

**A Threat to One Country Two Systems: National Law  
Making for Hong Kong**

Chau Pak-kwan

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## Introduction

“There are two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and on the other hand, its rules of recognition specifying the criteria of legal validity and its rule of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.”<sup>1</sup>

*H. L. A. Hart*

“Our experience is still insufficient and immature on the question of handling the relationship between the central and local authorities and that between different local authorities. We hope that you will consider and discuss it in earnest and sum up your experience from time to time so as to enhance achievements and overcome shortcomings.”<sup>2</sup>

*Mao Tsetung*

Since China resumed sovereignty over Hong Kong on July 1, 1997, there have been various kinds of legal maneuverings in Hong Kong, most prominent thus far have been a court challenge on the legality of the provisional legislature<sup>3</sup> and a series of legal battles surrounding legislation that seeks to restrict mainland children with right of abode from settling immediately in Hong Kong.<sup>4</sup> Hong Kong people use to believe that the Basic Law<sup>5</sup> can act as an effective shield against central authorities from interfering in local matters. The ruling of the case *HKSAR v Ma Wai Kwan David* has generated a sense of vulnerability and powerless of Hong Kong’s legal order.<sup>6</sup> The Chief Judge who heard the case argued that ‘regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign.

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<sup>1</sup> H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) p116.

<sup>2</sup> Mao Tsetung, ‘On the Ten Great Relationship,’ *Selected Works of Mao Tsetung Vol. 5* (Peking: Foreign Language Press, 1977) pp.284-307 at p.295.

<sup>3</sup> *HKSAR v Ma Wai Kwan David*, [1997] 2 HKC pp.315-72. The Provisional Legislative Council was set up by the Chinese Government to replace the democratically elected legislature existed before the transfer of sovereignty.

<sup>4</sup> *Cheung Lai Wah v The Director of Immigration*, *Hong Kong Law Reports and Digest*, Oct. 1997, pp.1081-96.

<sup>5</sup> The Basic Law serves as a mini-constitution of Hong Kong after July 1, 1997. See The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, in *The Laws of the People’s Republic of China 1990-1992*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Science Press, 1993) pp.17-49.

<sup>6</sup> See Yash Ghai, ‘Dark Day for Our Rights,’ *South China Morning Post*, Hong Kong, July 30, 1997, Margaret Ng, ‘HKSAR v Ma Wai-kwan, David, Chan Kok-wai, Donny and Tam kim-Yuen and the legality of the Provisional Legislative Council,’ speech delivered at ABA Conference, San Francisco, U. S. A., August 4, 1997 and Johannes Chan, ‘The Jurisdiction and Legality of the Provisional Legislative Council,’ *Hong Kong Law Journal*, Vol. 27, Part 3, 1997, pp.374-87.

There is simply no legal basis to do so.’<sup>7</sup>

According to the Basic Law, there is a clear division of legislative power between the Central Authorities and the Hong Kong Special Administrative Region (HKSAR). The Central Authorities’ lawmaking power for the Region is highly constrained by the Basic Law.<sup>8</sup> Only national laws that are listed in Annex III of the Basic Law shall be applied in the HKSAR.<sup>9</sup> This essay attempts to examine whether constraints laid down in the Basic Law are effective means for limiting the Central Authorities’ capacity to make laws for the Region.

The essay will first look at the legal relationship between the central and the local governments in the People’s Republic of China (PRC). The legal basis of the policy of ‘one country, two systems’ will also be examined. Secondly, the essay will trace the historical development of the constraints and boundaries that have been laid down in the Basic Law specifically designed for limiting the Central Authorities’ law making power for the Region. Thirdly, the essay will examine in detail various legislative activities for the HKSAR by the Central Authorities since the promulgation of the Basic Law. It will critically evaluate legal controversies concerning these lawmaking activities and problems associated with the application of national laws in the Region. Due to the limitations of space, this essay will only focus on public law. Finally, and more importantly, the essay will argue that if the Central Authorities continue to exercise wide range of legislative power over the Region, it will seriously undermine the notion of ‘high degree of autonomy ‘and the whole idea of ‘one country, two systems’.

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<sup>7</sup> *HKSAR v Ma Wai Kwan David*, *op.cit.*, p.334.

<sup>8</sup> For details, see chapter II of this essay.

<sup>9</sup> The Basic Law, Article 18.

## Chapter I: Background

This chapter first looks at the general legal relationship between the central and the local governments in the People's Republic of China. It serves as a background to understanding the situation in the Hong Kong Special Administrative Region. The second part of this chapter deals with the legal background of the policy of 'one country, two systems'.

### Legal Relationship between the Central and the Locals in the PRC

Central-local relation has been an age-old issue in Chinese politics. Mao Tsetung, in his 1956 famous speech 'On the Ten Great Relationships', said that "[o]ur territory is so vast, our population is so large and the conditions are so complex that it is far better to have the initiative come from both the central and the local authorities than from one source alone."<sup>10</sup> Since then, the relationship between the centre and the regions has been constantly changed, like a pendulum swinging between the pole of centralisation and decentralisation.<sup>11</sup> A vicious cycle has developed in Chinese politics: "centralisation—decentralisation—recentralisation". It has been said that 'to impose unity, the regions will lose initiation; to allow independence, the regions will act wildly (*yitong jiushi, yifang jiluan*)'.

Since the Qin Dynasty, China has for the most part been a unified country. During the early Republic era (1911 to 1925), there was a provincial constitutionalism movement which called for federalism.<sup>12</sup> Unfortunately the movement was led by local warlords and the demand for federalism was only seen as a way to preserve their personal interest and to assure their independence from the central government. The movement died down quickly.

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<sup>10</sup> Mao Tsetung, 'On the Ten Great Relationship,' *Selected Works of Mao Tsetung Vol. 5* (Peking: Foreign Language Press, 1977) pp.284-307 at p. 292.

<sup>11</sup> See S. Schram, 'Decentralization in a Unitary State: Theory and Practice 1940-1984' in S. Schram, ed. *The Scope of State Power in China* (London: School of Oriental and African Studies, 1985) pp.81-125, David S. G Goodman and Gerald Segal, eds., *China Deconstructs: Politics, Trade and Regionalism* (London: Routledge, 1994), Wu Guoguang & Zheng Yongnian, *Lun Zhongyang Difang Guanxi – Zhongguo Zhidu Zhuanbian zhong de YiGe Zhouxin Wenti* (Comment on Central and Local Relationship---a Central Issue in China's Institutional Change) (Hong Kong: Oxford, 1995), Tung Fuseng *et.al.*, *Jiquan ye Fenquan—Zhongyang yu Difang Guanxi de Goujian* (Centralisation and Decentralisation---The Construction of Relationship between the Central and Regions) ( Beijing: 1996), and David S. G Goodman, ed. *China's Provinces in Reform—Class, Community and Political Culture* (London: Routledge, 1997). For regional legislation, See Tang Xiaokui, Ou Yangzhen, and Huang Xiangping eds., *Difang Lifa Bijiao Yanjiu* (A Comparative Study on Regional Legislation) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 1992, and Liu Hailiang, ed., *Zhongguo Difang Fazhi Jianshe* (Construction of China's Regional Legal Institution) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 1996).

<sup>12</sup> In 1922, Wunan province promulgated the first provincial constitution in Chinese history which was even passed by a provincial referendum. See Chien Tuan-Sheng, *The Government and Politics of China* (Massachusetts: Harvard University Press, 1950) pp.77-8 and Yang Yu-Chiung, rev. ed. *Jindai Zhongguo Lifa Shi* (A History of Modern Chinese Legislation) (Taipei: Shangwu, 1966) pp.285-95.

Although Mao Tsetung had expressed an interest in federalism in the 1930s and 1940s<sup>13</sup>, the idea was never put into practice. Since its foundation, the PRC has adopted a unitary state system. The Common Program of 1949 stipulates that all organs of state power at all levels in the PRC shall practice democratic centralism<sup>14</sup>. The jurisdiction of the central and local governments has been “defined according to the nature of various matters involved” and “prescribed by degrees of the Central People’s Government Council so as to satisfy the requirements of both national unity and local expediency.”<sup>15</sup>

The 1954 Constitution reaffirmed that the organising principle of all state organs is democratic centralism and stated that “[t]he People’s Republic of China is a single multi-national state.”<sup>16</sup> The Constitution also laid down the basic administrative division in the PRC as provinces, autonomous regions, and municipalities<sup>17</sup>.

In the 1982 Constitution (hereinafter the Constitution and the Chinese Constitution), the specification of ‘China is a single multi-national state’ was moved to the Preamble section. Democratic centralism remains the organising principle of state organs and the division of functions and powers between the centre and the regions is “guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.”<sup>18</sup>

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<sup>13</sup> Schram, *op.cit.* (note 2 above), pp.82-3. For a recent discussion, see Tong Zhiwei, ‘Daiyi zhi, Lianbang zhi de Lilun Pingjia he Shijian Xuanze,’ (‘Approach & Choice in Practice between the Competing Unitary-State and Federal-State Theories’) *Faxue Yanjiu* (CASS Journal of Law), Vol. 18, 1996, pp.92-109.

<sup>14</sup> The Common Program of the Chinese People’s Political Consultative Conference (1949) acted as the Basic Law of the PRC until 1954, adopted at the First Plenary Session of the Chinese People’s Consultative Conference on December 29 1949. In Albert P. Blaustein, *Fundamental Legal Documents of Communist China* (New Jersey: Rothman, 1962), pp.34-53. Art. 15 of the Common Program explains democratic centralism as ‘the People’s Congresses shall be responsible and accountable to the People’s Congress. Within the People’s Congresses and within the People’s Government Councils, the minority shall abide by the decisions of the majority; the appointment of the People’s Governments of each level shall be ratified by the People’s Government of the higher level; the People’s Government of the lower levels shall obey the People’s government of the higher levels and all local People’s government throughout the country shall obey the Central People’s Government.’

<sup>15</sup> The Common Program, Article 16.

<sup>16</sup> Article 3, The PRC constitution of 1954, adopted at the First Session of the First National People’s Congress of the People’s Republic of China on September 20, 1954. In Joseph En-pao Wang *Selected Legal Documents of the People’s Republic of China* (Virginia: University Publication of America, Inc., 1976) pp.1-59 at p.11.

<sup>17</sup> Provinces and autonomous regions are further divided into autonomous *chou*, counties, autonomous counties and municipalities; and counties and autonomous counties are divided into *hsiang*, nationality *hsiang*, and towns. See The PRC constitution of 1954, Article 53.

<sup>18</sup> Article 3, the PRC Constitution of 1982. Adopted at the Fifth session of the Fifth National People’s Congress. In *The Laws of the People’s Republic of China (1979-1982)*, [hereinafter *The Laws of the PRC(1979-1982)*] compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Foreign Languages Press, 1987), pp.2-32 at p.6.

Historically, Constitutions in the PRC have not been used to regulate detailed power relations between the central and local governments.<sup>19</sup> The legal relationship between the centre and the regions is largely determined by various national laws<sup>20</sup> and administrative regulations<sup>21</sup>. Although there is a division of functions between the centre and the regions, this division follows the principle of democratic centralism, which gives the central government the power to interfere in all regional matters.

The division of legislative power between the centre and the regions is one of the most controversial legal issues in the PRC.<sup>22</sup> In the 1954 Constitution, Article 22 stipulated that “the National People’s Congress is the only legislative authority in the country”. However, in reality, local governments could promulgate regional regulations according to their circumstances. Mao even acknowledged this practice by saying that

“According to our Constitution, the legislative powers are all vested in the central authorities. But, provided that the policies of the central authorities are not violated, the local authorities may work out rules, regulations and measures in the light of their specific conditions and the needs of their work, and this is no way prohibited by the Constitution”.<sup>23</sup>

The 1982 Constitution stipulates that the National People’s Congress (NPC) has the power to amend the constitution and to enact and amend basic statutes relating to criminal offenses, civil affairs, and the state organs. The Standing Committee of the National People’s Congress (NPCSC) has the power to interpret the constitution and to enact and amend laws other than those should be enacted by the NPC. The State Council has the power to enact administrative rules and regulations and issue decisions and orders in accordance with the constitution and law. In order to facilitate regional construction, Article 100 of the Constitution provides that “[t]he people’s congresses of provinces and municipalities directly under the Central Government and their standing committee may adopt local regulations, which must not contravene the Constitution and the law and administrative rules and regulations.....” With the rapid transformation from a planned economy to a market economy, regional

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<sup>19</sup> Albert H. Y. Chen, *An Introduction to the Legal System of the People’s Republic of China* (HK: Butterworths, 1994) p.50.

<sup>20</sup> It is estimated that 68.5% of the national law and resolutions has a direct bearing on local authorities. See Liu Hailiang, *op.cit.* (note 2 above), p.35.

<sup>21</sup> It is estimated that 74% of the administrative regulations has a direct bearing on local authorities. See Liu Hailiang, *op.cit.* (note 2 above), pp.35-9.

<sup>22</sup> See Chen Sixi, ‘Lun Woguo Lifa Quanxian de Huafen,’ (‘On Classification of Legislative Powers in China’) *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 63, 1995, pp.12-9, and Li Yahong, ‘Dui Zhuaxing Shiqi Zhongyang yu Difang Lifa Guanxi de Sikao,’ (‘Thinking over the Central-Local Relationship in a Period of Reformation’) *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 69, 1996, pp.23-9, and Xu Anbiao, ‘Guanyu Zhongyang yu Difang Lifa Quanxian de Huafen,’ (‘Division of the Law Making Power between Central & Local Governments’) *Zhongguo Faxue* (Chinese Legal Sciences), Vol.71, 1996, pp.38-43, and Shen Guancheng, ‘Dui Difang Lifa Quan de Zai Renshi,’ (‘Re-recognition of the Power of Law-making by Local Governments’) *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 69, 1996, pp.16-22, and Xu Xianghua, ‘Lun Zhongyang yu Difang de Lifa Quanli Guanxi,’ (‘On the Relationship between Central & Local Authorities Regarding the Power of Law-making’) *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 78, 1997, pp.11-7. For an English source, see Perry Keller, ‘Sources of Order in Chinese Law’ *The American Journal of Comparative Law*, Vol. 42, 1994, pp.711-59.

<sup>23</sup> Mao Tsetung, *op.cit.* (note 1 above), p.294.

legislation initiatives have significantly increased. One figure shows that from 1979 to 1996, about 3300 pieces of regional regulations were enacted by the people's congress and its standing committee of provinces, autonomous regions and municipalities directly under the Central Government.<sup>24</sup>

Although the 1982 Constitution provides a legal base for regional legislation, there are many areas that remain unresolved. For example, it is not clear what matters should be legislated by national laws and what matters should leave for the regional legislation,<sup>25</sup> how to resolve conflicts between departmental regulation and regional legislation,<sup>26</sup> what should be a proper supervision system for regional legislation.<sup>27</sup> Right now, a Law on Legislation is being drafted to address some of these issues.<sup>28</sup>

## Legal Background of 'One Country, Two Systems'

The legal basis for the 'one country two systems' principle derives from Article 13 of the 1982 Constitution, which was originally devised to settle the Taiwan issue.<sup>29</sup> Article 13 stipulates that "the state may establish special administrative regions when necessary. The systems to be instituted in special administration regions shall be prescribed by the law enacted by the National People's Congress in the light of specific conditions." The article was intentionally left vague and wide open so as to accommodate further political compromise.<sup>30</sup> There is no provision in the Constitution as to how power should be divided between the central and a special administrative region.

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<sup>24</sup> Li Yahong, *op.cit.* (note 13 above), p.23.

<sup>25</sup> See articles in note 12.

<sup>26</sup> See Wu Gaosheng, 'Difang Xing Faqui yuGuowuyuan Bumen zhijian Maodun de Xiejue ('On Resolving Contradiction between Local Law and Regulations of Departments of State Council') *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 47, 1992, pp.65-7.

<sup>27</sup> Chen Janqing, 'Lun Woguo Lifa Jiandu de Quaxian he Chengxu,' ('On the Jurisdiction and Procedure of Legislative Supervision in Our Country') *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 65, 1995, pp. 27-31, and Y. Zhang, 'An Overview of Legislation and Its Supervisory System in China' in Yang Zhang, ed., *Comparative Studies on the Judicial Review System in East and Southeast Asia* (Netherlands: Kluwer Law International, 1997), pp.101-31.

<sup>28</sup> See Li Buyun, 'Guanyu Qicao Zhonghua Renmin Gongheguo Lifa Fa (Zhuanjia jianyi Gao) de Ruogan Wenti,' ('Several Issues on the Drafting Law of People's Republic of China on Legislation Proposed by Experts') *Zhongguo Faxue* (Chinese Legal Sciences), Vol. 75, 1997, pp. 11-9, and Qiao Xiaoyang, 'Zhiding Lifa Fa Cujun Yifa Zhiguo' ('Rule of Law through Making a Law on Legislation') *Xingzheng Faxue Yanjiu*, No. 3, 1997, pp.1-5.

<sup>29</sup> Peng Zhen, 'Report on the Draft of the Revised Constitution of the People's Republic of China,' in *The Laws of the PRC (1979-1982)*, pp. 397-419 at p.414.

<sup>30</sup> *Ibid.*



On December 18, 1984, a Joint Declaration on the Question of Hong Kong (Joint Declaration)<sup>31</sup> was signed between the Chinese and the British Government. This treaty outlines China's basic policies towards Hong Kong. According to the Joint Declaration, the PRC would establish a Hong Kong Special Administration Region upon resuming the exercise of sovereignty over Hong Kong. The HKSAR would "enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People's Government".<sup>32</sup> Also, it would "be vested with executive, legislative and independent judicial power, including that of final adjudication" and the laws currently in force in Hong Kong would remain basically unchanged.<sup>33</sup> The NPC was obligated to enact and promulgate a Basic Law for the HKSAR.

China started the Basic Law drafting process in 1985 by appointing a Basic Law Drafting Committee<sup>34</sup> and a Basic Law Consultative Committee<sup>35</sup>. The first draft of the Basic Law was published in April 1988 for public consultation. The final version was adopted on April 4, 1990.<sup>36</sup> The Basic Law contains 160 articles and three annexes.<sup>37</sup>

One of the controversies during the drafting process was the legal status of the Basic Law. From Hong Kong people's point of view, the Basic Law was a constitutional document, since it governed the basic political, legal and social structure of the HKSAR, just like the two colonial constitutional documents---The Letter Patents and the Royal Instructions.<sup>38</sup> However, a leading Chinese legal scholar, who was also a member of the Basic Law Drafting Committee, quickly pointed out that the Basic Law "is not in of itself a constitution.....it can be nothing but a statutory law".<sup>39</sup>

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<sup>31</sup> 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, reprinted in *The Basic Law of the Hong Kong Special Administrative Region Administrative Region of the People's Republic of China* (HK: One Country Two Systems Economic Research Institute Ltd., 1992) pp.89-116.

<sup>32</sup> Joint Declaration 3(2).

<sup>33</sup> Joint Declaration 3(3).

<sup>34</sup> With a membership of 59, of whom 23 were from Hong Kong (included numerous representatives of business interests) the rest were from China.

<sup>35</sup> With a membership of 180, it was drawn from various sectors and strata in Hong Kong.

<sup>36</sup> For a general overview of the drafting process, see Ming K. Chan & Devid J. Clark, eds., *The Hong Kong Basic Law: Blueprint for 'Stability and Prosperity' under Chinese Sovereignty?* (HK: Hong Kong University Press, 1991).

<sup>37</sup> See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, in *The Law of the People's Republic of China 1990-1992*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Science Press, 1993). For a general legal analysis of the Basic Law, see Yash Ghai, *Hong Kong's New Constitutional Order—the Resumption of Chinese Sovereignty and the Basic Law* (HK: Hong Kong University Press, 1997).

<sup>38</sup> See Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2nd ed., (Hong Kong: Longman Asia, 1994) pp. 42-49 and Yash Ghai, 'The Past and the Future of Hong Kong's Constitution,' *The China Quarterly*, Vol. 128, 1991, pp.794-813.

<sup>39</sup> See Zhang Youyu, 'The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, And Its Essential Contents and Mode of Expression,' *Journal of Chinese Law* vol. 2, 1988, pp.5-19 at p. 7.

Subsequently, Chinese legal scholars argued that the Basic Law should be classified as a basic statute with socialist characteristics for two main reasons. Firstly, it was enacted by the NPC, which is the highest law-making organ representing the whole nation's socialist will and interest. Secondly, its purpose was to primarily serve the interests of the PRC in developing socialism.<sup>40</sup> In the Chinese hierarchy of law, the Basic Law is in the second level below the Constitution, and is a national law having effect in both the HKSAR and other parts of China.

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<sup>40</sup> Xiao Weiyun ed., *Yiguo Liangzhi yu Xianggang Tebie Xingzhengqu Jibenfa* (One Country, Two Systems and the Basic Law of the Hong Kong Special Administrative Region) (HK: Wenhui Chupanshe, 1990), pp. 72-4.

## Chapter II: Boundaries

This chapter seeks to argue that one of the major purposes of the Basic Law is to give integrity to Hong Kong's legal system. Unlike the situation on the mainland China where all state organs follow the principle of democratic centralism, the relationship between the Central Government and the HKSAR is spelled out in the Basic Law. Three major areas will be studied in this chapter which are (1) the applicability of the Chinese Constitution in the HKSAR, (2) the application of national law in the HKSAR, and (3) the legislative power of the HKSAR. It will show that limits are laid down in the Basic Law so as to constrain Central Authorities' law-making power for the HKSAR.

### Applicability of the Chinese Constitution

During the Basic Law drafting process, there were queries about whether the Basic Law contradicted the Chinese Constitution.<sup>41</sup> The Preamble of the 1982 Constitution stipulates that "Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road....." Also, Article 1 of the Constitution states that the PRC "is a socialist state under the People's democratic dictatorship....." and Article 5 states that "[n]o laws or administrative or local rules and regulations may contravene the Constitution..." There is no provision in the Constitution that allows any exception. Those provisions of the Basic Law which ensure the continuation of a capitalist system in the HKSAR inevitably contradict the various socialist provisions of the Chinese Constitution.<sup>42</sup> In order to solve this problem, there were suggestions that the principle of 'one country, two systems' should clearly be stated in the Constitution.<sup>43</sup>

However, Chinese legal scholars argued that this issue should be dealt with from the Chinese legal point of view. They said that Article 31 was especially designed to allow an exception in the Constitution. Article 31 of the Constitution provided a sufficient exemption for the NPC to institute a system in a special administration region that was different from the socialist system.<sup>44</sup> Also, it has been

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<sup>41</sup> *The Consultation Report on The Draft Basic Law For Solicitation of Opinions Vol. 2* [hereinafter *The Basic Law Consultation Report*], The Consultation Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1988, pp.3-10.

<sup>42</sup> See William Wade, 'Opinion on the Draft Hong Kong Basic Law' in Hungdah Chiu, ed. *The Draft Basic Law of Hong Kong: Analysis and Documents* (Baltimore: School of University of Maryland, 1988), pp.82-3.

<sup>43</sup> One suggestion was to amend Article 13, adding a cause like 'not restrained by other provisions in the constitution' to Article 13. Another suggestion was to pass a resolution by the NPC, stating that 'SAR can adopt a system that is different from socialist system and is not restrained by the preamble and other provisions in the constitution.' See Wen Songran, 'Yiguo Liangzhi Chulun' ('A Brief Discussion on One Country Two Systems') in Zhang Fumei (ed.) *Taiwan Wenti Taolunji* (Discussion on Taiwan Issue) (Taiwan: Qianwei Chubanshe, 1988) pp.88-127.

<sup>44</sup> See Wang Shu-wen, *Xianggang Tebie Xingzhengqu Jibenfa Daolun* (Introduction to the Basic Law of the Hong Kong Special Administrative Region) (Beijing: Chungkung Chungyang Tanghsiao Chupanshe, 1990) pp.63-6, and Xiao Weiyun ed., *Yiguo Liangzhi yu Xianggang Tebie Xingzhengqu Jibenfa* (One Country, Two Systems and the Basic Law of the Hong Kong Special Administrative Region) (HK: Wenhui Chupanshe, 1990), pp.65-8.

argued that there are many instances in the Chinese Constitution which allow exceptions. For example, Article 19 of the Constitution stipulates that “[t]he state promotes the nationwide use of Putonghua”, but Article 4 states that “[a]ll nationalities have the freedom to use and develop their own spoken and written languages”.<sup>45</sup>

When the Basic Law was passed in 1990, a simultaneous resolution was passed by the NPC, stating that the Basic Law of the SAR “is constitutional as it is enacted in accordance with the Constitution of the People’s Republic of China and in light of the specific conditions of Hong Kong”.<sup>46</sup> The discussion here tries to illustrate that the Chinese government tends to use a pragmatic and instrumental approach to solve legal conflicts. This is possible because NPC is the supreme state organ. As one commentator put it:

“As the same body controls powers of interpretation of the constitution as well as exercise of the constitution (as far as article 31 is concerned), problem concerning contradiction of or conflict with the constitution should not arise in practice”.<sup>47</sup>

During the Basic Law drafting process, another major issue relating to the relationship between the Chinese Constitution and the Basic Law was the applicability of the Chinese Constitution to the HKSAR.<sup>48</sup> From the national point of view, Hong Kong, as an SAR under the authority of Central People’s Government, should abide by the Chinese Constitution. However, because of the policy of ‘one country, two systems’, not all provisions of the Chinese Constitution are applicable to the HKSAR, especially those relating to socialism. The problem is how to determine which provisions are applicable and which are not.<sup>49</sup>

Chinese legal scholars hold that not only Article 31 is applicable to HKSAR, but the Chinese Constitution as a whole is applicable.<sup>50</sup> The Preamble of the Basic Law clearly states that its legal basis is the Chinese Constitution.<sup>51</sup> Although it is difficult to spell out which provisions are applicable to the HKSAR and which are not,

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<sup>45</sup> Xiao Weiyun, *ibid.* p.66.

<sup>46</sup> Decision of the National People’s Congress on the Basic Law of the Hong Kong Special Administration Region of the People’s Republic of China, adopted by the Seventh National People’s Congress at its Third Session on 4 April 1990. in *The Laws of the People’s Republic of China 1990-1992*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Science Press, 1993) p.166.

<sup>47</sup> C. Y. Ho, ‘Draft Proposals on the Constitutional Format of Self-Administered Territory: Hong Kong,’ *Pai Shing*, Sept 16, 1983, quote in W. S. Clarke, ‘Hong Kong Under the Chinese Constitution,’ *Hong Kong Law Journal*, Vol. 14, 1984, pp.71-81 at p.78.

<sup>48</sup> *The Basic Law Consultation Report*, pp.10-2.

<sup>49</sup> There was an attempt to classify which provisions in the Chinese constitution were applicable and which were not applicable to the HKSAR. See Liao Yaozhu, ‘Zhongguo Xianfa he Qita Falu zai Xinaggang Tebie Xingzhengqu nei Shiyong Wenti’ (Application of The Chinese Constitution and Other Laws in the HKSAR) in Hunag Bingshen, ed., *Dangdai Guoji Fa* (Contemporary International Law) (HK: Wide Angle Press, 1988) pp.278-89. Her conclusion was that it was difficult to provide a list in the Basic Law because the Basic Law could not restrict the Chinese Constitution and the listing would be too complicated and technical.

<sup>50</sup> Wang Shu-wen, *op.cit.* (note 4 above) pp.66-71, and Lan tian, ed., *Yiguo Liangzhi Falu Wenti Yanju*, (The Study of Legal Problem of One Country Two Systems) (Beijing: Publishing House of Law, 1997) pp.41-2.

<sup>51</sup> The last paragraph of the Preamble of the Basic Law says: ‘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 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.’

it has been suggested that all constitutional provisions relating to safeguarding national security, unity and territorial integrity would apply to Hong Kong.<sup>52</sup> Specifically, they include provisions on the organisation and structure of a state, provisions on national defense and foreign affairs, and provisions on nationality and on the national flag, emblem and capital. They certainly include Article 57 which stipulates that the NPC of PRC is the highest organ of state power and Article 58 which states that the NPC and its Standing Committee exercise the legislative power of the state.

However, it has been argued that one important principle of the applicability of the Chinese Constitution in the HKSAR is that it should be according to the policy of ‘one country, two systems’.<sup>53</sup> The Basic Law is ‘constitutional’ and is the legal basis for the ‘one country, two systems’ principle. Even though the NPC is the highest organ of state power and the NPC and its Standing Committee exercise the legislative power of the state, the NPC and its Standing Committee must also abide by the Basic Law. One would argue that NPC is the highest organ of state power, therefore it should be omnipotent. However, this is only a misconception. In the Preamble of the Chinese Constitution, it states that “.....all state organs.....must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.” Also, Article 5 of the Constitution stipulates that “[a]ll state organ.....must abide by the Constitution and the law”.

Even though the relationship between the Chinese Constitution and the Basic Law significantly affects the implementation of the Basic Law, it is not addressed in the Basic Law.<sup>54</sup> As a result of this lacuna, Hong Kong people have looked for other ways to protect their autonomy. One way has been to limit the application of Chinese national law to the HKSAR.

## The Application of Chinese National Law

Article 18 of the Basic Law specifies the legislative powers of Central Authorities in relation to the HKSAR. It was one of the most controversial articles during the Basic Law drafting process. In order to get a good understanding of the article, one should look at the history on how the article’s wording had been decided.

In the first Draft of the Basic Law, the article was numbered as Article 17. It stipulated that laws of the HKSAR would be the Basic Law, the laws previously in force in Hong Kong and the laws enacted by the HKSAR. However, Article 17 also stipulated that laws enacted by the National People’s Congress or its Standing Committee which related to defense and foreign affairs, national unity and territorial

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<sup>52</sup> Wang Shu-wen, *op.cit.* (note 4 above) p.69.

<sup>53</sup> Wang Shu-wen, *op.cit.* (note 4 above) p. 68.

<sup>54</sup> There was a funny way to look at this issue. ‘Some people compare the Basic Law to an umbrella and the Chinese constitution to the sun. The sun is shining all over the territory but its rays cannot penetrate the area sheltered by the umbrella, i.e. the Basic Law. In other words, the provisions concerning the SAR and its scope of autonomy will be implemented in accordance with the Basic Law and not with the provisions of the Chinese constitution. In areas not stipulated by the Basic Law, the relevant provisions of the Chinese constitution will be automatically applied.’ Quote in The Basic Law Consultation Report, p.11. However, one must not forget the wind can easily take the sun’s position and blows away the umbrella.

integrity or outside the limits of the high degree of autonomy of the HKSAR, should be applied to the territory either through directives or decree of the State Council after consultation with the committee for Basic Law. In cases of emergency, the consultation provision could be derogated from.<sup>55</sup>

Several issues arose. Firstly, whether Article 17 fully accorded with the Joint Declaration. The Joint Declaration has clearly specified three sources of law for the HKSAR: the Basic Law, the laws previously in force in Hong Kong and laws enacted by the HKSAR legislature. There is no mention of other categories of laws like Chinese national law that can be applied to the HKSAR in the Joint Declaration.

Secondly, what was meant by “other laws which give expression to national unity and territorial integrity.” There were great concerns that the Chinese government would widely interpret these concepts of national unity and territorial integrity.<sup>56</sup>

Thirdly, there was great fear that the State Council’s power to apply laws to the HKSAR by way of directives and direct decree would seriously undermine the high degree of autonomy of the HKSAR.<sup>57</sup> In addition, there was concern about enforcement of Chinese laws in the HKSAR because of the great difference between the legal system in China and Hong Kong.<sup>58</sup>

The second draft of the Basic Law was issued for public consultation in February 1989. Article 17 of the first draft was renumbered as Article 18 in the second draft. There were several major changes in the new article including (1) the wording of “Laws enacted by the National People’s Congress or its Standing Committee” was changed to ‘National Laws’; (2) there was no mention of concepts such as ‘national unity’ and ‘territorial integrity’; (3) only National Laws listed in Annex III of the Basic Law could be applied to the HKSAR and the listed laws should confine to those to defense and foreign affairs as well as other laws outside the limits of the autonomy of the Region as specified by the Basic Law (4) the meaning of ‘cases of emergency’ was more clearly defined as in the ‘case of a state of war’ and in

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<sup>55</sup> Exact wording is as follows:

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

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

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

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

<sup>56</sup> See Albert H. Y. Chen, ‘The Relationship Between the Central Government and the SAR’ in Peter Welsey-Smith & Albert H. Y. Chen eds., *The Basic Law and Hong Kong’s Future* (HK: Butterworths, 1988) pp.107-40 at 126.

<sup>57</sup> See Marin Lee and Szeto Wah, *The Basic Law: Some Basic Flaws* (HK: Kasper Printing Press, 1988), pp. 16-7.

<sup>58</sup> *Ibid.* p.16.

the ‘case of turmoil within the HKSAR’; and (5) there was no mention of State Council’s power to issue directives to the HKSAR.

The final version of Article 18 of the Basic Law was similar to that in the second draft, except for some further changes in wording.<sup>59</sup> By looking at the final version, one will find that the scope of national laws that can be applied to the HKSAR has been narrowed and the ways in which they can be applied to the HKSAR has been clarified. One could still argue though, as long as the Chinese Constitution as a whole (contains provisions relating to safeguarding national security, unity and territorial integrity) is applicable to the HKSAR and the NPC is the supreme power organ, the limits set out here to restrict national authorities’ legislative power for Hong Kong are vulnerable and dubious. However, the real purpose of Article 18 is to limit NPC and its Standing Committee’s capacity to make laws for the HKSAR. As mentioned above, all state organs must abide by the Basic Law and their legislative power shall not exceed the limits that are stipulated in the Basic Law.

## **The Legislative Power of the HKSAR**

Article 17 of the Basic Law stipulates that the HKSAR shall be vested with legislative power. Compared to the people’s congresses of province and autonomous regions in the PRC, the HKSAR enjoys a greater autonomy over legislative power.<sup>60</sup> The Legislature of the HKSAR can enact any law provided that it does not contravene the Basic Law. The HKSAR can even enact law on matters outside the limits of the autonomy of the Region. Article 23 states that the HKSAR shall enact laws to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government. According to Article 17, all laws enacted by the HKSAR must be reported to NPCSC. The reporting process does not mean that the approval of the NPCSC is needed. The NPCSC has the power to return the law to the HKSAR if, after consulting the Committee of the Basic Law, it considers that the law is not in conformity with the provisions of the Basic Law regarding matters within the responsibilities of the Central Government or regarding the relationship between the Central Government and the Region.

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<sup>59</sup> Final wording of Article 18 is as follows:

The laws in force in the 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 the 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 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 defense 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 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 Peoples government may issue an order applying the relevant national laws in the Region.

<sup>60</sup> For a detail comparison of the legislative power between the HKSAR and other regions in the PRC, see Lan tian, *op.cit.* (note 10 above) pp.315-26.

According to the Article 67(8) of the Chinese Constitution, the NPCSC has the power to annul any regional legislation that contravene the Constitution and law or the administrative rules. Here, one again, the NPCSC's power is constrained by the Basic Law. The NPCSC can only return laws in two special areas mentioned above.

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## Chapter III: National Lawmaking for Hong Kong

This chapter looks at various legislative activities for the HKSAR by the Central Government since the promulgation of the Basic Law. This chapter first examines the lawmaking activities for the HKSAR by the NPC and its Standing Committee. A major problem of Chinese legal system has often been one of correctly identifying where is the law. Lawmaking in the PRC has been very fluid and unstructured.<sup>61</sup> This has also manifested in the national lawmaking for the HKSAR. Laws enacted by the NPC and its Standing Committee can take at least seven different names, namely: (1) law (*fa*), (2) resolution (*jueyi*), (3) decision (*jueding*), (4) regulation (*tiaoli*), (5) provision (*guiding*), (6) procedure (*banfa*), and (7) method (*fangan*).<sup>62</sup> The State Council is also responsible for making some laws for the HKSAR, which will be discussed at the end of this chapter.

### Lawmaking by the NPC and its Standing Committee for the HKSAR

Since the promulgation of the Basic Law, various decisions for the HKSAR had been passed either by the NPC or its Standing Committee. A major group of decisions relates to the Preparatory Committee.

#### (I) Decisions Relate to the Preparatory Committee

Several decisions were adopted by the NPC at the same time as the Basic Law was passed in 1990.<sup>63</sup> Among them, a decision on the method for formation of first government and legislature which stated that the NPC was to establish a Preparatory Committee for the HKSAR within 1996.<sup>64</sup> According to the decision, the Preparatory Committee “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 and shall prescribe the specific method for forming the First Government and the first legislative Council in accordance to this Decision.”<sup>65</sup>

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<sup>61</sup> See Guo Daohui, ‘Lifa Wuxu Xiansiang Jiqu Duice’ (Disorder in Legislation and Its Improvement Strategy) in Guo Daohui, *et. al.*, eds., *Lifa – Yuanze, Zhidu, Jishu* (Legislation – Principle, Institution and Techniques) (Beijing: Beijing Daxue Chubanshe, 1994) pp.197-211 and Perry Keller, ‘Source of Order in Chinese Law,’ *The American Journal of Comparative Law*, Vol. 42, 1994.

<sup>62</sup> Zhou Wangsheng, *Lifa Xue* (On Legislative Studies) (Beijing: Beijing DaXue Chubanshe, 1988) p.419.

<sup>63</sup> They included (1) a decision concerning the constitutionality of the Basic Law, (2) a decision on the establishment of the HKSAR, (3) a decision on the method for the formation of the first HKSAR government, (4) a decision on the establishment of the committee for the Basic Law. See *The Laws of the People’s Republic of China 1990-1992* [hereinafter *The Laws of the PRC 1990-1992*] compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Science Press, 1993), pp.162-7.

<sup>64</sup> 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 by the Seventh NPC at its Third session on April 4 1990, *The Laws of the PRC 1990-1992*, p. 162.

<sup>65</sup> *Ibid.* The Chinese wording is different which is ‘shall be responsible for matters relating to the preparation of the establishment of the HKSAR and shall prescribe the specific method for

Since the last Governor of Hong Kong Christopher Patten introduced a constitutional reform proposal in 1992, the relationship between the Chinese and British Government had deteriorated. Furthermore, seventeenth rounds of Sino-British negotiations on Patten's reform proposals in 1993 failed to resolve the differences between the two governments. In view of this, the Chinese government began to establish a new set of legal and political institutions in order to carry out Chinese policy. They became known collectively as the 'Second Stove' for the HKSAR.<sup>66</sup> A preparatory organ, known as the Preliminary Working Commission for the Preparatory Committee (PWC), was established by two decisions adopted by the NPC and NPCSC in 1993.<sup>67</sup> The PWC was a working commission under the NPCSC. The PWC created a lot of controversies in Hong Kong<sup>68</sup>, the major one being its suggestion regarding the setting up of a provisional legislature in the HKSAR after 1997. A PWC report, which contained forty-six pieces of suggestions and decisions, was presented to the NPCSC on December 26, 1995.

The Preparatory Committee (PC) was established on January 26, 1996. A report about the working of the PC (PC Working Report) was submitted to the NPC for examination (*shenyi*) on March 1997.<sup>69</sup> The report was later ratified (*piehun*) by an NPC resolution<sup>70</sup> (Resolution on PC Report). The report contained decisions, resolutions (PC Decisions and Resolutions) and a series of suggestions including: (1) Measures for the Selection of the First Chief Executive of the HKSAR, (2) Decision

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forming the First Government and the first legislative Council in accordance to this Decision' According to a decision adopted by the NPCSC on June 28, 1990, in case of discrepancy between the Chinese and English texts, the Chinese text will prevail. See Decision of the Standing Committee of the National People's Congress on the English Text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, in *The Laws of the PRC 1990-1992*, p.167.

<sup>66</sup> See Lo Chi-kin, 'From "Through Train" to "Second Stove"', in Joseph Y. S. Cheng & Sonny S. H. Lo, eds., *From Colony to SAR: Hong Kong's Challenges Ahead* (HK: Chinese University Press, 1995) pp. 25-37.

<sup>67</sup> The first decision, Decision of the National People's Congress on Authorizing the Standing Committee of the National People's Congress to Establish a Preparatory Organ for the Preparatory Committee of the Hong Kong Special Administrative Region, was adopted at the First session of the Eighth NPC on March 31 1993. The second decision, Decision of the Standing Committee of the National People's Congress to Establish of a Preliminary Working Commission for the Preparatory Committee of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, was adopted at the Second session of the Eighth NPCSC on July 2 1993. Both decisions are in *The Laws of the People's Republic of China 1993* [hereinafter *The Laws of the PRC 1993*] compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Science Press, 1995), p. 376 & 378.

<sup>68</sup> Its legal status was also queried by Hong Kong people because the PWC was not mentioned in the Basic Law.

<sup>69</sup> Qian Qichen, 'Report on the Work of the Preparatory Committee for the Hong Kong Special Administration Region Under the National People's Congress', submitted at the Fifth session of the Eighth NPC on March 10, 1997, *Zhonghua Remin Ggongheguo Qquanquo Rremin Diabiao Dahui Chungwu Weiyuanhui Gongbao* (*Gazette of the Standing Committee of the National People's Congress of the People's Republic of China, hereinafter Gazette of NPCSC*) No. 2, 1997, pp.302-10.

<sup>70</sup> Resolution of the Fifth Session of the Eighth National People's Congress Concerning the Report on the Work of the Preparatory Committee for the Hong Kong Special Administration Region Under the National People's Congress, adopted at the Fifth session of the Eighth NPC on March 14 1997, *Gazette of NPCSC*, No.2, 1997, p.301.

on the Establishment of a Provisional Legislative Council of the HKSAR, (3) Measures for the Formation of the Provisional Legislative Council, (4) Recommendations on the implementation of the PRC Nationality Law in the HKSAR and (5) Recommendations on the Treatment of Laws Previously in Force in Hong Kong.<sup>71</sup>

The legality of the Resolution on PC Report became a controversial subject especially with regards to the establishment of the provisional legislature. In an influential and controversial case, *HKSAR v Ma Wai Kwan, David*,<sup>72</sup> heard before the Court of Appeal less than a month after China resumed the exercise of sovereignty over Hong Kong, the Hong Kong government argued that the Resolution on PC Report ‘has the effect of law’.<sup>73</sup> The Chief judge who heard the case considered the Resolution on PC Report as ‘a sovereign act which the HKSAR courts cannot challenge’.<sup>74</sup>

From the beginning, there were uncertainties concerning the status and power of the PC. The Chairman of the PC, Mr. Qian Qichen<sup>75</sup>, pointed out at the opening section of the committee that “the Preparatory Committee is not a *working organ* under the NPC, but is itself an *organ of power* (italics added).”<sup>76</sup> In the PC Working Report, Mr. Qian Qichen reaffirmed that PC “is an *organ of power*” and “has been *authorised* by the NPC to make *decisions* on matter relating to the establishment of the HKSAR” (italics added).<sup>77</sup> According to Article 70 and 71 of the Chinese Constitution, the NPC can establish regular committees, special committees and investigation committees. The PC was clearly a special committee under NPC, according to Article 70 again, which only had the function “to examine, discuss and draw up relevant bills and draft resolutions under the direction of the NPC and its Standing Committee.”

If decisions and resolutions made by the PC were to have any legal effect, it would mean that the PC had been delegated by the NPC to perform a legislative role. China is a unitary state and there is only one legislative power which belongs to the

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<sup>71</sup> Other decisions and resolutions were (1) Decision on the Public Holiday Schedule in the Latter Half of 1997 and the Entire Year 1998, (2) Decision on Setting Up a Celebration Committee, (3) Resolution on the Suggested Principles for the Method of Formation of the Selection Committee, (4) Resolution on Erecting a Monument Commemorating Hong Kong Return to the Motherland, (5) Resolution on Issues Related to Textbooks, (6) Provisional Measures on the Use of the Regional Flag and Emblem of the HKSAR, (7) Decision on Legislative Issue relating to Article 23 of the Basic Law, (8), Decision on Establishment of Provisional District Organisations of the HKSAR, (9) Decision on the Commencement of Work by the Chief Executive and the Provisional Legislative Council of the HKSAR before 30 June 1997, and (10) Decision on Oaths of Office of Relevant Persons of the HKSAR.

<sup>72</sup> *HKSAR v Ma Wai Kwan David*, [1997] 2 HKC pp.315-72.

<sup>73</sup> HKSAR’s Submissions in the High Court of the HKSAR Court of Appeal Criminal Case No 1 of 1997 between HKSAR and Ma Wai-kwan, David, p.23.

<sup>74</sup> note 12 above, p.342.

<sup>75</sup> Who is also China’s Foreign Secretary.

<sup>76</sup> Quote in Albert H Y Chen, ‘Legal Preparation for the Establishment of the HKSAR: Chronology and Selected Documents’[hereinafter ‘Legal Preparation of the HKSAR’], *Hong Kong Law Journal*, Vol. 27, Part 3, 1997, pp. 405-431 at p.407.

<sup>77</sup> Qian Qichen, (note 9 above) p. 305.

NPC and its Standing Committee.<sup>78</sup> Institutions like the State Council, the people's congress of provinces and municipalities, and the people's congress of autonomous region and bigger cities can perform legislative functions, but they do not enjoy independent legislative power.<sup>79</sup> In the past, the NPC has made several legislative delegations to the NPCSC, the State Council, Provinces and bigger cities.<sup>80</sup> These have been criticised as too vague, unclear, without time limits and lack of supervision procedure.<sup>81</sup> However, the 1990 decision on the method for formation of first government and legislature was by no means a power-conferring or a legislation-delegating decision. Also, it is inconceivable that the NPC would have delegated some legislative power to a special committee.

To argue that the Resolution on PC Report has the effect of law is also questionable. The NPC is the highest power organ in China and is conferred by the Constitution to exercise four major types of power, which are law-making power (*Lifa Quan*), decision-making power (*Jueding Quan*), appointment power (*Renmian Quan*), and supervision power (*Jiandu Quan*).<sup>82</sup> The NPC has used its decision-making powers to carry out a variety of functions such as approval of the national economic plan and state budget and reports on their implementation, approval of supplements and amendments to existing laws, making legislative delegations and important policy decisions.<sup>83</sup>

Also, the NPC is organised according to the principle of unity of deliberation and execution (*yixing heyi*), which means that the NPC enjoys both legislative and executive power. Approval of a report could only have a meaning of acknowledgment, consent or just an expression of opinion. The NPC has used its decision power to provide policy guidance to the country or just to express policy position, such as decisions relating economic structure reform and education structure reform. These policy decisions have the force of law within China because all state organs in China must adhere to the principle of democratic centralism. But the relationships between the Central and HKSAR is different, which is defined in the Basic Law. Therefore, one could not argue that any resolution made by NPC has the effect of law, at least in the HKSAR.

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<sup>78</sup> Cai Dingjian, 'Lifa Quan yu Lifa Quanxian' ('Legislative Power and the Legislative Competence') *Faxue Yanjiu* (CASS Journal of Law) No.2, 1993, p. 3-9 and Guo Daohui, 'Woguo Yiyuanxing Lifa Tizhi' ('China's Unitary Legislative Structure') in Guo Daohui, *et. al.*, eds., *Lifa - Yuanze, Zhidu, Jishu* (Legislation - Principle, Institution and Techniques) (Beijing: Beijing Daxue Chubanshe, 1994) pp.83-94.

<sup>79</sup> This is often referred as the 'unitary, two level and multi-layered' (*yiyuan, erji, duoceng*) legislative structure. See Liu Shengping, 'Dangdai Woguo Lifa Tizhi Yanjiu' ('A Study of China's Contemporary Legislative Structure') in Guo Daohui *et. al.*, *ibid.*, pp.95-109.

<sup>80</sup> All together there were eight times, two for the NPCSC, three for the State Council, two for provinces and one for bigger cities. See Li Cheng & Wan Qigang, 'Luelun Woguo Dangqian Lifa zhong Cuzai de Wenti' ('A Brief Analysis of Issues in Recent China Legislation') *Zhongwai Faxue* (Peking University Law Journal), Vol.44, 1996, pp.43-46 and Zhou Wangsheng, ed., *Lifa Xue Jiaocheng* (The Curriculum of Legislative Studies) (Beijing: Falu Chubanshe, 1995) pp.167-83.

<sup>81</sup> Zhou Wangsheng, *ibid.*, pp.178-80.

<sup>82</sup> Cai Dingjian, *Zhongguo Renda Zhidu* (The People's Congress in China) (Beijing: Shehui Kexue Wenxian Chubanshe, 1996) pp. 232-349.

<sup>83</sup> *Ibid.*, pp.269-87.

It should be added that the passing of the Resolution on PC report didn't follow the NPC's standard law-making procedure,<sup>84</sup> the PC Working Report was not presented to the NPC as a bill and it had not been scrutinized by the Law Committee of the NPC. Although one can argue that law-making activities in the mainland China do not usually follow the standard procedure, many important laws enacted for HKSAR by the NPC and its Standing Committee, including those discussed later, have actually followed the standard law-making procedure.

On July 3, 1997, a decision was passed by the NPCSC to conclude the work of the Preparatory Committee.<sup>85</sup>

## **(II) Decision to Abolish the Through Train**

On August 31, 1994, a decision was made by the NPCSC, in response to a motion raised by thirty-two delegates, to dismantle the last Legislative Council, Urban Council and Regional Council and District Councils that were set up by the British government before July 1, 1997.<sup>86</sup> The motion was scrutinized by the Law Committee of the NPC. This decision contravened the Basic Law because it ruled out the 'through train' arrangement for all political institutions in the Basic Law. The decision was in fact an amendment to the Basic Law.

## **(III) Explanation on Nationality Law**

On May 15, 1996, an explanation was passed by the NPCSC concerning the implementation of the Nationality Law of the PRC in the HKSAR (Explanation on Nationality Law).<sup>87</sup> The explanation was based on suggestions put forward by the Preparatory Committee. The explanation first clarifies that all Hong Kong residents who are of Chinese descent and born in China (including Hong Kong) who satisfy the conditions set out in the Nationality Law of the PRC for Chinese nationality are Chinese nationals. It affirms that Hong Kong Citizens who hold 'British Dependent

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<sup>84</sup> The law-making procedure of the NPC is governed by the Procedural Rules of the NPC which supplement the Organic Law of the NPC. See Perry Keller, 'Sources of Order in Chinese Law' *The American Journal of Comparative Law*, Vol. 42, 1994, pp.711-59 and Cai Dingjian, *op. cit.* (note 22 above) pp. 255-68.

<sup>85</sup> Decision of the Standing Committee of the National People's Congress on Approving Proposal for Concluding the Work of the Preparatory Committee for Hong Kong Special Administrative Region Under the National People's Congress, adopted at the Twenty-sixth session of the Eighth NPCSC, *Gazette of NPCSC*, no. 4, 1997, p.509-510.

<sup>86</sup> Decision of the Standing Committee of National People's Congress on the Proposal submitted by Mr. Zheng Yaotang & other Thirty-one Deputies to the National People's Congress, adopted at the Ninth session of the Eighth NPCSC on August 31 1994, in *The Laws of the People's Republic of China 1994*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Science Press, 1996) p.220.

<sup>87</sup> Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in Hong Kong Special Administrative Region, adopted at the Nineteenth session of the Eighth NPCSC on May 15 1996, *Gazette of NPCSC*, No.4, 1996, pp.97-8. For an unofficial English translation, see 'Legal Preparation of the HKSAR' (note 16 above), pp.415-6.

Territories Citizens passport' or 'British nationals (Overseas) passport 'are Chinese nationals. However, it does not recognise British status acquired by Hong Kong residents through the 'British Nationality Selection Scheme'. Also, it allows Chinese nationals in the HKSAR who have a right of abode in a foreign country to use travel documents issued by foreign governments to travel to other countries, but stipulates that the foreign passport will not ensure consular protection in the HKSAR.

In the explanation, there is an 'accommodating' interpretation (*biantong jieshi*) of the Chinese Nationality Law. It allows Chinese nationals in the HKSAR, with a report with valid documents, to change their nationality to the responsible HKSAR organ.<sup>88</sup> In other words, Chinese nationals in the HKSAR who have foreign passports can maintain their Chinese nationality as long as they do not report it to the responsible HKSAR organ. This interpretation actually contravenes Article 9 of the Nationality Law of the PRC, which stipulates that "[a]ny Chinese National who has settle abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality."

Obviously, the Explanation on Nationality Law is more like making new rules than offering a legislative interpretation to the Nationality Law. In 1981, a resolution relating to interpretation of laws was passed which authorised the NPCSC to further define and to add additional stipulations to existing laws.<sup>89</sup> In the 1982 Constitution, the NPCSC was entrusted with the power to interpret laws. The NPCSC seldom exercises its power to interpret law<sup>90</sup>. In China, legislative interpretation is considered as a way to supplement or amend legislation, which is called 'invisible amendment' (*wuxing xiuzheng*).<sup>91</sup>

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<sup>88</sup> Qiao Xiaoyang, 'Explanation on Draft Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in Hong Kong Special Administrative Region', *Gazette of NPCSC*, No.4, 1996, pp.98-100.

<sup>89</sup> Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law, adopted at Nineteenth meeting of Fifth NPCSC, *The Laws of the People's Republic of China 1979-1982*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Foreign Language Press, 1987) pp.251-2.

<sup>90</sup> Since 1979, many legislative clarifications have been issued by the Legislative Affairs Commission of the NPCSC, but these legislative interpretations have no legal effect. See Cai Dingjian & Liu Xinghong, 'Lu Lifa Jieshi' ('On Legislative Explanation') *Zhongguo Faxue* (Chinese Legal Sciences) Vol. 56, 1993, pp.36-43. There are some discussions on whether the NPCSC should have the power to interpret constitution and laws, see Yuan Jiliang, 'Lun Lifa Jieshi Zhidu Zhifei' ('On Weak Points of Legislation Interpretation System') *Zhongguo Faxue* (Chinese Legal Sciences) Vol. 60, 1994, pp.24-29, Zhou Zhenxiao, 'Ye Lun Lifa Jieshi' ('Also on Legislative Interpretation') *Zhongguo Faxue* (Chinese Legal Sciences) Vol. 63, 1995, pp. 30-3, Yuan Jiliang, 'Zai Lun Lifa Jieshi Zhidu Zhi Fei' ('Continued Comments on the Loopholes of the Legislative Explanatory System') *Zhongguo Faxue* (Chinese Legal Sciences) Vol. 65, 1995, pp.44-7.

<sup>91</sup> See Guo Daohui, 'Falu Xiugai Fanglue Shuping' ('Comments on Method of Legislative Amendment') in Guo Daohui, *et. al.* (note 18 above) pp. 269-87.

The Basic Law specifies the conditions under which national laws in Annex III can be added and deleted by the NPCSC. This states that the NPCSC can only add or delete national laws after consulting the Committee of Basic Law and the Government of the HKSAR. However, there is a question whether subsequent amendments, interpretations and even regulations of the National Laws in Annex III are subject to the same procedure. It would seem from the procedure used for the Explanation on Nationality Law, that the answer is yes. It was argued that as the explanation was a part of the Nationality Law of the PRC, it automatically applied in the HKSAR.<sup>92</sup>

#### **(IV) Decision on Law Previously Enforced in HK**

On February 23, 1997, a decision was passed by NPCSC on the treatment of the Laws previously in Hong Kong (Decision on Treatment of Laws).<sup>93</sup> The decision embodies recommendations of the PWC and the Preparatory Committee. The decision consists of four major parts: (1) the first part sets out some principles regarding the adaptation of laws previously in Hong Kong; (2) annex 1 lists fourteen ordinances to be repealed totally<sup>94</sup>; (3) annex 2 lists ten ordinances to be repealed in sections<sup>95</sup>; and (4) annex 3 provides some rules for the interpretation and application of laws that are adopted.

According to Article 160 of the Basic Law, the laws previously in force in Hong Kong shall be adopted as laws of the HKSAR except those which the NPCSC declares to be in contravention of the Basic Law. However, the Decision on Treatment of Laws was not only a legal determination of which laws actually contravene the Basic Law, it also served other legal and political purposes.<sup>96</sup>

First, the NPCSC was in fact making new rules in the relationship between the National Laws and Laws in the HKSAR. As discussed in Chapter 2, the HKSAR enjoys a wide range of legislative power. The NPCSC only has the power to return a HKSAR law if it considers the law not to be in conformity with the provisions of the

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<sup>92</sup> See Cao Zhi, 'Explanation of the Draft Decision of the Standing Committee of the National People's Congress on Adding and Taking out the National Law Listed in Annex III of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,' *Gazette of NPCSC*, No.4, 1997, pp.507-8 at p.508.

<sup>93</sup> Decision of the Standing Committee of the National People's Congress on Dealing with the Laws Previously in Force in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Twenty-fourth session of the Eighth NPCSC on February 23 1997, *GSCNPC*, no.2, 1997, pp.23-8. For an unofficial English Translation, see 'Legal Preparation of the HKSAR' (note 16 above) pp.419-24.

<sup>94</sup> They include: the Application of English Ordinance, three electoral ordinances relating to Pattern's political reform, several ordinances relating to British Garrison, two ordinances relating to British Nationality, and two ordinances deal with the writ of habeas corpus. For a full list, see 'Legal Preparation of the HKSAR' (note 16 above) p.421.

<sup>95</sup> They include: the Immigration Ordinance, four ordinances deal with election to District and Municipal Councils, the Bill of Rights Ordinance, the Personal Data (Privacy) Ordinance, the Societies Ordinance, and the Public Order Ordinance. For a full list, see 'Legal Preparation of the HKSAR' (note 16 above) p. 422.

<sup>96</sup> See also Yash Ghai, 'The Continuity of Laws and Legal Rights and Obligations in the SAR', *Hong Kong Law Journal*, Vol. 27, No. 2, 1997, pp.136-51.

Basic Law regarding matters within the responsibilities of the Central Government or regarding the relationship between the Central Government and the Region. Article 4(1) of Decision on Treatment of Laws stipulates that laws relating to foreign affairs in the HKSAR shall conform the Central People's Government's international obligation and duties, and if they are contradict the National Laws applied in the HKSAR, the National Laws shall prevail. The Central Government was actually adding two new restrictions on lawmaking power of the HKSAR.

Second, laws previously in force in Hong Kong were repealed partially or totally because of reasons other than that they were in contravention with the Basic Law. For example, laws and sections of laws relating to Patten's electoral reform were repealed because they were politically opposed by the Chinese Government. Also, sections in the Societies Ordinance and the Public Order Ordinance were repealed because there were some major amendments to them during the 1990s. The NPCSC repealed the major amendments to the Societies Ordinance since July 17, 1992 and to the Public Order Ordinance since July 27, 1995. As one critic put it, the NPCSC was actually making rules on how laws of the HKSAR should be modified.<sup>97</sup>

#### **(V) Decision on Annex III of the Basic Law**

On July 1, 1997, a decision was passed by the NPCSC in relation to a change of the national laws listed in Annex III of the Basic Law (Decision on Annex III).<sup>98</sup> The decision was based on a recommendation put forward by the Preparatory Committee. Five new national laws relating to foreign affairs and defense were added to and one national laws was deleted from the Annex III.<sup>99</sup> It was argued that these new national laws would be essential for Chinese Central Government to carry out the foreign affairs and national security functions for the HKSAR.<sup>100</sup> According to Article 18 of the Basic Law, the procedure for adding and deleting national laws listed in Annex III requires a consultation with the Committee for the Basic Law and the Government of the HKSAR. However, the Committee for Basic Law was only

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<sup>97</sup> *Ibid.*, p. 145.

<sup>98</sup> Decision of the Standing Committee of the National People's Congress on Adding and Taking out the National Law Listed in Annex III of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Twenty-sixth session of the Eighth NPCSC on July 1 1997, *Gazette of NPCSC*, No.4, 1997, pp.506.

<sup>99</sup> The five new national laws were (1) Law of the People's Republic of China on the National Flag, (2) Regulations of the People's Republic of China Concerning Consular Privileges and Immunities, (3) Law of the People's Republic of China on the National Emblem, (4) Law of the People's Republic of China on the Territorial Sea and Contiguous Zone, and (5) Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administration Region. The deleted one was the 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. These new set of laws was noticed by The Chief Executive of the HKSAR, Mr. Tung Chee-hwa, and applied to HKSAR on and from 1 July 1997, see *Legal Supplement No.2 to The Government of the Hong Kong Special Administrative Region Gazette NO. 1*, 4 July 1997, p. B118-9.

<sup>100</sup> Cao Zhi, 'Explanation of the Draft Decision of the Standing Committee of the National People's Congress on Adding and Taking out the National Law Listed in Annex III of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China', *Gazette of NPCSC*, No.4, 1997, pp.507-8.



appointed at the same meeting as the NPCSC passed the Decision on Annex III. Hong Kong public was not fully informed when the NPCSC made the change. The whole process was only later reported by a pro-Beijing newspaper<sup>101</sup> in Hong Kong that the Committee for Basic Law held a meeting immediately after its appointment and agreed upon the change to the list of laws in the Annex III.

## (VI) The Garrison Law of the HKSAR

The Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administration Region (the Garrison Law) was passed by the NPCSC in December 1996.<sup>102</sup> Unlike the decisions discussed above, the Garrison Law is a piece of formal legislation especially designed for HKSAR. It illustrates how two different legal systems collide and how conflicts are being resolved.

Around the middle of 1996, there were news reports that the Draft Garrison Law would be discussed by the Preparatory Committee. Despite a call for public consultation by the Hong Kong Legislative Council<sup>103</sup>, no public consultation was held in Hong Kong for such an important law.<sup>104</sup> The draft Garrison Law was unofficially published by a local newspaper in October 1996.<sup>105</sup>

Under Article 14 of the Basic Law, Chinese military forces stationed in the HKSAR are to abide by both national laws and laws of Hong Kong. The central controversy of the Garrison Law is the judicial jurisdiction over members of the Hong Kong Garrison. The common law tradition recognises the importance of the civil court's jurisdiction over military personnel. Military personnel are regarded as ordinary citizens in uniform.<sup>106</sup> However, military law in China stresses that the jurisdiction of the military or civil courts depends on the identity of the suspects.<sup>107</sup> If a alleged criminal offense is committed by the People's Liberation Army (PLA), he should be tried by the military courts.<sup>108</sup>

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<sup>101</sup> See *Wen Wei Po*, Hong Kong, July 2, 1997.

<sup>102</sup> Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administration Region, adopted at the Twenty-third session of the Eighth NPCSC, *Gazette of NPCSC*, No.9, 1996, p.3-8. English translation in *Legal Supplement No.2 to The Government of the Hong Kong Special Administrative Region Gazette No. 1*, 4 July 1997, p. B132-B141.

<sup>103</sup> In July 1996, the Hong Kong Legislative Council had a motion debate on 'Stationing of Chinese Armed Forces in Hong Kong After 1997', see *Official Record of Proceeding of the Sitting of the Legislative Council*, 10 July 1996, pp.342-8.

<sup>104</sup> Under Hong Kong People's pressure, several closed door consultative meetings were held at the end of Nov. 1996. These meetings invited Hong Kong Bar Association, Hong Kong Law Society, Hong Kong NPC Representatives, Hong Kong Representatives of the People's Political Consultative Committee and some pro-Beijing politicians.

<sup>105</sup> 'Draft Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administration Region' *Ming Pao*, 24 October 1996.

<sup>106</sup> 'A soldier is, for most purposes, a civilian in uniform. Although he is subject to certain special rule of law, he is not exempt from the general law of the land.' Dicey, *Introduction to the Study of the Law of the Constitution*, quoted in Stanley de Smith & Rodney Brazier, 7<sup>th</sup> ed., *Constitutional and Administrative Law*, (London: Penguin, 1994) p.226.

<sup>107</sup> Xu Anbiao, 'Tixian Yiguo Liangzhi de Xiangaud Tebie Xingzhengqu Zhujunfa' ('The Garrison Law of the Hong Kong Special Administrative Region') *Zhongguo Faxue* (Chinese Legal Science) Vol.76, 1997, pp.70-77.

<sup>108</sup> When the Garrison Law was drafted, two principle laws governed the criminal offenses of the

The Draft Garrison Law states that “[c]riminal offenses committed by members of the Hong Kong Garrison shall be under the jurisdiction of the military judicial organs.”<sup>109</sup> Only when an alleged criminal offense is committed by military personnel when not performing their official duties, shall the HKSAR courts have jurisdiction. For civil jurisdiction, the draft Garrison Law provides that where military personnel violate the HKSAR law that infringes upon the civil rights of individuals or persons other than Garrison personnel, the parties may seek conciliation. If not, the case can be brought to court. The infringements of rights by military personnel when not performing their official duties shall be tried in the HKSAR courts. If the infringements occur when military personnel performing their official duties, the Supreme People’s Court of the PRC shall have jurisdiction.<sup>110</sup>

The criminal and civil jurisdiction arrangement in the Draft Garrison Law were criticised by the Hong Kong government and local opposition parties such as the Democracy Party and the Frontier. It was argued that under Article 19 of the Basic Law, the courts in the HKSAR should have jurisdiction over all cases in the Region, therefore, the courts should have the full jurisdiction over any criminal offense committed by the PLA Garrison personnel, except those offenses which were purely domestic to the PLA Garrison.<sup>111</sup> Hong Kong people also worried that if their cases were tried in the Supreme People’s Court, they would be in a disadvantageous position because of lack of understanding of legal procedure in the Court’s litigation .

In view of Hong Kong people’s great concern about this matter, the Draft Garrison Law was amended. The final draft was passed by the NPCSC at the end of December 1996 . For criminal cases, an addition provision was added to allow more flexibility. The military judicial organs and courts or relevant law enforcement organ of the HKSAR, after a consensus is reached through consultation of each other, may decide other party is more suitable to handle the case.<sup>112</sup> For civil cases, if the infringement of rights was committed by a personnel performing official duties, the Supreme People’s Court of the PRC shall still have jurisdiction, but ‘compensation for any loss or injury incurred by acts of tort shall be governed by the laws of the HKSAR.’<sup>113</sup>

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People’s Liberation Army: the Criminal Law of the People’s Republic of China (as amended 1996) and the Interim Regulation of the People’s Republic of China on the Punishment of Soldiers in Breach of their Duties (1982). In March 1997, the Interim Regulation was incorporated into the Amendments to the Criminal Law. There are two other administrative provisions governing the criminal jurisdiction of civil courts and the military courts: the Provision on the Question relating to the Jurisdiction over Cases Involving Military and Civil Parties Against Each Other (1982) and the Supplementary Provisions on the Investigative Works relating to the Cases Involving Military and Civil parties Against Each Other (1983).

<sup>109</sup> Draft Law of the People’s Republic of China on the Garrisoning of the Hong Kong Special Administration Region, Article 20.

<sup>110</sup> *Ibid*, Article 23.

<sup>111</sup> See Democratic Party, *Comments on the Draft Garrison Law of the Hong Kong Special Administration Region of the People’s Republic of China*, November 1996,.

<sup>112</sup> The Garrison Law, Article 20.

<sup>113</sup> The Garrison Law, Article 23.

The Garrison Law was included in the National Laws listed in Annex III of the Basic Law on July 1, 1997 and was applied to the HKSAR through a notice in the Gazette.<sup>114</sup> Nevertheless, many major issues remain unsettled. The application of the Law entails problems with regards to the proper procedure for indictment and prosecution of offences. Also, some of the language used in the Garrison Law is vague and unclear, phrases like “loyal to the motherland”<sup>115</sup>, “respect the organ of the political power of the HKSAR”<sup>116</sup> and “cherish the public property of the HKSAR”<sup>117</sup>. This makes the law difficult to enforce. Terms such as “act of state”<sup>118</sup> and “endangering the national unity or safety”<sup>119</sup> have different meanings in the socialist and the common law system. Even the most crucial term “performing official duties” is not defined in the Law. The Supreme People’s Court’s ability to apply common law concepts in civil cases is also questionable.

### **(VII) Measures for Election of the NPC Deputies of the HKSAR**

On March 14, 1997, the NPC passed a decision concerning questions on the election method and number of seats for deputies to the Ninth NPC.<sup>120</sup> According to the Electoral Law of the NPC and Local People’s Congress of the PRC (as amended 1995), the election method of the NPC deputies of the HKSAR shall be prescribed separately by the NPC.<sup>121</sup> Thus, on the same day, the NPC adopted the Measures for Election of Deputies of HKSAR to the Ninth NPC (Measures to Ninth NPC) for the HKSAR.<sup>122</sup> The Measures to Ninth NPC is another piece of national legislation (not like the Garrison Law which has the effect in the whole country) specially designed for the HKSAR. Here, one can see how electoral legal system and political culture between the mainland China and the HKSAR collide.

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<sup>114</sup> See note 42 above.

<sup>115</sup> The Garrison Law, Article 16(1).

<sup>116</sup> The Garrison Law, Article 16(2).

<sup>117</sup> The Garrison Law, Article 16(4).

<sup>118</sup> The Garrison Law, Article 26. For a discussion of acts of state under the Common Law and the Chinese legal system, see Wang Guiguo, ‘A Comparative Study on the Act of State Doctrine— with Special Reference to the Hong Kong Court of Final Appeal,’ in Wang Guiguo & Wei Zhenying, *Legal Developments in China—Markets Economy and Law* (HK: Sweet & Maxwell Ltd., 1996) pp.249-53.

<sup>119</sup> The Garrison Law, Article 6.

<sup>120</sup> Decision of the Fifth Session of the Eighth National People’s Congress on the Number of Deputies to the Ninth National People’s Congress and on the Election of the Deputies, *Gazette of NPCSC*, No. 2, 1997, pp.251-2.

<sup>121</sup> When the Electoral Law of the NPC and Local People’s Congress of the PRC was amended in 1995, a new paragraph was added as the third paragraph to the original Article 13: ‘The number of deputies to the National People’s Congress to be elected by the Hong Kong Special Administrative Region and Macau Special Administration Region and the methods for their elections shall be prescribed separately by the National People’s Congress.’ See Decision of the Standing Committee of the National People’s Congress Regarding Revision of the Electoral Law of the National People’s Congress and Local People’s Congresses of the People’s Republic of China, adopted at Twelfth meeting of the Eighth NPCSC on February 28, 1995, *The Laws of the People’s Republic of China 1995*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Science Press, 1996) p.5-12.

<sup>122</sup> Measures for Election of Deputies of Hong Kong Administrative Region of the People Republic’s of China to the Ninth National People’s Congress, adopted at the Fifth session of the Eighth NPC on March 14 1997, *Gazette of NPCSC*, No.2, 1997, pp.253-4.

The Measures to Ninth NPC provide that thirty-six NPC deputies of the HKSAR are to be selected by a Election Council, consisting of members of Selection Committee for the First Government of the HKSAR who are Chinese nationals, members of the Provisional Legislative Council who are Chinese nationals, and Hong Kong Chinese People's Political Consultative Conference 8<sup>th</sup> Committee members who are not members of the Selection Committee. The specific election method of the deputies will be prescribed by a Presidium elected by the Election Council.

On November 1, 1997, the Election Council of the HKSAR for Ninth NPC Deputies, with four hundred twenty-four members, was appointed by the NPCSC.<sup>123</sup> The Election Council held its first meeting in Hong Kong in the middle of November 1997, and passed two sets of rules for the election: (1) Specific Measures for Election of Deputies of HKSAR to the Ninth NPC and (2) Guidelines for the Election Council Members. Thirty-six NPC deputies of the HKSAR were selected by the Election Council on December 9, 1997.

The whole election process of the NPC deputies in Hong Kong generated a wide range of controversies.<sup>124</sup> One was whether the Measures to Ninth NPC, which only allowed the Election Council members the right to select NPC deputies, actually deprived Hong Kong people's right to participate in the work of the NPC. This right is guaranteed in Article 21 of the Basic Law which provides that '...the Chinese citizens among the residents of the HKSAR shall locally elect deputies of the Region to the NPC to participate in the work of the highest organ of state power.' NPC deputies elections within the mainland China in a sense is more democratic than that in the HKSAR. Although most of the mainland NPC deputies are elected by the members of the people's congresses, deputies of people's congresses up to the county level are directly elected.

Another major issue was the nationality of NPC Deputies of the HKSAR. When the Draft bill of the Measures to Ninth NPC was presented to the NPC on March 1997, sixteen Hong Kong NPC deputies proposed an amendment to the bill so as to restrict NPC deputies of the HKSAR to Chinese nationals of the Region who do not have a right of abode in a foreign country. This was necessary because the definition of Chinese nationals in the HKSAR had been extended through the Explanation on Nationality Law discussed above. However, the proposed amendment was turned down by the NPCSC.

Also, the ways by which the NPC deputies of the HKSAR were elected was very different from the electoral system in the HKSAR. The whole election process was characterised as a "small circle election" and was a typical example of Chinese-style of election, in which the final results were highly manipulated. The Specific

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<sup>123</sup> Name List of Members of the Election Council of the Hong Kong Special Administrative Region of the People's Republic of China for Deputies to the Ninth National People's Congress, adopted at Twenty-eighth meeting of the Eighth NPCSC, *Gazette of NPCSC*, No. 6, 1997, pp.774-6.

<sup>124</sup> See materials in the following Internet site address: <http://www.scmp.com/news/special/NPCSelection/SCMPSpecial.asp> and Chris Yeung, 'New Deputies Face Tough Task Proving Positive Role,' *South China Morning Post*, International Weekly, December 20, 1997.

Measures for Election of Deputies of HKSAR to the Ninth NPC and Guidelines for the Election Council members passed by the Election Council were only rules without judicial effect. There were no legal instruments either from China or Hong Kong governing the actual election process. Hong Kong public tends to believe that a fair and open election should be backed up by appropriate legal means. By far the most controversial issue was the New China News Agency's (NCNA), which was considered the PRC official representative in Hong Kong before July 1, 1997, participation in the election.<sup>125</sup> The Director of the NCNA, Jiang Enshu, only came to Hong Kong three months before he ran for the post and was elected as an NPC deputy of the HKSAR.<sup>126</sup> Hong Kong people queried this as a violation of the principle of 'one country, two systems'.

## Lawmaking by the State Council for the HKSAR

The State Council has altogether issued three decrees for the HKSAR since the promulgation of the Basic Law. The first decree was issued on December 16, 1996 to appoint Mr. Tung Chee-hwa as the Chief Executive of the HKSAR.<sup>127</sup> Article 15 of the Basic Law stipulated that the Chief Executive of the HKSAR was to be appointed by the Central People's Government. The second decree was issued on June 5, 1997 on the Regulations of the State Council on the National Flag and the Regional Flag of the Hong Kong SAR to be Hoisted Up Simultaneously.<sup>128</sup> The regulation was enacted for the implementation of the Law of the People's Republic of China on the National Flag in the HKSAR. A strange thing was that, at the time the regulation was enacted, the Law on the National Flag was not listed in Annex III of the Basic Law. At that time, the listed national law in Annex III which regulated the use of national flag was the Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China. The State Council had in fact anticipated that the Law on National Flag would be listed in Annex III on July 1, 1997 and enacted the regulations for the HKSAR. The Central Government also assumed that regulations under a listed national law would automatically be applied in the HKSAR.

The final decree was issued on July 1, 1997, which was about The Map of the Administrative Division of the Hong Kong Specific Administrative Region.<sup>129</sup> According to the Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region, the State Council is authorised to publish the map of the administrative division of the HKSAR.<sup>130</sup>

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<sup>125</sup> An opinion poll conducted by Hong Kong University's Social Science Research Center revealed that most Hong Kong people believed NCNA chief should not stand for NPC Election in HK. See *South China Morning Post*, Hong Kong, November 26, 1997.

<sup>126</sup> See 'Deputies Urge Openness and Accountability', *South China Morning Post*, December 9, 1997.

<sup>127</sup> Decree No. 207 of the State Council of the People's Republic of China, *Zhonghua Remin Gongheguo Guowuyuan Gongbao* (Gazette of the State Council of the People's Republic of China) No. 37, 1996, p.1496.

<sup>128</sup> Decree No. 219 of the State Council of the People's Republic of China, *Gazette of the State Council of the People's Republic of China*, No. 18, 1997, p.786.

<sup>129</sup> Decree No. 221 of the State Council of the People's Republic of China, *Gazette of the State Council of the People's Republic of China*, No. 23, 1997, pp. 1033-6

<sup>130</sup> *The Laws of the People's Republic of China 1990-1992*, p. 162.

In China, the State Council exercises a wide range of legislative authority, including the power to enact administrative regulations, the power to submit legislative proposals to the NPC and its Standing Committee, the power to enact law through delegation, the power to supervise legislation enacted by local organs of state administration. Article 89(1) of the Constitution entrusts the State Council “to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the law.” However, the Basic Law, as a whole, is silent on the role of lawmaking power of the State Council for the HKSAR. Can the State Council, in accordance with the Constitution, enact an administrative rule to be applied in the HKSAR? Can the State Council enact regulations to implement the Basic Law?

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## Chapter IV: A Threat to ‘One Country, Two Systems’

The change of sovereignty of Hong Kong was in fact a breach of legal continuity. The ultimate legitimacy of Hong Kong’s political and legal orders had shifted from a British colonial legal system to a Chinese socialist legal system.<sup>131</sup> Legal theorists tends to regard a fundamental change in legal order as simply a political fact.<sup>132</sup> The old legal doctrine ought to accommodate this change.<sup>133</sup> As Han Kelsen has postulated, ‘the basic norm or ultimate principle underlying a constitutional order is that the constitution ought to be obeyed.’<sup>134</sup>

Although the HKSAR’s legal foundation is derived from the Chinese Constitution, Article 31 of the Constitution and the enactment of the Basic law actually stipulate that certain basic provisions of the Constitution shall not be applied in the HKSAR. The underlying principle of the Basic Law is to make sure that legal practices previously in Hong Kong would be mostly preserved after 1997.<sup>135</sup>

Drawing on the various legislative activities for the HKSAR by the Central Government discussed in last chapter, this chapter discusses their implications in four major aspects, namely (1) the legal authority of the Basic Law, (2) the adequacy of Article 18 of the Basic Law and (3) conflicts between the Chinese legal order and the Hong Kong legal order and (4) the judicial independence of the HKSAR.

### The Legal Authority of the Basic Law

The discussion in the preceding chapter should amply demonstrate that the Central Government is prepared to extend its legislative power over the HKSAR, despite the constraints laid down by the Basic Law. The NPC and its Standing Committee could easily pass a decision (such as the Decision to Abolish the Through Train) that amends the Basic Law. The NPC and its Standing Committee could also easily extend its jurisdiction through a decision (such as the Decision on Law Previously Enforced in HK) that has an effect of making new laws for the HKSAR.

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<sup>131</sup> For a theoretical exposition of the problem of continuity and legitimacy of the HK’s legal system, see Raymond Wacks, ‘One Country, Two Grundnormen? The Basic Law and the Basic Norm,’ in Raymond Wacks, ed., *China, Hong Kong and 1997—Essays in Legal Theory* (HK: Hong Kong University Press, 1993) pp.151-183.

<sup>132</sup> See Stanley de Smith & Rodney Brazier, 7<sup>th</sup> ed., *Constitutional and Administrative Law*, (London: Penguin, 1994), pp. 69-73.

<sup>133</sup> See Albert H Y Chen, ‘The Provisional Legislative Council of the SAR,’ *Hong Kong Law Journal*, Vol. 27, Part 1, 1997, pp.1-10. He argued that ‘Hong Kong will be absorbed into the legal order of the PRC, and will adopt as its own the grundnorm of the PRC legal system.’ p.10.

<sup>134</sup> Han Kelsen, *General Theory of Law*, p.201. Quote in Stanley de Smith & Rodney Brazier, *op.cit.* p.72.

<sup>135</sup> The Basic Law is designed to give integrity to Hong Kong’s legal system rather than to create a ‘mixed jurisdiction’. See Edward J. Espstein, ‘China and Hong Kong: Law, Ideology, and the Future Interaction of the Legal Systems,’ in Raymond Wacks, ed., *op. cit.* (note 1 above) pp.37-75 at p.54.

The notion of ultra virus is not highly regarded in Chinese jurisprudence. Conflicting legal practices and interpretations are acceptable as long as they are finally legitimised by the supreme power organ. There is a danger that the Basic Law means whatever the Central People's Government decides it means. If this is the case, it will seriously undermine the legitimacy of the Basic Law because the Basic Law will become a law binding only within the HKSAR.

## **The Adequacy of Article 18**

According to Article 18 of the Basic Law, national laws shall not be applied in the HKSAR except for those listed in Annex III of the Basic Law. However, this has not been observed by the Central Government. All the decisions relating to the Preparatory Committee, if they were considered as national laws, could not be applied in the HKSAR because they were not in Annex III. But in reality, they are fully implemented in the HKSAR.

Also, the consultation procedure by which national laws can be applied in the HKSAR has not been taken seriously. The consultation process concerning the application of The Garrison Law to the HKSAR on July 1, 1997 was only a symbolic ritual. The Measures to Ninth NPC was even applied in the HKSAR without any consultation and being listed in Annex III. Details of the consultation process need to be worked out and should be transparent and truly reflective of the legitimate interests of the HKSAR.

Furthermore, the national laws application procedure stipulated in the Basic Law will become frivolous, if a subsequent amendment or interpretation to an applied national law (like the Decision on Implementation of the Nationality Law) which actually changes the meaning of the original legislation, is allowed to apply in the HKSAR automatically. It is, therefore, fair to say that if later changes to the listed national laws are going to apply in the Region, they shall go through the similar consultation process stipulated in Article 18 of the Basic Law.

## **Conflicts between the Chinese Legal Order and the Hong Kong Legal Order**

One legal commentator argues that since the Basic Law is a Chinese national law and the interpretation power of the Basic Law is vested in the NPCSC, the NPCSC could provide supplements to further define the Basic Law if it considers necessary. The State Council could also promulgate regulations to help the implementation of the Basic Law. Therefore, from the Chinese legal point of view, all the decisions relating to the Preparatory Committee and the Decision to Abolish the Through Train are legally justifiable.<sup>136</sup> Besides, some writers suggest that if laws are specifically enacted for the HKSAR by the NPC, such as the Measures to Ninth NPC, they are not required to list in Annex III because they are matters related to the

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<sup>136</sup> Leung Meifen, 'Tan Linshi Lifahui Hefaxing,' ('A Discussion on the Legitimacy of the Provisional Legislature') *Wen Wei Po*, Hong Kong, April 17, 1996.



sovereign power.<sup>137</sup>

However, it must be pointed out that the interpretation and implementation of the Basic Law should be based on the principle of ‘one country, two systems’. The Basic Law clearly sets out its amendment process and the ways by which national laws can be applied in the HKSAR. If all legal practices between the Central Authorities and the HKSAR have to follow the Chinese legal order, there is no need to have the Basic Law from the beginning.

Having said the above, there is no denying that interactions between the two legal systems will be more frequent and increasingly more important. National laws concerning defense, foreign affairs, and other matters outside the limits of the autonomy of the Region, if they are listed in Annex III, can apply in the HKSAR. However, from last chapter’s analysis, one can notice that there are ample of problems associated with the application and enforcement of national laws in Hong Kong.<sup>138</sup> Chinese legislation is often drafted in vague and inspirational language, with wide discretion and with procedures and method unspecified.<sup>139</sup> No only will the courts in the HKSAR have difficulties in interpreting these laws, but the HKSAR government also has the problems to enforce them. In China, the implementation of national law depends on a wide range of subordinate regulations. In order to suit the local conditions, the Central Government should allow the HKSAR to enact supplementary legislation for the implementation of national laws listed in Annex III if it is necessary.

Also, the ways in which the National Laws for the HKSAR was drafted, such as the Garrison Law and the Measures for Election of the NPC Deputies of the HKSAR, had been fairly autocratic.<sup>140</sup> Right now, there is a lack of channels for Hong Kong people’s interests to be reflected in the national law-making process for the HKSAR. The Committee for the Basic Law is only a working committee under the NPCSC with a function to help the implementation of the Basic Law. One writer argues that it is undesirable for the Committee to play a political role, the Committee should focus on providing legal advice to the NPCSC.<sup>141</sup> Although Hong Kong’s

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<sup>137</sup> Huazheng, ‘Renda Keyi Wei Xiangang Teding Lifa,’ (‘NPC Can Enact Law Specially for Hong Kong’), *Ming Pao*, Hong Kong, November 11, 1997 and Leung Meifen, ‘Jibenfa Weiyuanhui Gongneng—Quanguo Renda Jieyi zai Xiangang de Shiyong Wenti,’ (The Function of the Committee of the Basic Law—The Application of NPC’s resolutions in Hong Kong’), *Kuai Pao*, Hong Kong, December 17, 1997.

<sup>138</sup> During the Basic Law drafting process, there were suggestions that the HKSAR should be allowed to enact its own legislation to implement national laws so that national laws needed not be enforced in the Region. But they were turned down because it was argued that ‘the HKSAR does not possess legislative authority over foreign relations, national defense, or matter involving the nation as a whole.’ See Wu Jianfan, ‘Several Issues Concerning the Relationship between the Central Government of the People’s Republic of China and the Hong Kong Special Administrative Region,’ *Journal of Chinese Law*, Vol. 65, No. 2, 1988, pp.78-9.

<sup>139</sup> See Perry Keller, ‘Source of Order in Chinese Law,’ *The American Journal of Comparative Law*, Vol. 42, 1994, pp.711-59.

<sup>140</sup> For a overview of public participation in China’s law-making process, see Chen Sijia, ‘Lun Woguo Lifa de Gongzhong Canyu Zhidu’ (‘A Discussion on Public Participation in China’s Law-making Process’) *Xingzheng Faxue Yanjiu*, No. 9, 1995, pp.35-39.

<sup>141</sup> See Yash Ghai, *Hong Kong’s New Constitutional Order—The Resumption of Chinese Sovereignty and the Basic Law* (HK: Hong Kong University Press, 1997) pp.192-3.

delegates to the NPC can play a role in representing local people's interests, the Central Government recently expressed an opinion that they should confine their work in national affairs, and not interfere in the affairs of the Hong Kong Government.<sup>142</sup> There is a great need for incorporation a wide range of different opinions, especially those from representatives of the Region, in the national law-making process for the HKSAR. In order to avoid serious conflict between the two systems, the Central Authorities need to be more attentive to legal and social practices of the HKSAR.

With the implementation of the policy of 'one country, two systems' in the PRC, legal scholars have anticipated that there will be a wide range of legal conflicts between the mainland China and the HKSAR.<sup>143</sup> The problem arises because the mainland and the HKSAR belong to two different law 'districts', each has its own legal characteristics. Legal conflicts can happen in areas relating to the division of jurisdiction between Courts in China and the HKSAR, or judicial investigation, or legal enforcement.<sup>144</sup> Chinese legal scholars tend to use the idea of 'interregional conflict of laws' to analysis the problem.<sup>145</sup> Some writers suggest that specific national legislation will be needed<sup>146</sup> or some sort of judicial arrangements will be required<sup>147</sup> to tackle this problem. The drafting of the Garrison Law can be seen as an effort attempting to deal with the problem of joint jurisdictions in the HKSAR. However, there are still many areas need to be worked out clearly, and the major question is whether the judicial independence and the power of final adjudication of the HKSAR will be fully respected.

## Undermining the Judicial Independence of the HKSAR

There is no issue more fundamental for the autonomy of the HKSAR than the jurisdiction of the HKSAR courts. The Basic Law guarantees the HKSAR shall have jurisdiction over all cases in the Region. The courts of the HKSAR are vested with

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<sup>142</sup> The opinion was expressed by the President of the PRC, Jiang Zemin, at a meeting of the Ninth National People's Congress held in March 1998. See *Summary of World Broadcast*, FE/3172 S1/10-13, March 11, 1998, British Broadcasting Corporation

<sup>143</sup> See Wang Bingkun 'Guoji Falu Chongtu juqu Jiejue—Jianlun Yiguo Liangzhi yu Zhongguo Guoji Falu Chongtu,' ('The International Conflict of Laws and its Solution---a Discussion on 'One Country, Two Systems' and International Conflict of Laws in China') in Wang Bingkun ed., *Yiguo Liangzhi Falu Wenti Mianmian Guan* (Several Aspects of Legal Problems of 'One Country, Two Systems') (HK: Joint Publishing Co., 1989) and Lantian, ed., *Yiguo Liangzhi Falu Wenti Yanju*, (The Study of Legal Problem of One Country Two Systems) (Beijing: Publishing House of Law, 1997) Chapter 3.

<sup>144</sup> See for example, Zhao Biuzhi & Sui Li, 'Xianggand Tebie Xingzhengqu yu Neidi jian Hushe Xiangshi Falu Wenti Yanju' ('Study on Problem of Criminal Law Between Hong Kong and Mainland') *Zhongguo Faxue* (Chinese Legal Sciences) Vol. 52, 1993, pp.79-88.

<sup>145</sup> See Wang Bingkun *op.cit.* (note 12 above) and Lantian, *op.cit.* (note 12 above).

<sup>146</sup> Han Depei & Wang Bingkun, 'Zhiding Guoji Chongtufa ye Jiejue Woguo Dalu ye Taiwan, Xiangang , Aomen de Guoji Falu Chongtu' ('Enactment of a Interregional Conflicts Law to Solve Conflict of laws Among China, Taiwan, Hong Kong and Macau') *Wuhan Daxue Xuebao: Shekeban*, No. 4, 1993.

<sup>147</sup> Zhong Jianhua, 'Shilun Yungyong Panli Fangfa Jiejue Woguo Guoji Falu Chongtu Wenti' ('A Preliminary Discussion of Using Judicial Decision Method to Solve the Problem of Conflict of Laws in China') *Fasue Tiandi*, No.2, 1993.

independent judicial power, including that of final adjudication. The only constraint of the HKSAR courts is that they have no jurisdiction over acts of state such as defense and foreign affairs.<sup>148</sup>

The courts of the HKSAR will always have jurisdiction over laws that are delineated by the Basic Law, namely the Basic Law and its annexes, the laws previously in force in Hong Kong, and the laws enacted by the HKSAR legislature. If laws fall outside the Basic Law were imposed, in the name of sovereignty, on the Region by the Central Government, the courts of the HKSAR presumably have no jurisdiction on them. In other words, cases that relate to these imposed laws will not be matters of the HKSAR courts. If this continues to happen, the judicial independence and power of final adjudication of the HKSAR courts will be seriously undermined, and the notion of ‘a high degree of autonomy’ will become a hypocrisy.

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<sup>148</sup> The Basic Law, Article 19.

## Conclusion

Hong Kong's legal system had been shielded from the course of legal development in China for over 150 years by the British colonial rule. After China's resumption of sovereignty over Hong Kong, Hong Kong's common law system became subordinate to a socialist legal system. Legal practices in China have undoubtedly affected Hong Kong significantly. Some of the problems found in Chapter 3 were actually anticipated by certain Basic Law Drafting Committee members<sup>149</sup> and legal scholars.<sup>150</sup>

Some argue that the Chinese Government did not consider Hong Kong as autonomous political entity before July 1, 1997, this was why the Central Government had to 'interfere' on matters in Hong Kong. The situation will be different after June 30, 1997.<sup>151</sup> Looking back the last 6 months since the transfer of sovereignty of Hong Kong, the Central Government has on many occasions reiterated its commitment to the policy of 'one country, two systems',<sup>152</sup> and has shown considerable restraint in dealing with matters of the HKSAR. However, part of the reason for this may be that conflicts between the Central Government and the Region have been suppressed because most of the opposition forces have been excluded from the HKSAR's political institutions, especially the legislature.<sup>153</sup> Also, some major potential conflicts between the Central Government and the Region such as legislation on subversion against the Central Government have not yet emerged.<sup>154</sup>

The central-local relationship has always been a contentious issue in China. It is important for the Central Government to realise the real impact of its action towards the HKSAR, recognising that its lawmaking activities do have considerable effect and influence on the legal system of the Region. There is a major disagreement among legal scholars on whether laws outside the Basic Law should be given effect.<sup>155</sup> Using Hart's terminology, there is no consensus on 'the rule of recognition'. The invocation of principles not contained in the Basic Law, such as the Chinese legal order and Kelsen's idea of hierarchy of norms, will only negate the rule of law and perpetuate an atmosphere of undemocratic traditions. Some permanent damage may have already been done to the integrity of Hong Kong's legal system. That damage will be limited only if the Central Government is willing to act with considerable restraint in dealing with matters of the HKSAR and the Basic Law.

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<sup>149</sup> See Marin Lee and Szeto Wah, *The Basic Law: Some Basic Flaws* (HK: Kasper Printing Press, 1988)

<sup>150</sup> See, for example, Anna M. Han, 'Hong Kong's Basic Law: The Path to 1997, Paved with Pitfalls,' *Hastings International & Comparative Law Review*, Vol. 16, 1993, pp.321-42,

<sup>151</sup> See Albert H Y Chen, 'Some Reflection on Hong Kong's Autonomy,' *Hong Kong Law Journal*, Vol. 24, Part 2, 1994, pp.173-180 at pp.178-9.

<sup>152</sup> The latest reiteration was by President Jiang Jemin during the First Session of the Ninth NPC, see *Summary of Broadcasts*, FE/3172 S1/10-13, March 11, 1998, British Broadcasting Corporation.

<sup>153</sup> Hong Kong's largest opposition party, the Democratic Party, is not in the Provisional Legislative Council.

<sup>154</sup> Under Article 23 of the Basic Law, the HKSAR shall enact its own legislation to prohibit any act of treason, secession, sedition, and subvention against the Central People's Government.

<sup>155</sup> See Margaret Ng, 'HKSAR v Ma Wai-kwan, David, Chan Kok-wai, Donny and Tam kim-Yuen and the legality of the Provisional Legislative Council,' speech delivered at ABA Conference, San Francisco, U. S. A., August 4, 1997 and Johannes Chan, 'The Jurisdiction and Legality of the Provisional Legislative Council,' *Hong Kong Law Journal*, Vol. 27, Part 3, 1997, pp.374-87.

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