by the provision of safeguards of different kinds operating in the [legal system], independently of the Covenant but in full conformity with it’ (para 1, emphasis supplied). (UN Doc. CCPR/C/1/Add.37)
1. the right to life;
2. protection from torture or cruel, inhuman or degrading punishment or treatment;
3. protection from slavery or servitude; the right to liberty and security of the person;
4. rights of those in custody to be treated with humanity and respect for the inherent dignity of the human person;
5. protection against imprisonment for inability to fulfil a contractual obligation;
6. freedom of movement;
7. procedural safeguards for an alien in relation to deportation;
8. equal protection of the law and rights in relation to criminal trials;
9. protection against retrospection of criminal law;
10. privacy and reputation;
11. recognition as a person;
12. freedom of thought, conscience and religion;
13. the right to hold opinions without interference and the freedom of expression;
14. protection from propaganda for war or incitement to national, racial or religious hostility;
15. right of peaceful assembly;
16. freedom of association;
17. the protection of family related rights;
18. certain rights of a child;
19. the right to take part in public affairs;
20. protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; and
21. freedom of minorities to enjoy their culture, profess their religion and use their language.

Britain applied the ICCPR to Hong Kong with a number of reservations. The UK declared that in so far as the obligations under the ICCPR were inconsistent with the United Nations Charter (particularly art. 103 which referred to ‘progressive development of their free political institutions’), the charter would overrule the covenant; this ‘reservation’ was primarily intended to delay the application of the right to self-determination, and implied that the covenant was not a mandate for Hong Kong’s independence. The other important reservations included

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5 The principle of self-determination became even less relevant once, at the request of China, the UN removed Hong Kong from the UN list of dependencies whose progress
Britain’s right not to establish an elected executive or legislature despite the ICCPR provisions for political rights; to confine nationality entitlements to persons having a connection with the UK or any of its dependent territories; to recognize each of its territories as separate units for the purposes of the right of movement; to give itself considerable latitude in immigration matters and in the maintenance of discipline among members of armed forces service and of custodial discipline among prisoners. Further, the UK reserved the right not to legislate on art. 20 (which required the prohibition of propaganda for war or the incitement of racial, national or religious hatred), because of its relationship to arts. 19 (freedom of expression) and 21 (freedom of assembly) and as it had already legislated ‘in matters of practical concerns in the interests of public order (ordre public).’

The effect of these statements is uncertain. They did not necessarily exclude the relevant provisions, but rather reserved to Britain the right to modify them in their application to Hong Kong (as with political rights). The comment on art. 20 is not a reservation, but a declaration that it has already been implemented (although it is curious to single out that article in view of the British argument that all provisions of the ICCPR were effective under the then existing law). In part the statements serve to maintain some flexibility in policy. Nor are the declarations effective for ever, as Britain could in due course adhere to a full acceptance of these provisions. Perhaps the reason for the declarations was some uncertainty as to whether all the provisions of the ICCPR were in reality implemented to independence was to be supervised by the UN. However, it is important to emphasize that self-determination has both external and internal aspects; and has been applied to the special relationship, involving a measure of autonomy, that a part of a state may have with central authorities, see, for example Hannum 1990. How far the internal aspect of self-determination was applied in Hong Kong’s decolonization and the adoption of the scheme of autonomy is discussed in Chapter 2.

6 This statement reflects general opposition of Western states to art. 20, which was considered to infringe the right of expression. Since then most western states have accepted the need for some legislation (for the UK see the Race Relations Act, 1976), although the US position is different. See National Socialist Party v Skokie 439 US 916 (1978). The statement was made in relation to the UK, but it went on to say, ‘The United Kingdom also reserves a similar right in regard to each of its dependent territories’. The other reservations were: (a) prisoners and armed forces personnel may be subjected to disciplinary procedures that may not necessarily be consistent with the rights and freedoms in the covenant; (b) adult and juvenile prisoners need not be segregated (as required by art. 6); and (c) persons without the right to abode in Hong Kong may not have the right of appeal against deportation. See Ghai 1993c. For ways in which these reservations have been used to restrict rights, see Chim Shing Chung v Commissioner of Correctional Services (1996) HKPLR 313; and R v Director of Immigration, exp. Hai Ho-tak (1994) HKPLR 324.
on the date of ratification, and awareness that full implementation might take some time. Although policy did change in some respects (in 1984, for example, the government proposed ‘to develop progressively a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the views of the people of Hong Kong, and which is more directly accountable to the people of Hong Kong’, Hong Kong 1984), Britain made no formal changes in its declarations and reservations. Nor was a formal change strictly necessary for it to revert to the full implementation of the ICCPR provisions (the reservations being permissive rather than obligatory).

However, the subsequent history of the ICCPR (as of the ICESCR) tended to convert these declarations into hard boundaries, defining the outer permissible limits of the scope of the ICCPR. Thus when China and Britain agreed on the continuation of the ICCPR, the reference was to the covenant ‘as applied to Hong Kong’ (Joint Declaration, Annex I, sec. XIII). An explanatory note to the Joint Declaration, which says that the covenant applies to Hong Kong with certain reservations (para 46, Chan and Clark 1991: 285), seems to indicate these limitations on the application of the ICCPR under the new arrangements (the same formula was used in the adoption of the ICESCR). Whatever the ambiguities or intentions of the UK, there is little doubt that it diminished the ICCPR in relation to Hong Kong. By excluding key democratic principles, it weakened one of the foundations of rights and freedoms, and introduced an element of opportunism in the approach to rights.  

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7 In its report on Hong Kong in 1995, the UN Human Rights Committee commented specifically on the reservation regarding an elected legislative council. It stated that ‘once an elected Legislative Council is established, its election must conform to art. 25 of the Covenant’. It considered that the electoral system whereby only 20 out of 60 seats were filled by direct popular election, and the provisions for functional constituencies, gave ‘undue weight to the views of the business community’, discriminating among voters on the basis of property or functions, and constituted a violation of articles 2, para 1, 25 (b) and 26 (para 19, CCPR/C/79/Add.57).

8 Jayawickrama (1993: 55–56) has noted the tendency of the UK to exclude Hong Kong, as opposed to other dependencies, from the application of international instruments (or their enforcement sections) to which it is a party (e.g., the European Convention on Human Rights).

The UN Human Rights Committee has since stated in a General Comment that reservations which derogate from rights are invalid, casting doubts about the validity of reservations to the ICCPR and ICESCR in Hong Kong. It states that ‘it is desirable in principle that States accept the full range of obligations, because human rights norms are the legal expression of the essential rights that every person is entitled to as a human being’. Applying the general test in international law that a reservation cannot be incompatible with the object and purpose of a treaty, it ruled that ‘Reservations that offend peremptory norms would not be compatible with the object and purpose of the
Enforcement

Britain adopted a similarly parsimonious position with respect to remedies under the ICCPR. The covenant provides for three ways in which the compatibility of national laws or practices with it can be tested (of which only one is compulsory, the others being at the option of the state). The compulsory method is through the submission of national reports by states parties on measures taken to implement the ICCPR rights and to ensure their enjoyment. The second method is through a complaint of one signatory against another of a violation of the covenant, if both parties have accepted the special jurisdiction of the Human Rights Committee (art. 41). The third method is through a complaint of the violation of an ICCPR right made against the state by any individual ‘under its jurisdiction’ (art. 1 of the Optional Protocol to the ICCPR). In all three instances the report or complaint is considered by the Human Rights Committee composed of experts (art. 28). The committee has no powers of direct enforcement; its main contribution is through the interpretation and elaboration of ICCPR rights, either in general terms or through its consideration of laws and practices which have been challenged (McGoldrick 1991; Opsahl 1994). Its interpretations are, however, highly respected and several states have revised their laws following an adverse finding by the committee. The UK accepted the inter-state complaints jurisdiction (art. 41) shortly before it ratified the covenant, but not the Optional Protocol. Little use has been made internationally of the inter-state complaint mechanism (for obvious diplomatic reasons); there is no instance of its use in relation to Hong Kong. Therefore there has been no opportunity for the Human Rights Committee to comment on the compatibility of Hong Kong laws with the ICCPR through the examination of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of international law it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.’ (CCPR/C/Rev.1/Add.6, 2 November 1994)
of particular cases, although its review of periodic reports has provided indications of how the law or practice might be made more consistent with it.\(^\text{10}\)

### The International Covenant on Economic, Social and Cultural Rights (ICESCR)

#### Rights as applied to Hong Kong

The rights under the ICESCR are generally deemed to be of a different kind from those in the ICCPR, not only, as is obvious, in the subjects they cover but in the enforceability of these rights. Although frequently regarded as goals and objectives which cannot be judicially enforced as they lack the necessary precision and as their implementation depends on national resources (the former being the reason given in Hong Kong for not incorporating it locally, Hong Kong 1990: para 7), the treaty provides ‘clearly stated and carefully targeted policies’ as the UN Committee on Economic, Social and Cultural Rights has emphasized in its General Comment 1 (1989).\(^\text{11}\) The rights promoted by the ICESCR are:

1. the right to work, which includes ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’;
2. the enjoyment of just and favourable conditions of work, ensuring in particular fair wages and equal enumeration for work of equal value;
3. the right to form and participate in trade unions, and to strike;
4. the protection of family rights, including the care of children and pregnant women;
5. the right to an adequate standard of living, including adequate food, clothing and housing;

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\(^\text{10}\) The Human Rights Committee and the Committee on Economic, Social and Cultural Rights under the Covenant on Economic, Social and Cultural Rights have taken a keen interest in Hong Kong, principally in view of the transfer of sovereignty, and under pressure from Hong Kong based and other NGOs. See Chan and Lau 1990; Jayawickrama 1992. These reviews have assumed an importance which is out of proportion to their usual role in the supervision of the covenants. The Bill of Rights Ordinance was enacted in part due to pressure from the Human Rights Committee, which also identified many laws which it regarded as breaches of the ICCPR. Many of these laws were revised.

\(^\text{11}\) In its report on Hong Kong (7 December 1994), the UN Committee expressed its regrets that the ICESCR had not been incorporated into domestic law and dismissed the government’s arguments that rights enshrined in it are different from political and civil rights and incapable of being the subject of an enforcement procedure under domestic law (para 22, M/E/C.12/1994/22).
6. the enjoyment of ‘the highest attainable standard of physical and mental health’;
7. the right to education, including compulsory, free primary education, and education which ‘shall be directed to the full development of the human personality and the sense of its dignity’; and
8. the right to take part in cultural life, enjoy the benefits of scientific progress and to the protection to an author ‘of the moral and material interests resulting from any scientific, literary or artistic production’.

Britain made several reservations to the covenant, including in relation to the right to self-determination. It interpreted the right to work as not precluding restrictions, ‘based on place of birth or residence qualifications’, to safeguard employment opportunities of local workers. It reserved the right to postpone the equal remuneration of men and women in the private sector (presumably because of opposition from that sector). Finally, it disapplied the right of trade unions to establish national federations or confederations or their right to join international federations (undoubtedly to ward off the influence of the PRC or Taiwan, or to prevent the rivalry between them being played out in Hong Kong).

**Enforcement**

The covenant sets out the steps and activities that member states should take to implement these rights. It aims to help states to achieve them through international cooperation and assistance and recognizes that they may require time for their full realization. Consequently there is no provision, as with the ICCPR, for complaints procedure, the only requirement being periodical reports on measures for and the progress towards the achievement of the rights. The reports are submitted to the UN Economic and Social Council and are examined by a committee of experts (Alston 1994).

**International Labour Conventions**

**Rights**

Over 47 international labour instruments have been applied to Hong Kong by Britain, of which the major ones are two conventions of the International Labour Organization (‘ILO’), the 1948 Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organize and the 1949 Convention (No 98) Concerning the Application of the
Right to Organize and to Bargain Collectively. The purpose of the conventions is to provide a framework to create a more balanced bargaining situation between worker and employers (particularly in a market economy). The first convention gives to all worker and employers the right to establish and join organizations of ‘their own choosing without previous authorization’ (art. 2), which may not be dissolved or suspended by administrative authority (art. 4). Workers’ and employers’ organizations have the right to establish and join federations and confederations and ‘any such organization, federation or confederation shall have the right to affiliate with international organizations of workers and employers’ (art. 5). The extension of these rights to members of armed forces and the police may be determined nationally (art. 9).12 Britain entered several reservations, which had the effect of reducing the autonomy of trade unions — reflecting fear of PRC and Taiwan involvement as well as the general colonial distrust of trade unions. One reservation requires that, except with the permission of public authorities, all officers of trade union or federations should be engaged or employed in the industry or occupation with which the union is connected. Funds of a union or federation could be expended only for objects specified in national laws or as approved by the public authority. Public authorities may intervene to supervise the accounts of trade unions and ensure the application of their rules. Merger of unions, where one union is affiliated to an organization outside the territory, requires the consent of a public authority. Britain also reserved the right to impose the requirement of governmental consent for the affiliation of a union with international organizations and to prevent the federation of unions other than by registered unions in the same trade or occupation.13

12 Taking advantage of this flexibility, the law prohibits members of the armed and police forces from joining trade unions (the latter under the Police Force Ordinance, sec. 8), although the Commissioner of Police may establish and recognize associations composed only of police officers. (There are doubts whether this is consistent with guarantees of equality). Until 1995 traffic wardens under the authority of the police were required to obtain the Police Commissioner’s permission before joining a union (sec. 59(6) of the Road Traffic Ordinance).

13 Use was made of the reservations in the Trade Union Ordinance which prohibits a person from becoming a member of a union if he or she is not engaged or employed in the trade, industry or occupation (sec. 17(1)), although there is no prohibition on multi-trade or multi-industry unions. The ordinance also restricts the formation of trade union federations by requiring that each of the component trade unions be itself a trade union and that members of each and all component unions are engaged or employed in the same trade, industry or occupation. According to the government, this provision was enacted to ‘prevent essentially political organizations, with no genuine interest in their members’ welfare, from registering as a trade union federation’ (Hong Kong 1995: 139).
The second convention ensures that the workers’ organizations are protected from interference by employers in their establishment, functioning or administration and vice versa (art. 2 (1)). As the convention expressly recognizes, this non-interference is particularly important for trade unions which are susceptible to domination by employers or their organization, through financial or other means (art. 2(2)). The convention also protects collective agreements whereby the unions negotiate the terms and conditions of employment with employers by requiring measures appropriate to national conditions to encourage voluntary negotiations (art. 4). It is up to a state to decide how far the convention would apply to armed, police and public services (arts. 5 and 6).

**Enforcement**

In accordance with the ILO practice, these conventions do not contain provisions for supervision and enforcement, since they are subject to a general scheme (considered to be the most effective of all international schemes) which is provided for in the ILO constitution. There are three principal procedures, in each of which the Governing Board of the ILO (composed of representatives of governments, workers and employers) plays a key role. An industrial association of workers or employers may complain to the ILO against the breach of a convention by a state to which it is a party (art. 24 of the ILO constitution). The board appoints a committee of its members, composed of equal numbers of government, worker and employer representatives, to investigate the complaint. The board may publish the complaint and the response of the government (art. 25). Secondly, complaints against a member for breach of any convention it has ratified may be made by another signatory state, a delegate to the ILO conference or the board itself. The board may appoint a Commission of Enquiry to consider, and report on, the complaint (arts. 26–34). Finally, there is a special procedure established by the board for dealing with alleged violations of trade unions against any member of the ILO, regardless of whether it has signed the particular convention, although the procedure to be adopted depends on whether it has or not. The board refers the complaint to its tripartite Committee on Freedom of Association, which advises the board whether a further enquiry is necessary, in which case the matter may be referred to the Committee of Experts on the Application of Conventions and Recommendations or, if the convention has not been ratified by the state, with its consent, to a fact finding and conciliation commission.
The Legal Basis for the Application of These Treaties

There are two and possibly three bases for the application of these treaties in the HKSAR. The most obvious basis is the Joint Declaration, under which China undertook to continue them in force, although it is an obligation to Britain, rather than the international community, and, as has been discussed previously, there are no clear procedures to secure its enforcement. The second possible basis under international law arises from a developing notion that human rights treaties survive a change of sovereignty. Since the Basic Law (the third basis) provides for the continuation of the treaties, it may not now be necessary to explore the international bases, except for one special reason — the obligation of China to provide periodic reports to the relevant UN bodies or the right of a member state to complain about the violation of the ICCPR. Even if the Basic Law wanted to continue the application of the international machinery, it may be unable to vest these bodies with the necessary jurisdiction in the absence of China’s international obligations under the treaties.

The treaties were implemented to varying degrees in Hong Kong under British rule. The only explicit incorporation of a treaty was by the Bill of Rights Ordinance in 1991 which gave effect to the substantive terms of the ICCPR but which had no provision for periodic reports to the Human Rights Committee or inter-state complaints. The substantive obligations under other treaties (as indeed under the ICCPR before 1991) were met through a number of laws or administrative policies and measures, although it is unlikely that all of the obligations were fully satisfied. There has been considerable controversy as to which provisions are continued by the Basic Law, particularly as to whether they are the terms of the treaties themselves or the Hong Kong laws which implement them, and whether they include both substantive rights and the international machinery. The issue is complicated by the fact that China is not a signatory of the two covenants or the 1948 and 1949 ILO conventions (although it is a member of the ILO), so that if the machinery of these instruments were to be applied in Hong Kong, it would have to be based on a source other than the treaties directly. In order to explore these questions, it is necessary to set out the full text of art. 39 of the Basic Law.

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not
be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.  

Some Chinese officials have argued that ‘as applied’ referred to laws which had already implemented the treaties in Hong Kong, rather than directly to the provisions of the treaties themselves. As Britain had long asserted that the treaties did not require explicit incorporation since the then existing laws covered the treaty guarantees, Chinese officials may have understood at the time of the Joint Declaration that no further legislative initiatives were necessary. China has also argued that the date for the laws referred to in art. 39 is the time of the signing of the Joint Declaration (see below). The contrary interpretation is that the reference is to the actual provisions of the treaties, subject to interpretations of specific provisions and minus any reservations made at the time the treaties were extended to Hong Kong. The second view is consistent with the history of the negotiations of the Joint Declaration as well as its language and that of art. 39. Contemporaneous explanations of the Joint Declaration refer clearly to the provisions of the treaties, rather than Hong Kong laws (see Explanatory Notes to the Joint Declaration issued by the Hong Kong administration in 1984, reproduced in Chan and Clark 1991: 285). The history of the expression ‘as applied’, given above, reinforces this view. Moreover, if the intention in the Joint Declaration or the Basic Law were to refer to laws, the expression ‘as implemented’ rather than ‘as applied’ would have been more appropriate. Article 39 makes a distinction between applying (when referring to the provisions of treaties) and implementing (when referring to laws). The effect of art. 39 is therefore to both continue in force the applied treaty obligations and require their implementation through the laws, so that the rights under the treaties exist in two forms.  

The second issue is the form in which treaties continue. Are they to continue as international treaties, unless implemented or incorporated locally, and in which case is their effect to be governed by the common

\[14\] The final form of this article represents the merger (and refinement) of two separate articles in the 1987 and 1988 drafts of the Basic Law. In essence one article required the enforcement of the ICCPR etc through the HKSAR laws, and the other provided for the restrictions that may be placed upon rights and freedoms — restrictions had to be prescribed by law and had to be limited to (or as in the 1988 draft, ‘shall not go beyond the necessity for’) the maintenance of national security, public order, public safety, public health, public safety, public health, public morals or for the safeguarding (‘protection’ in the 1987 draft) of the rights and freedoms of other persons. The effect of art. 39 on restrictions of rights is discussed below.

\[15\] The legal sub-group of the Preliminary Working Committee seemed to have such a view; see their views reproduced in Edwards and Chan nd: Appendix A. See also Wu (1995).
law and so not directly enforceable under domestic law or by the Chinese law and so directly enforceable? A way to reconcile the common law and Chinese law positions would be to regard the treaties as incorporated by reference (which technique is sometimes used in common law countries\textsuperscript{16}). As far as the substantive rights are concerned, there may not be much difference, as art. 39 requires that treaty provisions be implemented through local laws.

The third issue concerns the application of the enforcement provisions of the treaties, which raise two related questions. The first is whether there is any obligation on the part of China (or Hong Kong) to submit periodic reports to the relevant UN or ILO bodies or to accept the machinery for complaints or dispute resolution which applied before the transfer of sovereignty. The wording of the Joint Declaration and the Basic Law is broad enough to create, respectively, such an obligation internationally and domestically.\textsuperscript{17} Additionally China has undertaken to facilitate the continued operation of treaties which applied to Hong Kong before the transfer of sovereignty (Annex I, part XI of the Joint Declaration and art. 153 of the Basic Law; the matter is further discussed in Chapter 11).\textsuperscript{18}

The second question is how this obligation might be discharged, and in particular whether the international bodies have the jurisdiction to receive the reports or complaints in the absence of Chinese ratification of the treaties. The ILO conventions are in a different position from the covenants. China and Britain have agreed that China would take on Britain’s ILO obligations in respect of Hong Kong. The ILO constitution permits a member state to apply a convention to its ‘non-metropolitan territory’ — as Hong Kong was in relation to Britain. China has notified the ILO that the HKSAR is not to be regarded as a ‘non-metropolitan’ territory of China

\textsuperscript{16} Just to take one example: the UK Carriage by Air Act 1961 s. 1 incorporates the Warsaw Convention into UK law.

\textsuperscript{17} This appears to have been the original understanding of Britain and China. Britain reiterated this position in its representation to the Human Rights Committee on the Third Periodic Report in respect of Hong Kong (CCPR/C/SR 1050, para 61). Both covenant committees have taken this view (for Human Rights Committee see CCPR/C/79/Add 57, and for the other, E/C.12/1994/22, para 20). China entered into discussions with Britain in the JLG on the mode of reporting, but subsequently denied any such obligation as it had not signed the ICCPR (Eastern Express 13 October 1994).

\textsuperscript{18} The reporting obligations are of little relevance in the case of most countries, whose nationals hardly ever see the reports or know when they are submitted or reviewed. In Hong Kong, however, they are distributed widely locally, commented on in the press, rebutted by NGOs, and the proceedings in and reviews by the UN committees keenly followed. The future of the reporting procedures is therefore of considerable importance and interest in Hong Kong (and others who are anxious to know and influence the Hong Kong situation).
as it is ‘an inseparable part’ of China, but that Hong Kong would continue its independent participation in the ILO and the conventions would remain effective ‘by analogy’ (Ago 1994). Quite what this means is unclear, but no other member state has objected to the Chinese declaration and presumably the previous practice, whereby Hong Kong was subject to the reporting and dispute resolution of the ILO, can continue.

The situation was more complicated as regards the covenants, for China had neither adhered to them nor made any formal declaration that the reporting and complaints procedures would apply; rather China hinted the contrary. It is doubtful whether a Chinese declaration accepting the jurisdiction of the covenant committees or even signing the covenants for Hong Kong alone would suffice to vest the covenant committees with the necessary jurisdiction, since the covenants have to be extended to all the territory of a signatory state. It therefore seemed that the only way in which China could fulfil its international obligations assumed in the Joint Declaration would be as a full party to the covenants — at one time China indicated that it intended to do so (South China Morning Post 25 November 1986; Hong Kong Standard 29 December 1986).

Nevertheless the Human Rights Committee, and somewhat more tentatively, the Committee for the ICESCR, stated that they have jurisdiction even in the absence of a Chinese declaration or the full ratification of the covenants.19 This position is based on a doctrine which is said to have emerged from recent practice in state succession under which human rights treaties pass to the new entity (or entities if the previous signatory state is fragmented as in the case of Yugoslavia, Czechoslovakia or the Soviet Union). The core of this putative doctrine is that human rights treaties are for the benefit of the people and in that sense belong to them, and accordingly they should not be deprived of this

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19 The Human Rights Committee stating its unanimous view, on the occasion of the consideration of the Fourth Periodic Report on Hong Kong, that the reporting obligations under the ICCPR would continue to apply to Hong Kong, said that human rights treaties devolve with the territory. ‘Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State’ (CCPR/C/79/Add 57, 3 November 1995).

The Committee on Economic, Social and Cultural Rights said that while the continuation of reporting ‘may pose some legal and technical problems’, there were various ways to overcome them and urged Britain and China to agree on the necessary modalities. It affirmed its desire and willingness to continue to receive reports in respect of Hong Kong, whether from China or Hong Kong and expressed the hope that China would accede to the ICESCR, ‘especially in view of the commitments entered into in the Joint Declaration’ (E/C.121/1994/19, paras 20 and 32).
benefit on the change of sovereignty. It is claimed that this doctrine was accepted in the case of states which succeeded to states mentioned above. However, it would seem that in these instances the reports were submitted willingly by the new states (even if on the request of the committees), on the ratification of the treaties or declarations of accession to them. Even if the doctrine were now to be regarded as good law, it is not clear if it could apply to a territory which does not become a state but passes from one sovereign to another and where its new sovereign has not acceded to the treaties. The view of the committees is that the treaties continue to apply. China has not yet stated its view on the ‘doctrine’.

The issue became academic when China announced that it would provide periodic reports to the treaty on behalf of the HKSAR, although the legal basis was not mentioned (South China Morning Post 23 November 1997). China has also signalled its intention to ratify the ICESCR and to sign the ICCPR.

DOMESTIC SOURCES OF RIGHTS

I discuss the two most important domestic sources of rights and freedoms, the Basic Law and the Bill of Rights Ordinance. The Basic Law implements the rights and freedoms guaranteed in the Joint Declaration, while the Ordinance (‘Bill of Rights’) incorporates the ICCPR. The scope of rights and freedoms in the Basic Law is wider than in the Bill of Rights. The Basic Law is supreme and overrides other Hong Kong laws which are inconsistent with it (art. 11). The status of the Bill of Rights is more complicated, and can only be understood in the context of its genesis. That background is also necessary to understand the debates about its compatibility with the Basic Law.

The Status of the Basic Law and the Bill of Rights Ordinance

The Bill of Rights Ordinance, section 8 of which contains the Bill of Rights itself, was enacted in the aftermath of the Tiananmen Square massacre,

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20 Jayawickrama (1995) has argued that such a doctrine exists and that it applies to Hong Kong, reversing his earlier position (1992: 162–165) before the developments in respect of Eastern Europe. Chan (1996b) takes a contrary view, although he considers that the Joint Declaration does impose a reporting obligation on China. Neither paper considers the status of the provisions for inter-state complaints under the ICCPR. For a discussion of the position in the former Soviet Union and Yugoslavia, see Mullerson (1993).
under considerable local and overseas pressure, as a means to strengthen the regime of rights. Some initiatives towards a bill of rights had already been taken before then, after the publication of the first draft of the Basic Law which was considered to be inadequate (Jayawickrama 1990a; Ghai 1995a). The decision to enact a bill was made before the Basic Law was finalized, but its enactment took place subsequently. The status to be given to the Bill of Rights was influenced by the Basic Law, particularly art. 39 which accorded a special status to the ICCPR. The principal issue was how to give a status to the Bill of Rights superior to that of other legislation (without which it could not provide effective protection), without offending the provisions of the Basic Law. There was no problem so far as inconsistent laws in force before its enactment were concerned, for under the ordinary rules of construction, they would, to the extent of their inconsistency, be repealed by the Bill of Rights Ordinance (which in fact spelled this out in sec. 3(2)). Nor was there in general a problem with executive acts or policies, whether prior or subsequent to the bill, unless they are expressly authorized by subsequent legislation. But future laws could only be governed by the bill if it enjoyed a superior status to them.

There were two problems with assigning a higher status to it. The first was connected with a British imperial statute, the Colonial Laws Validity Act 1865, which cast doubts on the ability of the Hong Kong Legislative Council, as an unrepresentative legislature, to pass entrenched legislation (Wesley-Smith 1990). The other, and more serious, constraint arose from the provisions of the Basic Law, which, while itself superior to

21 At first the British and Hong Kong position was that the laws in Hong Kong had to converge with the Basic Law and therefore no decision on a domestic bill could be made unless the final form of the Basic Law was known. See statements by the Secretary for Constitutional Affairs, Michael Suen Ming-yeung (SCMP 19 April 1989) and Chief Secretary Sir David Ford in the Legislative Council on 3 May 1989. After Tiananmen Square, the Foreign Affairs Committee of the British Parliament recommended that a Bill of Rights should be enacted to reassure the people of Hong Kong of their rights in the future (House of Commons: Foreign Affairs Committee, Second Report, HC 281–1 printed on 28 June 1989, para 2.11). The Foreign Secretary, Geoffrey Howe, announced in the House of Commons that a Bill of Rights would be enacted (SCMP 5 July 1989).

22 This problem is not normally encountered with Bills of Rights. They usually appear as part of a constitution and therefore automatically enjoy superior status. Even when a bill of rights is adopted subsequently to the constitution, it is customary to integrate it in the constitution (e.g., US, Canada, Tanzania). The problem of status arises in legal systems which do not have the notion of a supreme law, as in the UK and New Zealand (the latter, but not the former, having a Bill of Rights, but without a special status). In the UK the problem of special status for a law has arisen in connection with its membership of the European Union and has been solved largely through ‘rules of construction’ (see Chapter 5).
other laws, makes no express provision for the HKSAR legislature to entrenched a law (although as I argue later, art. 39 might be implied as authorizing it). An attempt to give a superior status to the bill by its own provisions would run the serious risk of having the whole of it declared invalid either by the NPCSC under art. 160 or by the HKSAR courts after the transfer of sovereignty under art. 158.

No attempt was made to give the bill a superior status through its own terms. The ordinance merely provided that subsequent legislation shall, ‘to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong’ (sec. 4), which is little more than a rule of construction, and does not by itself invalidate subsequent legislation. However, the bill was entrenched indirectly by the Letters Patent, which were amended to control the law-making capacity of the Legislative Council. The amendment (Art. VII (5)) read:

The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.

The amendment entrenched not the bill as such, but the ICCPR as applied to Hong Kong. However, since the bill is an authoritative statement of the ICCPR as applied to Hong Kong, courts frequently looked to the bill when examining subsequent laws, although if a law was held invalid, it was because of inconsistency with the Letters Patent.23 The Bill of

23 In R v Sin Yau Ming [1991] 2 HKCLR 127, at 154; (1991) 1 HKPLR 88, Kempster JA, said, *obiter*, that ‘the Bill of Rights is effectively entrenched unless the Letters Patent were materially amended before, or Art. 39 of the Basic Law amended after, 30 June 1997’. The former part of the sentence would seem to be inaccurate if by ‘effectively’ is meant that it is legally binding (my views on the second part, i.e., the effect of art. 39 are discussed below).

In R v Lum Wai-ming [1992] 2 HKCLR 221; (1992) 2 HKPLR 182, the High Court had to decide on the validity of certain provisions of the Dangerous Drugs (Amendment) (No. 2) Ordinance, passed after the Bill of Rights Ordinance, concerning certain presumptions. The defence referred to art. 14(2) of the ICCPR rather than art. 11(1) of the Bill of Rights (which covers the presumption of innocence). Reference was made to the Letters Patent for the superior effect of the right (although the judgment is not entirely free from confusion as the court seems at one point to assume that the Bill of Rights Ordinance covers subsequent legislation also under sec. 4). See also the discussion by Duffy J in R v William Hung [1992] 2 HKCLR 90; (1992) 2 HKPLR 49.
Rights does not overlap exactly with the ICCPR as applied in Hong Kong; in particular the bill is restricted in its application to inter-citizen relations (see below) and it is prevented from operating to challenge restrictions on the franchise which are protected by a subsequent amendment to the Letters Patent (see Chapter 7). Whatever the approach and whatever the consequence, the Letters Patent themselves, as imperial law, lapsed on 1 July 1997. Does that render the Bill of Rights an ordinary piece of legislation, subject to the vagaries of subsequent legislation by the HKSAR legislature?

The hope of the Hong Kong administration was that it would remain in force, and continue its quasi-superior status. The rather convoluted wording of the amendment to the Letters Patent derives from art. 39 of the Basic Law, in the expectation that the Bill of Rights would attach itself to and draw sustenance from the latter (which would not have been possible if the Bill of Rights had been entrenched directly in the Letters Patent). To a large extent this expectation has been fulfilled; the HKSAR courts have referred to the Bill of Rights as if it enjoyed a superior status (presumably under art. 39). The government and the courts have applied the tests of the ICCPR, relying on it in preference to the rights provision of the Basic Law itself.

**The Structure of the Rights Provisions in the Basic Law and the Bill of Rights**

The provenance of the Bill of Rights is an international human rights instrument, incorporating the notion that rights are inherent and universal and based on the fundamental principle of equality and non-discrimination. The Basic Law provisions are more clearly linked to the framework of a special administrative region within the PRC and are related to the apparatus of government (and are consequently more concrete, with some rights dependent on national status). Many of these provisions arise from the imperative of a market economy (as it has developed in Hong Kong) (Ghai 1993). The drafting styles are different, that of the Basic Law being looser. These differences must not be overdone, for while the Bill of Rights starts with the ICCPR, it bends it to suit Hong Kong, while the Basic Law itself has many cosmopolitan characteristics (see Chapter 11).

The Bill of Rights is confined to what might be called civil and political rights. The reach of the Basic Law is wider, encompassing economic, social and cultural rights also. The Basic Law represents a much better balance of rights, entitlements and duties, and is more sensitive to the truth that human dignity is a matter not merely of abstract rules but of
social and economic conditions when these abstract rules become real. It departs from the Bill of Rights in another respect; it provides also for the duty of residents. The notion of duties — with its ideological overtones — however, plays only a small role, and although the plural form is used in the heading of Chapter III, only one duty is specified: the obligation to abide by the laws (art. 42).24

Provisions on rights and freedoms are spread throughout the Basic Law, within the context of some General Principles. One General Principle states that the HKSAR ‘shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with the law’ (art. 4), while another guarantees the right of private ownership of property in accordance with the law (art. 6). General Principles also preserve the capitalist system and way of life of Hong Kong (art. 5) and provide for the continuation of the common law and Hong Kong’s legislation which are an important source of rights and freedoms (art. 8). The main substantive provisions on rights and freedoms are contained in Chapter III. The right of property and of the ownership of enterprises appears in Chapter V (Economy) while the presumption of innocence and the right to trial by jury appear in Chapter IV Section 4 (The Judiciary). Some rights are expressly provided for, others are either incorporated entirely by reference to pre-transfer laws or partly by definition and partly by reference (e.g., the right of fair trial, art. 87, of which some elements are set out expressly, and the rest by reference to previous laws). The difficulty of reference to ‘previous’ laws or systems is compounded by the controversy as to the date of ‘reception’ (see Chapter 8). Also problematic is the manner of the incorporation of the ICCPR and other international instruments in art. 39; the status given by the article to these instruments is crucial to the scope and protection of rights. There is no doubt that in terms of drafting, Chapter III is the least satisfactory part of the Basic Law.25

24 The Chinese constitution imposes several duties: to work (‘work is the glorious duty of all citizens with the capacity to work’ (art. 42); the duty to receive education (art. 46); the duty to practise family planning (art. 49); the duty of parents to rear and educate their minor children and the duty of children of age to support and assist their parents (art. 49); to safeguard the unity of the country and the unity of all its nationalities (art. 52); duty to protect public property and respect social ethics (art. 53); to safeguard the security, honour and interests of the motherland (art. 54); to defend the motherland and resist aggression and to perform military service (art. 55) and to pay taxes (art. 56). Although the notion of constitutional duties was derived from the Soviet model, some duties are reflective of Chinese cultural values.

The singularity of duty in the HKSAR has been explained by a Chinese scholar as reflecting deference to its separate system and traditions, Wang Shuwen 1990.

25 Chan (1988) has suggested that this may have resulted from the lack of adequate
Neither the Basic Law nor the Bill of Rights has a general scheme for the limitations on rights. Each right has its own provisions for limitations (though some rights are stated in absolute terms), and each statute has a general provision dealing with the suspension of rights in emergencies. In the Basic Law rights tend to be formulated in absolute terms, but when they are qualified, it is hard to understand why they have been so singled out. There is no general provision for the status of rights during emergencies; in fact there is no provision for emergencies, but there is provision for the application of national emergency laws (art. 18). These matters are discussed later.

**Beneficiaries of Rights**

The Basic Law has an elaborate scheme for the categorization of beneficiaries, reflecting both the HKSAR’s status as a region of a state and its cosmopolitan character. The Basic Law divides individuals into two broad categories: residents and others (e.g., visitors). The category of residents is in turn subdivided into permanent and non-permanent residents (art. 24; see Chapter 4). The qualifications for permanent residency are specified in the Basic Law. Not all permanent residents enjoy equal rights; the Basic Law distinguishes, in this broad category, between Chinese nationals who have the right of abode in Hong Kong, permanent residents who are Chinese nationals and have no right of abode in a foreign country, permanent residents who are Chinese nationals with varying periods of residence in Hong Kong, and non-Chinese national permanent residents. There is also, for limited purposes, the category of ‘indigenous inhabitants’ of ‘the New Territories’ (art. 40).

In principle, rights and freedoms under the Basic Law are available to all residents. The exceptions are the right to vote in elections of HKSAR representatives to the NPC (art. 21) and to vote in and stand for elections to the HKSAR legislature, which are confined to permanent residents (art. 26), though only 20% of the legislature may consist of non-Chinese nationals or Chinese nationals with a right of abode in a foreign country (art. 67). Non-permanent residents do not enjoy the same right to serve in the public services as permanent residents (art. 99), and certain offices are reserved for Chinese nationals who are permanent residents without a representation of persons trained in the common law in the sub-committee on human rights or its staff.

In contrast to Hong Kong’s Basic Law, the rights provisions in the Macau Basic Law are elegant and comprehensive.
The rights of non-resident persons in Hong Kong are a little obscure; it is merely provided that they ‘shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter’ (i.e., Chapter III), which, on one reading, makes their rights contingent on ordinary legislation.

The indigenous inhabitants of the New Territories are guaranteed their ‘lawful traditional rights and interests’ (art. 40), which however are not defined (and so presumably would be discovered by reference to existing law or practice). It is generally acknowledged that they relate to questions of land, building of ‘small houses’ by male descendants, exemption from rates for rural houses, and certain burial and funeral rights (for lists of them see Chan (1988: 216–217) and Basic Law Consultative Committee 1988). Some specific rights to land for the male descendants of persons who were residents in 1898 of ‘an established village in Hong Kong’, which would cover the New Territories, are protected (art. 122), thus offending both against the general and the gender principle of equality.

Rights under the Bill of Rights are in principle available to all persons, including visitors and aliens. The exceptions are the rights to participate in public life (elections and the public service), which are restricted to ‘permanent residents’ (art. 21); the right to enter Hong Kong (art. 8) and some guarantees against expulsion from Hong Kong (art. 9) which are restricted to those with a right of abode.

There is no simple answer as to whether the rights are available to legal persons, as for example corporations and associations. In the Basic Law rights are for the most part granted to ‘residents’ or ‘other persons’; it is clear from the definition of these categories that the reference is to natural persons. When rights are more widely conferred, different language is used. The right in connection with civil or criminal proceedings are available to ‘parties to proceedings’ (art. 87) (and would therefore include corporations) but related rights of access to the courts, etc. are given only

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26 These are the Chief Executive (art. 43), members of the Executive Council (art. 55), principal officials of the government (art. 61), President of the legislature (art. 71), the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court (art. 90), and members of the Committee for the Basic Law.

27 It has been held that the expression ‘permanent resident’ in the Bill of Rights does not mean ‘permanent resident’ as defined in the Basic Law (art. 24). The former term refers to a person who has the right of abode in Hong Kong under the pre-transfer law. If there is to be convergence with the Basic Law, it must be after and not before the transfer of sovereignty (Keith J in Re Association of Expatriate Civil Servants of Hong Kong (1995) 5 HKPLR 490.) Presumably after the transfer the expression has the same meaning as in the Basic Law.
to ‘residents’ (art. 35). The right to property is granted to ‘individuals and legal persons’ (art. 105) as well as to religious organizations (art. 141); educational institutions are granted ‘autonomy’ and ‘academic freedom’ (art. 137); religious organizations are given various rights, including the running of schools, hospitals and welfare institutions (art. 141); professions as corporate groups have some rights in relation to the organization of the profession (art. 142) and other non-governmental organizations have various rights as well (arts. 143, 144, 145). These provisions are important in showing the various ways in which the interests of the state are balanced with those of others, and serve to give some kind of status and standing to civil society. It is altogether a more commendable approach than that of the Bill of Rights.

However, if we were therefore to conclude that rights are confined to individuals unless expressly conferred on corporate groups, it would leave the latter without protection of their legitimate interests. For example, the freedom of expression is a right of ‘residents’; yet it is to companies engaged in journalism or publishing that this right is of key importance. It may be possible in certain cases for individual members of the company to bring a personal action to secure the right, but it is unlikely that the right would provide a defence to a charge of sedition brought against it. A similar problem arises in relation to the Bill of Rights where the rights are granted to ‘everyone’. It is arguable that ‘persons’ includes corporate or incorporated bodies (Chan 1992a) and corporations have been allowed to plead rights in defence (e.g., Ming Pao Newspapers Ltd. v AG (1996) 6 HKPLR 103).

The Scope of Rights: Rights Against Whom?

Under the Bill of Rights, rights are available only against the government, a public authority or their agents (sec. 7). The restriction was imposed under pressure from the business community, which armed itself with a legal opinion from a leading counsel in London (Byrnes 1993: 83–84). In this way the application of the ICCPR was even further truncated than under the British reservations.28 As the ICCPR undoubtedly places an

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28 The Court of Appeal turned down the possibility of limiting the scope of the restriction in Tam Hing-ye v Wu Tai-wai (1991) 1 HKPLR 262, when, overruling a district court judge, it held that legislation affecting relations between private parties which might violate the right of a private party was not reviewable. The case concerned a provision of the District Court Ordinance (sec. 53E(1)(a)) whereby, on the basis of an ex parte application by a creditor, the court may grant an order prohibiting his or her judgment debtor from leaving Hong Kong. The District Court had held that the provision infringed
obligation on the state to ensure to all the enjoyment of rights (Byrnes 1993), the scope of rights would be broader under art. 39 of the Basic Law. The courts have, however, not so far taken a narrow view of what is a public authority; they have held that it covers a university (*Hong Kong Polytechnic University v Next Magazine Ltd.* (1996) 6 HKPLR 117). Keith J. suggested (p. 122–123) that something more than functions for the public benefit is required, such as government control, monitoring or accountability, or, as here, public funding. Shortly before the transfer of sovereignty, a bill introduced by a member, was passed by the legislature to extend the scope of protection as against private parties. The law was suspended and subsequently repealed by the Provisional Legislature.

The Basic Law does not expressly state against whom the rights are protected. There is little in the language to suggest that the protection is available only as against public authorities (although of course some rights are relevant only as against them, e.g., the right to fair trial or access to courts). On the other hand, the language in a General Principle (art. 4) suggests that the responsibilities of public authorities extend beyond merely refraining from infringing rights to, in a more positive manner, safeguarding them (presumably against non-state bodies), while art. 6 (also a General Principle) states that the HKSAR ‘shall protect the right of private ownership of property . . .’. Article 30 dealing with privacy of communication is one of the few articles which actually mentions who may not violate a right and includes both government departments and individuals. It may be that in keeping with general principles and practice, the courts would restrict protection to public authorities, unless either expressly or by necessary implication it is extended further.

**Rights and Freedoms**

The rights protected by these instruments may be divided into seven categories: political, personal, civil, legal, economic, social and cultural (although there is considerable overlap between them, for while the freedom of belief and religion is regarded as a civil right exercised fully in association with others, it is also an intensely personal right). Political rights (i.e., electoral rights and right of participation in government and public affairs) are not discussed here as they were dealt with in Chapter 7. They are the right of movement (art. 8(2)), and rejected the plaintiff’s argument that the Bill of Rights did not apply due to sec. 7 by distinguishing that section from sec. 3(2), under which the court was obliged to declare invalid, legislation which unlawfully infringed a right (this judgment is at (1991) 1 HKPLR 1).
extremely important in establishing democracy which is essential both to the protection of rights and Hong Kong’s autonomy.

**Personal rights**

The Basic Law guarantees the ‘inviolability’ of the freedom of the person. Its provides specific protections against:
1. arbitrary or unlawful arrest, detention or imprisonment;
2. arbitrary or unlawful search of the body;
3. deprivation or restriction of the freedom of the person;
4. torture; and
5. arbitrary or unlawful deprivation of life (art. 28).

These rights are protected in a more comprehensive manner in the Bill of Rights. Thus the right to life restricts the imposition of the death penalty to the most serious crimes and prohibits its imposition on persons below 18 years (as is required by the Convention on the Rights of the Child which is applied to Hong Kong, see below) or pregnant women (art. 2),\(^{29}\) while the right to liberty provides for a number of safeguards for those who are arrested or detained (art. 5) as well as for those who are imprisoned (art. 6).

Another personal right in the Basic Law is the protection of the privacy of communication, although it may be infringed by ‘relevant authorities’ to inspect communications in accordance with legal procedures for reasons of public security or investigation of crimes (art. 30). The right of privacy in the Bill of Rights is broader, protecting additionally, home, family and reputation (art. 14).

The freedom of marriage and the right to raise a ‘family freely’ are protected in the Basic Law (art. 37). The Bill of Rights defines this right in greater detail. It includes the right to marry for men and women of ‘marriageable age’; no marriage shall be entered into without the free and full consent of the intending spouses; and spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In addition the family is recognized as the ‘natural and fundamental group unit of society and is entitled to protection by the state’ (art. 19).

\(^{29}\) The Second Optional Protocol to the ICCPR (1989) abolishes the death penalty, but it does not apply in Hong Kong. However, the death penalty was abolished in 1993 by the Crimes (Amendment) Ordinance (no. 24), although no death sentence had been executed after 1966, and in 1973 the British Government instructed the Governor to exercise clemency in respect of all such sentences. See Liu (1992) and, for arguments that might be deployed against the re-introduction of the death penalty, see Cottrell (1994).
Related rights which are protected in the Bill of Rights but not in the Basic Law are the rights of children (art. 20). The Bill of Rights guarantees to every child, without the usual discriminatory factors, the right to ‘such measures of protection as are required by his status as a minor, on the part of his family, society and the State’. More specifically, it provides that every child shall be registered immediately after birth and shall have a name (art. 20). An idea of what rights are implied by the article can be gleaned from the Convention on the Rights of the Child; these include the obligations of relevant private and public institutions to give primacy to the best interests of the child (e.g., adoption proceedings); rights connected with the unity of the family, including parental responsibilities for decisions about the welfare of the child; protection against maltreatment, and from economic, sexual and other forms of exploitation.  

The Basic Law protects the right of movement within Hong Kong, to travel out of and into Hong Kong, and the freedom of emigration to other countries and regions is protected (art. 31). No special permission is required to leave Hong Kong if a person has valid travel documents, ‘unless constrained by law’. The exercise of this right is to be facilitated by the provision which enables the HKSAR, although itself not sovereign, to issue regional passports to permanent residents who are Chinese citizens and travel documents to other permanent residents (art. 154), as well as the commitment of the PRC to assist or authorize the HKSAR to conclude

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30 The Convention on the Rights of the Child was extended to Hong Kong in 1994. China has also ratified the convention. The Hong Kong government stated that it was unnecessary to have a separate Children’s Ordinance as all the rights were adequately covered in existing legislation (see Fourth Periodic Report to the UN Committee on the ICCPR, para 289 1995, where the current legislation and policies for the protection of children are discussed). The Births and Deaths Registration Ordinance provides for the particulars of any child born alive to be registered within 42 days of birth. While some other progress had been made as regards the rights of the child (e.g., the abolition of the distinction between legitimate and illegitimate children for the purposes of inheritance, the Parent and Child Ordinance (1993)) before the transfer of sovereignty, some problems remained, particularly in relation to the right of certain children born in China to join their parents or parent in Hong Kong. It was and is even more difficult for other relatives of residents (including spouses) to join them, a situation which is aggravated by the daily migration of mainlanders. The separation of families, particularly children, was criticized locally as well as by the UN Committee on Economic, Social and Cultural Rights (see its comments on the second periodic report from Hong Kong, November 1994). The problem is compounded by the fact that the permission to leave the mainland to enter Hong Kong is granted by China within a quota. After the transfer of sovereignty, children of the HKSAR residents who are Chinese citizens acquired the right to enter Hong Kong (art. 24(3)), but see Chap. 4 for legislative restrictions on it.

31 The reasons for restrictions on the freedom of movement in the Bill of Rights are more carefully delineated — national security, public order (ordre public), public health or morals or the rights and freedoms of others (art. 8).
visa abolition agreements with foreign states or regions (art. 155). It is not obvious from the wording of art. 154 that a permanent resident has a right to a passport or a travel document. But it could be argued that the state is obliged to give these documents for otherwise the right to leave and enter Hong Kong would be frustrated. Unlike the Basic Law, the Bill of Rights purports to confer some rights of review on expulsion from Hong Kong on those without the right of abode (art. 9) but these may effectively be nullified by another provision of the ordinance (sec. 12) — so there may be no effective difference.

The Basic Law does not expressly provide for certain personal types rights which are guaranteed in the Bill of Rights. The first is the ‘right to recognition everywhere as a person before the law’ (art. 13). The second is the prohibition against slavery, servitude or forced labour (art. 4), although it is probable that the protection of personal liberty and freedom under the Basic Law would cover these rights. There can be no imprisonment for breach of contract (art. 7). On the other hand, unlike the Bill of Rights, the Basic Law protects an individual’s right to choose his or her occupation (art. 33, discussed below under economic rights).

**Civil rights**

The Basic Law guarantees without any qualifications the ‘freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike’ (art. 27). The freedom of the press is not explicitly protected in the Bill of Rights (the freedom of expression not necessarily covering all the aspects of the freedom of the public, journalists and the owners of the media). The Basic Law reinforces the

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32 The Hong Kong Special Administrative Region Passport Ordinance (No. 127 of 1997) does not appear to give a permanent resident the right to a passport (see s. 3). The Ordinance, however, provides greater protection against the cancellation of a passport (s. 9). It is possible that the Ordinance will be interpreted in accordance with international and comparative case law. In England it was at one point held that the issue of a passport was a prerogative matter and refusal could be challenged; however, it has more recently been held that the decision to refuse a passport may be subject to judicial review (R v Secretary of State for Foreign and Commonwealth Affairs [1989] 1 All ER 655). The Indian Supreme Court has held that a right to passport, although not expressly given, may be included in the right to liberty (Maneka Gandhi v Union of India AIR (1978) SC 597). (The Indian Supreme Court has given a broad meaning to ‘personal liberty’. See B. Errabbi 1986.)

33 There is no space to explore the ramifications of the freedom of the press. For a summary, see C. Edwin Baker 1989, especially Chapters 10 and 11. However, the freedom of the press is of special significance in Hong Kong, as it has played an
freedom of expression through the right of the residents to ‘engage in academic research, literary and artistic creation, and other cultural activities’ (art. 34). It also guarantees to educational institutions the right to retain ‘their autonomy and enjoy academic freedom’ (art. 137). The Basic Law also obliges the government to improve standards of education — an important means for the exercise of the freedom of expression and creativity (art. 136, see below under social rights). The Bill of Rights treats separately the freedom of opinion and expression (art. 16), right of peaceful assembly (art. 17) and the freedom of association (art. 18). Unlike the Basic Law, the restrictions that may be imposed on each right or freedom are spelled out.

The Basic Law is particularly expansive on religious rights. It guarantees residents the freedom of conscience and religion and the freedom to preach and conduct and participate in religious activities in public (art. 32). This right is reinforced by various institutional guarantees. Apart from this general provision, there are specific guarantees that ‘schools run by religious organizations may continue to provide religious education, including courses in religion’ (art. 137). Furthermore the government of the HKSAR is prohibited from restricting the freedom of religious belief, interfering in the internal affairs of religious organizations or restricting religious activities ‘which do not contravene the laws of the Region’ (art. 141). ‘In accordance with law’, religious organizations shall enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests are to be maintained and protected. They may, according to previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services. Religious organizations and believers in the HKSAR may maintain and develop their relations with religious organizations and believers elsewhere (art. 141). Religious organizations (as other non-governmental organizations in various social and professional fields) are free to maintain and develop relations with their counterparts in foreign countries and regions and with international organizations (art. 149) while in relation to their counterparts...
in China, their relations ‘shall be based on the principles of non-subordination, non-interference and mutual respect’ (art. 148).35

**Legal rights**

The Basic Law guarantees a number of rights in relation to the legal system. Apart from establishing an independent judiciary and ensuring the autonomy of the courts regarding their powers and procedures (for which see Chapter 8), the Basic Law provides for access to the legal system. An important element in legal rights is to ensure that there is no abuse of the legal process, particularly in relation to criminal prosecutions. The Basic Law seeks to provide this protection through a variety of methods. The power to institute and control criminal prosecutions is to be exercised ‘free from any interference’ (art. 63). The independence of prosecuting authorities is intended to prevent politically motivated prosecutions (or to ensure that a politically favoured criminal is not sheltered from prosecution). It is doubtful if art. 63 will achieve this, since the power of prosecution is vested in the Department of Justice, which is an integral part of the machinery of the executive (see Chapter 7 for further discussion). Secondly, once a prosecution has been initiated, there are various safeguards before and during the trial. The right to confidential legal advice is guaranteed (art. 35), so that a person may discuss his or her problems with a lawyer (and provide personal information), knowing that the advice or the information will not be or may not be divulged to others. The same article provides for the right of representation by lawyers of one’s choice. There is an omnibus provision whereby the rights of the accused in relation to criminal proceedings which were available ‘previously’ (i.e., under the pre-transfer law) are to continue to apply. More specifically the right to a fair trial without delay and the presumption of innocence are guaranteed (art. 87).36 The general provision would encompass the right to produce the testimony of one’s witnesses and to cross-examine the witnesses of the prosecution.

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35 The Bill of Rights gives substantially similar rights regarding belief (art. 15). However, it sets out the grounds of restriction and expressly recognizes the liberty of parents or legal guardians ‘to ensure the religious and moral education of their children in conformity with their own convictions’.

36 The wording is not without ambiguity — ‘shall be presumed innocent until convicted by the judicial organs’. It is not clear how far this imports rules about the burdens of proof, requiring in essence the prosecutor to prove beyond reasonable doubt the guilt of the accused. For quite what one should read into it, see the discussion on interpretation in Chapter 5. Since the common law is generally to be preserved, one could argue perhaps that something considered as fundamental as the ‘golden thread’ of the presumption of innocence at trial is to be preserved with it, see *Woolmington v DPP* [1935] AC 402.
The previous system of trial by jury is to continue (art. 86), although as has been shown in Chapter 8, the jury is available only for serious offences which are tried in the High Court, and thus for a very small proportion of cases. It must of course be said that how great a safeguard against oppression trial by jury might be can only be a matter of speculation. Existing research suggests that Hong Kong juries have some difficulty understanding what is going on, and that they are rather more likely to convict than in many countries. A shift in the language of the courts would go a good way towards changing the former, and the authors themselves say, ‘it may be that . . . the Hong Kong jury . . . would act as a defender of freedom in politically sensitive cases’ (Duff et al. 1992: 101). Jury enthusiasts have tended to argue that one of the first things a tyrant would do would be to abolish the jury (Devlin 1956: 164).

The Basic Law protects the access to courts and lawyers for civil purposes (art. 35), the rights of litigants to civil proceedings (art. 87), and the right to institute legal proceedings and seek judicial remedies against the acts of the executive authorities and their personnel (art. 35). The government is obliged to act in accordance with the law (art. 64).

The rights in respect of the legal process are set out in greater detail in the Bill of Rights (although it does not guarantee jury trials). It secures various rights to a person who is arrested, including being brought promptly before a court and the grant of bail. A person wrongfully arrested or detained is entitled to compensation (art. 5). Persons in detention are to be treated with humanity and with respect for the inherent dignity of the human person, with the separation of the accused from the convicted; while the essential purpose of the penitentiary system is ‘reformation and social re-habilitation’ (art. 6). Among the rights of the criminal defendant not specifically mentioned in the Basic Law are: information to the accused on charges; time and facilities for preparation of the defence; legal representation at public expense if justice so requires; the right to have his or her witnesses and to examine those against him or her; the use of an interpreter if necessary; protection against self-incrimination and double jeopardy; and the right to review of conviction or sentence (art. 11). There is right to a public trial by an impartial court (although the public or press may be excluded for part of the trial for reasons of public policy or the privacy of the parties, art. 10). There is protection against the retrospectivity of criminal offences or penalties (art. 12). These provisions would no doubt be read into the Basic Law through art. 87, with its general requirement of ‘fair trial’.

The Bill of Rights also protects legal rights in civil matters. Apart from the right to have one’s own counsel, ‘everyone shall be entitled to a fair and public hearing by a competent and independent and impartial
tribunal established by law’ ‘in the determination of his rights and obligations in a suit of law’ (art. 10). These rights are effectively covered in Basic Law, and arguably they are broader than in the Bill of Rights, for the expression ‘suit at law’ has been often interpreted elsewhere as being restricted to suits involving issues under private as opposed to public law, although the trend is towards a broader approach even there (Boyle).37

**Economic rights**

**Property** The Bill of Rights does not protect rights of property.38 On the other hand, the Basic Law provides extensive guarantees of property rights — protection of property seems to be something of a leitmotif of the Basic Law, reflecting its concern with the capitalist market. A General Principle protects the ‘private ownership of property in accordance with law’ (art. 6). The substantive provision protects, ‘in accordance with the law, the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property’ (art. 105). The compensation corresponds to the real value of the property at the time and has to be freely convertible and paid without undue delay (see Chen 1993c for a detailed discussion). Also protected is the ownership of enterprises and investments from outside the HKSAR. The right to property thus departs from the general rule that rights are restricted to natural persons and to residents. Related rights are the protection of leases beyond 1997 (art. 120–122), the protection of ‘achievements in scientific and technological research, patents, discoveries and inventions’ (art. 139) and ‘the achievements and the lawful rights and interests of authors in their literary and artistic creation’ (art. 140). I have already referred to the rights of the original inhabitants of the New Territories which are largely related to property.

The Basic Law establishes land rights specifically, which were a major cause of uncertainty and anxiety in the 1980s and were a principal reason for the start of negotiations about the future of Hong Kong. Under the British administration, all land was vested in the government (‘the Crown’), and land for the use of individuals and corporations was provided through leases (for an account of the land system under the British administration, see Sihombing and Wilkinson 1996). The policy regarding the duration of

37 Hong Kong courts have taken a very restrictive view of ‘suits’ at law (Ghai 1997; Chen 1998).

38 This is because of its omission in the ICCPR — due to opposition from socialist states in the UN. Property rights are protected in the common law, but as such are capable of being limited or eliminated by legislation.
leases has varied from time to time; for many years, before the transfer of sovereignty in Hong Kong and Kowloon, it was a period of 75 years renewable for a similar period, although there were older leases which were granted for 999 years. In the New Territories the leases were originally for 75 years, subject to a renewal for 24 years less three days so that the lease would expire before the exhaustion of the treaty lease under which Britain administered the New Territories. After 1959 all the leases were granted to expire three days before 30 June 1997.

Following the Joint Declaration (Annex III), the Basic Law makes a number of new provisions in relation to leases. It vests the land in the state (meaning the PRC) but the government of the HKSAR is made responsible for its management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development (art. 7). It continues the validity of all leases ‘granted, decided upon or renewed’ before the transfer of sovereignty and which extend beyond that date (art. 120). The Joint Declaration provides that the Hong Kong administration may not grant leases beyond 2047 (the guarantees of ‘two system’ extending up to that date) (Annex III, sec. 3). Where a lease without the right of renewal expires after 30 June 1997, it shall be dealt ‘in accordance with laws and policies formulated’ by the HKSAR (art. 123). Where the lease which contains no right of renewal is renewed, no premium will be paid (as under the pre-transfer law and practice); instead an annual rent of 3% of the rateable value of the property, as adjusted from time to time, will be paid (art. 121).³⁹ In relation to leases of old scheduled lots, village lots, small houses and similar rural holdings held on 30 June 1984 or granted subsequently with small houses by a lessee who was in 1898 a resident of an established village, the previous rent is to remain unchanged so long as the property is held by the lessee or one of the lessee’s lawful successors in the male line (art. 123; on small house policy, see Watford Construction Co v Secretary for the New Territories [1978] HKLR 410 (CA) and Sihombing and Wilkinson II[37] to [42]). The Basic Law does not, however, remove all uncertainties: it does not determine what is to happen to leases after 2047, nor to leases without the right of renewal which expire after 30 June 1997.

Choice of occupation  The second economic right is the freedom of choice of occupation (art. 33). Presumably it would prohibit conscription for a

³⁹ This change will have major significance for the revenue of the government, which in the past relied heavily on premiums for the original grant and renewals. On the other hand now the income will be steady throughout the duration of the lease. The Basic Law does not mention the variation of user under the lease or its transfer, and presumably premiums will continue to be levied for these as under the previous laws.
job. However, the right to the freedom of occupation is a passive or negative right; it does not guarantee a job or occupation to a resident.\textsuperscript{40} The ICESCR defines the right so as to include ‘the right of everyone to the opportunity to gain his living by work which he chooses freely or accepts’ (art. 6). The government is to promote this right through training programmes and policies for full employment ‘under conditions safeguarding fundamental political and economic freedoms to the individual’. The covenant guarantees also the right of everyone to ‘just and favourable conditions of work’, including fair wages and equal remuneration for work of equal value (without distinction, particularly gender), safe and healthy working conditions, and the limitation of working hours and the right to paid holidays (art. 7). However, some restriction on free choice is implied by art. 142 which grants a significant degree of self-governance of entry into and discipline within the profession (art. 142). Stringent qualifications and other conditions could well prevent persons with requisite skills from engaging in a profession (for the occupation of law, see Chapter 8).

**Trade union rights** The Basic Law protects the right to form trade unions and to strike. The Bill of Rights does not directly refer to the right to strike, but by incorporating the 1948 ILO Convention regarding the Freedom of Association and the Right to Organize (art. 18(3)), it recognizes this as well as a host of other worker rights. The Basic Law incorporates even a wider set of rights, since art. 39 entrenches all the labour conventions applied to Hong Kong. Specifically, the Basic Law provides that the ‘welfare benefits and retirement security of the labour force shall be protected by law’ (art. 36), but these rights are not specified. Some guidance may be obtained from the more general protection of welfare rights (which are discussed in the following subsection).\textsuperscript{41}

\textsuperscript{40} In Papua New Guinea, where a similar right is protected (sec. 48 of the constitution), the Supreme Court has held that it does not provide a guarantee of employment, *Premdas v The Independent State of Papua New Guinea* [1979] PNGLR 329. The Indian constitution guarantees the freedom of profession, occupation, trade or business (art. 19) (f)), but no one appears to have argued that it gives the right to work.

\textsuperscript{41} Hong Kong laws substantially incorporate these guarantees. (See particularly the Employment Ordinance and the Trade Unions Ordinance.) The latter gives trade unions immunity from any civil action in respect of certain acts done in the furtherance of a trade dispute. Workers who participate in industrial actions are protected from anti-union discrimination and interference (Part IVA of the Employment Ordinance), by criminalizing such conduct by the employer. However, the provision has not been effective since it is hard to establish that the discrimination or dismissal is due to union activities (the onus to prove which is on the worker). In its report to the UN committee, the government stated its intention to amend the legislation to provide compensation from employers for
Social rights

Social welfare The Basic Law gives Hong Kong residents the right to ‘social welfare in accordance with law’ and provides that the ‘welfare benefits and retirement security of the labour force shall be protected by law’ (art. 36). No indication is given of the system or scope of welfare rights, but art. 145 makes the ‘previous’ system the basis of the rights (‘On the basis of the previous social welfare system, the Government of the HKSAR shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs’). Although the HKSAR is endowed with sufficient flexibility in adjusting the precise benefits, it is necessary to give a brief account of the previous system as it will be the legal foundation of the new system.

The laissez faire nature of the ‘previous’ economic system did not provide for much social welfare or social security. Largely under the impetus of incipient democratization of the Legislative Council and the return of sovereignty, some progress was achieved towards the end of the colonial period. The system was a patchwork of laws and administrative practices; the benefits that it conferred were more in the nature of ‘grace’ those dismissed for union activities and to place on employers the burden of proving that the dismissal is not discriminatory (Fourth Periodic Report . . . p. 142).

As for collective bargaining, while the law facilitates it, the agreements themselves are not binding. The government has resisted trade union pressures for legislation to make them enforceable when the membership of a union has reached a prescribed percentage as impractical and inappropriate to the circumstances of Hong Kong — there are numerous trade unions, most of which have a relatively low participation rate, while small business establishments are the norm and there is high labour mobility (Fourth Periodic Report . . . p. 142).

Despite these relatively liberal provisions, the level of unionization is low, amounting in the aggregate to just under 21%. Several factors account for this low level, particularly for an urban and industrial society. Most enterprises are small scale employing less than 20 or so employees; the kinship and regional links between employers and workers tend to replace unions; many workers are immigrants preferring to keep a low profile; and despite legislative protection, alleged victimization of workers remains active in union business. There has also been a steady improvement in the conditions of workers, although considerable exploitation still occurs. Nor should one discount the general laissez faire attitudes in Hong Kong and the dominant position of capital. For similar reasons collective bargaining is rare; one estimate puts it as covering less than 5% of labour; and even then the agreements, not being enforceable at law, are sometimes ignored by employers. For a discussion of legislation and the situation of workers, see Levin and Chiu (1994). Shortly before the transfer of sovereignty a law was passed to enforce collection agreements but it was first suspended and then repealed by the Provisional Legislature.

It is not possible to give a detailed account of welfare benefits that were available ‘previously’. A comprehensive description is contained in the Third Periodic Report in respect of Hong Kong under Articles 2 to 16 of the International Covenant on Economic, Social and Cultural Rights (1995).
than right. The government’s view was that ‘welfare’ (as referring to obligations under the ICESCR) was not ‘justiciable’, and best provided through administrative measures. It could be argued that the Basic Law transforms ‘grace’ into ‘entitlements’.

The Hong Kong government described the overall objective of its social security policy as meeting ‘basic and special needs of Hong Kong’s disadvantaged people’. These included such people as the financially vulnerable, the elderly and the severely disabled. All local residents, irrespective of their sex, race or religion enjoyed the right to social security. This was achieved through a comprehensive social security system administered on an entirely non-contributory basis (Hong Kong 1995a: para 58). The most general form of assistance was provided through the Comprehensive Social Security Assistance (CSSA) and the Social Security Allowance (SSA) Scheme, which covered over 10% of the population. The CSSA, which was means tested, aimed to raise the income of a single person or family to a level, relevant to the conditions in Hong Kong, at which they could meet essential needs such as food, rent and clothing. Recipients of CSSA were entitled to free medical treatment at public hospitals and clinics as well as to special grants to cover costs such as rent, school fees and other educational allowances, medically recommended diets, glasses, dentures, and burials.

The SSA scheme provided Old Age Allowance (OAA) and the Disability Allowance (DA) in the form of a monthly flat-rate allowance to elderly persons aged 65 or above or to severely disabled persons. The Old Age Allowance was payable to those who had resided in Hong Kong for at least five years. It was means tested for those under 70 but not for those over. The Disability Allowance was not means tested and was payable to all persons with at least one year’s residence who are certified by medical authorities to be suffering from a disability broadly equivalent to 100% loss of earning capacity.

**Housing** Turning to more specific benefits, perhaps the most important is housing. The right or benefit to housing is not expressly granted in the Basic Law or the Bill of Rights.\(^{43}\) Nor is it provided for in legislation.\(^{44}\) It

\(^{43}\) Article 11 of the ICESCR recognizes the ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . . ’.

\(^{44}\) The UN Committee on Economic, Social and Cultural Rights urged the government in its Concluding Observations on the Second Periodic Report to consider embodying the right to housing into domestic law. The government stated in the Third Periodic Report that after giving ‘very serious consideration’ to the matter, it concluded that ‘further legislation of the kind envisaged is unnecessary’ (para 176). There is a great deal of legislation governing housing, particularly the Housing Ordinance and the Land
was a stated objective of the Hong Kong government to ‘ensure that all households are adequately housed at a price or rent that they can afford’. The government was well placed to carry out this policy as it controls allocations of land, enabling it to influence public as well as private housing. Public housing is provided at subsidized rates by the Housing Authority under the Housing Ordinance (the rents are typically 20% of those in the private market), and further rent reductions are granted to elderly tenants and families with disabled members (who are also entitled to a rent allowance even if living in private market housing). In 1995 public housing, accommodating nearly 2 million people, constituted 45% of all housing (another million lived in other forms of public housing). Only those who had resided in Hong Kong for at least seven years and had an income below prescribed levels were eligible for public housing (in 1995 the limit was HK$13,000 for a four-person family). Preference was given to families whose elderly members lived with them.

There were official schemes to enable lower-income families (defined in 1995 as having a monthly income of $25,000) to own their homes, through purchases of public or private housing at a discount (normally 30% of open market values) or by interest free loans. Members of the ‘sandwich class’ (by 1995 standards, with income between $25,000 and $50,000) were helped through the grant of land at half the market value to a housing society which was required to build flats for sale to them.

**Health** The Basic Law requires the HKSAR to ‘improve medical and health services’ by ‘formulating policies to develop Western and traditional Chinese medicine’ (art. 138). The article provides that ‘community organizations and individuals may provide various medical and health services in accordance with law’, but no entitlements or standards are established. It may well be that medical services are an aspect of ‘welfare’ in which case the ‘previous’ system would provide guidelines.

**Development Corporation Ordinance** as well as a large number of administrative measures, such as the Home Ownership Scheme, the Home Purchase Loan Scheme, the Sandwich Class Housing Scheme and the establishment of the Hong Kong Housing Authority (details of which are to be found in the *Third Periodic Report* . . . para 175–254).

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45 *Third Periodic Report* . . . para 175.
46 Guidance may also be secured from the ICESCR which recognizes the right to ‘the highest attainable standard of physical and mental health’ (art. 12). Steps that member states have to take to assure this right include: (a) the provision to reduce stillbirths and infant mortality; (b) improvement of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and (d) the creation of conditions which assure to all medical service and medical attention when ill.
Kong had a well established and sophisticated system of public health, which is reflected in the high standards of health. Medical services were offered in public hospitals at highly subsidized rates, and free to those without the means to pay (in contrast to private medical services which were highly expensive).

While the practice of Western medicine and the dispensation of Western medicines are regulated (and considerable resources are devoted to research in modern medicine), there is little regulation of traditional Chinese medicine nor significant assistance to it. A working party established by the Department of Health and Welfare to review the use and practice of traditional Chinese medicine found that it was practised on a wide scale, and recommended greater regulation of its practice and the dispensation of traditional medicine (Hong Kong 1994).

**Education**  The Basic Law requires the HKSAR to ‘formulate policies on the development and improvement of education’ on a variety of topics, taking as its starting point the previous educational system, and authorizes community organizations and individuals to run educational undertakings (art. 136), with the possibility of subventions from the government (art. 144). Educational institutions are promised autonomy and academic freedom and those run by religious organizations may provide religious education (art. 137). Teachers may be recruited from abroad and foreign teaching materials may be used. Students are promised the choice of educational institutions, and even the freedom to study abroad (art. 137). All these were features of the previous system. The majority of the schools were run by the government, but a substantial number of schools offering education in English were run by a foundation; in addition schools were run by other foundations and expatriate community organizations — all receiving some form of official assistance. Tertiary institutions enjoyed considerable autonomy under their legislative charters, and a University Grants Committee and a Research Grants Council, responsible for advice on and the disbursement of funds for higher education, were supposed to act as a buffer between them and the government and involve academics in their decisions (for a mission statement, see http://www.ust/websong/RGC/operation.html, 31.1–97). Education for children between 6 to 15 was compulsory and in government schools, free. The first three years of secondary education were free, but thereafter, reaching into the tertiary level, students had to pay fees. For a long time the fees were heavily subsidized but starting from the early nineties, the scale of fees went up greatly.

The ICESCR states the internationally agreed objectives of education — it should be directed to the full development of the human personality
and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. It should also enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the UN for the maintenance of peace (art. 13 (1)). Education was not free from political bias in the colonial period; it was not until 1993 that a provision which gave the Director of Education the power to refuse to register a school if the school was affiliated to or connected with or in any way controlled by a foreign government or organization or group of a political nature was repealed (Morris 1992).

**Cultural rights**

The ICESCR obliges states to ensure the right of everyone to take part in cultural life; enjoy the benefits of scientific progress and its applications; and to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15). Governments have to respect the freedom indispensable for scientific research and creative activity. There is also an acknowledgement of the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

The Basic Law protects cultural rights in a number of ways, meeting the standards of the ICESCR. I have already outlined the freedoms of expression and association which are essential to the exercise and enjoyment of culture. Similarly the provisions in relation to education and religion facilitate the exercise of cultural rights as does academic freedom. The government has to protect ‘by law achievements in scientific and technological research, patents, discoveries and inventions’ (art. 139) as well as ‘the achievements and the lawful rights and interests of authors in their literary and artistic creation’ (art. 140). As ‘previously’, the government has to provide subventions to non-governmental organizations.

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47 The previous administration had extended to Hong Kong various international conventions for protection of intellectual property: the Paris Convention for patents and trade marks, 1883–1967; the revised Berne Convention for literary and artistic works, 1886–1948; the revised Universal Copyright Convention and Protocols 1952–71; the Convention for Protection of Producers of Phonograms Against Unauthorized Duplication; and (at the time of writing) was contemplating new legislation on the Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods concluded in GATT Uruguay Round 1994. These instruments would be kept in force, consistently with the Basic Law (see also Chapter 10).
for arts, culture, education, and sports (art. 144). These organizations may maintain and develop relations with their counterparts in foreign countries, regions and international bodies (art. 149). Particularly important is the recognition given to non-governmental organizations, for culture thrives best when it is free of official constraints. These provisions should help to maintain Hong Kong’s strong vibrant culture, in which both Chinese as well as Western arts flourish.

**Restrictions or Limitations on Rights and Freedoms**

**Introduction**

The question of the restrictions that may lawfully be imposed on rights and freedoms in the HKSAR is complicated, for a variety of reasons. First, the Bill of Rights and the Basic Law have different schemes for the application of restrictions, and different styles of drafting. Would restrictions justified under one instrument but not another be valid? This question raises the second difficulty, that of the relationship between the Basic Law and the Bill of Rights. Thirdly, and relatedly, what is the relationship of the ICCPR, the ICESCR, and the labour conventions which under art. 39 govern restrictions on rights and freedoms, to the Basic Law and the Bill of Rights? Fourthly, what is the impact on restrictions under art. 23 which requires the HKSAR to establish various offences relating to sedition, subversion, etc. and art. 18 which enables the CPG to extend various national laws to Hong Kong, particularly how far are the laws under arts. 18 and 23 to be governed by art. 39? Fifthly, to the extent that the purpose of restrictions is to strike a proper balance between the individual and state/society, what values and norms are to be applied in determining the scope of restrictions? These questions, which go to the heart of the regime of rights under the Basic Law, are examined after a brief overview of the scheme of restrictions in the Basic Law and the Bill of Rights.

**The Scheme of Restrictions**

The question of restrictions is important principally in relation to civil and political rights. Although the Basic Law has several provisions on social, economic and cultural rights, they are formulated either in broad
terms or so as to give directions and guidelines to public authorities (in which case they are not so much rights but policy directives). In so far as there are restrictions, they are established by reference to ‘previous’ laws or practices, but it would make little legal or policy sense to regard specific ‘previous’ rules as carved in stone. There are some particular economic rights (especially those relating to workers or general or intellectual property) where the permissible restrictions are expressly or impliedly provided, and which require careful analysis.

Neither the Bill of Rights nor the Basic Law has a general overriding provision on restrictions (as for example in the Canadian Charter of Rights and Freedoms — ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’ s. 1). In the Bill of Rights, following the scheme and terms of the ICCPR, restrictions, when they apply, are carefully formulated in relation to each specific right. The Basic Law is less precisely formulated and it is not always easy to determine the existence or scope of restrictions. Both instruments contain rights that are formulated in unqualified terms. Absolute rights in the two instruments do not necessarily overlap. Those which overlap are equality before the law; freedom of conscience (although only some aspects of it in the Bill of Rights); protection against torture; and marriage and family rights. Additional ‘absolute’ rights in the Basic Law are: the right to strike (art. 27); the freedom of movement within

48 For example, the special rights that the indigenous inhabitants of the New Territories enjoy are defined as ‘the lawful traditional rights and interests’; rights which are defined in absolute terms cannot really be unqualified; and occasionally rights and restrictions are defined by reference to ‘previous laws’ — in itself a contested concept. See below for a discussion of some of these ambiguities.

49 It is no longer clear that the ‘absolute’ rights of the Bill of Rights are really absolute. Speaking for the Privy Council, Lord Woolf said in AG v Lee Kwong-kut [1993] 3 HKPLR 72 in relation to art. 11 (1) (‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’) that such provisions of general application are always subject to implied limitations, as was recognized in ‘all of the many decisions in different jurisdictions to which their Lordships were referred’ (at 92). He did not elaborate on this statement, but indicated that the implied limitations, providing an element of flexibility, allow ‘a balance to be drawn between the interests of the person charged and the State’ (p. 93–94). If carried to an extreme, this approach would make the precise language of restrictions secondary to judicial determinations of policy.

On the other hand, several national and international courts and tribunals have held that the right to equality, although generally cast in absolute terms, may be qualified if the basis for the discrimination is rational and reasonable. See also R v Secretary for the Civil Service and the A-G (1995) 5 HKPLR 490, where discriminatory policies against expatriate civil servants were upheld on the grounds that otherwise relations between the government and local public servant would become difficult.
Hong Kong and to enter Hong Kong (art. 31); freedom of choice of occupation (art. 33); the freedom to engage in academic research, literary and artistic creation and other cultural activities (art. 34); access to lawyers and courts and remedies against the state (art. 35); the presumption of innocence (art. 67); and freedoms of speech, of the press and of publication, assembly, procession and demonstration, and association (art. 27, although they may be qualified for various reasons under art. 23 — see below). Additional ‘absolute’ rights in the Bill of Rights are: protections against inhuman or degrading punishment, slavery and servitude, imprisonment for breach of contract, retrospective criminal offences or penalties, and the rights to recognition as a person, and, for children, to registration and a name.

When rights may be restricted, different formulations are used. Both instruments state that some rights may be exercised in ‘accordance with the law’ (in the case of the Basic Law these are the right to vote or stand for elections, art. 26; the right to social welfare, art. 36; and the right to property, arts. 6 and 105). Under both instruments some rights are protected only against ‘unlawful’ or ‘arbitrary’ acts (in the Bill of Rights, in relation to arrest or detention, art. 5; in the Basic Law, personal liberty, art. 28; the protection against the search of the body or deprivation or restriction of the freedom of the person, art. 28; and privacy of home and other premises, art. 29). The freedom and privacy of communication may be infringed by ‘relevant authorities . . . in accordance with legal procedures to meet the needs of public security or of investigations into criminal offences’ (art. 30). The right to leave Hong Kong may only be exercised by ‘holders of valid travel documents’, ‘unless restrained by law’ (art. 31). The rights of the indigenous inhabitants of the New Territories extends only to ‘lawful traditional rights and interests’ (art. 40). This formulation is an illustration of another technique used in the Basic Law to define or limit rights: by reference to ‘previous laws’. Further examples are: rights in criminal or civil trials (art. 87); the general protection of the common law (art. 8); the autonomy of professions (art. 142); rights of non-government organizations (art. 144); and general rights of welfare assistance (art. 145). Some rights in both instruments may be qualified for reasons

50 In relation to foreigners, these rights are subject to the overriding power of the HKSAR to ‘apply immigration controls on entry into, stay in and departure from the Region’ (art. 154).

51 As to whether there is a right to a passport, see above fn. 32 and text to that footnote.

52 It is more realistic to regard references to ‘previous laws’ as expanding rather than restricting rights. The intention is that rights which were provided under previous laws must continue in at least as extended a form, but there is no prohibition against their expansion.
of public or national security; while the Bill of Rights also lists public order, public health, morals, protection of the rights of others, and the interests of justice as justifiable grounds for restrictions. The Bill of Rights allows restrictions through a partial interpretation of rights (as with what does not constitute forced labour or compulsory labour, art. 4).

Having in this way authorized restrictions on rights, both instruments then set out (at least in some instances) the framework for or limitations on the restrictions. They provide that the restrictions must be authorized by law.\textsuperscript{53} The Bill of Rights requires that restrictions on open trials (art. 10), assembly (art. 17), and association (art. 18) must be justifiable in a democratic society. Sometimes it provides that the restrictions must be ‘necessary’ to meet specified objectives (arts. 8, liberty of movement, 15, freedom of religion, etc., 16, freedom of expression, 17 assembly, and 18 association) and once, ‘strictly necessary’ (art. 10, dealing with open trials).\textsuperscript{54} The Bill of Rights occasionally uses other forms of limitations on restrictions (‘exceptional circumstances, art. 6, ‘compelling reasons’, art. 9, and ‘special circumstances’, art. 10).

The Basic Law avoids such formulations. However, it has a general principle governing restrictions — restrictions cannot contravene the provisions of the ICCPR, the ICESCR and international labour conventions as applied to Hong Kong (art. 39, second paragraph). Since the limits on restrictions in the Bill of Rights follow the scheme of the ICCPR, the result is that despite the different formulations in it and the Basic Law, the substantive position is the same.\textsuperscript{55} The general position of the courts

\textsuperscript{53} Following comparative and international jurisprudence, Hong Kong courts have held that for the purposes of restrictions, the expression ‘law’ has an autonomous meaning, and requires that the restrictions must be reasonable, proportionate to the objectives sought to be achieved, clear and accessible (e.g. \textit{Sin Yau-ming}; see also Ghai 1997). That law must also be accessible both in terms of ability to make use of it, and in terms of its clarity, so that one knows what the offence is. (These points are discussed in detail in Ghai 1993c.) However the courts now tend to apply a looser test of ‘reasonableness’, which would diminish the protection of rights. See \textit{Lee Miu Ling v AG} (1995) SHKPLR discussed in Chap. 7.

\textsuperscript{54} It was assumed by some commentators that in practice there was little difference between the expressions ‘necessary’ and ‘strictly necessary’. The European Court of Human Rights has held that ‘necessary’ implied the existence of a pressing social need, but in \textit{Ming Pao v AG} (1996) 6 HKPLR 103, the Privy Council disapproved of that approach, holding that ‘necessary’ should be used in its ‘normal meaning’. Without analysis, it stated, ‘The courts in Hong Kong have not been assisted by substituting for ‘necessary’ a phrase such as ‘pressing social need . . .’ (at page 113). It is not clear whether the same restrictive view would apply to ‘strictly necessary’.

\textsuperscript{55} This statement needs to be qualified to take into account the further limitations on restrictions that are imposed in relation to the Basic Law by other international instruments mentioned in art. 39, with the result that the regime of restrictions is narrower than in the Bill of Rights.
in relation to the Bill of Rights (before the transfer of sovereignty) although somewhat relaxed after Lee Kwong-kut was to require that a restriction on rights could only be justified if:
1. it seeks to achieve a pressing social need (the necessity test);
2. the means provided are sufficiently connected to that objective (the rationality test); and
3. the restriction impairs the right as little as possible, and its effect on the right is proportional to the objective (the proportionality test) (R v Sin Yau-ming (1991) 1 HKPLR 88, which is still good law despite strictures on it by Lord Woolf in Attorney-General v Lee Kwong-kut (1993) 3 HKPLR 73; Ghai 1997; but see footnote 53).

In this approach the courts are not overly concerned with the precise formulation of the scope of permitted restrictions (in common with many other jurisdictions, Beatty 1996: 142). The tendency towards a congruent interpretation of the provisions relating to restrictions in the two instruments would be reinforced by the fact that the same courts would deal with both instruments.

**Suspension of Rights**

Related to the issue of restrictions is that of the suspension of rights during an emergency. The circumstances justifying the use of emergency powers and the limits on those powers are more strictly and narrowly defined in the Bill of Rights (sec. 5) which permits the invocation of emergency powers only when the life of the nation is threatened. There is some international case law which suggests that the test of what threatens the life of the nation is objective and justiciable (First Cyprus Case (1958) YBECCHR 174; Lawless Case 1 EHHRR 15; Greek Case (1969) YBECCHR 1; Ireland v UK (1978) 2 EHRR 25). The Inter American Commission on Human Rights has reached a similar conclusion; see references cited Sorabjee (1993: 483, fn 57). On the other hand the Basic Law permits the application of emergency laws if, in the event that the NPCSC declares a state of war or, ‘by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region’ the NPCSC ‘decides that the Region is in a state of emergency’ (art. 18, third para). The wording here suggests a much more subjective judgment. In any event, it is not clear that its interpretation would ultimately be up to the courts in Hong Kong, being a matter concerning the relationship between the Central Authorities and the HKSAR (and therefore within the jurisdiction of the
NPCSC itself!). The Basic Law does not expressly provide for an emergency to be declared by the HKSAR authorities and the powers therein, but if the ‘previous’ laws on the subject continue in force, presumably there will be considerable power at their disposal.\(^{56}\) (The question may be raised whether such emergency legislation is compatible with the Basic Law, both on grounds of subject matter, i.e., is it within the competence of the HKSAR authorities, and its scope, i.e., does it offend against Chapter III and other human rights provisions of the Basic Law. On the first point, since the HKSAR has the primary responsibility for law and order in the region, it would seem reasonable that it should have some emergency powers. The second point is discussed later.)

The Bill of Rights restricts the limits of emergency powers by requiring that (a) they be provided under law and (b) that measures derogating from the Bill of Rights should be strictly necessary for the exigencies of the situation. In addition it prohibits any derogation from rights relating to life, torture and inhuman treatment, slavery or servitude, imprisonment for contractual breach, retrospectivity of offences or penalties, recognition as a person before the law, and the freedom of thought, conscience and religion.

The Basic Law contains no such restrictions. It merely authorizes the Central People’s Government to apply ‘the relevant national laws in the Region’. It neither restricts ‘relevant laws’ to PRC emergency laws nor

\(^{56}\) The principal source of emergency powers is the Emergency Regulations Ordinance. A number of regulations made under it (which could only be used if a declaration of emergency was made by the Governor in Council) over a number of years, some as long ago as 40 years, were repealed in 1995 (under considerable public pressure, particularly from the Hong Kong Journalists Association as they included severe restrictions on the freedom of expression and the press). Nevertheless, the ordinance is drafted in extremely broad terms; it provides that ‘On any occasion which the Governor in Council may consider to be an occasion of emergency or public danger he may make any regulations whatsoever which he may consider desirable in the public interest’ (sec. 2(1)). The Ordinance could therefore be abused both as to the declaration of emergency or public danger, there being no definition of these terms, and as to the powers provided in the regulations, ‘public interest’ being a broad and vague concept. In the Fourth Period Report to the UN Committee, the Hong Kong government stated that ‘the Letters Patent (before 1 July 1997) and the Basic Law (from that date) would preclude the making of any new regulations which are inconsistent with the Bill of Rights and the Covenant as applied to Hong Kong’ (pp. 61–62).

With respect, this is hardly satisfactory; courts may be reluctant to intervene in the sensitive area of emergency powers (see *Ningkan v Government of Malaysia* [1967] AC 379), and the legislation provides no guidance to the executive or the courts. Legislation as broad as that which still exists in Hong Kong is inconsistent with the ICCPR. On the other hand, the PWC recommended that the emergency regulations be reinstated. No steps have been taken to implement the recommendation.
provides any guidance as to what other laws might be covered or indeed whether special laws might be enacted for Hong Kong. In March 1996 the NPCSC passed the Law on Martial Law which is one of the laws which may be applied to Hong Kong. It enables the State Council to recommend to the NPCSC the imposition of martial law either throughout the country or a province, autonomous region or a municipality directly under the central government. The State Council can decide by itself on the imposition of martial law if only a part of the country, province, autonomous region or a municipality directly under it is covered (art. 2), although presumably under the Basic Law the State Council can on its own apply the martial law to Hong Kong. The law enables the state to restrict the rights and liberties of citizens which are protected under the constitution or laws (art. 8) and to use the army for enforcement of martial law provisions (art. 8). It authorizes powers of search, arrest and detention and regulates when force and weapons may be used. It enables regulations to be made to:
1. prohibit or restrict assemblies, processions, demonstrations, speeches in streets, and other meetings;
2. prohibit strikes by workers, businesses or students;
3. impose news censorship;
4. control communications, post, and electronic communications;
5. control entry or exit of persons; and
6. prohibit any activities opposing the martial law (art. 13).

It is unclear how far the Basic Law itself can control the reach of such national laws. The supremacy of the Basic Law is asserted only against laws made by the Hong Kong legislature (art. 11) or ‘Hong Kong’ laws (art. 8). However, art. 39 would cover all applicable national laws as it refers not to the source of law but to the protection of rights against all laws. The Ordinance implementing national legislation on the national flag was subjected to the test of the ICCPR standard without objection from the HKSAR government (*HKSAR v Ng Kung-su*, Case no. 3151 of 1998). Moreover, the last paragraph of art. 159 prohibits any amendment of the Basic Law which contravene ‘the established policies of the People’s Republic of China regarding Hong Kong’. These include the protection of the rights of its residents and the application of the ICCPR to the region. Presumably any exercise by the Central Authorities (or any authorization of power to the HKSAR authorities) which contravene these guarantees would amount to an (attempted) amendment of the Basic Law, and thus void.
IS THE BILL OF RIGHTS COMPATIBLE WITH THE BASIC LAW?

Chinese authorities have been critical of the Bill of Rights from its inception. The Preliminary Working Committee (which appears to have the support of the Preparatory Committee) stated that the Bill of Rights has an ‘adverse effect on the implementation of the Basic Law’. In its view, sec. 2(3) of the Bill of Rights which deals with its principles and purposes and secs. 3 and 4 (which deal, respectively, with the interpretation of previous and subsequent legislation) are inconsistent with arts. 8, 11 and 39 of the Basic Law. Consequently, it recommended that they should be repealed by the NPCSC under art. 160. It also recommended that various amendments to other laws which were made to bring them in conformity with the Bill of Rights should likewise be repealed. Its report does not provide an analysis of its conclusion on incompatibility; but from other general statements made at various times by Chinese officials or members of the PWC, the following reasons can be adduced. In its view, the ordinance confers a special status on the Bill of Rights, superior to other laws, whereas the Basic Law treats all laws as of the same status. A further reason is that the Bill of Rights and the legislative amendments contravene the ‘principle under the Joint Declaration and the Basic Law that the laws previously in force in Hong Kong shall remain basically unchanged’. Underlying this reasoning is the assumption that the ICCPR (and other international instruments) had been effectively implemented in local law by 1984 (Window November 1995). Moreover, the amendments ‘will weaken the administration of Hong Kong and are not conducive to the maintenance of stability of Hong Kong’. A more elaborate version of this argument is that the weakening of the administration contravenes the Basic Law provision of an ‘executive led’ system in the HKSAR. (For a detailed discussion of the issue of the compatibility of the Bill of Rights with the Basic Law, see Ghai 1995 and for the NPCSC Decision on the Bill of Rights, see Appendix 1.)

The NPCSC accepted the recommendations of the PWC which had been endorsed by the Preparatory Committee (see NPCSC Decision under art. 160, Appendix Six). It repealed s. 2(3) (which had included a reference to the incorporation of the ICCPR), s. 3 which provided for the invalidity of previous inconsistent laws, and s. 4 which required the interpretation of subsequent legislation to be so far as possible consistent with the Bill. It

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57 The PWC accepted the views of its legal sub-group, which are reproduced in Edwards and Chan (nd: 163–165) in a translation by Johannes Chan from which the quotations are taken.
is unclear what the effect of these repeals is. Section 2(3) was probably intended to encourage reference to interpretations of the ICCPR; it is no longer necessary for this purpose as art. 39 directly applies the ICCPR itself. In practice the courts have referred somewhat interchangeably to the Bill or the ICCPR, and since the ICCPR binds previous and subsequent legislation, the effect of the repeal has not changed the status of the Bill. The other sections are little more than common law rules of interpretation and they would continue to apply as such. Because judges have accepted that the purpose of the Bill is to implement the ICCPR, in effected its provisions can invalidate even subsequent legislation, thus giving the Bill a stronger status than it enjoyed under the repealed s. 4 (see next section).58

**Special Status and Art. 39**

So far as the special status of the Bill of Rights is concerned, secs. 3 and 4 do not confer it, being merely a codification of the common law rules of interpretation. But I would argue that Basic Law itself accords, through art. 39, a special status to the Bill of Rights. The article obliges the HKSAR to implement the applicable provisions of the ICCPR through its laws, presumably either through a general incorporation (as in the Bill of Rights Ordinance) or through a series of different laws (as the UK claimed before 1991) — so long as the relevant rights are secured.59 If the Chinese view that the ICCPR had already been implemented through the common law and specific legislation before the Joint Declaration is valid, it would not constitute a basis for the repeal of whole or part of the ordinance. The Bill of Rights is a substantial implementation of the ICCPR (and

58 The NPCSC also repealed ‘major amendments’ since 17 July 1992 to the Societies Ordinance and ‘major amendments’ since 27 July 1995 to the Public Order Ordinance. The ‘major amendments’ are not identified. They presumably refer to amendments which were made to bring these ordinances into conformity with the Bill of Rights, the first to liberalise the rules regarding the registration of societies by removing provisions requiring the prior approval of officials; and the second by liberalising rules requiring official approval for holding meetings or processions. The Chief Executive-designate made a judgment as to what were ‘major amendments’ in preparing legislative proposals which were submitted to the provisional legislature for the amendments to these ordinances. The amendments were brought into effect through the Reunification Ordinance on 1 July 1997. They were criticised for restricting rights, but they did fall short of restoring the original colonial version. The government claimed that the amendments were compatible with the ICCPR (see Ghai and Van Dale 1998).

59 Once a general incorporation has been effected, there may follow the need for the revision of various specific laws to conform to the general legislation, as Hong Kong has discovered.
subsequent case law and legislative amendments demonstrate that it was far from superfluous); in the circumstances it would be somewhat bizarre (not to say unconstitutional) for the NPCSC to repeal legislation that is obligatory under the Basic Law. There is no clear or easy way otherwise of identifying which of the laws implement the ICCPR and may therefore not be transgressed. The advantage of the Bill of Rights is that it states authoritatively how the ICCPR is applied to Hong Kong, and provides a yardstick to test the validity of other laws.

Regardless of the Bill of Rights, there is little doubt that no restrictions on the rights and freedoms of Hong Kong residents can be imposed which are inconsistent with the ICCPR (and other instruments mentioned in the first paragraph). This provision incorporates the general jurisprudence of the ICCPR and overrides other provisions on restrictions of rights (such as might be implied in the formula ‘in accordance with law’). If this view of the effect of implementing legislation is correct, then paradoxically, the Bill of Rights Ordinance may achieve a status that it did not have in the colonial period. The ordinance may be the starting point for an enquiry into the constitutionality of legislation, but references to the ICCPR may still be necessary, as my view, discussed previously, is that the ordinance does not fully implement it as applied to Hong Kong.

Regardless of these fine points, the result of art. 39 is that the ICCPR enjoys a special constitutional status, governing other laws. One consequence of this view is that possible conflicts between the Basic Law and the Bill of Rights Ordinance are no longer to be seen as conflicts between two different legal instruments, but within one document since in one sense the latter (or at least the ICCPR) is part of the Basic Law. As a general principle, a document which is incorporated by another must be read subject to the incorporating document. The ICCPR should, as far as possible, govern the provisions of the Basic Law, but when the inconsistency is explicitly provided for in the Basic Law, the latter would prevail.60

**Restrictions Under Art. 23**

In order to determine the scope of restrictions on rights that can lawfully be imposed under art. 23, it is necessary to establish its relationship to art. 39. Article 23 requires the HKSAR to enact laws ‘to prohibit any act

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60 This conclusion follows from domestic constitutional documents, and needs to be qualified by reference to China’s obligations under international law (both under the Basic Law and general principles), which may be said to override these documents (see Chapters 2 and 11).
of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies’. Unusually the article does not merely permit limitations on rights, but requires them. The reach of art. 23 is potentially very wide. It would be easy (and even tempting) to implement it in a way which contravenes guarantees in the Basic Law and the ICCPR, as by giving broad definitions to expressions like treason, secession, sedition, subversion, theft, state secrets, and political ties. (‘Political ties’ is particularly vague, and could be stretched to any organization which seeks to influence public policy or private conduct.) The freedom of expression and the right of association would undoubtedly be violated as would probably also various protections of the legal process. It is therefore important to establish the parameters for the implementation of art. 23.

The Basic Law leaves it to the HKSAR legislature to implement art. 23. Accordingly the restrictions on rights and freedoms are governed by art. 11 which requires all Hong Kong laws to be consistent with the Basic Law and art. 39 which subjects any restrictions to conform to the provisions of specified international instruments, including the ICCPR. Moreover, the vesting of the responsibility in the HKSAR indicates that the intention was not to apply the national laws on these subjects (as for example in relation to special laws under art. 18). It is therefore for the HKSAR authorities to design a law which conforms to guarantees of rights as well as the general principles and structure of the Hong Kong legal system. The HKSAR has accepted that legislation under art. 23 must conform to the ICCPR (see the Consultative Paper of the Chief-Executive-designate Civil Liberties Social Order, April 1997).

Steps have been taken to implement some of its provisions, but the implementation of the more sensitive provisions dealing with treason, secession, sedition, and subversion has yet to be undertaken. The government decided to leave that further implementation until an elected legislature was in place after May 1998.

The outgoing colonial government attempted to legislate for this article, in an attempt to forestall more restrictive legislation later. For this enterprise Chinese support would have been necessary in order to ensure that the legislation continued after the transfer of sovereignty. The Chinese authorities refused to co-operate and took the position that under the Basic Law it was upto the Hong Kong Special Administrative Region to implement art. 23. However, it agreed to the enactment of legislation to cover the ‘theft of state secrets’. Britain had extended the UK Official
Secrets Acts to Hong Kong. China and Britain agreed that this legislation would be enacted as a local Ordinance and would in that form continue after the change of sovereignty. The Official Secrets Ordinance 1997 therefore implements a part of art. 23. Journalists and human rights groups are not happy at its restrictions, particularly at what is regarded as the non-availability of the defence of public interest in the disclosure of official information. But there is little doubt that it is a more carefully drawn legislation than its predecessors and makes an attempt to classify official information by some rationale criteria. In any event it is a great improvement on Chinese legislation on this subject, which has acted as a deterrent to the proper discharge of journalistic functions.

The colonial government also sponsored, over Chinese opposition, laws to cover treason, sedition and subversion (Crimes (Amendment) (No.2) Bill 1997). It proposed to create the offences of subversion and secession and to liberalise the law on treason and sedition. The Legislative Council were opposed to the creation of the new offences, arguing that the substance of these offences was effectively covered by the existing criminal offences. In the end they were not passed. However, the rules on treason and sedition were liberalised.

China criticized the law, saying it would not accept the amendments ‘which are themselves confusing, and we will take necessary action to rectify the situation’. The new administration has since stated that the Basic Law requires the government of the HKSAR (and not the previous Hong Kong government) to enact laws on sedition. The Chief Executive, Tung Chee Hwa, has criticized, inter alia, the passage of the Crimes (Amendment) Ordinance in June 1997 and warned that it would be reviewed by the Secretary for Justice. The Secretary has stated that intent and motive are what distinguish seditious remarks from those expressing discontent, but she has not clarified how intent and motive are to be ascertained. It remains to be seen whether the government will take any fresh initiatives after the new legislature is sworn in. However, the government has implemented that part of art. 23 which requires prohibition of foreign political organizations from conducting political activities in the region and local bodies from establishing ties with foreign political organizations or bodies through amendment to the Societies Ordinance.

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61 *South China Morning Post* 25 June 1997.
63 “Motives ‘key to legality’ of Li Peng Slogans” *South China Morning Post*, 24 June 1997 at 6.
CONCLUSION

These has been no serious restrictions on rights since the Chinese resumption of sovereignty save for the amendments to the Public Order and Societies Ordinances. However, the future of human rights in Hong Kong is problematic. The ethos and the scope of the ICCPR sit uneasily with the Chinese concept of rights. The differences are captured in statements by two acute observers of political systems. The first observation is by Alexis de Tocqueville, ‘There is nothing which, generally speaking, elevates and sustains the human spirit more than the idea of rights. There is something great and virile in the idea of rights which removes from any request its supplicant character, and places the one who claims it on the same level as the one who grants it’ (cited in Vincent 1986). The other observation is by Havel, who emphasises that rights are important not only because they protect certain entitlements and practices, but even more because they protect an area of autonomy of individuals and groups (Havel 1989), and thereby they restrict the space within which the writ of the state may run. It is because of this drawing of boundaries between state and civil society that totalitarian regimes (as operated in Havel’s Czechoslovakia especially after the Soviet crackdown of 1968) dislike the notion of rights. In the Chinese government’s concept, rights are defined and granted by the state. They are also located within the cultural and social traditions and circumstances of a place, which in the Marxist as well as Confucian tradition means that the scope of rights is delineated by the individual’s subordination to the community (which in contemporary ‘Asian’ parlance means the state). Rights and their discourse have been a key element of the Hong Kong economic and social system, and by opting for ‘Two Systems’, China accepted the Hong Kong version of rights (for which the Joint Declaration is evidence). But China, increasingly anxious about order and control, is suspicious about rights as it is about democracy; both help define a consciousness and identity that seem threatening to China. Consequently there has been a considerable drawing back from the Joint Declaration. Furthermore, Chinese officials tried in the transition period to establish ground rules for restrictions on the exercise of rights.64

64 An example is free political expression in the arts. In recent years China appears to have brought pressure on the organizers of Hong Kong’s film festival or on producers to withdraw particular films of which it has disapproved politically (e.g., SCMP 27 March 1996, p. 6). Chinese films which have been banned in China have often had their premier in Hong Kong and have been able to enter world festivals only as Hong Kong films. The fears of continued Chinese censorship persist although ‘culture’ falls within Hong Kong’s autonomy.
By the same token people are less willing to exercise their rights. Self-censorship in the media is widespread, facilitated by the fact that the key sections of the media are under the ownership and control of tycoons anxious to placate China for commercial reasons (HKJA 1996: 35–45). Self restraint is spreading to other areas: universities and above all, commerce. The higher judiciary has shown a strong tendency to narrow the ambit of rights (Ghai 1997; Chen 1998). Attempts have been made to isolate politicians who have struggled to advance the cause of rights.

These developments conform with the agenda of the Central Authorities for Hong Kong (inspired to some extent by the Singapore model). The scope for the application of rights is to be derived from the market; property and contractual rights are primary. China has realized that markets can function without the expansive notion of rights that are associated with democracy. A truncated version of the rule of law, which protects market but not democratic or civil rights, suffices. This narrow view of rights is evident in deficiencies in the scheme even of economic and social rights which one would expect a socialist state to favour.

Impressive as the provisions on social, economic and cultural rights are, their full or even merely adequate implementation is likely to be problematic. These rights depend on expenditures by the government. The fiscal provisions of the Basic Law seek to restrict government spending (see Chapter 6). The HKSAR is bound by the principle of ‘keeping expenditure within the limits of revenue’ and to avoid budget deficits (art. 107). It has to follow a low tax policy (art. 108) and to provide full foreign reserves for the issue of the Hong Kong dollar (art. 111). It is unlikely that the PRC will countenance the use of Hong Kong’s considerable financial reserves for social welfare and cultural development; it has already opposed any extension of welfare and social security, arguing that it is

China has long claimed that it does not punish the exercise of the freedom of expression. Its paper on Human Rights in China (PRC 1991: 25) states that ‘ideas alone, in the absence of action which violates the criminal law, do not constitute a crime; nobody will be sentenced to punishment merely because he holds dissenting political views. So-called political prisoners do not exist in China’.

The point arose in relation to Hong Kong when Lu Ping, then Director of the HK MAO, tried to define the limits of the freedom of expression under the Basic Law. In an interview with CNN (31 May 1996), he said any one could criticize the government, but would have to be ‘careful with regard to action’. He said that the advocacy of ‘two Chinas’ would not be allowed. What would constitute ‘advocacy’ was not clarified, but to the question by the interviewer whether writing that Hong Kong or Taiwan wanted to be independent would be allowed, Lu said ‘certainly wouldn’t be allowed’ (for the relevant part of the transcript, see HKJA 1996: 47–48).

Lu made a similar point when he talked to Hong Kong media at a seminar in Beijing organized by the Information Office of the State Council (SCMP 3 August 1996).
‘socialist’ and incompatible with the Basic Law, although the Basic Law actually requires it. Economic differences are increasing; there are vast disparities in incomes and wealth. The Basic Law is not calculated to reduce them. Thus the prospects for neither civil/political rights nor economic/social rights appear promising.
INTRODUCTION

No constitutional arrangements for the autonomy of Hong Kong would have been effective without a significant devolution of external affairs to the HKSAR. Hong Kong is one of the most international cities or territories in the world. It has extensive trade, business and cultural links with the rest of the world. Its economy necessitates a myriad of international contacts, the negotiation and maintenance of agreements, and membership of regional and global organizations. Hong Kong is a major centre for migration, primarily to the West and Australasia, and there is considerable movement in and out of Hong Kong, for short or long term residence. There is a significant Hong Kong diaspora, particularly in Europe, North America and Australasia, with which the resident community maintains close connections, while over 400,000 expatriates (nearly 7% of the population) live in Hong Kong. Hong Kong is a cosmopolitan city, a place where cultures and peoples mix; this also affects Hong Kong’s international position. It is a key player in the world economy. It is the world’s eighth largest trading economy, the value of its trade amounting to US$36.7 billion (in 1995). In early 1996 its foreign reserves stood at US$57 billion, the world’s seventh largest. It is a major financial centre, with some 565 banks and deposit taking companies from over 40 countries, including 85 of the world’s top 100 in terms of assets. Its stock market is the eighth largest in terms of capitalization and its foreign exchange market ranks fifth with a daily turnover of US$91 million. It has the world’s busiest container port and its airport is the world’s second busiest in terms of international cargo and third busiest in terms of passengers.
These circumstances almost dictate the status of a quasi-state for Hong Kong, yet, as we have seen, the leitmotif of the Basic Law is the sovereignty of the Central Authorities. The solution to the dilemma lies in the reservation of foreign affairs to the Central Authorities and then the delegation of significant powers to the HKSAR, particularly in so far as they are connected to the maintenance of Hong Kong’s international economy. Although detailed provisions are set out in the Basic Law in this regard, a balance between national and regional powers will have to be established through practice, and would need to be re-negotiated periodically, as external and internal exigencies change.

The Basic Law provides expressly for several aspects of Hong Kong’s international connections which for regions of other states might be taken for granted, like the right to maintain cultural, educational or sporting links with organizations in third states (which may have been deemed necessary because these rights are not necessarily available to groups on the mainland). But the Basic Law also provides for many matters that would, for a region, require the authorization of a sovereign, like the right to make treaties, join international organizations and issue passports. As with so many other powers of the HKSAR, the competence for external affairs is not always a matter of the empowerment or discretion of Hong Kong as its exercise in many instances is mandatory.

THE CHINESE VIEW OF INTERNATIONAL LAW

Since so many aspects of Hong Kong’s relationship with the mainland as well as the rest of the world are influenced by or mediated through international law, it is necessary to provide a brief account of the Chinese view of international law. Official Chinese views of international law have been changing over the last 150 years or so. Chinese scholarship has closely reflected these official views, few writers taking an independent line. China became engaged with (Western) international law in the middle of the nineteenth century, primarily in order to deal with Western powers that wished to trade with China and establish diplomatic negotiations (see Chapter 1). At that time China had its own view of international relations which derived from the supreme status of its Emperor as the ruler of China as the Middle Kingdom. Other states were admitted not as equals but as tributaries (Gong 1984). This created particular difficulties in negotiating with Western powers on a basis of equality. After the Western states asserted their military superiority to force open China’s borders and trade, Chinese officials turned to international law as protection against
their degradations (Wang 1990: 228–237), only to be told that its primitive legal system did not provide adequate protection to foreign traders. China continued to suffer under a regime of unequal treaties for over 100 years.

After the communist revolution, the Chinese approach to international law was influenced by studies in the Soviet Union. International law was perceived in the same way as domestic law, as superstructure, expressing the economic base of the state and serving the interests of its ruling class. International law was regarded as ‘necessarily possessing a class character, even if expressed in a compromise of the wills of the ruling classes of states having different social and political systems’ (Kim 1987: 127). China did not accept many norms of international law and joined relatively few international organizations. It remained aloof from the world trading and financial systems. The admission of the PRC to China’s seat at the UN in 1971 had at first limited impact on Chinese attitudes towards international law; the decisive factor was its strategy of economic development and foreign investment, which necessitated a greater knowledge of international law (Kim 1987; Wang 1990). Hungdah Chiu (1987: 289) quotes a Chinese scholar to illustrate the new attitudes to international law as follows:

So far as our country is concerned, international law is an indispensable legal means to realize socialist modernization and construction. For instance, in order to explore resources near our coast, we must study the legal status of the continental shelf, fishing zone and exclusive economic zone and international norms between states in delimiting these regions.

Studies of international law were promoted at universities and the first Chinese textbook on international law (written by twenty Chinese scholars) was published in 1981. The new approach in scholarly writing (reflecting the official position) is to divorce the analysis of international law from remnants of Marxian ideology. Instead, the approach is largely policy oriented, devoid of theoretical debates. As Kim says, ‘Chinese scholars apparently agree today that there is but one international law applicable to all international actors. This is reflected in the collaborative 1981 textbook, which defines international law as “mainly the law among the states” and “the sum total of principles, rules, regulations and systems which are binding and which mainly regulate interstate relations”’ (p. 145). This is manifested in a broad acceptance, contrary to the practice after the revolution, of traditional sources of international law, including appropriate resolutions of international organizations, although as Chiu points out, the main emphasis is still on treaties and custom (Chiu 1987: 292–294). Consistent with this new approach, China has played an active role in conferences formulating new rules of international law in areas such as the law of the sea and the protection of the environment.
However, Chinese officials and scholars do not favour all contemporary developments of international law. Although China’s attitude towards the International Court of Justice has changed from earlier firm opposition (especially after its nominee was accepted for a seat on the International Court in 1984), it still does not accept the compulsory jurisdiction of the International Court. China also opposes the expansionary views of the role of the international community in the promotion and protection of human rights and humanitarian intervention. It regards state sovereignty as the most fundamental principle of international law and society. Three of the five principles of peaceful coexistence that China claims are the foundation of international relations and its own foreign policy (now enshrined in the preamble to the 1982 national constitution) are based on state sovereignty and ‘mutual non-interference in internal affairs’, while the other two are contingent on national sovereignty (Kim 1987: 148–149). Nor, it has been argued, is China’s stand on international law consistent and principled, but is instead influenced by its national interest. Kim has summarized post-Mao developments as regards international law in a dualistic way. On the one hand, there ‘persists the instrumental conception of foreign policy goals and objectives. Chinese statesmen and scholars do not believe in the feasibility and desirability of separating the domain of law from the domain of politics’ (p. 158). On the other hand, “world peace and world development” are now identified as the twin objectives of Chinese foreign and domestic policies, as the twin problems of East-West and North-South relations, and the twin challenges of the United Nations and international law. The cumulative effect of increasing enmeshment with global networks of interdependence is that China has become, for the first time, an integral part of the global political system. There is a now a growing tendency toward conceptualizing Chinese and world interests and responsibilities in mutually complementary terms’ (p. 159).

China’s full and active participation in the world community and its acceptance of most norms of international law have facilitated Hong Kong’s international role and status. On the other hand, as has been suggested elsewhere in this book, China’s firm, indeed rigid, view of state sovereignty remains a serious obstacle to the full implementation of the autonomy of Hong Kong. It provides a basis both for clawing back or qualifying the powers within the autonomy of Hong Kong and for restricting its international activities or connections. This is manifest in China’s resentment at what is undoubtedly the logic of the Basic Law — the internationalization of Hong Kong (a point which is discussed below).
EXTERNAL AFFAIRS POWERS IN THE BASIC LAW

The Basic Law (following the Joint Declaration) vests the HKSAR with considerable powers to conduct its external affairs. These powers include the right to conclude treaties and to be a member of international organizations. As in other areas, the Basic Law aims to preserve large elements of the previous system of external relations as well as to confer on the HKSAR the capacity for the conduct of these relations in the future. Extensive as these powers are, they are regarded in functional terms, not carrying connotations of sovereignty or diplomacy. A distinction is implied between foreign affairs (waijiao shiwu), which are quintessentially matters of state and international diplomacy, and external affairs (dui wai shiwu), which appear to be concerned with economic and cultural matters. The former expression is used when referring to the responsibilities of the CPG (as in art. 13) and the latter when referring to the powers of the HKSAR (in art. 13 as well as the title of chapter VII (‘External Affairs’ in English). Presumably waijiao shiwu, being the broader concept, would include dui wai shiwu. The CPG is responsible for foreign affairs relating to the HKSAR and it ‘authorizes the HKSAR to conduct relevant external affairs on its own’ (art. 13). Article 150 reinforces this distinction when it provides that Hong Kong government representatives may participate in ‘negotiations at the diplomatic level’ as members of delegations of the government of the PRC.

However, the distinction is hard to maintain in practice (although that does not necessarily mean that the Central Authorities might not use it to rein in the HKSAR when they wish to). The HKSAR is given the power to issue its own passports to Chinese citizens who hold permanent identity cards of the region and to issue travel documents to other residents. Both the passports and documents are ‘valid for all states and regions and shall record the holder’s right to return to the Region’ (art. 154). The same article authorizes the HKSAR to ‘apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions’. It may, with the assistance or authorization of the CPG, conclude visa abolition agreements with foreign states and regions (art. 155). When the powers of the HKSAR transgress beyond the economic or cultural, some degree of specific authorization or permission from the CPG is necessary, so that the Central Authorities are able to control their

1 Waijiao is defined in the Contemporary Chinese Dictionary (1977) as the ‘activities of a State in international relations, i.e., participating in international organizations and meetings, sending envoys to other countries, negotiating with and signing treaties or agreements with other countries’ (p. 1050).
exercise (as with the visa arrangements or the establishment of consular offices in the HKSAR, art. 157, or the visit of foreign warships, art. 126, or foreign state aircraft, art. 129).

The international character of Hong Kong is established not only by external affairs powers *stricto sensu*, but also by other aspects of the Basic Law which connect Hong Kong to the wider world. The use of English as an official language (art. 9) and the right of non-citizen permanent residents to vote and stand for public office (art. 2) are illustrations of the latter, while the powers of the HKSAR to issue passports and travel documents and to negotiate the abolition of visas are an aspect of both the international character of Hong Kong and external affairs.

The general scheme for the external affairs powers of the HKSAR is that while the CPG is in principle responsible for the foreign affairs of the region, it has authorized the HKSAR to conduct ‘relevant external affairs on its own in accordance with this Law’ (art. 13). The Ministry of Foreign Affairs of the PRC maintains an office in Hong Kong to discharge its responsibilities in relation to Hong Kong (art. 13). The most general provisions for the external affairs of the HKSAR are set out in art. 151 under which it may on ‘its own, using the name “Hong Kong, China”, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields’. This is authority for the HKSAR to join international organizations and conclude treaties, although more specific authority for membership of international organizations is also provided in art. 152. To establish the precise scope of the authority of the HKSAR under art. 151, it is necessary to turn to several other provisions of the Basic Law, particularly to establish what are the ‘appropriate fields’. It then becomes clear that the powers are extensive but that they are not necessarily as autonomous as the expression ‘on its own’ might suggest, for the HKSAR requires express authority from the CPG for various transactions even though they relate to ‘appropriate fields’ (such as civil aviation).

The HKSAR is able to conduct some diplomatic relations with foreign states and international organizations in Hong Kong as the Basic Law provides for the establishment of foreign consular and semi-official missions in Hong Kong. The provisions are complex and not entirely clear (see art. 157). Consular and other official missions which were established in Hong Kong before the transfer of sovereignty by states which have formal diplomatic relations with China are allowed to continue their work (there were nearly 100 missions at the transfer of sovereignty, although several with only an honorary consul). If the states concerned had no diplomatic
relations with China, consulates or missions were permitted to remain or needed to be changed to a ‘semi-official’ status, ‘according to the circumstances of each case’. The establishment of new, foreign consular and other official missions requires the approval of China. States with which China has no diplomatic relations may only establish non-governmental institutions. Presumably these missions may deal directly with the HKSAR authorities on matters in ‘appropriate fields’. Hong Kong itself may establish official or semi-official missions abroad, for which it does not require the permission of China, but needs to inform it for ‘the record’ (art. 156) (there were over 60 such offices at the transfer of sovereignty). However, these missions are restricted to economic and trade matters. Hong Kong may conduct independent negotiations and relations with international organizations in ‘appropriate fields’ which are not limited to states; and, when the organizations are limited to states, Hong Kong, when its interests are affected, may participate in them as members of the PRC delegation or in some other suitable capacity as permitted by the relevant organization and the PRC, using the name ‘Hong Kong, China’ (art. 152). The Basic Law authorizes Hong Kong’s membership in the GATT (now World Trade Organization) and ‘arrangements regarding international trade in textiles’ (art. 116). It also recognizes Hong Kong’s membership of the International Civil Aviation Organization (art. 130).

Hong Kong exercises wide treaty-making powers. Treaties which may be beyond the capacity of the region may be applied to it with the authorization or assistance of the PRC (art. 153). Treaties to which the PRC is a party may also be applied to the region by the CPG ‘in accordance with the circumstances and needs of the region, and after seeking the views of the government of the Region’ (art. 153). As discussed later, it may not be solely up to the PRC to decide these matters, as some treaties may require them to be applied to all the territory of a signatory state. The colonial law provided a framework for the necessary immunities for diplomatic representatives of foreign states and international organizations of which Hong Kong or Britain was a member or associate member (constituted principally by the International Organizations and Diplomatic Privileges Ordinance and the Consular Relations Ordinance). The Basic Law applies the PRC Regulations on Diplomatic Privileges and Immunities (Annex III) but these ordinances might be regarded as the implementation of those Regulations since the differences from the Regulations are minor (see Chapter 9). The ordinances were not identified by either the Preliminary Working Committee or Preparatory Committee as incompatible with the Basic Law nor repealed by the NPCSC.

The key to the scope of external affairs power is the concept of
‘appropriate fields’. The term itself is not defined, and it is necessary to examine all the provisions of the Basic Law to determine in what areas Hong Kong may have capacity for external relations. This capacity grows out of the exigencies of the exercise of its autonomy or express delegation, and is principally concerned with the maintenance of Hong Kong’s economic and cultural systems which are distinct from those on the mainland. In other words, it is the external face of the domestic system of Hong Kong, not an independent basis for its diplomatic involvement with the rest of the world.

The external affairs powers may be divided into various categories, relating to different aspects of the autonomy of Hong Kong. A few examples are given here. The first set of powers, though perhaps not all strictly external affairs, is connected with maintaining the separateness of Hong Kong’s legal and judicial system and the application of the common law. Hong Kong is thus free to recruit judges from other jurisdictions, to invite judges from other common law jurisdictions to sit in the Court of Final Appeal, to refer to precedents from other common law jurisdictions, and to permit lawyers from outside Hong Kong to work and practise in the region (see Chapter 7). With the assistance or authorization of the CPG, it may make ‘appropriate’ arrangements with foreign states for reciprocal juridical assistance (art. 96). Under this provision it may make agreements for the mutual enforcement of judgments and arbitral awards, taking of evidence overseas, and extradition arrangements (now known as agreements for the surrender of fugitive offenders, as extradition was deemed to connote sovereignty). 2 Not only are these arrangements crucial for the ability of the legal system to provide the framework for Hong Kong’s international economy, but they are also contingent on the continued independence of its legal and judicial system (for other states would be reluctant to enter into these arrangements if that system become permeable to interference from Central Authorities, particularly in the case of extradition). 3

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3 In R v The Secretary of State for the Home Department, ex parte Launder (8 August 1996 reported in The Times 29 October 1996), the English Divisional Court quashed the decision of the Home Secretary to extradite the petitioner as the Home Secretary had failed adequately to take into consideration the petitioner’s argument, for which he had provided plausible evidence, that there was a real possibility that after the transfer of sovereignty, the independence and separateness of Hong Kong’s legal system would be undermined by China.
Next is a series of powers connected with different aspects of Hong Kong’s economy. The most detailed formulation is in the area of civil aviation and arises out of the injunction to the HKSAR government to ‘provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation’ (art. 128). Towards this end, Hong Kong is to keep its own aircraft register, although in accordance with provisions made by the CPG regarding nationality marks and registration marks of aircraft (art. 129). The Hong Kong register is a branch of the PRC register, and the aircraft of both places would have the same nationality (Heilbronn 1994: 4). Hong Kong is also to be responsible for ‘routine business and technical management of civil aviation’ and the discharge of responsibilities allocated to it under the regional procedures of the International Civil Aviation Organization (art. 130). These include the technical management of flight operations, airports, air traffic services (traffic control, communications, and navigation aids). The Hong Kong government decides on the issue of licences to airlines incorporated and having their principal place of business in Hong Kong and may designate them for the purposes of air service agreements which are within its powers to conclude (art. 134(2) and (3)). However, the provisions regarding the conclusion of the air services agreements are complex, designed to protect the interests of both Hong Kong and the mainland (and reflecting the influence of the Chinese Civil Aviation Authority in the drafting of the Joint Declaration and the Basic Law which wanted provision enabling it to control civil aviation in Hong Kong). There are three categories of air services:

1. services between Hong Kong and foreign states,
2. services between Hong Kong and the mainland, and
3. services between Hong Kong and foreign states which stop over or continue to the mainland and services from the other parts of China to foreign states which stop over in Hong Kong.

The power to decide on air services between Hong Kong and other parts of China, and administered either by airlines incorporated and having their principal place of business in Hong Kong or by other airlines of the PRC, is vested in the CPG, after consultation with the HKSAR government (art. 131). Air service agreements under category 3 above are concluded by the CPG, although it has to take into account the ‘special conditions and economic interests’ of Hong Kong and has to consult its government. Moreover, representatives of the HKSAR government may participate in the negotiations by the CPG for these agreements (art. 132). Air services agreements in category 1 above are the responsibility of the HKSAR government, although acting ‘under specific authorizations’ from the CPG
All scheduled air services must be regulated by air service agreements or provisional agreements (i.e., informal agreements). Under these agreements, the HKSAR decides on the rights of landing or overflight over Hong Kong of foreign airlines as well as the routes for airlines incorporated in Hong Kong (so long as the flights have no connection with the mainland). There is no express provision for charter or special flights, and these would presumably be subject to licence by the civil aviation administration of Hong Kong as previously.

Hong Kong will have greater autonomy than under most of the colonial period, when Hong Kong was part of the UK for the purposes of international or bilateral aviation agreements (and was the basis for lucrative routes for British airlines, see generally Heilbronn 1994). Under the Basic Law, Chinese mainland airlines do not benefit from the exchange of landing rights and scheduled services in Hong Kong with foreign states. Nevertheless, the CPG has ample instruments for firm control over aviation policy in Hong Kong, even if its administration is partially the responsibility of the HKSAR. CPG authorization is necessary for Hong Kong to negotiate and conclude air services agreements and the CPG may diminish the commercial competitiveness of Hong Kong airlines by its powers to license services which have a mainland connection (quite apart from the fact that the two major Hong Kong ‘designated’ airlines, Cathay Pacific and Dragon Air, have been substantially acquired by China National Aviation Corporation (CNAC) and Citic Pacific, a mainland company with extensive interests in Hong Kong).

In so far as Hong Kong is a separate ‘civil aviation jurisdiction’ for certain purposes, its engagement with the international system is inevitable. Apart from the application of the provisions of the Convention on Internation Civil Aviation which set up the International Civil Aviation Organization (ICAO) (and deals with a wide range of issues relating to civil aviation administration) (Chicago 7 December 1977 ICAO Doc 2187), it is bound by various other international conventions relating to aviation, particularly the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (1929, amended in 1955). Hong Kong is also tied to a series

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4 The requirement for specific authorization is puzzling since art. 134 seems to require the CPG to grant the authority for agreements under 133. It may be that art. 134 was intended to reflect the practice that had developed during the terminal stages of the colonial period.

5 The first air services agreement that Hong Kong signed on its own (albeit under entrustment from the UK government) was in 1987, with the Netherlands. This was in anticipation of the powers of Hong Kong after the transfer of sovereignty as outlined in the Joint Declaration and was the first example of a formal air services agreement made by a political entity without full sovereignty (Heilbronn 1988a: 62). Several other agreements were signed by Hong Kong during the transitional period, with the joint consent of the UK and China, in order to ensure that they would continue to operate after the transfer of sovereignty.
of conventions dealing with aviation security (in addition to the ICAO convention), like the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1973), the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1969), and the Convention for the Suppression of Unlawful Seizure of Aircraft (1971).

Hong Kong is also required to maintain the ‘previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen’ (art. 125). It has consequently become a party to or participates in various international agreements, such as for unification of legal rules relating to assistance and salvage at sea, and collisions at sea; civil jurisdiction in matters of collision; safety at sea; maritime search and rescue. It is also a member of the International Maritime Organization. There are likewise treaty implications of Hong Kong being a separate customs territory (a whole series of conventions relating to procedures and formalities, on importation of goods for exhibitions and fairs, private vehicles and planes, containers, are applied in Hong Kong).

Hong Kong is required to stimulate investment and economic development, in part by providing protection to property, including intellectual property. It is thus a member of World Intellectual Property Organization and is bound by the Convention for the Protection of Industrial Property 1883, amended in 1967, Universal Copyright Convention, and Patent Co-operation Treaty). It has entered into various investment protection treaties (see below) and adheres to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and the Multilateral Investment Guarantee Agency.

The injunction to protect the environment (art. 119) gives it the right or imposes an obligation to participate in international regimes of environmental protection, including the Convention on Wetlands of International Importance 1971, Convention for the Protection of the World Cultural and Natural Heritage 1972, Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989, Convention for the Protection of the Ozone Layer, and the Montreal Protocol on Substances that Deplete the Ozone Layer 1987. The power to determine labour matters justifies its separate membership of the ILO and adherence to a large number of its conventions (labour conventions are expressly maintained in art. 39).⁶ Hong Kong’s competence over tourism,

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⁶ During the colonial period Hong Kong was a member of the ILO as a ‘non-metropolitan territory’ by virtue of UK membership. The category of non-metropolitan was devised principally for colonies of sovereign members, which need not have the same regime of conventions as full members. In September 1989 China notified the Director-General of the ILO of the continued participation of Hong Kong in the ILO in the following terms, ‘With effect from 1 July 1997 the Hong Kong Special Administrative Region, as an
telecommunications, stock markets, and currency involve it in a network of external relations and cooperation. And so on.

Nor are all external affairs restricted to economic matters. The right of the HKSAR to conduct its own consular relations (albeit in a limited form) results in the continued application of conventions on diplomatic and consular relations. Juridical cooperation, already mentioned, while important for economic reasons, is also necessary for social and family affairs. Nor are ‘external relations’ confined to the activities of the government. Educational institutions are authorized to recruit staff and use teaching materials from outside the region, and students may pursue studies abroad (art. 137). Religious organizations may maintain and develop their relations with religious organizations and believers elsewhere (art. 141); this guarantee of external contacts is extended to non-governmental organizations in a variety of areas, ‘such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work’ and is reiterated for religious organizations (art. 149). These organizations will be free to use the name ‘“Hong Kong, China”’ in the relevant activities’ (art. 149). Since the non-governmental sector has been a major factor integrating Hong Kong in the wider global system, these provisions are significant. Under their authorization, Hong Kong will be able to enter its own team for the Olympics and other sports contests, for example, and its professionals will be able to maintain relationships with their counterparts elsewhere. Thus, while Hong Kong will not be able to participate in the official organizations of the Commonwealth, it will remain free to participate in its numerous professional and non-governmental organizations and activities (including those of the legal profession and tertiary educational institutions) (Loh 1996).7

inseparable part of the territory of the People’s Republic of China, will not and should not be deemed to be a ‘Non-Metropolitan Territory’. However, the Hong Kong Special Administrative Region will be autonomous in the enactment of labour legislation and in the administration of labour affairs. Therefore, for the purpose of enabling the Hong Kong Special Administrative Region to continue its participation in the International Labour Organization activities and to continue to have international Conventions applied to it, the relevant articles of the International Labour Organization constitution will be applied, by analogy, to the Hong Kong Special Administrative Region’. Some implications of this form of membership are discussed in Ago 1994.

7 Two further comments may be made on these provisions. One is that in one sense their very presence is odd, since the kinds of rights they protect are taken for granted in most countries and do not need specific legal protection. Undoubtedly they were included to distinguish the different practice in these matters on the mainland. And by specifying them in the Basic Law, they become entrenched.

Secondly, the generosity of these provisions contrasts sharply with the narrowness of provisions of art. 23 which prohibit ‘political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies’ (see Chapter 9).
There is another element of the ‘external relations’ of Hong Kong which is not provided for in the Basic Law nor directly in the Joint Declaration and which does not confer any power on the HKSAR. However, it reflects the multiple identities of the people of Hong Kong as well as their international connections. It was agreed during the negotiations for the Joint Declaration that those residents of Hong Kong who were previously British Dependent Territories Citizens would be eligible to retain ‘an appropriate status’ which would entitle them to continue to use British passports. The Chinese preferred to describe passports as ‘travel documents’ for the purpose of travelling to other states and regions. Britain has declared that such persons would be entitled to receive, upon their request, British consular services and protection in third countries, while China, although accepting the substance of the British position, put the matter somewhat negatively that such persons would not be entitled to British consular protection in the HKSAR or other parts of the PRC. The essential purpose of these arrangements, agreed to satisfy certain sections of the Hong Kong elite, was to facilitate international travel. The citizenship position of many residents of Hong Kong was further complicated by a decision of the NPCSC that ethnic Chinese who were formerly permanent residents of Hong Kong but had acquired the nationality of a foreign state by residence in that state could nevertheless retain their Chinese nationality as well as the right of abode in Hong Kong, provided they did not declare their foreign nationality to government authorities in Hong Kong (although the decision seems to be contrary both to the Basic Law and the Chinese Nationality Law). China has stated that these persons would not be entitled to the consular protection of the state of their ‘foreign’ nationality in Hong Kong or other parts of China, but this is hardly a matter China can decide, since diplomatic protection is a right of the state and not the national (for detailed discussion and references on these issues, see Chapter 4). These arrangements reflect not only Hong Kong’s internationalism but also the contradictions of its internationalism.

**PROBLEMS IN HONG KONG’S INTERNATIONAL LEGAL REGIME**

Despite this broad and generous framework which gives Hong Kong, as merely a region of a sovereign state, such extensive external affairs powers, far outstripping the powers of other sub-national entities in other states (Michelmann and Soldatos 1990), there are likely to be a number of problems in operating the regime.
The Scope of External Affairs Powers

A major difficulty would be in defining the exact scope of the external affairs powers, and in determining what is the reach of the powers of the Central Authorities in Hong Kong arising out of their responsibilities for foreign affairs and defence. Even if one can justifiably infer from the autonomy of Hong Kong the range of its capacity over external affairs discussed above, it is unclear how far these provisions qualify the foreign affairs powers of the PRC (e.g., as regards extradition in relation to Hong Kong or the consular protection of its residents in these third countries) or more importantly, how far Hong Kong’s powers may be clawed back by the Central Authorities. To answer these questions we need to return to the formulation in the Basic Law which vests the responsibility for defence and foreign affairs relating to Hong Kong in the CPG, but Hong Kong is authorized by the CPG in the Basic Law to conduct relevant external affairs (arts. 12 and 13).

I have argued in Chapter 4 that the authority is vested directly in the HKSAR by the Basic Law (notwithstanding the reference to authorization from the CPG) and that it cannot be withdrawn except through an amendment of the Basic Law. On the other hand, foreign affairs is a flexible concept and the scope of powers under it broadens as more and more matters which were previously matters of domestic concern only are brought into one or another regime of international regulation. Can the CPG intrude upon the powers authorized to the HKSAR under the Basic Law by entering into and implementing treaties which concern areas within the autonomy of Hong Kong? Is there a distinction between foreign affairs and external affairs that suggests that they cover different ground and areas, and that external affairs are therefore not susceptible to reduction through the greater acceptance by the Central Authorities of international obligations for domestic affairs? Similarly, how far can the Central Authorities use its ‘defence’ powers to override Hong Kong’s autonomy? These questions are novel for the PRC since China is a unitary state and there have been no restrictions on the jurisdiction of the Central Authorities over any part of the country. It has therefore been unnecessary, until the coming into force of the Basic Law, to define foreign or defence powers as separate bases of jurisdiction. However, the precise scope of these powers could be of great significance in Hong Kong’s relations with China (as is shown below), especially as China is likely to play an increasing role in international affairs, sometimes perhaps of a controversial nature (e.g., in the resolution of differences with its neighbours over the Spratly Islands, the South China Sea generally and policy over Taiwan, Valencia 1995).

Although the Chinese authorities prefer not to regard the Basic Law
as establishing a federal or semi-federal regime, it may be useful to examine
the experiences of other states where foreign affairs are the responsibility
of central authorities. The position in these states is not uniform (depending
in part upon the language of the relevant provisions, and in part on
judicial attitudes to the appropriate balance between different constituents
of the state), but in general a broad view of the powers of federal authorities
has been accepted, although not without controversy. A particular difficulty
has been the reconciliation of the imperatives of international cooperation
and the protection of the powers of states/provinces. For the purposes of
discussion, the views of Australian and Canadian courts may be contrasted.

There has been considerable debate and litigation on this issue in
Australia, whose constitution vests ‘external affairs’ in the national
legislature (s. 51(xxix)). The Australian courts appear to have had no
difficulty with matters that are ‘external’ to the country. These have been
regarded as covered by sec. 51(xxix) (NSW v Commonwealth (1975) 135
CLR 337 and Chiou Yaou Fa v Morris (1987) 46 NTR 1), both concerned
with jurisdiction over territorial waters, ‘matters and things geographically
external to Australia’ (Lumb and Moens 1995: 227), although some judges
have expressed the (minority) view that external matter must concern or
touch Australia in some sense (Toohey and Brennan, JJ in Polyukhovich
More controversial has been the case when the national government claims
as a result of a treaty a power which otherwise is outside its scope, being
a matter within the competence of states. At first the courts took the
position that a treaty gave the national government power only over a
matter otherwise within its jurisdiction; otherwise the necessary legislation
would have to be enacted by the states (Bailey 1951). The courts are now
prepared to allow the national government to conclude treaties on topics
outside its normal jurisdiction and for the national legislature to enact
legislation to implement them. In R v Burgess, ex parte Henry (1936) 55
CLR 608, the High Court upheld the Air Navigation Act which
implemented an international convention on aviation, a subject otherwise
outside the competence of the national authorities, but the court was
divided on the question whether any treaty founded federal legislative
authority. Those who opposed the broad view of federal authority would
only accord authority if the subject matter was ‘of sufficient international
significance to make it a legitimate subject for international cooperation
and agreement’ (e.g., Starke J at 658). Others such as Latham CJ considered
that it was ‘impossible to say a priori that any subject is necessarily such
that it could never properly be dealt with by international agreement’ (at
669). These differences of approach were reflected in Koowarta v Bjelke-
Petersen (1982) 153 CLR 168 which concerned the validity of federal
legislation, implementing the International Convention on the Elimination of All Forms of Racial Discrimination, which prohibited racial discrimination.

These differences were canvassed at length in Commonwealth v Tasmania 46 ALR 625 (1983), in which a clear majority view appeared in favour of the broader view of ‘external powers’. The national legislature had passed a law to prohibit the building of a dam in Tasmania on a site of great historic and environmental significance. Such legislation would normally be outside the competence of the federal authorities, but was justified on the basis that it implemented Australia’s treaty obligations arising out of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage. A majority (of four judges) held that the existence of a treaty obligation was sufficient (though not necessary) to give rise to competence under external affairs power, there being no additional, independent requirement that the subject matter of the treaty be ‘of international concern’. The minority of three held that there was such a requirement and that the UNESCO Convention, unlike that of race relations in Koowarta’s case, did not exhibit a sufficient degree of international concern (three of the majority judges held that if the requirement applied, it was satisfied).\(^8\) Two of the dissenting judges went on to hold that even if the test of international concern was satisfied, the power to implement the treaty was confined to those which imposed obligations, and in this case no relevant obligation was imposed by the convention. The majority was reluctant to impose any restrictions on federal competence arising out of considerations whether the treaty created binding obligations or the matter was of international concern.\(^9\)

The minority judges were anxious that the federal authorities should not be able to usurp state functions through the coloration of a treaty. Their concern was not sufficiently met by one safeguard on which all the judges were agreed, namely that in exercising its power to implement treaty obligations, the federal authorities could not legislate generally on the subject matter of the treaty; the legislation had to be an appropriate means of giving effect to the obligations. Another obvious limit on treaty power is that the treaty must have been entered into in good faith.

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8 A similar limitation has been proposed, unsuccessfully, in the US, by former Chief Justice Evans, who defined the treaty powers restrictively as the ‘power to deal with foreign nations with regard to matters of international concern’ (quoted in Henkin 1972: 152).

9 In 1994 the federal Parliament passed the Human Rights (Sexual Conduct) Act to implement a decision of the UN Human Rights Committee which had declared that ss. 122 and 123 of Tasmania’s Criminal Code, which criminalized homosexual acts between consenting males violated, inter alia, art. 17 (rights of privacy) of the ICCPR.
court recognized that the test is hard to administer, and some judges were prepared to assume good faith if a treaty had been entered into. Thirdly, the legislation could not go beyond the terms of the treaty, using it as a general excuse to expand federal jurisdiction. Fourthly, the treaty could not authorize federal authorities to overcome express prohibitions in the constitution.

The more controversial issue was whether there were implied limitations so that a treaty could invade the powers of a state in such a way that the state would be impaired from performing its functions. This argument was connected with the notion of preserving the ‘federal balance’. All the judges agreed that external affairs could encompass a wide variety of issues, as there was increasing international collaboration to fight common problems like drugs, crimes, pollution, destruction of the natural heritage as well as the protection of rights, etc. Many of these matters would previously have been regarded as falling purely within the domestic jurisdiction of a state. The minority judges argued that it was in the nature of the federal constitution that there should be limits on external affairs powers. Their position was represented most cogently by Gibbs CJ who contrasted external affairs powers with other powers given to the federal authorities, whose boundaries ‘may be wide but at least they were capable of definition’ (at 669). By contrast,

[T]here is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth [i.e., federal] legislative power . . . The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive. . . . the federal nature of the Constitution requires that ‘no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament (quoting from an earlier decision)’. (at 669)

The opposed view of the majority was most effectively stated by Mason J. He adopted a liberal or generous approach to the interpretation of the constitution and therefore rejected the implication of the minority
that external powers should be restricted to the type of activities envisaged at the time of the adoption of the constitution in 1900. External powers must be given effect to in the contemporary context of the intercourse between states (692–693). He adopted a restrictive view of ‘federal balance’. He disapproved of the view that the constitution prohibits a federal law which ‘inhibits, impairs or curtails any governmental function of a State in a material way’. He formulated the rule as follows, ‘What it does is to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes’ (at 703). Quoting Stephen J in *Koowarta* that the rule is designed ‘to protect the structural integrity of the State components of the federal framework, State legislatures and State executives’, he stated that the rule is infringed only if ‘there is a substantial interference with the State’s capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system’ (at 703). Under his approach, considerable incursions into the powers of the states would be tolerated under the external powers of the federal authorities.10

Canadian courts have adopted a position similar to that of the minority judges in the Tasmania Dam case. The Canadian decisions depend, at least in part, on the different historical context: they are based on the 1867 constitution when foreign affairs powers for Canada were vested in the Crown in respect of the UK; and the only provision on foreign affairs authorized the federal executive and legislature to exercise ‘all Powers necessary or proper for performing the Obligations of Canada or any

10 The US position is similar to the Australian, reflecting similar tensions between those judges who support an expansionist view of external (or ‘treaty’) powers and those who oppose it on the basis of maintaining the ‘federal balance’, *Missouri v Holland* 252 US 416 (1920). Only the federal authorities may enter into foreign relations; treaties made by the US ‘shall be the supreme Law of the Land’ (art. VI(2)). Although *Missouri* is regarded as good law, its doctrine has been questioned by many, and attempts, unsuccessful, have been made to override it through a constitutional amendment (Henkin 1972: 143–147). Henkin suggests that some opposition to *Missouri* was based less on concern with the rights of states, as on resistance to ‘unnecessary, novel “entanglements” with other countries, reflecting a desire to maintain for the United States a sacrosanct zone of isolation, autonomy, “privacy”, freedom from foreign scrutiny’ (p. 151).

The position in India is similar. Foreign affairs powers are exclusively with the federal authorities, and the federal parliament may pass any law for the whole or any part of India for implementing ‘any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body’ (art. 253). This article allows the federal authorities to invade state powers, but other constitutional provisions like fundamental rights, as in Australia and the US, cannot be overridden under it (*Maganbhai Ishurbhai Patel v Union of India* AIR 1969 SC 783).
Province thereof’ but referred to treaties ‘between the Empire and Foreign countries’ (s. 132). With the increasing devolution of powers to Canada and the emergence of self-government, the basis for its own treaty-making power was declared to lie in the prerogative powers of the federal executive, and not any specific section of the constitution. In *AG for Canada v AG for Ontario* [1937] AC 326, the issue was whether the Dominion (i.e., the federal) Parliament could pass a law to implement certain ILO conventions which the federal executive had ratified even though their subject matter concerned matters which under the constitution belonged to provinces and not the centre. In its decision which is still valid law, the Privy Council made a distinction between entering into a treaty and implementing it. It was prepared to grant the executive the power to enter into treaties on any subject, but held that its implementation was governed by the distribution of powers between the centre and provinces, so that federal law was not valid if it invaded provincial powers. In order words, it held that the treaty-making power was not in itself a source of federal legislative power, regarding the distribution of powers between the centre and powers as essential to the Canadian constitutional system, as ‘probably the most essential condition, in the interprovincial compact to which the . . . [Constitution] gives effect’. Lord Atkin, speaking for the Privy Council, went on to say:

It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in Provinces, yet its Government, not responsible to the Provinces nor controlled by Provincial Parliaments, need only agree with a foreign country to enact such legislation and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy. (pp. 351–352)

Neither the Australian nor the Canadian cases can be any more than a guide to the relations between the Central Authorities and Hong Kong as regards the foreign affairs powers of the former. Unlike the Australian states or Canadian provinces, the HKSAR does itself explicitly enjoy powers relating to external affairs. In our case therefore there is the additional problem of the balance between the external affairs of Hong Kong and the foreign affairs of the Central Authorities. Apart from the contrast involved in the terminology (‘external’ as opposed to ‘foreign’), it may be said that the foreign affairs powers of the PRC are an independent source of power, while the external powers of Hong Kong are both limited and ancillary to its other powers. However, even if they are ancillary, they are susceptible of expansion, since the exigencies of international cooperation
in the areas of its autonomy may well increase and become more complex. This expansion would not rule out a review of the scope of the external relations powers of Hong Kong, in a way that the Australian courts seem to be engaged in the cases cited above (see also Horta v The Commonwealth 68 ALR 620 (1994)).

The Basic Law seeks to limit the scope of conflict between the exercise of China’s foreign powers and Hong Kong’s exercise of external relations by requiring specific permission of the CPG for the exercise of some of its external relations, and in some other cases providing for joint delegations. However, it provides no ready answer as to the resolution of the conflict when it does occur. It could be argued that since sovereignty resides with China, its jurisdiction must supersede that of Hong Kong, although that may go against the principal purpose of the Basic Law, i.e., the maintenance of Hong Kong’s separate systems. An instance would be if the Central Authorities decide to impose an economic boycott against a state with whom Hong Kong has negotiated a trade or investment agreement (particularly relying upon the guarantee in the Basic Law of Hong Kong’s status as a separate customs territory, art. 116 and the requirement to maintain free trade, art. 115). Could Hong Kong be legally compelled to join the boycott (as it could during the colonial rule under the quite different relationship between Hong Kong and the old sovereign)? And what about Hong Kong’s liability to the state against whom the boycott is imposed, and its answerability to the WTO or other relevant international or regional trade organizations? The situation is complicated by an additional factor: China has encouraged other states and international organizations to treat Hong Kong as a separate legal person both by the provisions of the Joint Declaration and the Basic Law as well as the notes sent to international organizations and agreeing with the British authorization of Hong Kong to negotiate treaties on its own in the period before the transfer of sovereignty. It may be that in the absence of specific legislation, the Central Authorities would be unable to order the HKSAR to impose sanctions on foreign states. The only legislation so far is the United Nations Sanctions Ordinance (no. 125 of 1997) which enables the PRC Ministry of Foreign Affairs to instruct the Chief Executive to impose sanctions in accordance with a decision of the UN Security Council under Chapter 7 of the UN Charter.

The second issue is more akin to the Australian case — to what extent may the Central Authorities extend to Hong Kong its treaties and the laws implementing them even if they limit the powers or capacity of the HKSAR to carry out its functions under the Basic Law? If the Australian decisions
are followed, there will remain no guarantee for the autonomy of Hong Kong. But it may be argued that the Australian analogy is not applicable as the system established under the Basic Law is different from the Australian federation. For one, there is a treaty obligation on China to maintain Hong Kong’s autonomy. Secondly, the Basic Law (following the national constitution) sets up a separate system of economy, politics, culture, etc. for Hong Kong and guarantees it for 50 years. The separation of systems would be seriously threatened by the use of foreign affairs powers of China in Hong Kong in a way that the use of such powers in Australia by the federal authorities does not threaten the viability of the states or the coherence of the economic or social systems or violate constitutional guarantees. For this reason the Basic Law (following the Joint Declaration) effectively establishes separate treaty regimes for Hong Kong and the rest of China. Accordingly, the consequences of an expansionist view of the powers of the Central Authorities under defence or foreign affairs would undermine the very basis of the doctrine of ‘One Country Two Systems’ and thus the foundations of the Basic Law. The problem is particularly serious, as for example compared with other federal type arrangements, as there are no adequate arrangements for judicial or other impartial review of the scope of these powers. As these powers concern the responsibilities of the CPG, any dispute whether in any particular instance the powers have been exceeded would be resolved by the NPCSC (which is unlikely to oppose the views of the CPG). The problem would in the diminution of the autonomy of the region, although action under defence powers is more likely to restrict civil liberties than foreign affairs (examples include seizure of property, detention without trial, banning of societies and organization) as well as controls over the economy (e.g., price controls or regulation of housing). But like foreign affairs, the concept of ‘defence’ is not limited conceptually. ‘Defence’ was traditionally used to refer to protection against warlike action or its threats from some external source. Now it might carry a broader meaning, covering reaction to foreign policies of other states in the diplomatic or even psychological areas of ‘contest’. In an Australian case Dixon J said that defence power could only be defined in terms of purpose (Stenhouse v Coleman (1994) 69 CLR 457 at 471). The courts have defined their role restrictively; and in general they do not question the necessity or desirability of federal acts, so long as there is some connection between ‘defence’ and the purported exercise of it, although in time of peace, the Australian courts have required a test of reasonable proportionality (Polyuchovich, see above, and The Communist Party v The Commonwealth (1951) 83 CLR 1).

Defence may also be connected with questions of internal security, although in the case of Hong Kong, the Basic Law vests the responsibility for at least public order directly in the HKSAR (art. 14). The Basic Law recognises that Central Authorities may station a garrison of the People’s Liberation Army in Hong Kong (art. 14), while this power is implicit in the concept of defence powers. Presumably the Central Authorities could introduce conscription in Hong Kong if they deemed that would be necessary for ‘defence’.
be eased if the Central Authorities were to accept a convention that it would not extend to Hong Kong any PRC treaty which covered topics within the autonomy of the region, by using, where necessary, the ‘federal clause’ or reservations (as discussed immediately below).

**The Legal Effects of Treaties**

A second set of difficulties may arise from the interaction between the provisions governing the treaty regimes of the PRC and Hong Kong. First there are different modes of giving effect to a treaty. In China, a treaty, once it is properly ratified by the NPC, becomes, in theory, automatically a part of the law, and overrides a national law (except presumably the constitution) in case of conflict (see Chapter 2). In Hong Kong there is no formal process for the ratification by the legislature of treaties (although treaties may be tabled in the Legislative Council for the information of its members) and a treaty has no direct legal effect internally unless it is incorporated under local law (see Chapter 1). It is not clear what the effect of the extension to Hong Kong of a treaty to which the PRC is a party (under art. 153) is. Does it require incorporation by Hong Kong legislation before it takes effect in the region or would it be effective by the mere fact of its application in Hong Kong? In this context it should be noted that art. 18, which sets out the sources of law in Hong Kong, does not recognize treaties as an independent source of law. Assuming that the effect of a ‘Hong Kong’ treaty continues to be governed by the previous requirement of express incorporation, it would be better to have the same requirement for a ‘PRC’ treaty so that it could be properly accommodated within the local law — and avoid the confusion that would arise from a rule which recognizes different ways of giving effect to a treaty depending on its origin.

The second issue is that in ordinary circumstances a treaty signed by the PRC would be binding on it in relation to all its territory in accordance with general principles of treaty law (art. 29 of the Vienna Convention on Treaties). Consequently it would be desirable when the PRC signs a treaty which it is not sure it would apply to Hong Kong or which it has not had time to discuss with the Hong Kong authorities, to specify that the treaty would not (at least in the first instance) apply to Hong Kong. This could either be in the form of a reservation or by use of the ‘federal clause’.12

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12 In federal states, the federal authorities who negotiate treaties on subjects which are within the domain of provinces/regions sometimes include the ‘federal clause’ whereby they assume only those obligations which the federal authorities can perform but
Some treaties do not permit any reservations of a territorial nature so that if the PRC were to sign such treaties, it would have no choice but to apply them to Hong Kong (although presumably the choice as to the modalities of implementation would lie with Hong Kong, in accordance with the law there). All these circumstances suggest the desirability for prior consultation with Hong Kong before China enters into treaty obligations, rather than at the stage of deciding whether to extend it to Hong Kong as art. 153 provides.

**Hong Kong’s Status in PRC Treaties**

In some cases when a PRC treaty is extended to Hong Kong, there may be some difficulty in accommodating Hong Kong to it if the treaty makes a distinction between developed and developing countries (on the general question of the distinction between developing and developed countries and their legal implications in international law and organizations, including preferential loans and trade concessions, see Fatorous 1992). One may take as examples the Conventions on Biodiversity and Climate Change which were adopted at the Rio Earth Summit (UN Conference on Environment and Development). The conventions make a distinction between developed and developing countries in their obligations and require states with advanced economies to assist developing countries to achieve the objectives of the conventions by providing them with financial and technological aid (arts. 20 and 21 of the Biodiversity Convention and art. 4(3)-(10) of the Climate Change Convention). Although Britain ratified the conventions, they were not extended to Hong Kong as, according to a spokesman of the previous government, it was not clear whether Hong Kong should be designated as a developed or developing country given the imminence of its status as a special administrative region of China (*Legislative Council Debates*, 2 December 1992, p. 1114) (though it seems that under the Climate Change Convention, at any rate, Hong Kong as a non-member of the OECD, would be classed as developing). China is a signatory, qualifying as a developing country. It would seem that China would have to extend the application of, at least, the Biodiversity Convention to Hong Kong since it is to be applied to all areas within the
national jurisdiction of a signatory state (art. 4 of the Biodiversity Convention) and no reservations are allowed (art. 37). If the Climate Convention were also extended, it would need to be established whether Hong Kong’s obligations as regards the control of the emission of greenhouses gases would be separate from the rest of China, and whether they would be assessed on the basis of criteria for a developed country.

**Relationship With Other Territories**

A difficulty in Hong Kong’s handling of relations with other states or entities may arise from Chinese attitudes to them. An obvious case is Taiwan with whom Hong Kong has had extensive commercial relations and exchange of some forms of representation. China’s views of its own and Hong Kong’s relationship with Taiwan change periodically, which may make it difficult for Hong Kong to establish a clear and coherent external relations policy with Taiwan.

**Membership in International Organizations**

In so far as Hong Kong is a separate member of an international organization of which China is also a member, the situation can become quite fraught if Hong Kong’s interests on particular issues diverge from those of China. Theoretically Hong Kong delegates should be free to fight for its interests (as to some extent used to happen when British and Hong Kong interests diverged in the GATT). Similarly, would Hong Kong and China use the machinery that the organization may have for dispute resolution to settle their differences? When Hong Kong is represented in some organization or conference as part of the Chinese delegation, would its delegates be free to pursue an independent line? It would seem unlikely from Chinese attitudes towards national sovereignty that Hong Kong would be allowed to operate in these independent ways.

**CONTINUITY OF THE PREVIOUS INTERNATIONAL REGIME**

In keeping with the Joint Declaration’s and Basic Law’s general theme of continuity of the previous laws and systems, both these instruments set up a special regime of treaty succession, which differs in important respects from the general international norms on state succession. In other British
colonies, the issues of succession to treaties and to membership of international organizations were significantly different in that the succession was to a new state entity, on whose behalf Britain had entered into obligations when the entity was a colony, a straightforward case of state succession and there was no complication of a third country as the new sovereign, with its own treaty regime. International law on the subject of succession has developed through state practice as well as international agreements. In 1978 the Vienna Convention on Succession of States in Respect of Treaties was adopted to regulate the issue of treaties on state succession (i.e., the change of sovereignty over a state or territory). The convention applies in respect of treaties between states (art. 1) and treaties which are constituent instruments of international organizations (without prejudice, however, to the rules concerning the acquisition of membership) or treaties adopted within an organization (art. 4). The bulk of the convention deals with treaty succession in respect of newly independent states. However, it endorses the rule (known as the Moving Treaty Frontiers Rule) that when the territory of a state, or when any territory for the international relations of which a state is responsible, not being a part of that territory, becomes a part of the territory of another state, the international agreements of the predecessor state shall cease to apply to that territory while the agreements of the successor state shall begin to apply to the incorporated territory, ‘unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation’ (art. 15). The convention provides that this rule cannot be displaced by an agreement between the predecessor state and the successor state that treaty rights and obligations of the former shall devolve upon the latter (art. 8) nor by a unilateral declaration by the successor state providing for the continuance in force of the treaties in respect of its territory (art. 9).

The convention has not been ratified by a sufficient number of states to enter into force (and China is not yet among the signatories), but the convention rule is widely regarded as no more than codification of international law (although there is considerable controversy about the details of the rules on succession). Accordingly, many states which had, through their treaties with the UK, a relationship with Hong Kong may prefer to conduct their future relations with Hong Kong on the basis of the Moving Treaty Frontiers Rule and regard all treaty relationships at an end unless their continuation is negotiated with China. In order to fully understand the difficulties that may arise, it is necessary to explain the regime for treaty succession contained in the Joint Declaration and the Basic Law.
There are two aspects to the Moving Treaty Frontier Rule — the extinction of treaty rights and obligations of the former sovereign, and the assumption of the rights and obligations of the new sovereign. On the first principle, the Basic Law states that international agreements to which the PRC is not a party ‘but which are implemented in Hong Kong may continue to be implemented’ in the HKSAR (art. 153). There are several points of interest to note in this formulation. First, the reference here is presumably to treaties which were operational at the time of the transfer of sovereignty. These treaties would have been concluded by the UK on behalf of Hong Kong or extended to Hong Kong or signed by the Hong Kong administration under authority from the UK. Secondly, the Basic Law does not automatically continue these treaties; it uses the word ‘may’ as opposed to ‘shall’. But it does not specify whether it is the Central Authorities or the HKSAR which decide whether a previous treaty should continue (there are similar ambiguities in the Joint Declaration, Annex I, Part XI). Although presumably these treaties fall within the areas in relation to which the HKSAR has been authorized to make treaties on its own and it would consequently be logical to leave the decision to regional authorities, Chinese susceptibilities are such that the Central Authorities would probably make the decision (presumably, in practice, after consultation with the HKSAR).

On the second principle, the Basic Law provides that the application of treaties to which the PRC ‘is or becomes a party’ to the HKSAR shall be decided by the CPG ‘in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region’ (art. 153). This formulation involves no automaticity but relies on discretionary powers as regards the application of PRC treaties. However, in this instance it is made explicit that the decision is taken by the CPG, although after consultation with Hong Kong’s government. It is also indicated that the primary consideration in the decision is the ‘circumstances and needs’ of Hong Kong (which should prescribe severe limits on the application of these treaties).

It is thus evident that the provisions of the Vienna Convention and the regime of the Basic Law for treaty succession are fundamentally different. First, the Basic Law regime departs from the Vienna Convention in making the continued application of a treaty discretionary instead of automatic. Secondly, it neither fully disapplies all the treaties of the previous sovereign nor applies all those of the new sovereign. The difficulties are compounded by the fact that there are many treaties that the UK applied

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13 It is possible that the word ‘may’ was used to give discretion to the HKSAR to revoke or amend the treaties.
to Hong Kong to which the PRC is not a party. However, it is also evident that the regime of the Basic Law is more logical and sensible. The autonomy of the HKSAR cannot be adequately exercised unless it has its own treaty regime. As has been indicated above, Hong Kong’s economic system is not only separate from that of the rest of China, but also requires a series of international agreements to sustain it. Similarly, the maintenance of the distinctiveness of Hong Kong’s legal system necessitates separate agreements (e.g., for the enforcement of judgments and arbitral awards, extradition, etc). Many of the treaties (or Hong Kong’s membership of multilateral treaties or organizations) were specifically concluded or made for Hong Kong as a territory distinct from the UK, giving Hong Kong its own treaty regime — strengthening the case for its continuation.

On the other hand, it is not possible for China or the UK to impose the treaty regime of the Joint Declaration or the Basic Law on other states or international organizations. It would seem that the two sovereign powers realized that the consent of other states and organizations would be necessary. The principal mechanism for the review of ‘previous’ treaties was the Joint Liaison Group (JLG), after which the continuation or revocation of the treaties would be negotiated with external parties.

One of the functions of the JLG was to consider action to be taken by the two sovereigns to enable the HKSAR ‘to maintain its economic relations as a separate customs territory, and in particular to ensure the maintenance of Hong Kong’s participation in the General Agreement on Tariffs and Trade, the Multifibre Arrangement and other international arrangements’ as well as action to ‘ensure the continued application of international rights and obligations affecting Hong Kong’ (Annex II, art. 4 (a) and (b)). In the run up to the transfer of sovereignty, consideration was to be given to action to assist the HKSAR ‘to maintain and develop economic and cultural relations and conclude agreements on these matters with states, regions and relevant international organizations’ (Annex II, art. 5 (b)).

14 Other states may refuse to be bound by earlier treaties, as the change of sovereignty may create conditions that make it impossible for the treaty to be performed, or the change may be inconsistent with the purpose of these obligations. It could also be argued that the other states could abrogate a treaty on a change of sovereignty on grounds of a fundamental change of circumstances or the inability of the incorporated territory to fulfil its treaty obligations. A US District Court held that there could be no ‘succession’ to an extradition treaty between the US and UK which was extended to Hong Kong. The assumption was that British Hong Kong’s legal system provided adequate guarantees and safeguards that were unlikely to be available under the Chinese legal system. The treaty would lapse with the end of British sovereignty, and further extradition to Hong Kong would require a treaty with the new sovereign (Lui Kin-Hong v US (CA No. 96–10849–JLT) dated 7 January 1997 in the District of Massachusetts). This decision was, however, overruled by the appeal court (SCMP 21 March 1997).
the whole this aspect of the work of the JLG was conducted without much controversy (although the negotiations were often protracted). The British side prepared papers on each treaty for consideration by the Chinese members. There were about 180 bilateral treaties which Britain had extended to Hong Kong. There could be no straightforward transfer of rights and obligations by applying these treaties to Hong Kong under Chinese auspices as China was not a signatory to them (New Gazette 1993:16–21). Different approaches were adopted for the continuation of bilateral and multilateral treaties. For bilateral treaties (which covered for example extradition, air services, and mutual legal assistance) a model agreement was prepared and agreed in the JLG. A similar procedure was adopted in those areas where Hong Kong’s bilateral obligations were the result, not of a treaty, but of a Commonwealth scheme as in extradition or mutual legal assistance (the scheme thus being replaced by a treaty or rather a series of treaties). The government of Hong Kong would then be authorized, with the consent of China, to negotiate the agreement directly with the foreign state concerned, thus replacing with it the treaty extended to Hong Kong. As China had consented to the negotiation of these treaties (and approved, where necessary, the departures from the model agreement), they remain effective despite the change of sovereignty. Thus on 1 July 1997 Hong Kong’s treaties included investment promotion and protection agreements with over 14 countries; surrender of fugitive offenders agreement with at least 5 countries; and air services agreements with at least 14 states.

As far as multilateral treaties (of which there were more than 200) were concerned, the general approach was that once the British and the Chinese had reached agreement, notes were sent to the Secretary-General of the UN and the depositary of the treaty by Britain and China recording their intention to continue the treaty after 1 July 1997. Unless a member objected, it was assumed that the treaty would continue to apply to Hong Kong. A somewhat similar procedure was followed for continuing Hong Kong’s membership of international organizations. Britain would send a note to inform the secretary-general (or comparable officer) of the organization that in accordance with the Sino-British Joint Declaration Britain would cease to have international responsibility for Hong Kong on 1 July 1997; at the same time China would send a note stating its international responsibility for Hong Kong after that date and declaring its intention that Hong Kong should continue to be a full or associate member (as appropriate). Hong Kong is consequently bound by treaties in numerous fields, such as civil aviation, conservation, customs, health, human rights, intellectual property, international crime, labour, marine pollution, merchant shipping, judicial cooperation, and telecommunications.
It is also a full or associate member of over 20 international organizations, like the GATT/WTO, the World Bank, International Monetary Fund, the ILO, the International Maritime Organization, World Health Organization, the World Intellectual Property Organization, the Food and Agriculture Organization, the Asian Development Bank, and the International Civil Aviation Organization.

By these procedures Britain and China ensured that the HKSAR would start its life with a well-established regime of treaties and membership of international organizations (although tensions between Britain and China meant that not all the treaties which it was agreed should be put in place could be renegotiated — a problem largely in the area of bilateral treaties).\footnote{There were particular difficulties, for example, with treaties on the surrender of fugitive offenders which were to replace previous extradition arrangements. This turned out to be a specially sensitive area as foreign states were not confident that either Hong Kong’s legal system would continue to remain independent and competent or that returnees would not find themselves entangled in the Chinese legal system. See Brabyn 1994 for some difficulties in achieving greater progress in this area.}

They would also ensure that doubts that other states might have had about the acceptability of the treaty succession regime provided in the Basic Law were cleared up before the transfer of sovereignty. In fact the two sovereign powers had begun to establish an independent international regime for Hong Kong even before the promulgation of the Basic Law. Hong Kong, with the consent of Britain and China, became an independent member of the GATT in 1986 (under art. XXVI of its constituent instrument whereby a customs territory having autonomy over its external commercial relations and other GATT matters may become a member). Under the circumstances it could continue its membership despite the change of sovereignty so long as it retained the necessary autonomy, but in fact China (not itself a member of the GATT) sent a note to the GATT outlining Hong Kong’s eligibility to remain a member as the Joint Declaration ensured it the autonomy and authorized it to remain a member of the GATT. In October 1994, Hong Kong became a founder member of the World Trade Organization (WTO), although China itself failed to secure that distinction. Secondly, to continue the practice of foreign investment, the Hong Kong government on its own, even though under...
British authorization and with the consent of China, entered into a series of treaties on the encouragement and protection of investment with some of its major investing states, like Australia, US, Sweden and Japan before the transfer of sovereignty.

Therefore the provisions of the Joint Declaration and the Basic Law on treaty succession, although they were in one sense the foundation, were not the real basis, for the new treaty regime of Hong Kong (the Joint Declaration, as signifying the consent of the previous sovereign to the new proposed scheme, being more important than the Basic Law, and it was the Declaration rather than the Basic Law which was cited in its notes to the international community). Rather the treaty regime is the result of fresh negotiations and the explicit or implicit agreement of other states and organizations to continue to accept Hong Kong as a party.

The full implementation of the treaties required a further step, although of purely domestic nature. Since a treaty can only be given effect domestically if incorporated under local law, the practice during the colonial period was to extend the UK implementing legislation to Hong Kong. Since such legislation would have lapsed on the transfer of sovereignty, it was necessary to replace it with local ordinances. This localization of laws required the consent of the Chinese (secured in the JLG). A considerable amount of legislation was passed accordingly (covering shipping, aviation, intellectual property, fisheries, environment and conservation).

THE FOUNDATIONS OF HONG KONG’S INTERNATIONAL REGIME

It is clear from the preceding discussion that Hong Kong enjoys a significant international capacity and status. It is a major actor on the international scene, especially as regards economic, financial and commercial issues. It has a right to make treaties and to be a member of international organizations. How secure are the legal foundations for its capacity and status; in particular, do they depend solely on the policies or decisions of the PRC? Britain and various other states have argued that the international community has a legitimate interest in the continuation of Hong Kong’s international status (especially as exemplified in its participation in global affairs and the autonomy that makes it possible). In its closing days, the British administration (in London and Hong Kong) invested considerable effort into what has been termed ‘internationalizing the question of Hong Kong’, by, for example, drumming up support for the Joint Declaration, insisting on the imperative of the continuation of the rule of law, and
mobilizing opposition to the provisional legislature. Although Britain would continue to have some standing in relation to the autonomy of Hong Kong under the Joint Declaration through its membership of the JLG until the year 2000, it is increasingly to the US, as a state with sufficient clout and a political system that is amenable to public lobbying, that some groups in Hong Kong and abroad look to protect its international status. Certain pressures from Hong Kong resulted in one manifestation of the US determination to reinforce the guarantees of Hong Kong’s autonomy, the United States-Hong Kong Policy Act, which provides a good illustration of the potential and limits of outside support for autonomy.

In 1992, at the instigation of a few members of the US Congress who were encouraged in this enterprise by some groups in Hong Kong, the United States-Hong Kong Policy Act was enacted. It was presented by one of its promoters as ‘supporting the aspirations of the people of Hong Kong for the exercise of their political and civil rights’. He went on to say, ‘In this day of crumbling dictatorships around the world, we must not forget that China, the world’s most populous totalitarian state, continues to suppress the groundswell for democracy in the tiny colony of Hong Kong. The bill we are adopting today reflects the American people’s displeasure with Beijing’s intention to abide by neither the letter nor the spirit of the Sino-British Joint Declaration’ (Senator Simon from Illinois, Congressional Record page S-13876; 17 September 1992). However, a close reading of the act casts doubts about the centrality and effectiveness of this objective.

A justification for the act was to ensure that the provisions of the Joint Declaration were made effective, so far as the US-Hong Kong relations were concerned, by recognizing in US law the special status that Hong Kong had enjoyed with the US and which is guaranteed in the Joint Declaration. Sponsors of the act were concerned to establish the economic stake of the US in Hong Kong: as of 1991, US investments in Hong Kong totalled over US$7 billion and over US$99 billion were deposited in Hong Kong financial institutions; 44 US banks had entities in Hong Kong. Additionally, about 900 US firms had corporate offices in Hong Kong, most of which were used as financial and marketing bases in support of substantial production facilities in China and as headquarters for business activities throughout Asia. About 25,000 US nationals lived and worked in Hong Kong, making them one of the largest expatriate groups in Hong Kong. US multinationals had played a large role in organizing production in Hong Kong and Guangdong Province. There was very significant trade between the US and Hong Kong, worth approximately US$19 billion, of which $10 billion were exported from
Hong Kong, making the US its largest market, while Hong Kong was the twelfth largest market for the US, with per capita consumption by Hong Kong residents of US goods exceeding that in Japan. More than 600,000 US tourists visited Hong Kong in 1991 (speech by Representative Falaeomavaagega of American Samoa, *Congressional Record* H-8002; Dumbaugh 1992).

The US-Hong Kong Policy Act seeks to achieve various purposes, some strictly legal and others more political. In the first place it aims to reinforce the Joint Declaration. After reciting the principal provisions of the Declaration, the act declares the wish of the Congress ‘to see full implementation’ of the Declaration (sec. 2). The act makes specific mention of US support for democratization and human rights in Hong Kong, as an application of general policy of US in these matters. Another set of provisions requires the US to support various aspects of Hong Kong’s economy, autonomy and status under the Joint Declaration such as its role as an international financial centre, the mutually beneficial ties between the peoples of Hong Kong and the US, to establish and expand direct bilateral ties and agreements with Hong Kong in economic trade, financial, monetary, aviation, shipping, communications, tourism, cultural, sports, and other ‘appropriate areas’ (picking up the language of the Declaration and the Basic Law). It enjoins the US to continue to negotiate separately with Hong Kong when this is allowed under the Declaration, including air services agreements (which should lead to ‘pro-competitive air service agreements’ — this clause was perhaps aimed at the fear that China might use its powers under the Basic Law to advantage mainland airlines). The US should recognize the Hong Kong register for ships and aircraft; and treat it as ‘fully autonomous from the People’s Republic of China with respect to economic and trade matters’ (sec. 103), including immigration matters (sec. 101(6)). The US should support Hong Kong’s participation in all appropriate multilateral conferences, agreements, and organizations in which Hong Kong is eligible to participate (sec. 102(1)). The US should also treat Hong Kong as a separate customs territory. Importantly, the US should continue to support access by Hong Kong to sensitive technologies controlled under the Coordinating Committee for Multilateral Export Controls ‘for so long as the United States is satisfied that such technologies are protected from improper use or export’ (sec. 103(8)), presumably including exports to the rest of China. The act authorizes the continued application of relevant US laws to Hong Kong despite the change of sovereignty, in the same manner as they were applied previously’ (sec. 201(a)). Similarly, all treaties and other international agreements, including multilateral agreements, entered into between the US or Hong Kong or the UK and the US and extended to Hong Kong, would continue to apply
after the transfer of sovereignty (sec. 201(b)). The US should maintain a consulate-general in Hong Kong and invite Hong Kong to maintain its official and semi-official missions in the US (sec. 101(3 and 4). The US should recognize passports and travel documents issued by the HKSAR (sec. 101(5)).

In all these respects the act does little more than state what is already explicit or implicit in the Joint Declaration, and indeed in the Basic Law. To some extent, it could be seen as endorsing the treaty and international regime for Hong Kong set out in these documents so far as the US is concerned. However, it has two provisions which may be seen in the nature of ‘sanctions’. The President of the United States may suspend the application of US laws to Hong Kong (and so presumably withdraw the privileged position of Hong Kong) if the President ‘determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provisions thereof, different from that accorded the People’s Republic of China’ (sec. 202 (a)). In making such a determination, the President ‘should consider the terms, obligations, and expectations expressed in the Joint Declaration with respect to Hong Kong’ (sec. 202 (b)) and consult in an appropriate way with the Congress (sec. 204). The suspension may be rescinded if the President determines that Hong Kong has regained sufficient autonomy (sec. 202(d)). The second provision is for reporting by the US government to the Congress, at specified periods from 1993 to 2000, ‘on conditions of interest to the United States’, including the development of democratic institutions in Hong Kong (sec. 301), and is therefore clearly connected with the transitional period.

Neither sanction is likely to be particularly effective, other than by putting China on notice. The suspension of laws would harm Hong Kong, which is intended to be the beneficiary of the act. The US administration was less than enthusiastic about the legislation and managed to water down several provisions during its passage. The language of the act suggests less hard law than exhortations to the administration, within whose jurisdiction fall many matters covered by it. The inspiration for the US-Hong Kong Policy Act may have been the Taiwan Relations Act 1979 which was passed after the US recognized the PRC and consequently had to revise its relations with Taiwan. The aim of the Taiwan Act was to ‘preserve and promote extensive, close, and friendly commercial, cultural and other relations between the people of the United States and the people of Taiwan . . . ’(s. 3301(b)(1)). The legislation was necessary to continue previous treaties and other legal relations with Taiwan, provide authority for the supply of arms to Taiwan, and provide for the US representation in Taiwan (at less than full diplomatic level). It was also important in
providing assurances of continued US support to Taiwan. These considerations do not apply in the case of Hong Kong.\footnote{A US District Court in the District of Massachussets has taken the view that the US-Hong Kong Policy Act by itself does not continue treaties between the US and the UK which previously applied to Hong Kong (Lui Kin-Hong \textit{v} US (1997) CA No. 96–10849–JLT). See footnote 14.}

Other states have taken a less high profile position as regards their concern with Hong Kong’s autonomy, but are understood to have expressed their views about the importance of the autonomy to Chinese leaders in private. The Pope has declared that the Catholic Church (which has over 250,000 adherents in Hong Kong) would watch developments (\textit{South China Morning Post} 13 January 1997). Britain has announced its intention to monitor developments, particularly as regards human rights and issue six monthly reports (which would also be available to UN human rights committees) until the year 2000 (Rifkind 1997). However, the kind of sanctions open to other states are, as the analysis of the US-Hong Kong Policy Act shows, limited. Most states are interested in trade or security relations with China and are for that reason unlikely to make an issue out of the diminution of Hong Kong’s autonomy. The US relations with China are complex and many-fold, in which considerations about Hong Kong are unlikely to play a major role, although the US Congress could probably be more easily mobilized to support Hong Kong’s autonomy.

China has greatly resented these moves, which it has characterized as interference in its domestic affairs. This view underestimates the legitimate interest of other states in Hong Kong as well as the significance of the Joint Declaration which, from the British (and to some extent, international) point of view, provides the clearest basis for Hong Kong’s autonomy in local and international affairs, the British opinion being that sovereignty over Hong Kong was returned to China in return for guarantees for the future status of Hong Kong. China’s position (as explored in the first two chapters of this book) is that China never lost sovereignty over Hong Kong and consequently its statements in the Joint Declaration about its future policy for Hong Kong concerned domestic issues only. However, it is difficult to dismiss the international ramifications of Chinese promises so easily. The negotiations on the future system of Hong Kong were long and difficult and many details were worked out in lengthy discussions with Britain. Britain had made clear that it would be willing to give up sovereignty only if adequate guarantees for Hong Kong were provided; this was the basis on which the negotiations proceeded after having stalled on the sovereignty issue. The Joint Declaration, being a treaty, is automatically binding under Chinese law.
Nor is the Chinese view of sovereignty consistent. It accepts that most of the treaties signed for Hong Kong during the colonial period are valid, and seeks their continuation, thus acknowledging British sovereignty. China allows its Hong Kong citizens to retain an element of UK nationality, and even perhaps to acknowledge UK’s right to offer consular protection to them in third countries. China encourages other states and international organizations to believe in the autonomy of Hong Kong by the provisions of the Basic Law and notifications to other states and international organizations as part of the procedure for the continuation of treaties and membership in these organizations. It has given Hong Kong the right to conclude relations with other states and international organizations; Hong Kong is encouraged to facilitate investments from abroad and to provide them with guarantees. China also expects other states to accept the unusual regime of treaties and treaty succession for Hong Kong; and allows them to set up consulates in Hong Kong to deal with the Hong Kong government. The Joint Declaration authorizes Hong Kong to establish mutually beneficial economic relations with the UK and other countries, ‘whose economic intents in Hong Kong will be given due regard’ (art. 3(9)). It also provides the UK the right to set up a consulate-general in Hong Kong (Annex I, sec. XI).

Under the treaties that Hong Kong has signed under authorization from its old or present sovereign (and which are binding on it now), a number of obligations have been established between it and foreign states which both reinforce its autonomy and require that autonomy for the fulfilment of the obligations. The reinforcement occurs through an expansion of Hong Kong’s international links, tying it in to foreign states or international organizations, so that it becomes increasingly an international actor and a bearer of rights and duties in its own right in the international community. Thus, under treaties for the encouragement and protection of foreign investments, Hong Kong has to provide for the repatriation of profits and investments and to ensure equal or most favoured nation treatment for nationals of the contracting state. It may have to ensure the protection of intellectual property rights. It may seek to protect the claims of Hong Kong investors in the contracting state, using the specified machinery; although not quite diplomatic protection, it resembles it in many respects.

The fulfilment of Hong Kong’s obligations depends on its continuing autonomy. It cannot guarantee equal or most favoured nation treatment to nationals of contracting states unless it is free to pursue independently its commercial and monetary policies. Its international trading relations (including its membership of the GATT and WTO) cannot be sustained unless it is able to retain its status as a separate customs territory. Nor
can it expect to continue its membership of and participation in the international regime for the protection of intellectual property unless it is able to control movement of goods from and to China. The international regime for the return of fugitive offenders or prisoners cannot long be maintained unless the Hong Kong judiciary is independent and impartial and the legal system retains its full separation from the mainland authorities.
Reflections

THE BASIC LAW IN A COMPARATIVE PERSPECTIVE

The Basic Law is an unusual instrument, full of irony. It is a great compliment from the PRC to Britain, for despite the great resentment by China of British rule in Hong Kong, it entrenches the system (in its economic as well as political aspects) that Britain established. A further irony is that, by elevating the market to the highest principle, professedly the most ardent communist state promulgates the most extensive charter of capitalism in the world. A regime that considers that law is subsidiary to economics and politics and has traditionally despised it, relies on legal form for the guarantees of ‘One Country Two Systems’, while its predecessor, with its professed respect for the rule of law, was content to rely upon the broadest of discretion in the colonial bureaucracy. A state that believes that constitutions need to be updated and refurbished periodically to register victories of class struggle has provided a legal framework unalterable in its essentials for fifty years, written almost as it were on tablets of stone, and aimed at muting conflicts and struggles. The constitution for ‘the high autonomy of Hong Kong’ and ‘Hong Kong people ruling Hong Kong’ is made with only minimal participation of its people. A document that glories in pragmatism is prolix, detailed and, in places, rigid. Yet that pragmatism stands constantly threatened by doctrinaire notions of state sovereignty.

The regime of the Basic Law is unique. The Basic Law operates at the intersection of two powerful global traditions of politics and economy — the capitalist and the socialist. It entrenches capitalism within a state whose constitution still proclaims as its mission the strengthening of a planned economy and which condemns any deviation from socialism as a
counter-revolutionary crime. The Basic Law seeks to maintain and strengthen a political system marked by openness, free elections, public participation in politics and administration, accountability and respect for human rights, but depends for its validity and integrity on a tightly controlled and authoritarian system, based on what it claims is democratic centralism under the dictatorship of the proletariat. The Basic Law, underpinned by a commitment to legality, provides for the coexistence and interaction of two different and contrasting legal systems and traditions. It places the common law in a new and unfamiliar shell. Few legal instruments have carried such a heavy burden of responsibility.

The very uniqueness of the Basic Law makes it a subject of general interest. It provides, in the first instance, an unusual scheme of autonomy. In many parts of the world, arrangements for autonomy have been constituted or are being negotiated, reflecting the crisis of the state, whether brought about by assertions of ethnicity, the integration of economies on a regional or global basis, or considerations of efficiency or popular participation in public affairs. Secondly, there is also a growing movement for integration of states with differing types and levels of economic development, necessitating partial separation of economies. Thirdly, as an aspect of these and other processes of integration, legal rules and systems coexist or mingle, providing a specific example of the growing phenomenon of legal pluralism. Fourthly, the Basic Law places the common law in an unfamiliar context, with its future a matter of considerable speculation, providing points of comparison with the common law elsewhere in different political or linguistic contexts. Fifthly, several countries are engaged in democratization, recovering from the collapse of the state, or the retreat of the military or the one party state. There is a growing concern with the reform of legal systems, clearer norms and stronger judiciaries, in short with legality. Sixthly, the Joint Declaration and the Basic Law have, with the subsequent concurrence of the international community, conferred a unique international status on Hong Kong which requires the reconceptualization of several key international norms.

Despite Deng Xiaoping’s claim about the precedential value of the Basic Law to solve problems in other parts of the world and despite the interest expressed in several countries in the system of autonomy it establishes (see Chapter 4), the unique circumstances of its origin and its various special features make it an unlikely model. Moreover, the Basic Law would be of little value or interest if it did not succeed in its objectives of securing autonomy and separate economic and political systems for Hong Kong. The Basic Law could provide a fascinating experience or example of a complex process of coexistence or it could collapse in the face of Chinese authoritarianism. For comparativists a particular interest
will lie in the dialectics between politics and legality. Were the Basic Law to acquire the characteristics of hard law, then undoubtedly it would become an objective of considerable interest and comparative study. However, this will not occur if Hong Kong supporters of an expansive mainland jurisdiction over the SAR toe the line that the NPC has unlimited authority over Hong Kong. Nor will it occur if the NPCSC continues its arbitrary approach to interpretation. Such a general approach to interpretation may not matter on the mainland as there is no separation of powers and authority is highly centralized, but it will be fatal to Hong Kong’s autonomy.

**PRINCIPAL THEMES OF THE BASIC LAW**

The book has moved between a detailed legal analysis of the Basic Law and explorations of its historical, social, economic, and political contexts. I have long argued for a contextual approach to the study of law, particularly in the field of public law. Constitutions are not only, and some would say, not even primarily, legal instruments. For an adequate study of constitutions, indeed of any law, it is necessary to establish a framework broader than the law itself, and to uncover its underlying social and economic foundations. The form and substance of the law are shaped significantly by social and economic forces. The symbols of the law are manipulated to secure legitimacy. The ways in which apparently neutral concepts and rules operate are determined by the underlying economic or political power of parties who use them. However, this is not to suggest that law is a purely dependent variable, responding to or resisting changes in society. The influences are reciprocal. It is within this framework of reciprocal influences that we must study law if we are to gain an understanding of its actual or potential social and political role. Such an approach is particularly pertinent to the study of the Basic Law, with its occasional vague and general phraseology, and its existence within and between two different legal systems and traditions.

It may of course be questioned whether this approach, which assumes a measure of autonomy for the system of law, is appropriate for the Basic Law in view of the paramountcy of the political in the Chinese constitutional and legal orders. Indeed so widely is it assumed that the relationship between Hong Kong and the Central Authorities and the scope and nature of autonomy that Hong Kong would enjoy are dependent on politics and policies of the Chinese Communist Party that few analyses of the future of Hong Kong pay any attention to the content or structure
of the Basic Law. Similarly discussions of strategies whereby Hong Kong should deal with the Central Authorities, premised for the most part on either placating or standing up to Beijing, rarely engage with the provisions of the Basic Law and the scope it offers for sustaining autonomy. An underlying assumption is that autonomy may be feasible only so long as Hong Kong in its present form continues to serve the agenda of the sovereign. These perspectives demonstrate that a fundamental issue, generally overlooked, is the legal character of the Basic Law and the role of legality in its application. Equally important is the nature of the political system established by the Basic Law.

The Basic Law differs in many respects from its predecessor, the Letters Patent and the Royal Instructions. The latter were instruments of control and subordination. Except after the 1991 amendment which entrenched the International Covenant on Civil and Political Rights, they had few normative principles to guide or control legislative and executive authorities. The Basic Law, on the other hand, is intended as an instrument for the empowerment of the people of Hong Kong, with a firm and extensive regime of norms and values. But there is much anxiety that the Central Authorities will seek to turn it into a device for control. There are many features of the Basic Law which would lend themselves to this task: the directive and supervisory powers of the Central Authorities and the powers of the NPCSC to interpret the Basic Law.

Hong Kong has a vast number of legislative and executive powers under its jurisdiction, greater undoubtedly than under any other scheme of autonomy in the world. However, I argued in Chapter 4 that a more convincing account of the principal objective of the Basic Law is the separation of the economy of Hong Kong from that of the mainland, rather than autonomy as such. The separation is a very distinct theme, with a large number of provisions which define the characteristics of the economy that must be preserved. The extensive elaboration of the economy serves to limit the discretion and policy choices of the government of the HKSAR. The theme of separation rather than autonomy is also borne out by the design of political institutions and relationships. I attempted to demonstrate in Chapter 7 that despite the slogan of ‘Hong Kong people ruling Hong Kong’, political institutions are structured to provide for the leadership within Hong Kong of conservative elites committed to the maintenance of the status quo and to their subordination to the Central Authorities. Political institutions and relationships are the Achilles’ heel of autonomy. Autonomy is also vulnerable to the vague Chinese concept of sovereignty which pervades all aspects of government and society and seems incapable of distinguishing its external and internal aspects.
THE FUTURE OF THE BASIC LAW

There cannot be a simple answer to the question of the future of the Basic Law. In keeping with the approach of the Basic Law which tends not to see Hong Kong as an integrated social and economic entity, but instead in terms of ‘systems’, it may be more fruitful to think of the future of Hong Kong by economic, political and legal sectors. Some clues may be found in the practices during the transitional period, when China sought to emasculate the small gains Hong Kong had made in the democratization and accountability of public institutions. Clues may also be found in the methods used during that period.

If the separation of economies is one of the principal assumptions of the Basic Law, to a significant effect it has already been negated. The opening of the PRC to the outside world and the establishment of economic zones, particularly in Shenzhen, led to a rapid integration of the economies of Hong Kong and the mainland. There are massive Hong Kong investments in China but also large mainland investments in Hong Kong, with thousands of Chinese companies operating in all key areas of economy. The economy now provides points of leverage for the mainland authorities to influence policy and developments in Hong Kong, in addition to devices contained in the Basic Law. The economy of Hong Kong has become increasingly dependent on China, and its success is contingent on the growth of the mainland economy. The mainland authorities have an interest in the economic success of Hong Kong, for a variety of obvious reasons. They also have an interest in keeping it as a market economy, although the dominance in it of mainland companies might tilt public policies in their favour and thus affect the ‘level playing fields’ that were said to characterize Hong Kong before the resumption of sovereignty. Hong Kong may begin to acquire some of the features of a ‘negotiated economy’ and certainly access to public office or to the inner sanctum of authorities would be an advantage. However, the law would continue to provide a framework for business transaction and the resolution of disputes.

As far as political institutions are concerned, even if China has of late developed a passion for, and perhaps some understanding of, capitalism, it has neither for autonomy. The Chief Executive and the apparatus of the government are subordinated to the Central Authorities. There is a tendency for the Chief Executive to be integrated in the hierarchy of offices in the PRC, and thus doubly subordinated to the Central Authorities, diluting thereby also the separation of political institutions. There is already a return to the pre-transfer politics of clientelism and patronage, with an alliance of the Chinese Communist Party and the business elite of Hong Kong. At best there would be a form of indirect rule, which might seem
an improvement upon colonial rule. However, there are likely to be striking similarities with British rule: reliance on state sovereignty to overcome inconveniences of local jurisdiction; a disregard of treaty obligations; a preference for patronage politics over democratic politics; collaboration with the business community; and the lack of interest in an ethical or just society. The difference will probably lie in the mode of rationalization; Britain allowed itself little recourse other than to statecraft and the rule of law, while China will be able to deploy cultural arguments and appeal to nationalism. The drive would be towards integration, which might more effectively deny a separate voice than merely produce subordination.

The first HKSAR government is, above all, a government of businessmen. Its ideology is that of a commercial community. Its leader is suspicious of popular ‘politics’ which he regards as separate from the real issues of society and as distracting from ‘livelihood’ issues. There is spurious emphasis on ‘community’ and ‘consensus’ and disparagement of ‘adversarial’ politics. There is frequent reference to the Chineseness of Hong Kong and its destiny as part of China, which are often presented as the anti-thesis of rights and democracy. These themes are presented by Tung rather than the Central Authorities; he undoubtedly considers a mission of his office the cultural integration of Hong Kong with China. However, there are not many resonance among the people of Hong Kong to this approach.

These perspectives on the economy and politics immediately suggest a model that has considerable appeal to many in China and Hong Kong: Singapore, with a (relatively) liberal economy but a restrictive and authoritarian political order. It thrives on a truncated version of legality, where commercial rights are considered more important and more deserving of legal and judicial protection than human rights and freedoms. Given the likely pressures from the mainland on the autonomy of Hong Kong, the Basic Law is largely meaningless without the shield of legality — few legal instruments seem so desperately in need of it.

So what about that alleged jewel in the British colonial Crown, the common law and the rule of law? The common law would come under two kinds of pressures, from the traditions of socialist/civil law on the mainland, and from the conversion of its medium to Chinese, in a milieu not so much bilingual as mono-lingual, with the decreasing capacity of the English language to keep the law to its common law moorings. The language question will be but one factor affecting the tradition of legality. Of all the Hong Kong institutions, the judiciary is the most effectively insulated from the mainland. It is also independent of other institutions in Hong Kong. However, the separation and independence of the judiciary are misleading, for the judicial function is not the exclusive preserve of
the Hong Kong courts. The NPCSC is the body ultimately responsible for giving meaning to the provisions of the Basic Law. It operates on the basis of different rules and procedures for interpretation. Key provisions of the Basic Law could be nullified by the interpretation of the NPCSC or displaced by its politics. From its opinion there is no appeal. The legality of the PRC is different from that of the common law. At best there is the prospect of two forms of legality: a law based legality in the internal affairs of Hong Kong administered by the Hong Kong courts, and a politically based ‘legality’ espoused by the NPCSC. However, these forms of legality cannot coexist for long, and will put the Hong Kong judiciary under great pressure. Perhaps realizing this, the NPCSC has refrained from interpretations of the Basic Law since the resumption of sovereignty. After a shaky start, the Hong Kong judiciary has taken significant control over the shaping of the Basic Law. In particular, it has embedded the Basic Law in common law principles (although, as is well known, the common law is not the most fertile ground for the growth of constitutionalism).

The ultimate failure of Britain, so boastful of the colonial foundations of the rule of law, is that it failed to win over to its notion of legality the group which it favoured most and which was supposed to be the principal beneficiary of legality — the business community; this reflects perhaps Britain’s own ambiguity towards the rule of law. Nor did it do much to ensure respect for democracy, collaborating instead with groups that had an interest in denigrating it. Britain had thus created the conditions which China exploited to turn the Basic Law to its own purposes.

These speculations are stimulated by the politics of the transition period, the glosses on the Basic Law,¹ the style of interpretations adopted by various groups, particularly China and its supporters, and the activities of China-appointed bodies. Perhaps one should not read too much into the politics of the transition period. They were troubled times, with constant bickering between the British and the Chinese, in which different groups in Hong Kong were drawn. China may have felt driven to excessive interventions in Hong Kong to fight what it regarded as the machinations

¹ An example of such a gloss is the statement by Tung Chee-hwa on 10 February 1996 that to qualify for the membership of Urban and District Councils, a person had ‘to love China, love Hong Kong and to uphold the Basic Law’. However, he refused to clarify whether these conditions ruled out pro-democracy councillors (SCMP 11 February 1996). This statement is reminiscent of Deng Xiaoping’s definition of who would qualify to participate in Hong Kong’s affairs, ‘There is only one requirement for participants: they must be patriots, that is people who love the motherland and Hong Kong’ (1993: 19). Such vague formulations, which have no foundation in the Joint Declaration or the Basic Law, can be used to exclude people arbitrarily or punitively.
of the British Governor. Indeed, the Central Authorities, perhaps in pursuit of a larger agenda in which its status as a world power and reunification with Taiwan are the stakes, has exercised great restraint, at least as regards public intervention, in relation to governmental power in the HKSAR.

With Britain safely out of the way, it is necessary to follow the norms and methods of the Basic Law, particularly with the passing away of its architect, Deng Xiaoping. It is easy for the Central Authorities, if they were so minded, to bypass or undermine the Basic Law, and they would presumably always find people who are willing to collaborate with them in this enterprise. However, China stands to gain more from a faithful adherence to the Basic Law, to keep promises of autonomy, to permit people of all persuasions to participate in public affairs, to respect rights and freedoms, and to let an independent judiciary enforce the Basic Law and other laws. This is a more effective way to win the loyalty of Hong Kong people. An adherence to legal norms and consultative and democratic procedures would ultimately also benefit the Central Authorities as they grapple with the difficult task of managing affairs on the mainland as economic reforms and the movement for democracy generate renewed tensions.
Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of China, being desirous of putting an end to the misunderstandings and consequent hostilities which have arisen between the 2 countries, have resolved to conclude a Treaty for that purpose, and have therefore named as their Plenipotentiaries, that is to say:

Her Majesty the Queen of Great Britain and Ireland, Sir Henry Pottinger, Bart., a Major-General in the service of the East India Company, &c.;

And His Imperial Majesty the Emperor of China, the High Commissioners Keying, a member of the Imperial House, a Guardian of the Crown Prince, and General of the garrison of Canton; and Elepoo, of the Imperial Kindred, graciously permitted to wear the insignia of the first rank, and the distinction of a peacock’s feather, lately Minister and Governor-General, &c., and now Lieutenant-General commanding at Chapoo;

Who, after having communicated to each other their respective Full Powers, and found them to be in good and due form, have agreed upon and concluded the following Articles:

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Ratifications were exchanged at Hong Kong on 26 June 1843. This treaty was ‘renewed and confirmed’ by article 1 of the Treaty of Peace, Friendship and Commerce between China and Great Britain signed at Tientsin on 26 June 1860, reproduced in C Parry (ed), Consolidated Treaty Series, vol 119, p 163 and Laws of Hong Kong, 1964 Ed., Appendix IV, E1.
ART. I. There shall henceforward be peace and friendship between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and His Majesty the Emperor of China, and between their respective subjects, who shall enjoy full security and protection for their persons and property within the dominions of the other.

II. His Majesty the Emperor of China agrees, that British subjects, with their families and establishments, shall he allowed to reside, for the purposes of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai; and Her Majesty the Queen of Great Britain, &c., will appoint Superintendents, or Consular Officers, to reside at each of the above-named cities or towns, to be the medium of communication between the Chinese authorities and the said merchants, and to see that the just duties and other dues of the Chinese Government, as hereafter provided for, are duly discharged by Her Britannic Majesty’s subjects.

III. It being obviously necessary and desirable that British subjects should have some port whereat they may careen and refit their ships when required, and keep stores for that purpose, His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, &c., the Island of Hong-Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, &c., shall see fit to direct.

IV. The Emperor of China agrees to pay the sum of 6,000,000 of dollars, as the value of the opium which was delivered up at Canton in the month of March, 1839, as a ransom for the lives of Her Britannic Majesty’s Superintendent and subjects, who had been imprisoned and threatened with death by the Chinese High Officers.

V. The Government of China having compelled the British merchants trading at Canton to deal exclusively with certain Chinese merchants, called Hong merchants (or Co-Hong), who had been licensed by the Chinese Government for that purpose, the Emperor of China agrees to abolish that practice in future at all ports where British merchants may reside, and to permit them to carry on their mercantile transactions with whatever persons they please; and His Imperial Majesty further agrees to pay to the British Government the sum of 3,000,000 of dollars, on account of debts due to British subjects by some of the said Hong merchants, or Co-Hong, who have become insolvent, and who owe very large sums of money to subjects of Her Britannic Majesty.

VI. The Government of Her Britannic Majesty having been obliged to send out an expedition to demand and obtain redress for the violent and unjust proceedings of the Chinese High Authorities towards Her Britannic Majesty’s officer and subjects, the Emperor of China agrees to pay the sum of 12,000,000 of dollars, on account of the expenses incurred; and Her Britannic Majesty’s Plenipotentiary voluntarily agrees, on behalf of Her Majesty, to deduct from the said amount of 12,000,000 of dollars, any sums which may have been received by Her Majesty’s combined forces, as ransom for cities and towns in China, subsequent to the 1st day of August, 1841.
VII. It is agreed, that the total amount of 21,000,000 of dollars, described in the 3 preceding Articles, shall be paid as follows:

6,000,000 immediately.

6,000,000 in 1843; that is, 3,000,000 on or before the 30th of the month of June, and 3,000,000 on or before the 31st of December.

5,000,000 in 1844; that is, 2,500,000 on or before the 30th of June, and 2,500,000 on or before the 31st of December.

4,000,000 in 1845; that is, 2,000,000 on or before the 30th of June, and 2,000,000 on or before the 31st of December.

And it is further stipulated, that interest, at the rate of 5 per cent per annum, shall be paid by the Government of China on any portion of the above sums that are not punctually discharged at the periods fixed.

VIII. The Emperor of China agrees to release, unconditionally, all subjects of Her Britannic Majesty (whether natives of Europe or India), who may be in confinement at this moment in any part of the Chinese empire.

IX. The Emperor of China agrees to publish and promulgate, under his Imperial sign manual and seal, a full and entire amnesty and act of indemnity to all subjects of China, on account of their having resided under, or having had dealings and intercourse with, or having entered the service of, Her Britannic Majesty, or of Her Majesty’s officers; and His Imperial Majesty further engages to release all Chinese subjects who may be at this moment in confinement for similar reasons.

X. His Majesty the Emperor of China agrees to establish at all the ports which are, by the IInd Article of this Treaty, to be thrown open for the resort of British merchants, a fair and regular tariff of export and import customs and other dues, which tariff shall be publicly notified and promulgated for general information; and the Emperor further engages, that when British merchandize shall have once paid at any of the said ports the regulated customs and dues, agreeable to the tariff to be hereafter fixed, such merchandize may be conveyed by Chinese merchants to any province or city in the interior of the Empire of China, on paying a further amount as transit duties, which shall not exceed** per cent.2 on the tariff value of such goods.

XI. It is agreed that Her Britannic Majesty’s Chief High Officer in China shall correspond with the Chinese High Officers, both at the capital and in the provinces, under the term “communication”; the subordinate British Officers and Chinese High Officers in the provinces, under the terms “statement” on the part of the former, and on the part of the latter, “declaration”; and the subordinates of both countries on a footing of perfect equality: merchants and others not holding official situations, and therefore not included in the above, on both sides, to use the term “representation” in all papers addressed to, or intended for the notice of, the respective Governments.

XII. On the assent of the Emperor of China to this Treaty being received, and the discharge of the first instalment of money, Her Britannic Majesty’s forces will retire from Nanking and the Grand Canal, and will no longer molest or stop the trade of China. The military post at Chinhai will also be withdrawn; but the Islands of Koolangsoo, and that of Chusan, will continue to be held by Her Majesty’s forces until the money payments, and the arrangement for opening the ports to British merchants, be completed.

XIII. The ratification of this Treaty by Her Majesty the Queen of Great Britain, &c., and His Majesty the Emperor of China, shall be exchanged as soon as the great distance which separates England from China will admit; but in the meantime, counterpart copies of it, signed and sealed by the Plenipotentiaries on behalf of their respective Sovereigns, shall be mutually delivered, and all its provisions and arrangements shall take effect.

Done at Nanking, and signed and sealed by the Plenipotentiaries on board Her Britannic Majesty’s ship Cornwallis, this 29th day of August, 1842; corresponding with the Chinese date, 24th day of the 7th month, in the 22nd year of Taoukwang.

(L.S.) Henry Pottinger.

(L.S.) Seal of the Chinese High Commissioner

Signature of 3rd Chinese Plenipotentiary.  Signature of 2nd Chinese Plenipotentiary.  Signature of 1st Chinese Plenipotentiary.
Appendix Two

CONVENTION OF FRIENDSHIP BETWEEN GREAT BRITAIN AND CHINA SIGNED IN PEKING, 24 OCTOBER 1860

HER Majesty the Queen of Great Britain and Ireland, and His Imperial Majesty the Emperor of China, being alike desirous to bring to an end the misunderstanding at present existing between their respective Governments, and to secure their relations against further interruption, have for this purpose appointed Plenipotentiaries, that is to say:

Her Majesty the Queen of Great Britain and Ireland, the Earl of Elgin and Kincardine;

And His Imperial Majesty the Emperor of China, His Imperial Highness the Prince of Kung;

Who, having met and communicated to each other their full powers, and finding these to be in proper form, have agreed upon the following Convention, in 9 Articles:

ART. I. A breach of friendly relations having been occasioned by the act of the garrison of Ta-ku, which obstructed Her Britannic Majesty’s Representative, when on his way to Peking for the purpose of exchanging the ratifications of the Treaty of Peace concluded at Tien-tsin in the month of June, 1858, His Imperial Majesty the Emperor of China expresses his deep regret at the misunderstanding so occasioned.

II. It is further expressly declared, that the arrangement entered into at Shanghai in the month of October, 1858, between Her Britannic Majesty’s Ambassador the Earl of Elgin and Kincardine, and His Imperial Majesty’s Commissioners Kweiliang

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and Hwashana, regarding the residence of Her Britannic Majesty’s Representative in China, is hereby cancelled; and that, in accordance with Article III of the Treaty of 1858, Her Britannic Majesty’s Representative will henceforward reside permanently or occasionally at Peking, as Her Britannic Majesty shall be pleased to decide.

III. It is agreed that the Separate Article of the Treaty of 1858 is hereby annulled; and that in lieu of the amount of indemnity therein specified, His Imperial Majesty the Emperor of China shall pay the sum of 8,000,000 of taels in the following proportions or instalments, namely: — At Tien-tsin, on or before the 30th day of November, the sum of 500,000 taels; at Canton, and on or before the 31st day of December, 1860, 333,333 taels, less the sum which shall have been advanced by the Canton authorities towards the completion of the British Factory site at Shameen; and the remainder at the ports open to foreign trade, in quarterly payments, which shall consist of 1–5th of the gross revenue from Customs there collected; — the 1st of the said payments being due on the 31st day of December, 1860, for the quarter terminating on that day.

It is further agreed, that these moneys shall be paid into the hands of an officer whom Her Britannic Majesty’s Representative shall specially appoint to receive them, and that the accuracy of the amounts shall, before payment, be duly ascertained by British and Chinese officers appointed to discharge this duty.

In order to prevent future discussion, it is moreover declared, that of 8,000,000 of taels herein guaranteed, 2,000,000 will be appropriated to the indemnification of the British mercantile community at Canton, for losses sustained by them, and the remaining 6,000,000 to the liquidation of war expenses.

IV. It is agreed that, on the day on which this Convention is signed, His Imperial Majesty the Emperor of China shall open the port of Tien-tsin to trade, and that it shall be thereafter competent to British subjects to reside and trade there under the same conditions as at any other port of China, by Treaty open to trade.

V. As soon as the ratifications of the Treaty of 1858 shall have been exchanged, His Imperial Majesty the Emperor of China will, by Decree, command the high authorities of every province to proclaim throughout their jurisdictions, that Chinese choosing to take service in the British Colonies, or other parts beyond sea, are at perfect liberty to enter into engagements with British subjects for that purpose, and to ship themselves and their families on board any British vessel at any of the open ports of China; also that the high authorities aforesaid shall, ill concert with Her Britannic Majesty’s Representative in China, frame such regulations for the protection of Chinese, emigrating as above, as the circumstances of the different open ports may demand.

VI. With a view to the maintenance of law and order in and about the harbour of Hong Kong, His Imperial Majesty the Emperor of China agrees to cede to Her Majesty the Queen of Great Britain and Ireland, and to her heirs and successors, to have and to hold as a dependency of Her Britannic Majesty’s Colony of Hong Kong, that portion of the township of Cowloon, in the Province of Kwang-tung, of which a lease was granted in perpetuity to Harry Smith Parkes, Esquire, Companion of the Bath, a member of the Allied Commission at
Appendix Two

Canton, on behalf of Her Britannic Majesty’s Government, by Lan Tsung Kwang, Governor-General of the Two Kwang.²

It is further declared that the lease in question is hereby cancelled; that the claims of any Chinese to property on the said portion of Cowloon shall be duly investigated by a Mixed Commission of British and Chinese officers; and that compensation shall be awarded by the British Government to any Chinese whose claim shall be by the said Commission established, should his removal be deemed necessary by the British Government.

VII. It is agreed that the provisions of the Treaty of 1858, except in so far as these are modified by the present Convention, shall without delay come into operation as soon as the ratifications of the Treaty aforesaid shall have been exchanged.

And it is further agreed that no separate ratification of the present Convention shall be necessary, but that it shall take effect from the date of its signature, and be equally binding with the Treaty above mentioned on the High Contracting Parties.

VIII. It is agreed that, as soon as the ratifications of the Treaty of the year 1858 shall have been exchanged, His Imperial Majesty the Emperor of China shall, by Decree, command the high authorities in the capital and in the provinces to print and publish the aforesaid Treaty and the present Convention, for general Information.

IX. It is agreed that, as soon as this Convention shall have been signed, the ratifications of the Treaty of the year 1858 shall have been exchanged, and an Imperial Decree respecting the publication of the said Convention and Treaty, shall have been promulgated, as provided for by Article VIII of this Convention, Chusan shall be evacuated by Her Britannic Majesty’s troops there stationed; and Her Britannic Majesty’s force now before Peking shall commence its march towards the city of Tien-tsin, the forts of Taku, the north coast of Shang-tung, and the city of Canton, at each or all of which places it shall be at the option of Her Majesty the Queen of Great Britain and Ireland to retain a force, until the indemnity of 8,000,000 of taels, guaranteed in Article III, shall have been paid.

Done at Peking, in the Court of the Board of Ceremonies, on the 24th day of October, in the year of our Lord, 1860.

(L.S.) Elgin and Kincardine

(L.S.) Signature and seal of the Chinese Plenipotentiary

² For the text of the lease, see Laws of Hong Kong, 1964 Ed, Appendix IV, F1.
CONVENTION BETWEEN GREAT BRITAIN AND CHINA RESPECTING AN EXTENSION OF HONG KONG TERRITORY SIGNED AT PEKING, 9 JUNE 1898

Whereas it has for many years past been recognized that an extension of Hong Kong territory is necessary for the proper defence and protection of the Colony, it has now been agreed between the Governments of Great Britain and China that the limits of British territory shall be enlarged under lease to the extent indicated generally on the annexed map. The exact boundaries shall be hereafter fixed when proper surveys have been made by officials appointed by the two Governments. The term of this lease shall be ninety-nine years.

It is at the same time agreed that within the city of Kowloon the Chinese officials now stationed there shall continue to exercise jurisdiction, except so far as may be inconsistent with the military requirements for the defence of Hong Kong. Within the remainder of the newly-leased territory Great Britain shall have sole jurisdiction. Chinese officials and people shall be allowed as heretofore to use the road from Kowloon to Hsinan.

It is further agreed that the existing landing-place near Kowloon City shall be reserved for the convenience of Chinese men-of-war, merchant and passenger vessels, which may come and go and lie there at their pleasure; and for the convenience of movement of the officials and people within the city.

When hereafter China constructs a railway to the boundary of the Kowloon territory under British control, arrangements shall be discussed.

It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension, and that if land is

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1 Text: C Parry (ed), The Consolidated Treaty Series, vol 186, p 310. Ratifications were exchanged at London on 6 August 1898.
required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price.

If cases of extradition of criminals occur, they shall be dealt with in accordance with the existing Treaties between Great Britain and China and the Hong Kong Regulations.

The area leased to Great Britain, as shown on the annexed map, includes the waters of Mirs Bay and Deep Bay, but it is agreed that Chinese vessels of war, whether neutral or otherwise, shall retain the right to use those waters.

This Convention shall come into force on the 1st day of July, 1898, being the 13th day of the 5th moon of the 24th year of Kuang Hs. It shall be ratified by the Sovereigns of the two countries, and the ratifications shall be exchanged in London as soon as possible.

In witness whereof the Undersigned, duly authorised thereto by their respective Governments, have signed the present Agreement.

Done at Peking in quadruplicate (four copies in English and four in Chinese) the 9th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, being the 21st day of the 4th moon of the 24th year of Kuang Hs.

(L.S.) Claude M. Macdonald

(L.S.) Seal Of The Chinese Plenipotentiary
Preamble

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China have reviewed with satisfaction the friendly relations existing between the two Governments and peoples in recent years and agreed that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis. To this end, they have, after talks between the delegations of the two Governments, agreed to declare as follows:

1. The Government of the People’s Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.

2. The Government of the United Kingdom declares that it will restore Hong Kong to the People’s Republic of China with effect from 1 July 1997.

1 The Declaration was signed in Beijing on 19 December 1984 and entered into force on 27 May 1985 on the exchange of instruments of ratification.
3. The Government of the People’s Republic of China declares that the basic policies of the People’s Republic of China regarding Hong Kong are as follows:

(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People’s Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong.

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People’s Government.

(3) The Hong Kong Special Administrative Region 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.

(4) The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People’s Government. Chinese and foreign nationals previously working in the public and police services in the government departments of Hong Kong may remain in employment. British and other foreign nationals may also be employed to serve as advisers or hold certain public posts in government departments of the Hong Kong Special Administrative Region.

(5) The current social and economic systems in Hong Kong will remain and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.

(7) The Hong Kong Special Administrative Region will retain the status of an international financial centre, and its markets for foreign exchange, gold, securities and futures will continue. There will be free flow of capital. The Hong Kong dollar will continue to circulate and remain freely convertible.

(8) The Hong Kong Special Administrative Region will have dependent finances. The Central People’s Government will not levy taxes on the Hong Kong Special Administrative Region.
(9) The Hong Kong Special Administrative Region may establish mutually beneficial economic relations with the United Kingdom and other countries, whose economic interests in Hong Kong will be given due regard.

(10) Using the name of “Hong Kong, China”, the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations.

The Government of the Hong Kong Special Administrative Region may on its own issue travel documents for entry into and exit from Hong Kong.

(11) The maintenance of public order in the Hong Kong Special Administrative Region will be the responsibility of the Government of the Hong Kong Special Administrative Region.

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

4. The Government of the United Kingdom and the Government of the People’s Republic of China declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People’s Republic of China will give its cooperation in this connection.

5. The Government of the United Kingdom and the Government of the People’s Republic of China declare that, in order to ensure a smooth transfer of government in 1997, and with a view to the effective implementation of this Joint Declaration, a Sino-British Joint Liaison Group will be set up when this Joint Declaration enters into force; and that it will be established and will function in accordance with the provisions of Annex II to this Joint Declaration.

6. The Government of the United Kingdom and the Government of the People’s Republic of China declare that land leases in Hong Kong and other related matters will be dealt with in accordance with the provisions of Annex III to this Joint Declaration.

7. The Government of the United Kingdom and the Government of the People’s Republic of China agree to implement the preceding declarations and the Annexes to this Joint Declaration.

8. This Joint Declaration is subject to ratification and shall enter into force on
the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985. This Joint Declaration and its Annexes shall be equally binding.

Done in duplicate at Beijing on 19 December 1984 in the English and Chinese languages, both texts being equally authentic.

(Signed) (Signed)
For the Government For the Government
of the United Kingdom of the People’s
of Great Britain and Republic of China
Northern Ireland

Annex I

Elaboration by the Government of the People’s Republic of China of Its Basic Policies Regarding Hong Kong

The Government of the People’s Republic of China elaborates the basic policies of the People’s Republic of China regarding Hong Kong as set out in paragraph 3 of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong as follows:

I CONSTITUTION

Establishment of the Hong Kong S.A.R. The Basic Law*

The Constitution of the People’s Republic of China stipulates in Article 31 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.” In accordance with this Article, the People’s Republic of China shall, upon the resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, establish the Hong Kong Special Administrative Region of the People’s Republic of China. The National People’s Congress of the People’s Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region 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 after the establishment of the Hong Kong Special Administrative

* Headings do not appear in the official version of the treaty. I am grateful to Andrew Brynes and Johnnes Chan for the headings.
Region the socialist system and socialist policies shall not be practised in the
Hong Kong Special Administrative Region and that Hong Kong’s previous capitalist
system and life-style shall remain unchanged for 50 years.

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

Chief Executive. Principal Officials. The Legislature

The government and legislature of the Hong Kong Special Administrative Region
shall be composed of local inhabitants. 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. Principal
officials (equivalent to Secretaries) shall be nominated by the chief executive of
the Hong Kong Special Administrative Region and appointed by the Central
People's Government. 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.

Language

In addition to Chinese, English may also be used in organs of government and in
the courts in the Hong Kong Special Administrative Region.

Regional flag and emblem

Apart from displaying the national flag and national emblem of the People’s
Republic of China, the Hong Kong Special Administrative Region may use a
regional flag and emblem of its own.

II LEGAL SYSTEM

Laws previously in force

After the establishment of the Hong Kong Special Administrative Region, the
laws previously in force in Hong Kong (i.e. the common law, rules of equity,
ordinances, subordinate legislation and customary law) shall be maintained, save
for any that contravene the Basic Law and subject to any amendment by the
Hong Kong Special Administrative Region legislature.

Legislative power

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

**Laws of the SAR**

The Laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature as above.

### III JUDICIAL SYSTEM

**Previous judicial system**

After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication.

**Judicial power; Precedents**

Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. The courts shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions. The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions.

**Appointment and removal of judges**

Judges of the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions. A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. Additionally, the appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the chief executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People’s Congress for the record. The system of appointment and removal of judicial officers other than judges shall be maintained.
Power of final judgement

The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal.

Prosecutions

A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.

Legal practitioners

On the basis of the system previously operating in Hong Kong, the Hong Kong Special Administrative Region Government shall on its own make provision for local lawyers and lawyers from outside the Hong Kong Special Administrative Region to work and practise in the Hong Kong Special Administrative Region.

Reciprocal juridical assistance

The Central People’s Government shall assist or authorise the Hong Kong Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.

IV PUBLIC SERVICE

Public servants and members of judiciary previously serving in H.K.

After the establishment of the Hong Kong Special Administrative Region, public servants previously serving in Hong Kong in all government departments, including the police department, and members of the judiciary may all remain in employment and continue their service with pay, allowances, benefits and conditions of service no less favourable than before. The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, 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.

Foreign nationals in public service

The Hong Kong Special Administrative Region Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the Hong Kong Special Administrative Region to serve as public servants at all levels, except as heads of major government departments (corresponding to branches or departments at Secretary level) including the police department, and as deputy heads of some of those departments. The Hong Kong Special Administrative Region Government may also employ British and other foreign
nationals as advisers to government departments and, when there is a need, may recruit qualified candidates from outside the Hong Kong Special Administrative Region to professional and technical posts in government departments. The above shall be employed only in their individual capacities and, like other public servants, shall be responsible to the Hong Kong Special Administrative Region Government.

Appointment and promotion of public servants

The appointment and promotion of public servants shall be on the basis of 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 appointment, pay and conditions of service) shall, save for any provisions providing privileged treatment for foreign nationals, be maintained.

V FINANCE

Budget

The Hong Kong Special Administrative Region shall deal on its own with financial matters, including disposing of its financial resources and drawing up its budgets and its final accounts. The Hong Kong Special Administrative Region shall report its budgets and final accounts to the Central People’s Government for the record.

Taxation and public expenditure

The Central People’s Government shall not levy taxes on the Hong Kong Special Administrative Region. 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. The systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained.

VI ECONOMIC SYSTEM

Economic and trade system. Ownership of property

The Hong Kong Special Administrative Region shall maintain the capitalist economic and trade systems previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall decide its economic and trade policies on its own. Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.

Free port and free trade policy

The Hong Kong Special Administrative Region shall retain the status of a free
port and continue a free trade policy, including the free movement of goods and capital. The Hong Kong Special Administrative Region may on its own maintain and develop economic and trade relations with all states and regions.

_customs territory. GATT_

The Hong Kong Special Administrative Region shall be a separate customs territory. It may participate in relevant international organisations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Hong Kong Special Administrative Region shall be enjoyed exclusively by the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.

_trade missions_

The Hong Kong Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment of such missions to the Central People’s Government for the record.

_VII MONETARY SYSTEM_

_previous monetary and financial systems_

The Hong Kong Special Administrative Region shall retain the status of an international financial centre. The monetary and financial systems previously practised in Hong Kong, including the systems of regulation and supervision of deposit taking institutions and financial markets, shall be maintained.

_monetary and financial policies_

The Hong Kong Special Administrative Region Government may decide its monetary and financial policies on its own. It shall safeguard the free operation of financial business and the free flow of capital within, into and out of the Hong Kong Special Administrative Region. No exchange control policy shall be applied in the Hong Kong Special Administrative Region. Markets for foreign exchange, gold, securities and futures shall continue.

_Hong Kong dollar_

The Hong Kong dollar, as the local legal tender, shall continue to circulate and remain freely convertible. The authority to issue Hong Kong currency shall be vested in the Hong Kong Special Administrative Region Government. The Hong Kong Special Administrative Region Government may authorise 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 maintaining the
stability of the currency. Hong Kong currency bearing references inappropriate to the status of Hong Kong as a Special Administrative Region of the People’s Republic of China shall be progressively replaced and withdrawn from circulation.

**Exchange Fund**

The Exchange Fund shall be managed and controlled by the Hong Kong Special Administrative Region Government, primarily for regulating the exchange value of the Hong Kong dollar.

**VIII SHIPPING**

*Previous systems of shipping management and regulation*

The Hong Kong Special Administrative Region shall maintain Hong Kong’s previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen. The specific functions and responsibilities of the Hong Kong Special Administrative Region Government in the field of shipping shall be defined by the Hong Kong Special Administrative Region Government on its own. Private shipping businesses and shipping-related businesses and private container terminals in Hong Kong may continue to operate freely.

*Shipping registers and issue of certificates*

The Hong Kong Special Administrative Region shall be authorised by the Central People’s Government to continue to maintain a shipping register and issue related certificates under its own legislation in the name of “Hong Kong, China”.

*Access to HKSAR ports*

With the exception of foreign warships, access for which requires the 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 Hong Kong Special Administrative Region.

**IX CIVIL AVIATION**

*Previous system of civil aviation management*

The Hong Kong Special Administrative Region shall maintain the status of Hong Kong as a centre of international and regional aviation. Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related business may continue to operate. 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. The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of airports, the provision of air traffic services within the flight information region of the Hong
Kong Special Administrative Region, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organisation.

Air services

The Central People’s Government shall, in consultation with the Hong Kong Special Administrative Region Government, make arrangements providing for air services between the Hong Kong Special Administrative Region and other parts of the People’s Republic of China for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and other airlines of the People’s Republic of China. 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 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. For this purpose, 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 Hong Kong Special Administrative Region Government. Representatives of the Hong Kong Special Administrative Region Government may participate as members of delegations of the Government of the People’s Republic of China in air service consultations with foreign governments concerning arrangements for such services.

Air Service Agreements

Acting under specific authorisations from the Central People’s Government, the Hong Kong Special Administrative Region Government may:

- renew or amend Air Service Agreements and arrangements previously in force; in principle, all such Agreements and arrangements may be renewed or amended with the rights contained in such previous Agreements and arrangements being as far as possible maintained;
- negotiate and conclude new Air Service Agreements providing routes for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and rights for overflights and technical stops; and
- negotiate and conclude provisional arrangements where no Air Service Agreement with a foreign state or other region is in force.

All scheduled air services to, from or through the Hong Kong Special Administrative Region which do not operate to, from or through the mainland of China shall be regulated by Air Service Agreements or provisional arrangements referred to in this paragraph.

The Central People’s Government shall give the Hong Kong Special Administrative Region Government the authority to:

- negotiate and conclude with other authorities all arrangements concerning
the implementation of the above Air Service Agreements and provisional arrangements;
- issue licences to airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region;
- designate such airlines under the above Air Service Agreements and provisional arrangements; and
- issue permits to foreign airlines for services other than those to, from or through the mainland of China.

X EDUCATION

The Hong Kong Special Administrative Region shall maintain the educational system previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, 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 and technological qualifications.

Institutions of all kinds, including those run by religious and community organisations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.

XI FOREIGN AFFAIRS

General

Subject to the principle that foreign affairs are the responsibility of the Central People’s Government, representatives of the Hong Kong Special Administrative Region Government 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 Hong Kong Special Administrative Region conducted by the Central People’s Government. 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 organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields. Representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People’s Republic of China, in international organisations or conferences in appropriate fields limited to states and affecting the Hong Kong Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People’s Government and the organisation or conference concerned, and may express their views in the name of “Hong Kong, China”. The Hong Kong Special Administrative
Region may, using the name “Hong Kong, China”, participate in international organisations and conferences not limited to states.

International agreements

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 Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government.

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 Hong Kong Special Administrative Region. The Central People’s Government shall, as necessary, authorise or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements. 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 organisations 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 organisations 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.

Consular and other missions

Foreign consular and other official or semi-official missions may be established in the Hong Kong Special Administrative Region with the approval of the Central People’s Government. Consular and other official missions established in Hong Kong by states which have established formal diplomatic relations with the People’s Republic of China may be maintained. According to the circumstances of each case, consular and other official missions of states having no formal diplomatic relations with the People’s Republic of China may either be maintained or changed to semi-official missions.

States not recognised by the People’s Republic of China can only establish non-governmental institutions.

The United Kingdom may establish a Consulate-General in the Hong Kong Special Administrative Region.

XII DEFENCE

The maintenance of public order in the Hong Kong Special Administrative Region shall be the responsibility of the Hong Kong Special Administrative Region
Government. Military forces sent by the Central People’s Government to be stationed in the Hong Kong Special Administrative Region for the purpose of defence shall not interfere in the internal affairs of the Hong Kong Special Administrative Region. Expenditure for these military forces shall be borne by the Central People’s Government.

XIII BASIC RIGHTS AND FREEDOMS

General

The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.

Legal advice and judicial remedies

Every person shall have the right to confidential legal advice, access to the courts, representation in the courts by lawyers of his choice, and to obtain judicial remedies. Every person shall have the right to challenge the actions of the executive in the courts.

Religion

Religious organisations and believers may maintain their relations with religious organisations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organisations may be continued. The relationship between religious organisations in the Hong Kong Special Administrative Region and those in other parts of the People’s Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.

International Covenants

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.

XIV RIGHT OF ABODE, TRAVEL, IMMIGRATION

Right of abode

The following categories of persons shall have the right of abode in the Hong Kong Special Administrative Region, and, in accordance with the law of the Hong Kong Special Administrative Region, be qualified to obtain permanent
identity cards issued by the Hong Kong Special Administrative Region Government, which state their right of abode:

- all Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals;
- all other persons who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region, and persons under 21 years of age who were born of such persons in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- any other persons who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region.

Passports etc.

The Central People’s Government shall authorise the Hong Kong Special Administrative Region Government to issue, in accordance with the 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 Hong Kong Special Administrative 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 Hong Kong Special Administrative Region. The above passports and documents shall be valid for all states and regions and shall record the holder’s right to return to the Hong Kong Special Administrative Region.

Use of travel documents

For the purpose of travelling to and from the Hong Kong Special Administrative Region, residents of the Hong Kong Special Administrative Region may use travel documents issued by the Hong Kong Special Administrative Region Government, or by other competent authorities of the People’s Republic of China, or of other states. Holders of permanent identity cards of the Hong Kong Special Administrative Region may have this fact stated in their travel documents as evidence that the holders have the right of abode in the Hong Kong Special Administrative Region.

Entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice.

Immigration controls

The Hong Kong Special Administrative Region Government may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions.
Freedom to leave SAR

Unless restrained by law, holders of valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorisation.

Visa abolition agreements

The Central People’s Government shall assist or authorise the Hong Kong Special Administrative Region Government to conclude visa abolition agreements with states or regions.

Annex II

Sino-British Joint Liaison Group

1. In furtherance of their common aim and in order to ensure a smooth transfer of government in 1997, the Government of the United Kingdom and the Government of the People’s Republic of China have agreed to continue their discussions in a friendly spirit and to develop the cooperative relationship which already exists between the two Governments over Hong Kong with a view to the effective implementation of the Joint Declaration.

2. In order to meet the requirements for liaison, consultation and the exchange of information, the two Governments have agreed to set up a Joint Liaison Group.

3. The functions of the Joint Liaison Group shall be:
(a) to conduct consultations on the implementation of the Joint Declaration;
(b) to discuss matters relating to the smooth transfer of government in 1997;
(c) to exchange information and conduct consultations on such subjects as may be agreed by the two sides.

Matters on which there is disagreement in the Joint Liaison Group shall be referred to the two Governments for solution through consultations.

4. Matters for consideration during the first half of the period between the establishment of the Joint Liaison Group and 1 July 1997 shall include:
(a) action to be taken by the two Governments to enable the Hong Kong Special Administrative Region to maintain its economic relations as a separate customs territory, and in particular to ensure the maintenance of Hong Kong’s participation in the General Agreement on Tariffs and Trade, the Multifibre Arrangement and other international arrangements; and
(b) action to be taken by the two Governments to ensure the continued application of international rights and obligations affecting Hong Kong.

5. The two Governments have agreed that in the second half of the period
between the establishment of the Joint Liaison Group and 1 July 1997 there will be need for closer cooperation, which will therefore be intensified during that period. Matters for consideration during this second period shall include:
(a) procedures to be adopted for the smooth transition in 1997;
(b) action to assist the Hong Kong Special Administrative Region to maintain and develop economic and cultural relations and conclude agreements on these matters with states, regions and relevant international organisations.

6. The Joint Liaison Group shall be an organ for liaison and not an organ of power. It shall play no part in the administration of Hong Kong or the Hong Kong Special Administrative Region. Nor shall it have any supervisory role over that administration. The members and supporting staff of the Joint Liaison Group shall only conduct activities within the scope of the functions of the Joint Liaison Group.

7. Each side shall designate a senior representative who shall be of Ambassadorial rank, and four other members of the group. Each side may send up to 20 supporting staff.

8. The Joint Liaison Group shall be established on the entry into force of the Joint Declaration. From 1 July 1988 the Joint Liaison Group shall have its principal base in Hong Kong. The Joint Liaison Group shall continue its work until 1 January 2000.

9. The Joint Liaison Group shall meet in Beijing, London and Hong Kong. It shall meet at least once in each of the three locations in each year. The venue for each meeting shall be agreed between the two sides.

10. Members of the Joint Liaison Group shall enjoy diplomatic privileges and immunities as appropriate when in the three locations. Proceedings of the Joint Liaison Group shall remain confidential unless otherwise agreed between the two sides.

11. The Joint Liaison Group may by agreement between the two sides decide to set up specialist sub-groups to deal with particular subjects requiring expert assistance.

12. Meetings of the Joint Liaison Group and sub-groups may be attended by experts other than the members of the Joint Liaison Group. Each side shall determine the composition of its delegation to particular meetings of the Joint Liaison Group or sub-group in accordance with the subjects to be discussed and the venue chosen.

13. The working procedures of the Joint Liaison Group shall be discussed and decided upon by the two sides within the guidelines laid down in this Annex.
Annex III

Land Leases

The Government of the United Kingdom and the Government of the People’s Republic of China have agreed that, with effect from the entry into force of the Joint Declaration, land leases in Hong Kong and other related matters shall be dealt with in accordance with the following provisions:

1. All leases of land granted or decided upon before the entry into force of the Joint Declaration and those granted thereafter in accordance with paragraph 2 or 3 of this Annex, and which extend beyond 30 June 1997, and all rights in relation to such leases shall continue to be recognised and protected under the law of the Hong Kong Special Administrative Region.

2. All leases of land granted by the British Hong Kong Government not containing a right of renewal that expire before 30 June 1997, except short term tenancies and leases for special purposes, may be extended if the lessee so wishes for a period expiring not later than 30 June 2047 without payment of an additional premium. An annual rent shall be charged from the date of extension equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter. In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, the 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 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. Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the Hong Kong Special Administrative Region.

3. From the entry into force of the Joint Declaration until 30 June 1997, new leases of land may be granted by the British Hong Kong Government for terms expiring not later than 30 June 2047. Such leases shall be granted at a premium and nominal rental until 30 June 1997, after which date they shall not require payment of an additional premium but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with changes in the rateable value thereafter, shall be charged.

4. The total amount of new land to be granted under paragraph 3 of this Annex shall be limited to 50 hectares a year (excluding land to be granted to the Hong Kong Housing Authority for public rental housing) from the entry into force of the Joint Declaration until 30 June 1997.
5. Modifications of the conditions specified in leases granted by the British Hong Kong Government may continue to be granted before 1 July 1997 at a premium equivalent to the difference between the value of the land under the previous conditions and its value under the modified conditions.

6. From the entry into force of the Joint Declaration until 30 June 1997, premium income obtained by the British Hong Kong Government from land transactions shall, after deduction of the average cost of land production, be shared equally between the British Hong Kong Government and the future Hong Kong Special Administrative Region Government. All the income obtained by the British Hong Kong Government, including the amount of the above-mentioned deduction, shall be put into the Capital Works Reserve Fund for the financing of land development and public works in Hong Kong. The Hong Kong Special Administrative Region Government’s share of the premium income shall be deposited in banks incorporated in Hong Kong and shall not be drawn on except for the financing of land development and public works in Hong Kong in accordance with the provisions of paragraph 7(d) of this Annex.

7. A Land Commission shall be established in Hong Kong immediately upon the entry into force of the Joint Declaration. The Land Commission shall be composed of an equal number of officials designated respectively by the Government of the United Kingdom and the Government of the People’s Republic of China together with necessary supporting staff. The officials of the two sides shall be responsible to their respective governments. The Land Commission shall be dissolved on 30 June 1997.

   The terms of reference of the Land Commission shall be:
   (a) to conduct consultations on the implementation of this Annex;
   (b) to monitor observance of the limit specified in paragraph 4 of this Annex, the amount of land granted to the Hong Kong Housing Authority for public rental housing, and the division and use of premium income referred to in paragraph 6 of this Annex;
   (c) to consider and decide on proposals from the British Hong Kong Government for increasing the limit referred to in paragraph 4 of this Annex;
   (d) to examine proposals for drawing on the Hong Kong Special Administrative Region Government’s share of premium income referred to in paragraph 6 of this Annex and to make recommendations to the Chinese side for decision.

Matters on which there is disagreement in the Land Commission shall be referred to the Government of the United Kingdom and the Government of the People’s Republic of China for decision.

8. Specific details regarding the establishment of the Land Commission shall be finalised separately by the two sides through consultations.
MEMORANDA
(Exchanged Between the Two Sides)

UNITED KINGDOM MEMORANDUM

In connection with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and to be signed this day, the Government of the United Kingdom declares that, subject to the completion of the necessary amendments to the relevant United Kingdom legislation:

(a) All persons who on 30 June 1997 are, by virtue of a connection with Hong Kong, British Dependent Territories Citizens (BDTCs) under the law in force in the United Kingdom will cease to be BDTCs with effect from 1 July 1997, but will be eligible to retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the Government of the United Kingdom. This status will be acquired by such persons only if they hold or are included in such a British passport issued before 1 July 1997, except that eligible persons born on or after 1 January 1997 but before 1 July 1997 may obtain or be included in such a passport up to 31 December 1997.

(b) No person will acquire BDTC status on or after 1 July 1997 by virtue of a connection with Hong Kong. No person born on or after 1 July 1997 will acquire the status referred to as being appropriate in sub-paragraph (a).

(c) United Kingdom consular officials in the Hong Kong Special Administrative Region and elsewhere may renew and replace passports of persons mentioned in sub-paragraph (a) and may also issue them to persons born before 1 July 1997 of such persons, who had previously been included in the passport of their parent.

(d) Those who have obtained or been included in passports issued by the Government of the United Kingdom under sub-paragraphs (a) and (c) will be entitled to receive, upon request, British consular services and protection when in third countries.

Beijing, 19 December 1984.

CHINESE MEMORANDUM

The Government of the People’s Republic of China has received the memorandum from the Government of the United Kingdom of Great Britain and Northern Ireland dated 19 December 1984.

Under the Nationality Law of the People’s Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the “British Dependent Territories Citizens’ Passport” or not, are Chinese nationals.

Taking account of the historical background of Hong Kong and its realities,
the competent authorities of the Government of the People’s Republic of China will, with effect from 1 July 1997, permit Chinese nationals in Hong Kong who were previously called “British Dependent Territories Citizens” to use travel documents issued by the Government of the United Kingdom for the purpose of travelling to other states and regions.

The above Chinese nationals will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People’s Republic of China on account of their holding the above-mentioned British travel documents.

Beijing, 19 December 1984.
DECREE OF THE PRESIDENT OF THE PEOPLE’S REPUBLIC OF CHINA, NO. 26

I hereby promulgate the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, including Annex I, Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, Annex II, Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, Annex III, National Laws to be Applied in the Hong Kong Special Administrative Region, and designs of the regional flag and regional emblem of the Hong Kong Special Administrative Region, which was adopted at the Third Session of the Seventh National People’s Congress of the People’s Republic of China on 4 April 1990 and shall be put into effect as of 1 July 1997.

(Signed)
Yang Shangkun
President of the
People’s Republic of China

4 April 1990
THE BASIC LAW OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF
CHINA

Adopted on 4 April 1990 by the Seventh National People’s Congress
of the People’s Republic of China at its Third Session

PREAMBLE

Hong Kong has been part of the territory of China since ancient times; it was
occupied by Britain after the Opium War in 1840. On 19 December 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 with effect from 1 July
1997, thus fulfilling the long-cherished common aspiration of the Chinese people
for the recovery of Hong Kong.

Upholding national unity and territorial integrity, maintaining the prosperity
and stability of Hong Kong, and taking account of its history and realities, the
People’s Republic of China has decided that upon China’s resumption of the
exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative
Region will be established in accordance with the provisions of Article 31 of the
Constiution of the People’s Republic China, and that under the principle of “one
country, two systems”, the 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 the Chinese 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

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 and enjoy executive, legislative and
independent judicial power, including that of final adjudication, in accordance
with the provisions of this Law.
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
The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with Law.

Article 5
The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

Article 6
The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

Article 7
The land and natural resources within the Hong Kong Special Administrative Region shall be State property. 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, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the government of the 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 any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

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

Article 10
Apart from displaying the national flag and national emblem of the People’s Republic of China, the Hong Kong Special Administrative Region may also use a regional flag and regional emblem.

The regional flag of the Hong Kong Special Administrative Region is a red flag with a bauhinia highlighted by five star-tipped stamens.
The regional emblem of the Hong Kong Special Administrative Region is a bauhinia in the centre highlighted by five star-tipped stamens and encircled by the words “Hong Kong Special Administrative Region of the People’s Republic of China” in Chinese and “HONG KONG” in English.

Article 11
In accordance with Article 31 of the Constitution of the People’s Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

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

CHAPTER II: RELATIONSHIP BETWEEN THE CENTRAL AUTHORITIES AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION

Article 12
The Hong Kong Special Administrative Region shall be a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People’s Government.

Article 13
The Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.

The Ministry of Foreign Affairs of the People’s Republic of China shall establish an office in Hong Kong to deal with foreign affairs.

The Central People’s Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

Article 14
The Central People’s Government shall be responsible for the defence of the Hong Kong Special Administrative Region.

The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.

Military forces stationed by the Central People’s Government in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the Region. The Government of the Hong Kong Special Administrative Region may, when necessary, ask the Central People’s Government for assistance from the garrison in the maintenance of public order and in disaster relief.

In addition to abiding by national laws, members of the garrison shall abide by the laws of the Hong Kong Special Administrative Region.
Expenditure for the garrison shall be borne by the Central People’s Government.

Article 15
The Central People’s Government shall appoint the Chief Executive and the principal officials of the executive authorities of the Hong Kong Special Administrative Region in accordance with the provisions of Chapter IV of this Law.

Article 16
The Hong Kong Special Administrative Region shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law.

Article 17
The Hong Kong Special Administrative Region shall be vested with legislative power.

Laws enacted by the legislature of the Hong Kong Special Administrative Region must 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 the Committee for the Basic Law of the Hong Kong Special Administrative Region under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People’s Congress shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.

Article 18
The laws in force in Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

National laws shall not be applied in Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The Laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.
In the event that the Standing Committee of the National People’s Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People’s Government may issue an order applying the relevant national laws in the Region.

Article 19

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

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.

Article 20

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 Central People’s Government.

Article 21

Chinese citizens who are residents of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs according to law.

In accordance with the assigned number of seats and the selection method specified by the National People’s Congress, the Chinese citizens among the residents of the Hong Kong Special Administrative Region shall locally elect deputies of the Region to the National People’s Congress to participate in the work of the highest organ of state power.

Article 22

No department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.

If there is a need for departments of the Central Government, or for provinces, autonomous regions, or municipalities directly under the Central Government to
set up offices in the Hong Kong Special Administrative Region, they must obtain the consent of the government of the Region and the approval of the Central People’s Government.

All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.

For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region.

The Hong Kong Special Administrative Region may establish an office in Beijing.

Article 23

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

CHAPTER III: FUNDAMENTAL RIGHTS AND DUTIES OF THE RESIDENTS

Article 24

Residents of the Hong Kong Special Administrative Region (“Hong Kong residents”) shall include permanent residents and non-permanent residents.

The permanent residents of the Hong Kong Special Administrative Region shall be:

1. Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
2. Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
3. Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
4. Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
5. Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Administrative Region; and
(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

Article 25
All Hong Kong residents shall be equal before the law.

Article 26
Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

Article 27
Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

Article 28
The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.

Article 29
The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises shall be prohibited.

Article 30
The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.
Article 31

Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.

Article 32

Hong Kong residents shall have freedom of conscience.

Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.

Article 33

Hong Kong residents shall have freedom of choice of occupation.

Article 34

Hong Kong residents shall have freedom to engage in academic research, literary and artistic creation, and other cultural activities.

Article 35

Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

Article 36

Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law.

Article 37

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

Article 38

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

Article 39

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Article 40

The lawful traditional rights and interests of the indigenous inhabitants of the “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 prescribed in this Chapter.

Article 42

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

CHAPTER IV: POLITICAL STRUCTURE

Section 1: The Chief Executive

Article 43

The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent 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 Executive of the Hong Kong Special Administrative Region shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 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 method for selecting the Chief Executive shall be specified 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. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a
broadly representative nominating committee in accordance with democratic procedures.

The specific method for selecting the Chief Executive is prescribed in Annex I: “Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”.

Article 46

The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms.

Article 47

The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties.

The Chief Executive, on assuming office, shall declare his or 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.

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;

(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 Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise; and to recommend to the Central People’s Government the removal of the above-mentioned officials;

(6) To appoint or remove judges of the courts at all levels in accordance with legal procedures;

(7) To appoint or remove holders of public office 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 conduct, on behalf of the Government of the Hong Kong Special Administrative Region, external affairs and other affairs as 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 vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees;
(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 of the Hong Kong Special Administrative Region considers that a bill passed by the Legislative Council is not compatible with the overall interests of the Region, he or she may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by not less than a two-thirds majority of all the members, 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 of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office.

Article 51

If the Legislative Council of the Hong Kong Special Administrative Region refuses to pass the budget introduced by the government, the Chief Executive may apply to the Legislative Council for provisional appropriations. If appropriation of public funds cannot be approved because the Legislative Council has already been dissolved, the Chief Executive may, prior to the election of the new Legislative Council, approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year.

Article 52

The Chief Executive of the Hong Kong Special Administrative Region must resign under any of the following circumstances:
(1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;
(2) When, after the Legislative Council is dissolved because he or she twice
refuses to sign a bill passed by it, the new Legislative Council again passes by a two-thirds majority of all the members the original bill in dispute, but he or she still refuses to sign it; and

(3) When, after the Legislative Council is dissolved because it refuses to pass a budget or any other important bill, the new Legislative 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 or her duties for a short period, such duties shall temporarily be assumed by the Administrative Secretary, Financial Secretary or 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 in accordance with the provisions of Article 45 of this Law. During the period of vacancy, his or 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 shall be 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 appointment or removal shall be decided by the Chief Executive. The term of office of members of the Executive Council shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them.

Members of the Executive Council of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

The Chief Executive may, as he or she deems necessary, invite other persons concerned to sit in on meetings of the Council.

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 officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.

If the Chief Executive does not accept a majority opinion of the Executive Council, he or she shall put the specific reasons on record.
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.

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

The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region.

The head of the Government of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region.

A Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions shall be established in the Government of the Hong Kong Special Administrative Region.

The principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country and have ordinarily resided in Hong Kong for a continuous period of not less than 15 years.

The Government of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
(1) To formulate and implement policies;
(2) To conduct administrative affairs;
(3) To conduct external affairs as authorized by the Central People’s Government under this Law;
(4) To draw up and introduce budgets and final accounts;
(5) To draft and introduce bills, motions and subordinate legislation; and
(6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.

The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.
Article 64
The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.

Article 65
The previous system of establishing advisory bodies by the executive authorities shall be maintained.

Section 3: The Legislature

Article 66
The Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region.

Article 67
The Legislative Council of the Hong Kong Special Administrative Region shall be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. However, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region, provided that the proportion of such members does not exceed 20 per cent of the total membership of the Council.

Article 68
The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified 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. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: “Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures”.

Article 69
The term of office of the Legislative Council of the Hong Kong Special Administrative Region shall be four years, except the first term which shall be two years.
Article 70

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 must, within three months, be reconstituted by election in accordance with Article 68 of this Law.

Article 71

The President of the Legislative Council of the Hong Kong Special Administrative Region shall be elected by and 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 citizen of not less than 40 years of age, who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.

Article 72

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 the agenda, giving priority to government bills for inclusion in the agenda;
3. To decide on the time of meetings;
4. To call special sessions during the recess;
5. To call emergency sessions on the request of the Chief Executive; and
6. To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council.

Article 73

The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

1. To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures;
2. To examine and approve budgets introduced by the government;
3. To approve taxation and public expenditure;
4. To receive and debate the policy addresses of the Chief Executive;
5. To raise questions on the work of the government;
6. To debate any issue concerning public interests;
7. To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
8. To receive and handle complaints from Hong Kong residents;
9. If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction
of duty and if he or she refuses to resign, the Council may, after passing a
motion for investigation, give a mandate to the Chief Justice of the Court of
Final Appeal to form and chair an independent investigation committee.
The committee shall be responsible for carrying out the investigation and
reporting its findings to the Council. If the committee considers the evidence
sufficient to substantiate such charges, the Council may pass a motion of
impeachment by a two-thirds majority of all its members and report it to
the Central People’s Government for decision; and

(10) To summon, as required when exercising the above-mentioned powers and
functions, persons concerned to testify or give evidence.

Article 74

Members of the Legislative Council of the Hong Kong Special Administrative
Region may introduce bills in accordance with the provisions of this Law and
legal procedures. Bills which do not relate to public expenditure or political
structure or the operation of the government may be introduced individually or
jointly by members of the Council. The written consent of the Chief Executive
shall be required before bills relating to government policies are introduced.

Article 75

The quorum for the meeting of the Legislative Council of the Hong Kong Special
Administrative Region shall be not less than one half of all its members.

The rules of procedure of the Legislative Council shall be made by the
Council on its own, provided that they do not contravene this Law.

Article 76

A bill passed by the Legislative Council of the Hong Kong Special Administrative
Region may take effect only after it is signed and promulgated by the Chief
Executive.

Article 77

Members of the Legislative Council of the Hong Kong Special Administrative
Region shall be immune from legal action in respect of their statements at meetings
of the Council.

Article 78

Members of the Legislative Council of the Hong Kong Special Administrative
Region shall not be subjected to arrest when attending or on their way to a
meeting of the Council.

Article 79

The President of the Legislative Council of the Hong Kong Special Administrative
Region shall declare that a member of the Council is no longer qualified for the
office under any of the following circumstances:
(1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;
(2) When he or she, with no valid reason, is absent from meetings for three consecutive months without the consent of the President of the Legislative Council;
(3) When he or she loses or renounces his or her status as a permanent resident of the Region;
(4) When he or she accepts a government appointment and becomes a public servant;
(5) When he or she is bankrupt or fails to comply with a court order to repay debts;
(6) When he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Region and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present; and
(7) When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present.

Section 4: The Judiciary

Article 80

The courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.

Article 81

The Court of Final Appeal, the High Court, district courts, magistrates’ courts and other special courts shall be established in the Hong Kong Administrative region. The High Court shall comprise the Court of Appeal and the Court of First Instance.

The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region.

Article 82

The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.

Article 83

The structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law.
Article 84
The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

Article 85
The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

Article 86
The principle of trial by jury previously practised in Hong Kong shall be maintained.

Article 87
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 parties to proceedings shall be maintained.

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

Article 88
Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

Article 89
A judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on 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 of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, 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 prescribed in this Law.

Article 90
The Chief Justice of the Court of Final Appeal and the Chief Judge of the High
Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

In the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall, in addition to following the procedures prescribed in Articles 88 and 89 of this Law, obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People’s Congress for the record.

Article 91

The Hong Kong Special Administrative Region shall maintain the previous system of appointment and removal of members of the judiciary other than judges.

Article 92

Judges and other members of the judiciary of the Hong Kong Special Administrative region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

Article 93

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.

The Government of 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, including those who have retired or left the service before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place or residence.

Article 94

On the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region.

Article 95

The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.

Article 96

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 juridical assistance.

**Section 5: District Organizations**

**Article 97**

District organizations which are not 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 98**

The powers and functions of the district organizations and the method for their formation shall be prescribed by law.

**Section 6: Public Servants**

**Article 99**

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 101 of this Law regarding public servants of foreign nationalities and except for those below a certain rank 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 100**

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 101**

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 in government departments at all levels, but only Chinese citizens among permanent residents of the Region with no right of abode in any foreign country may fill the following posts: the Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner 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 departments
and, when required, may recruit qualified candidates from outside the Region to fill 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 102**

The Government of the Hong Kong Special Administrative Region shall pay to public servants who retire or who leave the service in compliance with regulations, including those who have retired or who have left the service in compliance with regulations before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place of residence.

**Article 103**

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 104**

When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.

**CHAPTER V: ECONOMY**

**Section 1: Public Finance, Monetary Affairs, Trade, Industry and Commerce**

**Article 105**

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.
Article 106
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.

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 follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.

Article 108
The Hong Kong Special Administrative Region shall practise an independent taxation system.

The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.

Article 109
The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.

Article 110
The monetary and financial systems of the Hong Kong Special Administrative Region shall be prescribed by law.

The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law.

Article 111
The Hong Kong dollar, as the legal tender in the Hong Kong Special Administrative Region, shall continue to circulate.

The authority to issue Hong Kong currency shall be vested in the Government of the Hong Kong Special Administrative Region. The issue of Hong Kong currency must be backed by a 100 per cent reserve fund. The system regarding the issue of Hong Kong currency and the reserve fund system shall be prescribed by law.

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 maintaining the stability of the currency.

Article 112
No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region. The Hong Kong dollar shall be freely convertible. Markets for foreign exchange, gold, securities, futures and the like shall continue.

The Government of the Hong Kong Special Administrative Region shall safeguard the free flow of capital within, into and out of the Region.

Article 113
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.

Article 114
The Hong Kong Special Administrative Region shall maintain the status of a free port and shall not impose any tariff unless otherwise prescribed by law.

Article 115
The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.

Article 116
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 international trade in textiles.

Export quotas, tariff preferences and other similar arrangements, which are obtained or made by the Hong Kong Special Administrative Region or which were obtained or made and remain valid, shall be enjoyed exclusively by the Region.

Article 117
The Hong Kong Special Administrative Region may issue its own certificates of origin for products in accordance with prevailing rules of origin.

Article 118
The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries.
Appendix Five

Article 119
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 manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and pay regard to the protection of the environment.

Section 2: Land Leases

Article 120
All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region.

Article 121
As regards all leases of land granted or renewed where the original leases contain no right of renewal, during the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire not later than 30 June 2047, the lessee is not required to pay an additional premium as from 1 July 1997, but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter, shall be charged.

Article 122
In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, where the property is granted to, a lessee 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 lessee or by one of his lawful successors in the male line.

Article 123
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 3: Shipping

Article 124
The Hong Kong Special Administrative Region shall maintain Hong Kong’s previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen.

The Government of the Hong Kong Special Administrative Region shall, on its own, define its specific functions and responsibilities in respect of shipping.
Article 125
The Hong Kong Special Administrative Region shall be authorized by the Central People’s Government to continue to maintain a shipping register and issue related certificates under its legislation, using the name “Hong Kong, China”.

Article 126
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 127
Private shipping businesses and shipping-related businesses and private container terminals in the Hong Kong Special Administrative Region may continue to operate freely.

Section 4: Civilaviation

Article 128
The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation.

Article 129
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 state aircraft to the Hong Kong Special Administrative Region shall require the special permission of the Central People’s Government.

Article 130
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 Administrative Region, and the discharge of other responsibilities allocated to it under the regional air navigation procedures of the International Civil Aviation Organization.

Article 131
The Central People’s Government shall, in consultation with the Government of the Hong Kong Special Administrative Region, make arrangements providing 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 132

All air service agreements providing 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 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 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, as members of the delegations of the Government of the People’s Republic of China, participate in air service consultations conducted by the Central People’s Government with foreign governments concerning arrangements for such services referred to in the first paragraph of this Article.

Article 133

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 providing rights for overflights and technical stops; and
(3) negotiate and conclude provisional arrangements with foreign states or regions with which no air service agreements have been concluded.

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 134

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 implementation of the air service agreements and provisional arrangements referred to in Article 133 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 133 of this Law; and
(4) issue permits to foreign airlines for services other than those to, from or through the mainland of China.

Article 135
Airlines incorporated and having their principal place of business in Hong Kong and businesses related to civil aviation functioning there prior to the establishment of the Hong Kong Special Administrative Region may continue to operate.

CHAPTER VI: EDUCATION, SCIENCE, CULTURE, SPORTS, RELIGION, LABOUR AND SOCIAL SERVICES

Article 136
On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of 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 137
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 in religion.

Students shall enjoy freedom of choice of educational institutions and freedom to pursue their education outside the Hong Kong Administrative Region.

Article 138
The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies to develop Western and traditional Chinese medicine and to improve medical and health services. Community organizations and individuals may provide various medical and health services in accordance with law.

Article 139
The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology and 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 140

The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation.

Article 141

The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or 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.

Religious organizations and believers in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organizations and believers elsewhere.

Article 142

The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.

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 in accordance with the relevant regulations and codes of practice.

The Government of the Hong Kong Special Administrative Region shall continue to recognize the professions and the professional organizations recognized prior to the establishment of the Region, and these organizations may, on their own, assess and confer 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 143

The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on sports. Non-governmental sports organizations may continue to exist and develop in accordance with law.
Article 144
The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare and social work. Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.

Article 145
On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.

Article 146
Voluntary organizations providing social services in the Hong Kong Special Administrative Region may, on their own, decide their forms of service, provided that the law is not contravened.

Article 147
The Hong Kong Special Administrative Region shall on its own formulate laws and policies relating to labour.

Article 148
The relationship between non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Region and their counterparts on the mainland shall be based on the principles of non-subordination, non-interference and mutual respect.

Article 149
Non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Region may maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organizations. They may, as required, use the name “Hong Kong, China” in the relevant activities.

CHAPTER VII EXTERNAL AFFAIRS

Article 150
Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the Government of the People’s Republic
of China, participate in negotiations at the diplomatic level directly affecting the Region conducted by the Central People’s Government.

**Article 151**

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 foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.

**Article 152**

Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the People’s Republic of China, participate in international organizations or conferences in appropriate fields 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 the 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 organizations 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 153**

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.

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 154

The Central People’s Government shall authorize the Government of the 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 citizens 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 the Region.

The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions.

Article 155

The Central People’s Government shall assist or authorize the Government of the Hong Kong Special Administrative Region to conclude visa abolition agreements with foreign states or regions.

Article 156

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 157

The establishment of foreign consular and other official or semi-official missions in the Hong Kong Special Administrative Region shall require 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 the 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 be permitted either to remain or be changed to semi-official missions.

States not recognized by the People’s Republic of China may only establish non-governmental institutions in the Region.

CHAPTER VIII: INTERPRETATION AND AMENDMENT OF THE BASIC LAW

Article 158

The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.
The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek and interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People’s Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

Article 159

The power of amendment of this Law shall be vested in the National People’s Congress.

The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People’s Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People’s Congress by the delegation of the Region to the National People’s Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People’s Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.

Before a bill for amendment to this Law is put on the agenda of the National People’s Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views.

No amendment to this Law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong.

CHAPTER IX: SUPPLEMENTARY PROVISIONS

Article 160

Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress
declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.

Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

ANNEX I: METHOD FOR THE SELECTION OF THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

1. The Chief Executive shall be elected by a broadly representative Election Committee in accordance with this Law and appointed by the Central People’s Government.

2. The Election Committee shall be composed of 800 members from the following sectors:
   Industrial, commercial and financial sectors 200
   The professions 200
   Labour, social services, religious and other sectors 200
   Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference 200

   The term of office of the Election Committee shall be five years.

3. The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall be prescribed by an electoral law enacted by the Hong Kong Special Administrative Region in accordance with the principles of democracy and openness.
   Corporate bodies in various sectors shall, on their own, elect members to the Election Committee, in accordance with the number of seats allocated and the election method as prescribed by the electoral law.
   Members of the Election Committee shall vote in their individual capacities.

4. Candidates for the office of Chief Executive may be nominated jointly by not less than 100 members of the Election Committee. Each member may nominate only one candidate.

5. The Election Committee shall, on the basis of the list of nominees, elect the Chief Executive designate by secret ballot on a one-person-one-vote basis. The specific election method shall be prescribed by the electoral law.

6. The first Chief Executive shall be selected in accordance with the “Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region”.
7. If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for approval.

ANNEX II: METHOD FOR THE FORMATION OF THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION AND ITS VOTING PROCEDURES

I. Method for the formation of the Legislative Council

1. The Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term. In the first term, the Legislative Council shall be formed in accordance with the “Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region”. The composition of the Legislative Council in the second and third terms shall be as follows:

   Second term
   - Members returned by functional constituencies: 30
   - Members returned by the Election Committee: 6
   - Members returned by geographical constituencies through direct elections: 24

   Third term
   - Members returned by functional constituencies: 30
   - Members returned by geographical constituencies through direct elections: 30

2. Except in the case of the first Legislative Council, the above-mentioned Election Committee refers to the one provided for in Annex I of this Law. The division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods; and the method for electing members of the Legislative Council by the Election Committee shall be specified by and electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council.

II. Procedures for voting on bills and motions in the Legislative Council

Unless otherwise provided for in this Law, the Legislative Council shall adopt the following procedures for voting on bills and motions:

The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present.

The passage of motions, bills or amendments to government bills introduced
by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee.

III. Method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007

With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for the record.

ANNEX III: NATIONAL LAWS TO BE APPLIED IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region:

1. Resolution on the Capital, Calendar, National Anthem and National Flag of the People’s Republic of China
2. Resolution on the National Day of the People’s Republic of China
3. Order on the National Emblem of the People’s Republic of China Proclaimed by the Central People’s Government
   Attached: Design of the national emblem, notes of explanation and instructions for use
5. Nationality Law of the People’s Republic of China

DECISION OF THE NATIONAL PEOPLE’S CONGRESS ON THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA

(Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990)

The Third Session of the Seventh National People’s Congress has adopted the
Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, which includes Annex I, Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, Annex II, Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, Annex III, National Laws to be Applied in the Hong Kong Special Administrative Region, and designs of the regional flag and regional emblem of the Hong Kong Special Administrative Region. Article 31 of the Constitution of the People’s Republic of China 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 the specific conditions.” The Basic Law of the Hong Kong Special Administrative Region is constitutional as it is enacted in accordance with the Constitution of the People’s Republic of China and in the light of the specific conditions of Hong Kong. The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region.

The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China shall be put into effect as of 1 July 1997.

DECISION OF THE NATIONAL PEOPLE’S CONGRESS ON THE ESTABLISHMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

(Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990)

In accordance with the provisions of Article 31 and sub-paragraph 13 of Article 62 of the Constitution of the People’s Republic of China, the Third Session of the Seventh National People’s Congress has hereby decided
1. that the Hong Kong Special Administrative Region is to be established as of 1 July 1997; and
2. that the area of the Hong Kong Special Administrative Region covers the Hong Kong Island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction. The map of the administrative division of the Hong Kong Special Administrative Region will be published by the State Council separately.
DECISION OF THE NATIONAL PEOPLE’S CONGRESS ON THE
METHOD FOR THE FORMATION OF THE FIRST GOVERNMENT
AND THE FIRST LEGISLATIVE COUNCIL OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

(Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990)

1. The first Government and the first Legislative Council of the Hong Kong Special Administrative Region shall be formed in accordance with the principles of state sovereignty and smooth transition.

2. Within the year 1996, the National People’s Congress shall establish a Preparatory Committee for the Hong Kong Special Administrative Region, which shall be responsible for preparing the establishment of the Region and shall prescribe the specific method for forming the first Government and the first Legislative Council in accordance with this Decision. The Preparatory Committee shall be composed of mainland members and of Hong Kong members who shall constitute not less than 50 per cent of its membership. Its chairman and members shall be appointed by the Standing Committee of the National People’s Congress.

3. The Preparatory Committee for the Hong Kong Special Administrative Region shall be responsible for preparing the establishment of the Selection Committee for the First Government of the Hong Kong Special Administrative Region (the “Selection Committee”).

The Selection Committee shall be composed entirely of permanent residents of Hong Kong and must be broadly representative. It shall include Hong Kong deputies to the National People’s Congress, representatives of Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference, persons with practical experience who have served in Hong Kong’s executive, legislative and advisory organs prior to the establishment of the Hong Kong Special Administrative Region, and persons representative of various strata and sectors of society.

The Selection Committee shall be composed of 400 members in the following proportions:

- Industrial, commercial and financial sectors: 25 per cent
- The professions: 25 per cent
- Labour, grass-roots, religious and other sectors: 25 per cent
- Former political figures, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference: 25 per cent

4. The Selection Committee shall recommend the candidate for the first Chief Executive through local consultations or through nomination and election after consultations, and report the recommended candidate to the Central People’s
Government for appointment. The term of office of the first Chief Executive shall be the same as the regular term.

5. The Chief Executive of the Hong Kong Special Administrative Region shall be responsible for preparing the formation of the first Government of the Region in accordance with this law.

6. The first Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies. If the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong Special Administrative Region is in conformity with the relevant provisions of this Decision and the Basic Law of the Hong Kong Special Administrative Region, those of its members who uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China, and who meet the requirements set forth in the Basic Law of the Region may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region.

The term of office of members of the first Legislative Council of the Hong Kong Special Administrative Region shall be two years.


(Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990)

The Third Session of the Seventh National People’s Congress has decided

1. to approve the proposal by the the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People’s Congress; and

2. to establish the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People’s Congress upon the implementation of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.
Appendix

Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People’s Congress

1. Name: The Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People’s Congress.

2. Affiliation: To be a working committee under the Standing Committee of the National People’s Congress.

3. Function: To study questions arising from the implementation of Articles 17, 18, 158 and 159 of the Basic Law of the Hong Kong Special Administrative Region and submit its views thereon to the Standing Committee of the National People’s Congress.

4. Composition: Twelve members, six from the mainland and six form Hong Kong, including persons from the legal profession, appointed by the Standing Committee of the National People’s Congress for a term of office of five years. Hong Kong members shall be Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region with no right of abode in any foreign country and shall be nominated jointly by the Chief Executive, President of the Legislative Council and Chief Justice of the Court of Final Appeal of the Region for appointment by the Standing Committee of the National People’s Congress.


(Adopted on 28 June 1990)

The 14th sitting of the Standing Committee of the Seventh National People’s Congress hereby decides that the English translation of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China which has been finalized upon examination under the auspices of the Law Committee of the National People’s Congress shall be the official English text and shall be used in parallel with the Chinese text. In case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail.
Decision on Previous Laws

DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS ON TREATMENT OF THE LAWS PREVIOUSLY IN FORCE IN HONG KONG IN ACCORDANCE WITH ARTICLE 160 OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA

(Adopted by the Standing Committee of the Eighth National People’s Congress at its 24th sitting on 23 February 1997)

Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (hereinafter referred to as ‘the Basic Law’) stipulates as follows:

‘Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.’

Article 8 stipulates -

‘The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.’

After examination of the Proposals made by the Preparatory Committee of the
Hong Kong Special Administrative Region on treatment of matters relating to the laws previously in force in Hong Kong, and in accordance with the above provisions, the Standing Committee of the Eighth National People’s Congress decided at its 24th sitting as follows:

1. The laws previously in force in Hong Kong, which include the common law, rules of equity, ordinances, subsidiary legislation and customary law, except for those which contravene the Basic Law, are to be adopted as the laws of the Hong Kong Special Administrative Region.

2. Such of the ordinances and subsidiary legislation previously in force in Hong Kong as set out in Annex 1 to this Decision which are in contravention of the Basic Law are not to be adopted as the laws of the Hong Kong Special Administrative Region.

3. Such provisions of the ordinances and subsidiary legislation previously in force in Hong Kong as set out in Annex 2 to this Decision which are in contravention of the Basic Law are not to be adopted as the laws of the Hong Kong Special Administrative Region.

4. Such of the laws previously in force in Hong Kong as having been adopted as the laws of the Hong Kong Special Administrative Region shall, as from 1 July 1997, be applied subject to such modification, adaptation, limitation or exception as is necessary so as to be in line with the status of Hong Kong after resumption by the People’s Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law. For example, the New Territories Land (Exemption) Ordinance should comply with the above principles in its application.

Subject to the above principles, in the ordinances and subsidiary legislation previously in force:

(1) where any law making provision for foreign affairs in respect of the Hong Kong Special Administrative Region is inconsistent with the national law applicable in the Hong Kong Special Administrative Region, the national law shall prevail so that it accords with the international rights enjoyed and international obligations borne by the Central People’s Government;

(2) any provision conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions relating to reciprocal arrangements between Hong Kong and the United Kingdom or other Commonwealth countries or territories, shall not be retained;

(3) any provision relating to the rights, exemptions and obligations of the British military forces stationed in Hong Kong which does not contravene the provisions of the Basic Law and the Garrison Law of the Hong Kong Special Administrative Region of the People’s Republic of China shall be retained and be applicable to the military forces stationed by the Central People’s Government of the People’s Republic of China in Hong Kong;

(4) any provision relating to the superior legal status of the English language
as compared with the Chinese language shall be construed as providing that both the English and Chinese languages are to be official languages;

(5) any provision applying any English law may continue to be applicable by reference thereto as a transitional arrangement pending its amendment by the Hong Kong Special Administrative Region, provided that it is not prejudicial to the sovereignty of the People’s Republic of China and it does not contravene the provisions of the Basic Law.

5. Subject to the provisions of paragraph 4 thereof, names, terms and expressions appearing in the laws previously in force in Hong Kong that are to be adopted as the laws of the Hong Kong Special Administrative Region shall, unless the context otherwise requires, be construed or applied in accordance with the principles of substitution provided for in Annex 3 to this Decision.

6. Where the laws previously in force in Hong Kong are to be adopted as the laws of the Hong Kong Special Administrative Region but are later discovered to be in contravention of the Basic Law, they shall be amended or shall cease to have force in accordance with the procedure as prescribed by the Basic Law.

Annex 1

The following ordinances and subsidiary legislation made thereunder previously in force in Hong Kong, which contravene the Basic Law, are not to be adopted as the laws of the Hong Kong Special Administrative Region:

1. Trustees (Hong Kong Government Securities) Ordinance (Cap. 77);
2. Application of English Law Ordinance (Cap. 88);
3. Foreign Marriage Ordinance (Cap. 180);
4. Chinese Extradition Ordinance (Cap. 235);
5. Colony Armorial Bearings (Protection) Ordinance (Cap. 315);
6. Secretary of State for Defence (Succession to Property) Ordinance (Cap. 193);
7. Royal Hong Kong Regiment Ordinance (Cap. 199);
8. Compulsory Service Ordinance (Cap. 246);
9. Army and Royal Air Force Legal Services Ordinance (Cap. 286);
10. British Nationality (Miscellaneous Provisions) Ordinance (Cap. 186);
11. British Nationality Act 1981 (Consequential Amendments) Ordinance (Cap. 373);
12. Electoral Provisions Ordinance (Cap. 367);
13. Legislative Council (Electoral Provisions) Ordinance (Cap. 381);

Annex 2

The following provisions in ordinances and subsidiary legislation previously in
force in Hong Kong which contravene the Basic Law are not to be adopted as the laws of the Hong Kong Special Administrative Region:

1. the definition of ‘Hong Kong permanent resident’ in section 2 of the Immigration Ordinance (Cap 115) and the provisions relating to ‘Hong Kong permanent residents’ in Schedule 1 to that Ordinance;
2. any provision giving effect to British Nationality Act applicable in Hong Kong;
3. the provisions relating to election in the Urban Council Ordinance (Cap. 101);
4. the provisions relating to election in the Regional Council Ordinance (Cap. 385);
5. the provisions relating to election in the District Boards Ordinance (Cap. 366);
6. the Urban Council, Regional Council and District Boards Election Expenses Order (sub. leg. A) \[sic\] and the Resolution of the Legislative Council (sub. leg. C) made under the Corrupt and Illegal Practices Ordinance (Cap. 288);
7. the provisions relating to the interpretation and application of the ordinance in section 2(3), the effect on pre-existing legislation in section 3 and the interpretation of subsequent legislation in section 4 of the Hong Kong Bill of Rights Ordinance (Cap. 383);
8. the provisions relating to the superior status of the Personal Data (Privacy) Ordinance (Cap. 486) in section 3(2) of that Ordinance;
9. major amendments to the Societies Ordinance (Cap. 151) since 17 July 1992;
10. major amendments to the Public Order Ordinance (Cap. 245) since 27 July 1995.

Annex 3

Principles of substitution of names terms and expressions in the laws previously in force in Hong Kong that are to be adopted as the laws of the Hong Kong Special Administrative Region:

1. In the case of any provision in which any reference is made to ‘Her Majesty’, ‘Crown’, ‘British Government’ or ‘Secretary of State’ or similar names, terms or expressions, where the content of the provision relates to Hong Kong land title or involves affairs for which the Central [People’s Government] is responsible and relationship between the Central Authorities and the Hong Kong Special Administrative Region, those names, terms or expressions shall be construed as the Central [People’s Government] or other competent authorities of the People’s Republic of China or, in other cases, as the Government of the Hong Kong Special Administrative Region.

2. In the case of any provision in which any reference is made to ‘Her Majesty in Council’ or ‘Privy Council’, where the content of the provision relates to appellate jurisdiction, those names, terms or expressions shall be construed as the Court of Final Appeal of the Hong Kong Special Administrative Region or, in other cases, dealt with in accordance with the provisions of paragraph 1 hereof.
3. In the case of a Government agency or a semi-official agency bearing a name with the word ‘Royal’ included, the word ‘Royal’ shall be removed from its name and the agency shall be construed as the corresponding agency of the Hong Kong Special Administrative Region.

4. Any reference to ‘the Colony’ shall be construed as a reference to the Hong Kong Special Administrative Region, and any description of the territories of Hong Kong shall be construed and applied by reference to the map of the administrative region of the Hong Kong Special Administrative Region promulgated by the State Council.

5. Any reference to such names, terms or expressions as ‘Supreme Court’ and ‘High Court’ shall be construed respectively as a reference to the High Court and Court of First Instance of the High Court.

6. Any reference to such names, terms or expressions as ‘Governor’, ‘Governor in Council’, ‘Chief Secretary’, ‘Attorney General’, ‘Chief Justice’, ‘Secretary for Home Affairs’, ‘Secretary for Constitutional Affairs’, ‘Commissioner of Customs and Excise’ and ‘justice’ shall be construed respectively as a reference to the Chief Executive of the Hong Kong Special Administrative Region, Chief Executive in Council, Administrative Secretary, Secretary of Justice, Chief Judge of the Court of Final Appeal or Chief Judge of the High Court, Secretary for Home Affairs [Minzheng Shiwuju juzhang], Secretary for Electoral Affairs, Commissioner of Customs and Excise [Haiguan Guanzhang] and Judge of the High Court.

7. In the Chinese version of the laws previously in force Hong Kong, where any reference is made to the names, terms or expressions of the Legislative Council, the Judiciary or the Executive Authorities and the officers thereof, those names, terms or expressions shall be construed and applied in accordance with the relevant provisions of the Basic Law.

8. In the case of any provision in which any reference is made to ‘the People’s Republic of China’ or ‘China’ or similar names, terms or expressions, those names, terms or expressions shall be construed as a reference to the People’s Republic of China with the inclusion of Taiwan, Hong Kong and Macau; and where any reference is made to the names, terms or expressions of the Mainland, Taiwan, Hong Kong and Macau, whether separately or concurrently, those names, terms or expressions shall be construed as a reference to a component part of the People’s Republic of China.

9. In the case of any provision in which any reference is made to ‘foreign state’ or ‘foreign country’ or similar terms or expressions, those terms or expressions shall be construed as a reference to any country or territory other than the People’s Republic of China, or as a reference to “any place other than the Hong Kong Special Administrative Region”, depending on the content of the law or provision; and any reference to “alien” or similar terms or expressions shall be construed as a reference to a person other than a citizen of the People’s Republic of China.

10. Any provision to the effect of “nothing in this Ordinance shall affect or be
deemed to affect the rights of Her Majesty the Queen, her heirs or successors’
shall be construed as “nothing in this Ordinance shall affect or be deemed to
affect the rights of the Central [People’s Government] or the Government of
the Hong Kong Special Administrative Region under the Basic Law or any
other law”.

[Unofficial translation]
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Indexing Note:

The arrangement of entries is word-by-word. Subheadings are arranged alphabetically.

The following abbreviations are used in subheadings:

- BL  Basic Law
- HK  Hong Kong
- CPG  Central People’s Government
- CPPCC  Chinese People’s Political Consultative Conference
- HKSAR  Hong Kong Special Administrative Region
- JD  Joint Declaration
- NPC  National People’s Congress
- UN  United Nations

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