

The London School of Economics and Political Science

The Constitutional Relationship between China and Hong Kong:
A Study of the Status of Hong Kong in China's System of
Government under the Principle of 'One Country, Two Systems'

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Declaration

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Abstract

This thesis investigates the sustainability of constitutional review practised in the Hong Kong Special Administrative Region (HKSAR) within a broader political and legal system of the People's Republic of China (PRC) in post-1997 era. Theoretical questions regarding the compatibility and workability of this type of review have been raised, particularly with respect to the constitutional interpretation of the Hong Kong Basic Law.

Setting the scene against the background of thirteen years of implementation of the Hong Kong Basic Law, this thesis examines the challenge presented both to the HKSAR and the Chinese authorities working within the frame of 'one country, two systems'. It examines practical and theoretical aspects of the interpretation of the Basic Law and of the nature of this unique constitutional relationship between the HKSAR and the PRC.

This thesis explores the constitutional relations between the PRC and the HKSAR through the lens of constitutional jurisdiction of the Hong Kong Basic Law, whose interpretation has triggered huge debate in both Hong Kong and mainland China. This thesis finds that the cause for the disparity over the interpretation issue has its origins in the understanding of the fundamental concepts of sovereignty and constitution.

The thesis concludes that the Hong Kong Basic Law provides the frame for a new type of constitutional relationship between the PRC and the HKSAR. The Basic Law does not solve the constitutional questions raised but rather serves as

a basic framework through which the Central Authorities of the PRC and the HKSAR are enabled to evolve in an on-going process of constitutional norm-formation. My research also aims to contribute to the study on the special constitutional arrangements under the circumstances of Chinese political theory and legal system, and to offer reflections on the road towards constitutionalism in China.

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List of abbreviations

BLDC	Drafting Committee of the Basic Law of the HKSAR
CA	Court of Appeal
CE	Chief Executive (of the HKSAR)
CDIC	Central Discipline Inspection Committee of the CPC
CFA	Court of Final Appeal
CFI	Court of First Instance
CPC	Communist Party of China/Chinese Communist Party
CPG	Central People's Government
CPPCC	Chinese People's Political Consultative Conference
ExCo	Executive Council
HK	Hong Kong
HKBL	Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
HKMAO	Hong Kong and Macao Affairs Office of State Council, PRC
HKSAR	Hong Kong Special Administrative Region
HORO	Human Rights Ordinance (Cap.383)
ICCPR	International Conventions of Civil and Political Rights
JCPC	Judicial Committee of Privy Council
JD	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
JLG	Sino-British Joint Liaison Group
LAO	Legislative Affairs Office of the State Council

LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of National People's Congress
OCTS	One Country, Two Systems
PLC	Provisional Legislative Council, HKSAR
PRC	People's Republic of China
SAR	Special Administrative Region
SEZ	Special Economic Zone
S for J	Secretary for Justice
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate

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1 Chapter I

Introduction

This thesis examines the constitutional order of the Hong Kong Special Administrative Region under the principle of ‘one country, two systems’.¹ It is concerned, in particular, to investigate the practice of constitutional review exercised by the courts of Hong Kong and the interpretations given to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (hereafter the Hong Kong Basic Law)² by the Standing Committee of the National People’s Congress (NPCSC). By examining the legal and political issues surrounding the implementation of the Hong Kong Basic Law since 1 July 1997, and by theoretical reflection on the status of the Hong Kong Basic Law within the contemporary Chinese constitutional order, this thesis aims to contribute to a better understanding of the constitutional relationship between Hong Kong and the People’s Republic of China.

¹ The principle of ‘one country, two systems’ was formulated in the early 1980s, with the aim of finding mutually acceptable solutions for reunification of the Chinese mainland with Hong Kong, Macau and Taiwan. It was first proposed by Ye Jianying, the then chairman of the NPCSC, in the ‘nine points’ for peaceful reunion with Taiwan on 30 September 1979. See also, Deng Xiaoping, “‘One Country, Two Systems’: Summation of separate talks with members of a Hong Kong industrial and commercial delegation and with Sze-yuen Chung and other prominent Hong Kong figures on 22–23 June 1984’, in *Selected Works of Deng Xiaoping, 1982–1992* (Beijing: Foreign Languages Press, 1994); Deng Xiaoping, ‘An idea for the peaceful reunifications of the Chinese mainland and Taiwan’ (an excerpt from a talk with Professor Winston L. Y. Yang of Seton Hall University, South Orange, New Jersey, USA, 26 June 1983), and ‘China will always keep its promises’, in *Deng Xiaoping on the Question of Hong Kong* (Beijing: Foreign Language Press, 1993).

² The Basic Law of the Hong Kong Special Administrative Region of the PRC (中华人民共和国香港特别行政区基本法) was adopted at the Third Session of the Seventh National People’s Congress of the People’s Republic of China on 4 April 1990.

1.1 Background

The principle of ‘one country, two systems’ was first proposed by Chinese leaders to achieve territorial reunification with Taiwan, Hong Kong and Macau, while allowing the co-existence of different social, political and legal systems within a unitary country.³ Generally speaking, it means the mainland of the People’s Republic of China (PRC) maintains its socialist system, whereas the Special Administrative Regions (SAR) of Hong Kong and Macau will continue to practise capitalism and enjoy a high degree of autonomy in accordance with the Basic Law.⁴ The Chinese Constitution of 1982 provides that upon resumption of Chinese sovereignty, an SAR shall be established pursuant to Article 31 of the Chinese Constitution and the system practised in the SAR shall be prescribed by law.⁵

Hong Kong was returned to the PRC on 1 July 1997. As part of that arrangement a political deal was negotiated that incorporated certain guarantees about the Hong Kong’s way of life.⁶ These were formalized in the Hong Kong Basic Law.⁷ Article 5 of the Hong Kong Basic Law stipulates that the socialist system and policies shall not be practised in the Hong Kong SAR, and the previous capitalist system and way of

³ Deng Xiaoping, ‘One Country, Two Systems’: a summation of Deng Xiaoping’s separate talks with members of a Hong Kong industrial and commercial delegation and with Sze-yuen Chung and other prominent Hong Kong figures in Deng Xiaoping, *Deng Xiaoping on the Question of Hong Kong* (Beijing: Foreign Language Press, 1993). Also see the Chinese central government’s official report to the second plenary session of the sixth National People’s Congress (NPC) on 15 May 1984.

⁴ Deng Xiaoping, above n. 3. See also Hu Jintao, ‘Address to the Reception of Celebrating the 10th Anniversary of Hong Kong’s Return to China’. Full Chinese text available at <http://www.npc.gov.cn>

⁵ Article 31 of the Constitution of the PRC of 1982: ‘The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions’.

⁶ Negotiations between the British and Chinese governments on the historical question of Hong Kong officially started in 1982 and resulted in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, made in duplicate in Beijing on 19 December 1984, and formally approved in June 1985.

⁷ The Hong Kong Basic Law is generally known as the legal form for actualizing China’s ‘one country, two systems’ policy as declared in the annex to the Joint Declaration of the British and Chinese governments.

life shall remain unchanged for fifty years.⁸ Since Hong Kong was being incorporated into the socialist regime of the PRC, and the PRC explicitly asserted sovereignty over the entire territory, the question arose as to the nature of this constitutional relationship. This thesis seeks to offer an answer to the question of the nature of that relationship.

The Hong Kong Basic Law, drafted and promulgated in accordance with the Constitution of the PRC and adopted by the National People's Congress (NPC), is widely deemed to be a legal form to actualize the principle of 'one country, two systems'. According to the Basic Law, the Hong Kong Special Administrative Region (henceforth HKSAR) shall be directly under the authority of the Central People's Government (CPG) and enjoy a high degree of autonomy, having vested in it executive, legislative and independent judicial power, including that of final adjudication. In this way, the principle of 'two systems' here not only suggests the co-existence of capitalism and socialism in a unitary country, but also implies substantial institutional arrangements regarding the distribution of power between Beijing and Hong Kong.

The Hong Kong Basic Law is regarded by the residents of Hong Kong as a form of normative, constitutional guarantee of the high degree autonomy of the HKSAR which cannot easily be altered. It is stipulated in Article 159 of the Basic Law, in

⁸ Former Chinese leader Deng Xiaoping explained the reason for specifying fifty years. He said this proposal was based on the reality of China's situation and its plan to approach the standards of the developed countries by the middle of the twenty-first century. Even after China has achieved prosperity, it will not change its policy of 'one country, two systems' because 'when we are approaching the level of the developed countries, we shall have even more reason to follow it. If we departed from it, we could not accomplish anything. It is in China's vital interest to keep Hong Kong prosperous and stable.' See, Deng Xiaoping, 'China will always keep its promises' in *Deng Xiaoping on the Question of Hong Kong* (Beijing: Foreign Languages Press, 1993).

particular, that ‘no amendment to this law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong’.⁹ However, to the PRC government, the Basic Law is by no means a restriction on sovereignty itself. The Basic Law itself is not only a mode of realization of the principle of ‘one country, two systems’ in legal form: the drafting and adoption of such a law is a clear demonstration of Chinese sovereignty. It has also been repeatedly emphasized in China that ‘one country’ and ‘two systems’ are not given equal value; the precondition of the co-existence of the two systems is that the socialism of the mainland China will not be challenged or even jeopardized. In the unitary country of the PRC, all power derives from the sovereign authority, and autonomy has to be compatible with China’s sovereignty.

In recent years the implementation of the Hong Kong Basic Law is seen as being transformed from a promise of the preservation of capitalism and the way of life in the HKSAR to interpretation of the nature of the Basic Law itself, in particular, the relationship between the Basic Law and the Chinese constitutional order. The constitutional relationship between the HKSAR and the PRC in the post-1997 period can best be explained through the issue of interpretation of the Basic Law.¹⁰ In terms of interpretation, it is widely known that Article 158 of the Basic law introduces a special arrangement. The general power of interpretation is vested in the NPCSC; at the same time, it authorizes the courts of the HKSAR to interpret the clauses of the Basic Law on their own during adjudication with the exception that, under certain circumstances, the courts in Hong Kong shall refer the case to the NPCSC for

⁹ Article 159 of the Basic Law.

¹⁰ Article 158 of the Basic Law provides a distribution in the power of interpretation of the Basic Law between the NPCSC and the courts of the HKSAR.

interpretation before rendering judgment through the Court of Final Appeal of the HKSAR (CFA).

In a series of cases decided since 1997, the judiciary of the HKSAR has taken a liberal, normative approach towards interpretation of the Basic Law, regarding it as a constitution in the sense of the Western liberal tradition.¹¹ Hong Kong courts have interpreted more than sixty articles of the Basic Law since 1997.¹² The CFA illustrated its constitutional jurisdiction in *Ng Ka Ling & others v. Director of Immigration*,¹³ in which the CFA held that the courts of the HKSAR have constitutional obligation to perform constitutional review of all local legislation as well as the decisions and acts of the NPCSC, thus fulfilling their constitutional duty to safeguard the Hong Kong Basic Law. *Ng Ka Ling* case exerted far-reaching significance on the constitutional review practice in Hong Kong. Since then, significant issues have been considered in the courts regarding the constitutionality of local legislation, including the continuity of the common law, the division of power between political institutions, the protection of human rights, the balance between national security and freedom of expression, and methods of the interpretation of the Basic Law. The Hong Kong courts have relied for their constitutional jurisdiction on the principle of judicial independence, which is guaranteed in the Basic Law, and the status of the Basic Law as a constitution enacted for the special purpose of the establishment of an SAR. The Basic Law itself has a unique nature involving the implementation of Chinese policies promised in the Joint Declaration, but the

¹¹ This will be further discussed in chapter IV of this thesis.

¹² As shown in the official website of Department of Justice of the HKSAR. See, <http://www.gov.hk>.

¹³ *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315, 731, Court of Final Appeal of the HKSAR, 29 January 1999.

Constitution of the PRC shall not be implemented in the SAR according to the ‘one country, two systems’ principle.¹⁴

On the other hand, the NPCSC first interpreted the Basic Law in 1999, and it has interpreted it on several other occasions since.¹⁵ The interpretations of the NPCSC have caused controversy with regard to the manner of legislative interpretation,¹⁶ which is alien to the legal traditions of the HKSAR. In particular, the NPCSC’s power of interpretation, aimed at clarifying the meaning of and proffering supplementation to existing laws, derives from the principles of the Chinese Constitution; therefore this legislative interpretation is processed in the Chinese constitutional language, including its interpretive approach. Although the courts of the HKSAR are vested the power of final adjudication, it does not naturally follow that they have the final word on the meaning of these norms. More importantly, the

¹⁴ The relationship between the Basic Law and the Constitution of the PRC will be examined in Chapter VII.

¹⁵ The three Interpretations will be discussed in chapter V. They are: (a) *Interpretation of the Standing Committee of the National People’s Congress regarding Paragraph 4 in Article 22 and Category (3) of Paragraph 2 in Article 24 of the Basic Law of the People’s Republic of China* (adopted at the Tenth meeting of the Standing Committee of the Ninth NPC on 26 June 1999); (b) *Interpretation by the Standing Committee of the National People’s Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (adopted by the Standing Committee of the Tenth NPC at its Eighth Session on 6 April 2004); (c) *Interpretation of the Standing Committee of the National People’s Congress with Respect to Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (adopted at the Fifteenth Session of the Standing Committee of the Tenth NPC on 27 April 2005). Apart from these, in 1996 the NPCSC issued an Interpretation of the Nationality Law of the PRC regarding its application in the HKSAR. Although this is not an interpretation of the Basic Law itself, it is noteworthy since the NPCSC had rarely exercised its power of legal interpretation before. See, *Interpretation by the Standing Committee of the National People’s Congress on some questions concerning the implementation of the Nationality Law in the Hong Kong Special Administrative Region* (adopted at the Nineteenth Session of the Standing Committee of the Eighth NPC on 15 May 1996). It should also be noted that on 26 August 2011, the NPCSC issued its fourth interpretation of the Hong Kong Basic Law, upon a reference by the Court of Final Appeal of the HKSAR with respect of legal issues in *FG Hemisphere v. Democratic Republic of Congo*.

¹⁶ The term of ‘legislative interpretation (Li Fa Jie Shi 立法解释)’ has been used in Chinese legal system referring to the interpretation delivered by the institution of legislature, i.e. the NPCSC at the central level. In Chinese legal theory, legal interpretation is divided into three forms: legislative interpretation, administrative interpretation and judicial interpretation. See, the Law of Legislation, 2000, and ‘Resolution Concerning the Strengthening of Interpretation Work of the NPCSC’, adopted by the NPCSC on 10 June 1981. ‘Legislative interpretation’ will be further discussed in detail in Chapter V of the thesis.

justification of the NPCSC's interpretative power, which is embodied in Article 158 (1) of the Basic Law, originates from the Chinese Constitution of 1982. In its interpretation of Annexes I and II, the NPCSC further established its authority over the substantial issue of the political development of the HKSAR.

The question raised here is whether the constitutional review practised by the judiciary of the HKSAR is sustainable under the new constitutional order. Constitutional review by the judiciary of Hong Kong needs to be justified in the new constitutional order. It also requires the NPCSC to explain and justify its interpretations of the Hong Kong Basic Law. Eventually this leads to a more fundamental theoretical question that has yet to be explored: What is the constitutional relationship of the HKSAR and the PRC? The Hong Kong Basic Law ushers in challenges but it also provides a framework for the Hong Kong-PRC relationship to develop. It is my intention to investigate the implementation of the Hong Kong Basic Law since 1 July 1997 from the perspective of constitutional interpretation, and to examine certain theoretical issues in order to achieve a better understanding of the Hong Kong-PRC relationship.

1.2 Scholarly debate over the status of the Hong Kong Basic Law

A considerable body of literature has been devoted in recent years to discussing the unique nature of the constitutional relationship between the HKSAR and the PRC. Regarding the Basic Law, legal theory has yet to provide a congenial basis for the two competing sides that have to co-exist within a unitary state pursuant to the unique formula of 'one country, two systems'. In Hong Kong, the Basic Law is viewed mainly as a firewall against the socialism and party rule of the PRC. Hong Kong scholars, educated in the Western legal tradition, are more concerned with the

guarantee of a high degree of autonomy for Hong Kong.¹⁷ Legal professionals in Hong Kong regard the judicial review of executive and legislative acts as the essence or the ‘true meaning of the rule of law’,¹⁸ putting the CFA in the position of a champion of human rights protection and an authority in interpreting the basic norms. From their point of view, the relationship between Hong Kong and the PRC measures China’s ability to interact with Western-style constitutional values, while China’s response to constitutional debates in Hong Kong is increasingly viewed as indicative of China’s plans for the development of constitutional structures and processes in the mainland.¹⁹

Although Hong Kong based scholars seek to articulate the special constitutional character of the Basic Law,²⁰ Chinese scholars adopt an orthodox ‘reassertion of sovereignty’ approach and adopt legal hermeneutics to interpret the Hong Kong Basic Law from the perspective of legislative intention.²¹ It has been consistently

¹⁷ Albert H.Y. Chen, ‘The Theory, Constitution, and Practice of Autonomy: The Case of Hong Kong’ in Jorge Costa Oliveira and Paulo Cardinal (eds.), *One Country, Two Systems, Three Legal Orders: Perspective of Evolution* (Verlag; Berlin; Heidelberg: Springer, 2009), 751-767.

¹⁸ See e.g., Raymond Wacks, ‘The Judicial Function’ in Raymond Wacks (ed.) *The Future of Law in Hong Kong* (Hong Kong; Oxford: Oxford University Press, 1989), p.44.

¹⁹ Hualing Fu, Lison Harris and Simon N. M. Young (eds.), *Interpreting Hong Kong’s Basic Law: the Struggle for Coherence* (Palgrave MacMillan, 2007), p.2.

²⁰ On debates in the Hong Kong legal community on the Basic Law, see, e.g., Yash Ghai, *Hong Kong’s New Constitutional Order* (Hong Kong: Hong Kong University Press, 2nd edn., 1999); Yash Ghai, Hualing Fu and Johannes Chan (eds.), *The Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000); Johannes Chan and Lison Harris (eds.), *Hong Kong’s Constitutional Debates* (Hong Kong: Hong Kong Law Journal Ltd., 2005); Hualing Fu, Lison Harris and Simon Young (eds.), *Interpreting Hong Kong’s Basic Law: the struggle for coherence* (Palgrave MacMillan, 2007).

²¹ For the views of Chinese scholars on the Basic Law, see e.g. Xiao Weiyun, *Lun Xianggang Jibenfa* (论香港基本法 Essays on the Hong Kong Basic Law), (Beijing: Peking University Press, 2003); Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001); Wang Zhenmin, *Zhongyang Yu Tebie Xingzhengqu Guanxi* (中央与特别行政区关系 On the Relations Between Central and the SAR), (Beijing: Qinghua Daxue Chubanshe, 2002); Wang Zhenmin, ‘A Decade of Hong Kong Basic Law Actualization’ in Ming K. Chan (ed.), *China’s Hong Kong Transformed: retrospect and prospects beyond the first decade* (Hong Kong: City University of Hong Kong Press, 2008), 155-172; Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Law Press, China, 2000); Fu Siming, *Xianggang Tebie Xingzhengqu Xingzheng Zhudao Zhengzhi Tizhi* (香港特别行政区行政主导政治

pointed out that in a unitary state like the PRC,²² the HKSAR does not enjoy any power except that conferred by the sovereign.²³ While Hong Kong scholars argue that the NPCSC's interpretation jeopardizes the independence of the judiciary of Hong Kong, mainland scholars contend that in a unitary country all the local powers are derived from the centre. Hong Kong is no exception—its autonomy has been delegated by the National People's Congress through the Hong Kong Basic Law.

Scholarly points of view on the status of the Hong Kong Basic Law within the constitutional order of the PRC are also quite diverse. It is argued that the purpose of the Basic Law was not to *integrate* the legal systems of Hong Kong and China; rather, it was meant to *keep them apart*.²⁴ Concerns have been expressed with Hong Kong's new constitutional order that 'sovereignty may well be an overriding factor in determining the relationship between China and Hong Kong', and that 'an important function of the separateness of Hong Kong is to safeguard an economic system, not confer autonomy upon the people of Hong Kong'.²⁵

On the other hand, Chinese scholars usually consider the Hong Kong Basic Law as a national law in the Chinese legal system,²⁶ which was enacted in accordance with

体制 The Executive-Led Political System in the Hong Kong Special Administrative Region) (Zhongguo Minzhu Fazhi Chubanshe, 2010).

²² The PRC claims to be a unitary state. The Chinese Constitution of 1982 states that 'the People's Republic of China is a unitary multi-national state created jointly by the people of all its nationalities'. Within the unitary state, governments are organized in accordance with the doctrine of 'democratic centralism' at both central and local level. The structure of state will be discussed further in Chapter II.

²³ See e.g., Xiao Weiyun, *Lun Xianggang Jiben Fa* (论香港基本法 Essays on the Hong Kong Basic Law) (Beijing: Peking University Press, 2003).

²⁴ Yash Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' (2007) 37 *Hong Kong Law Journal* 363.

²⁵ Yash Ghai, 'The Past and the Future of Hong Kong's Constitution' (1991) 128 *The China Quarterly* 794-813.

²⁶ Here the term 'national law' refers to the Chinese national legislative power exercised by the NPC and its Standing Committee (NPCSC). The Legislation Law of 2000 has further demarcated the

Article 31 of the Chinese Constitution of 1982. Accordingly, the Basic Law should not be deemed as a constitution, nor should it be detached from the Chinese Constitution and allowed to develop in a completely different way.²⁷ Consequently, the interpretation of the Basic Law by the NPCSC does not undermine the judicial independence of the HKSAR; on the contrary, the jurisdiction of the courts in the HKSAR derives from Chinese sovereignty. It is argued that Article 158 of the Basic Law, which vests the ‘power of final interpretation’ in the NPCSC but reserves to the Hong Kong courts the ‘power of final adjudication’, is not only *consistent* with China’s constitutional and legal principles, but is also a remarkable *integration* of ‘one country’ and ‘two systems’.²⁸

From the point of view of scholars in the PRC, the dual function of the NPCSC as a national legislature and a legal interpretation body does not involve a conflict of interests. It is argued that the NPCSC’s constitutional duty is ancillary to the highest state power. The law-interpreting act is neither juridical nor legislative in nature, but rather a special legal interpretative activity. More importantly, these mainland scholars argue that the principle of ‘one country’ and ‘two systems’ are interlinked and that the principle of ‘one country’ takes priority over ‘two systems’. When Hong Kong scholars question the guarantee of a ‘high degree of autonomy’ and China is determined to deny ‘residual power’,²⁹ there can be no agreement in terms of the

legislation function, providing that laws in certain categories shall be enacted by the NPC only, and certain affairs can only be adjusted by law, instead of administrative regulations.

²⁷ Wang Zhenmin, ‘Xianggang Teshu Buxuan Renqi Fei Wu Nian de Fali Genju’ (The Jurisprudential Grounds on Why the terms of office of the New Chief Executive returned in a by-election should not be five years), available at <http://www.fmcoprc.gov.hk/chn/zt/zzfz/t189596>.

²⁸ Wang Zhenmin, ‘A Decade of Hong Kong Basic Law Actualization’ in Ming K. Chan (ed.), *China’s Hong Kong Transformed: Retrospect and Prospect beyond the First Decade* (Hong Kong: City University Hong Kong Press, 2008), 155-172.

²⁹ This will be discussed in chapter VI. Generally speaking, the concept of ‘residual power’ had caused controversy during the drafting process of the Basic Law. One view insisted that in the unitary country of the PRC, all the state power derives from the NPC. Therefore, the autonomy Hong Kong

foundation of the constitutional order. This might be the origin of the various disputes on the interpretation of the Hong Kong Basic Law.

It is evident that most Hong Kong-based scholars take a normativist approach towards the nature of the Hong Kong Basic Law. For them, the key to autonomy lies in the power to interpret the Basic Law, which becomes critical to Hong Kong's relationship with the Central Authorities of the PRC. The constitutional guarantee in the Basic Law should be understood as preserving the status of Hong Kong both politically and legally. For mainland scholars, the Basic Law is taken as a reassertion of sovereignty by the PRC over Hong Kong. It is understood primarily as a means to realize political ends; ultimately, the Basic Law itself is the product of a sovereign decision. It does not in any way limit the sovereign power to legislate. In other words, it is not a constitutional restriction; on the contrary, it is deliberately intended by the sovereign power. The autonomy given to Hong Kong is authorized by the sovereign and does not change the nature of the state.

Therefore, scholarly debate divides into two opposing sides. One regards the Basic Law as protection for the liberal constitutional order, entrenching doctrines that impose restrictions on sovereignty. The other side takes it as a reassertion of sovereignty, emphasizing the relativity of autonomy under a unitary state. In my view, neither of the two all-or-nothing paradigms could give a satisfactory account of the constitutional relationship between the HKSAR and the PRC under the 'one country, two systems' formula.

enjoys shall be over those matters explicitly delegated to Hong Kong by the NPC through the Hong Kong Basic Law. However, there was a strong voice in Hong Kong arguing that, except for foreign affairs and defence which should be the responsibility of the central authority, other powers should remain with the HKSAR.

The pluralism exhibited in Hong Kong/PRC relations is not so unfamiliar to western scholars given the situations widely debated in the United Kingdom, Canada and other European countries. Western theories on the concept of sovereignty and constitution, in particular, Bodin, Hobbes and Rousseau will be discussed in this thesis. With respect of the concept of constitution and constitutional pluralism, modern constitutional debate in the west will also give useful insights on the understanding of Hong Kong issue within the Chinese constitutional order, although in China, territorial pluralism has always been created by the central authorities for essentially political reasons. The theoretical analysis in the thesis suggests that it is necessary to recognize the duality of the Basic Law: its normative nature and its political dimension.

1.3 Statement of thesis

My basic argument is that the Hong Kong Basic Law suggests a new type of constitutional relationship between the PRC and the HKSAR. The Basic Law serves as a basic framework through which the Central Authorities of the PRC and Hong Kong are enabled to evolve in an on-going process of constitutional norm formation. In other words, the Hong Kong Basic Law is an instrument around which the two parts of the constitutional relationship continuously evolve and through which negotiations take place. The essential features of the Hong Kong Basic Law mirror those of a written constitution in which certain terms are fixed although more are left blank for the participants to determine in an evolving process. Similarly, the norm that defines the relationship between Hong Kong and China is not fixed; the content of this relationship is continually developed through the framework of the Basic Law and ultimately determined through the interpretation of this instrument.

The interpretation of the Hong Kong Basic Law itself is a construction of the constitutional order of China and Hong Kong under the principle of ‘one country, two systems’. The arrangement introduced by the Basic Law has been presented with tremendous challenges since 1 July 1997. The courts of the HKSAR have manifestly adopted the role of interpreters of the Basic Law as the constitutional guarantee of Hong Kong’s high degree of autonomy. On the other hand, interpretation of the Basic Law has become an important method by which the NPCSC ensures China’s sovereignty and its ultimate authority over the Basic Law. Whereas the elites in the HKSAR envisage a much more westernized model, China is taking a separate path of strengthening the power of the NPCSC. In the long run, the NPCSC will continue to play a role in the norm-formulating process regarding the Basic Law.

This thesis argues that the essence of the tension between the HKSAR and mainland China regarding the issue of interpretation of the Hong Kong Basic Law lies in the different understandings of the nature of the Hong Kong Basic Law. The two systems can only be compatible when they reach a relatively shared understanding with regard to the concepts of sovereignty and constitution, in particular, the compatibility of Hong Kong’s autonomy and the status of the Basic Law within a broader Chinese constitutional order.

The Basic Law represents a new constitutional relationship between Hong Kong and the PRC in which neither of the two sides would be able to maintain their previous doctrines and principles, without recognizing fundamental changes. The courts of Hong Kong, especially the CFA, some argue, shoulder the role of guardian of the Basic Law. The rule of law and the independence of the judiciary are highly valued as the cornerstones of the success of Hong Kong in the past, and have been

the foundation of Hong Kong's constitutional principles. However, this emphasis on the normative nature of the Basic Law ignores the fundamental change that the Basic Law has ushered in to the constitutional order of Hong Kong from which the political system and legal doctrine must start.

I will argue that the reason for the tension from the beginning of drafting the Basic Law arises from a disparity in the understanding of sovereignty and the foundation of a constitutional order. The popular view in Hong Kong is that the HKSAR enjoys all powers except those that have been explicitly given to the Central Authorities. This has been denied by the mainland side. Mainland scholars always emphasize that, in Chinese constitutional theory, under one unitary state, all powers are derived from the fact of sovereignty. Power can only be authorized by the Constitution of the PRC and in the way that the Constitution defines. The HKSAR simply enjoys such autonomy as is defined by the Hong Kong Basic Law.

It is exactly the tension between the normative constitutional scheme and the political dimension of sovereignty that constitutes the dynamics of the Hong Kong-PRC relationship. This tension also reflects a theoretical struggle between a formal/normative approach and a material/functional approach, between normativist and functionalist styles of the study of a constitution. Drawing Western concepts of sovereignty and constitution, this thesis claims that the relational nature of sovereignty should be recognized by mainland China. As for Hong Kong, it should not ignore the political dimension of a constitution. The Basic Law has a dual nature, which demonstrates the two dimensions of a constitution: normative and political. Universal principles only gain momentum when they are set to work within certain

institutional arrangements of government and are embedded within the existing practice of government regimes.

Therefore, the unique arrangement introduced by the Hong Kong Basic Law requires the PRC to reflect on its sovereignty-based argument and to explain its governmental system using knowledge acceptable to both sides of the constitutional relationship. Similarly, Hong Kong should not emphasize only the normative nature of the Basic Law and turn a blind eye to its political dimension. The constitutional relationship under the Basic Law between the HKSAR and the PRC can only be enhanced in an evolving process of norm formation, which is participated in by both Beijing and Hong Kong. Finally, although it is hard to envisage any convergence between the two systems, the issue of Hong Kong does offer an opportunity for mainland China to reflect on the theoretical basis of the Chinese constitutional framework and to achieve a better understanding of the contemporary Chinese political and legal systems.

1.4 Research method

This research takes the relationship between Hong Kong and the PRC as an evolving process. However, no matter how the power struggle between Beijing and Hong Kong evolves, one thing is certain: the Basic Law has come to serve as a new conceptual basis for the constitutional development of mainland China and Hong Kong, and the interactions between the two will lead to an evolving basic law that is more than what is written in the text.

Therefore, the past all-or-nothing approach which locates the issue of Hong Kong in opposition to the PRC is not sufficient for the purpose of seeking a better

understanding of this unique constitutional relationship. This research will analyse this issue from a ‘Hong Kong within the PRC’ perspective by situating the issue of Hong Kong within the overall constitutional order of the PRC.

In this thesis, I take the view that constitutional law is genuinely political law: it appears as binding normative rules and forms the existence, maintenance and function of the political entity. Its ultimate function is to facilitate, preserve and support the state in the political order. This is consistent with the nature of sovereignty. It is true that there is no ideal type of constitution: a constitution can only be assessed within a particular socio-political context.³⁰ From this perspective, this research, beyond its original intention of making a contribution to the study of the constitutional relationship between Hong Kong and the PRC, also demonstrates the limitations of traditional formalist approaches to a constitution.

This research relies heavily on documents from several categories. First, the interpretations of the Hong Kong Basic Law, made by both the Hong Kong judiciary and the NPCSC, are the essential primary documents from which this research starts. Secondly, the drafting history of the Basic Law has been consulted, including the documents of the Basic Law Drafting Committee (BLDC), the Basic Law Consultative Committee (BLCC), and the Preparatory Committee of the NPC (PC), and official records of the proceedings of the Legislative Council (LegCo) of Hong Kong. Thirdly, in relation to the PRC, legislation, judicial cases and official explanations of relevant legislation or legal interpretation are examined. It should be noted that all the data in this thesis is for the period to the end of 2010, including the

³⁰ Martin Loughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 182-202.

judicial decision of the courts of the HKSAR, and the legislation, decisions and interpretations of the NPCSC and other legislative bodies in the Chinese legal system.

In addition, since constitutional discourse is intrinsically political, this research resorts to a body of literature on political thought and constitution theory to shed light on the comprehension of some of its fundamental concepts. Put simply, we examine this issue from both a philosophical-political standpoint and from the perspective of public law. Only by analysing the concepts of sovereignty and constitution, can we fully apprehend the constitutional issues in China.

1.5 Thesis structure

The main issue I address is the constitutional relationship between the HKSAR and the PRC under the principle of ‘one country, two systems’ by examining whether, and to what extent, the constitutional review claimed by Hong Kong courts could be sustained in the Chinese context. Therefore, this thesis will first describe and analyse the distinctive ways in which certain important institutions interact with one another in each of the constitutional orders (**Chapters II and III**). The case law of the courts of Hong Kong and the interpretations of the NPCSC on the terms of the Basic Law will be examined to illustrate the disparities between the two systems, in terms of source of power, interpretative approach and constitutional jurisprudence (**Chapters IV and V**). I then analyse the concepts of sovereignty and the constitution, in order to explain the nature of sovereignty/autonomy in the Hong Kong-PRC context and understand the unique constitutional arrangement in the light of constitutional theory (**Chapters VI and VII**).

Part I contains Chapter II and Chapter III. This part will describe the distinctive ways in which certain important institutions interact with one another in each of the constitutional orders. Institutional analysis and an exploration of the nature, process and legal basis of the functions of these political institutions will be carried out to demonstrate how the Hong Kong Basic Law not only creates a new constitutional order for the HKSAR but also changes the way China governs a peripheral area both in form and in substance.

Chapter II focuses on the constitutional framework in China. This chapter reviews the constitution-making history in China, examines the Chinese governmental system, both at the central and local level, and concludes with the role of the constitution in China's governmental system. It provides an account of the institutional relationship between the branches of the Chinese government, in particular, the nature, function and authority of the NPCSC and the courts in China. Taking the contemporary Chinese debate over the status of the judiciary into account, this chapter provides an overall map of the Chinese political and legal system in general.

This naturally leads to an examination of the constitutional framework of Hong Kong, particularly the basic principles and institutional design of the Basic Law. Chapter III describes briefly the evolution of the system of government of Hong Kong, its transformation and its relationship with the Central Authorities of the PRC. This chapter examines two levels of institutional relationship, i.e., the governmental system in Hong Kong and its relations with the Central Authority within the structure of the Basic Law, and demonstrates fundamental changes in Hong Kong's constitutional order since 1997.

Part II consists of Chapter IV and Chapter V. This part gives a detailed account of how the Basic Law is interpreted by the Hong Kong courts and by the NPCSC. The case law of the Hong Kong courts and the interpretations of the NPCSC on the terms of the Basic Law will be examined in detail to illustrate the disparities regarding interpretative approach and constitutional jurisprudence.

Chapter IV concentrates on the constitutional jurisdiction exercised by the courts of the HKSAR since 1997 by making inquiries into those judicial cases that have a significant influence on the jurisprudence and constitutional development of Hong Kong. This chapter tries to discover the inherent limitations of the constitutional jurisdiction of the courts in the HKSAR. It suggests that although the judiciary of the HKSAR has taken the Basic Law as a constitution to review local legislation and has adopted a rights-based approach in human rights protection, the jurisdiction of Hong Kong courts has a limited status in this new constitutional order. The CFA's reasoning relies heavily on the normative nature of the Basic Law but ignores the fundamental constitutional changes the Basic Law has brought.

Chapter V explores further the NPCSC's interpretations of the Hong Kong Basic Law. This chapter analyses the nature of the interpretations of the Basic Law delivered by the NPCSC and the predicament caused by the coexistence of the two political and legal systems. In concluding this chapter, I will suggest that the practice in the field of interpretation warrants further theoretical exploration of the concepts of sovereignty and state, and of Chinese constitutional theory.

To illustrate the issue of interpretation of the Hong Kong Basic Law, we need first to examine the nature and status of the Basic Law itself and its relation to the Constitution of the PRC. It is the lack of a common understanding of sovereignty and constitution that leads to the vulnerability of the Basic Law. Hence, it is necessary to explore how the concepts of sovereignty and constitution are conceived, in general and in Chinese thinking, in order to understand the constitutional relationship between the HKSAR and the PRC. It has been claimed that the concept of sovereignty has been in decline in recent decades, with globalization and the emergence of transnational and international organizations. However, the sovereign state is still an essential figure in law and politics. The state is still the major force for implementing rules. Hence, this thesis takes the concept of sovereignty and constitution as the major focus of examination.

Therefore, **Part III** is composed of two chapters which provide a theoretical exploration of the concept of sovereignty, the state and the constitution, and the nature of the Basic Law. Chapter VI focuses on the concept of sovereignty in China in the light of Western political thinking, and analyses the features of the Chinese understanding of sovereignty from a historical perspective. Traditional Chinese political thought contributes to a better comprehension of the sovereignty issue and the PRC's view on central-local relations. This chapter demonstrates that the state tradition in China differs fundamentally from that of the West. It explains why 'one country' takes priority over 'two systems' in the thinking of Chinese scholars,³¹ and

³¹ The point of view has been emphasized by Chinese leaders and followed by mainland scholars in recent years. It insists that 'one country' and 'two systems' are not two equal terms: 'one country' is the precondition of 'two systems'. Complete autonomy will lead to independent unity, which contradicts the fundamental principle of 'one country, two systems'.

more importantly, the nature of autonomy in the Chinese understanding of sovereignty.

Chapter VII discusses the status of the Hong Kong Basic Law within the constitutional order of the PRC. It concludes that the Basic Law is best seen as a restriction made by the sovereign authority itself. In other words, restrictions on power can enable and enhance the capacity of sovereignty.³² From the perspective of the PRC, the autonomy of the HKSAR is an exception to the general norm; from the perspective of the HKSAR, the Basic Law should exclude the application of the Chinese Constitution unless its application is explicitly specified. Positioning the Hong Kong issue in the broader picture of the PRC, this chapter seeks a better explanation of the status of the Basic Law in the overall constitutional order of the PRC.

The overall aim of this thesis is to explore the constitutional relationship between Hong Kong and the PRC which emerges from the principle of ‘one country, two systems’. It aims at proffering a better understanding of the post-1997 Hong Kong-PRC constitutional relationship from the angle of political-legal research, on the presumption that currently available approaches are neither sufficient in explaining these relations nor able to avoid the political dilemma in reality. This thesis tries to develop a new understanding to fill the field that both Hong Kong and China have neglected in the past, and build a systematic account of this unique constitutional relationship between Hong Kong and the PRC.

³² Stephen Holmes has drawn out this aspect as a construction of Bodin’s theory against negative constitutionalism. See Stephen Holmes, ‘The Constitution of Sovereignty in Jean Bodin’ in *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago and London: the University of Chicago Press, 1995), 100-133.

Recent developments in the area of Hong Kong-PRC relations have shown that, in responding to the demand of Hong Kong society for a faster pace of democratization, Chinese authorities are becoming more actively involved in Hong Kong affairs.³³ In its decision of 2007,³⁴ the NPCSC set the earliest date for the election for the Chief Executive of the HKSAR by means of universal suffrage as 2017, and after that, the election of the Legislative Council may be implemented, with all members elected by universal suffrage.³⁵ The Chinese central government has been seen to change from the old attitude of ‘well water does not interfere with river water’³⁶ to being more actively involved in the political development of the HKSAR.³⁷ In recent years, concern about Hong Kong has shifted, from doubt about whether the PRC would deliver on its promise of ‘one country, two systems’ after the transfer of sovereignty, to a study of how Hong Kong can contribute to the development of China and the role of Hong Kong as poised between China and international society. This, on the other hand, provides a powerful illustration of my argument that the Basic Law is a framework through which the relationship between Hong Kong and the PRC will continue to evolve.

³³ Cheng Jie, ‘The Story of a New Policy’ (2009) *Hong Kong Journal*. In this article, Chen mentioned another article written by Cao Erbao, ‘Governing forces under the condition of “one country, two systems”’, (English translation available at http://www.civicparty.hk/media/pdf/090506_cao_eng.pdf). These two articles raised certain concerns within Hong Kong as implying the possibility of change of Beijing’s strategy towards Hong Kong. Mr. Cao, an official at the Liaison Office of the Central People’s Government in the HKSAR, later clarified that his article was written for purely theoretical purposes. For relevant report in local media, see, e.g., “‘two governing team’ causes concern’ in *South China Morning Post*, 18 August 2009.

³⁴ *Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2012 on issues relating to Universal Suffrage* (adopted by the Standing Committee of the tenth NPC at its thirty-one Session on 29 December 2007).

³⁵ There is no clear statement on when the Legislative Council may be elected by universal suffrage, but there is wide speculation in Hong Kong society that the earliest date would be 2020 provided that election of the Chief Executive by universal suffrage has been realized in 2017.

³⁶ ‘Well water does not interfere with river water’ (井水不犯河水) is a Chinese saying.

³⁷ Cheng Jie, ‘The Story of a New Policy’, above n. 32.

2 Chapter II

The Constitutional Framework of the People's Republic of China

The main purpose of this chapter is to provide an account of the system of government of the People's Republic of China (PRC) since 1949. The major theme that informs this chapter is the relationship between the constitution and the evolution of the governmental system in contemporary China.¹

It is widely acknowledged that the modern concept of constitution involves imposing limits on the exercise of public power, and protecting the fundamental rights and freedom of citizens. From this point of view, it is natural for some scholars to argue that the Chinese Constitution 'seems to bear no relation to the actual government of China',² and 'the written constitution was not a place to start if one wanted to know what the government of China was really like'.³ However, it is undeniable that a written constitution plays an essential part in the contemporary political and legal environment of China. Today the Constitution not only serves as the legitimate source of authority of the government, but also prescribes the fundamental principles underlying the relationship of governmental institutions. Moreover, the transcendental authority of the written constitution gradually gains

¹ In addition to the official texts of the Constitution of the PRC of 1954, 1975, 1978, and 1982, I have referred to the following English versions of the Constitution: the 1949 Common Programme in Albert P. Blaustein (ed.), *Fundamental Legal Documents of Communist China* (South Hackensack, NJ: F. B. Rothman, 1962); the 1954 Constitution in *The Constitution of the People's Republic of China* (Peking: Foreign Languages Press, 1954); the 1975 Constitution in *Documents of the First Session of the Fourth National People's Congress of the People's Republic of China* (Peking: Foreign Language Press, 1975); the 1978 Constitution in the *Documents of the First Session of the Fifth National People's Congress of the People's Republic of China* (Peking: Foreign Language Press, 1978).

² William C. Jones, 'The Constitution of the Peoples' Republic of China' (1985) 63 *Washington University Law Quarterly* 708-735, 710.

³ *Ibid.*, p.711.

more and more momentum, which might portend a possible change in the future of constitutional development in China.

Instead of applying Western values to evaluate Chinese constitutional development, this chapter describes in detail the contemporary system of government of the PRC.⁴ After a brief introduction to the history of Chinese constitution-making, we examine the constitutional texts and evolution of the system of government in China, focusing on the period from the establishment of the PRC to the present. This chapter will conclude with efforts to identify the role of the Constitution in the governmental system of China.

2.1 The history of constitution-making in China

2.1.1 *The origin of the written constitution in China*

It is due to contact with the West that the concept of a constitution was transplanted to China.⁵ From the mid-nineteenth century, intellectuals, officials and many enlightened Chinese people believed that learning from the West was the only way to save the country.⁶ In 1905, responding to increasing demands for political reformation, the government of the Qing dynasty set up a constitutional commission which was charged with the task, primarily, of investigating constitutional governments in Europe, the United States and Japan. On its return this commission

⁴ See, Donald C. Clark, 'Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?' in Jerome A. Cohen and Stephen Hsu (eds.) *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (New York University Press, 2003), p. 93.

⁵ For the political history of China from the decline of the imperial system to the Republican era, see e.g., Chien-Nung Li, Ssu-Yu Teng and Jeremy Ingalls, *The Political History of China, 1840-1928* (Princeton, NJ and London: Van Nostrand, 1956); Jean Chesneaux, Marianne Bastid, Marie Claire Bergère, and Anne Destenay, *China from the Opium Wars to the 1911 Revolution* (Hassocks: Harvester Press, 1977).

⁶ For details regarding the translation of Western theories during the period from mid-nineteenth century to the early twentieth century, see, Hawking L. Yen, *A Survey of Constitutional Development in China* (first edition, New York, 1911; reprint, AMS Press, 1968).

recommended establishing a constitutional monarchy to cope with reformist pressure and to maintain Qing rule.⁷

The first embryonic written constitutional document in China emerged in 1908, when the Qing emperor publicly acknowledged that adopting a constitution and convening a parliament was the only way to strengthen and unify the nation.⁸ Against this backdrop, the government of Qing issued the ‘Qin Ding Xianfa Dagang’ (钦定宪法大纲 Principles of the Constitution) in 1908 and announced a ‘preparatory period for constitutionalism’.⁹ According to the ‘Principles of Constitution’, the National Legislative Council was an advisory organ and the emperor retained absolute power as he retained the power to convene, adjourn, postpone, or dissolve the Council at will. The ‘Principles of Constitution’ was intended by the Throne to for quieting the advocates of a Western-style representative system without altering totalitarian rule, but it had neither the capacity to regulate the social order closely, nor the intention.¹⁰

The Revolution in 1911 terminated the monarchical rule that had lasted in China for two thousand years,¹¹ and started China’s Republican era, yet the constitutional development was fraught with difficulties. The ‘Lin Shi Yue Fa’ (临时约法 the

⁷ Five high-rank officials visited Austria, Belgium, France, Germany and Italy, Great Britain, Japan and the United States. An English translation of their report can be found at Yen, *A Survey of Constitutional Development in China*. At the same time, Chinese intellectuals who had experience of learning in the West, such as Yen Fu, made great efforts translating and introducing Western works into China.

⁸ For the four imperial edicts from 1906 to 1908, see, Yen, *A Survey of Constitutional Development in China*.

⁹ See Pan Wei-tong, *The Chinese Constitution: A Study for Forty Years of Constitution-making in China* (Washington DC: Catholic University of America Press, 1945), p.145.

¹⁰ James P. Brady, *Justice and Politics in People's China: Legal Order or Continuing Revolution?* (London and New York: Academic Press, 1982), p.13.

¹¹ From the Qin Dynasty (221 B.C.-202B.C.) to the end of the Qing Dynasty (1644-1911).

Provisional Constitution) was drafted and took effect on 11 March 1912.¹² The National Assembly convened on schedule in April 1913, but the Assembly merely amplified the dissension and disorder.¹³ It achieved neither political stability nor the unification of the state. Yuan Shikai later usurped power and dissolved this parliament in 1914. A famous Chinese scholar concluded that this period of constitution-making (between 1911 and 1923) only 'enabled the politically unscrupulous to take advantage of constitutions to promote their selfish and personal interests, almost invariably to the detriment of the national interest'.¹⁴

Although the Nationalist Party (Kuomintang) unified China in 1928 after its victory over the warlords, it did not lead China towards becoming a constitutional state. This progress was postponed pending the administrative consolidation and the so-called stage of political tutelage. It was not until 1946 that a formal Constitution of the Republic of China was adopted.¹⁵ It aimed to establish a governmental system based on the principles of 'five *yuan*'¹⁶ proposed by Dr Sun Yat-sen, who believed that political power should be distinguished from governmental power, and that the people should control the government by exercising their political powers. In fact, Dr Sun's belief echoed an attempt to assimilate Western democratic ideas and

¹² The 'provisional constitution' contains 56 articles. According to Article 54 of this document, the National Assembly is empowered to draft and promulgate a permanent constitution. A committee was formed in 1913 to draft a permanent constitution, but soon afterwards President Yuan Shikai (also known as Yuan Shih-k'ai) dissolved the Assembly and appointed a new committee to draft the constitution. In September 1916 the National Assembly was reconvened and the 'provisional constitution' was revived. For analysis, see, e.g. Min Ch'ien T.Z. Tyau, *China's New Constitution and International Problems* (Shanghai: Commercial Press, 2nd edition, 1920).

¹³ Kevin J. O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (New York: Cambridge University Press, 1990), p.15.

¹⁴ Ch'ien, Tuan-sheng (Qian Duansheng), *The Government and Politics of China* (Cambridge, MA: Harvard University Press, 1950), p.70.

¹⁵ For further analysis of the history of constitution-making during the Republican era, see, e.g. Pan Wei-tung, *The Chinese Constitution: A Study of Forty Years of Constitution-making in China* (Washington: Catholic University of America Press, 1945).

¹⁶ 'Yuan' roughly means 'government institution'. The 'five yuan' are: the executive, the legislative, the judicial, the examination and the supervision *yuan*.

incorporate institutional devices into traditional Chinese society in order to create a workable system.

Several decades of constitutional experiments before 1949 exerted significant influence on China's subsequent history. The modern idea of a constitution seriously challenged traditional Chinese thought and initiated a new era in which a constitution becomes the source of legitimate governance of a state.

2.1.2 Constitution-making in the People's Republic of China (1949-)

The present Constitution of the PRC was adopted in 1982. From the establishment of the PRC, one provisional Constitution and three formal Constitutions and were promulgated before the 1982 Constitution came into being. These include the 1949 Common Programme, the 1954 Constitution, the 1975 Constitution and the 1978 Constitution. The background, content and characteristics of these respective constitutions could be summarized as follows.

*The Common Programme*¹⁷

From 1949 to 1953, the Common Programme adopted by the Chinese People's Political Consultative Conference (CPPCC), together with the Organization Laws of the Central People's Government, served as the constitutional document for the newly established PRC. The main purpose of this provisional constitution was to proclaim the establishment of the PRC and announce the fundamental state policies the PRC government would carry out. As a provisional constitution, it contained

¹⁷ The Common Programme of the Chinese People's Political Consultative Conference, drafted by a preparatory committee consisting of 134 members, and was adopted by the First Plenary Session of the Chinese People's Political Consultative Conference on 29 September 1949 in Peking. An English translation can be found in Albert P. Blaustein (ed.), *Fundamental Legal Documents of Communist China* ((South Hackensack, N.J: F. B. Rothman, 1962), pp. 34-53.

general principles and established the organs of state power and the military system,¹⁸ and national policies for economy, culture and education, nationalities and foreign affairs.¹⁹

As a constitutional document, the transitional nature of the Common Programme was obvious. For instance, it provided that the CPPCC exercised supreme state power before the convocation of an All-China People's Congress elected by universal franchise.²⁰ During this period, internal reunification continued, and the central government was a coalition government composed of the representatives of democratic parties. It was not until the Chinese Communist Party (CPC) leaders considered it necessary to 'bring about a highly co-coordinating leadership of the state',²¹ as well as to set down the general task of building a socialist country in a legal form, that a drafting committee for a written constitution was formed in 1953. The first written constitution of the PRC was adopted in 1954.

*The 1954 Constitution*²²

The 1954 Constitution, composed of 106 articles on general principles, the state structure, fundamental rights and duties of citizens, and so forth, largely copied the Constitution of the then USSR in terms of the structure of government.²³ In the history of Chinese constitution-making, the 1954 Constitution played a prominent role. As the first formal constitution adopted by the first NPC, it exhibited the great

¹⁸ Articles 1-11, 12-19, 20-25 of the Common Programme.

¹⁹ Articles 26-40, 41-49, 50-53, and 54-60 of the Common Programme.

²⁰ Article 13 of the Common Programme.

²¹ Liu Shao-chi, 'Report on the Draft Constitution of the People's Republic of China' in *The 1954 Constitution of the People's Republic of China* (Peking: Foreign Language Press, 1954), p.18.

²² The Constitution of the PRC, adopted on 20 September 1954 by the First National People's Congress of the People's Republic of China at its First Session.

²³ For comparison of the Chinese Constitution of 1954 with the 1936 Constitution of the USSR, see, e.g., *Law Yearbook of China* 2005, p.193.

efforts made by the Chinese Communist Party (CPC) in the 1950s to formalize and institutionalize the administration of the state.²⁴ More importantly, it laid the foundation of the system of government. Although it was largely ignored during two decades of political campaigns (1957-1976),²⁵ it provided a blueprint for the enactment of the current Constitution.

The 1954 Constitution was only intended to serve as a constitution before the realization of socialism in the PRC. Mao Zedong predicted that it would serve for fifteen years.²⁶ This transitional nature was also expressed in the report of the drafting committee of the Constitution.²⁷ As explained by Liu Shaoqi, the 1954 Constitution would serve for a period while the new PRC transformed itself into a socialist country; before the completion of this transformation the nature of the state should be a joint dictatorship of the working class in the city and the farmers in rural areas.²⁸ Therefore, after the reformation of the economy towards socialism had been accomplished, a new constitution was adopted in 1975.

*The 1975 Constitution*²⁹

After the socialist reformation of the economy had been completed, the Chinese leaders considered it necessary to adopt a new constitution to replace the 1954

²⁴ Chen Jianfu, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (The Hague, London and Boston, MA: Kluwer Law International, 1999), p.65.

²⁵ From 1957 to 1976, China's progress towards the regular construction of a legal order was interrupted. Political campaigns and movements destroyed the whole governmental structure and legal system. These political movements included the Anti-Rightist Campaign (from 1957), the Great Leap Forward (1958), the Cultural Revolution (1966-1976).

²⁶ Cai Dingjian, *Xianfa Jing Jie* (宪法精解) (Beijing: Law Press, 2004), p. 47

²⁷ See, Liu Shao-chi, 'Report on the draft Constitution of the People's Republic of China' in *The 1954 Constitution of the People's Republic of China* (Peking: Foreign Language Press, 1954). In this report, it was stated that the 1954 Constitution was drafted in order to set down in legal form the general tasks to be accomplished in the transitional period.

²⁸ Ibid.

²⁹ The Constitution of the PRC, adopted by the First Session of the Fourth NPC on 18 January 1975.

Constitution. Due to the internal political struggle of the Party, the drafting process was postponed several times until 1975 when the NPC adopted a new Constitution. Composed of thirty articles, this Constitution curtailed citizens' rights dramatically, institutionalized the Chinese Communist Party's formal role in the state,³⁰ and abolished the procuratorial organs.³¹ The 1975 Constitution was always criticized for reflecting extremely leftist thought, emphasizing class struggle and continued revolution under the dictatorship of the proletariat. It boldly confirmed the direct rule of the Party over the state and advocated a wholesale dictatorship by the proletariat.³²

*The 1978 Constitution*³³

Compared with its predecessors, the 1978 Constitution was generally conceived as a compromise between the 'liberal' Constitution of 1954 and the Maoist Constitution of 1975.³⁴ It restored the procuratorial organs,³⁵ increased the powers of the National

³⁰ Article 2 of the 1975 Constitution states that, 'the Communist Party of China is the core of the leadership of the whole Chinese People'. Article 16 provides that 'the National People's Congress is the highest organ of state power under the leadership of the Communist Party'. For analysis of the 1975 Constitution, see, e.g., Leng Shao-chuan, *Criminal Justice in Post-Mao China: Analysis and Documents* (State University of New York Press, 1985), 7-34; Chen Jianfu, *Chinese Law: towards an understanding of Chinese law, its nature and development* (Hague, London, Boston: Kluwer Law international, 1999), p.66.

³¹ The Procuratorate in China was first established in the 1954 Constitution under Soviet influence. According to the constitutional system established in 1954, the procuratorate was charged with responsibility not only for prosecuting criminal cases on behalf of the state but also for ensuring observance of the law by all state organs and the persons in the organs of the state. See, article 81 of the 1954 Constitution. The 1982 Constitution provides that the procuratorial organs 'are state organs for legal supervision'. See, Article 129 of the 1982 Constitution.

³² See Zhang Chunqiao, *Guanyu Xiugai Xianfa de Baogao* (关于修改宪法的报告 Report on amendment of the Constitution), addressed to the first session of the fourth NPC on 13 January 1975. Chinese text can be found in *Remin Ribao* (人民日报 People's Daily), 20 January 1975.

³³ The Constitution of the PRC, adopted by the First Session of the Fifth NPC on 5 March 1978.

³⁴ Leng Shao-chuan, *Criminal Justice in Post-Mao China: Analysis and Documents* (State University of New York Press, 1985), p.38. Jerome A. Cohen argues that the 1978 Constitution serves as 'a halfway house between the 1975 Constitution on the left and the 1954 Constitution on the right'. See, Jerome, A. Cohen, 'China's Changing Constitution' (1978) 76 *The China Quarterly* 794-841, 836.

³⁵ See, Article 43 of the 1978 Constitution. Cohen regards the restoration of the procuratorate as one of the most significant changes introduced by the 1978 Constitution. See, Jerome, A. Cohen, 'Due Process?' in Tahirih V. Lee (ed.) *Chinese Law: Law, the State, and the Society in China* (New York and London: Garland Publishing, 1997).

People's Congress,³⁶ and revived some of the citizen's rights that were embodied in the 1954 Constitution.³⁷ Despite these modifications, the general ideological line of the 1975 Constitution remained unchanged.

The reform and open-door policy launched in 1978 at the third plenary session of the eleventh Central Committee of the Communist Party marked a new era in the modernization of China. The post-Mao Chinese leaders considered that the major social contradiction in China was no longer class struggle, but the disparity between the people's growing material and cultural needs and the backwardness of social production.³⁸ Against this background, the 1978 Constitution, apparently incapable of meeting this demand, was replaced by a new Constitution in 1982.

*The 1982 Constitution*³⁹

From 1978, Chinese leaders decided to divert the state's focus from ideological class struggle to the realization of socialist modernization.⁴⁰ This made it necessary to adopt a new constitution, within which the basic system and basic tasks of the state could be laid down in legal form.⁴¹ The communiqué of the third plenary session of

³⁶ Article 20 to 29 of the 1978 Constitution.

³⁷ Articles 44 to 55 of the 1978 Constitution.

³⁸ See, *Guanyu Jianguo Yilai Dang de Ruogan Lishi Wenti de Jueyi* (关于建国以来党的若干历史问题的决议 Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China), adopted on 27 June 1981, by the Sixth Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CPC). For an English version, see, 'On Questions of Party History', *Beijing Review*, 24, No. 27, 6 July 1981.

³⁹ The Constitution of the PRC of 1982, as amended in 1988, 1993, 1999 and 2004

⁴⁰ The 1975 Constitution was amended twice before the enactment of the 1982 Constitution. In July 1979, an amendment was adopted to establish the Local Standing Committees of Local People's Congresses, and changed the revolutionary committees into regular local governmental institutions. In 1980, the NPC amended Article 45 of the 1978 Constitution by deleting the controversial citizens' rights. For the Chinese version of these amendments mentioned above, see, *Zhonghua Renmin Gongheguo Falu Huibian* (中华人民共和国法律汇编 Compiled Laws and Regulations of the PRC) (Beijing: People's Press)

⁴¹ Peng Zhen, *Guanyu Zhonghua Renmin Gongheguo Xianfa Xiugai Cao'an de Baogao* (关于中华人民共和国宪法修改草案的报告 Report on the draft Constitution of the PRC) at the fifth session of

the eleventh Central Committee of the CPC proposed four principles of legal construction,⁴² and the former procuratorial and judicial organizations were restored.

Against this background, the 1982 Constitution manifests a determination to institutionalize public power. The supremacy of the Constitution is emphasized,⁴³ in contrast with the 1975 and 1978 Constitutions where the supremacy of the CPC's authority was formally written into the text.⁴⁴ In addition, the fundamental rights of citizens are greatly expanded, and elevated ahead of the provisions on the structure of the government in such a way as to show the significance of citizens' rights.⁴⁵

The 1982 Constitution made notable institutional changes in strengthening the system of the National People's Congress (NPC). It gave special attention to enlarging the national legislative powers of the Standing Committee of the NPC (NPCSC). Special committees within the NPC were also established.⁴⁶ The position of the President of the PRC was restored⁴⁷ and a Central Military Commission was

the fifth NPC on 26 November 1982. A Chinese version can be found at *Remin Ribao* (人民日报 People's Daily), 6 December 1982.

⁴² The four principles of legal reform are: *You Fa Ke Yi, You Fa Bi Yi, Zhi Fa Bi Yan, Wei Fa Bi Jiu* (有法可依, 有法必依, 执法必严, 违法必究 there must be laws for the people to follow; these laws must be observed; their enforcement must be strict and law breakers must be dealt with). See, for instance, 'Quarterly Chronicle and Documentation: October to December 1978' (1979) 77 *The China Quarterly*.

⁴³ See Article 5 of the 1982 Constitution.

⁴⁴ It should be noted that although the Constitution of 1982 does not explicitly stipulates the leadership of the Party, it has stated in its preamble that 'four cardinal principles' the country must uphold, including the leadership of the Chinese Communist Party. Furthermore, article 1 of the Constitution declares the nature of the state: 'The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants'. This is another way to confirm the leadership of the Party since the CPC is called the vanguard of the working class.

⁴⁵ Chapter II, 'The Fundamental Rights and Duties of Citizens' follows the 'General Principles', the Constitution of the PRC, 1982.

⁴⁶ See Article 70 of the Constitution of 1982. The special committees are to examine, discuss and draw up relevant bills and draft resolutions under the direction of the NPC and its Standing Committee.

⁴⁷ Section II, 'The President of the People's Republic of China' in Chapter III, 'The Structure of the State', Constitution of 1982. In accordance with the Chinese Constitution of 1982, the President and

established.⁴⁸ Under the new Constitution, the President of the PRC would fulfil many ceremonial functions in pursuance of the decisions of the NPC or NPCSC but would not be in command of the military forces.⁴⁹ The new Constitution also exerted restraints on the consecutive terms of certain high officials.⁵⁰

The 1982 Constitution has been amended four times subsequently;⁵¹ and many of these amendments reflect the ideological changes of the CPC. For example, the amendment in 1993 added ‘our country is in the primary stage of socialism’ to the Preamble. In 1999, ‘Deng Xiaoping theory’ was added as the guidance for building a socialist country in China. In 2004, the Preamble of the Constitution was amended further, stating that China would stay in the primary stage of socialism for a long time. The notion of ‘three represents’ was also adopted in the 2004 amendment to the Constitution.⁵²

The frequent amendments to the Constitution are also linked with the necessity to facilitate economic reform during the past three decades. It has been observed that

Vice-President of the PRC are elected by the NPC, and the President, in pursuance of the decisions of the NPC/NPCSC, promulgates statutes, appoints or removes government officials, and performs other functions (article 80, 81).

⁴⁸ Section IV, ‘The Central Military Commission’ in Chapter III, ‘The Structure of the State’, Constitution of 1982.

⁴⁹ According to the Chinese Constitution of 1982, the Chairman of the Central Military Commission (CMC) is elected by the NPC and other members of the CMC are to be decided by the NPC upon nomination by the Chairman of the CMC.

⁵⁰ See, Article 66 on the Chairman and Vice-Chairman of the NPCSC, Article 79 on the President and Vice-President of the PRC, Article 87 on the Premier, Vice-Premiers and State Councilors.

⁵¹ Constitutional amendment 1988, adopted at the First Session of the Seventh NPC on 12 April 1988; constitutional amendment 1993, adopted at the First Session of the Eighth NPC on 29 March 1993; constitutional amendment 1999, adopted at the Second Session of the Ninth NPC on 15 March 1999; constitutional amendment 2004, adopted at the Second Session of the Tenth NPC on 14 March 2004.

⁵² The relevant part in the seventh paragraph of the Preamble of the Chinese Constitution of 1982 was revised as ‘under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents’. See, *Amendments to the Constitution of the People’s Republic of China*, adopted at the Second Session of the Tenth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on 14 March 2004.

‘apart from merely signaling a change in power or in the political and economic conditions of the country, constitutions in China also tend to show the direction that their promulgators plan to take in governing China’.⁵³ At least thirteen out of the thirty-one amendments to the Constitution of 1982 are related to economic policy. For instance, the Constitution was amended in 1988 to give legal status to the private sector of the economy as well as to legalize the commercial transfer of land use rights.⁵⁴ The amendment of 1999 provided a further legal basis for ‘diverse sectors of the economy’.⁵⁵ Alongside the integration of the notion that ‘the state has put into practice a socialist market economy’ into the Constitution, the state’s economic function has subsequently changed towards providing the legal framework for the process of building a socialist economy.⁵⁶

2.2 System of government in contemporary China

Article 3 of the 1982 Constitution provides that ‘the state organs of the People’s Republic of China apply the principle of democratic centralism’. Democratic centralism, first as a discipline of communist party organization, is adopted as the main principle for governmental organization horizontally and also in terms of the central-local relationship in the governmental system. Originally it referred to a high degree of centralism after a democratic process. The concentration of power aims at

⁵³ William C. Jones, ‘The Constitution of the People’s Republic of China’ (1985) 63 *Washington University Law Quarterly* 708-735,713

⁵⁴ Article 10 of the 1982 Constitution originally stipulated that ‘No organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means’. The amended article provides, ‘No organizations or individual may appropriate, buy, sell or unlawfully transfer land in other ways. This right to the use of land may be transferred in accordance with law’.

⁵⁵ See the amendment to Article 6, approved on 15 March 1993 by the ninth NPC at its second session. The amended article reads, ‘During the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side’.

⁵⁶ See amendment to Article 15, approved on 29 March 1993 by the eighth NPC at its first plenary session. It reads after the amendment, ‘The state practices socialist market economy ... The state will enhance economic legislation and improve macro-control of the economy’.

the promotion of efficiency, although in theory all the decisions must be taken after sufficient discussion on a democratic basis.

2.2.1 People's congress system

The 1982 Constitution provides the fundamental framework for the operation of the state organs. The system of government in the PRC has been established pursuant to the people's congress system (*renmin daibiao dahui zhidu* 人民代表大会制). The National People's Congress (NPC) is the supreme organ of state power.⁵⁷ The NPC and its Standing Committee (NPCSC)⁵⁸ exercise the legislative power of the state.⁵⁹ At the top, the NPCSC oversees the enforcement of the Constitution and the work of the State Council, the Central Military Commission (CMC), the Supreme People's Court (SPC), and the Supreme People's Procuratorate (SPP).⁶⁰ The State Council, the SPC and SPP are all answerable to the NPC. On the provincial and county level, the institutions by and large mirror the central system of government. Hence the Chinese political system of the people's congress creates a hierarchical system of government with the NPC at its apex.

The Constitution asserts that the power of the state belongs to the people; the people exercise their power through the NPC and various people's congresses.⁶¹ In theory,

⁵⁷ Article 57 of the 1982 Constitution.

⁵⁸ According to Article 57 of the 1982 Constitution, the NPCSC is the permanent body of the NPC.

⁵⁹ Article 58 of the 1982 Constitution.

⁶⁰ The basic methods that the NPCSC exercises its supervision powers include listening to and examining work reports made by the State Council and its departments, the Supreme People's Court and the Supreme People's Procuratorate; inspecting the enforcement of laws; and putting on record and reviewing the administrative regulations of the State Council and such regulatory documents of local people's congresses as local statutes and regulations concerning autonomy and local needs. In addition, the Standing Committee can also exercise oversight on the work of the State Council, the Supreme People's Court and the Supreme People's Procuratorate by addressing inquiries and investigating into specific issues.

⁶¹ In China, the people's congresses have five vertical levels. These are the national people's congress, the provincial people's congress, the municipal people's congress, the county (or district in city)

people's congresses at all levels are elected by the people and accountable to the people and also subject to their supervision. The people's congresses create other state organs and supervise them. Therefore, the system of people's congress is based on the claim that sovereignty rests with 'the people'. This is the fundamental principle which the people's congress system must follow and is also the final objective to be achieved by the people's congress system. Here, the distinction has not been made between the political unity of the people in general, and the people who form the constitutional contract of a state. The will of the people could only be realised through the medium of the constitution; otherwise the claim that 'sovereignty rests with the people could be an entirely symbolic notion.

The people's congress system is referred to as the 'basic political system' (*gen ben zheng zhi zhi du* 根本政治制度) in China. Textbooks on Chinese constitutional law usually draw a distinction between the 'state system' (*guo ti*, 国体), which refers to the nature of the state, and the 'system of government' (*zheng ti* 政体), which refers to the organizational structure of political power.⁶² In China, the nature of the state is people's democratic dictatorship, and the government is organized in accordance with the doctrine of democratic centralism.⁶³ According to Mao Zedong, the system of government was determined by the state system. The nature of the state concerns the place of the various social classes in the state, i.e., it is the question of which class controls the political power of the state. As for the question of the 'system of

people's congress and the township people's congress. A people's congress above the county level has a standing committee, which can exercise almost all the powers of the people's congress while the latter is not in session. See, The Organization Law of the National People's Congress and The Organization Law of Local People's Congress and Local People's Government.

⁶² Xu Chongde, *Zhongguo Xianfa* (中国宪法 Constitutional Law in China) (Beijing: Renmin University Press, 1999).

⁶³ See, Articles 1 and 2 of the 1982 Constitution, and Peng Zhen's report to the NPC on the draft of the 1982 Constitution.

government', it is a matter of how political power is organized, the form in which one social class or another chooses to arrange the apparatus of political power to oppose its enemies and protect itself.⁶⁴

The people's congress system as the fundamental political system represents a rejection of the doctrine of the separation of powers, which is considered inseparable from a bourgeois constitution. The doctrine of the separation of powers encounters formidable resistance from Chinese leaders. As Deng Xiaoping pointed out, 'in political reforms we can affirm one point: We have to adhere to the system of the National People's Congress and not the American system of the separation of three powers'.⁶⁵ The Chairman of the NPCSC, in a recent working report to the plenary meeting of the NPC, asserted that

The people's congress system is clearly differentiated from the separation of powers political system. Branches of government exercise different functions, but they are working to achieve the same objective ... the supervision taken by the NPC over the State Council, the Supreme People's Court and Supreme People's Procuratorate, is to enhance their work and safeguard the overall implementation of the Constitution and the law correctly, to enhance lawful administration and just adjudication, [and to] guarantee the power of the people in the Constitution is respected and preserved.⁶⁶

It is stated that the relationship between the people's congresses and the state administrative organs, the People's Court and the People's Procuratorate is that of

⁶⁴ Mao Zedong, *Xin Minzhu Zhuyi Lun* (新民主主义论 On the New Democracy), January 1940.

⁶⁵ Deng Xiaoping's comment on 9 June 1989; cited in Kevin J. O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (New York: Cambridge University Press, 1990), at xiii.

⁶⁶ Wu Bangguo, *Work Report of the Standing Committee of the National People's Congress*, addressed to the plenary meeting of the NPC on 9 March 2006.

making decisions and implementing them; of the supervisor and the supervised; and of working in coordination.⁶⁷ Thus the purpose of this division of labour between different institutions is to achieve coordination and avoid power being over-concentrated, so as to allow the state organs to specialize in their distinctive responsibilities and at the same time to work in a coordinated manner. In other words, the governmental system in the PRC is designed to achieve a centralised decision-making system instead of checks and balances between government powers.

It is also argued that the institutional relationship between the people's congress and other government institutions is a kind of congress-executive combined system (*Yixing Heyi* 议行合一).⁶⁸ This argument is supported by the fact that in Chinese constitutional theory, the administrative branch of the government is an executive body of the representative; its main function is to carry out the decisions made by the representatives. However, one might doubt the practicality of this doctrine in a country with such a large population. The view that perceives the governmental system of China as a parliamentary system also over-simplifies China's political system.⁶⁹

⁶⁷ Official website of the PRC government: http://english.gov.cn/2005-09/02/content_28453.htm.

⁶⁸ Zhang Youyu and Wang Shuwen (eds.), *Zhongguo Faxue Sishi Nian* (中国法学四十年 Forty years of China's Legal Science) (Shanghai: Shanghai People's Press, 1990).

⁶⁹ Dowdle argues that China's governmental system belongs to a parliamentary system, which revolves the principle of parliamentary supremacy rather than the principle of separation of powers. See, Michael W. Dowdle, 'The Constitutional Development and Operations of the National People's Congress', (1997) 11 *Columbia Journal of Asian Law* 1-126, 55.

2.2.2 *The National People's Congress and its Standing Committee*⁷⁰

The NPC is composed of approximately three thousand deputies elected from the provinces, autonomous regions and municipalities directly under the Central Government and of deputies elected from the armed forces.⁷¹ Its plenary session is usually convened in early March, and continues for two weeks.⁷² These are not permanent or semi-permanent sessions interrupted by vacations, as in the Western parliamentary/congressional model. The NPC's permanent body, the NPCSC, is elected by the NPC and meets every two month.⁷³ Under the Constitution of 1982, the NPCSC is vested with extensive legislative power and is authorized to interpret the Constitution and the law.

The functions and powers of the NPC stipulated in the Constitution fall into three types. The first is the function exercised as the highest state power, such as the power to examine the state budget, to approve the establishment of provinces, autonomous regions, and municipalities directly under the Central Government, and to decide on questions of war and peace. The NPC is equipped with the legislative power of the state, which is exercised in tandem with its Standing Committee. The third important function of the NPC and its Standing Committee is supervisory power. This consists of the appointment and removal of certain officials of the state, organizing inquiries,

⁷⁰ For the historical institutional development of the NPC and its Standing Committee from 1954 to 1990, see, Kevin J. O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (New York: Cambridge University Press, 1990). For discussion of the politics of the NPC, see e.g., Murray Scot Tanner, *the Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects* (Oxford, New York: Clarendon Press, 1999).

⁷¹ Article 59 of the 1982 Constitution.

⁷² Article 61 of the 1982 Constitution provides that one plenary session of the NPC may be convened on a proposal by the NPCSC when it deems it necessary or when one-fifth of the deputies to the NPCSC so propose.

⁷³ Article 3, *Quanguo Remin Daibiao Dahui Changwu Weiyuanhui Yishiguize* (全国人民代表大会常务委员会议事规则 Rules of Procedures of the Standing Committee of the National People's Congress), passed by the NPCSC on 24 November 1987, and revised on 24 April 2009.

supervising the enforcement of the Constitution, and examining working reports from the administration, the judiciary and procuratorate.

The legislative function of the NPC and its Standing Committee

Both the NPC and its Standing Committee (NPCSC) enjoy the legislative power of the state; however, the division between their law-making competences has remained vague and symbolic. The current Constitution stipulates, ‘the Standing Committee is the permanent body of the National People’s Congress’,⁷⁴ while in the 1954 Constitution the NPCSC is designed as a ‘working organ’ of the NPC.⁷⁵ In the 1982 Constitution, the function of the NPCSC has been strengthened in order to accommodate the proliferation of legislative tasks during the early 1980s, since the NPCSC is smaller in size and it is convened more often than the NPC.⁷⁶

The NPC retains the sole power of amending the Constitution and enacting basic laws,⁷⁷ while the NPCSC exercises powers to interpret the Constitution and to enact laws with the exception of those that should be enacted by the NPC.⁷⁸ The NPC and its Standing Committee share the function of supervising the enforcement of the Constitution.⁷⁹ The present Constitution further provides that the NPC may alter or

⁷⁴ Article 57 of the 1982 Constitution.

⁷⁵ Article 30 of the 1954 Constitution of the PRC.

⁷⁶ Peng Zhen, ‘Guanyu Xiugai Xianfa de Baogao’ (关于修改宪法的报告 Report on the Draft Constitution 1982), in the Legislative Affairs Commission of the NPCSC (ed.), *Zhonghua Renmin Gongheguo Falu Huibian* (1979-1984) (Compiled Laws of the PRC) (Beijing: People’s Press).

⁷⁷ The term ‘Ji ben Fa lü’, has also been translated as ‘basic laws’. Article 62(3) of the 1982 Constitution refers to the power ‘to enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters’. No guidance is given on how to differentiate between ‘basic laws’ and ‘laws’. The Legislation Law of 2000 further delimits the legislative power between the NPC and the NPCSC.

⁷⁸ Article 67 of the 1982 Constitution.

⁷⁹ Articles 62(2) and 67(1) of the 1982 Constitution.

annul inappropriate decisions of the NPCSC;⁸⁰ at the same time, the NPCSC is entitled to partially supplement and amend laws enacted by the NPC when the NPC is not in session, provided that the basic principles of these laws are not contravened.⁸¹

In terms of the legal competence of initiating the legislative process, the following organs or persons are authorized to initiate legislation within the jurisdiction of the NPC: the Presidium of the NPC,⁸² any one of the special committees of the NPC,⁸³ the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, one of the delegation units⁸⁴ or the signature of thirty deputies of the NPC.⁸⁵ Seven entities are entitled to submit legislative proposals and other bills to the Chairman's Group of the NPCSC regarding legislation that falls within the jurisdiction of the NPCSC, including the State Council, one of the special committees of the NPC, the Central Military

⁸⁰ See Article 62(11) of the 1982 Constitution. There are no mechanism or legal provisions so far to ensure the consistency of NPCSC's law with the basic law adopted by the NPC.

⁸¹ See Article 67 (3) of the 1982 Constitution. It should be noted that there is no legal provision, procedure or any convention regarding who should decide the consistency of these amendments or supplements made by the NPCSC with the laws made by the NPC. Practically speaking, it is hard to imagine any restrictions on the power of the NPCSC in exercising this function.

⁸² According to the 1982 Constitution, the NPC meets in session once a year, usually convened by its Standing Committee. When the NPC meets, it elects a *Presidium* to conduct its session.

⁸³ Before 1988, the NPC had established six special committees, namely the Ethnic Group Committee, Law Committee, Finance and Economic Committee, Education, Science, Culture and Public Health Committee, Foreign Affairs Committee, and Overseas Chinese Committee. Two other special committees have been added, namely, the Internal and Judicial Affairs Committee (1988) and Environmental Protection Committee (1993). These special committees of the NPC are responsible for examination, discussion, elaboration and drawing up relevant bills and draft revolutions under the direction of the NPC and its Standing Committee. Among them, the Law Committee is responsible for carrying out 'unified investigation' of the drafts of all laws.

⁸⁴ By and large, the deputies (representatives) of the NPC are organized into around 30 units, according to the geographical provincial demarcation; each province has one delegation in the NPC. Deputies from the military forces shall be organized into their own group.

⁸⁵ See, *Quanguo Renmin Daibiao Dahui Zuzhi Fa* (全国人民代表大会组织法 Organization Law of the National People's Congress), adopted on 10 December 1982 by the Fifth Session of the Fifth NPC; *Quanguo Renmin Daibiao Dahui Yishi Guize* (全国人民代表大会会议事规则 The Rules of Procedures of the National People's Congress), adopted by the Second Session of the Seventh NPC on 4 April 1989.

Commission, the Supreme People's Court, the Supreme Procuratorate, and ten members (jointly signed) of the NPCSC.⁸⁶

The Legislation Law defines the competence of the NPC and the State Council

As stated above, the reform and opening-up of China since the late 1970s makes it imperative to enact laws providing the necessary legal environment in order to accommodate the needs of attracting foreign investment and regulating the private sector economy in China. In order to accommodate the increasing legislative tasks, the NPC authorized the State Council to promulgate 'temporary legislation'⁸⁷ on issues of 'economic reform and restructuring, and opening to the outside' in a resolution passed in 1985.⁸⁸ The State Council, in addition to its function of enacting administrative rules and regulations in accordance with the Constitution and the law,⁸⁹ began to share the legislative function of the NPC/NPCSC.

It is not uncommon in modern countries that the administration, possessing the personnel and expertise, assumes a *de facto* legislative role.⁹⁰ Secondary legislation came into widespread use in the nineteenth century with the emergence of

⁸⁶ *Quanguo Renmin Daibiao Dahui Yishi Guize* (全国人民代表大会议事规则 The Rules of Procedure of the National People's Congress of the PRC), adopted by the Second Session of the Seventh NPC on 4 April 1989.

⁸⁷ Also cited by some scholars as 'Chaoqian Lifa' (超前立法 advanced legislation), or 'Zanxing Lifa' (暂行立法 provisional legislation). See e.g., Li Yahong, 'Chinese Law: The Law-making law: A Solution to the Problem in the Chinese Legislation System?' (2000) 30 *Hong Kong Law Journal* 120-140.

⁸⁸ *Quanguo Renmin Daibiao Dahui Guanyu Shouquan Guowuyuan Zai Jingji Tizhi Gaige he Duiwai Kaifang Fangmian Keyi Zhiding Zanxing de Guiding Huozhe Tiaoli de Jueding* (全国人民代表大会关于授权国务院在经济体制改革和对外开放方面制定暂行规定的决定 Resolution by the National People's Congress on authorizing the State Council to enact provisional rules or regulations on the issues of economic reforms and restructuring, and opening to the outside), adopted by the Third Session of the Sixth NPC on 10 April 1985.

⁸⁹ Article 89 of the 1982 Constitution provides that the State Council exercises the function to enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the law.

⁹⁰ T. C. Hartley, and J.A.G. Griffith, *Government and Law: an introduction to the working of the Constitution in Britain* (London: Weidenfeld and Nicolson, 2nd edition, 1981).

collectivism and the realization that Parliament had to delegate the powers to make detailed rules for the new central government departments.⁹¹ However, the situation has been exacerbated in China during the past twenty years owing to the rapid growth of law-making tasks and the instrumental approach towards the law. The consequent delegation of legislative power and the emergence of local legislation demonstrate a much more complex picture of legislation in reality. Moreover, the respective authority among the major law-making institutions in the Chinese system is vaguely defined. As a matter of fact, each of these various organizations has its own package of power resources that allows it to influence law-making at different stages, the result being that consensus decision-making has become increasingly difficult.⁹² Many scholars have pointed out the deficiency in this legislative system. Keller contends that 'China's legislative hierarchy is a complex thicket of ill-defined powers and ambiguous sources of legal authority', while the role of law in Chinese society is 'supplementary rather than a fundamental source of certainty and predictability in social, commercial or administrative relationships'.⁹³

It has been rightly pointed out that in recent years the legislative function of the NPC and its Standing Committee has been intensified to some extent and that it has made use of its constitutional status to fight back to expand its sphere of influence. One example is the drafting plan promulgated by the NPCSC every five years, which lists proposed legislation and specifies the institutions responsible for the concrete

⁹¹ Robert Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995).

⁹² Murray Scot Tanner, 'Organizations and Politics in China's Post-Mao Law-Making System', in Pitman B. Potter (ed.), *Domestic Law Reforms in Post-Mao China* (M. E. Sharpe, Inc, 1994) See also, Tanner, *The Politics of Law-Making in Post-Mao China: Institutions, Processes and Democratic Prospects* (Oxford: Clarendon Press, 1999).

⁹³ Perry Keller, 'The National People's Congress and the Making of National Law', in Jan Michiel Otto (ed.), *Law-Making in the People's Republic of China* (Kluwer Law International, 2000), pp.77-78

drafting work. Considering the fact that prior to 1993 these legislative plans were issued by the State Council, it may be appropriate to assume that the NPCSC has become a more influential institution during this turf war with the State Council.

The adoption of the Legislation Law⁹⁴ represents arduous efforts to regularize the chaotic situation in the field of law-making and to establish a uniform legislative hierarchy and consolidate its authority over other law-making institutions.⁹⁵ Faced with extensive criticism and incoherence of laws and rampant regulations, the NPC leaders pushed for the enactment of this law with the hope of regulating legislative activities and maintaining the unity of the entire legal system after the rapid but unplanned development in the field of legislation during the past two decades.⁹⁶

The Legislation Law emphasizes the primacy of the NPC over the legislative function of the state by asserting its exclusive legislative status. Legislation in certain essential areas, including human rights protection, criminal justice, fundamental civil and political rights, personal liberties and the judicial system, cannot be delegated. The activity of these areas can only be prescribed in the form of national law, which should be strictly enacted by the NPC and its Standing Committee. These fundamental matters cannot be dealt with by administrative regulations. Furthermore,

⁹⁴ *Zhonghua Remin Gongheguo Lifa Fa* (中华人民共和国立法法 The Legislation Law of the People's Republic of China) adopted by the Third Session of the Ninth NPC on 15 March 2005.

⁹⁵ During the drafting process from 1993 to 2000, several drafts were written including an 'expert draft' submitted on 20 October 1996 by legal experts. The Legislative Affairs Commission of the NPCSC prepared six other drafts. Many sensitive issues relating to constitutionalism in China were debated during this legislation process. These debates continue among legal professionals in China. The issues include the vertical division of central and local legislative powers, the horizontal distribution of legislative power between the NPC and the State Council, supervisory authority over laws, administrative regulations and rules, and legal interpretation. See, Laura Paller, 'China's Legislation Law and the Making of a More Orderly and Representative Legislative System' (2005) 182 *The China Quarterly* 301-318.

⁹⁶ *Ibid.* 304.

the exercise of delegated power must be within the purpose, scope and duration of the delegation.⁹⁷ Through these provisions in the Legislation Law, the provisional legislative power exercised by the State Council is now strictly defined.

After the adoption of the Legislation Law, the hierarchy of the sources of law in China becomes clearer in theory. In reality, however, conflicts of laws are mainly resolved through informal co-ordination between various authorities, including prior approval by superior authorities and allowing party control over legislative affairs.⁹⁸ The basic laws and other national laws adopted respectively by the NPC and its Standing Committee constitute the main body of laws. The State Council, as the executive body and the highest administrative organ of state, is entitled to issue administrative regulations to implement the national laws. The provisional legislation enacted by the State Council has been strictly defined. Local decrees (adopted by the provincial congresses), administrative rules (issued by the ministries and commissions of the State Council) and local rules (enacted by local governments)⁹⁹ together constitute tertiary rules, which are not *law* in a strict sense, but are only regulations with limited binding effect.

⁹⁷ Articles 8, 9, 10, 11 of the Legislation Law.

⁹⁸ Chen Jianfu, 'Unanswered Questions and Unresolved Issues: Comments on the Law on Law-making', in Jan Michiel Otto (ed.), *Law-Making in the PRC* (Kluwer Law International, 2000), p.247.

⁹⁹ For analysis of hierarchy of the Chinese legal system, see Perry Keller, 'Sources of Order in Chinese Law' (1994) 42 *American Journal of Comparative Law* 711-759. See also, Chen Jianfu, *Chinese Law: Towards an Understanding of Chinese Law, Its nature and Development* (Hague, London: Kluwer Law international, 1999). Both authors divide the hierarchy into three levels. Chen argues for the following division: primary (national law), secondary (national administrative rules and regulations) and tertiary (local rules). Perry Keller instead puts the local decree (adopted by the provincial congresses) into the secondary level, while keeping only administrative rules (passed by ministries) and local rules (passed by local governments) in the tertiary level. According to article 67(8), 89 and 100 of the 1982 Constitution, the legal authority of the administrative regulation made by the State Council is higher than local decrees. But it seems that the State Council could not annul or alter the local decrees directly. This situation is further defined in chapter 5 of the Legislation Law.

Supervisory power of the NPC and its Standing Committee

As stated above, in addition to exercising the national legislative power of the state, the NPC and its Standing Committee also enjoy supervisory power over the administration, the judiciary and the procuratorate. This is performed in various ways, such as the election or removal of certain top officials, the power to vet and approve work reports from the State Council, the Supreme People's Court and the Supreme People's Procuratorate, and conducting inquiries into specific questions.

The NPC and its Standing Committee are empowered to elect senior officials and remove them from their offices. The NPC elects the President and Vice-President of the PRC, decides on the choice of the Premier of the State Council (upon nomination by the President of the PRC) and the members in the Premier's cabinet, elects the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate.

Another significant function enjoyed by the NPC is to appoint committees of inquiry into specific questions when it deems necessary and adopt relevant resolutions in the light of their reports.¹⁰⁰ The Standing Committee of the NPC can conduct an investigation into the implementation of certain laws, or make inquiries to the executive through its deputies. These inquiries must be answered in a responsible manner.¹⁰¹ The investigatory committee is sometimes considered to be the most potent weapon in the NPC's supervisory arsenal.¹⁰²

¹⁰⁰ See, Article 71 of the 1982 Constitution. Inquiries that have been conducted shall be reported in the Gazette of the NPCSC.

¹⁰¹ Article 71 and 73 of the 1982 Constitution.

¹⁰² Michael W. Dowdle, 'The Constitutional Development and Operations of the National People's Congress' (1997) 11 *Columbia Journal of Asian Law* 1-126.

2.2.3 *The judiciary in the system of government of the PRC*

The system of courts is composed of the Supreme People's Court (SPC) and various lower level courts. China exercises a four-level, two-hearing trial process.¹⁰³ Below the SPC, higher courts are established at the levels of provinces, ethnic minority autonomous regions, and municipalities, followed by intermediate courts (usually in cities), and primary people's courts at county level or one district of a city. The jurisdiction of the courts is provided by specific legislation.¹⁰⁴

The Supreme People's Court performs three main functions: adjudicating cases, supervising the administration of justice by local people's courts and special people's courts at different levels, and offering explanations of the concrete application of laws during the trial process.¹⁰⁵ The SPC supervises the administration of justice by the people's court at various levels. Unlike the vertically responsible system of the people's procuratorate,¹⁰⁶ higher level courts, except the SPC, only 'guide in the professional work' of lower courts. The SPC is the only institution entitled to issue interpretations of law in the system of people's courts.

According to the 1982 Constitution, the people's courts in China are the judicial

¹⁰³ Generally speaking, the two-hearing system means that, when litigants are not satisfied with the verdict of any of the local people's court at various levels, they are entitled to appeal to a court of the immediate higher level within the time limits prescribed by law. The verdict of the second hearing is the final decision.

¹⁰⁴ See, Articles 17-32, chapter II 'Organization, functions and powers of the people's court' in *Renmin Fayuan Zuzhi Fa* (人民法院组织法 Organization Law of the People's Court), adopted on the Second Session of the Fifth NPC on 1 July 1979, and amended by the NPCSC in September 1983. Latest amendment was passed by the NPCSC on 31 October 2006.

¹⁰⁵ Ibid.

¹⁰⁶ According to the *Remin Jianchayuan Zuzhifa* (人民检察院组织法 Organization Law of the People's Procuratorate), the people's procuratorate at higher level directs the work of the procuratorate at lower levels. See, *Remin Jianchayuan Zuzhifa*, passed by the Second Session of the Fifth NPC on 1 July 1979 and amended on 2 September 1983.

organs of the state,¹⁰⁷ which exercise judicial power independently in accordance with the provisions of the law, not subject to interference by any administrative organ, public organization or individual.¹⁰⁸ However, this expression does not equate to the independence of the judiciary. Some scholars compare the provisions of the 1982 Constitution with the 1954 Constitution and conclude that the 1954 Constitution made the courts free of intervention of direct political pressure from either the Party or the influences of mass campaigns, so that the courts would be politically independent and subordinate only to the law.¹⁰⁹ For instance, Liu argues that Article 78 of the 1954 Constitution¹¹⁰ was striking in that it strongly suggested interference from any other agency or individual, including the Party and its members, in the Courts' administration of justice was excluded. Thus in comparison with Article 126 of the current Chinese Constitution, the 1954 Constitution seemed to give a stronger promise of the independent administration of justice.¹¹¹

The role of the judiciary within the Chinese constitutional framework is restricted.¹¹² First, as many scholars have argued hitherto,¹¹³ in theory, the legal

¹⁰⁷ Article 123 of the 1982 Constitution.

¹⁰⁸ Article 126 of the 1982 Constitution.

¹⁰⁹ James P. Brady, *Justice and Politics in Peoples' China: Legal Order or Continuing Revolution?* (London; New York: Academic Press, 1982), p.120.

¹¹⁰ Article 78 of the 1954 Constitution stipulates that 'in administering justice, the people's courts are independent, subject only to the law'.

¹¹¹ Liu Nanping, *Opinions of the Supreme People's Court: Judicial Interpretation in China* (Sweet & Maxwell Asia, 1997), p.8.

¹¹² Discussion of independence of the judiciary is still a politically sensitive issue in the legal communities in the PRC. He Weifang of the Peking University has written on this subject continuously; most scholars, however, prefer to choose less sensitive topics and devote their research to study on how law has been carried out in urban and rural areas by various levels of people's courts. For instance, He Weifang, 'Guanyu Shenpan Weiyuanhui de Jidian Pinglun' (Several Comments on the Adjudicative Committee in Courts) (1998) 1 (2) *Peking University Law Review* 365-374; He Weifang, *Sifa de Linian yu Zhidu* (司法的理念与制度 Concepts and Institutions of Judicature) (Beijing: University of Politics and Law Press, 1998); Zhu Suli, 'Political Parties in China's Judiciary' (2006-07) 17 *Duke Journal of Comparative and International Law* 533-560; Zhu Suli, 'Jiceng Fayuan Shenpan Weiyuanhui Zhidu de Kaocha Ji Sikao' (基层法院审判委员会制度的考察及思考

status of the people's courts is inferior to the people's congress. The Constitution uses the term 'highest judicial organ of the state' instead of the 'highest court of the state', which may suggest the courts are just specialized organs responsible for coercive adjudication.¹¹⁴ In 1998, the SPC issued an 'opinion' regarding the relationship between the people's courts and the people's congresses.¹¹⁵ However, scholars contend that the supervision over the courts by congresses should not extend to intervention in any specific case, since the people's congresses should not have a judicial function according to the Constitution.¹¹⁶ The court's responsibility for the people's congress also raises concern about the court's possible predicament when the local legislation is inconsistent with the interpretation of the SPC.¹¹⁷

Secondly, in Western countries the role of the courts as the bulwarks of the constitution is a strong argument for the permanent tenure of judges.¹¹⁸ In China, the tenure of judges is not assured at the central or local level. Given the status of local courts in the local governmental system, the independence of the administration of justice might be even harder to achieve. Judges are appointed by the people's

Examination and Reflection on the Adjudicative Committee in Chinese Local Courts) (1998) 2 *Peking University Law Review* 320-364; Su Li, *Song Fa Xia Xiang: Zhongguo Jiceng Sifa Zhidu Yanjiu* (送法下乡: 中国基层司法制度研究 Taking Law to Countryside: A Study of the Basic Level Judicial System in the PRC) (Beijing: University of Politics and Law Press, 2000).

¹¹³ Shen Kui, 'Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's First "Constitutional Case"', Liu Yuping trans. (2003) 12 *Pacific Rim Law and Policy Journal* 199-232.

¹¹⁴ Susan Finder, 'The Supreme People's Court of the People's Republic of China' (1993) 7 *Journal of Chinese Law* 145-224.

¹¹⁵ See, *Guanyu Remin Fayuan Jiesshou Renmin Daibiao Dahui Jiqi Changwu Weiyuanhui Jiandu de Ruogan Yijian* (关于人民法院接受代表大会及其常务委员会监督的若干意见 Opinion regarding the supervision of the People's Courts by the People's Congress and its Standing Committee), issued on 24 December 1998.

¹¹⁶ Wang Zhenmin, *Zhongguo Weixian Shencha Zhidu* (中国违宪审查制度 Constitutional Review in China) (Beijing: Chinese Politics and Law University Press, 2004), p.191.

¹¹⁷ For example, William C. Jones, 'The Constitution of the People's Republic of China' (1985) 63 *Washington University Law Quarterly* 708-35, 710.

¹¹⁸ Alexander Hamilton, *Federalist Papers*, No.78.

congress at the same level. At the same time, the court's finance is controlled within the hands of local government. In general, judges are treated similarly to other civil servants in the administrative systems in China. In contrast with the general perception in the West that the judiciary is an essential barrier to the encroachment and oppression of the representative body to secure an impartial administration of justice, the courts in China are considered part of the whole bureaucratic system.

Thirdly, the courts have no inherent or exclusive function of interpreting laws and maintaining the coherence and conformity of the legal system. With the adoption of the '1981 resolution concerning the strengthening of the legal interpretative work',¹¹⁹ the interpretation of law was divided into several types: legislative interpretation, administrative interpretation and interpretation in the administration of justice (i.e., interpretation by the Supreme People's Court, or interpretation by the Supreme People's Procuratorate). The Organization Law of the People's Courts empowers the SPC to interpret law in respect of how to apply law and decrees during concrete adjudication.¹²⁰ The SPC, in the administration of justice and the supervision of lower level courts, has issued general opinions, or taken action in the form of replying to inquiries from local courts concerning the application and enforcement of legal norms.

The exercise of interpretative functions by the courts is restricted. The SPC is the

¹¹⁹ *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falu Jieshi Gongzuo de Jueyi* (全国人民代表大会常务委员会关于加强法律解释工作的决议 Resolution Concerning the Strengthening of Interpretation Work of the NPCSC), adopted by the NPCSC on 10 June 1981 by the nineteenth meeting of the Standing Committee of the fifth plenary NPC.

¹²⁰ Article 33, *Renmin Fayuan Zuzhi Fa* (人民法院组织法 Organization Law of the People's Court), adopted on the Second Session of the Fifth NPC on 1 July 1979, and amended by the Standing Committee of the Sixth NPC on 2 September 1983. Latest amendment is in 2006.

only legitimate organ among all the people's courts to issue formal interpretations of laws and its interpretations are only binding within the system of the judiciary. By contrast, interpretations by the NPCSC are considered as part of the law. Since China basically exercises a civil law system, the principle of *stare decisis* in common law jurisdictions exerts little influence in judicial practice. In addition, the scope of the law that the SPC interprets is restricted to the national laws enacted by the NPC and its Standing Committee. The interpretation of administrative regulations, however, belongs to the State Council according to the 'Procedure of Enactment of Administrative Regulations'.¹²¹ This yields an odd situation whereby the people's congress at provincial level is entitled to interpret its local regulations, and the State Council is responsible for interpreting the administrative regulations it has enacted; however, the SPC can only interpret national law regarding the application of laws, and such judicial interpretation is subject to and inferior to the NPCSC's interpretation.

More importantly, the role of the Party in the judiciary remains an ambiguous and sensitive issue confined to scholarly discussion.¹²² Actually abolition of the Party institution known as the political-legal committee was discussed at the early stages of China's reform and opening-up. Jiang Hua, then Chief Justice of the Supreme People's Court, told the Beijing criminal trials conference that the Party was ready to abolish the system of Party Committee Review and approval of cases.¹²³ One

¹²¹ *Xingzheng Fagui Zhiding Chengxu Tiaoli* (行政法规制定程序条例 Procedural rules on the enacting of administrative regulations), adopted by the State Council on 16 November 2001.

¹²² See, for instance, Zhu Suli, 'Political Parties in China's Judiciary' (2006-07) 17 *Duke Journal of Comparative and International Law* 533-560.

¹²³ See, the *New York Times*, 25 August 1980, cited by Hungdah Chiu, 'Socialist Legalism: Reform and Continuity in post-Mao People's Republic of China', in Occasional Papers Reprint series in Contemporary Asian Studies, no. 1-1982(46): pp.20-22. For comments on China's political reform in

conference held in Chongqing in 1979 concluded that ‘it is entirely correct to have the Procuratorate and the court exercise their functions independently and to change the system of party committee’s approval of cases’.¹²⁴

In summary, judicial reform in China has lagged behind relative to other reforms. The deficiencies existing in the judicial system are acknowledged by senior officials as well as academics and practitioners. Broad consensus seems to exist, at least among Chinese legal specialists, that what needs to be done is to eliminate the current defects.¹²⁵ Since judicial reform has been launched in China, measures have been pressed forward, and positive trends have emerged in the wake of these reforms. The enactment of the Judges Law is an example.¹²⁶ It provides that a judge should not be removed unless this is due to a legal situation and any punishment must be administered according to legal procedure.¹²⁷ In 2005, the SPC launched its second five-year plan for judicial reform in China. Suggestions have been advanced in this project, such as raising the level of judges’ professional training to promote the overall quality of the administration of justice, and requiring the courts’ budgets, and the selection, promotion, assignment and pensions of judges, to be handled by central rather than local authorities, and encouraging professional training to reduce the prominence of *guanxi* and corruption.

the 1980s, see, James Seymour, ‘The Abortive Attempt to Democratize China’s Political System’, in Ronald A. Morse (ed.), *The Limits of Reform in China* (Boulder, CO: Westview, 1983); Harry Harding, ‘Political Development in post-Mao China’, in A. Doak Barnett and Ralph N. Clough (eds), *Modernizing China* (Boulder, CO: Westview, 1986).

¹²⁴ *Xi Nan Zheng Fa Xue Yuan Xue Bao* (西南政法学院学报 Study Journal of Southwest College of Political Science and Law), No.2 1979, p. 59.

¹²⁵ Jerome A. Cohen, ‘Reforming China’s Civil Procedure: Judging the Courts’ (1997) 45 *American Journal of Comparative Law* 793-804.

¹²⁶ *Zhonghua Renmin Gongheguo Faguan Fa* (中华人民共和国法官法 Judges Law of the People’s Republic of China) passed by the NPCSC on 28 Feb 1995. It was further amended on 30 June 2001.

¹²⁷ Article 8 of the Judges Law of the PRC.

2.2.4 Central-Local Relations in the PRC

It has been stated in the Chinese Constitution of 1982 that the PRC is ‘a unitary multi-national state created jointly by the people of all its nationalities’.¹²⁸ In accordance with the principle of ‘democratic centralism’, the system of government at central and local levels is subsequently established. People’s congresses and people’s governments are established in provinces, municipalities directly under the Central People’s Government (CPG), counties, cities, municipal districts, townships, nationality townships, and towns;¹²⁹ organs of self-government are established in autonomous regions, autonomous prefectures and autonomous counties.¹³⁰ The legal status of the ethnic minority autonomous regions (EAR) is written into the Constitution and further defined in the Law of the PRC on Regional National Autonomy,¹³¹ allowing the EARs to enjoy a more flexible range of policy-making and law enforcement powers. Local legislation in these regions is permitted to make necessary alterations or adjustments to national laws according to local circumstances.¹³²

The division of functions and powers between the central and local state organs, stated in the 1982 Constitution, 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’.¹³³ Pragmatically speaking, power-sharing between the centre and

¹²⁸ Preface of 1982 Constitution.

¹²⁹ Article 95 of the 1982 Constitution.

¹³⁰ Section 6, Chapter III on Structure of the State, the 1982 Constitution.

¹³¹ Zhonghua Remin Gongheguo Minzhu Quyu Zizhifa (中华人民共和国民族区域自治法 Law of the PRC on Regional National Autonomy), adopted at the Second Session of the Sixth NPC, promulgated by Order No.13 of the President of the PRC on 31 May 1984, and effective as of 1 October 1984.

¹³² Article 100 and Article 117 of the 1982 Constitution.

¹³³ Article 3 of the 1982 Constitution.

localities in the PRC seems inevitable. Local legislative power was denied during the first thirty years of the PRC. Until 1979, pursuant to the organization law concerning the local congresses of various levels,¹³⁴ the people's congress at provincial level was endowed with the power to enact local regulations. This was subsequently recognized in the 1982 Constitution, which made significant changes to enhance local authority and give stimulus to local development. In contrast with the 1954 Constitution, which gave the NPC the sole legislative power of the state and confined the function of local congresses in their respective administrative areas to ensure the observance and execution of the NPC law and decrees,¹³⁵ the 1982 Constitution entitled the people's congresses of provinces and municipalities directly under the CPG and their standing committees to adopt local regulations, on the condition that these local regulations shall not contravene the Constitution and the law. To ensure the integrity of the law and the authority of the Constitution and national law, local regulations must be reported to the NPCSC for record and are subject to review of the NPCSC.¹³⁶ Also, all local regulations must adhere to the national laws, and the administrative regulations issued by the CPG.

Briefly put, the Chinese Constitution gives a direction on central-local relationship both in government organizations and the division of law-making power. The Constitution and the Law of Legislation have endeavored to ensure the integrity and consistency of the law. The Constitution has been changed to accommodate the

¹³⁴ *Zhonghua Renmin Gongheguo Difang Geji Renmin Daibiao Dahui he Difang Geji renmin Zhengfu Zuzhifa* (中华人民共和国地方各级代表大会和地方各级人民政府组织法 The Organization Law on Local People's Congresses and Local Government at Various Levels), adopted on 1 July 1979 by the Second Session of the Fifth Plenary NPC, amended on 10 December 1982, 2 December 1986 and 28 February 1995 respectively.

¹³⁵ See, Article 22 of the 1954 Constitution. Also, the Organic Law of the Local People's Congresses and Local People's Councils of the PRC, adopted by the First Session of the First NPC on 21 September 1954.

¹³⁶ See, Article 99 of the 1982 Constitution and the Legislation Law of 2000.

increase of local legislation power, and more flexibility has been given to EAR regarding local law-making and making necessary alterations to national laws. The most significant challenge to the Chinese constitution in its ability to accommodate territorial pluralism arises from the adoption of article 31 of the Chinese Constitution of 1982 and the subsequently drafted Hong Kong Basic Law by the NPC.

Article 31 of the 1982 Chinese Constitution provides a legal basis for the establishment of a new Special Autonomous Region (SAR) and the constitutional responsibility of the NPC. This is a unique stipulation in the form of the state and its regions since it only states that a new form of a sub-state government shall be established and its fundamental systems will be provided in a basic law. Nevertheless, we see that article 31 has brought normative change to the Chinese Constitution 1982; it equates to an amendment of constitution and introduces a nascent and unique mode of central-local relationship. At the same time, the normative changes provide a framework within which further acknowledgment of a new autonomy becomes possible. The autonomy bestowed to the SARs substantially accommodates another fundamentally distinct social and legal system.

The question still remains concerning what kind of power should be given to the NPC and its Standing Committee in making a decision on the issues related to the bilateral relations, and how far, and on what basis, the NPC or its Standing Committee should take the charge of defining the relations between Hong Kong and mainland China before and after the adoption of the Basic Law. In fact, what differs Hong Kong/PRC relations from other autonomy in ethnic minority regions is that the

Hong Kong issue introduces an exception to the system of government that the Constitution provides. It is not about division or sharing of power; it is about a paradoxical relationship of norm and exception.

2.3 The role of the Constitution in the Chinese governmental system

Based on the above historical review of the constitutional experience in China and examination of the system of government of the PRC, it can be deduced that the primary role of the Constitution in China is to provide the organizational structure of the state rather than endorsing the principle of the checks and balances of state powers. Furthermore, it is more closely concerned with providing the future direction of society than providing protection for the fundamental rights of citizens.¹³⁷ This argument can be further consolidated as follows.

First, the significance of the Constitution in the Chinese governmental system is beyond doubt. As a fundamental charter of the state, the Constitution sets out the fundamental principles of the government subsequent to the Revolution, purporting to give a moral authority, or legitimacy, to the institutions of the state. It could be forcefully argued that the Constitution gained undeniable and irreplaceable authority in the reconstruction of the political order in China during the process of China's state-building and modernization. Along with the introduction of Western constitutional concepts into China, the Constitution is re-interpreted as an instrument to establish a new authority, and to proclaim the fundamental policies of a government. The Constitution, with the ability and authority to ensure a stable

¹³⁷ See also, Jiang Shigong, 'Falu Yizhi, Gonggong Lingyu Yu Hefaxing' (法律移植, 公共领域与合法性 Legal Transplantation, Public Sphere and Legitimacy) in Zhu Suli (ed.), *Ershi Shiji De Zhongguo: Xueshu Yu Shehui* (二十世纪的中国: 学术与社会 Academia and Society in twentieth century China) (Ji'nan: Shandong People's Press, 2001), p.92.

regime, is considered necessary to ascertain and sustain in legal form the assignment of state power.

More importantly, its authority comes from the declaration of the Constitution that it rests its power in all the people. The reason for adopting a constitution is usually to provide for the common good and protect the common interest. In China, each of the written constitutions of the PRC has declared that it is based on the will of the people.¹³⁸ For instance, when the PRC was founded in 1949, it was declared in the provisional constitution that the newly established government was based on the general will of the people. The Common Programme proclaimed that ‘the Chinese People’s Political Consultative Committee, representing the will of the people of the whole country, proclaims the establishment of the PRC and the organization of the central government’. The 1954 Constitution and the 1982 Constitution both declared that ‘all power in the People’s Republic of China belongs to the people’. This may suggest that in theory, the legitimate source of the government was rooted in the people and should serve this end.

Second, the Chinese constitution has continuously emphasized its nature as a socialist constitution and the doctrine of separation of powers has been rejected. Textbooks on Chinese constitutional law usually point out that a constitution in a socialist state is a new type of constitution under which the principles differ from those of capitalist countries. A capitalist constitution is usually attached to the doctrine of separation of powers, the rule of law, and the protection of private

¹³⁸ Mao Tse-tung, *On the People’s Democratic Dictatorship* (Peking: Foreign Languages Press, 1951). Mao defined that at the then present stage of China, ‘the people’ referred to ‘the working class, the peasantry, the urban petty bourgeoisie and the national bourgeoisie’ led by the working class. The subjects of the dictatorship would be the landlord class and the bureaucrat bourgeoisie and others.

property. In socialist countries, it is claimed in the constitution itself that all power belongs to the people, and the state structure is organized in accordance with the principle of democratic centralism.¹³⁹

The doctrine of the separation of powers is usually considered as of the utmost significance for bringing the government under control and placing limits on the exercise of power in order to realize, promote and safeguard the values of the society. By contrast, the main purpose of the people's congresses is to stabilize the institutional relationship so as to achieve better co-operation between the different divisions of the government. Thereby a separate organizational setup of the state organs is for the convenience of the management of and the division of responsibility for state affairs.

Therefore, the role of the Constitution in terms of limitation on governmental power is restricted in China. The emphasis on the supremacy of the Constitution might derive from the pragmatic necessity to restore internal social stability and regular political process.¹⁴⁰ The post-Mao Chinese leaders envisaged that where written laws were respected and observed, the chances of maintaining a stable society might be assured.¹⁴¹ As Deng Xiaoping argued, democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes or whenever the leaders change their

¹³⁹ Xu Chongde, *Zhongguo Xianfa* (中国宪法 The Chinese Constitution) (Beijing: Renmin University Press, 2nd edition, 1996).

¹⁴⁰ Frankie Fook-lun Leng, 'Some Observations on Socialist Legality of the PRC' (1987) 17 *California Western International Law Journal* 102.

¹⁴¹ Andrew Mayer, 'The Rocky Road to Democracy: A Few Comments on Legal Developments in China since the Cultural Revolution' (1989) 6 *China Law Reporter* 1, 3.

views.¹⁴²

Thirdly, there is the role of the Chinese Communist Party in the Constitution. The supremacy of the Constitution and the four cardinal principles¹⁴³ are both embodied in the constitutional text. Article 5 of the Constitution provides that no law or administrative rules or regulations shall contravene the Constitution and that all state organs, the armed forces, all political parties, all social organizations, all enterprises and institutions must abide by the Constitution and the law. As discussed above, the adoption of a new Constitution in 1982 signifies the determination of the CPC to exercise its power within the boundary of law and rule the country in accordance with law; however, the incorporation of the four cardinal principles into the preamble of the Constitution raises concerns about possible paradoxical situation.

The four cardinal principles were first systematically laid down in March 1979 in Deng Xiaoping's address to the Party's conference.¹⁴⁴ Although the Chinese Communist Party's Constitution, as adopted at its Twelfth Congress on 6 September 1982, provides that the Party must conduct its activities within the boundary of the Constitution, one might wonder whether the provision of the CPC leadership in the Preamble of the Constitution is in itself legally binding.

It is argued that the provision of the supremacy of the 1982 Constitution reflects

¹⁴² Deng Xiaoping, *Selected Works of Deng Xiaoping, 1975-1982* (Beijing: Foreign Languages Press, 1984), at 158

¹⁴³ The four cardinal principles are: 1. Keeping to the socialist road. 2. Upholding the dictatorship of the proletariat. 3. Upholding the leadership of the Chinese Communist Party. 4. Upholding Marxism-Leninism and Mao Zedong thought. See, the Preamble of the 1982 Constitution.

¹⁴⁴ Chen Jianfu, *Chinese Law: Towards an Understanding of Chinese Law, its nature and development* (Hague, London: Kluwer Law international, 1999), p. 70.

Deng Xiaoping's thoughts on the importance of the four cardinal principles as well as the rule by law.¹⁴⁵ On the one hand, the four cardinal principles are the foundation of the ideology which is the source of the CPC's legitimacy to rule. Rule by law, the opposite of the rule of man, is seen as crucial in pursuing the goal of socialist modernization. The denunciation of the rule of persons was intended to remind the party leaders to exercise their leadership within the boundaries, or through the instrument of law. Lo argues that the four cardinal principles 'were designed to provide an ideological safeguard against the possibility that emancipating the mind from dogmatism could lead to the negation of Marxism. On the other hand, the fact that they were interpreted as living anti-dogmatic principles offered much hope for emancipation'.¹⁴⁶

The CPC sets up a separate Party system paralleled to the governmental system in China which is mainly in charge of policy-making and CPC cadres. The Party discipline ensures the consistency of policy from the centre being implemented at various local levels. Therefore, although the government is elected and accountable to the people's congress, the Party is not. It has been noticed that in recent years certain constitutional conventions have emerged.¹⁴⁷ One example is that the President of the PRC only exercised a rather ceremonial role together with the NPCSC prior to the 1990s.¹⁴⁸ From the beginning of the 1990s, the General Secretary of the CPC started to take over the position of the President of the PRC,

¹⁴⁵ Carlos Wing-Hung Lo, 'Socialist Legal Theory in Deng Xiaoping's China' (1997) 11 *Columbia Journal of Asian Law* 469-486.

¹⁴⁶ Ibid, 477.

¹⁴⁷ Jiang Shigong, 'Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China' (2010) 36 *Modern China* 12-46.

¹⁴⁸ The then President of the PRC, Li Xiannian, performed a merely ceremonial role. The 1982 Constitution designates a collective head of state, which means the President of the PRC usually exercises his official role together with the NPC/NPCSC.

and later that of the Chairman of the Central Military Committee as well. It has also become a general practice that the Party Secretary at and below the provincial level is elected as the Chairman of the Standing Committee of the local People's Congress. This might suggest that the leaders of the CPC aim to realize the party's leadership through the political system existing under the current constitutional framework.

Fourthly, the Chinese Constitution tends to give a direction to social change in China, which results in frequent amendments to the Constitution. Apart from signalling a change in power or in the political and economic conditions of the country, the Chinese Constitution also tends to show the direction that Chinese leaders plan to take in governing the nation. This also reflects the duality of a constitution. From the perspective of politicians, the Constitution is an instrument of planning and implementing political policies. The constitution-making history in China demonstrates that each time a written constitution has been enacted, significant change has happened in Chinese society. It is argued that 'the adoption of a constitution is a signal that a significant change has taken place in the government or in society'.¹⁴⁹

This can be observed clearly in the history of China's constitutional amendments. The Chinese economy, before the enactment of the 1954 Constitution, was composed of various elements apart from state ownership. The then leaders decided to declare the socialist path in the Chinese constitution because 'it is impossible for the two conflicting relationships of production to develop side by side in a country without interfering with each other. China's advance along the road to socialism is fixed and

¹⁴⁹ William C. Jones, 'The Constitution of the People's Republic of China' (1985) 63 *Washington University Law Quarterly* 708-735.

irrevocable'.¹⁵⁰ The social changes in China after the 1980s have been reflected in the several amendments to the current Constitution due to continuing social and political changes, especially in a transitional age of political and economic reform in the process of building socialism with Chinese characteristics. Amendment of the Constitution is also a way of avoiding unconstitutionality, especially in the area of economic reform in the 1980s and 1990s.

Looking into the future, the endorsement of the notion of 'The People's Republic of China governs the country according to law and makes it a socialist country under rule of law' in the Constitution in 1999, might also be conducive to the Party's exercise of power within the boundary of the Constitution and the law.¹⁵¹ 'Governing the country according to law', as the basic strategy of the CPC in leading the people in running the country, is conceived as 'the objective demand of a socialist market economy' and 'a vital guarantee for lasting political stability of the country', which enables the Party to unify the adherence to Party leadership, the development of the people's democracy and doing things in strict accordance with law, thus ensuring, institutionally and legally, that the Party's basic line and basic policies are carried out without fail.¹⁵²

¹⁵⁰ Liu Shao-chi. 'Report on the Draft Constitution of the People's Republic of China', in *The 1954 Constitution of the People's Republic of China* (Peking: Foreign Language press, 1954), 16-17.

¹⁵¹ Before the amendment to the 1982 Constitution in 1999, this notion was elaborated in a political report of the CPC addressed to the fifteenth Party Congress. Chinese version of this report can be found in *People's Daily*, Internet edition, 25 September 1997. The corresponding English version can be found in *China Daily*, Internet edition, 10 October 1997. It has been elaborated that 'ruling the country by law means that the broad masses on the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work of the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader'.

¹⁵² See the political report of the CPC addressed to the fifteenth Party Congress, above no. 151. One should bear in mind that the meaning of 'governs the country according to law and makes it a socialist country under rule of law' is different from the Western doctrine of 'the rule of law'. For further

In summary, this chapter has reviewed the history of constitution-making in China, examined the Chinese governmental system, both at the central and local level. It has examined the political system of China and how power has been distributed among political institutions, in particular, the power of the National People's Congress and the role of courts in China. It has demonstrated how the Constitution has been developed and amended to accommodate economic reforms, social changes and territorial pluralism. This chapter concluded with the features of Chinese constitutional development. The trajectory of constitutional development that China has experienced demonstrates the significance of the constitution in China, which may serve as the basis for greater change in the future.

elaboration of the Western version of the rule of law, see, Allan C. Hutchinson and Patrick Monahan (ed.), *The Rule of Law: Ideal or Ideology?* (Carswell, 1987); Lon L. Fuller, *Morality of Law* (New Haven CT, 2nd edition, 1969); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979). For analysis of the rule of law in China, see, e.g., Randall P. Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002); Karen G. Turner, James V. Feinerman, and R. Kent Guy (eds.) *The Limits of the Rule of Law in China* (Seattle and London: University of Washington Press, 2000); Arthur Rosett, Lucie Leng and Margaret Y.K. Woo (eds.), *East Asian Law: Universal Norms and Local Cultures* (London and New York: Routledge Curzon, 2003).

3 Chapter III

Constitutional Framework of the Hong Kong Special Administrative Region

This chapter examines the evolution of the system of government of Hong Kong, and discusses the dynamic of constitutional development under the formula of ‘one country, two systems’ (OCTS). It intends to serve two purposes. First, through historical review of the settlement of the Hong Kong question and the political system previously practised in Hong Kong before the handover in 1997, this chapter attempts to demonstrate the fundamental concerns of China’s policy towards Hong Kong. The negotiation, public consultation and conflict over political change in the 1990s demonstrated China’s consistent position: a strict line on sovereignty and flexibility on the system of Hong Kong to sustain Hong Kong’s social stability and prosperity. Second, this chapter analyses the governmental framework of the HKSAR under the Hong Kong Basic Law ¹ in order to reveal the dynamics of Hong Kong politics after China resumed the exercise of sovereignty on 1 July 1997.

This chapter consists of five sections. The first section introduces the settlement of historical question of Hong Kong between the British and Chinese governments. The next section analyses the essential features of British governance of Hong Kong prior

¹ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, adopted at the Third Session of the Seventh NPC on 4 April 1990.

In paragraph 3 of the Joint Declaration on the question of Hong Kong between the Chinese and British governments, the Chinese government promised that China would establish a special administrative region upon its resumption of sovereignty over Hong Kong on 1 July 1997, in accordance with Article 31 of the 1982 Constitution. The Chinese government further elaborated its basic policies towards Hong Kong in Annex I of the Joint Declaration.

to 1984, when the Sino-British Joint Declaration was signed.² This section demonstrates that Britain in its rule over Hong Kong implemented one of the typical modes of governance of its overseas territories, which has often been depicted as executive-led³ authoritarian government with a subordinate legislature.⁴ The mode of governance during the colonial period reveals the background against which Chinese leaders brought up the idea of ‘one country, two systems’. However, the system of Hong Kong had undergone transformation between 1985 and 1997, when representative government⁵ and the Hong Kong Bill of Rights Ordinance⁶ were introduced. This is discussed in section 3.

The constitutional framework of Hong Kong involves two levels of institutional relationships: a unique political system within the HKSAR itself, and the central-local relationship between Hong Kong and Beijing. Therefore, apart from examining the interactions between the Chief Executive, the Legislative Council and the judiciary of Hong Kong, it is necessary to explore how the high degree of autonomy of Hong Kong is perceived in the PRC. Therefore section 4 and 5 are

² The Joint Declaration of the Government of the People’s Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong was signed by the British and Chinese government in Beijing on 19 December 1984 and entered into force on 27 May 1985 upon the exchange of instruments of ratification.

³ ‘Executive-led government’ is said to be one of the features of colonial government of HK before 1997. It suggests a dominant role of the executive, in particular, the Governor, over the Legislative Council. In related to the political structure of the HKSAR, views are divergent regarding whether the political system of the HKSAR should be summarized as ‘executive-led government’. This will be discussed later in this chapter.

⁴ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong: Text and Materials* (Hong Kong: China and Hong Kong Law Studies, 1987), vol.1, p.81. In this book, Peter Wesley-Smith summarized the constitution of colonial Hong Kong as ‘not a democratic’ and ‘adventitious’.

⁵ The British Hong Kong Government published the Green Paper, ‘The Future Development of Representative Government in Hong Kong’ in 1984, signalling the start of the democratization of Hong Kong. See, *Hong Kong Hansard: Reports on the Meetings of the Legislative Council* (Government Printer, 18 July 1984). For analysis of the beginning of elections in Hong Kong, see e.g., Lau Siu-kai and Kuan Hsin-chi, ‘The 1985 District Board Election in Hong Kong: The Limits of Political Mobilization in a Dependent Polity’ (1987) 25 *Journal of Commonwealth and Comparative Politics* 82-102.

⁶ The Hong Kong Bill of Rights Ordinance (Cap.383) (BORO) was passed by Hong Kong Legislative Council on 6 June 1991.

devoted to these two pairs of institutional relationships respectively.

After introducing Hong Kong's mode of governance under British rule, its evolution during the transitional period (1985-1997), and in particular, the institutional relationship within the HKSAR and its relationship with the Central Authority of the PRC, this chapter demonstrates the dynamics of political development in the HKSAR.

3.1 A brief review of the settlement of the Hong Kong question

British rule in Hong Kong was based on three treaties made with China under the Qing Dynasty (1614-1911), namely: the Treaty of Nanking 1842, in which the Island of Hong Kong was ceded to the UK;⁷ the Convention of Peking 1860, in which the Kowloon peninsula was further ceded to Britain;⁸ and the Convention of Peking 1898, which expanded British rule to the 'New Territories'⁹ with a ninety-nine year's lease.¹⁰ The first two territorial concessions were made after China was

⁷ See, Article III of Treaty of Nanking 1842 (Treaty Between China and the United Kingdom, signed at Nanking, 29 August 1842), which stipulates that 'His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, &c., the Island of Hong Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors'.

⁸ See, Article VI of the Convention of Peking 1860 (Convention of Friendship between the United Kingdom and China), signed in Peking, 24 October 1860.

⁹ The 'New Territories' in the context of Hong Kong refers to the land which, in accordance with the Convention of Peking 1898, was recognized as an extension of British territory under a ninety-nine years' lease. Before 30 June 1997, the 'New Territories' were governed together with the other two parts of Hong Kong (the island of Hong Kong and the Kowloon peninsula). It was stated in the Order in Council 1898 that 'the territories within the limits and for the term described in the said Convention shall be, and the same are hereby declared to be, part and parcel of Her Majesty's Colony of Hong Kong in the like manner and for all intents and purpose as if they had originally formed part of the Colony'. See, the Convention of Peking 1898: Convention between China and Great Britain respecting an Extension of Hong Kong Territory, signed at Peking, 9 June 1898; Ratifications exchanged at London, 6 August 1898; Order in Council, providing for the Administration of the Territories adjacent to Hong Kong Acquired by Her Majesty under the Anglo-Chinese Convention of 9 June 1898, at the Court at Balmoral, 20 October 1898.

¹⁰ See, the Convention of Peking 1898. The text of the three treaties mentioned above can be found in Andrew Byrnes and Johannes Chan (eds.), *Public Law and Human Rights: A Hong Kong Sourcebook* (Hong Kong; Singapore; Malaysia: Butterworths, 1993).

defeated during the first and second Opium War,¹¹ whereas in the Convention of Peking 1898, Britain acquired leasehold over the 'New Territories' based on the necessity of proper defence and protection of the Colony (Hong Kong Island and the Kowloon peninsula).¹² Upon the completion of the formal exchange of ratification of the Treaty of Nanking 1842 and the public promulgation of the island of Hong Kong as a British colony on 26 June 1843, Hong Kong came under British rule until 30 June 1997, except for three years spent under Japanese occupation during the Second World War.

However, the validity of the three above-mentioned treaties has been consistently denied by the Chinese government.¹³ The Chinese government rejected the relevance of a technical distinction in legal status between the New Territories and other parts of Hong Kong.¹⁴ Nonetheless, China's policy towards Hong Kong was pragmatic.¹⁵ On the one hand, China was consistent in its sovereignty claim; on the other hand, its

¹¹ The 'Opium wars' refers to the two wars between Britain and Qing imperial China in 1840-1842 (the first Opium War), and 1860 (the second Opium War).

¹² For the legal status and history of these treaties, see, Peter Wesley-Smith, *Unequal Treaty: China, Britain and Hong Kong's New Territory* (New York: Oxford University Press, 2nd edition, 1998); Roda Mushkat, *One Country, Two International Personalities: the case of Hong Kong* (Hong Kong: University of Hong Kong Press, 1997); Steve Tsang, *A Modern History of Hong Kong* (London, New York: I. B. Tauris, 2004). For general discussion by Chinese scholars on the effectiveness of international treaties in the Chinese legal system, see, e.g., Wang Tieya, 'Status of Treaties in Chinese Legal System' (1994) *Zhongguo Guojifa Niankan* (Chinese Yearbook of International Law); Xue Hanqin and Jin Qian, 'International Treaties in the Chinese Domestic Legal System' (2009) *Chinese Journal of International Law* 8 (2): 299-322.

¹³ In this sentence, the 'Chinese government' is used loosely, including the Republican era (1912-1949) and the People's Republic of China (founded in 1949). According to Steve Tsang, the issue of Hong Kong's future arose when Britain negotiated with China in late 1942 to end extraterritorial and other privileges. At that time the Chinese government (under the rule of the nationalist party) informed Britain that it reserved its right to raise the issue of the New Territories lease again for discussion at a later date. See, Steve Tsang, *A Modern History of Hong Kong* (London, New York: I. B. Tauris, 2004); Steve Tsang, *Hong Kong: Appointment with China* (London: I. B. Tauris, 1997).

¹⁴ The 'New Territories' was widely deemed to be a territory held by Britain with the restriction of a ninety-nine year lease, in comparison with Hong Kong Island and Kowloon peninsula. This was also the British government's point of view when Mrs. Thatcher first visited Beijing in 1982. See, Peter Wesley-Smith, *Unequal Treaty: China, Britain and Hong Kong's New Territory* (New York: Oxford University Press, 2nd edition, 1998).

¹⁵ Kevin P. Lane, *Sovereignty and Status Quo: the historical roots of China's Hong Kong policy* (Boulder: Westview Press, 1990)

leaders continuously stated that the question of Hong Kong would be settled in an appropriate way when conditions were ripe and the *status quo* would be kept until such a settlement was achieved.¹⁶ When the PRC rejoined the United Nations in 1972, the Chinese government made a request to remove Hong Kong from the list of ‘colonies’ based on the reason that ‘settlement of the questions of Hong Kong and Macau is entirely within China’s sovereign right and they do not at all fall under the category of colonial territories. Consequently they should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and people’.¹⁷

Against this background, an official visit to Beijing by the Governor of Hong Kong, Sir MacLehose, in March 1979 brought the settlement of the question of Hong Kong onto the Chinese leaders’ agenda.¹⁸ Meanwhile, China itself was undergoing a major ideological shift from an emphasis on ‘class struggle’ towards an opening-up and reform policy with a strong commitment to modernization and economic growth.¹⁹ Realization of reunification with Hong Kong, Macau and Taiwan, which

¹⁶ For the historical record of China’s policy towards Hong Kong, see, e.g. Kevin P. Lane, *Sovereignty and Status Quo: the historical roots of China’s Hong Kong policy* (Boulder: Westview Press, 1990); Qian Yin, *Dynamics vs. Tradition in Chinese Foreign Policy Motivation: Beijing’s Fifth Column Policy in Hong Kong* (Commack, NY: Nova Science Publishers, 1999); Qian Qichen, *Ten Episodes of China’s Diplomacy* (New York: HarperCollins Publication, 2005).

¹⁷ Huang Hua, then representative of the PRC to the United Nations, wrote a letter to the chairman of the UN committee on decolonization in March 1972. See, UN document A.AC.109/396, ‘Letter Dated 3 March 1972 from the Permanent Representative of China to the United Nations Addressed to the Chairman of the Special Committee’, on the session of special committee on the situation with regard to the implementation of the declaration on the granting of independence to colonial countries and peoples. This speech was also quoted in *South China Morning Post*, 13 March 1972. For analysis of China and the UN prior to 1980s, see, e.g., Samuel S. Kim, ‘The People’s Republic of China in the United Nations: A Preliminary Analysis’ (1974) 26 *World Politics* 299-330.

¹⁸ Sir Murray MacLehose’s visit was on an invitation from the Chinese Minister of Foreign Trade to discuss Hong Kong’s possible contribution to the Chinese programme of the ‘four modernisations’. The issue of Hong Kong’s future was not meant to be discussed officially. However, because the ninety-nine years lease of the ‘New Territories’ was due to expire soon, MacLehose also attempted to test the Chinese leaders’ position on the status of Hong Kong.

¹⁹ See, relevant documents of the Chinese Communist Party from 1978 to 1980. For instance, *Zhongguo Gongchandang di Shiyijie Zhongyang Quanhui Gongbao* (中国共产党十一届三中全会

had been just a ‘common aspiration’ of all Chinese people in the past, now became one of the major tasks of the state.²⁰ Although this policy was originally contemplated and initiated with the aim of achieving reunification with Taiwan,²¹ Hong Kong became the first successful case for the actualization of the policy.

The diplomatic negotiations between the Chinese and British governments yielded the Sino-British Joint Declaration (JD), which was signed in December 1984. In a talk with Mrs. Thatcher, Deng Xiaoping summarized China’s basic position on the question of Hong Kong as ‘one country, two systems’.²² Under the guidance of this principle, upon China’s resumption of the exercise of sovereignty over Hong Kong, the National People’s Congress would establish a Special Administrative Region (SAR) in accordance with Article 31 of the 1982 Constitution, and the systems in the SAR would be prescribed by law which would be enacted by the NPC ‘in the light of specific conditions’.²³

Therefore, the Chinese government’s promise to assure to Hong Kong the high degree of autonomy which was elaborated in the Joint Declaration was to be guaranteed in the form of the Hong Kong Basic Law. The Basic Law Drafting Committee (BLDC), set up by the NPC in July 1985, subsequently undertook the

公报, Communiqué of the third plenary session of the eleventh Central Committee of the Chinese Communist Party), 22 December 1978.

²⁰ See, Preamble of the 1982 Constitution.

²¹ Ye Jianying, the chairman of the Standing Committee of the NPC, proposed ‘nine points’ of China’s policy for peaceful reunification with Taiwan in 1979.

²² Deng Xiaoping, ‘Our Basic Position on the Question of Hong Kong’, 24 September 1982, in Deng Xiaoping, *Deng Xiaoping on the Question of Hong Kong* the Bureau for the Translation and Compilation of the Works of Marx Engels Lenin and Stalin trans. (Beijing: Foreign Languages Press, 1993).

²³ Article 31 of the 1982 Constitution provides that ‘The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of special conditions’. See, *Constitution of the People’s Republic of China* (adopted at the Fifth Session of the Fifth NPC on December 4, 1982).

task of drawing up the Basic Law, which came to be known as the mini-constitution in Hong Kong.²⁴ Although the Chinese government consistently emphasized that drafting the Basic Law was an internal matter and should not be internationalized, it did acknowledge the necessity to ensure that the law was well received by Hong Kong residents. In fact, according to one member of the BLDC, the drafting procedure of the Basic Law was unprecedented in the history of NPC legislation.²⁵ Every single article of the Basic Law required the approval of two-thirds of the members.²⁶ In addition, the people of Hong Kong were widely involved in the drafting process: a Basic Law Consultative Committee (BLCC) was set up in Hong Kong to seek the opinions of local residents; two drafts of the Basic Law underwent seven months' public consultation in 1988 and 1989 respectively before the final version was approved on 4 April 1990.²⁷

As shown above, both the terms of the Joint Declaration and the provisions of the Basic Law aim to guarantee continuity of Hong Kong's capitalist system to ensure the prosperity and stability of Hong Kong despite the fundamentally different values and systems of Hong Kong and the PRC. Hong Kong's mode of governance,

²⁴ China regards the drafting of the Basic Law as the 'internal affairs' of the PRC to provide a basic system for its SAR according to the Chinese Constitution. On this ground, China refuses interference on this matter from outside. This also coincides with China's claim that the Hong Kong Basic Law is a national law within the Chinese legal system. The meaning of 'national law' is defined in the Legislation Law of the PRC. The national legislative function is divided between the NPC and its Standing Committee (the NPC is only convened once a year lasting less than two weeks, while the NPCSC holds a meeting every two months). The Chinese legal system is further examined in other chapter of this thesis.

²⁵ Xiao Weiyun, *Xiangang Tebiexingzhengqu Jibenfa yu Yiguoliangzhi de Weida Shijian* (The Hong Kong Basic Law and Great Experience of 'One Country, Two Systems') (Shenzhen: Haitian Press, 1993).

²⁶ The Basic Law drafting committee had 59 members in total (Martin Lee and Szeto Hwa quit after 1989).

²⁷ The textual history of the drafting of the Basic Law is available at Basic Law Drafting History Online (BLDHO), a joint project of the Centre for Comparative and Public Law, Law Faculty of Hong Kong University (HKU) and the HKU Library. It provides a broad coverage including official documents of the BLDC, reports of the BLCC, newspaper clippings (1985-1990), and other relevant materials.

however, was to be transformed from a British colonial administration to a Special Administrative Region directly under the Central People's Government of the PRC.

3.2 Features of the system of government in Hong Kong before 1984

The British ruled over Hong Kong using one of the typical modes of governing their colonies. According to Martin Wight, British dependencies were divided into three legal classifications: Colonies, Protectorates, and Mandated and Trust Territories.²⁸ He further observes that the British colonial system was built on two great principles of subordination: (1) the legislature is subordinate to the executive; (2) the colonial government is subordinate to the imperial government.²⁹ In relation to Hong Kong, the constitutional order was set up exactly like other British colonies. An Order in Council was first issued by the monarch declaring a formal taking of possession of the territory, defining the territorial boundaries and extent of the jurisdiction.³⁰ Letters Patent and the Royal Instructions, which were often referred as the constitutional documents of Hong Kong before its return to the PRC, served the purpose of distributing government powers.³¹

²⁸ 'Dependency' is the only word that covers all the kinds of political community within the dependent empire. 'Colonies' were dependencies that were annexed by the Crown, which became part of the British dominions in two ways: by settlement or by being conquered/ ceded. After the nineteenth century, this distinction became blurred. In other words, the mode of acquisition no longer determined the mode of government. See, Martin Wight, *British Colonial Constitutions, 1947* (Oxford: Clarendon Press, 1952), p.5.

²⁹ Ibid, p.17.

³⁰ In the legal system of the United Kingdom, an 'Order in Council' is usually made under the royal prerogative and does not depend on any statute or its authority, although it may be overridden by an Act of Parliament. It is issued by virtue of the royal prerogative on the advice of the Privy Council, or more usually on the advice of a few selected members thereof, with no requirement of sanction of the Parliament. See, e.g. Gary Slapper, David Kelly, *The English Legal System* (London: Cavendish Publication, 7th edition, 2004).

³¹ Letters Patent of Hong Kong (passed under the Great Seal of the United Kingdom, constituting the office of governor and commander-in-chief of the colony of Hong Kong and its dependencies, first dated 14 February 1917, as amended to 31 May 1996). Royal Instructions was passed under the Royal Sign Manual and Signet to the Governor of Hong Kong, is dated 14 February 1917 and lastly amended

The features of British rule over Hong Kong prior to 1984 can be summarized as follows: First, the Governor of Hong Kong was the representative of the British sovereign over this territory and exercised by delegation the powers of the royal prerogative. His major responsibility involved carrying out decisions made by the British government, exercising his power with the advice and consent of the Legislative Council to make laws for the peace, order and good governance of the Region, to make grants of land, to appoint judges and other officers of the government according to the Colonial Regulations,³² to suspend or dismiss any officers and to grant pardons, and so forth.

The colonial councils, including the Executive Council (ExCo) and the Legislative Council (LegCo), served a subsidiary and assisting role to the Governor in policy-making and governance. Of the two councils, the Executive Council was the authoritative decision-maker assisting the Governor. The position of the Executive Council roughly corresponded to that of the Cabinet in Britain. It was composed of *ex officio* member³³ and other appointed members; most of them were members of the social elite of the business sector. In the execution of the powers and the authorities granted, the Governor had a legal obligation to consult the Executive Council, although he could act contrary to the advice of the Executive Council if he

to 12 May 1991. For further reference, see, Steve Tsang (ed.), *Government and Politics: a Documentary History of Hong Kong* (Hong Kong: Hong Kong University Press, 1995).

³² Colonial Regulations included detailed guidance on the civil service. On the establishment of the HKSAR, most of the regulations were replaced in the Public Service Order (Administration) and Public Service Order (Disciplinary). See, John P. Burns, 'The Hong Kong Civil Service in Transition', (1999) 8 (20) *Journal of Contemporary China* 67-87.

³³ *Ex Officio* members refer to those who were in charge of certain posts of the government at the time, such as the Chief Secretary, Financial Secretary and Attorney in General, and other Hong Kong government officers.

deemed it right to do so.³⁴

By 1984, with all the seats appointed by the Governor, the Legislative Council was by no means a legislature or representative organ;³⁵ it played a subordinate role in elaborating and adopting legislation, and examining the government budget. Almost all the bills were drafted in the Secretariat and introduced by the official members within the LegCo; unofficial members were not allowed to propose public bills except with the express permission of the Governor.³⁶ Naturally no government bill faced serious challenge in the LegCo, and there was hardly any check on administrative powers from the legislative branch.

Second, in terms of the legal system, Hong Kong mirrored the English legal system, including the common law, courts of justice, legal profession, and so forth. Final adjudication was reserved to the Judicial Committee of the Privy Council (JCPC). English common law was directly applicable to Hong Kong. The precedents of the House of Lords and the JCPC were legally binding given the overlapping membership of the two institutions. In the case of Acts of Parliament, all legislation of the British Parliament previous to 1843 directly applied to Hong

³⁴ According to Miners, the requirement that all significant government decisions should come before the Executive Council was the main check upon the autocracy of the Governor. In the history of colonial Hong Kong, very occasionally the Governor found himself in a minority; nonetheless it was rare for the Governor not to give way to the majority of the Executive Council, although he was specifically legally permitted to do so. See, Norman Miners, *Hong Kong under Imperial Rule, 1912–1941* (Hong Kong, Oxford and New York: Oxford University Press, 1987).

³⁵ See, Lydia Dunn, 'The Role of Members of the Executive and Legislative Councils', in Kathleen Cheek-Milby and Miron Mushkat (eds.), *Hong Kong: The Challenge of Transformation* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1989). Lydia Dunn was the most senior member of both the Executive Council and Legislative Council before 1992 and she was made a life peer in 1990 (her official title was The Right Honorable Baroness Dunn, DBE, JP).

³⁶ Article XXIV, Royal Instructions, passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of Hong Kong and its Dependencies, dated 14th February 1917, amended to 1 July 1994. It is stated in this article that 'every ordinance, vote, resolution, or question, the object or effect of which may be dispose of or charge any part of Our revenue arising within the Colony, shall be proposed only by...(c) a member of the Legislative Council expressly authorized or permitted by the Governor to make such a proposal'. It should be noted that Basic Law has a similar provision in its Article 73. This will be discussed further in Chapter IV.

Kong. However, according to the Ordinance of Application of British Law 1966, British legislation after 1843 did not automatically apply to this territory.³⁷

Third, despite its non-democratic character, from the 1970s the government of Hong Kong gradually developed a broadly consultative system in order to enhance communications between the government and the people and facilitate efficient governance. Public participation in the process of policy-making was enlarged through various advisory boards that the government established. Through absorbing the business and professional elites who were given disproportionately high representation in decision-making bodies, the government obtained an external, society-based, warrant for executive action. This special feature was observed by Norman Miners, describing how the ‘government achieves legitimacy, not through the ballot box, but by popular consent mediated by those group leaders who help to participate in the formulation of policy and then let their agreement to government’s final proposals be made known’.³⁸

In summary, the system of Hong Kong government prior to 1984 represents typical British colonial governance. An executive-led government was assisted by an Executive Council and a Legislative Council, and final adjudication was reserved to the Judicial Committee of the Privy Council of Great Britain. Hong Kong’s political and legal system underwent transformation between 1985 and 1997, however, owing to the rapid democratization of Hong Kong, and the introduction of the Bill of Rights Ordinance (BORO) in 1991.

³⁷ See, Peter Wesley-Smith, *The Source of Hong Kong Law* (Hong Kong: University of Hong Kong Press, 1995).

³⁸ Norman Miners, *The Government and Politics of Hong Kong* (Oxford University Press, 5th edition, 1991), p.188.

3.3 Hong Kong in transition: from 1985 to 1997

The transitional period of Hong Kong, from the ratification of the Joint Declaration to the transfer of sovereignty on 1 July 1997, saw an influential and dramatic transformation of Hong Kong's political, constitutional and legal system in parallel. Two parallel processes will be discussed in this chapter: the introduction of representative government to Hong Kong from 1985, and the adoption of the Bill of Rights Ordinance (BORO) in 1991.

During the transitional period, the British Hong Kong Government introduced a series of political reforms and gradually established a three-tier representative system.³⁹ The pace of democracy was accelerated when Christopher Patten, the last Governor of Hong Kong, embarked on a process of political and legal reform from 1992. Patten viewed democracy as the best way to safeguard Hong Kong's social values and way of life, and Britain 'clearly recognized its duty to defend Hong Kong's bonds to the economic and political values that had shaped it and that defined its difference from the rest of China'.⁴⁰

However, the Chinese government approached the issue of democratization of Hong Kong from a different perspective. It strongly contended that the political reform during the transitional period should be consistent with the principles laid down in the Basic Law to ensure the smooth transfer of sovereignty. Furthermore, any pre-determination of the political systems for the SAR would not be welcomed.

³⁹ The Three-tier representative government consisted of the District Council, the Urban Council/Regional Council and the Legislative Council. The Urban and Regional Councils were dissolved in 1999, with their functions replaced by various government departments of the HKSAR.

⁴⁰ Christopher Patten, *East and West: The Last Governor of Hong Kong on Power, Freedom and the Future* (London: MacMillan 1998), p. 29.

The transitional period, especially in the early 1990s, was filled with tensions and disputes between the Chinese and British governments, in particular over the issues of the intensified pace of Hong Kong's democratization and the BORO.⁴¹ Matters deteriorated when negotiations on the political reform of Hong Kong held in 1994-1995 collapsed, and China unilaterally revoked the 'through-train' arrangement and decided to set up a 'second stove'.⁴² In terms of the BORO, all the major changes made by the British Hong Kong government were revoked by the decision of the NPCSC in accordance with Article 160 of the Basic Law.⁴³

3.3.1 Democratization of Hong Kong

The British Hong Kong government had embarked on a series of political reforms since the 1980s to enlarge public participation and develop a representative government. In 1981, the Hong Kong government consulted the public on proposals to introduce a more representative system of government at the district level. This led to the establishment of District Councils with terms of reference to advise the government on a wide range of issues of concern to local residents. In a similar vein,

⁴¹ The most controversial stipulations Hong Kong Bill of Rights Ordinance (Cap.383) (BORO) are sections 2 and 3, which provide that any Hong Kong local legislation shall not contravene the BORO; otherwise it would be declared null and void. On the resumption of sovereignty over Hong Kong, in a declaration on the review of previous laws in accordance with Article 160 of the Basic Law, the NPCSC declared that sections 2 and 3 of the BORO contradict the Basic Law and shall not be adopted as laws of the HKSAR. However, as we will see in the next chapter, the NPCSC's decision does not affect the way that Hong Kong courts exercise their judicial review function.

⁴² 'Through-train' refers to the mutual understanding of the British and Chinese governments in relation to the arrangement of the 1995 election of the LegCo to survive the transfer of sovereignty and continue to serve as the first LegCo of the HKSAR for another two years without further election. See, 'Decision of the National People's Congress on the Method for the formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region' (promulgated in 1990 together with the Hong Kong Basic Law). After the breakdown of negotiations between the Chinese and British governments in 1994, the Chinese government decided to revoke the 'through train' arrangement and to establish a Provisional Legislative Council (PLC) upon its resumption of sovereignty over Hong Kong on 1 July 1997.

⁴³ *Decision of the Standing Committee of the National People's Congress concerning the handling of the laws previously in force in Hong Kong in according with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (adopted by the NPCSC on 23 February 1997).

a Regional Council was organized in 1986 in addition to the Urban Council which had been established in 1936.⁴⁴ Elections for LegCo members from functional constituencies started officially in 1985.⁴⁵

In July 1984, the Hong Kong government issued a Green Paper, *The Further Development of Representative Government in Hong Kong*,⁴⁶ marking the beginning of political reform in Hong Kong during the transitional period. This was made in line with Sir Geoffrey Howe's announcement of the end of British administration in 1997, and his promise that during the years ahead Hong Kong would be developed on increasingly representative lines.⁴⁷ The 1984 Green Paper set out a detailed outline of political reform in Hong Kong during the 1990s, the essence of which was that the government of Hong Kong would move towards a modified form of parliamentary democracy with the executive chosen by and accountable to the legislature. In accordance with the 1984 Green Paper, the proportion of elected members from the District Boards would increase from one-third to two-thirds, and District Board members were to form an electoral college to elect ten members of the LegCo. Later, in a white paper published in November 1984, the Hong Kong government further set out the constitutional reform in detail, in particular regarding the election of the LegCo in 1985. This white paper suggested that twenty-four seats

⁴⁴ The Urban Council and Regional Council became the Provisional Urban and Regional Council respectively in the return of Hong Kong to the PRC in 1997. Both were abolished in December 1999 with part of their functions being transferred to the Hong Kong government.

⁴⁵ 'Functional constituency' was introduced to the election of the LegCo in 1985. It aims to develop a representation of the community through *occupational* interests, such as commerce and industry, law, education, medicine and social services, all of which are considered to play an important role in Hong Kong's social and economic life. Consequently, the election of representatives of functional constituency is meant to give weight to those industrial, financial, professional sectors and so on which are seen as essential in Hong Kong's capitalist system, its international financial status, and its stability and prosperity.

⁴⁶ 'Green Paper: The Future Development of Representative Government in Hong Kong', in *Hong Kong Hansard: Reports on the Meetings of the Legislative Council* (Government Printer, 18 July 1984).

⁴⁷ Norman Miners, *The Government and Politics of Hong Kong* (Oxford University Press, 5th edition, with update, 1998), p. 25.

out of fifty-six seats of the Legislative Council should be elected indirectly, including twelve unofficial members returned from an Electoral College (the District Board and Urban and Regional Councils), and another twelve members returned by functional constituencies.

However, the essential constitutional reform embodied in the 1984 Green Paper did not take effect due to opposition from the Chinese government. The Chinese government made it plain that any changes at constitutional level during the transitional period must conform to the pattern and pace laid down in the Basic Law. The Hong Kong government later held a review of representative government in 1987,⁴⁸ and issued a White Paper in February 1988. The 1988 White Paper, *The Development of Representative Government: the Way Forward*, adopted a milder tone over Hong Kong's pace of political reform. It announced that the timetable concerning the first direct election of members of the LegCo was to be deferred until 1991. By contrast with the 1984 Green Paper, it particularly stressed the significance of policy continuity and the determination to develop Hong Kong's political system in the light of its own circumstances and realities. Any change to Hong Kong's political system should be evolutionary, steady and cautious, and should only be taken in a way that was compatible with the achievement of a smooth transition of sovereignty. Only minor changes to the LegCo election were introduced in 1988, which included adding two members from the functional constituencies and reducing the appointed members.⁴⁹

⁴⁸ See, statement of the Chief Secretary for Administration at the Legislative Council on 27 May 1987, 'The 1987 Review of Development in Representative Government', in *Hong Kong Hansard: Reports on the Meetings of the Legislative Council* (Government Printer, 27 May 1987).

⁴⁹ See, 'The Development of Representative Government: The Way Forward', *Hong Kong Hansard: Reports on the Meetings of the Legislative Council* (Government Printer, 10 February 1988).

More radical changes started in the early 1990s, when the last governor, Christopher Patten, decided to accelerate the pace of political reform. Unlike his predecessors, Patten emphasized that Britain's effective governance over Hong Kong before 1 July 1997 should not be undermined due to Chinese pressure. In his first official speech addressed to the LegCo in October 1992, Patten put forward the constitutional reform package aiming at 'exploring in parallel how to develop our representative institutions to the maximum extent within the terms of the Joint Declaration and the Basic Law'.⁵⁰ In order to achieve the widest democratic participation by the people of Hong Kong, the 1992 constitutional package proposed that in the 1995 LegCo election, there would be thirty seats returned from the functional constituencies, including the existing twenty-one and nine newly created ones. The franchise of the functional constituency election was expanded ten times compared with that of 1991 due to corporate voters being replaced by individuals.

The 1992 package also ushered in the reform concerning the relationship between the Executive Council and the Legislative Council to 'ensure a vigorous and effective executive-led government accountable to this Legislative Council'.⁵¹ Any overlapping membership between the Executive and Legislative Councils, it was argued, would result in the transfer of political debate from the open forum of the Legislative Council to the closed council of the Executive Council and would do no good to confidentiality within the Executive Council and collective responsibility. The new Executive Council under the design of the 1992 package would be converted to a non-party political body from which the Governor could

⁵⁰ The opening speech addressed to the Legislative Council by the Governor of Hong Kong, Christopher Patten, in October 1992. See, Christopher Patten, 'Our Next Five Years: The Agenda for Hong Kong' in *Hong Kong Hansard: Reports on the Meetings of the Legislative Council* (Government Printer, 7 October 1992).

⁵¹ Ibid.

seek impartial advice on a wide range of issues. The separation between the two Councils not only implied a change in the nature of the two Councils, but also hinted at a transformation of typical British governance over its colony.

Not surprisingly, the Chinese authority opposed Patten's policy, claiming that it violated not only the Sino-British Joint Declaration, and the principle of compatibility with the Hong Kong Basic Law, but also mutual understandings previously achieved between the Chinese and British governments.⁵² In particular, the Chinese government argued that the nine newly created functional constituencies had fundamentally distorted the original intention of functional constituency elections, which aimed to give consideration to the interests of the different sectors of society and to facilitate the development of a capitalist economy.⁵³ The antagonism and growing distrust between the Chinese and British governments eventually led to the break-down of negotiations on the arrangements for the 1995 election.⁵⁴ The Chinese government subsequently declared that 'the last Legislative Council, city government, district government and District Board

⁵² For the Chinese government's position, see, 'Zhong Ying Guanyu Xianggang 1994/95 Xuanju Anpai Huitan Zhong Jige Zhuyao Wenti de Zhenxiang' (中英关于香港1994/95选举安排会谈中几个主要问题的真相 The Real Situation on Several Principal Questions During the Negotiation Between the Chinese and British Governments on the 1994/95 Elections), in Yuan Qiushi (ed.), *Xianggang Guodu Shiqi Wenjian Huibian* (香港过渡时期文件汇编 Compiled important files during the transitional period of Hong Kong) (Hong Kong: Joint Publishing, 1994).

⁵³ Ji Pengfei, Chairman of the Drafting Committee for the Basic Law, in a speech to the NPC on 28 March 1990, said that 'consideration must be given to the interests of the different sectors of society and to facilitate the development of capitalist economy', and 'a democratic system that suits Hong Kong's reality should gradually be introduced'. He also highlighted in this speech that the political structure of Hong Kong shall be designed 'in line with its legal status and actual situation'. See Ji Pengfei's report to the NPC, 'Elaboration on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (draft) and Related Documents', 28 March 1990.

⁵⁴ See, Qian Qichen, *Ten Episodes in China's Diplomacy* (New York: HarperCollins Publication, 2005); Christopher Patten, *East and West: the Last Governor of Hong Kong on Power, Freedom and the Future* (London: MacMillan, 1998)

will be terminated on 30 June 1997'.⁵⁵

From the perspective of the Chinese government, the pace of political reform in Hong Kong should coincide with the Basic Law to ensure a smooth transformation and social stability. The Basic Law had already set out an agenda of political development for Hong Kong,⁵⁶ and provided that Hong Kong's constitutional development should proceed 'in the light of the actual situation' and 'in accordance with the principle of gradual and orderly progress', with an ultimate goal of selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee, and all members of the LegCo being elected by universal suffrage.⁵⁷ However, Patten's governance of Hong Kong showed a sharp break from the policy of his predecessors. Along with increasing seats from geographical constituencies and the development of party politics in Hong Kong from the early 1990s,⁵⁸ the LegCo was gradually transformed from a subsidiary institution into an important political arena. As the above indicates, to a large extent, the political reform of Hong Kong undertaken by Patten during this period exerted far-reaching impact on the shape of Hong Kong's political future.

3.3.2 The Hong Kong Bill of Rights Ordinance

Apart from the enlarged representation introduced into the reform of the LegCo, the introduction of the Hong Kong Bill of Rights Ordinance (BORO) in 1991 and

⁵⁵ See, *Quanguo Renda Changweihui Guanyu Cheng Yiu-tong deng 32 ming Quanguo Renda Daibiao Suoti Yi'an de Jueding* (全国人大常委会关于郑耀棠等 32 名全国人大代表所提议案的决定 Decision by the NPCSC on the motion by Cheng Yiu-tong and other 31 Deputies of the NPC), 31 August 1994.

⁵⁶ See, Annex I and annex II of the Hong Kong Basic Law.

⁵⁷ See, Article 45 and Article 68 of the Hong Kong Basic Law.

⁵⁸ See, statistics shown in websites of the major political parties in Hong Kong. For instance, the Democratic Party, the Liberal Party, the Democratic Alliance for Betterment and Progress of Hong Kong (DAB) and Civic Party.

subsequent amendments to the Letters Patent and Royal Instructions apparently raised critical issues related to the constitutional jurisdiction of the courts of Hong Kong. It was provided in VII (5) of the Letters Patent, as amended on 8 June 1991, that:

The provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall be implemented through the laws of Hong Kong and no law of Hong Kong shall be made restricting the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.

Legal issues were raised immediately after this unusual step was taken. The first question is whether the BORO had changed the previous legal system of Hong Kong and the common law tradition, under which rights and freedoms were generally protected in statutes and common law, rather than in separate legislation on human rights.⁵⁹ In the common law system of the UK, according to the principle of parliamentary supremacy, all acts of Parliament are of same legal force. However, with the enactment of the BORO and further entrenchment in the Letters Patent, BORO obtains a superior status over ordinary legislation, which could be declared void if the courts of Hong Kong consider it inconsistent with the BORO. This leads to a severe challenge to the status of the Basic Law in the HKSAR legal system.

⁵⁹ There is a large literature on the issue of the application of the ICCPR in Hong Kong and the status of the BORO. For instance, Johannes Chan and Andrew Byrnes (eds.), *Public Law and Human Rights: A Hong Kong Sourcebook* (Hong Kong: Butterworths, 1993); Johannes Chan and Yash Ghai (eds.), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993); Johannes Chan, 'Hong Kong's Bill of Rights: Its Inception of and Contribution to International Comparative Jurisprudence' (1998) 47 *International and Comparative Law Quarterly* 306. For Chinese scholars' points of view, see, e.g., Rao Geping, 'The Application of the International Covenant on Civil and Political Rights to Hong Kong' (1993) 2 *Pacific Rim Law and Policy Journal* 9-35.

The second issue refers to the necessity of introducing the BORO to Hong Kong. Article 39 of the Basic Law provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and be implemented through the laws of the HKSAR; the rights and freedoms enjoyed by Hong Kong residents shall not be restricted except as prescribed by law. Put differently, the rights and freedoms of Hong Kong residents are already assured by being listed in detail in a separate chapter of the Basic Law itself. Article 39 of the Basic Law further ensures that Hong Kong residents enjoy all the protections under the ICCPR as applied to this Region.

More importantly, the adoption of the BORO provides a forceful instrument for those who favour the establishment of constitutional review in Hong Kong. With the enactment of the BORO and further entrenchment in the Letters Patent, the BORO gains a superior status over ordinary legislation, given that ordinary legislation could be declared null and void by the judiciary in the event of inconsistency. Substantial amendments to the Societies Ordinance (Cap.151) in July 1992, to the Public Order Ordinance (Cap.245) in July 1995, and other significant amendments to the statutory laws also widened the discord between the Chinese and British governments.

In relation to the role of the judiciary in the political structure of the SAR, judicial review of unlawful acts of government is far less controversial than review of the constitutionality of legislation. One Chinese scholar argues that the introduction of the BORO to Hong Kong and the consequent amendment to the Letters Patent in 1991 had reversed the past practice of the judiciary's competence in Hong Kong. Wu, a member of the drafting committee of the Basic Law, argues

that the BORO is totally unacceptable because ‘this is a complete reversal of the existing practice of implementing the covenants through Hong Kong law. It is obvious that this provision not only contravenes the Joint Declaration, but also infringes upon the Basic Law’.⁶⁰ Hong Kong judges had rarely been called upon to pronounce upon the validity of ordinances passed by the Legislative Council before 1991. The Colonial Laws Validity Act passed by the British Parliament in 1865 stipulated that no colonial laws may be declared by the courts to be void and inoperative merely because they conflicted with any instructions issued by the Crown with reference to such law or the subject thereof.⁶¹ However, since the adoption of the BORO, Hong Kong courts have claimed an explicit legal basis to invalidate legislation on the ground of inconsistency with the BORO.

The far-reaching significance of the BORO has been demonstrated in post-1997 judicial practice. In 1996, in a decision regarding treatment of the laws previously in force in Hong Kong,⁶² the NPCSC declared that ‘the provisions relating to the interpretation and application of the ordinance in section 2(3), the effect on pre-existing legislation in section 3 and the interpretation of subsequent legislation in section 4 of the Hong Kong Bill of Rights Ordinance’ contravene the Basic Law and ‘are not to be adopted as the laws of the Hong Kong Special Administrative Region’. Although this decision removed the ‘teeth’ of the BORO, Hong Kong courts continue to regard the BORO as one of Hong Kong’s constitutional documents and a

⁶⁰ Wu Jianfan, (1995) *Window* 10, p. 11.

⁶¹ See, Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), p.148.

⁶² *Decision of the Standing Committee of the National People’s Congress on treatment of the laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (adopted by the Standing Committee of the Eighth NPC on 23 February 1997). It is provided that, ‘the provisions relating to the interpretation and application of the ordinance in section 2(3), the effect on pre-existing legislation in section 3 and the interpretation of subsequent legislation in section 4 of the Hong Kong Bill of Rights Ordinance’ contravene the Basic Law and “are not to be adopted as the laws of the Hong Kong Special Administrative Region’.

potent instrument for judicial review over legislation. This will be further examined in the next chapter.

3.4 Political system of the HKSAR (1997 onwards)

3.4.1 General features

The enactment of the Hong Kong Basic Law by the NPC signified the establishment of a new constitutional order in the HKSAR. The Basic Law itself, as a legalized manifestation of the formula of ‘one country, two systems’ and ‘Hong Kong people governing Hong Kong’, is designed to fulfil the dual purposes of providing a mini-constitution for the HKSAR, and establishing a SAR system within the constitutional order of the PRC. Seen as a ‘basic law’ in the Chinese legal system,⁶³ enacted and adopted by the NPC in accordance with Article 31 of the Chinese Constitution, the Basic Law serves as the fundamental document realizing ‘one country, two systems’.

With regard to the political system of Hong Kong after the transfer of sovereignty, the Joint Declaration clearly states, first, that Hong Kong will be vested with executive, legislative and independent judicial power, including that of final adjudication; second, the government of Hong Kong should be composed of local inhabitants and the legislature of the SAR shall be constituted by elections; third, the executive authorities shall be accountable to the legislature.

The Chinese government’s main concerns over the political structure of the HKSAR are more explicitly illustrated in Ji Pengfei’s report on behalf of the BLDC

⁶³ See, The Legislation Law of the PPC, adopted at the Third Session of the Ninth NPC on 15 March 2000.

to the NPC. Ji Pengfei, the general director of the Drafting Committee (BLDC), explained the design of the political structure of the HKSAR as ‘aimed at maintaining stability and prosperity in Hong Kong’ and that ‘consideration must be given to the interests of different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong’s reality should gradually be introduced’.⁶⁴

The political structure of the HKSAR reflects China’s determination to devise a suitable and workable political system for Hong Kong’s future stability and prosperity. As elaborated by one of the drafters, and the convener of the political structure subgroup of the BLDC, drafting of the political structure of the HKSAR was guided by the spirit of the Joint Declaration and the principle of ‘one country, two systems’, i.e., it shall uphold national unity and territorial integrity and implement a high degree of autonomy at the same time. In addition, Hong Kong shall also gradually increase appropriate democratic participation, while at the same time retaining certain features of pre-1997 practice.⁶⁵

The provisions of the Basic Law suggest that the political system of the HKSAR is a combination of old features of the system of government in the colonial era, and the creation of a political system particularly devised for the SAR suitable for its constitutional status under the principle of ‘one country, two systems’. First,

⁶⁴ Ji Pengfei, ‘Guanyu Zhonghua Renmin Gongheguo Xianggang Jibenfa (Cao’an) Jiqi Youguan Wenjian de Shuoming’ (关于中华人民共和国香港行政区基本法（草案）及其有关文件的说明 Elaboration on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (draft) and Related Documents).

⁶⁵ Xiao Weiyun, ‘Concepts Underlying the Design of the Future Political Structure of Hong Kong’, in *The Basic Law Reference Paper* (8), prepared by the Secretariat of the Consultative Committee for the Basic Law.

certain features of governance pre-1997 are retained in the Basic Law, such as the civil service, the Executive Council and a broad consultative system. The Executive Council, in particular, is retained in order to enhance mutual coordination and reduce friction between the executive and the legislature, since the Chief Executive and the LegCo are elected in separate elections.⁶⁶ This reservation is an attempt to reproduce most of the features of the existing colonial political system, while allowing for some possible liberalization under Chinese supervision.⁶⁷ Second, the political structure of the HKSAR differs fundamentally from the previous one in that Hong Kong will gradually develop democracy at a well-ordered pace. The Chinese authority will not appoint a governor of Hong Kong, nor govern Hong Kong in the same way as any of its provinces, ethnic minority autonomous regions, or municipalities directly under the central government; instead, a Chief Executive will be selected by permanent residents of Hong Kong and appointed by the Central People's Government (CPG) on the basis of the results of elections or consultations to be held locally.⁶⁸

3.4.2 Relations between the Chief Executive and the Legislative Council of the SAR

Relations between the executive and the legislature lie at the heart of the debate over institutional change. The political system designed in the Basic Law has often been

⁶⁶ As will be discussed later, the Basic Law and its annexes have provided methods for selection of the Chief Executive and formulation of the Legislative Council. It should be noted that, during the first term (1998–2000) and the second term (2000–2004) of the LegCo of the HKSAR, certain members of the LegCo were returned by the election committee, which was exactly the same committee responsible for electing the Chief Executive. From the third term (2004–08), the LegCo consists of two types of members, returned by geographical constituency and functional constituency respectively.

⁶⁷ David J. Clark, 'The Basic Law: One Document, Two Systems', in Ming K. Chan and David J. Clark (eds.), *the Hong Kong Basic Law: Blueprint for 'Stability and Prosperity under Chinese Sovereignty'* (Armonk, NY: M.E. Sharpe, 1991).

⁶⁸ Article 15 and Article 45 of the Basic Law.

referred to by Chinese scholars as ‘checking and mutual co-operation’ between the executive and legislative branches, making clear distinction from the doctrine of separation of powers.⁶⁹ Ji Pengfei mentioned in his address that ‘the executive authorities and the legislature should check each other as well as co-ordinate their activities. To maintain Hong Kong’s stability and administrative efficiency, the Chief Executive must have real power which, at the same time, should be subject to some restrictions’.⁷⁰

The Chief Executive (CE) as the head of the HKSAR, according to the Basic Law, shall be accountable to the Central People’s Government (CPG) and the HKSAR in accordance with the provisions of the Basic Law, in which the CE’s power and function are listed in Article 48. The CE is also the head of the HKSAR government, which is composed of a Department of Administration, a Department of Justice, and various bureaux, divisions and commissions, with the main function of formulating and conducting government policies and administrative affairs. This dual accountability⁷¹ of the CE to both the HKSAR and CPG is argued to be conducive to strengthening the unified leadership of administrative work, raising the effectiveness of the work of government administration and improving the working relations between the Central Authority and the HKSAR.⁷² On the other hand, the LegCo of the HKSAR has more power and more functions than in the pre-1997 period. Under the Basic Law, the main function of the LegCo is to enact, amend, or repeal laws in

⁶⁹ See, e.g. Xiao Weiyun, ‘A Study of the Political System of the Hong Kong Special Administrative Region under the Basic Law’, (1988) 2 *Journal of Chinese Law* 95-114.

⁷⁰ See, Ji Pengfei’s elaboration on the Hong Kong Basic Law, above n. 64.

⁷¹ Here the dual accountability of the CE should be distinguished from the provision of Article 64 that ‘the executive authorities shall abide by the law and shall be accountable to the legislature’. The latter refers to the government in a restricted sense, i.e. the administrative branch.

⁷² Xiao Weiyun, ‘Concepts Underlying the Design of the Future Political Structure of Hong Kong’, in *The Basic Law Reference Paper* (8), prepared by the Secretariat of the Consultative Committee for the Basic Law.

accordance with the provisions and procedure of the Basic Law.⁷³ In addition, it is responsible for the examination and approval of the budget plan, taxation and public expenditure.⁷⁴

Regarding relations between the government and legislature, first, we need to explore to what extent the executive shall be accountable to the legislature. The Joint Declaration only states that ‘the executive authorities shall abide by the law and shall be accountable to the legislature’ without further elaboration.⁷⁵ In the Basic Law, the government’s ‘accountability’ to the legislature is concretized: implementing laws passed by the LegCo; presenting regular policy addresses; answering questions raised by members of the LegCo; and obtaining approval from the LegCo for taxation and public expenditure.⁷⁶ It is argued that the accountability of the HKSAR government to the LegCo shall not include vote of ‘no-confidence’ since this will contradict the principle of the Basic Law.⁷⁷

Second, the Basic Law creates a sophisticated system of mutual checking between the executive and legislature. For instance, the Chief Executive, under the conditions and procedures provided by law, shall have the authority to dissolve the legislature;⁷⁸ the Legislative Council, under the conditions and procedures provided by law, shall have the power to ask the Chief Executive to resign.⁷⁹ In addition, the

⁷³ Article 73(1) of the Basic Law.

⁷⁴ Article 73(2) of the Basic Law.

⁷⁵ The Joint Declaration provides that the executive shall be accountable to the Legislative Council. There is no further elaboration on the content of ‘accountable’. During the drafting process, the relationship between the executive and legislative gave rise to considerable debates in Hong Kong society. See, *Final Report on the Relationship between Legislature and the Executive Authorities*, prepared by the Consultative Committee for the Basic Law of the HKSAR, 8 August 1987.

⁷⁶ See, article 64 of the Hong Kong Basic Law.

⁷⁷ See, Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: Law Press, 2000), pp.378-383.

⁷⁸ Article 49 of the Basic Law.

⁷⁹ Article 52 of the Basic Law.

Legislative Council is entitled to initiate a motion of investigation against the Chief Executive under certain circumstances and pursuant to strict procedures.⁸⁰ These provisions suggest the main aim of the Basic Law was to establish a government whose power is circumscribed by the legislature, although this does not go as far as a cabinet system where a government is accountable to a Parliament and subject to a non-confidence vote. It is said that the drafting committee considered this parliamentary system might result in unstable government and affect economic development and social stability, and determined that this parliamentary system was thus not suitable for Hong Kong.⁸¹

On the other hand, the legislative function of the Legislative Council also faces some restrictions. First, a bill passed by the LegCo may take effect only after it is signed and promulgated by the Chief Executive. If the Chief Executive considers that the bill is not compatible with the overall interests of the HKSAR, he or she may return it to the LegCo within three months for consideration.⁸² Second, private bills and amendments to government bills are restricted by Article 74 and Annex II of the Basic Law in substance and procedure respectively.⁸³ Third, the legislation of the HKSAR is subject to review by the NPCSC on its conformity with the Basic Law, but this is confined to those matters which are within the responsibility of the Central

⁸⁰ Article 73 of the Hong Kong Basic Law.

⁸¹ Xiao Weiyun, *Xiangang Tebiexingzhengqu Jibenfa yu Yiguoliangzhi de Weida Shijian* (The Hong Kong Basic Law and Great Experience of 'One Country, Two Systems') (Shenzhen: Haitian Press, 1993), p. 110.

⁸² Article 49 of the Basic Law.

⁸³ Annex II of the Basic Law provides, 'The passage of a bill introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present. The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee'. Article 74 of the Basic Law provides, 'Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced'.

Authority, or concern the relationship between the Central Authority and Hong Kong.⁸⁴

Third, we need to examine whether the design of the Hong Kong political system is consistent with the predominant goal of ‘executive-led government’. An executive-led government, it is argued, was an important consideration of the Basic Law drafting committee. During recent debates on constitutional development in the HKSAR, ‘executive-led government’ is frequently mentioned by Chinese officials or senior figures from the NPCSC. It is pointed out that ‘the part of the previous political structure proven to be effective which should be maintained is mainly reflected in the executive-led government’.⁸⁵ After all, it was intended in the Joint Declaration that the existing model of government structure be maintained. Its unwritten text, to which both China and Britain implicitly subscribed, to varying degrees, represents the informal political rules of the game. These rules of the game, according to Ian Scott, contribute a syndrome of characteristics, including an executive-led government and consequently a legislature restricted to a subsidiary role.⁸⁶

⁸⁴ Article 17 of the Basic Law provides that if the NPCSC, after consulting the Committee for the Basic Law under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the NPCSC may return the law in question but shall not amend it. Any law returned shall immediately be invalidated.

⁸⁵ See, e.g. Qiao Xiaoyang’s speech on 26 April 2004 at a discussion panel concerning the NPCSC’s decision on the election method of the Chief Executive and the Legislative Council in 2007 and 2008 respectively. Qiao was General Secretary of the NPCSC, and head of the Committee for the Basic Law under the NPCSC.

⁸⁶ Ian Scott (ed.), *Institutional Change and the Political Transition in Hong Kong* (MacMillan Press, 1998), pp. 4-8. ‘Functional Constituency Election’ for members of the Legislative Council was first introduced to Hong Kong in 1985, with the purpose of giving full weight to representation of the economic and professional sectors in the society and emphasizing the role of professional elites in the process of policy-making.

Mainland scholars argue for a similar approach on this matter. Cheng Jie contends that administrative power actually embodies discretionary power and the CE of the HKSAR should take the lead in areas of policy formulation, and many others, instead of being passive, dragged along by opinion polls or LegCo members.⁸⁷ In her view, executive-led government is supported not only in its inheriting the previous governmental system, but also in the Basic Law itself in that the CE has higher status than the other political institutions of the HKSAR, the government has a leading role in the proposal of legislation, there is an easier voting procedure for government bills compared with private bills, and so forth.

The reason Chinese officials and scholars emphasize an executive-led political system might be that a strong executive branch is good for economic development and social control, thus fulfilling the primary intention of maintaining the prosperity and stability of Hong Kong. More importantly, as has already been discussed, this is also linked to the Chief Executive's accountability to the CPG. As Albert Chen has argued, since the Basic Law provides that the Chief Executive is accountable to the Central People's Government of the PRC, the notion of executive-led government is related to affirming the Central Authorities' power over Hong Kong.⁸⁸

In my view, executive-led government suggests two-fold implications. First, within the SAR framework, the Chief Executive as the head of the administration takes the lead in formulating policy and initiates bills in the Legislative Council; in

⁸⁷ Cheng Jie, 'Xianggang Xianzhi Fazhan yu Xingzheng Zhudao Tizhi' (the Constitutional Development of the HKSAR and Executive-led System), (2009) 1 *Fa Xue* 45-56.

⁸⁸ Albert H. Y. Chen, "Executive-led" Government, Strong and Weak Governments and "Consensus Democracy", in Johannes Chan and Lison Harris (eds.), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005), pp.9-13.

terms of the relationship with the CPG, the Chief Executive is the only institution that is accountable to the CPG. In fact, only if the goal of executive-led government is achieved within the SAR can the Chief Executive fulfil his accountability to the CPG, since the Chief Executive is not only the head of the Hong Kong administration, but also the leader of the HKSAR. However, whether this ‘executive-led’ government can be achieved is not only decided by the design of the political system in the Basic Law; the election methods of the Chief Executive and the Legislative Council also have an important role since, in recent years, it has become evident that both the Hong Kong government and the LegCo turn to the public for support.

Hence, the political structure designed in the Basic Law, and whether it should be called ‘executive-led’ government, could result in either a strong government or a weak government when this concept is put into force. The realization of efficient governance is contingent on factors other than the legal provision itself. Nowadays the government has to make efforts to ensure that government bills gain sufficient votes in the Legislative Council. However, this was never a problem before 1985, when the governor had the power to appoint civil servants and other members to form a majority of the seats on the Legislative Council. The introduction of the principal official accountability system (POAS) in 2002 by the Chief Executive Tung Chee-hwa, does not seem to have been as effective as expected in soliciting enough support from the Legislative Council, although it did show the determination of the government to be more responsive to the public voice.⁸⁹ The constitutional

⁸⁹ In fact, Sir David Wilson, then Governor of Hong Kong, announced in 1991 that a quasi-ministerial system would be introduced whereby individual Executive Council members would concern

developments of the HKSAR since 1997, however, have demonstrated the government's great difficulties in soliciting enough votes of support in the Legislative Council. Alternatively, the government turns to the general public for support and hopes to generate pressure on the Legislative Council. With increasing numbers returned from geographical constituencies, the Legislative Council is determined to scrutinize the government instead of showing an attitude of co-operation. As pointed out by Joan Leung, the political parties with public support but no real policy-making power in the government are destined to play an oppositional role.⁹⁰

In addition to the practical difficulties of achieving an executive-led government, some scholars argue that the political structure provided in the Basic Law actually contains internal contradictions. Ghai argues that the goal of executive-led government is hardly achievable under the current provisions of the Basic Law. In his view, the design in the Basic Law, including retaining previous features of the administration, reflects a form of authoritarian government; however, the gradually widening public participation in the election of the Legislative Council represents a form of democratic politics.⁹¹ Furthermore, the Legislative Council members representing geographical constituencies are widely deemed to enjoy more popular support in Hong Kong society than do Hong Kong government officials.

themselves with a particular programme area. This is quite similar to Tung's proposal, although Wilson's plan was not put into force.

⁹⁰ Ian Scott and Joan Y.H. Leung, 'Dysfunctional Elections and the Political System in Hong Kong', (2004) 12 *Asian Journal of Political Science* 1-30.

⁹¹ Yash Ghai, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd edition, 1999), pp.292-302.

3.4.3 *Recent developments*

The future relationship between the executive and the legislature in Hong Kong is destined to undergo transformation alongside the change of electoral methods for the Chief Executive and members of the Legislative Council. As the Basic Law states that the methods both for constituting the Legislative Council and for the selection of the Chief Executive of the HKSAR may be modified after 2007 in line with the actual circumstances of the HKSAR and after careful consideration of whether there is a need to amend the methods,⁹² the debates on the pace and timetable of democratization in Hong Kong have increased.

As stated above, the Basic Law stipulates that the method of selecting the Chief Executive shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress, while the ultimate aim is the election of the Chief Executive by universal suffrage upon nomination by a nominating committee.⁹³ The underlying principle of the selection of the Chief Executive, articulated by the Chinese government, is based on whether it is conducive to the prosperity and stability of Hong Kong, to democratic participation by all sectors of the community, to a smooth transition of sovereignty and to implementation of the policy of ‘Hong Kong people govern Hong Kong’ in a gradual and orderly progress.

In its decision of 2007, the NPCSC set the earliest date for realization of the two

⁹² See, Annex I and II of the Basic Law.

⁹³ See, Annex I of the Basic Law. Except for the first term of Chief Executive, the Election Committee shall be composed of 800 members from the following four sectors, each of which shall return 200 members to the election committee: the industrial, commercial and financial sectors; the professions; labour, social service, religious and other sectors; Members of the Legislative Council, representatives of district-based organisations, Hong Kong deputies to the National People’s Congress, and representatives of the Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference.

elections by universal suffrage, while a new development in June 2010 suggests one step forward closer to that final goal has been taken.⁹⁴ A Constitutional Development Task Force was first established by the HKSAR government in January 2004 to examine in depth Hong Kong's future constitutional development. Since then, the NPCSC has made one interpretation and two decisions on this matter. In 2004, based on NPCSC's interpretation of the Basic Law,⁹⁵ and the Hong Kong Government's report, the NPCSC decided that neither the election of the third Chief Executive in 2007 nor elections of the fourth Legislative Council in 2008 were to be held by means of universal suffrage.⁹⁶ Later in 2005, the HKSAR government failed to secure two-thirds of the votes of the Legislative Council for its proposal regarding the election method of the Chief Executive in 2007 and the formation of the Legislative Council in 2008 respectively. Therefore, the 2007 decision of the NPCSC represents a breakthrough in the pace of Hong Kong's democratization, declaring that the fifth election of the Chief Executive in 2017 may be by universal suffrage, and after that the election for the Legislative Council may be implemented with all members elected by universal suffrage.⁹⁷

⁹⁴ *Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2012 on issues relating to Universal Suffrage*, adopted by the Standing Committee of the Tenth NPC at its Thirty-one Session on 29 December 2007.

⁹⁵ *The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Standing Committee of the Tenth NPC at its Eighth Session on 6 April 2004.

⁹⁶ *Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2008*, adopted by the Standing Committee of the Tenth NPC at its Ninth Session on 26 April 2004.

⁹⁷ There is no clear statement on when the LegCo members may be elected by universal suffrage, but there is wide speculation in Hong Kong society that the earliest date would be 2020.

3.5 Institutional relationship between the HKSAR and the Central Authority of the PRC

One of the fundamental tasks of the Basic Law is to draw a line between the sovereignty of the PRC and the autonomy of the HKSAR. Theoretically, the concept of autonomy refers to a particular form of distribution of governmental power within a sovereign state.⁹⁸ The Basic Law first states that the central government shall be responsible for the foreign affairs and the defence of the HKSAR.⁹⁹ It further stipulates that the HKSAR enjoys a high degree of autonomy, including executive, legislative power and final adjudication within the Region. It is argued that under the Basic Law the central-local relationship can be divided into three kinds of situations: affairs related to state sovereignty; a high degree of autonomy of local government; and other powers granted to it by the NPC, NPCSC or the Central People's Government.¹⁰⁰

First, it is necessary to examine the accountability of the Chief Executive to the Central People's Government (CPG).¹⁰¹ According to the Basic Law, the Chief Executive shall be the head of the HKSAR and shall represent the Region. The powers and functions of the Chief Executive are listed in Article 48 of the Basic Law. It is argued that the accountability of the Chief Executive to both the CPG and the HKSAR 'shall be consistent and compatible with each other' and such a provision in the Basic Law will facilitate the Chief Executive's better and proper

⁹⁸ Albert H. Y. Chen, 'The Relationship Between the Central Government and the SAR', in Peter Wesley-Smith and Albert H. Y. Chen (eds.), *The Basic Law and Hong Kong Future* (Hong Kong, Singapore, Malaysia: Butterworths, 1988), p. 108.

⁹⁹ Articles 13 and 14 of the Hong Kong Basic Law.

¹⁰⁰ 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' (1988) 2 *Journal of Chinese Law* 65-82.

¹⁰¹ Article 43 of the Hong Kong Basic Law.

performance of his duties.¹⁰²

Before 1 July 1997, the competence of the Governor was authorized but also circumscribed by the Letters Patent, the Royal Instructions and colonial regulations, and constitutional conventions. He could receive specific directions from the Secretary of State for Foreign and Commonwealth Affairs.¹⁰³ The Governor was seen as the representative of the Crown, relaying the decisions of the British government and endeavouring to explain them and make them as acceptable as possible to the local population. In contrast, the Chief Executive is required to be a permanent resident of Hong Kong without any foreign passports. He should be elected locally by an election committee which is constituted by permanent residents of Hong Kong. The selection method in Annex I of the Basic Law is undergoing amendment towards an enlarged base of democratic procedure.¹⁰⁴ The ultimate goal of selecting the Chief Executive by universal suffrage based on nomination by a ‘broadly representative nominating committee in accordance with democratic procedures’ is stated in Article 45 of the Basic Law, although it is also stipulated that any change of method shall be specified in light of the actual situation of Hong Kong and in accordance with the principle of a gradually and orderly process.

¹⁰² Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001), Ch. 8.

¹⁰³ Norman Miners, *The Government and Politics of Hong Kong* (Oxford University Press, 5th Edition, 1991), p. 68

¹⁰⁴ In the case of the first Chief Executive, for whom the method of election is provided in ‘Method for the selection of the Chief Executive of the Hong Kong Special Administrative Region’, Annex I of the Basic Law. In terms of the method of election of the Chief Executive in 2012, after the NPCSC ratified the proposal of amendment of Annex I of the Basic Law, and agreed the amendment to Annex II for filing records on 28 August 2010, the LegCo needs to complete local legislation on this matter. The local legislation for the two election methods was completed in March 2011. It should be noted also that, according to the decision made by the NPCSC in 2007, ‘the session is of the view that ... the election of the fifth Chief Executive may be implemented by universal suffrage’. See, *Decision of the NPCSC on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the year 2012 and on Issues Relating to Universal Suffrage*, 29 December 2007.

Generally speaking, the HKSAR government led by the Chief Executive enjoys a high degree of autonomy in administration. The Chinese government has been seen to keep its distance from the internal affairs of the HKSAR, and showing supportive and even benign attitude towards Hong Kong's economic adjustment after the Asian financial crisis in 1998 and the SARS outbreak in 2003. The CPG is only in charge of the appointment of the Chief Executive and principal government ministers specified in the Basic Law upon nomination of the Chief Executive.¹⁰⁵ As a matter of convention, the Chief Executive will report to the Chinese Premier each year in December. In addition, the accountability of the Chief Executive to the CPG has not been formalized in terms of its formal procedure. For instance, the Basic Law provides that the Chief Executive shall 'implement the directives issued by the Central People's Government in respect of the relevant matters provided for in this law'.¹⁰⁶ However, there is little evidence that this clause has been put into practice. In other words, the general public does not have any information, if there is any, on how directives from the central people's government are received and carried out by the Chief Executive of the HKSAR.

Second, regarding the relationship between the local legislature and the NPCSC, the NPCSC retains the power to review local legislation passed by the Legislative Council and reserves the power to apply national laws to the HKSAR under certain circumstances provided in the Basic Law.¹⁰⁷ Laws enacted by the legislature of the HKSAR shall be reported to the NPCSC for the record. If the NPCSC considers that any local legislation is not in conformity with the provisions of the Basic Law

¹⁰⁵ Article 48 (5) of the Hong Kong Basic Law

¹⁰⁶ See Article 48 (8) of the Hong Kong Basic Law.

¹⁰⁷ Article 18 of the Basic Law provides that 'National laws shall not be applied in Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The Laws listed therein shall be applied locally by way of promulgation or legislation by the Region'.

regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR,¹⁰⁸ the NPCSC may return the law in question and this law shall be invalid immediately.¹⁰⁹

Third, although the Basic Law delimits the boundaries between the Central Authority and the HKSAR, obscurity continues to exist. However, the core question is who would be the ultimate arbitrator in the case of ambiguity. Here the high degree of autonomy gives rise to a dilemma: the National People's Congress marks the boundary between the Central Authority and the HKSAR; its Standing Committee has the general power to interpret the norms of the Basic Law. In this case, the extent of the high degree of autonomy seems to be with a matter for the NPC or the NPCSC.

In the debates about whether the powers of the PRC central government in relation to the HKSAR should be confined to defence and foreign affairs, Chinese scholars argue that, in a unitary state, power is generally reserved to the central government and any other powers are derived from the centre. This argument can be supported by the Basic Law itself, which stipulates that the HKSAR may 'enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government'.¹¹⁰ This provision shows the ultimate source of power which grants the high degree of autonomy. Furthermore, in addition to foreign affairs and

¹⁰⁸ It should be noted that the Basic Law uses the term 'Central Authority' in Chapter II, 'Relations between the Central Authority and the Hong Kong Special Administrative Region', instead of 'Central People's Government', since under the circumstances of these provisions, apart from the CPG, it is necessary to include other central authorities of the PRC.

¹⁰⁹ Article 17 of the Hong Kong Basic Law provides the procedure for the Hong Kong legislature to file for record to the NPCSC.

¹¹⁰ Article 20 of the Hong Kong Basic Law

defence, there are other matters affecting the interests of the nation as a whole, which should be managed by the central government, but not by local administrative regions. For instance, Article 18 provides that laws listed in Annex III to the Basic Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy specified in the Basic Law.¹¹¹

However, Hong Kong scholars generally hold the opinion that when it is said that the HKSAR enjoys a ‘high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People’s Government’ this implies an exclusion of the Central Authorities of the PRC from any matters *except* defence and foreign affairs. In other words, the Chinese Central Authorities’ power should be defined negatively as the absence of political intervention except in defence and foreign affairs. Furthermore, there is one crucial restriction on the sovereign power to amend the Basic Law. The Basic Law itself provides an extremely strict procedure for amendment, and states that ‘no amendment to this law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong’.¹¹² This self-imposed restriction suggests the Basic Law itself as a rigid constitution, the outcome of a certain kind of drafting procedure that involved voices from Hong Kong, constitutes a limitation on the sovereignty itself.

¹¹¹ According to the Basic Law, national laws are not applied in the HKSAR except those listed in Annex III to the Basic Law. Article 18 of the Basic Law also provides the procedure for adding and deletion of laws in Annex III.

¹¹² See, Article 159 of the Hong Kong Basic Law. The term ‘Basic Policy’ (基本政策) usually refers to the principle of ‘one country, two systems’, in particular, the Chinese government’s basic policies towards Hong Kong which were elaborated in the annex of the Joint Declaration between Chinese and British government. So far there is no interpretation of this word in a legal sense.

Quarrels over the origin and boundary of this high degree of autonomy can be traced back to the period of drafting the Basic Law, when the residual power was one of the most controversial issues. However, the content of residual power and its grounds in political and constitutional theory are not clear. Residual powers normally refer to those powers that fall outside the boundary of powers that have been clearly divided between the central and local government.¹¹³ In the orthodox Chinese legal theory of the state system, the issue of residual powers usually exists in countries with a federal system, where the states of a federation were originally sovereign states which, in the process of forming a united federation, transferred part of their power while retaining residual power in the hands of each state. By contrast, in a unitary state like China, the local region's powers are not inherent but are conferred by the sovereign state. Although the HKSAR enjoys a 'high degree of autonomy', it cannot enjoy powers that are not granted to it. This autonomy is conferred by the sovereign state through the Basic Law.¹¹⁴

On the other hand, China has to face its own challenges. First, China has excluded itself from the administration of Hong Kong's internal affairs. The Chief Executive is appointed by the Central Government, but he is elected locally and exercises functions and powers in accordance with the Basic Law. Second, the Basic Law mirrors the government structure of the colonial era; however, the political moves towards a more representative legislature in Hong Kong after the 1990s have already impacted on constitutional development. Third, it is provided in the Basic Law that

¹¹³ See, *Final Report on Residual Power*, prepared by the special group on the relationship between the Central Government and the SAR, the Consultative Committee for the Basic Law of the HKSAR, 10 February 1987.

¹¹⁴ This view on the relation between 'residual power' and the form of state is shared widely in the legal community of mainland China. However, in recent years scholars have questioned this point of view. For instance, Li Yuanqi and Huang Ruogu, 'Lun Tebie Xingzhengqu Zhidu xia de Shengyu Quanli Wenti' (On 'Residual Power' Issues in Hong Kong Special Administrative Region), (2008) *Beifang Faxue* (Legal Science in the North), issue 2.

any amendment of this law shall not contravene the basic policies of the PRC regarding Hong Kong. Article 159 particularly stipulates a rigid procedure for amendment of the Basic Law. Hence the principle of ‘one country, two systems’ is guaranteed not only by the obligations of abiding by an international treaty, but also by the Basic Law that was drafted and adopted by the NPC.

Finally, according to the promise of ‘Hong Kong people govern Hong Kong’, ‘patriots’ from among the people of Hong Kong will form the main body of local administrators.¹¹⁵ So far the Chinese authority has three main offices established in the HKSAR, namely the Liaison Office of the CPG (formerly the Hong Kong branch of the Xinhua Agency),¹¹⁶ the Commissioner of the Ministry of Foreign Affairs, and the Garrison of the People’s Liberation Army. In addition, although Hong Kong practises a multi-party system regarding the election of Legislative Council, the Chief Executive is prohibited from membership of a political party according to the laws of the HKSAR.¹¹⁷

¹¹⁵ Deng Xiaoping defined a ‘patriot’ as ‘one who respects the Chinese nation, sincerely supports the motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability’, no matter they believe in capitalism or any other –ism. See, Deng Xiaoping, ‘One Country, Two Systems’, summation of separate talks with members of a Hong Kong industrial and commercial delegation and with Sze-yuen Chung and other prominent Hong Kong figures, June 22-23, 1984, in *Deng Xiaoping on the Question of Hong Kong* (Beijing: foreign language press, 1993). This loose definition differs from citizenship and it is suggested by some scholars that it is more characteristic of the traditional Chinese art of governance towards its peripheral areas. See, Jiang Shigong, ‘Yiguo Zhi Mi: Zhongguo yu Diguo’ (The Puzzle of ‘One Country’: China vs. Empire), (2008) 8 *Du Shu*.

¹¹⁶ The Xinhua Agency Hong Kong Branch was established in 1947. On 2 July 1999, Hong Kong government published in the government gazette that Xinhua Agency was an office established by the Central People’s Government in the HKSAR. In December 1999, the State Council decided to change its title to Liaison Office of the CPG. According to its website, its main functions include contacting other working bureaux of the CPG in Hong Kong, promoting communication and cooperation in the fields of economics, education, culture, etc. between mainland China and Hong Kong, and reporting to the CPG on Hong Kong issues.

¹¹⁷ See, the Chief Executive Ordinance (Cap.569) of the HKSAR.

In summary, this chapter has described briefly the evolution of the system of government of Hong Kong, its transformation and the relationship between the HKSAR and the Central Authorities of the PRC. Read together with the previous chapter, which describes the governmental system of the PRC established in accordance with the Chinese Constitution of 1982, this chapter demonstrates the predicament brought by the fundamental changes in Hong Kong's constitutional order. The norm that sets the fundamental framework of Hong Kong and its relations with mainland China—where the sovereignty lies—turns out to be a debate over the interpretation of norms.

The two issues, namely interpretation of the Basic Law and the political system of Hong Kong, are actually interrelated. The key considerations include how much power is retained by the Central Authorities of the PRC and by the HKSAR separately. What is crucial to the Basic Law is who shall interpret this law and who is endowed with the ultimate authority over this interpretation. The interpretation of the Basic Law entails not only ensuring the boundaries and mechanisms that preserve the two systems through the doctrine of 'one country, two systems', but also the guarantee of a high degree of autonomy for the HKSAR.

The contention over the interpretation of the Basic Law has gradually become a main area of debate. For the Central Authorities of the PRC, it restrains itself from the internal affairs of the SAR. The transformation of Hong Kong's political system in the 1980s and 1990s, and the struggle between the administrative branch and the LegCo also reduced the effective accountability of the Chief Executive to the CPG. Unavoidably the norm that sets the boundary between the HKSAR and the CPG in

the Basic Law has been transferred into a battle of interpretation. On the other hand, since the introduction of the BORO, the judiciary of the Hong Kong has begun to grasp the chance to declare its power to review the constitutionality of local legislation. In post-1997 practice, constitutional review has been constantly exercised on the basis of the higher status of the Basic Law, and the BORO as a local legislation of the ICCPR. It is commonly accepted in Hong Kong that the essential role of the judiciary is to maintain the principles and parameters of the Basic Law.¹¹⁸

According to Articles 158 and Article 159 of the Hong Kong Basic Law, the NPC and its Standing Committee retain the ultimate power to interpret and amend the Basic Law.¹¹⁹ In other words, the ultimate authority of setting the boundary between the sovereignty and the SAR remains with the NPC and its Standing Committee. Questions are raised with respect of how much capacity is left for judiciary of the HKSAR in interpreting the Basic Law. Does the Hong Kong legal system have the capacity to decide the extent of its own jurisdiction?¹²⁰ Divergence in interpreting of the Basic Law by Hong Kong courts and the NPCSC in post-1997 era is demonstrated in the next two chapters respectively. The interaction between the HKSAR and the PRC in relation to the political structure will continue, yet it is

¹¹⁸ According to Articles 19, 80, 81 and 82 of the Basic Law, the HKSAR shall be vested with independent judicial power, including that of final adjudication. The Court of Final Appeal of the HKSAR was established upon the return of Hong Kong to China to exercise the final adjudication, which, before 30 June 1997, was exercised by the Judicial Committee of Privy Council in London.

¹¹⁹ See, Article 158 and Article 159 of the Basic Law.

¹²⁰ Neil Walker argues that legal order involves a cluster of interconnected factors, in particular self-ordering, self-interpretation, self-extension, self-amendment, self-enforcement and self-discipline. 'The quality of self-extension', he argues, 'refers to the capacity of a legal system to decide the extent of its own jurisdiction-often known as *Kompetenz-Kompetenz*'. This term, used in the context of European Union means literally 'the competence of its competence'. See, Neil Walker, 'Taking Constitutionalism Beyond the State', (2008) 56 *Political Studies* 519-543, 527. For discussion of judicial *Kompetenz-Kompetenz*, see, Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press, 2006), p. 106.

beyond doubt that the Hong Kong Basic Law is exactly a reflection of the changing politics and so is the interpretation of its norms.

4 Chapter IV

Constitutional Review in Hong Kong

This chapter will examine the practice of constitutional review¹ in the Hong Kong Special Administrative Region (HKSAR) through a detailed examination of those judicial cases that have exerted salient influence on the jurisprudence and constitutional development of Hong Kong. We will consider the inherent limitations of the constitutional jurisdiction of the courts in the HKSAR, and its significance and possible implications for the political system of Hong Kong and the high degree of autonomy guaranteed in the Basic Law.

The complexity of judicial practice in Hong Kong in the post-1997 period might be attributed to the dual nature of the Basic Law itself. The Hong Kong Basic Law, enacted in 1990 by the NPC, is viewed from different perspectives by the Chinese authorities and those of Hong Kong. It is at the same time a political instrument for the resumption of sovereignty and a guarantee of Hong Kong's high degree of autonomy. As Albert Chen has pointed out, 'the paradox of the Basic Law lies in its dual nature. It is at once a national law and the constitutional instrument of the Hong Kong Special Administrative Region'.²

This chapter will discuss the practice of constitutional review in the HKSAR. Cases have been chosen according to their significance in Hong Kong's constitutional jurisprudence. Four main issues are examined: the justification of

¹ 'Constitutional review' refers to review of legislation on the issue of constitutionality (in the case of Hong Kong, constitutionality usually refers to the consistency with the Hong Kong Basic Law, instead of the Chinese Constitution).

² Albert H. Y. Chen, 'The Interpretation of the Basic Law: Common law and Mainland Chinese Perspectives' (2000) *Hong Kong Law Journal* 380-431.

constitutional review by the HKSAR courts; its influence upon the relationship between the executive and legislative branches in the HKSAR; the authority of the interpretation of the NPCSC within the HKSAR, and the rights-based approach in the Hong Kong courts' role in balancing governmental power and human rights protection.

This chapter concludes by arguing that the courts of the HKSAR have developed a constitutional jurisprudence distinct from that of other parts of the PRC; however, this constitutional jurisdiction is circumscribed. The practice of constitutional review in the HKSAR has attracted debate on the status of the Hong Kong judiciary and its relations with the NPCSC. Accompanied by the trend to politicize legal issues and the formation of a more rights-based approach, Hong Kong has undergone an unprecedented, unique constitutional journey during the past decade.

4.1 Jurisdiction of the courts in Hong Kong

The judicial system is considered the only part of the British constitutional structure that would survive the handover of sovereignty.³ Indeed, to a large extent, the courts of the HKSAR have inherited the jurisdiction previously practised in Hong Kong in order to achieve continuity and stability. This continuity is demonstrated not only in terms of institutions, but also in the sources of laws, the principle of judicial independence, and the preservation of the legal profession. However, the transfer of sovereignty has seen institutional changes in the judiciary, in particular, the establishment of the Court of Final Appeal (CFA) to exercise the final adjudication. The jurisdiction of the courts of the HKSAR, however, has to be defined by the Basic Law.

³ Norman Miners, *The Government and Politics of Hong Kong* (Hong Kong, Oxford and New York: Oxford University Press, 5th edition, 1991).

4.1.1 Institutional changes since the transfer of sovereignty

Before 1 July 1997, similar to other British colonies, the highest appellate institution in Hong Kong was the Judicial Committee of the Privy Council of Britain. Within the region of Hong Kong, the Supreme Court,⁴ which was composed of the High Court and Court of Appeal, was the most important judicial institution. Below the Supreme Court, District Courts were established with restricted jurisdiction both in criminal and civil cases. The jurisdiction of the courts in Hong Kong was provided by various ordinances adopted by the legislature. The Supreme Court had the power to make procedural rules for lower level courts, magistrates and tribunals.⁵

This basic structure of the judicial system of Hong Kong is retained by the Basic Law. The Basic Law endows Hong Kong with independent judicial power, including that of final adjudication. Currently the courts of justice in the HKSAR consist of the Court of Final Appeal (CFA), the High Court (which comprises the Court of Appeal and the Court of First Instance), the District Court, the Magistrates' Courts, the Coroner's Court, and the Juvenile Court. In addition, there are a number of tribunals which have jurisdiction to adjudicate on disputes relating to specific, defined areas, including the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal.

⁴ The Supreme Court was changed to 'High Court' after 1 July 1997. The original High Court was changed to 'Court of First Instance' correspondingly.

⁵ Before 1 July 1997, apart from the Supreme Court and District Court, Hong Kong also had magistrates, who mainly dealt with summary offences, with jurisdiction provided by law, and several semi-judicial institutions of tribunals. Appeals from the Land Tribunal went directly to the Court of Appeal, while appeals from other tribunals, such as the Small Claims Tribunal and Labour Tribunal, went to the High Court (Court of First Instance after 1 July 1997). For further reference, see, e.g. Peter Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994); Yash Ghai, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd Edition, 1999), Ch.8.

The CFA is established according to the Hong Kong Court of Final Appeal Ordinance (Cap.484) to exercise the power of final adjudication in the HKSAR.⁶ In terms of jurisdiction of the CFA, generally speaking, civil appeals to the CFA shall only be admitted when a leave to appeal has been granted by the CA or the CFA under the following circumstances: (a) any civil cause where the matter in dispute in the case on appeal amounts to or is of the value of one million Hong Kong dollars; (b) at the discretion of the CA or the CFA that the question involved is one of its great general or public importance; (c) at the discretion of the CFA, a determination of the Court of First Instance (CFI) under section 37 (1) of the Chief Executive Election Ordinance.⁷ Similarly, in terms of criminal appeals, leave shall be obtained first; no leave to appeal shall be granted unless it is certified by the CA or the CFI that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done.⁸

Legal practice in the HKSAR since 1997 gives further evidence that the common law legal system has been successfully retained. Even today, the courts of the HKSAR maintain close ties with other common law jurisdictions. The Basic Law allows the courts of the HKSAR to refer to precedents from other common law jurisdictions,⁹ and the CFA may invite judges from other common law jurisdictions to sit on the Court as required.¹⁰ Although in theory, precedents of the House of

⁶ Section 4 of the Hong Kong Court of Final Appeal Ordinance (Cap.484).

⁷ Sections 22 and 23 of the Hong Kong Court of Final Appeal Ordinance (Cap.484).

⁸ Section 32 of the Hong Kong Court of Final Appeal Ordinance (Cap.484).

⁹ See Article 84 of the Hong Kong Basic Law.

¹⁰ It should be noted that article 82 of the Basic Law states that the CFA may 'as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal'. The Hong Kong Court of Final Appeal Ordinance further stipulates that the CFA may as required invite non-permanent Hong Kong judges, or non-permanent judges from other common law jurisdictions. See, section 5 of the Hong Kong Court of Final Appeal Ordinance (Cap.484).

Lords of the United Kingdom are no longer legally binding in the HKSAR,¹¹ they are considered highly persuasive. As confirmed by the CFA, rulings of the Privy Council before 1 July 1997 on appeals from Hong Kong ‘continue to be binding since the resumption of sovereignty on all courts of Hong Kong, save for the Court of Final Appeal’, i.e., these decisions remain part of the common law of the HKSAR.¹² In this respect, the legal system of Hong Kong is separated from the mainland legal system. As the judicial system in Hong Kong contains features which differ fundamentally from that in mainland China, the former faces challenges in its efforts at integrating into the new constitutional order in the post-1997 era.

4.1.2 The issue of the constitutional jurisdiction of the HKSAR courts

In the post-1997 period, the issue of the constitutional jurisdiction of the HKSAR courts has concentrated on the justification and feasibility of the courts of the HKSAR reviewing the constitutionality¹³ of Hong Kong legislation and legislation enacted by the NPC or NPCSC.¹⁴ Owing to the British common law tradition in Hong Kong, judicial review of legislation was not exercised often. Legal

¹¹ It should be noted that the Supreme Court, established by part 3 of the Constitutional Reform Act 2005, which came into force on 1 October 2009, has replaced the House of Lords in its judicial capacity under the Appellate Jurisdiction Acts 1876 and 1888 (which are repealed) together with devolution matters under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006, which are transferred to the Supreme Court from the Judicial Committee of the Privy Council.

¹² See, *Thapa Indra Bahadur v. The Secretary for Security*, [2000] 2 HKBRD 113. It should be noted that rulings of the Privy Council before 1 July 1997 on non-Hong Kong appeals, as well as decisions of British courts after 1 July 1997, are not strictly binding on the Hong Kong courts, for all that decisions of such are persuasive and will always be treated with great respect, depending on all relevant circumstances (see *A Solicitor v. The Law Society of Hong Kong* [2008] FACV24/2007).

¹³ Here the term ‘constitutionality’ refers to consistency with the Basic Law instead of the Chinese Constitution.

¹⁴ See, for instance, Yash Ghai, ‘Intersection between Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?’ (2007) 37 *Hong Kong Law Journal* 363; Benny Y. T. Tai, ‘Is Final Really Final?’ (2002) 32 *Hong Kong Law Journal* 25; Albert H. Y. Chen, ‘Constitutional Adjudication in Post-1997 Hong Kong’ (2006) 15 *Pacific Rim Law and Policy Journal* 627-682; Albert H. Y. Chen, ‘The Interpretation of the Basic Law: Common Law and Mainland Chinese Perspectives’ (2000) 30 *Hong Kong Law Journal* 380-431; Jiang Shigong, ‘Heping Geming Zhong de Sifa Guanxiquan Zhi Zheng’ (Contest on Jurisdiction among Peaceful Revolution: the transformation of Hong Kong’s constitutional order from a study on the cases of David Ma and Ng Ka Ling) (2007) 19(6) *Zhongwai Faxue* (Peking University Law Journal) 641-669.

practitioners in Hong Kong largely accept that the Hong Kong courts enjoy the power of review of the constitutionality of legislation, particularly since the incorporation of the International Covenant on Civil and Political Rights (ICCPR) into Hong Kong through the Bill of Rights Ordinance (BORO) in 1991.

Constitutional review has been a major issue since the period of drafting the Basic Law. Diverse views were expressed in the consultative paper prepared by the Consultative Committee of the Basic Law (BLCC).¹⁵ Some argued that any future legislation or existing laws, if they contravene the Basic Law, should be held invalid by the courts of Hong Kong as part of their judicial function. Others contended that although the HKSAR courts, in adjudicating cases, would inevitably consider the issue of consistency with the Basic Law, the final authority of interpretation of the Basic Law rested with the NPCSC. Some further argued that the power of the NPCSC should be negative and symbolic. The NPCSC should restrain itself and only exercise this function upon request from the CFA made in accordance with Article 158 of the Basic Law.¹⁶

According to the Basic Law, the HKSAR ‘shall be vested with independent judicial power, including that of final adjudication’, and the courts of the HKSAR ‘shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained’.¹⁷ At the same time, Article 158 of the Basic Law provides that the interpretation of the Basic Law should be vested in the NPCSC. It

¹⁵ ‘The Power of Interpreting the Basic Law and the Judicial System of the Hong Kong Special Administrative Region’, Consultation Report by the BLCC, October 1988.

¹⁶ Ibid, p. 64.

¹⁷ Article 19 of the Basic Law.

further states that the NPCSC shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law that are within the limits of the autonomy of the HKSAR. The Hong Kong courts may also interpret other provisions of the Basic Law in adjudicating cases, but if they need to interpret the provisions of this law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region (referred to as 'excluded provisions' in CFA judgment), and if such interpretation will affect the judgment in the cases, before making their final judgment they shall seek an interpretation of the relevant provisions from the NPCSC through the CFA. Once the NPCSC gives an interpretation, the courts of Hong Kong shall follow, but any judgment previously rendered shall not be affected.

In the post-1997 period, the most controversial and primary issue raised is the constitutional jurisdiction of the courts of the HKSAR. The constitutional jurisdiction of Hong Kong courts is alleged to be justified on the following grounds. First, in accordance with the doctrine of separation of powers and judicial independence, the courts as dispute-resolution institutions should be the final authority on the meaning of laws. It is argued that one essential aspect of separation of powers, even in the colonial era, is judicial independence.¹⁸ Hong Kong scholars claim that under the common law and the doctrine of separation of powers, the constitutional duty of judges is to apply the law, and, when necessary, to determine which of two conflicting laws is to prevail.¹⁹ It is argued that, although the Basic Law does not expressly grant the power of judicial review of legislation, judicial

¹⁸ Peter Wesley-Smith, *Constitutional and Administrative law in Hong Kong* (Hong Kong: Hong Kong and China law studies, 1988), Vol. II, p. 479.

¹⁹ Peter Wesley-Smith, 'Judicial review of Legislation in Hong Kong', (1996) 26 *Hong Kong Law Journal* 1-2.

review is necessarily implied. Without it the Basic law would be almost unworkable or meaningless, since the only way to uphold the constitutional supremacy of the Basic Law over local legislation and executive acts is to apply the Basic Law.²⁰

Second, it is argued that the Hong Kong judiciary already had the capacity for constitutional review under the colonial regime. The Hong Kong Ordinances could be struck down if they were repugnant to an act of Parliament in force in the colony or if they contradicted the Letters Patent.²¹ Lawyers in Hong Kong also contend that judicial review of legislation can be traced back to the pre-1997 era. For example, Gladys Li argues that in the case of *Lee Miu-Ling v Attorney General*,²² the ability of the Hong Kong court to examine the consistency of Hong Kong legislation with the Letters Patent was already recognized.

However, these arguments for the constitutional review of the HKSAR courts have met with severe criticism from Chinese academics, including the drafters of the Basic Law.²³ In their opinion, there is no legal basis for the courts of the HKSAR to assert constitutional jurisdiction. For example, Wu Jianfan is of the opinion that, the Basic Law has retained restrictions on the jurisdiction of the Hong Kong courts that were imposed by the legal system and principles previously in force in Hong Kong, and these restrictions included the principle that the courts could only apply, but not challenge, the law. Furthermore, the CFA's claim to the

²⁰ Ibid.

²¹ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong: text and materials* (Hong Kong: Hong Kong and China law studies, 1988).

²² [1996] 1 HKC 124.

²³ See, for instance, the press release by Xinhua News Agency on 6 February 1999. For English translation, see, 'Why the Court of Final Appeal was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal', Johannes Chan trans. in Johannes M.M. Chan, H. L. Fu and Yash Ghai (eds.), *Hong Kong's Constitutional Debates: Conflict over Interpretation* (Hong Kong University Press, 2000).

power to review the legislative acts of the NPC and its Standing Committee constitutes a direct violation of Article 19 of the Basic Law,²⁴ which provides that the HKSAR courts have no jurisdiction over the ‘Act of State’.²⁵

4.2 The practice of constitutional review in the HKSAR regarding the implementation of the Basic Law

The practice of constitutional review in the HKSAR and relevant public debate reflect the complexity of building a new constitutional order in the HKSAR. Different arguments on this issue have demonstrated struggles over the relationship between the Central Authority and the HKSAR, as well as the internal relationship between Hong Kong political institutions. In this section, the practice of constitutional review in the HKSAR will be discussed from the following aspects.

The first issue is the establishment of the constitutional review jurisdiction in the post-1997 era. Two cases, *HKSAR v. Ma Wai-Kwan* and *Ng Ka Ling & others v. the Director of Immigration*, will be examined in detail. As mentioned above, the Hong Kong Court of Final Appeal (CFA) established its constitutional review jurisdiction in *Ng Ka Ling*. However, the boundaries of this jurisdiction remain unclear. The Court of Appeal ruled in *Ma Wai-Kwan* that the Hong Kong court was confined to the jurisdiction it had before the handover, as implied by Article 19 of the Basic

²⁴ Article 19 of the Basic Law provides that the courts of the HKSAR shall ‘have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state..This certificate shall be binding on the courts’.

²⁵ See, Wu Jianfan, ‘Comments On the ‘Right of Abode Case’, in Johannes M.M. Chan, H. L. Fu and Yash Ghai (eds.), *Hong Kong’s Constitutional Debates: Conflict over Interpretation* (Hong Kong University Press, 2000).

Law.²⁶ However, in *Ng Ka Ling*, the CFA concluded that, in exercising the judicial power conferred by the Basic Law, the courts of the HKSAR have a duty to enforce and interpret this law. Therefore, the courts undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the HKSAR or acts of its executive authorities are consistent with the Basic Law.²⁷ In addition, the CFA declared that the courts of Hong Kong, in performing their constitutional duty, shall have jurisdiction to examine not only the local legislation or executive acts, but also the legislative acts of the NPC or NPCSC on the issue of conformity with the Basic Law.

The second issue raised is the role of the judiciary in the internal relationship between political institutions in Hong Kong since 1997. To put it differently, to what extent, has the practice of constitutional review affected the institutional relationships of the HKSAR? As will be illustrated later in this chapter, through exercising review over legislation, the judiciary of the HKSAR has not only declared local legislation ‘null and void’, but also provided guidance in its judgments on how amendments to the legislation should be made.²⁸ The CFA claims that, by exercising the jurisdiction of review of the constitutionality of legislation and administrative acts, the courts are ‘performing their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law’.²⁹

²⁶ *HKSAR v. Ma Wai-Kwan, David, Chan Kok-Wai, Donny and Tam Kim-Yuen* (cited as *HKSAR and Ma Wai-Kwan, David* below), [1997] HKLRD 761.

²⁷ *Ng Ka Ling & others v. The Director of Immigration* (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315.

²⁸ An example is the CFA’s decision in *Koo Sze Yiu & Leung Kwok Hung v. Chief Executive of the HKSAR* (case no. FACV Nos. 12 & 13 of 2006) concerning the Interception of Communications Ordinance (Cap. 532).

²⁹ See above note 27.

To some extent, the court might have already blurred the distinct functions of the legislature and the judiciary. This also makes a sharp contrast with the practice during the pre-1997 period when judicial review was normally only exercised in a restricted manner. The research paper issued in 1988 by the Consultative Committee of the Basic Law (BLCC) on this topic suggested that the courts had the power to declare invalid any law which had not been passed in accordance with proper procedures, or subsidiary legislation that contravened superior legislation.³⁰ In addition, the courts had no power to adjudicate on hypothetical issues and hence decide legal questions in abstract or academic issues. Put differently, the courts were restricted to interpreting laws only as part of their judicial decisions in a specific case.

The third aspect relates to the authority of interpretation of the NPCSC in the HKSAR and the reference issue, i.e., under what circumstances the CFA shall refer to the NPCSC for the interpretation of the Basic Law, as required in Article 158 of the Basic Law. Regarding the authority of the interpretation of the NPCSC, the Hong Kong courts have shown reluctance to integrate the NPCSC into the HKSAR system.³¹ After the judgment in the *Ng Ka Ling* case caused controversy in Hong Kong, on the request of the Chief Executive of the HKSAR, the NPCSC gave an interpretation on relevant provisions of the Basic Law.³² The CFA elucidated the power of the NPCSC to make general interpretations and the nature of these

³⁰ Ibid.

³¹ In recently decided *FG Hemisphere v. Democratic Republic of Congo*, for the first time, the CFA requested the NPCSC for an interpretation in accordance with the procedure stipulated in Article 158 of the Hong Kong Basic Law. After the NPCSC gave its interpretation on 26 August 2011, the CFA delivered its final judgment in early September 2011. This case, however, does not change the overall situation in Hong Kong that referring to the NPCSC is still a controversial issue.

³² *The Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24(2)(3) of the Basic Law of the HKSAR*, adopted by the Standing Committee of the Ninth NPC at its Tenth Session on 26 June 1999.

interpretations in *Lau Kong Yung v. the Director of Immigration*,³³ and confirmed the legal effect of the NPCSC's interpretation of relevant provisions of the Basic Law. However, later cases have shown that the CFA has tailored the interpretation of the NPCSC.³⁴

In terms of the reference issue, the CFA established the criteria for such references in *Ng Ka Ling*. In this case, the judges made the following points on Article 158. Firstly, the Court held that it is for the CFA alone to decide, in adjudication cases, whether the conditions of making a reference to the NPCSC are satisfied. The Court held that it has a duty to make a reference to the NPCSC if the following two conditions are satisfied: (1) the classification condition, i.e., the provision shall be an 'excluded provision', which falls into the definition of 'affairs that are authority of the central people's government or related to the relationship between the Central Authority and the Hong Kong Special Administrative Region'; and (2) the necessity condition, which means that the Court in adjudicating the cases *needs* to interpret the excluded provision, and such provision will affect the judgment in the case.³⁵ The Court further scaled down the necessity condition by using the 'predominance' criterion. In *Ng Ka Ling*, although the Court was satisfied that Article 22(4) could be identified as an 'excluded provision', it stated that since Article 22(4) was not the provision that predominantly has to be interpreted, there is no need to make a reference to the NPCSC.

³³ *Lau Kong Yung & others vs. The Director of Immigration*, FACV Nos. 10 and 11 of 1999, [1999] 2 HKCFAR 300.

³⁴ *Director of Immigration v. Master Chong Fung-Yuen* [2001] 4 HKCFAR 211.

³⁵ *Ng Ka Ling & others and The Director of Immigration*, (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315, at 30I-31B.

The final issue is the rights-based approach in human rights protection cases. The CFA makes clear in various judgments that Hong Kong courts must adopt a common law legal approach in exercising their functions. In *Ng Ka Ling*, the CFA stated that a purposive approach should be appropriate and necessary in interpreting constitutional documents. By purposive approach, the Court held that, in ascertaining the true meaning of a constitutional instrument, the courts should consider the language in the light of context and purpose, although a court cannot give the language a meaning which it cannot bear. In order to achieve this, the courts need to avoid a literal, rigid and restricted meaning of the provision and intend to discern any meaning implicated in the legislation and adopt a broader view to contemplate related materials to ascertain the objective of legislative intention.

Post-1997 practice has demonstrated that the approach of Hong Kong courts is a mixture of liberal and conservative: liberal in terms of protecting human rights, relatively conservative in selecting authorities when it comes to decide what shall be included in the original meaning of the Basic Law. For instance, regarding the materials on which the court relies to ascertain the meaning of the Basic Law, the CFA makes a distinction between pre-enactment and post-enactment ‘extrinsic materials’. It is said the judges should confine themselves to materials from before the enactment of the Basic Law, including the Joint Declaration,³⁶ the Elaborations on the Basic Law (draft),³⁷ and the state of domestic legislation at that time,

³⁶ *The Joint Declaration of the Government of the People’s Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong*

³⁷ See Ji Pengfei’s report to the NPC, ‘Elaboration on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (draft) and Related Documents’, 28 March 1990.

whereas post-enactment materials shall only be considered in a prudent manner.³⁸ Even official documents adopted by the Preparatory Committee for the HKSAR of the NPC (全国人大香港特别行政区筹备委员会) and the Preliminary Working Committee for the Preparatory Committee for the HKSAR of the NPC (香港特别行政区筹备委员会预备工作委员会), said the CFA, will not necessarily be considered as evidence of the legislative intent of the Basic Law, given that these are post-enactment documents.³⁹ This emphasis seems to be a silent resistance to mainland China's legislative intent approach. It shows a contrast with the 'legislative interpretation' in the Chinese legal system, in which documents regarding the legislation background are always referred to as of assistance in discerning the meaning of the law itself. In this way the judiciary of the HKSAR endeavours to expand its field of authority in establishing its role as protector of human rights and authority in interpreting the Basic Law.

4.3 Analysis of the case law

4.3.1 Justification of the constitutional jurisdiction of the HKSAR courts

Regarding the scope of constitutional jurisdiction of the HKSAR courts, the essential concern is the foundation of this jurisdiction under the Basic Law. In its reasoning in *Ma Wai-Kwan* on whether the courts of the HKSAR have jurisdiction to query the validity of any acts of the NPC, the Court of Appeal made an analogy to the British Hong Kong system to show that Hong Kong courts are not allowed to challenge any decision made by the sovereign authority. This analogy between past

³⁸ See, Chief Justice Li's reasoning in *Director of Immigration v. Master Chong Fung-yuen*, [2001] 4 HKCFAR 211

³⁹ In *Director of Immigration v. Master Chong Fung-yuen*, the CFA had ruled over the legal effect of the NPCSC's interpretation of the Basic Law. This will be discussed later.

and current sovereignty was criticised later by the CFA in its judgment in *Ng Ka Ling*, in which the CFA held that Hong Kong courts have the constitutional obligation to perform constitutional review of all local legislation as well as the decisions and acts of the NPCSC, thus fulfilling their constitutional duty as a safeguard of this mini-constitution. The two cases and their contrasting views will be examined respectively.

*a. Ma Wai-Kwan*⁴⁰

This case concerns the jurisdiction of the courts of the HKSAR. It was presented to the Court of Appeal (CA) of the HKSAR ten days after Hong Kong returned to the PRC. The defendants were charged with conspiracy to pervert the course of public justice, a common law offence, before 1 July 1997. The issue presented to the court was whether the charges made under common law previous to 1 July 1997 should survive the transfer of sovereignty and continue to be effective after that date. The defendants argued that there was no formal recognition of the survival of common law in Hong Kong after the handover. Furthermore, although the Provisional Legislative Council (PLC)⁴¹ had passed the Reunification Ordinance⁴² to recognize

⁴⁰ *HKSAR v. David Ma Wai-Kwan, Chan Kok-Wai, and Tam Kim-Yuen*, [1997] HKLRD 761.

⁴¹ The Provisional Legislative Council was established in 1996 in accordance with the 'Decision of the National People's Congress on the method for the formation of the first government and the first legislative council of the Hong Kong Special Administrative Region'. Due to the failure of negotiations between the Chinese and British governments regarding the arrangement of the 1995 LegCo election, the Chinese government decided on 31 August 1994 that the last LegCo under British rule would not continue to serve its term after the transition of sovereignty, and the Preparatory Committee would 'be responsible for matters relating to the preparation of the establishment of the HKSAR, and to prescribe the specific method for the formation of the first Legislative Council of the HKSAR and organize the first Legislative Council of the HKSAR in accordance with the 1990 Decision of the NPC'. Since there is no provision for a contingency in the Basic Law, in order to avoid a legal vacuum and possible instability in Hong Kong, the Preparatory Committee decided on 24 March 1996 to establish the Provisional Legislative Council (PLC), prescribing a specific task within a limited function and term (1 July 1997–30 June 1998). The main purpose of the PLC was to adopt legislation indispensable to the normal government operations of the HKSAR and to make essential personnel appointments.

the continuity of the legal system, the legality and competence of the PLC was in doubt.

The judges of the CA concluded that there is no express or implied requirement in any of its provisions that the laws previously in force or the legal system previously in place need to be formally adopted before they can continue to be applicable after the change of sovereignty, since the key intention of the Basic Law is continuity of the legal system in order to achieve social stability. Subsequently, the Court has no jurisdiction to challenge an act of the sovereign, while the establishment of the PLC is of such a nature. The Court held that the HKSAR courts, as regional courts under the sovereignty of the PRC, shall have no jurisdiction to query the validity of any legislation or acts passed by the sovereign, just as it is hard to imagine any legal basis for the Hong Kong court to challenge the validity of an Act of Parliament in Britain.

This decision of *Ma Wai-Kwan* settled the continuous disputes over the legality of the PLC in its competence as an interim legislature. The legality of the PLC has been the subject of debate for years. Although the Chinese government argued that the establishment of the PLC was reflected prevailing political reality and that this interim body was wholly within the competence of the Preparatory Committee of the NPC, the Hong Kong legal community remains largely unconvinced.

⁴² The Hong Kong Reunification Ordinance (originally 110 of 1997; listed as A 601 in the Bilingual Legal Information System of Hong Kong), enacted and passed by the Provisional Legislative Council on 1 July 1997.

The profound significance of this case lies in the reasoning on Article 19 of the Basic Law, which provides that Hong Kong courts can adjudicate all cases in the HKSAR ‘except the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong’. This, in the view of the CA, suggested that HKSAR courts have no greater jurisdiction than the courts under British rule. Before the handover, Hong Kong courts had no jurisdiction to query Acts of Parliament and Ministerial decisions. Based on this analogy, the CA concluded it could only examine whether any acts made by the sovereignty authority did exist. Hence, with regard to the PLC, the Court’s task is to examine whether the NPC had authorized the Preparatory Committee to establish this interim body, and whether the Preparatory Committee had done so pursuant to its authority and powers and whether the PLC is the interim body set up by the Preparatory Committee. If all these enquiries are answered positively, the Court should confirm the legality of the Provisional Legislative Council.

*b. Ng Ka Ling and Chan Kam Nga*⁴³

The cases are concerned with the interpretation of Article 22 and 24 of the Basic Law on qualification for permanent residency in the HKSAR. Article 24 provides that the permanent residents of Hong Kong shall be the six categories of persons set out therein. In order to implement these provisions, the PLC enacted the ‘No.2 Ordinance’⁴⁴ and the ‘No.3 Ordinance’.⁴⁵ Paragraph 2(c) of the No.2 Ordinance

⁴³ *Ng Ka Ling & Others vs. the Director of Immigration*, (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315; *Chan Kam Nga & others vs. the Director of Immigration* (1999) 2 HKCFAR 82, [1999] 1 HKLRD 304

⁴⁴ The Immigration (Amendment) (No.2) Ordinance, adopted by the Provisional Legislative Council on 1 July 1997.

⁴⁵ The Immigration (Amendment) (No.3) Ordinance, adopted by the Provisional Legislative Council on 10 July 1997.

required an applicant who intends to claim permanent residency in accordance with Article 24(3) to prove that at the time of birth, his/her parent already had the right of abode in Hong Kong (this is referred as ‘time of birth limitation’);⁴⁶ while the No.3 Ordinance set out a scheme to verify and process the applications of those living in mainland China seeking to enter the HKSAR for the purpose of settlement.

The constitutionality of the No.2 and No. 3 Ordinances was challenged in a series of ‘right of abode’ cases. *Ng Ka Ling* is mainly concerned with the verification scheme of the No.3 ordinance; while *Chan Kam Nga* involves the ‘time of birth limitation’. The legal issues involved in these cases can be summed up as follows. First, an issue is raised regarding the constitutionality of paragraph 2(c) of new schedule 1 of the No.2 Ordinance, i.e. whether this ‘time of birth limitation’ stipulation is consistent with the Basic Law. The second is the constitutionality of paragraph 1(2) of schedule 1, which defines the relationship of parent and child with the effect that the relationship is only taken to exist when the child is subsequently legitimated by their parents’ marriage.⁴⁷ Third, two provisions in No. 3 Ordinance of 1997 were challenged. One is the retrospective provision which will not be dealt with here. The other is section 2AA, which provides that a person’s status as a permanent resident by descent in paragraph 2(c) of schedule 1 can only be

⁴⁶ Paragraph 2 (c) of the Immigration (Amendment) (No.2) Ordinance refers to ‘a person of Chinese nationality born outside Hong Kong to a parent who is a permanent resident of the Hong Kong Special Administrative Region in category (a) or (b) if the parent had the right of abode in Hong Kong at the time of the birth of the person’. Paragraph 2(a) refers to Chinese citizens who born in Hong Kong before or after the establishment of the HKSAR; while paragraph 2(b) refers to Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of HKSAR. The constitutionality of paragraph 2(a) was challenged in the *Chung Fung Yuen* case.

⁴⁷ This ‘the birth out of wedlock’ issue was raised in the *Cheung Lai-Wah* case, in which the applicant’s mother died during giving birth and the applicant’s parents had not been married. Both the High Court (CFI) and the Court of Appeal (CA) held that this stipulation was inconsistent with the Basic Law and should be invalid. This position was later approved by the CFA.

established by his/her holding a valid travel document and a valid certificate of entitlement affixed to such travel document. In other words, a mainland Chinese citizen's application for settlement in the HKSAR should only be made through the public security bureaus in the mainland.⁴⁸

The applicants in the *Ng Ka Ling* case were born in mainland China. At least one of their parents was a permanent resident of Hong Kong at the time when they were born. The applicants entered Hong Kong before or on 1 July 1997 and stayed there afterwards. The Director of Immigration ordered them to leave Hong Kong and apply to settle there through the Security Bureau in mainland China, as required by the new scheme introduced in the No.3 Ordinance. Counsel for the applicants argued that the No.3 ordinance contravened the Basic Law. The constitutionality of the No.3 Ordinance also involved the status of the Provisional Legislative Council since the PLC's legality and competence as a legislature in the HKSAR was also challenged.

The applicant in *Chan Kam Nga* was mainly concerned with the 'time of birth limitation'. Before this case went to the CFA, the Court of Appeal ruled that the No. 2 Ordinance was not inconsistent with the Basic Law, since 'on the true construction of Article 24 (2) (3), only persons of Chinese nationality born outside Hong Kong of parents who have *already* acquired permanent resident status *at the*

⁴⁸ The 'one-way permit scheme' started to operate from the 1980s. This arrangement was meant to control the mainland Chinese immigration to Hong Kong for family reunion in a gradual and orderly way, to fit the pace of social, economic development of Hong Kong. Under this scheme, any mainland China resident who wants to settle in Hong Kong needs to make an application for a 'one-way permit' to local Public Security Bureau in the PRC, and shall be issued with a certificate of settlement by the authorities of Hong Kong. Statistics show that 960,000 persons immigrated to Hong Kong from mainland China between 1983 and 2006, representing 14 per cent of the total population. See e.g., 'An Investigation into Hong Kong's Population Policy from the "One-way permit" Scheme', research report by the Bauhinia Foundation Research Centre, 28 August 2008.

time of their birth are included in Article 24(2) (3)’. In terms of whether Article 22(4) and Article 24(2) (3) are related to each other, ⁴⁹ both the CFI and CA held that the requirement in Article 22 (4) that ‘people from other parts of China must apply for approval’ is also applicable to those who can be identified as permanent residents of HKSAR. In other words, on the two issues in this case, both CFI and CA approved the position of the Director of Immigration.

In these cases the CFA first firmly established its jurisdiction in the review of constitutionality of any legislative act, including an act of the NPC/SC related to the Basic Law. As mentioned above, the CFA founded its justification on the constitutional guarantee of the Basic Law, which reserves judicial independence and grants the HKSAR court the power of final adjudication. As the judiciary of the SAR, the courts should have the duty to safeguard the constitution of the SAR—the Basic Law—by way of the review of any unconstitutional acts. This jurisdiction has its roots in the Basic Law, rather than by analogy to the previous legal system in colonial times. The Basic Law, as argued by the CFA, sets out the new constitutional order of the HKSAR.⁵⁰

⁴⁹ Article 22 (4) of the Basic Law stipulates that ‘for entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region’. In the *Ng Ka Ling* case the Court of Appeal held that Chinese citizens who currently live in mainland China are bound by Article 22(4). They should apply to settle in Hong Kong through the Mainland Security Bureau and be subject to the scheme of ‘one way permit’ and ‘certificate of settlement’ provided in the No. 3 Ordinance. These administrative arrangements for Chinese citizens to settle in Hong Kong mainly serve for family reunion purposes, and had been in place for years before 1999. Later the CFA held that since ‘right of abode’ is one of the core human rights, it should not be restricted by the bureaucracy of the Chinese government, and therefore, the CFA refused to establish a link between Article 22 (4) and Article 24(2)(3). This part of the reasoning of the CFA also constituted one of the reasons that it refused to seek a reference to the NPCSC for an interpretation.

⁵⁰ See, the reasoning of the CFA in the *Ng Ka Ling* case. The CFA stated that the jurisdiction of the courts of the HKSAR was derived from the Sovereign in that the NPC had enacted pursuant to Article 31 of the Chinese Constitution in the Basic Law for the Region. Hence, the position in the new order is fundamentally different from that of the system prior to 1997.

The Court further pointed out that the courts should give a generous interpretation to the provisions of the Basic Law which set out the rights and freedoms of residents. The right of abode, including the right to enter, according to the CFA, was an essential right guaranteed by the Basic Law and should not be subject to the discretionary control of the mainland authorities.⁵¹ It followed that the No. 3 Ordinance is unconstitutional to the extent that it requires the permanent residents of Hong Kong residing in mainland China to hold a one-way permit fixed to a certificate of settlement before they can enjoy the right of abode. Although the CFA admitted that it is reasonable for the legislature to introduce a scheme to verify a person's claim to be a permanent resident, it held that the link to the mainland authority is unconstitutional. Hence No.3 is partly constitutional in that within the HKSAR, the verifying procedure is constitutional; however, the requirement of a one-way permit fixed to the certificate of settlement is unconstitutional.

4.3.2 The role of the court in distribution of power between political institutions

The courts' role in performing their constitutional role under the Basic Law was declared by the CFA in *Ng Ka Ling* as 'acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law'. Judging from the practice of the past decade, there is no doubt that the judiciary has taken such an active role. In fact, the constitutional review practice in recent years indicates a trend of looking to the

⁵¹ Technically speaking, one cannot say the reasoning by the Chief Justice on the constitutionality of the No. 3 Ordinance is impeccable. In fact, it is vulnerable for two reasons. First, how can one enjoy the right of abode before this status can be verified? The right of abode, before the authority confirms it, is only a prerequisite of other rights and freedom. It is a nature of confirmation of citizenship. Second, the Court admitted that it was reasonable to introduce a procedure to verify the status of the application; one cannot be persuaded to accept the reasoning of severing the linkage between mainland China and Hong Kong.

judiciary to resolve political disputes since 1997. As discussed in the previous chapter, the relationship between the legislature and the government of the HKSAR has been in discord.⁵² A series of cases, set out below, demonstrates that the constitutional review exercised by the Hong Kong judiciary has *de facto* re-distributed the governmental power between the political institutions in the post-1997 period.

a. On the relationship between the LegCo and the Executive

The primary issue raised in *Leung Kwok Hung*⁵³ is the constitutionality of rule 57(6) of the Standing Order of the Legislative Council, which effectively prevents members of the LegCo from proposing any amendments to government bills with a charging effect.⁵⁴ The Court had to decide whether the binding effect of Article 74 of the Basic Law,⁵⁵ which restricts the LegCo member's capacity to introduce bills, should be extended to the LegCo members' power to propose *amendments* at the stage of committee elaboration. The Secretary for Justice argued that the legal effect of Article 74 must be construed to extend to amendments, since any other interpretation would create the anomaly that LegCo members may achieve their

⁵² For example, in *Association of Expatriate Civil Servant of Hong Kong v. Chief Executive of the HKSAR*, the applicant sought a judicial review of the decision of the Chief Executive to promulgate the Public Service (Administration) Order 1997 and the Public Service (Disciplinary Regulation). This case is reported in [1998] 1 HKLRD 615.

⁵³ See *Leung Kwok Hung v. the President of the Legislative Council and the Secretary of Justice of the HKSAR*, Court of First Instance, No.87 of 2006. The judgement was delivered on 22 January 2007 per Hon J. Hartmann.

⁵⁴ Here the term 'with a charging effect' refers to any amendment to government bills related to expenditure from the public purse.

⁵⁵ Article 74 of the Basic Law provides that individual members of the LegCo shall not introduce bills related to public expenditure, political structure or the operation of the government. Relevant provisions in the *Standing Order* of the LegCo, see, part K, article 50-66 of the 'Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region' provides the procedures for legislations.

goal by way of committee stage amendment to evade explicit prohibitions on introducing a bill.⁵⁶

The first legal issue the Court needed to tackle was whether the Court has jurisdiction over a Standing Order of the LegCo. The Basic Law states that rules of procedure of the LegCo must be consistent with the Basic Law,⁵⁷ which means that the LegCo must act not only in accordance with the Basic Law, but also with the rules of procedure which the Council has the power to set for itself in order to govern the manner in which it enacts amends or repeals laws. Based on this, the Court first confirmed its ‘non-disputable’ jurisdiction over this matter, even though the judge recognized that the LegCo, in order to avoid an impasse which may have jeopardized good governance, has the sole competence to make a procedural rule.

In this case, the Court exercised its function in a prudent and restricted manner. It refused to interpret Article 74 of the Basic Law directly. The judge held that, as enshrined in the Basic Law, the principle of separation of powers makes it evident that the executive, the administration and the legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong. In line with this, the judges referred to the USA that: ‘It is a principle of long-standing in the United States jurisprudence that a court will not formulate a rule of constitutional law broader than is required by the precise

⁵⁶ See *Leung Kwok Hung v. The president of the Legislative Council and the Secretary of Justice of the HKSAR*, No. 87 of 2006, Court of the First Instance, para. 37.

⁵⁷ Article 75 of the Basic Law.

facts to which it is to be applied’, and was thus reluctant to give a direct interpretation on the meaning of Article 74.⁵⁸

This case is significant in that it directly touches the boundary of the power of political institutions in the HKSAR. In another case, *Solicitor and Law Society of Hong Kong v. Secretary for Justice*,⁵⁹ the CFA held that any limitation on judicial power by the legislature must pursue a legitimate purpose and there must be reasonable proportionality between the limitation and the purpose sought to be achieved. A recent case raised the question whether the function vested in the LegCo by Article 73 of the Basic Law shall be applied to a single committee of the LegCo.⁶⁰ The applicants in this case, Cheng Kar-Shun and Leung Chi-Kin, asked the Court to clarify whether a committee of the LegCo is eligible to summon government officials or residents to give evidence in the LegCo when the committee appeals to concerns of public interest. This power, argued the applicants, is only vested in the LegCo when it functions as a full body. This case directly requires an interpretation of Article 73 (10) of the Basic Law,⁶¹ and the constitutionality of the relevant provisions in the Legislative Council (Power and Privileges) Ordinance (Cap.382). This case once again demonstrates the judiciary’s role in tackling issues related to the distribution of political powers.

b. On the issue of functional constituencies

⁵⁸ See, *Leung Kwok Hung v. The president of the Legislative Council and the Secretary of Justice of the HKSAR*, No. 87 of 2006, para.43. The Court cited *Ashwander v. Tennessee Valley Authority* (1935) 297 U.S. 288 to support its reasoning.

⁵⁹ *Solicitor and Law Society of Hong Kong v. Secretary for Justice*, [2003] 6 HKCFAR 571.

⁶⁰ *Cheng Kar-Shun and Leung Chi-Kin v. Hon Li Fung-Ying, etc.*, HCAL 79/2009 (judgment delivered on 24 September 2009 per Hon Andrew Cheung J.)

⁶¹ Article 73 of the Basic Law provides that the LegCo of the HKSAR shall ‘exercise the following powers and functions ... (10) to summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence’.

In *Chan Yu Nam*,⁶² the applicants sought a judicial review to declare relevant provisions in the Legislative Ordinance (Cap.542) unconstitutional, in so far as they provide for corporate voting in the elections for functional constituencies of the Legislative Council. In this case, both applicants alleged they were made ineligible to vote in elections for LegCo members returned from functional constituencies. Corporate voting, it was alleged by the applicant, contradicted Article 26 of the Basic Law, which gives rights to permanent residents of the HKSAR.⁶³ The applicants argued that Article 26 and Article 21 (b) of the BORO⁶⁴ apply only to natural persons.

The Court of First Instance (CFI) declined the applicants' argument. Cheung J recounted the history and purpose of the functional constituency at length,⁶⁵ and took a purposive approach in interpreting the Basic Law. In the opinion of the Court, the first question that needed to be examined was whether Article 26 of the Basic Law was intended to apply to elections for functional constituencies at all. The Court found that corporate voting in the elections of functional constituency had existed and borne the same meaning (i.e., corporations are allowed to vote) when the Basic Law took shape in April 1990, therefore it could not possibly contradict

⁶² *Chan Yu Nam v. Secretary for Justice*, HCAL32/2009, delivered by the Court of First Instance on 10 December 2009.

⁶³ Article 26 of the Basic Law provides, 'Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law'.

⁶⁴ Article 21 (b) of the BORO corresponds with Article 25 of the ICCPR. It states that 'Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions--... (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'.

⁶⁵ For academic research on functional constituencies, see, Simon N. M. Young, *Hong Kong's Functional Constituencies: Legislators and Elections* (Centre for Comparative and Public Law, University of Hong Kong, a research project commissioned by Civic Exchange).

the Basic Law given the fact that the ICCPR had already been incorporated into Hong Kong through Article 39 of the Basic Law itself.

The next issue the Court examined was the legislative intent with regard to the political development of the HKSAR. After reading Article 68, annex II of the Basic Law,⁶⁶ together with the elaborations on the draft Basic Law,⁶⁷ the Court observed that the election of the functional constituency of the LegCo found favour with the drafters of the Basic Law as an effective system to give sufficient weight to key players of the society in order to ensure a steady, gradual and orderly democratic progress which is suitable for the legal status and actual situation of the HKSAR. The Court subsequently came to the conclusion that the Basic Law never intended Article 26 to have the effect of prohibiting corporate voting in elections for functional constituencies.

c. On issues related to the administration of the HKSAR government

In *Chen Shu Ying v. the Chief Executive of the HKSAR*,⁶⁸ the applicant brought judicial review proceedings to challenge the Provision of Municipal Services (Reorganization) Ordinance (Cap.552),⁶⁹ on the basis that this ordinance was

⁶⁶ Article 68 of the Basic Law provides that the method of forming the LegCo shall be specified ‘in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress’; Annex II of the Basic Law provides that in the second and third term of the LegCo, members returned from functional constituencies constitute half (30 members) of the whole.

⁶⁷ Here the Court refers to the report of Ji Pengfei, ‘Elaborations on “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft) and Its Related Documents’’, which was addressed to the National People’s Congress On 28 March 1990.

⁶⁸ *Chen Shu Ying v. the Chief Executive of the HKSAR*, HCAL 151/1999, reported in [2001] 1 HKLRD 405.

⁶⁹ Due to the breakdown of negotiations between the Chinese and British governments on 1995 LegCo elections, the Chinese government unilaterally declared in 1994 that the Legislative Council, two Municipal Councils and District Councils (the so-called three tiers of representative government) should be abolished on 1 July 1997. In 1997, the HKSAR government established the Provisional Municipal Councils to take similar responsibility of Municipal Councils. All the members of the Provisional Municipal Councils were appointed by the CE. The HKSAR government decided to

inconsistent with Article 25 (a) of the ICCPR, which provides that every citizen shall have the right and opportunity to take part in the conduct of public affairs. The applicant argued that the Hong Kong government's decision to remove the Municipal Councils denied Hong Kong permanent residents the right to participate in public affairs at a regional or local level. In the argument of the applicant, although the District Councils have assumed the functions of Municipal Councils, this arrangement is not sufficient to meet the requirement of the ICCPR since the District Councils are only advisory institutions without any executive or administrative functions.

The primary issue for the Court to consider was whether the current legislative arrangements meet the requirements of Article 25(a) of the ICCPR. In this case, the Court interpreted the wording of 'take part in' and 'public affairs'⁷⁰ and concluded that the broad concept of 'participation' in the conduct of public affairs should encompass participation in institutions which have no legislative or executive powers but exert influence by means of open debate and liaison with legislative, executive and administrative bodies. In other words, a general right of participation should include direct and indirect means of taking part in public affairs. Therefore, it is for each jurisdiction, through its constitution and laws, to decide the modalities best suited to meet the requirements of Article 25(a) of ICCPR. The current institutional framework of the HKSAR has already complied with this specific requirement of the ICCPR.

abolish Municipal Councils in January 2000. The applicants in this case were former members of Municipal Councils.

⁷⁰ In *Secretary for Justice and others v. Chan Wah and others*, the CFA interpreted 'public affairs' as a broad concept covering 'all aspects of public administration including at the village level'. In the *Chen Shu-Ying* case, the court followed this precedent and interpreted 'public affairs' as covering 'all aspects of the formulation of public policies and their administration from the national to the regional to the local'.

Other cases, such as *Secretary for Justice v. Lau Kwok Fai Bernard*,⁷¹ concerning the reduction of a government official's salary, also raise the question of interpreting the Basic Law in an appropriate manner. This case concerns whether relevant provisions of the Public Officers Pay Adjustment Ordinance (Cap.574) and the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap.580), which purported to reduce the pay of public officers, are in breach of Article 100 of the Basic Law; and also in the case of the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap.580), whether it is in breach of Article 103 of the Basic Law.⁷²

Similar to *Chen Shu Ying v. the Chief Executive of the HKSAR*, when it comes to the interpretation of the Basic Law, the Court held that Article 100 should be given a purposive construction in confirming its principal object of ensuring continuity of employment so that a more general theme of continuity underlying the Basic Law would be achieved. In the Court's reasoning, Article 103 was designed to preserve the continuity of the previous system, and the maintenance of the previous system does not entail preservation of all of its elements.

4.3.3 Authority of the NPCSC's interpretation of the Basic Law in the HKSAR

The essential issue in *Lau Kong Yung*⁷³ is the legal effect of the NPCSC's

⁷¹ FACV No.16 of 2004, reported in [2005] 3 HKLRD 88, [2005] 8 HKCFAR 304.

⁷² Article 100 of the Basic Law provides that 'Public servants serving in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before'; article 103 provides that 'Hong Kong's previous system of recruitment...or the public service, including...pay and conditions of service, should be maintained, except for any provisions for privileged treatment of foreign nationals'.

⁷³ *Lau Kong Yung & others v. The Director of Immigration*, FACV Nos. 10 and 11 of 1999, [1999] 2 HKCFAR 300

interpretation of Article 22(4) and 24(2) (3) of the Basic Law.⁷⁴ By contrast with *Ng Ka Ling*, here the CFA adopted a more inferior position in its relationship with the NPCSC. It held that the NPCSC's power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms and therefore no constitutional restraint is imposed on the NPCSC's power. However, in another case, *Chong Fung-Yuen*,⁷⁵ the CFA took a step backwards in judging what amounts to a formal interpretation of the NPCSC. The two cases will be examined respectively.

a. *Lau Kong Yung v. the Director of Immigration*⁷⁶

In this case, the applicant arrived in Hong Kong before January 1999, when the judgment in *Chan Kam Nga* was handed down.⁷⁷ As a legal consequence of the *Chan Kam Nga* decision, the Court removed the 'limitation of time of birth', which required the applicant's parents to have had permanent resident status when the applicant was born. In the judgment in *Ng Ka Ling*, the CFA decided to cut off the one-way permit requirement from Chinese authority and abolish the relevant administrative in Notice 3 and 4 of the Immigration Ordinance of Hong Kong (Cap.115). As a result, the scheme of verifying the status of applicants in the No.3 Ordinance was rendered into an impasse situation.

In this case, the CFA recognized the legal effect of the interpretation of the

⁷⁴ *The Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999.

⁷⁵ *Director of Immigration v. Master Chong Fung-Yuen* [2001] 4 HKCFAR 211. For judgments in the High Court and the Court of Appeal of the HKSAR concerning the same case, please refer [2000] 1 HKC 359 and [2000] 3 HKLRD 661.

⁷⁶ *Lau Kong Yung & others v. The Director of Immigration*, FACV Nos. 10 and 11 of 1999, [1999] 2 HKCFAR 300

⁷⁷ The decisions in *Chan Kam Nga* and *Ng Ka Ling* were handed down together by the CFA on 29 January 1999.

NPCSC within the HKSAR. The judges also elaborated the limitation of the constitutional jurisdiction of the Court. Both Ching PJ and Sir Anthony Mason NPJ took the view that, according to Article 158 of the Basic Law, the power of the HKSAR courts to interpret the Basic Law is limited in scope. Mason NPJ concluded that, in light of ‘the context of the Basic Law and its character as the constitution for the HKSAR embodied in a national law enacted by the PRC’, the NPCSC’s power to interpret law is in general terms but that of the courts of the HKSAR is restricted. The expression ‘in adjudicating cases’ in Article 158 makes clear that the power of interpretation enjoyed by the courts of the HKSAR is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the NPCSC in accordance with Article 67(4) of the Chinese Constitution of 1982 and Article 158(1) of the Basic Law. Furthermore, the authorization of this interpretative power from the NPCSC requires the courts to make judicial references when adjudicating cases where it is necessary to interpret the provisions concerning affairs which are the responsibility of the Central People’s Government or concerning the relationship between the Central Authorities and the HKSAR.

*b. Director of Immigration vs. Master Chong Fung-Yuen*⁷⁸

This case involves Article 24 (2) (1), i.e., whether a Chinese citizen born in Hong Kong shall be entitled to the status of permanent resident. Article 24 (2)(1) provides that Chinese citizens born in Hong Kong before or after the establishment of the HKSAR shall be permanent residents; while paragraph 2(a) of Schedule 1 to the *Immigration Ordinance* (Cap.115) makes further requirements that, for a Chinese

⁷⁸ *Director of Immigration vs. Master Chong Fung-Yuen* [2001] 4 HKCFAR 211. For judgments in the High Court and the Court of Appeal of the HKSAR concerning the same case, see [2000] 1 HKC 359 and [2000] 3 HKLRD 661.

citizen born in Hong Kong to be a permanent resident, one of his parents must have been settled or had the right of abode in Hong Kong at the time of his birth or had the right of abode in Hong Kong at the time of his birth or any later time.

In this case, the respondent was born in Hong Kong on 29 September 1997 when his parents, both Chinese citizens, visited Hong Kong for a short period. The respondent claimed permanent resident status in accordance with the Basic Law and sought a declaration that the relevant provisions in the Immigration Ordinance were inconsistent with the Basic Law. Hence the main issue was whether, on a proper interpretation of Article 24(2) (1), the requirement concerning the status of the respondent's parents is unconstitutional. The Director of Immigration asked the Court to make a judicial reference to the NPCSC under Article 158 of Basic Law with regard to the meaning of Article 24(2) (1).

Before this case went to the CFA, both the High Court and Court of Appeal held in favour of the respondent. Not surprisingly, the CFA held that, in the common law tradition, the court must respect the provision itself when its meaning is clear and unambiguous; therefore the Court is not justified in interpreting the clauses by giving a meaning to legal provisions they do not bear. Hence, on a true construction of Article 24(2) (1), it must follow that a Chinese citizen who was born in Hong Kong should be entitled to permanent resident status without further requirement.

It should be noted that although the CFA admits its power of interpretation is subject to the limit imposed by Article 158(3) in relation to the 'excluded provisions' and subject to being bound by any interpretation by the NPCSC, the

Court re-interpreted the NPCSC's interpretation and in this way it refused to give legal effect to some of the contents in the NPCSC's interpretation. In the NPCSC's interpretation of Article 22 (4) and 24(2) (3),⁷⁹ it is stated that 'the legislative intent as stated by this *Interpretation*, together with the legislative intent of all other categories of Article 24(2) of the Basic Law' were reflected in the 'Opinions on the Implementation of Article 24(2) of the Basic Law of the [HKSAR] of the [PRC]'.⁸⁰ Clearly, in making this statement, the NPCSC intended to take this chance to resolve the chaotic situation on the issue of 'right of abode' cases once and for all. However, in the *Chong Fung-Yuen* case, the CFA argued that the title of the NPCSC's interpretation suggests that it only aimed to interpret Article 22(4) and 24(2) (3), instead of the whole provision of Article 24(2). Hence, the above sentence should only be treated as 'obiter' and shall not constitute a formal part of the 'interpretation'; therefore the Court is not bound to give it legal effect.

4.3.4 Rights-based approach and balance between human rights protection and public order

Judicial practice in the last decade concerning human rights protection has demonstrated the Hong Kong courts' unequivocal position of firmly arguing for a rights-based purposive approach. The Court carefully strikes a balance between public order and individual rights. Gradually the judiciary of the HKSAR has gained a reputation for using the Basic Law as a strong and useful instrument to uphold human rights.

⁷⁹ *The Interpretation by the NPCSC on Article 24(2)(3) and article 24(2) of the Basic Law of the HKSAR*, adopted by the Standing Committee of the Ninth NPC at its Tenth Session on 26 June 1999.

⁸⁰ See, 'Opinions on the Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC', adopted by the Preparatory Committee of the NPC in 1996.

There has been significant constitutional litigation regarding issues of human rights protection during the past decade in Hong Kong. The courts of the HKSAR have been vigilant in giving a broad interpretation to provisions guaranteeing fundamental human rights, and in giving a narrow meaning to permissive restrictions. However, the courts of the HKSAR have positioned themselves as common law courts; hence they do not make a distinction between statutory construction and constitutional interpretation.

The Basic Law provides a constitutional basis for the protection of human rights in the HKSAR. In particular, Article 39 stipulates that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. As mentioned in the previous chapter, the introduction of the Bill of Rights Ordinance (BORO) in 1991 and subsequent revision of the Letters Patent caused severe controversy regarding the status of the BORO in the Hong Kong legal system. Former Chief Justice Sir T. L. Yang once commented that section 3(2) of this Ordinance ‘gives the judicial organ legislative power’; ‘the power to repeal is a legislative and not a judicial function’.⁸¹ Although the NPCSC abolished the two clauses in this ordinance,⁸² the courts of Hong Kong continue to cite the BORO as the instrument incorporating the ICCPR into Hong Kong law.

⁸¹ See Joseph Y. S. and Shiu Hing Lo (eds.), *Jiu Qi Guo Du: Xianggang de Tiaozhan* (九七过渡：香港的挑战) (Hong Kong: Chinese University of Hong Kong, 1997).

⁸² *Decision of the Standing Committee of the National People's Congress on treatment of the laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Standing Committee of the Eighth NPC at its twenty-fourth sitting on 23 February 1997. It is stated in this decision that ‘the provisions relating to the interpretation and application of the ordinance in section 2(3), the effect on pre-existing legislation in section 4 of the Hong Kong Bill of Rights Ordinance (Cap.383)’ contravene the Basic Law and shall not be adopted as the laws of the HKSAR.

According to Chinese scholars, Article 39 of the Basic Law includes two meanings. First, the ICCPC applied to Hong Kong shall include the reservations made for Hong Kong by Britain.⁸³ The ICCPR had extended to Hong Kong by the ratification by Britain in 1976. China agreed to retain it for Hong Kong after the transfer of sovereignty. Second, the way the ICCPR is implemented shall be ‘through the laws of the HKSAR’.⁸⁴ In this respect, Article 39 is no more than a confirmation of the previous practice in Hong Kong before 1990, when the Basic Law was officially promulgated.

Two cases are to be briefly examined here. In *Ng Kung Siu*,⁸⁵ the defendants were convicted of desecrating the national and the regional flags by publicly and wilfully defiling them, contrary to s.7 of the National Flag and National Emblem Ordinance⁸⁶ and s.7 of the Regional Flag and Regional Emblem Ordinance.⁸⁷ In this case, the Court concluded that the aims of protection of the national flag as a unique symbol of the nation and the regional flag as a unique symbol of the HKSAR were unquestionable societal and community interests and thus did not go beyond what was proportionate in restricting freedom of expression.

⁸³ The UK ratified the ICCPR in 1976 and extended it to Hong Kong with reservations on article 25. On 20 June 1997, the PRC government notified the United Nations Secretary-General that, since it is provided both in Section XO of Annex I to the Joint Declaration and Article 153 of the Basic Law that international agreements to which the PRC is not a party but which are implemented in Hong Kong may continue to be implemented in the HKSAR, the provisions of the ICCPR as applied to Hong Kong would remain in force from 1 July 1997.

⁸⁴ See Article 39 of the Basic Law.

⁸⁵ *HKSAR v. Ng Kung Siu & another*, [1999] 2 HKCFAR 442.

⁸⁶ The Law of the National Flag and National Emblem is one of the pieces of PRC legislation applied to the HKSAR that is listed in annex III of the Basic Law. The National Flag and National Emblem Ordinance is Hong Kong legislation passed to apply national laws in the HKSAR.

⁸⁷ See Regional Flag and Regional Emblem Ordinance of the HKSAR (Cap.2602).

More importantly, in examining the balance between freedom of human rights and protection of public order, the CFA issued the following guidance. First, freedom of expression is a fundamental freedom in a democratic society and the Court must give a generous interpretation to its constitutional guarantee. Second, freedom of expression might be subject to certain restrictions. These restrictions should only be provided by law and must be necessary: (a) for respect of the rights or reputation of others; and (b) for the protection of national security or of public order. The Court further interpreted the concept of ‘public order’ to include what was necessary for the protection of the general welfare or for collective interests.

In another case, *Leung Kwok Hung & others v. HKSAR*,⁸⁸ the first defendant was a member of the LegCo, who was convicted of holding an unauthorized assembly contrary to s. 17A (3)(b)(1) of the Public Order Ordinance (Cap.245).⁸⁹ The issue was whether the statutory scheme for regulating public processions was contrary to the right to freedom of assembly in Article 27 of the Basic Law, Article 21 of the ICCPR and Article 17 of the Hong Kong Bill of Rights Ordinance (BORO). The defendant’s main argument was that discretion for the purpose of ‘public order’ did not come under the permissible restrictions of the Basic Law, the ICCPR and the BORO.

⁸⁸ *Leung Kwok Hung & others v. HKSAR*, FACC 1/2005. [2005] 3 HKLRD 164, [2005] 8 HKCFAR 229.

⁸⁹ Before 1 July 1997, the Hong Kong government amended the *Public Order Ordinance* (Cap.245) in 1995 to meet the requirement of the Bill of Rights Ordinance (Cap.383) (BORO) and this amendment caused severe protest from the Chinese government. In exercising its power over the previous law of Hong Kong in accordance with Article 160 of the Basic Law, the NPCSC declared that ‘major amendments to the Public Order Ordinance since 27 July 1995’ are not to be adopted as the laws of the HKSAR upon 1 July 1997. After the establishment of the HKSAR, the government restored the provisions current before the 1995 amendment, which require seven-days’ notice in advance for public processions.

Similar to the *Ng Kung-Siu* case, the CFA held that the freedom of peaceful assembly was a constitutional right and must be given a generous interpretation and restrictions on it must be narrowly interpreted. In examination of the requirements of ‘prescribed by law’ and ‘necessity requirement’, the Court stated that the proportionality test should be formulated in these terms: (1) the restrictions must be rationally connected with one or more of the legitimate purposes; and (2) the means used to impair the right of peaceful assembly must be no more than was necessary to accomplish the legitimate purpose in question.

It should be noted that in this case the Court interpreted the concept of ‘public order’ in making a distinction between the use of the concept of ‘public order (*ordre public*)’ at the constitutional level and the statutory level.⁹⁰ Constitutional norms are usually and advisedly expressed in relatively abstract terms and their boundaries cannot be clearly defined. In this case, the constitutional norm in the ICCPR was directly taken as a basis for the discretion of the Commissioner to restrict rights but it did not give an adequate indication of the scope of the discretion. Therefore, several provisions in the Ordinance were unconstitutional. However, the conviction of the defendant was upheld, since the offences did not relate to the Commissioner’s statutory discretion concerning ‘public order’, but arose from the holding of a public procession without complying with the statutory notification requirement.

In summary, this chapter explains the role that the judiciary of the HKSAR has played in the new constitutional order, and more importantly, the establishment and

⁹⁰ In *Ng Kung-Siu*, the CFA was of the view that, the concept of public order (*ordre public*) is not limited to public order in terms of law and order. The inclusion of the words ‘*ordre public*’ makes it clear that the relevant concept is wider than the common law notion of law and order.

practice of constitutional review in the HKSAR. In the post-1997 era, constitutional review of legislation by Hong Kong courts has been widely exercised and the courts have been performing their constitutional role acting as a check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law. As shown in *Leung Kwok Hung* on the issue of Standing Orders of the LegCo, in *Chan Yu Nam* on the issue of functional constituencies, and *Chen Shu Ying* on the removal of Municipal Councils, the courts of the HKSAR have behaved as an arbitrator of political disputes. Since China's resumption of sovereignty over Hong Kong, the governance of the Chief Executive has been challenged in many ways.⁹¹ This situation raises the serious concern that the judiciary, in exercising its functions, might blur the boundary between itself and other political institutions.

Furthermore, the issue of constitutional review touches on the relationship between the HKSAR and the PRC. As shown in *Ng Ka Ling*, the CFA set criteria for referring to the NPCSC for interpretation. Later in *Master Chong Fung-Yuen*, the courts of the HKSAR seem to be reluctant to make any adaptation even after the NPCSC has given an interpretation on relevant provisions of the Basic Law. It

⁹¹ For discussion of the politics and evaluation of the governance of Hong Kong after 1 July 1997, see, for instance, Lam Wai-man, Percy Luen-tim Lui, Wilson Wong and Ian Holliday (eds.), *Contemporary Hong Kong Politics* (Hong Kong: Hong Kong University Press, 2007); Kuan Hsin-chi, *The 2004 Legislative Council Election in Hong Kong* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong, 2006), Kuan, Hsin-chi (ed.), *Power Transfer and Electoral Politics: The first legislative election in the Hong Kong Special Administrative Region* (Hong Kong: Chinese University Press, 1999); Ian Scott, *Public Administration in Hong Kong: Regime change and its impact on the public sector* (Singapore: Times Academic Press, 2005); Poon, Kit, *The Political Future of Hong Kong: Democracy within Communist China* (London and New York: Routledge, 2008); Lau, Siu-kai (ed.), *The First Tung Chee-hwa Administration: The First Five years of the Hong Kong Special Administrative Region* (Hong Kong: The Chinese University Press, 2002); Lo, Shiu-Hing, *The Dynamics of Beijing-Hong Kong Relations: A model for Taiwan?* (Hong Kong: Hong Kong University Press, 2008); Gordon Mathews and Milton Park, *Hong Kong, China: Learning to Belong to a Nation* (Abingdon UK and New York: Routledge 2007); Ma Ngok, *Political Development in Hong Kong: State, political society, and civil society* (Hong Kong University Press, 2007), etc. These works have analysed a wide range of issues including political participation, election methods, the political culture of Hong Kong, social transformation after 1997, the impact of sovereignty change, and so forth.

seems that the common law courts in the HKSAR are unlikely to accept the role of ‘legislative interpretation’ by the NPCSC being incorporated into the HKSAR system. The NPCSC is commonly perceived as a political rather than a judicial body in the HKSAR. As illustrated in *Master Chong Fung-Yuen*, the court has tried to minimize the function of ‘extrinsic materials’ and emphasized the common law approach in its interpretation. The CFA’s continuous refusal to take into account any legislative intention might be a signal of its reluctance to entangle the Hong Kong system with that of the mainland. It also implies that the Court spreads its judicial power as a method of building a fence against possible influence or intervention from other parts of the PRC. It even implies the intention of the judiciary of the HKSAR to establish its authority over the meaning of the Basic Law.

On the other hand, the judiciary of the HKSAR refusing to adapt to the complexity of the post-1997 constitutional order leads to the issue of whether the constitutional review can be justified and sustained under the Basic Law from the mainland perspective. While Hong Kong scholars criticize interpretation by the NPCSC as lacking systematic justification, constitutional review in the HKSAR, which relies heavily on the doctrine of the separation of powers, the rule of law and the common law tradition, is still subject to the sovereign power from which its own function is derived. Since the Basic Law is apparently not only a law for Hong Kong but also a national law enacted by the National People’s Congress, a common law approach is obviously not enough for application of this law. The perspective of mainland China approach on the interpretation will be illustrated in the next chapter.

5 Chapter V

Interpretations of the Hong Kong Basic Law by the NPCSC

The issue of interpretation of the Hong Kong Basic Law directly raises the question of maintaining the unitary constitutional order on the one hand, and enabling the two legal systems of Hong Kong and mainland China to function simultaneously on the other. Debates on the issue of interpretation of the Basic Law started before 1997, when politicians and scholars in Hong Kong expressed the view that the judiciary of the HKSAR must be given the final power of interpretation of the Basic Law.¹ The Disputes over the issue of interpretation have intensified, especially since 1999, when the NPCSC gave an interpretation of Article 22 and 24 after the decision of the Hong Kong Court of Final Appeal (CFA) in *Ng Ka Ling*.² More interpretations of the Basic Law delivered by the NPCSC subsequently clearly suggest that over the past decade the Chinese government has relied heavily, if not exclusively, on the implementation of the Basic Law to achieve its governance over the HKSAR.

The power of interpretation is a vital power, under both the Hong Kong and mainland Chinese legal systems. It is widely acknowledged that under the common law system, judicial interpretation is a part of the process of adjudication. This also implies that the courts only have the chance to interpret when a specific case is raised

¹ See e.g., William McGurn, *Basic Law, Basic Questions: The Debate Continues* (Hong Kong: Review Publishing, 1988). Also see, *Final Report on Powers of Interpretation and Amendment of the Basic Law* (passed by the Executive Committee on 14 March 1987), the working group on Powers of Interpretation and Amendment of the Basic Law, Special Group on Law and Special Group on the Relationship between the Central Government and the HKSAR, the Consultative Committee for the Basic Law.

² *The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR*, adopted by the Standing Committee of the ninth NPC on 26 June 1999.

before them, i.e., the judiciary is not supposed to elaborate on the relevant legal terms in a general and abstract way when there is no case before them. After the judiciary gives an interpretation of legislation, in theory, the legislature may amend the law or enact new laws if it finds that the judiciary has misinterpreted certain provisions. However, in reality, it is very unlikely that the Hong Kong Legislative Council would seek to solve this predicament by passing new laws overturning the judicial interpretation.

By contrast, under the Chinese legal system, the NPCSC is responsible for interpreting the Chinese Constitution and the national laws. Although the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) can also interpret legislation during the process of application of law, the NPCSC has the ultimate authority on the meaning of laws. Under certain circumstances when the interpretations provided by the SPC and the SPP are at variance with each other in principle, they should submit the issue to the NPCSC for a final decision.³

Therefore, this chapter analyses the nature of the interpretations of the Basic Law delivered by the Standing Committee of the National People's Congress (NPCSC) and the predicament caused by the coexistence of the two governmental and legal systems within one country under the formula of 'one country, two systems'. It starts with an introduction of disputes on the NPCSC's power to interpret the Basic Law, and then moves on to analyse the NPCSC's interpretations of the Basic Law in detail. The examination of the nature of legislative interpretation under the Chinese legal system demonstrates that this power derives from the Chinese Constitution, and is deemed to be part of the legislative function. Towards the end of this chapter, I

³ *Resolution by the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law*, adopted at the nineteenth meeting of the Standing Committee at the fifth NPC on 10 June 1981.

suggest that in order to address this dilemma over the issue of interpretation, more theoretical exploration should be carried out.

5.1 Disputes on the NPCSC's power to interpret the Basic Law

5.1.1 Textual history of Article 158 of the Basic Law

Given the importance of Article 158 of the Basic Law, it is necessary to look at its drafting history. The Basic Law Drafting Committee (BLDC) published two drafts in 1988 and 1989 for solicitation of opinions (hereafter referred to as the 1988 draft and 1989 draft respectively).⁴ In the 1988 draft, the article on interpretation of the Basic Law was as follows:

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

⁴ The BLDC was formed in July 1985. According to the timetable announced at the inaugural meeting of the BLDC, there would be two rounds of consultation before the final draft approved by the NPC. Each round lasted for five months. In April 1988, the first draft of the Basic Law was released for the solicitation of public opinions. The second round of public consultation began in February 1989. It was interrupted by the Tian’anmen Square incident but resumed in July 1989 and the consultation period was subsequently extended to the end of October of the same year. Due to changes in the political environment after 1989, the final draft adopted by the NPC added a few provisions that later caused controversy, of which the most well known are Article 23 and the voting procedure of the Legislative Council in Annex II. The final version of the interpretation clause, Article 158, is basically the same as it was in the second draft. For the drafting history of the Basic Law, see, Basic Law Drafting History Online (BLDHO), a joint project of the Centre of Comparative and Public Law and the HKU Library.

shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law'.⁵

In the 1989 draft of the Basic Law, the article was changed to:

'The power of interpretation of this Law shall be vested in the Standing Committee of the NPC. The Standing Committee of the NPC shall authorize the courts of the Hong Kong SAR to interpret on their own, in adjudicating cases before them, the provisions of this Law that are within the limits of autonomy of the Region. The courts of the Hong Kong SAR may also interpret other provisions of this Law in adjudicating cases before them. However, if the courts of the Region, in adjudicating cases before them, need to interpret the provisions of the Law concerning affairs which are the responsibility of the Central People's Government, or the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the NPC shall consult its Committee for the Basic Law of the Hong Kong SAR before giving an interpretation of this Law.'⁶

⁵ See, Article 169 of the Draft Basic Law of the HKSAR of the PRC (for solicitation for opinions) (with introduction and summary), issued by the Drafting Committee (BLDC); the introduction and summary are compiled by the Secretariat of the Consultative Committee for the Basic Law, April 1988.

⁶ See, Article 157 of the Basic Law of the HKSAR (Draft), 21 February 1989.

When the 1988 draft went to the public, the provision on interpretation received severe criticism. Martin Lee, the leading figure of the democratic camp at that time, said that the Central People's Government retained firm control over the interpretation and this contravened the spirit of the Joint Declaration, which promised Hong Kong a high degree of autonomy.⁷ Lee contended that all the provisions of the Basic Law should be justifiable and interpreted by the Hong Kong courts to guarantee the promise of a high degree of autonomy. It was revealed in the consultation report of the Consultative Committee for the Basic Law (BLCC) that some Hong Kong residents were afraid that the interpretation power of the NPCSC would partially remove the power of final adjudication of the Hong Kong judiciary and undermine the common law system.⁸

In light of the concerns of Hong Kong society over the issue of judicial independence and preservation of the common law tradition, the 1989 draft made the following changes. First, the NPCSC's dominant power over interpretation was loosened by adding an 'authorization' paragraph which stated that the NPCSC authorized the Hong Kong courts to interpret those provisions of the Basic Law that are within the limit of the autonomy of the HKSAR.⁹ Second, a distinction was made between the provisions within the limits of the autonomy of the Region and those

⁷ See, Martin Lee's speech at Legislative Council debate on 14 July 1988 in *Hong Kong Hansard: the official record of debates of Hong Kong Legislative Council*.

⁸ 'The Power of Interpreting the Basic Law and the Judicial System of the Hong Kong Special Administrative Region', *The Consultation Report of the Consultative Committee for the Basic Law*, October 1988.

⁹ This was proposed during the first round of consultation on the draft Basic Law for solicitation of opinions. It was suggested that the NPCSC should officially delegate its power and give the courts of the HKSAR full power to interpret provisions of the Basic Law concerning the Region's internal affairs. This suggestion was accepted in the second draft and also the final version of the Basic Law. Some argues that it remains unclear whether this delegation is 'irretrievable'—that is, once it is delegated, the NPCSC cannot withdraw it. See, 'The Power of Interpretation the Basic Law and the Judicial System of the Hong Kong Special Administrative Region', *The Consultation Report of the Consultative Committee for the Basic Law*, October 1988, p46.

‘concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region’, but it remained unclear who should decide the dividing line of these categories.¹⁰ Third, the CFA became an intermediary between the Hong Kong courts and the NPCSC. The 1988 draft made the limited provision that the courts of the Region ‘shall seek an interpretation of the relevant provisions from the Standing Committee of the National people’s Congress’ if a case ‘involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are responsibility of the Central People’s Government’; while the 1989 draft and the final draft of the Basic Law specifically emphasized that the CFA was the only legitimate institution to make a request to the NPCSC for an interpretation. Finally, the power of the Hong Kong judiciary was strengthened in the 1989 draft and the final version of the Basic Law. The original second paragraph which stated that the courts of Hong Kong should follow the interpretation made by the NPCSC was removed, suggesting that the NPCSC made a considerable concession to reduce the objections from Hong Kong professionals and politicians.

To sum up, the 1989 draft and final version of the Basic Law gave more interpretation power to the HKSAR and strengthened the role of the CFA in the matter of interpretation of the Basic Law, but certain crucial issues remained unsolved. The most crucial question here is who has the competence and legitimacy to make a decision on the demarcation of the provisions of the Basic Law. This directly relates to the distribution of the interpretation power between Hong Kong

¹⁰ As discussed in the previous chapter, the CFA ruled on this matter in the *Ng Ka Ling* case in 1999, in which the CFA classified some of the provisions of the Basic Law as ‘excluded provision’. See, *Ng Ka Ling & others v. the Director of Immigration*, (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315.

courts and the NPCSC. Put in another way, this will set the real substantive boundary between Hong Kong and its sovereign state.

5.1.2 Disputes over the issue of interpretation on the Basic Law by the NPCSC

The debate between the legal professionals of Hong Kong and the mainland on the relationship between the Chinese Constitution and the Basic Law has continued since the beginning of the drafting process of the Basic Law. The contention has centred on the understanding of Article 158 of the Basic Law. The logic for Chinese and Hong Kong scholars can be summarized as follows.

Chinese scholars hold the view that the interpretation power of the NPCSC derives from the Chinese Constitution, which is the supreme law in China as one unitary country. Although the application of the Chinese Constitution in the HKSAR is largely restricted,¹¹ and mainland legislation will not apply to Hong Kong except that listed in Annex III of the Basic Law through certain procedures,¹² the autonomy of Hong Kong still has to function within the framework of ‘one country’. Hence, the Chinese Constitution, as the highest legal order of ‘one country’, should be valid in principle in the HKSAR, including the functions and powers of the NPC and its Standing Committee.¹³ Secondly, Chinese scholars and officials have insisted that in the legal order of the PRC, with the Chinese Constitution at the apex with supreme authority, the Basic Law belongs to the category of ‘national law’ in the sense that it

¹¹ There are different views on how far the Chinese Constitution should be extended to the HKSAR. This issue will also be discussed in chapter VII of this thesis.

¹² Article 18 of the Basic Law provides that ‘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 the way of promulgation or legislation by the Region’.

¹³ See, for example, Xiao Weiyun, ‘Zhonghua Renmin Gongheguo Xianfa yu Xianggang Tebie Xingzhengqu Jibenfa de Guanxi (On the relationship between the Constitution of the People’s Republic of China and the Basic Law of the Hong Kong Special Administrative Region)’ in Xiao Weiyun, *Lun Xianggang Jibenfa* (Essays on the Hong Kong Basic Law) (Beijing: Peking University Press, 2003).

was adopted by the NPC. As a national law, the Basic Law should be interpreted by the NPCSC.

Scholars from Hong Kong and mainland China also have different views regarding the understanding of Article 31 of the Chinese Constitution of 1982.¹⁴ The report of a subgroup of the Consultative Committee for the Basic Law suggests that some people held the view that the contradiction between the Chinese Constitution and the Basic Law implied that the Chinese Constitution had no legal effect in the future SAR; otherwise the Basic Law would be invalid due to its inconsistency with the Chinese Constitution.¹⁵

Chinese scholars argue for the integrity of the Constitution. Xiao points out that the Constitution should be examined from a holistic perspective. Certain contradictions within one single constitution always exist; however, this seeming contradiction within one constitutional document does not harm the integrity of the Constitution itself. It just shows the distinction between the norm and the exception. By 'normality', Xiao refers to the situation where there is no need to invoke any specific considerations. If they are both provided in one single document, and passed

¹⁴ Article 31 of the 1982 Constitution of the PRC provides that 'the state may establish special administrative regions when necessary. The system to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions'.

¹⁵ See, *Consultation Report*, Vol.2, by the Consultative Committee for the Basic Law, October 1988, pp.3-53. This report that it attempts to examine two questions regarding the relationship between the Basic Law and the Chinese Constitution: (1) does the Basic Law contradict the Chinese Constitution? and (2) the applicability of the Chinese Constitution to the HKSAR. The first question is resolved later in the decision of the NPC passed together with the Basic Law in which it is stated that the Basic Law is constitutional as it is enacted in accordance with the Chinese Constitution and in light of the special conditions of Hong Kong. The second question, however, is still under debate.

by the highest political institution of the country, both are valid and should be considered as a whole.¹⁶

Hong Kong scholars take the view that the Chinese Constitution and the Basic Law are incompatible because of the fundamental difference of the social systems and principles enshrined in each of them. If we allow the two systems to mix, the integrity of the Hong Kong legal system would be endangered, as argued by Yash Ghai.¹⁷ Ghai further contends that the Basic Law is itself a restriction of sovereignty. In his view, all the commitments by the Chinese government should be written in the Basic Law, the constitution for Hong Kong, instead of the Chinese Constitution. Provisions in the Basic Law, such as its amendment procedure,¹⁸ its interpretation,¹⁹ and the restriction of application of Chinese national laws in Hong Kong,²⁰ are examples of restrictions on the Central Authority of the PRC. Therefore, he argues, it is a clear implication of ‘one country, two systems’ that there would be a different kind of constitutional order in Hong Kong, which would also govern its relationship with the Central Authorities. The legality of this different constitutional order has been provided in Article 31 of the Chinese Constitution.²¹

¹⁶ Xiao Weiyun, above no.13, p.48.

¹⁷ Nihal Jayawickrama, ‘Hong Kong laws not so basic when tangled web of decisions considered’ *Hong Kong Standard*, 27 August 1997.

¹⁸ Here refers to Article 159 of the Basic Law.

¹⁹ Here refers to Article 158 of the Basic Law.

²⁰ Article 18 of the Basic Law.

²¹ See, Yash Ghai, *Hong Kong’s New Constitutional Order* (Hong Kong: University of Hong Kong Press, 2nd edition, 1999).

5.2 Interpretations of the Hong Kong Basic Law by the NPCSC since 1997: circumstances and consequences

5.2.1 *The interpretation by the NPCSC of Article 22(4) and 24(2)(3) of the Basic Law of the HKSAR*²²

After the Court of Final Appeal rendered judgments on a series of right of abode cases on 29 January 1999, controversy arose regarding the jurisdiction of Hong Kong courts, in particular their jurisdiction over the legislative acts of the NPC/NPCSC on the Basic Law. Although the self-clarification by the CFA on this matter eased the tension between the Central Authority of the PRC and the HKSAR,²³ the implementation of the Basic Law reached an impasse in relation to the matter of permanent residents of Hong Kong after the No.2 and No. 3 Ordinances 1997 were held unconstitutional.²⁴ Under these circumstances, the Chief Executive of the HKSAR requested the State Council to ask the NPCSC to make a legislative interpretation on the relevant provisions of the Basic Law.²⁵ In particular, the Chief Executive asked the NPCSC to clarify, first, whether the No. 2 and No.3 Ordinances

²² The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR, adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999.

²³ Facing the controversy caused by its judgment in *Ng Ka Ling* regarding the Hong Kong courts' jurisdiction over the legislative acts of the NPC/NPCSC, the CFA made a 'clarification' on 26 February 1999, in which it states that it 'accepts that it cannot question the authority of the Standing Committee to interpret the Basic Law and the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein'. The Legislative Affairs Commission of the NPCSC issued a statement stating that the 'clarification' had been 'necessary'. See, Johannes M.M. Chan, H.L. Fu and Yash Ghai (eds.), *Hong Kong's Constitutional Debate* (Hong Kong: Hong Kong University Press, 2000); Qiao Xiaoyang, *Explanatory Note on 'The Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24 (2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (draft)*, at the Tenth Session of the Ninth NPCSC on 22 June 1999.

²⁴ The Immigration (amendment) (No. 2) Ordinance, and Immigration (amendment)(No.3) Ordinance, passed by the Provisional Legislative Council on 1 July and 10 July 1997 respectively.

²⁵ See, the Chief Executive's report to the State Council of the PRC, *Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 20 May 1999.

1997, which were enacted pursuant to the ‘Opinions on the Implementation of Article 24(2) of the Basic Law’ of the Preparatory Committee of the NPC,²⁶ reflected the legislative intent of the Basic Law; second, whether ‘people from other parts of China’ under Article 22(4) should be interpreted as including those people on the mainland who were born of Hong Kong permanent residents.

In its ‘interpretation’, the NPCSC makes it clear that: (1) the provision in Article 22(4), ‘for entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval’, means that people from all provinces, autonomous regions, or municipalities directly under the Central People’s Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, must apply to the relevant authorities of their residential districts for approval and hold valid documents issued by the relevant authorities; (2) the provisions of Article 24(2)(3) mean both parents of such persons, whether born before or after the establishment of the HKSAR, or either of such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24 (2) of the Basic Law at the time of their birth.

This interpretation *de facto* overturned the CFA’s judgment on this matter by pointing out that ‘the interpretation of the Court of Final Appeal is not consistent with the legislative intent’. Regarding the procedural issue, the NPCSC stated that the CFA should have sought an interpretation from the NPCSC in pursuant to Article 158(3) of the Basic Law. In addition to interpreting the relevant two clauses of the

²⁶ See, ‘Opinions on the Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC’, adopted by the Preparatory Committee of the NPC at its fourth plenary meeting in August 1996.

Basic Law, the NPCSC also claimed that the legislative intent as stated by this ‘Interpretation’, together with the legislative intent of all other categories of Article 24(2) of the Basic Law of the HKSAR, has already been reflected in the ‘Opinions on the Implementation of Article 24(2) of the Basic Law’, which was adopted by the Preparatory Committee for the HKSAR of the NPC in 1996.

This interpretation by the NPCSC caused controversy in Hong Kong society. It is argued that since Article 158(2) has authorized the courts of the HKSAR to interpret on their own the provisions within the high degree of autonomy, the NPCSC should refrain from exercising interpretative power over these provisions. Second, even if the NPCSC is fully justified in giving interpretations of any provisions of the Basic Law, when the CFA has exercised its final adjudication, the NPCSC’s re-interpretation of the same provision is unacceptable because this would harm the independence of the judiciary and the power of final adjudication vested in the HKSAR. Furthermore, it is argued that the rule of law guaranteed in the Basic Law might become subject to essentially political considerations.²⁷ On the other hand, from the perspective of mainland scholars and officials and the HKSAR government, the NPCSC’s interpretation is deemed ‘necessary and totally appropriate’ to clarify the legislative intent of relevant articles of the Basic Law.²⁸ The purpose of the exercise of interpretation, as a senior member of the NPCSC has argued, was only to

²⁷ Johannes M.M. Chan, ‘Judicial Independence: A Reply to the Comments of the Mainland Legal Experts on the Constitutional Jurisdiction of the Court of Final Appeal’, in Johannes M. M. Chan, H. L. Fu and Yash Ghai (eds.), *Hong Kong’s Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press 2000), pp.61-71. See also, ‘Much more than an interpretation is at stake’, *South China Morning Post*, 27 June 1999.

²⁸ Qiao Xiaoyang, ‘Explanatory Note on ‘The Interpretation by the Standing Committee of the National People’s Congress of Article 22(4) and 24 (2)(3) of the Basic Law of the HKSAR (Draft)’, addressed to the NPCSC at the Tenth Session of the Ninth NPCSC on 22 June 1999.

ensure the correct enforcement of the Basic Law.²⁹

5.2.2 The Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law³⁰

The ultimate goal of selecting the Chief Executive and forming the Legislative Council by universal suffrage is enacted in Articles 45 and 68 of the Basic Law.³¹ At the same time, the Basic Law also stipulates that the democratic process in the HKSAR shall be specified ‘in the light of actual situation’ and ‘in accordance with the principle of gradual and orderly progress’.³² In terms of the timetable, annexes of the Basic law state that the method for selecting the Chief Executive and for forming of the Legislative Council can be amended after 1997 provided certain conditions and procedures are met.

Since the demonstration on 1 July 2003 protesting over the local legislation pursuant to Article 23 of the Basic Law, the aspiration of the people of Hong Kong for accelerating the pace of democratic change became widely acknowledged, but views have been enormously diverse on how, and when to achieve the ultimate goal that Articles 45 and 68 of the Basic Law have put forward. As the methods of

²⁹ *China Daily*, 23 June 1999

³⁰ The Interpretation by the Standing Committee of the National People’s Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the HKSAR, adopted by the Standing Committee of the Tenth National People’s Congress at its Eighth Session on 6 April 2004. See also, Li Fei, *Guanyu ‘Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu “Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa” Fujian Yi Di Qitiao he Fujian Er Di Santiao de Jieshi (Cao’an)’ de Shuoming* (关于《全国人民代表大会常务委员会关于〈中华人民共和国香港特别行政区基本法〉附件一第七条和附件二第三条的解释（草案）》的说明 Elaboration on the Interpretation (draft) by the NPCSC on Article 7 of Annex I and Article 3 of Annex II of the Basic Law), on the eighth meeting of the Standing Committee of the Tenth NPC, 2 April 2004. For relevant discussions among academics in Hong Kong, see, Johannes Chan and Lison Harris (eds.), *Hong Kong’s Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005).

³¹ See, Articles 45 and 68 of the Basic Law.

³² See, Article 45 of the Basic Law.

selecting the Chief Executive and the Legislative Council are established in Annex I and Annex II of the Basic Law, the meaning of the relevant provisions is vital to the future road of constitutional reform in Hong Kong.

Article 7 of Annex I ‘Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region’ states that ‘if there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the NPCSC for approval’. A similar procedure for amendment to forming the Legislative Council is stipulated in Annex II.³³ Herein the crucial questions are raised as to who should decide whether ‘there is a need’ to change the election methods, and the role of the NPCSC in Hong Kong’s democratic process.

In its interpretation,³⁴ the NPCSC first made some literal clarification of ‘subsequent to the year 2007’ and ‘if there is a need’. In the *‘interpretation’*, the NPCSC interprets that phrases ‘subsequent to the year 2007’ and ‘after 2007’ stipulated in the above-mentioned two Annexes include the year 2007; the term ‘if there is a need’ to amend the method of selecting the Chief Executive or the method for forming the LegCo means the method ‘may be amended or remain un-amended’.³⁵ More importantly, according to this interpretation, the NPCSC has the power to make a determination on whether the conditions of amendment are met.

³³ See ‘Method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007’, in Annex II of the Basic Law.

³⁴ See, Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law of the HKSAR.

³⁵ Ibid.

First, the Chief Executive shall make a report to the NPCSC as regards whether there is a need to make an amendment to the Annex of the Basic Law; second, the NPCSC shall make a decision in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress; third, the power of introducing bills on the amendments to the method for selecting the CE and the method for forming the LegCo is vested with the HKSAR government alone. Individual members of the LegCo are not eligible to propose such an amendment bill.³⁶

This interpretation is significant in many ways. First, the Central Authority took the initiative to make an interpretation of the Basic Law³⁷ and in this way confirmed its final say on HKSAR's democratic process. In explanation of this 'interpretation', Li Fei, deputy director of the Legislative Affairs Commission of the NPCSC, said that the power of deciding 'if there is a need to amend' rests with the Central Authorities.³⁸ In his view, this is deduced not only from the provisions in the Annexes of the Basic Law themselves, which require that such amendments must be reported to the NPCSC for 'approval' or 'filing for the record' before taking effect;

³⁶ Ibid. According to Annex II of the Basic Law, government bills and individual motion should go through different voting procedures. This procedure suggests that private bills are more restricted because the passage of government bills shall require a simple majority vote of the members of the Legislative Council present; while motions, bills or amendments to government bills introduced by individual members of the LegCo shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee.

³⁷ In this case, the Council of Chairmen of the NPCSC (Weiyuanzhang Huiyi 委员长会议) proposed the motion of making an interpretation on the relevant provision of the Basic Law. Article 24 of the Legislation Law of 2000 provides that the Council of Chairmen 'may submit legislative bills to a meeting of the Standing Committee for deliberation'. Other institutions, such as the State Council, may submit a legislative bill to the Standing Committee, and the Council of Chairmen shall decide whether to put it on the agenda of a meeting of the NPCSC. It is less clear, however, whether the Council of Chairmen can make a proposal for interpretation of the Basic Law. The Council of Chairmen of the NPCSC deals with procedural matters of legislation, and shall be in charge of the meeting when the NPCSC is in session. It consists of the Chairman, Vice-Chairmen and General Secretary of the NPCSC.

³⁸ Li Fei, 'Explanation on the Draft Interpretation of Clause 7 of Annex I and Clause 3 of Annex II to the Basic Law of the Hong Kong Special Administrative Region', *China Daily*, 7 April 2004.

but also from the status of the HKSAR under the principle of ‘one country, two systems’. The methods for selecting the Chief Executive and forming the LegCo have been essential issues in Hong Kong’s constitutional development; therefore, the local authorities have no power to decide on or change their constitutional system on their own. In addition, constitutional progress in Hong Kong has a bearing on relations between the Central Authorities and the SAR; therefore it does not fall into the high autonomy of the SAR.

Second, in terms of the interpretation method, the annexes of the Basic Law only stipulate a possibility of amendment subsequent to 2007, but remain silent on ‘who should decide whether there is a need’ to change the method for selecting the Chief Executive and forming the LegCo, especially the pace of increasing the member of LegCo members returned from geographical constituencies. Apparently, this interpretation of the NPCSC is not a literal interpretation of the annexes. It offers a sharp contrast to the interpretative approach adopted by the courts of Hong Kong.

Third, this interpretation also strengthens the executive-led government principles of the HKSAR. The interpretation particularly emphasizes that only the HKSAR government is eligible to introduce any bills that relate to amendments concerning the methods of selecting the Chief Executive and members of the LegCo. The justification for this interpretation is based on Article 74 which provides that the members of the LegCo may introduce bills not related to public expenditure and

political structure or the operation of government.³⁹ Since the revision of methods of selecting the Chief Executive and the LegCo is a matter of ‘political structure’, relevant bills must be introduced by the HKSAR government. Individual members of the LegCo are prohibited from introducing such an amendment.

In a nutshell, this interpretation of Annex I and II of the Basic Law restores the Central Authority’s final decisive power over the democratic process of the HKSAR. Since then, the NPCSC has grasped firmly the power to make a final determination on the pace of democratic development in Hong Kong. Moreover, it seems that certain constitutional convention has been gradually established, which is widely referred to as a ‘five-step procedure’ towards any amendment to the methods of election for the Chief Executive and the LegCo.⁴⁰ The NPCSC has made decisions afterwards based on the HKSAR’s report.⁴¹ In its decision made in 2007, the NPCSC stated that from 2017, the election of the Chief Executive may be implemented by

³⁹ Article 74 of the Basic Law provides that ‘Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced’.

⁴⁰ See, Qiao Xiaoyang, ‘Explanation on the “Decision of the Standing Committee of the National People’s Congress on issues relating to the Methods for selecting the Chief Executive of the Hong Kong Special Administrative Region and for forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2012 and issues relating to Universal Suffrage” (draft)’, at the thirty-first meeting of the tenth session of the NPCSC, 26 December 2007. This document is available at <http://www.npc.gov.cn>. The five steps are: (i) the HKSAR government is responsible for reporting to the NPCSC on whether there is a need to change two election methods; (ii) the NPCSC will consequently make a decision upon the HKSAR government’s request; (iii) if the HKSAR is allowed to amend the method, the third step should follow by the HKSAR government proposing a bill to the LegCo and achieving a two-thirds vote from the LegCo; (iv) the CE signs on the relevant bills; (v) CE should report to the NPCSC for approval or filing a record.

⁴¹ After its interpretation on Annexes I and II of the Basic Law in April 2004, the NPCSC made two decisions relating to the amendment to the methods of election for the CE and LegCo in 2004 and 2007 respectively. See, ‘Decision of the NPCSC on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR in the year 2007 and for Forming the Legislative Council of the HKSAR in the year 2008’, adopted by the NPCSC on 26 April 2004; ‘Decision of the NPCSC on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the year 2012 and on Issues Relating to Universal Suffrage’, adopted by the NPCSC on 29 December 2007.

universal suffrage and may be followed by the election of all members of the LegCo by universal suffrage.⁴²

5.2.3 Interpretation of the term of office of the Chief Executive by the NPCSC⁴³

This interpretation concerns the understanding of the provision on the tenure of a new Chief Executive to be returned in a by-election. The Basic Law only stipulates that in the event of the office of the Chief Executive becoming vacant, a new Chief Executive should be elected in six months; it remains silent on whether the newly elected Chief Executive should serve out the remaining term of his predecessor or start a new full-term of five years.

Following the State Council approval of the request of Tung Chee Hwa to resign from the office of Chief Executive in 2005 (Order No. 433 of the State Council), this became an imperative issue to resolve. This time the NPCSC's interpretation was given at the request of the acting Chief Executive,⁴⁴ who considered an interpretation of the NPCSC as the best way to gain an authoritative understanding of the relevant provision and thus ensure the smooth process of an election for a new Chief Executive.⁴⁵ In its interpretation, the NPCSC again built its reasoning on the

⁴² Decision of the NPCSC on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the year 2012 and on Issues Relating to Universal Suffrage, adopted by the NPCSC on 29 December 2007.

⁴³ Interpretation of paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the PRC, adopted at the Fifteenth Session of the Standing Committee of the Tenth NPC on 27 April 2005.

⁴⁴ See the report of then acting Chief Executive, Donald Tsang, to the State Council (i.e. the Central People's Government) concerning the submission of a request to the NPCSC regarding the interpretation of Article 53(2) of the Basic Law, 6 April 2005.

⁴⁵ During this period, Chan Wai Yip, a member of the LegCo, had prepared to request for a judicial review against the legislation of the HKSAR government regarding the term of the Chief Executive. He withdrew his application subsequently after the NPCSC gave this interpretation of Article 53.

legislative intent of the Election Committee⁴⁶ and held that the tenure should be the remaining period of an entire term. The NPCSC's view was that, prior to the year 2007, when the Election Committee elects the Chief Executive to a five-year term of office, in the event that the office becomes vacant, the term of office of the new Chief Executive shall be the remainder of the previous Chief Executive's term. Should the method of selecting the Chief Executive be amended after 2007, the term of office in the event of a vacancy shall be determined in the amended method for selecting the Chief Executive.

From the three interpretations of the NPCSC on the clauses of the Basic Law, we see that this type of legislative interpretation is totally alien to the common law system currently practised in Hong Kong. To some extent, the interpretations of the Basic Law issued by the NPCSC have modified the tradition of both legal systems involved, as well as the relationship between the HKSAR and the PRC. The controversy over this matter is both a challenge and an opportunity for the two political and legal systems to co-exist under one sovereign state.

The legal profession in Hong Kong finds it hard to accept that the NPCSC, itself being a legislature, also takes on the function of interpreting laws. This seems irreconcilable with the principles of the common law tradition because, when interpretation and lawmaking are the functions of the same institution, there would be no check and no remedy for an exercise of such a power. In addition, the

⁴⁶ Annex I of the Basic Law stipulates that except the first term, the CE of the HKSAR should be elected by the Election Committee, consisting of 800 members returned from four sectors. This Committee also serves for electing ten LegCo members for the first term (1998-2000) and six members for the second term (2000-04) of the LegCo.

interpretation of the NPCSC, as seen by the Hong Kong lawyers, is always unpredictable because the NPCSC is a political body, not a judicial body in term of its composition and procedure. Although during the process, the NPCSC did take steps to elicit opinions from Hong Kong and to give explanations, no transparent legal procedure can be guaranteed. Moreover, it seems that no clear distinction is made between interpretations in the narrow sense, as it exists in the common law, and law making.⁴⁷ Interpretation by the NPCSC raises concerns about the independence of the judiciary and the rule of law.⁴⁸

However, the function of legislative interpretation in mainland China is to maintain the integrity of the legal system. This explains why, in the Legislation Law⁴⁹ and the Supervision Law,⁵⁰ the function of interpretation is always to be dealt with alongside other function of supervision enjoyed by the NPCSC. Under the current legal system in China, legislative interpretation, together with investigation into the implementation of laws, functions as a measure to ensure that laws are applied correctly and are not derailed. Since as some lawyers have already suggested, the Basic Law itself purports to act as an interface between Hong Kong's common

⁴⁷ See, Eric Cavaliero's interview with Yash Ghai: 'Bending the law is as easy as a free interpretation', *Hong Kong Standard*, 8 September 1997.

⁴⁸ For comments by Hong Kong lawyers and politicians around the time the NPCSC's first interpretation was issued on 26 June 1999, see, for instance, Yash Ghai, 'NPC interpretation would prove disastrous for rule of law', *Hong Kong Standard*, 12 May 1999; Margaret Ng, 'Rule of law key to trust', *South China Morning Post*, 2 July 1999.

⁴⁹ *Zhonghua Renmin Gongheguo Lifafa* (Legislation Law of the PRC; 中华人民共和国立法法), adopted by the third plenary meeting of the ninth NPC on 15 March 2000.

⁵⁰ *Zhonghua Renmin Gongheguo Geji Renmin Daibiaodahui Changweiweiyuanhui Jiandufa* (Law of the PRC on Supervision by the Standing Committees of the People's Congresses at All Levels; 中华人民共和国各级人民代表大会常务委员会监督法), adopted at the twenty-third meeting of the Standing Committee of the tenth NPC on 27 August 2006.

law system and China's legal system,⁵¹ to address the interpretation issue, it is extremely important that we not only examine this issue from the perspective of the Hong Kong legal system and tradition, but also explore the nature and function of legislative interpretation in the Chinese legal system.

5.3 Nature and function of legislative interpretation in the Chinese legal system

In order to examine the function of interpretation by the NPCSC, it is necessary to go through some of the provisions in the constitutional documents of the PRC. In the Chinese legal system, the function of interpreting the Constitution and the law is vested in the NPCSC.⁵² In accordance with the Constitution, the NPC together with its Standing Committee exercises the legislative power of the state. The NPCSC also has the power to interpret the Constitution and supervise its implementation. It enacts and amends laws, with the exception of laws relating to fields reserved for the NPC as a whole, partially supplements and amends law enacted by the NPC when that body is not in session, and interpret laws.⁵³

Compared with the doctrine of separation of powers, this combination of legislative power and interpretative power in the single state organ of the NPCSC has its legal basis in the People's Congress System—the fundamental political system in

⁵¹ For example, Alan Hoo, 'Basic Law supports rule of law', *South China Morning Post*, 26 June 1999; Denis Chang, 'Pu Tong Fa Jichu shoudao Dongyao' (The foundation of the common law was shaken), *Ming Pao*, 28 June 1999; Chris Yeung, 'Judicial powers bound', *South China Morning Post*, 28 June 1999.

⁵² Article 67 (1) of the 1982 Constitution provides that the NPCSC is vested with the power to interpret the Constitution and laws.

⁵³ According to the Legislation Law of the PRC, the power of legal interpretation shall be exercised by the Standing Committee of the National People's Congress (NPC). When the NPCSC exercises its function of interpretation, 'law' has the same meaning as defined by Article 8 of the Legislation Law.

the PRC.⁵⁴ As the permanent organ of the NPC, the NPCSC not only assumes the function of national legislation, it is also responsible for supervising the implementation of the Constitution, and interpretation of the Constitution and other national laws. Legislative interpretation in China has its roots in Marxist theory on the conception of the role of law and certainly was influenced by the Soviet Union's Constitution of 1936, in which the power to interpret 'the laws of the USSR currently in force' was given to the Presidium of the Supreme Soviet.⁵⁵

Historically speaking, legislative interpretation emerged in the West after the French Revolution but was abolished soon afterwards. The obligation to refer to the legislature was a product of the distrust of judges, who had abused their powers to support the interests of the nobility. This was abolished later because of the inconsistency of legislative interpretation with the nature of interpretation. The power to interpret laws is the elucidation of what the codified law, in itself, means in certain circumstances. Without the function of day-to-day adjudication, the function of legislative interpretation could only be a general extension of legislation; it is also time-consuming.

5.3.1 Legislative interpretation and legislation

It seems that legislative interpretation by the NPCSC is of the same nature as its legislation. The legislative process of the NPCSC has been formalized in the Legislation Law,⁵⁶ the Organization Law of the NPC 1982,⁵⁷ and the Rules and

⁵⁴ For analysis by Chinese scholars on this matter, see, e.g., Xiao Weiyun, *Lun Xianfa* (论宪法; Essays on the Constitution) (Beijing: Peking University Press, 2004); Xu Chongde, He Huahui and Wei Dingren (eds.), *Zhongguo Xianfa* (中国宪法 On Chinese Constitution) (Beijing: Renmin University Press, 1996)

⁵⁵ Article 30, Chapter III, 1936 Constitution of the USSR.

⁵⁶ Legislation Law of the People's Republic of China, adopted at the Third Session of the Ninth NPC on March 15, 2000.

Procedures of the NPCSC.⁵⁸ The distinction between ‘basic laws’ and ‘ordinary laws’ is further formalized in the Legislation Law 2000,⁵⁹ which provides that the competence of certain legislation is within the exclusive power of the NPC. According to the various laws mentioned above, the formal procedure for enactment of national legislation involves the following stages.⁶⁰

The first stage is to propose a legislative bill to the NPCSC, and the Council of Chairmen⁶¹ will decide whether to put it on the agenda of a NPCSC meeting or refer it first to a relevant special committee for deliberation. During the deliberative process a bill will be read three times before it is submitted for voting.⁶² It is also required that the draft of a bill should be distributed to the members of the NPCSC seven days before the meeting;⁶³ and it must be deliberated upon by the relevant special committee, which shall offer its opinions after deliberation, which are then

⁵⁷ Organization Law of the National People’s Congress of the People’s Republic of China, adopted at the Fifth Session of the Fifth NPC and promulgated for implementation by the proclamation of the NPC on 10 December 1982.

⁵⁸ *Quanguo Renmin Daibiaodahui Changwu Weiyuanhui Yishiguize* (全国人民代表大会常务委员会议事规则 Rules and Procedures of the NPCSC), adopted at the twenty-third meeting of the Standing Committee of the Sixth NPC, 24 November 1987.

⁵⁹ Article 7 of the Legislation Law provides that ‘The National People’s Congress enacts and amends basic laws governing criminal offences, civil affairs, the State organs and other matters’. While Article 8 of the Legislation Law further defines certain affairs that should only be governed by law. Here ‘law’ refers to its narrow definition, meaning only the national legislative power vested in the NPC and its Standing Committee. These affairs include affairs concerning state sovereignty, the formation, organization, and the functions and powers of the people’s congresses, the people’s government, the people’s courts and the people’s procuratorates at all levels, criminal offences and their punishment, mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person, requisition of non-State-owned property, basic civil system; the basic economic system and basic system of finance, taxation, customs, banking and foreign trade, the system of litigation and arbitration, and other affairs on which laws must be made by the NPC or NPCSC.

⁶⁰ See, section 2, ‘Legislation Procedures for the National People’s Congress’; section 3, ‘Legislation procedures for the Standing Committee of the National People’s Congress’ and section 4, ‘Legal interpretations’ of the Legislation Law.

⁶¹ The Council of Chairmen of the NPCSC (全国人大常委会委员长会议) deals with procedural matters of legislation, and shall be in charge of the meeting when the NPCSC is in session. It consists of the Chairman, Vice-Chairmen and General Secretary of the NPCSC.

⁶² Article 27 of the Legislation Law.

⁶³ Article 26 of the Legislation Law.

distributed to the NPCSC; the Law Committee of the NPC shall conduct a deliberation on the basis of the opinions expressed by members of the NPCSC and the relevant special committee; in the case of soliciting opinions from the public by a decision of the Council of Chairmen, the working offices of the NPCSC should work to collect and sort out these opinions, and when necessary, distribute them to the members of the NPCSC.⁶⁴

In comparison, the procedure of legal interpretation by the NPCSC has been simplified,⁶⁵ although it is clear that the legal interpretations given by the NPCSC have the same effect as the laws enacted by it.⁶⁶ NPCSC interpretation does not require three readings; the procedure of collection and distribution of opinions within the NPCSC have been omitted with respect of legal interpretation. The draft interpretation is usually prepared by the working offices of the NPCSC. The special committee of the NPC then reflects on the draft and advises on legal issues. Afterwards the procedure will move on to the next meeting of the NPCSC.

It is stipulated in the 1981 resolution⁶⁷ that an interpretation of the NPCSC shall be made where the limits of provisions need to be further defined or additional stipulations need to be made. In the Legislation Law, the circumstances under which an interpretation shall be made by the NPCSC are, first, the specific meaning of a

⁶⁴ Article 30, 31, 34, and 35 of the Legislation Law.

⁶⁵ Articles 42-47 of the Legislation Law.

⁶⁶ Article 47 of the Legislation Law.

⁶⁷ See, *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falu Jieshi Gongzuo de Jueyi* (全国人民代表大会常务委员会关于加强法律解释工作的决议 Resolution concerning the Strengthening of Interpretation Work of the NPCSC), adopted at the nineteenth meeting of the Standing Committee of the Fifth plenary NPC on 10 June 1981.

provision needs to be further defined, and, second, after its enactment, new developments make it necessary to define the basis on which to apply the law.

I take as an example the interpretation of the Criminal Law 1997 to explain how the interpretation of the NPCSC works in general.⁶⁸ The first example concerns the interpretation of Article 93 of the Criminal Law on whether members of a village committee or of other rural organizations at the grass-root level engaging in certain work may be regarded as ‘other persons who perform public service according to law’.⁶⁹ The interpretation confirms the circumstances in which village committee members come into the category of ‘*persons who perform public service*’ and as a result, are subject to certain provisions of the Criminal Law. In this case, the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) jointly made a request to the NPCSC because of the different understandings of certain provisions of the Criminal Law by these two institutions. During the process of this interpretation, the working offices of the NPCSC wrote the draft itself and delivered a report to the NPCSC explaining the background and legal basis for this interpretation. At a later stage the Law Committee of the NPC reported to the NPCSC on its own examination of the same matter. The final stage of this legislative interpretation was a meeting of the NPCSC at which the NPCSC officially adopted this interpretation.

⁶⁸ The information on the examples of legal interpretation here is abstracted from official reports and gazettes.

⁶⁹ See, *Interpretation by the NPCSC Regarding the Second Paragraph of Article 93 of the Criminal Law of the PRC*, adopted at the fifteenth meeting of the Standing Committee of the Ninth NPC on 29 April 2000.

The second example is the interpretation of the phrase ‘organization in the nature of a criminal syndicate’.⁷⁰ The Supreme People’s Court (SPC) had provided a judicial interpretation on the same matter before. However, the Supreme People’s Procuratorate (SPP) disagreed with the judicial interpretation of the SPC and referred it to the NPCSC requesting an interpretation for the sake of clarification. The main dispute between the SPC and SPP was whether ‘taking advantage of protection and connivance by state functionaries’ shall form a crucial component in defining the nature of a criminal organization, or is just one type out of many. This final interpretation given by the NPCSC mediated between the SPC and SPP, listing the features of an ‘organization in the nature of criminal syndicate’.⁷¹

From the examples given above, we can conclude that certain procedures have been strictly followed and gradually standardized. Among these procedures, the deliberation of the Law Committee of the NPC and the preparation work of the working committee of the NPCSC are in fact the most important stages. Regarding the legal interpretation of the NPCSC, it is fair to say that all the necessary formalities have been carefully complied with. From textual analysis, the interpretation process is formal, legal. In addition, the purpose of legislative interpretation is to ensure the coherence of the legal system and guarantee the

⁷⁰ *Interpretation by the Standing Committee of the National People’s Congress Regarding the First Paragraph of Article 294 of the Criminal Law of the People’s Republic of China* (adopted at the twenty-seventh meeting of the Standing Committee of the Ninth NPC on 28 April 2002). The original version of the first paragraph of Article 294 of the Criminal Law is as follows: ‘Whoever forms, leads or takes an active part in an organization in the nature of a criminal syndicate to commit organized illegal or criminal acts through violence, threat or other means, such as lording it over the people in an area, perpetrating outrages, riding roughshod over or cruelly injuring or killing people, thus seriously disrupting economic order and people’s daily activities, shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights’.

⁷¹ *Ibid.*

implementation of state policies. This power is given to the NPCSC, which is accountable to the NPC, and thereby socialist legality is strengthened and stabilized. In this people's congress system, it is believed that the will of the Chinese people should be united and expressed through different levels of people's congresses, from the NPC to provincial and local people's congresses.⁷²

From the discussion above, the conclusion can be safely drawn that the NPCSC's interpretation is merely the reasonable extension of its legislative power.⁷³ The NPCSC's interpretation power is either an extension of its legislative power, or it is derived from its legislative power. It needs to be made clear that this interpretation power exercised by the NPCSC is not in any sense a 'delegated power'. This legislative interpretation further blurs the distinction of legislative and executive functions and might trigger arbitrariness of the legislature. Commentators on the NPCSC exercising its interpretation power have noted that only a small amount of the NPCSC's actions are labelled 'interpretations'. One scholar categorizes the NPCSC's interpretation power as part of its general power to make decisions.⁷⁴

5.3.2 Unresolved issues in the Legislation Law regarding interpretation

The adoption of the Legislation Law is widely seen as a demonstration of China's efforts to ensure an integrated, consistent and more responsible law-making system.

⁷² In accordance with the people's congress system, under the central government, local governments at various levels are established, including governments at the provincial level (including autonomous regions and the municipalities directly under the Central Government), the county level (including, autonomous counties, cities, municipalities), and township level. See, *Zhonghua Renmin Gongheguo Difang Renmin Daibiao Dahui he Difang Remin Zhengfu Zuzhifa* (中华人民共和国地方人民代表大会和地方人民政府组织法 Organization Law of the Local People's Congresses and Local People's Government of the PRC), adopted at the Second Session of the Fifth NPC on 1 July 1979, amended in 1982, 1986, 1995 and 2004 respectively.

⁷³ Kong Xiaohong, 'Legal Interpretation in China' (1990-91) 6 *Connecticut journal of international law* 491-506.

⁷⁴ Jiang Jinsong, *The National People's Congress of China* (Beijing: Foreign Language Press, 2002), 211-18.

It sets out a hierarchy of legal norms and a mechanism of filing records of all laws, regulations and local decrees, administrative rules and local rules. More importantly, the legislative interpretation function is one of the most essential efforts that the Legislation Law has made to strengthen the authority of the NPCSC. In addition to making formal interpretation of laws, the Legal Affairs Commission of the NPCSC frequently takes on the role of replying to various requests from central government departments and local congresses with regard to understanding and implementing relevant provisions of law.⁷⁵

However, there are two major unsolved issues in the Legislation Law. One is the nature of interpretation by the Supreme People's Court (SPC). The Legislation Law fails to make any clear provision on the legal status of judicial interpretation. It is reported that the provisions concerning interpretation by the SPC were drafted but eventually deleted,⁷⁶ so the status of judicial interpretation still does not have any clear recognition. According to the 1981 resolution, the SPC and the SPP shall interpret questions of law arising out of specific applications of law in their adjudicative or procuratorial work respectively.⁷⁷ In reality, the SPC and SPP, jointly with the Legal Affairs Commission of the NPCSC, together with relevant ministries of the Central Government of the PRC, occasionally issue opinions with regard to

⁷⁵ See e.g. *Quanguo Renda Changweihui Fazhi Gongzuo Weiyuanhui Guanyu Ruhe Lijie he Zhixing Falv Ruogan Wenti de Jieda* (全国人大常委会法制工作委员会关于如何理解和执行法律若干问题的解答 Reply to enquiries by the legal affairs committee of the Standing Committee of the National People's Congress on how to understand and implement laws).

⁷⁶ See above no.95 in Chapter II.

⁷⁷ *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falu Jieshi Gongzuo de Jueyi* (全国人民代表大会常务委员会关于加强法律解释工作的决议 Resolution Concerning the Strengthening of Interpretation Work of the Standing Committee of National People's Congress), adopted by the NPCSC on 10 June 1981.

problems raised during the implementation.⁷⁸ Although both the SPC and SPP have the legitimate power to issue interpretations in relation to the application of laws, their interpretation is inferior to that of the NPCSC in terms of legal effect.⁷⁹

The second issue left untouched is constitutional interpretation. The NPCSC has never exercised its legislative interpretation power over the Constitution, although this is one of the NPCSC's functions under the Chinese Constitution of 1982. Recent years have seen some theoretical discussion over constitutional review, such as the consistency of legislation with the Constitution, and the application of the constitution during adjudication to safeguard civil liberties and human dignity.⁸⁰ On the other hand, the Supreme People's Court has been involved in dealing with issues on interpretation of the Constitution in adjudicating cases. In a reply to the *Qi Yuling* case, the Supreme People's Court went further, finding citizen's rights as protected in the Constitution as the legal basis for the applicant's claim.⁸¹

This may yield a curious situation. On the one hand, the NPCSC rarely performs interpretation of laws due to the lack of expertise and procedure; on the other hand,

⁷⁸ For example, a provision on some questions about implementation of criminal procedure law was issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Justice and the Committee of Legal Affairs of the NPCSC in 1998.

⁷⁹ See e.g. *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* (中华人民共和国最高人民法院公报 Gazettes of the Supreme People's Court of the PRC) and *Zuigao Renmin Jianchangyuan Gongbao* (中华人民共和国最高人民检察院公报 Gazettes of the Supreme People's Procuratorate of the PRC).

⁸⁰ See, e.g., Wang Zhenmin, *Zhongguo Weixian Shencha Zhidu* (中国违宪审查制度 The Mechanism of Constitution Review in China) (Beijing: University of Politics and Law Press, 2004).

⁸¹ See, 'Zuigao Renmin Fayuan Guanyu yi Qinfan Xingmingquan de Shouduan Qinfa Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Mingshi Zeren de Pifu' (最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育权的基本权利是否应承担民事责任的批复 Reply by the Supreme People's Court on whether the defendant should take responsibility when basic education right protected by the Constitution was infringed through the way of violating citizen's name right) (2001) *Fa Shi* (法释 Legal Interpretation) 25.

although the SPC has issued various interpretations in applying laws, the status of judicial interpretation has not been confirmed. A regulation on the work of judicial interpretation, which defines the forms and procedure of interpretation by the SPC, did not come into force until April 2007.⁸² Although judicial independence has been advocated in China for many years, the process of judicial reform is slow despite deficiencies in the judicial system acknowledged by top officials as well as academics and practitioners. In addition to the problems in the judicial system itself, other factors also influence the process of legal reform. As Jerome A. Cohen indicates, the intervention of the Chinese Communist Party itself in judicial decision-making would not appear to violate the constitution and it often occurs through the Party institution known as the political-legal committee.⁸³

The appropriateness of the NPCSC's legislative interpretation power has been challenged by scholars. It is argued that interpretation of law should be an inherent function of the judiciary and interpretation by the legislature itself could trigger unpredictability and jeopardize the stability of the legal system.⁸⁴ Some scholars argue that legal interpretation should be vested in the institution that applies the law but hold that it might be pragmatic to maintain legislative interpretation to coordinate

⁸² See, *Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding* (最高人民法院关于司法解释工作的规定 Provisions for judicial interpretation by the Supreme People's Court), issued by the Supreme People's Court of the PRC in 2007. Text can be found at *Fazhi Ribao*, 23 March 2007; or, *Zuigao Renmin Fayuan Gongbao* (中华人民共和国最高人民法院公报 Gazettes of the Supreme People's Court of the PRC).

⁸³ Jerome A. Cohen, 'Reforming China's Civil Procedure: Judging the Courts' (1997) 45 *American Journal of Comparative Law* 793-804.

⁸⁴ Yuan Jiliang, 'Lun Lifa Jieshi Zhidu zhi Fei (On the Discredits of Legislative Interpretation)' (1994) 4 *Zhongguo Faxue* (中国法学 China Legal Science) 24-29.

political institutions and enhance a coherent legal system.⁸⁵

The interpretation mechanism has long been a target of criticism. Not only does the NPCSC need to justify its power, but the division of legislative, administrative and judicial interpretations in the '1981 resolution'⁸⁶ has also caused confusion. It is always difficult to define what kind of issues should fall within whose competence. Keller argues that the Chinese approach to the interpretation of law was essentially proprietary in nature.⁸⁷ Legislative as well as administrative bodies are consequently relatively free to interpret and re-interpret their laws and regulations according to the needs of the moment. The values of pragmatism and flexibility are judged to be more important than those of certainty and predictability.⁸⁸ In my view, this assertion might have rightly pointed out the defects in the interpretation system of China. In reality, the NPCSC rarely exercises its interpretation function except in relation to a few national laws,⁸⁹ partly because of the shortage of legal experts, and unavailability of procedure, whereas its power of constitutional interpretation has never been expressly exercised at all in mainland China.

⁸⁵ Chen Sixi, 'Lun Lifa Jieshi Zhidu de Shi Fei Yu Qita' (On the Credits and Discredits of Legislative Interpretation) (1998) 3 *Zhongguo Faxue* (中国法学 China Legal Science) 63-70.

⁸⁶ See above no.77.

⁸⁷ Generally speaking, this refers to the fact that a variety of state institutions can interpret the regulations they make. For instance, the State Council is responsible for the interpretation of State Council Regulations. People's Congresses at provincial level are responsible for local legislation. The distribution of power is significantly different from those countries where the courts are the only and final place to resolve disputes and give interpretations on legislation.

⁸⁸ Perry Keller, 'The National People's Congress and the Making of National Law' in Jan Michiel Otto (ed.) *Law-Making in the People's Republic of China* (The Hague; Boston: Kluwer Law International, 2000), p. 84.

⁸⁹ For example, after the adoption of the Criminal Law by the NPC, the NPCSC issued several interpretations of it. For instance, the NPCSC interpreted Article 93 of the Criminal Law on 29 April 2000; the NPCSC interpreted Articles 228, 342, and 410 on 31 August 2001; the NPCSC interpreted Articles 384 and 294 on 28 April 2002; the NPCSC issued an interpretation on the meaning of 'credit card' on 29 December 2004.

In summary, the power of interpretation of the NPCSC derives from the Chinese Constitution, and this interpretation has the same legal effect as the laws. Its legal basis lies in the fundamental political system of the people's congresses. Under the political system of China, the interpretation of the NPCSC is deemed to be part of the legislation function. Although the administrative branch and the judiciary can also exercise the power of interpretation, their interpretations are inferior in legal status, and subject to the supervision of the NPCSC.

5.4 Between two seemingly incompatible concepts of interpretation: an invitation for further theoretical investigation

As discussed in the previous section, the approach practised in the PRC, which combines legislation and interpretation in one institution, is not easily accepted in Hong Kong, where the common law system is practised. However, the ultimate authority for interpreting the Basic Law is vested in the NPCSC. The compatibility of legislative interpretation of the NPCSC and the judicial interpretation under the common law system in Hong Kong has attracted enormous attention.

Concern has been expressed in Hong Kong that the high degree of autonomy might be vulnerable if the NPCSC interprets the Basic Law without restriction. The Basic Law has gone through five years of drafting, involving wide participation, and the principles enshrined in this law are not amendable.⁹⁰ Interpretations of the Basic Law by the NPCSC only requires consultation with the Basic Law Committee of the NPC;⁹¹ the NPCSC itself, in the eyes of Hong Kong legal community, is a political

⁹⁰ Article 159 of the Basic Law provides that 'no amendments to this Law shall contravene the established policies of the People's Republic of China regarding Hong Kong'.

⁹¹ Article 158 of the Basic Law.

institution not a legal institution, with no qualified legal practitioners and legal procedures. In addition, given the history of the Provisional Legislative Council, it is not hard to imagine that exceptional methods could be taken by the Central Authority under specific circumstances outside the current framework.⁹² The continuous emphasis on Hong Kong's source of power in a unitary country suggests that the Central Authority can do anything it thinks justified.

Generally speaking, the issue of constitutional review involves theoretical debates over the legitimacy of the courts acting to strike down laws that have been enacted by democratically elected legislatures. The tension between a democratic congress and the judiciary is encapsulated in a commonly used term 'the counter-majoritarian difficulty'. The other difficulty lies in the legal basis for the binding effect of the written constitution on today's community, particularly the intentions of the framers of the Constitution. It is argued that judicial review has become an institutional mechanism to protect the rights enshrined in the Constitution against erosion by ordinary politics.⁹³

Having considered the specific situation of mainland China and Hong Kong, we propose these questions concerning the dilemma and compatibility of the two legal systems. For instance, how can the interpretation system in mainland China be reconciled with Hong Kong's model of judicial review, under the Chinese Constitution and the Basic Law? If the Basic Law is designed to achieve an

⁹² The PLC was established after the negotiation between the Chinese and British governments on the 1995 election for members of LegCo broke down.

⁹³ Michael J. Perry, *the Constitution in the Courts: Law or Politics?* (New York: Oxford University Press, 1994).

integrated constitutional order in the PRC for Hong Kong, what is the role for the Hong Kong judiciary and the NPCSC in defending the Basic Law respectively? Moreover, how much room is left for judicial review in Hong Kong under the principle of ‘one country, two systems’? After all, the legitimacy of constitutional review of legislation is ultimately a question of politics rather than a question of law. The exploration of this question must involve an investigation of the nature, and status of a constitution and the concept of constitutionalism within mainland China and Hong Kong.

Just as the complicated and prolonged drafting process of the Basic Law from 1985 to 1990 revealed much about the Chinese leadership’s understanding on such fundamental principles as constitutionality, jurisprudence, administrative control, elections and autonomy, and so on,⁹⁴ a review of the interpretation of the Basic Law in the post-1997 era by the NPCSC might also be highly indicative of the understanding of the Chinese authority on the crucial issues regarding the implementation and realisation of ‘one country, two systems’. We need to examine under what circumstances the NPCSC will decide to interpret the Basic Law. Simply put, what is the Chinese authority’s main concern in exercising its power of interpretation?

⁹⁴ Ming K. Chan, ‘Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90’, in M. K. Chan and D.J. Clark (eds.), *The Hong Kong Basic Law: Blueprint for Stability and Prosperity under Chinese Sovereignty?* (Armonk, NY: M.E. Sharpe, 1991), p.6.

The issue of sovereignty has frequently been addressed and emphasized in China's policy towards Hong Kong during the transitional period.⁹⁵ It is widely acknowledged that China's major objectives during the negotiations with the British government over Hong Kong were two-fold: territorial unity and maintenance of Hong Kong's stability and prosperity. Chinese leaders made it clear that 'the major premise is sovereignty because no nation can sacrifice sovereignty for prosperity'.⁹⁶ Deng Xiaoping once said, 'on the question of sovereignty, China has no room for manoeuvre. To be frank, the question is not open to discussion. The time is ripe for making it unequivocally clear that China will recover Hong Kong in 1997.'⁹⁷ Chinese scholars and politicians hold that sovereignty represents national unity and the rejection of any foreign intervention in internal affairs. As a consequence, the autonomy of an SAR can never be complete because China emphasizes that, in a unitary country, unlike a federal state, the autonomy of one region is conferred by the central sovereign authority and it continues at the sufferance of the Central Authority.

The emphasis on sovereignty and the unitary nature of the state has a direct link with the debate over Article 158 of the Basic Law. During the drafting process, as mentioned above, the Hong Kong legal community asked for judicial independence and final interpretation over the Basic Law. While the British government had suggested a constitutional court to resolve problems arising from the PRC-Hong

⁹⁵ For discussion on the history of Hong Kong's status, see, for instance, Kevin Lane, *Sovereignty and the status quo: The Historical Roots of China's Hong Kong Policy* (Boulder, CO: Westview Press, 1990); Roda Mushkat, *One Country, Two International Legal Personalities : The Case of Hong Kong, Hokum Press Law Series* (Hong Kong: Hong Kong University Press, 1997).

⁹⁶ Cited in James Tang, 'Sovereignty comes first, says Director', *Hong Kong Standard*, 20 April 1983. Also see, Deng Xiaoping, Communist Party of China, and Bureau for the Translation and Compilation of the Works of Marx Engels Lenin and Stalin (trans.), *Deng Xiaoping on the Question of Hong Kong* (Beijing: Foreign Languages Press, 1993).

⁹⁷ Deng Xiaoping, 'Our Basic Position on the Question of Hong Kong', in Deng Xiaoping, *Deng Xiaoping on the Question of Hong Kong*, Bureau for the Translation and Compilation of the Works of Marx Engels Lenin and Stalin trans. (Beijing: Foreign Language Press, 1993).

Kong relationship, the Chinese government insisted that the primary power of interpretation of the Basic Law should be vested in the NPCSC. Although in the final version a paragraph was added containing a delegation provision⁹⁸ and a sophisticated reference system from the CFA to the NPCSC was devised, the interpretation power has always been a vital power retained in the hands of the Central Authority of the PRC.

This also relates to China's governance over the special administrative regions. Unlike any other provinces, autonomous regions and other local governments, on matters other than foreign affairs and defence, the Central Authority of China can mainly exert its influence through the Chief Executive of HKSAR, and the power retained in the Basic Law. Interpretation of the Basic Law is one of the most significant powers that Central Authority retains.

Under this constitutional arrangement, the final word for the Basic Law is not a simple question of legal implementation. The crucial issue arises when a certain field has not been explicitly identified in a normative structure like the Basic Law. As mentioned above, the question is who has the final say over which provision falls within the boundary of 'high degree of autonomy', and which provision belongs to those 'concerning the responsibilities of the Central People's Government and the relationship between Hong Kong SAR and mainland China'. It cannot be denied that the Chinese government has a legitimate interest in seeing that the meaning of the Basic Law is not distorted by perverse interpretation by the Hong Kong Courts. On the other hand, the independence of the judiciary in Hong Kong, and the doctrine of

⁹⁸ Paragraph 2 of Article 158 of the Basic Law.

the rule of law also need assurance, for the benefit of the legal profession, the business sector and the society as a whole.

Therefore, the issue of interpretation of the Basic Law needs to be addressed at a more fundamental level. In particular, it is necessary to explore the theory of state sovereignty and to address this issue in a constitutional discourse. It is not until we undertake this task that we can accurately interpret the implications of ‘one country, two systems’ on the constitutional relationship between the PRC and the HKSAR. After all, the interpretation of the Basic Law, as I have shown in Chapter IV and this chapter, has become an issue that defines the functions of political institutions between the HKSAR and the Central Authorities of the PRC, a matter of delineation of political power within a state, a constitutional question at a state level. We expect this investigation on these fundamental concepts will shed light on our understanding of the current issues of interpretation of the Basic Law, and more importantly, help to reveal the constitutional order of the HKSAR under ‘one country, two systems’.

6 Chapter VI

The Concept of Sovereignty in China and the Issue of Hong Kong

This chapter examines the concept of sovereignty, and its meaning in the Chinese context. In particular, it considers how the concept of sovereignty helps us to understand the contemporary challenge of ‘one country, two systems’ in the light of general theories of sovereignty and China’s traditional thoughts on sovereignty.

The emergence and development of the modern concept of sovereignty in the West, associated with the formation of the modern nation-state, can be traced back to the sixteenth century. In tandem with the development of the concept of the modern state, the existence of a sovereign authority in a separate community is universally recognized as the essential qualification for its membership of the international community. It also represents a symbol of territorial integrity, which underpins now widely accepted doctrines in international relations. Alongside the formation of the modern state, sovereignty has been gradually transformed into an abstract representation of absolute, indivisible power.

By contrast, the concept of sovereignty in China is linked to China’s path towards modernization and the rise of the nationalist movement in the early twentieth century. China’s deep concern over territorial integrity and its continuous emphasis on the absolute and sole authority of the state reflects its history of struggle since the late Qing Dynasty. At the same time, owing to thousands of years of absolute monarchy, the official ideology of Confucianism, and the lack of a distinction between state and society, the Chinese understanding of sovereignty is different from its Western counterpart.

This chapter takes the view that the modern concept of sovereignty is built on the distinction between sovereignty and the form of government it takes. In Bodin's theory, sovereignty is indivisible, but government may take different forms.¹ The implication of this distinction between sovereignty and form of government suggests a possibility for resolving the historical problem of Hong Kong, Macau and Taiwan. Unlike other parts of the PRC, the system of a SAR is provided in a Basic Law adopted by the National People's Congress (NPC). In Chinese theory, the NPC is the institution through which people exercise their sovereign power. The question then arises as to explanation of this sovereignty and the Basic Law, which eventually leads to the most fundamental question: the status of the Basic Law in the constitutional order of the PRC.

6.1 The emergence of sovereignty in modern Western political thought

In Western political thought, the theory of sovereignty may be reduced to the following propositions. First, sovereignty is, in its nature, indivisible; secondly, sovereignty is claimed to be a domain of final and absolute authority of the political community; thirdly, sovereignty is the source of law. The concept of sovereignty is both political and legal; the only way to grasp its meaning is to combine an examination of political philosophy and the history of the formation of the nation-state.

It has been noted that the term sovereignty originally and for a long time expressed the idea that there is a final and absolute authority in the political community and was reformulated when conditions emphasized the independence of

¹ Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, Julian H. Franklin (ed.) (Cambridge University Press, 1992).

political society and more precisely, its government.² It is claimed that sovereignty is a concept by which people have sought to buttress older forms of legitimization of authority.³

Although the locus of sovereignty is always debatable in different countries, it is said that nation-states, from the twelfth century until today, are not only national but also sovereign.⁴ This meant that they did not consider themselves bound by supranational laws or subject to supranational institutions, so that they freely determined their own international politics, including war and peace. States had an internal dimension as well as their subjects were subjected completely and solely to the national law-giver, the national government and national judicature, without recourse to any outside authority. In the modern era of globalization, the state still survives despite the fragmentation process and remains today as a primary and principal agency of politically organized community to manage the economy and promote the wellbeing of its citizens.

In the following, I will seek to explain sovereignty by referring to three exemplary scholars.

6.1.1 Jean Bodin

First, Bodin's distinction between form of state and form of government established the foundation of the modern concept of sovereignty and public law. The distinction made between sovereignty and government ushers in the modern concept of

² Francis H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 2nd edition, 1986).

³ Ibid, pp. 22-25.

⁴ R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995), p.14.

sovereignty as an abstract conception representing absolute, indivisible power of a commonwealth and ultimate source of law.

In Bodin's theory, 'sovereignty is the absolute and perpetual power of a commonwealth. Sovereignty is perpetual in that it is not limited either in power, or in function, or in length of time'.⁵ The content of this sovereignty includes declaring war or making peace, as well as establishing the principal officers of state. The sovereign is not bound by the laws it created, but only by the laws of God and nature. In Bodin's words, 'the absolute power of princes and of other sovereign lordship...does not in any way extend to the laws of God and of nature'.⁶ Bodin has pointed out that 'legitimate or royal' state does not mean that the sovereign should be under the limit of law. The legitimate monarchy, or in terms of aristocracy or popular state, the institution which is vested with sovereignty, obeys the law of God, and natural liberty and natural rights to property are secured to all. The subjects under a monarchy should obey the law of the prince, while the prince in his turn obeys the law of God.

Bodin makes a distinction between the form of the state and the form of the government in that 'it is important that a clear distinction be made between the form of the state, and the form of the government, when is merely the machinery of policing the state, though none has yet considered it in that light'.⁷ In other words, there are no different species of commonwealth, but different modes of operation in their governance. Bodin observes three types of state: monarchy, aristocracy and

⁵ Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, Julian H. Franklin (ed. and trans.) (Cambridge: Cambridge University Press, 1992), p.3.

⁶ Ibid, pp.8, 13.

⁷ Jean Bodin, *Six Books of the Commonwealth*, M. J. Tooley (ed.) (Blackwell, 1955), p.56.

democracy.⁸ In terms of monarchy, sovereignty is vested in one person, and the rest have only to obey; while in a democracy, or a popular state, all the people, or a majority among them, exercise sovereign power collectively; in terms of aristocracy, a minority collectively enjoy sovereign power and impose law on the rest, generally and severally.⁹ Sovereignty could be exercised in a despotic, or royal/legitimate, or tyrannical way. Bodin takes the monarchical state as an example to explain ‘exactly the same diversity is to be found in aristocracies, and popular states, for each in its turn can be legitimate, despotic, or tyrannical’.¹⁰

Bodin further elaborates his idea of the distinction between the state and the government by introducing the idea of ‘change or alteration of government’. The form of the government of a commonwealth may change while the laws and customs remain what they were, except as they affect the exercise of sovereign power. On the other hand, if the constitution of a sovereign body remains unaltered, change in laws, customs, religion, or even change of situation, is not properly a change of the commonwealth, but merely the alteration of an already existing one.¹¹

6.1.2 Thomas Hobbes

Hobbes is widely considered to be the first theorist to create an integral theory of state based on individualism and human nature. Hobbes not only rationalizes the state but also builds a state-centred sovereignty. Since Hobbes, as Skinner pointed out, the confrontation between individuals and states furnishes the central topic of

⁸ Ibid, p.51.

⁹ Bodin further elaborates the ‘popular state’ as ‘that form of commonwealth in which the majority of the people have collectively sovereign authority over the rest considered collectively and over each several members considered individually’. See Jean Bodin, *Six Books of the Commonwealth*, M. J. Tooley trans. (Blackwell, 1955), p.72.

¹⁰ Ibid, p.57.

¹¹ Jean Bodin, Book IV in *Six Books of the Commonwealth*, p.109.

political theory.¹² Hobbes' declaration can thus be viewed as marking the end of one distinct phrase in the history of political theory as well as the beginning of another and more familiar one, since 'it announces the end of an era in which the concept of public power had been treated as far more personal and charismatic terms. It points to a simpler and altogether more abstract version, one that has remained with us ever since and has come to be embodied in the use of such terms'.¹³

In *Leviathan*, Hobbes bases his whole theory on an imagined condition of mankind in the state of nature where every man is enemy to each other in the struggle for gain, safety and reputation. Since men are equal in the state of nature, 'where there is no common power, there is no law; where no law, no injustice'.¹⁴ The only way to escape this state of nature is a commonwealth (*civitas*), to which men give up their right to govern themselves. By locating sovereignty with the 'state', rather than the monarch, or the people as a whole, Hobbes ushered in the modern era of the state as a centre of political theory. Citizens ought not to pay allegiance to those who exercise rights of sovereignty, argued Hobbes, but rather to the sovereignty inherent in the state or commonwealth itself. As he emphasized in *De Cive*, 'absolute universal obedience' owed by each and every subject is due not to the person of their ruler, but rather 'to the city, that is to say, to the sovereign power'.¹⁵

¹² Quentin Skinner, 'The State' in Terence Ball, James Farr, and Russell L. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), 90-131.

¹³ Ibid. p.90.

¹⁴ Thomas Hobbes, *Leviathan* [1651], Richard Tuck ed. (Cambridge: Cambridge University Press, 1996), ch.13.

¹⁵ Thomas Hobbes, *De Cive: the English version*, H. Warrender ed. (Oxford: Clarendon Press, 1983), p.186.

Hobbes used the term ‘state’ to denote this highest form of authority in matters of civil government. He inherited what Bodin had developed on the form of the commonwealth, stating that legitimate government might be monarchically, aristocratically, or democratically organized. The notion of the state itself does not entail and does not depend on any specific answers to question about the best form of government, the proper scope and direction of government activity, the true nature and range of civil liberties, and so on. But the government—however formulated—is always underwritten by, and must always serve the interests and goals of the state.¹⁶

6.1.3 *Jean-Jacques Rousseau*

Rousseau’s idea of the popular will has transformed the concept of sovereignty. Similar to Hobbes, Rousseau also starts his theory in *The Social Contract* from men in a state of nature, and positively asserts that it is only through living in a civil society that men can experience their fullest freedom, since ‘a strong man is never strong enough to be master all the time, unless he transfers force into right and obedience into duty’.¹⁷ The only way in which they can preserve themselves, Rousseau believes, is through unifying their separate powers into a combination that is strong enough to overcome any resistance, so that their powers are directed by a single motive and they act in concert.

One of the major contributions of Rousseau is the concept of popular sovereignty. Rousseau believes that sovereignty is nothing other than the exercise of general will.¹⁸ Sovereignty can never be alienated; and the sovereign, which is simply a

¹⁶ Peter J. Steinberger, *The Idea of the State* (Cambridge University Press, 2004), Preface, xiii.

¹⁷ J-J Rousseau, *The Social Contract* (Penguin Books, 1968), Book I, Chapter 3, p.53.

¹⁸ Ibid.

collective being, cannot be represented by anyone but himself because power can be delegated but the will cannot.

It is not clear in Rousseau's theory whether there is any limitation on sovereignty. Although he points out that each man alienates by the social pact only that part of his power, his goods and his liberty which is the concern of the community, it must also be admitted that the sovereign alone is judge of what is of such concern. Here exists the paradox: general will is the collective will of the citizens, thus it should embody each individual's will and is binding on any of them, since they willingly subordinate themselves to the general will.

Rousseau is consistent with Bodin in that sovereignty is perpetual, despite the form of government changing. Rousseau develops the concept of sovereignty in that sovereignty vests in the people and is generated from the general will of the citizens. After Hobbes, Rousseau expands the modern conception of the relationship between sovereignty, government and the people.

6.1.4 Development of the concept of sovereignty

From Bodin to later theorists, the concept of sovereignty has been transformed. Laws of God and nature are considered to be the only sources of limitation of sovereignty in Bodin's theory. The Prince exercises sovereignty by the grant of natural law, therefore it is unthinkable that he should act contrary to the natural law. Bodin distinguishes sovereignty and power in that power can be divided while sovereignty cannot. Sovereignty is invisible; it must be displayed in certain forms of politics. The attributes of sovereignty have been described as absolute, omnipotent, arbitrary and despotic, and they are alike in all countries, but the state may assume a

variety of forms. The question of form must affect the question of substance, but the real reference is, in fact, to the prevailing type of government. That is, in part, a question of those who share the power, in part, also, a question of the basis upon which responsibility is to rest.¹⁹

The state, as a distinctive political institution, particularly refers to organized political power, which societies have adopted at some stage of their evolution. The function of every political system is the maintenance of a social order within a territorial framework by the exercise of authority, and then every form of government, every political system, is essentially a state at some stage in its evolution. The distinctiveness of the state arises because the state imposes itself on its society, or attempts to do so, as the instrument of a power that is alien to the society itself.

The modern state is where sovereignty resides. Sovereignty expresses three features of the modern state: internal coherence, external independence, supremacy of the law.²⁰ The form of government may vary in different countries, but as a political concept, the state develops as the supreme power that a modern country can legitimately exercise. Sovereignty is an abstract concept, which men in certain circumstances have applied—a quality they have attributed or a claim they have counter posed—to the political power, which they or other men were exercising.²¹ The state represents a modern organized political institution, which is developed

¹⁹ Harold J. Laski, *Authority in the Modern State* (Yale University Press, 1919), p.26.

²⁰ Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), p.75.

²¹ Francis H. Hinsley, *Sovereignty* (2nd Edition, Cambridge: Cambridge University Press, 1986).

when modern nations adopt a certain particular means to organize political power when societies have advanced to a certain stage in their evolution.

Since Hobbes, the obedience of subjects to the sovereign is not owed to the person who exercises the sovereignty, but to a more abstract form, the state. As an institution and as a concept pertaining to the relations between individuals and the authorities, the state has been standing in the centre of political science ever since. The organs of the state—primarily the instruments of the government, military as well as civil—are complex tools with which the state attempts to implement its judgements. These tools are integral parts of the state and yet, at the same time, secondary and derivative. At the core of the state, one finds not tools but a conceptual apparatus; and this is what makes it, in essence, a structure of intelligibility.²² As Skinner points out, the acceptance of the state as both a supreme and an impersonal form of authority brought with it ‘a displacement of the more charismatic elements of political leadership which had earlier been a central importance to the theory and practice of government throughout Western Europe’.²³

From Bodin, Hobbes to Rousseau, it can be seen that the modern concept of sovereignty expresses the quality of political relationship between the state and the people. As argued by Martin Loughin, ‘sovereignty is quintessentially an expression of a political relationship’, and therefore, ‘sovereignty does not reside in any

²² Peter J. Steinberger, *The Idea of the State* (Cambridge University Press, 2004), p.21.

²³ Quentin Skinner, ‘The State’ in Terence Ball, James Farr, and Russell L. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), pp.124-125.

particular locus'.²⁴ It is to be understood as a representation of the autonomy of the political, and as providing the foundational concept of the discipline of public law.²⁵

6.2 Chinese understanding of sovereignty

6.2.1 *Main features of Chinese thinking on sovereignty*

The main features of Chinese thinking on sovereignty can be summarised as follows. First, the concept of sovereignty has been primarily used in contemporary Chinese thought in the sense of emphasizing state independence, the rebuttal of interference from other countries, and the determination to maintain a unitary country. The concept of sovereignty has been linked to the defence of territorial unity and is a highly sensitive issue given China's bitter semi-colonial modern history.²⁶

The concept of sovereignty was introduced from the West in the nineteenth century when China was transformed into a modern state. During the process of Chinese modernization, Sun Yat-sen and others attempted to use two principles of nationalism--that is, statehood based on ethnicity and popular sovereignty based on democracy--to build the identity of China. However, the 1911 Revolution did not help China build a strong democratic state. New democratic political arrangements 'failed to bring unity and order, not to mention legitimacy'.²⁷

²⁴ Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), p.70, 83.

²⁵ Martin Loughlin, 'Ten Tenets of Sovereignty' in Neil Walker (ed.) *Sovereignty in Transition* (Hart Publishing: Oxford and Portland, Oregon, 2003), p.56.

²⁶ Chinese historians call the period from the first Opium War (1840) until the founding of the PRC (1949) a 'semi-colonial, semi-feudal' society.

²⁷ Zheng Yongnian, *Discovering Chinese Nationalism in China: Modernization, Identity, and International Relations* (Cambridge University Press, 1999).

Nevertheless, the current Chinese Constitution devises a method of realization of people's sovereignty in the people's congress system, whereby all the Chinese people act as masters of the state and exercise their power through various levels of congresses. China also claims that democracy has been promoted continuously in its legislative process in that a number of experts are invited to give their opinions at symposia organized on the draft of almost every bill. For bills aiming at adjusting important social relations, the standing committees of local people's congresses often hold hearings to enable parties with different interests voice their opinions.²⁸

Secondly, given the Chinese history of modernization, a unitary form of state is considered to be consistent with Chinese tradition and the long-cherished aspirations of all Chinese peoples.²⁹ Mainstream theorists argue that throughout their history Chinese people have never practised any kind of federalism.³⁰ It is argued that the official version of Chinese history presents us with the continuous line of a centralized bureaucratic system, and, since the Qin Dynasty (220-210BC), China has sustained a unitary form to a large extent.

In general, sovereignty largely relates to the formation of a political community and the formation of a modern nation-state. In the case of China, sovereignty is linked to the Chinese people's shared sentiments on the history of foreign invasion

²⁸ See, the Information Office of the State Council of the PRC, *'Building of Political Democracy in China'*, October 2005.

²⁹ The preface of the 1982 Constitution of the PRC.

³⁰ Zhu Suli, "Federalism" in Contemporary China—a reflection on the allocation of power between Central and Local Government', (2003) 7 *Singapore Journal of International & Comparative Law* 1-14; Su Li, 'Dangdai Zhongguo de Zhongyang yu Difang Fenquan—chong du Mao Zedong "lun shi da guanxi"' (The Division of Power between the Central and Local Governments in Contemporary China: Reinterpretation of Chapter Five of "On the Ten Prominent Relations") (2004) 2 *Zhongguo Shehui Kexue* 42-55.

over one hundred years.³¹ It was exactly during this period of time that the Chinese nation took shape. China before the Republican period (1911-1949) was depicted as ‘a civilization trying to squeeze itself into the format of a modern state’.³² As observed by Anderson, one foundation of the idea of nation-state is the idea of ‘imagined communities’ which may be called a civic conception of the nation-state, derived from a union of ‘common sympathies’ or a history of common suffering.³³ Chinese history during the nineteenth century and the pre-1949 chaos provides a forceful explanation for the importance of state unity today, which has been emphasized as the core interest of the PRC and is written into the preface of the Chinese Constitution of 1982.

Third, although sovereignty and the unitary state form suggest that authority derives ultimately from a single, centralized source on high, it is argued that the realization of governance has ‘rarely if ever been able to adhere to some single, uniform, or preselected script for rule’.³⁴ Therefore, the *idea* of state authority is

³¹ It is argued that contemporary China’s education of patriotism is linked to support of the Chinese Communist Party. See, e.g., Zhao Suisheng, ‘China’s Pragmatic Nationalism: is it manageable?’ (2005-06) *The Washington Quarterly* 131-144. In this article, Zhao distinguishes liberal nationalism from pragmatic nationalism, arguing that the latter was used as an instrument by the Chinese Communist Party (CPC) to bolster the population’s faith in the political system and hold the country together during the period of post-communist society. ‘Pragmatic nationalism’, the author claims, considers the nation as a territorial-political unit, gives a communist state the responsibility to speak in the name of the nation and demands that citizens subordinate their individual interests to China’s national ones. By contrast, liberal nationalism defines the nation as a group of citizens who have a duty to support and defend the rights of their state in the world of nation-states, but also to pursue individual freedoms.

³² Lucian W. Pye, *The Spirit of Chinese Politics* (Cambridge, Massachusetts and London: Harvard University Press, new edition, 1992), preface, ix.

³³ See, Benedict Anderson, *Imagined Communities* (London, New York: Verso, 2006). In this book, the author defines ‘nation’ as an imagined political community, and imagined as both inherently limited and sovereign. In the view of Anderson, the ‘nation’ is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each life the image of their communion. The nation is imagined as limited because even the largest nation has boundaries, beyond which lie other nations.

³⁴ Vivienne Shue, ‘Rule as Repertory and the Compound Essence of Authority’ (2008) 34 *Modern China* 141.

always singular, transcendent, and universal; the *realization* of rule, however, is always plural, rooted, and particular.

Traditionally in China, the state entailed the existence of a hierarchical high administration, which governed by laws, regulations, and a whole body of precedents. Governance involved the application of the same rules to the enormous and fluctuating geographical expanse over which the power at the centre exercised its authority. In terms of the central-local relationship, the main theme has always been pragmatism in central-local relations. It is argued that China's governance is authoritarian in the sense that all local leaders are decided or removed by the CPC, with the only exception being election at the village level.

This might help us explain the pragmatic thinking of Chinese leaders in terms of centre-periphery relationships. Provided the primary and core interests of sovereignty are secured, it is possible to exercise lifting control based on the actual situation. Even in mainland China, the principle of 'democratic centralism' has had to adapt itself to the new era. The current Chinese Constitution clearly states that China is a unified country with ethnic nations and equality between nationalities. China's policy in ethnic minority areas has been crystallized in the law.³⁵ Since the early 1980s, certain legislative powers have been delegated to congresses at provincial level;³⁶ with the reform of the taxation system in China, the local authorities have been given

³⁵ *Law of the PRC on Regional National Autonomy* (adopted at the second session of the sixth NPC, promulgated by Order No.13 of the President of the PRC on 31May 1984, and effective as of 1 October 1984)

³⁶ According to the Chinese Constitution and various organization laws, the people's congress at provincial level is authorized to make local decrees, which must be consistent with the Constitution, national legislation adopted by the NPCSC, and administrative regulations by the State Council.

more incentives.³⁷ Local congresses are charged with the power of legislation over local affairs; the alteration of national laws and adaptation is allowed, particularly in ethnic minority autonomous regions.³⁸ In general, 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 in no way prohibited by the Constitution.

The central-local relationship in the PRC is often examined in comparison with the late Qing period. Wang Hui argues that governance during the Qing Dynasty (1644-1911) ‘was an exercise in accommodating a host of “pluralistic identities and pluralistic political/juridical systems within the empire system” in that the emperor himself embodied a synthesis of several identities’.³⁹ Similarly, Crossley explained the Qing’s multi-cultural ruler-ship and suggested that the Qing emperor did not seek to be simply a ‘Chinese’ emperor.⁴⁰ The Qing adopted Han imperial rituals,

³⁷ In 1994, the Chinese government introduced a set of fiscal reforms to tackle the deficit of central government and regulate a more reasonable share between the central and local governments. It has been decided that some revenues should be assigned entirely to the central or local governments and sharing of revenues from taxes such as the value-added tax (VAT) have been introduced. At the same time, the system of transfers from the centre to local governments was redesigned to include an equalization component based on the expenditure needs of each province and its revenue capacities. However, in order to convince the richer provinces to accept the new design, a ‘revenue-returned mechanism’ was introduced, to transfer back 30 percent of the increase in VAT and excise tax revenue to the originating province. See, Zhonggong Zhongyang Guanyu Jianli Shehuizhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding (中共中央关于建立社会主义市场经济体制若干问题的决定, Decision by the Central Committee of the Chinese Communist Party on several issues in relation to the establishing the mechanism of socialist market economy), passed by the fourteenth central committee of the CPC on its third meeting on 14 Nov 1993, published in *People’s Daily*, 17 November 1993.

³⁸ *Organization Law for Local People’s Congress and Local People’s Government at all levels*, as amended in October 2004.

³⁹ Wang Hui, ‘The Liberation of Objects and Interrogation of Modernity: Rethinking the Rise of Modern Chinese Thought’ (2008) 34 *Modern China* 114.

⁴⁰ In her book, *Translucent Mirror*, Crossley reveals the unique character of Qing rule over China which she calls the ‘multi-culture ruler-ship’. In her view, the Qing emperors did not seek to be simply Chinese emperors. They adopted Han ritual rules, such as praying at the Temple of Heaven by the emperor himself once a year and they recognized *Ke Jü* (recruiting officials through examination) in the regions where the Han nationality dominated. At the same time, the Qing emperors adopted different practices towards Tibet or Mongolia. They showed their respect for the religion and

and their examination system; at the same time, in relation to territories in which other nations dominated, such as Tibet, Mongolia and Xinjiang,⁴¹ they adopted a unique ideology of ruler-ship in which Tibetans, Mongolians or Uyghurs, and others could accommodate the Qing emperor within their own culture and on the top of their own religion. This strategy of combination of different identities created an image of unified emperorship, although the reason behind this unified ubiquitous emperor was pragmatic political manoeuvre.

Apart from the conceptual line of traditional and modern thinking of sovereignty in China, the history of state-formation that China has undertaken has also contributed to the above-mentioned features of the Chinese understanding of sovereignty. The history of Western Europe's transformation from the feudal era to the modern nation-state has demonstrated that the concepts of sovereignty and nation-state formation are clearly related and mutually influenced. As van Caenegem observes, there are three main lines to follow: political struggle, the writing of the jurists, and the treatises of political theorists.⁴² The formation of the Western nation-state was accompanied by political changes in the society. The main

governance of Tibetan and Mongolian leaders, but also invented identities for the Qing court's *within* Tibetan and Mongolian cultures. This strategy mainly combined different ideas of ruler-ship into one single idea or unified emperor. In other words, the imperial identities had many facets. Crossley believes this is still relevant to China's politics when we step into the area of China's rule in some of its peripheral areas, since the formal governance of Tibet by China was settled during the Qing period. See, Pamela Kyle Crossley, *Translucent Mirror: history and identity in Qing imperial ideology* (Berkeley, CA, and London: University of California Press, 2002, first published 1999).

⁴¹ 'Xinjiang' is one of the five ethnic minority autonomous regions in the PRC, which is formally called Xinjiang Uyghur Autonomous Region. The word 'Xinjiang' literally means 'new frontier', a name given during the Qing Dynasty. Xinjiang has been the home to a number of different ethnic groups including Uyghur, Han, Kazakh, etc for hundreds of years. Xinjiang Province was established in 1884 as part of the Qing Empire (1644-1911). During the period of Republican China (1911-1949), Xinjiang was governed for decades by Sheng Shicai, a warlord who was also a military general of the Nanjing government of the Republic of China. In 1955, Xinjiang Uyghur Autonomous Region was established under the PRC.

⁴² R. C. Van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995).

conflict of classic feudalism⁴³ in the Carolingian era was between the monarchy and the barons. The Carolingian monarchy created the system of fiefs and vassals,⁴⁴ which stamped the medieval world for centuries.⁴⁵ The personal character of the regime was underlined by the importance of the oath of loyalty to the king, which was demanded from everyone. At this time, the mission of expansion of the Christian faith and the protection of the Roman Church occupied a central place. The kings considered themselves as rulers by God's Grace and answerable to God. In the classic feudalism period, the monarch's rule was not absolute: his freedom of action was restricted by imperial and papal authority and the power of barons and vassals. The following period, the so-called 'second Middle Ages' from the twelfth to the fifteenth century witnessed the foundation of the political structure of modern Europe. The Renaissance offered rulers inspiration in Roman law rather than the Bible. But not until the new capitalist states had been established did the real revolution in state theory and form happen. In the classic age of absolutism, from the sixteenth century to the eighteenth century, the social contract theory, natural rights theory and the demand for people's sovereignty, expanded in the West to

⁴³ The definition of feudalism is debated, but roughly speaking a feudal society is one where land is held in exchange for service; obedience is rendered in exchange for protection, and the society is hierarchically ordered, with a military class of highly trained and expensively-equipped warriors supported by a mass of peasants who provide labour and are tied to the land. E.A.R. Brown in 'The Tyranny of a Construct: Feudalism and Historians of Medieval Europe' argues that the concept of feudalism was counterproductive, encouraging 'concentration on oversimplified models' and 'insufficient attention to recalcitrant data'. Brown's arguments were developed and expanded by Susan Reynolds in *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Oxford University Press, 1994). This book argued that historians had been too eager to read back feudal legal and social relationships into earlier periods before they actually developed in the eleventh and twelfth centuries. The debate lies in the question of whether the social system of medieval Europe revolved around grants of fiefs by lords in exchange for service from their vassals. However, Karl Marx developed another sense of feudalism, which was widely adopted by the Communist Party in China. Marx examined the feudal economy arguing that there were three phases in the development of society, each marked by different modes of production; tribal, feudal and capitalist. The Chinese Communist Party in its early stages adopted Marxist theory. Mao Zedong defined Chinese society before the PRC was founded as 'semi-colonist, semi-feudalism'.

⁴⁴ For more reading, see, e.g. Susan Reynolds, *Fiefs and Vassals: the medieval evidence reinterpreted* (Oxford: Oxford University Press, 1994).

⁴⁵ R. C. Van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995), p.48.

correspond to bourgeois' requirements for a highest lawgiver domestically, and externally for order and defence. The bourgeois nation-state completed its transformation in Europe over these two centuries.

By contrast, the concepts of sovereignty and constitution were introduced into China only from the nineteenth century when the imperial China was transforming towards modernization. Before we look into this transformation, we have to examine the traditional political thinking. The Chinese traditional political thinking contributes to the contemporary Chinese thinking on sovereignty in terms of the transformation of the state during the so-called modernization of China, starting from the mid-nineteenth century when imperial China first encountered the West. Without an introduction to Chinese history one can hardly understand the way the Chinese regard the issue of territorial unity or the emphasis on freedom from foreign intervention in internal matters.

6.2.2 Traditional Chinese thinking on the relations between the ruler and the ruled

It is widely acknowledged that universality and cultural continuity are the two aspects of imperial China that draw most attention from scholars studying traditional China. The former emphasizes a highly centralized bureaucratic superstructure and formalism; the latter, on the other hand, represents a vast substratum of heterogeneous local communities based on a morally oriented social order and the informal primary group.⁴⁶

⁴⁶ C. K. Yang, 'Chinese Bureaucratic Behaviour' in D. S. Nivison and Arthur F. Wright (eds.), *Confucianism in Action* (Stanford: Stanford University Press, 1959), 134-64; cited in Emily Martin Ahern, *Chinese Ritual and Politics* (Cambridge University Press, 1981).

In *The Politics*, Aristotle develops the fundamental distinction between the realm of politics and the pre-political realm of the household. Although both the household and the state are forms of human association, the roles of statesman and that of the household manager not only reflect variations in the scale of the task, but also constitute categorical differences. The objective of politics is an exercise of self-government through deliberative means by the members as a collective body.⁴⁷ Politics is concerned not simply with power and its exercise; it should be understood to be an activity intimately linked to the virtues of freedom and civilisation.⁴⁸

From this perspective, China has followed a different trajectory from the West. One of the features of imperial China is a lack of distinction between household and government. The emperor ruled the country without any restriction, especially after feudalism was destroyed and aristocratic elites were unable to restore their original privileges. In traditional Chinese thinking during the imperial period, the emperor's rule was considered to be universal; territorial borders changed over time depending on how far each dynasty ruled effectively. The idea of the modern state is claimed to be an entirely Western one and foreign to the Chinese tradition; it was therefore not until the Western states could by a show of force compel China to revise its concept of universality and to acknowledge the existence of political entities other than her own, that the concept of national states dawned on the Chinese.⁴⁹

⁴⁷ Martin Loughlin, *Sword and Scales: an examination of the relationship between law and politics* (Oxford: Hart Publishing, 2000), p.111.

⁴⁸ Sir John Fortescue, 'The Governance of England' [1471], in Shelly Lockwood (ed.), *On the Laws and Governance of England* (Cambridge: Cambridge University Press, 1997).

⁴⁹ Qian Duansheng (also known as Ch'ien Tuan-sheng), *The Government and Politics of China* (Cambridge, Massachusetts: Harvard University Press, 1950). For how Westerners saw imperial China in the late Qing Dynasty, see, James L. Hevia, *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793* (Durham, North Carolina, Duke University Press, 1995). This

Generally speaking, imperial Chinese history presents a discontinuous line of dynastic succession; however, the essential mode of governance remained unchanged despite turbulences, uprisings, and changes of the name of dynasties. From the beginning of the reign of the Qin Dynasty (221-210BC) to the end of the Qing Dynasty (1644-1911), China roughly remained a unitary empire. The feudal system was enforced during the first recorded dynasty in China, the Zhou Dynasty (eleventh century-256 BC) when the territory was tremendously enlarged. The land and military tenures which the barons⁵⁰ owed to the ruler and the various ranks of fiefs owed to the barons were not dissimilar to what obtained in the feudalism of early Europe. This was the case until the royal house lost its control over the feudal lords, during the Spring and Autumn Period (722—481BC) and the Warring States Period (475—221BC). Afterwards, during the Qin Dynasty, the feudal system was severely enfeebled and centralized government was strengthened. Although efforts to revive feudalism happened during the Han (206 BC—AD220) and the Jin (AD265—420), they eventually failed. Since then the feudal aristocratic families had never gained a cultural, political, or economic base as sound as that of most aristocratic groups in European history.⁵¹

book is about an episode that is among the best known in the history of Sino-European relations, the mission in 1793 of Macartney to the court of the Emperor Qianlong (1736-1795), as the ambassador of King of Great Britain and Ireland. The author captures the Qianlong era and this imperial regime 'in action' by examining several important areas, including the Chinese style of imperial formation and traditional Chinese rulership and statecraft.

⁵⁰ Here the word 'baron' is borrowed from the West. In traditional China it refers to *gui zu* (贵族, nobleman). Although the feudal system had declined since the late Han dynasty, the *ba qi zhi du* (eight banners system) practised under the Qing dynasty revived some of the features of feudalism.

⁵¹ Patricia Ebrey, *The Aristocratic Families of Early Imperial China* (Cambridge: Cambridge History Press, 1978), p.118

The mode of governance in imperial China has the following features. First, the emperor reigned supreme.⁵² His power was not limited by law or by any other power. There was no distinction between the household and the office of the emperor. The Emperor was at once the final author of the state's political decisions, its supreme law-giver and the commander of its military forces. In fact, without any supervision and restrictions, the quality of governance—good or bad—was determined by the morality and ability of individual emperors according to circumstances. Second, the emperor governed with the assistance of officials recruited through examinations based on the works Confucius. Scholars observe that China in the late imperial period was governed by a bureaucratic monarchy.⁵³ Meanwhile, as observed by Fei Xiaotong, in imperial China, officials at local level did not share in the political power of the emperor but served their monarch by neutralizing and softening down their power rather than by supporting it. In any case, they had no real political power in shaping policies.⁵⁴ Third, the examination system played an essential role in selecting bureaucrats, and providing the basic guidance of conduct and education for the public. The emperor had absolute authority, assisted by a bureaucracy which was not hereditary in principle. The officials were chosen from among the aristocracy through informal

⁵² Some scholars hold the view that even during the imperial period there was a *de facto* limit to the authority of the central government. In the traditional Chinese power structure there were two different layers. At the top, there was the central government; at the bottom, the local governing authority was the gentry. See, Fei Xiaotong (also, Fei Hsiao-tung), *China's Gentry: Essays in Rural-Urban Relations* (Chicago: University of Chicago Press, 1953); Fei Xiaotong, 'Peasantry and Gentry: An Interpretation of Chinese Social Structure and Its Changes' (1946) 52 (1) *American Journal of Sociology* 1-17. However, even if the government machine failed to penetrate into the local areas, there was, in theory, no limit to the imperial power.

⁵³ H. Lyman Miller, 'The Late Imperial Chinese State', in David Shambaugh (ed.), *The Modern Chinese State* (Cambridge: Cambridge University Press, 2000), p.17.

⁵⁴ Fei Xiaotong, *China's Gentry: essays in Rural-Urban Relations* (University of Chicago Press, 1953), pp.31-32.

recommendations during the Han⁵⁵ and the Jin Dynasty.⁵⁶ From the reign of Emperor Wu of the Han Dynasty,⁵⁷ Confucianism was officially advocated, and scholars started to have the opportunity to be interviewed by the emperor himself and to become high-ranking officials. From the Sui and the Tang dynasties,⁵⁸ aristocratic rule and the power of feudal barons was mostly crushed during hundreds of years of chaotic internal war. Furthermore, the competitive examination system (*Ke Jǔ*)⁵⁹ was officially introduced and gradually became the main channel for the recruitment of intellectuals to the bureaucracy. Fourth, law was not separated from ethics; legal institutions were not separated from the bureaucratic system. As part of this ruling system, traditional Chinese law consisted of an extensive body of indefinite yet generally accepted ethical and political concepts and a voluminous body of minutely recorded rules and precedents. As Qu Tongzu has observed, there was no distinction between government officials and the judiciary since the judicial function was part of the governance system in maintaining social order and upholding morality.⁶⁰

The mode of governance and political thinking in traditional China are mutually influenced. Traditional Chinese thinking on relations between the rulers and the ruled is best exhibited in the Spring-Autumn Period and the Warring States Period. Other

⁵⁵ Han Dynasty, from 206 BC to AD 220.

⁵⁶ Jin Dynasty, from AD 265 to 420.

⁵⁷ Emperor Wu (Han Wu Di) reigned between 156 and 87BC.

⁵⁸ Sui Dynasty, from AD 581 to 618; Tang Dynasty, from AD 618 to 907.

⁵⁹ ‘*Ku Jǔ*’ (科举) refers to the examination system practised during imperial China for selecting government officials. It started from the Sui Dynasty (AD 581–618) and was only abolished in 1905. Those who performed the best in these exams would be recruited to the elite class and become part of the state apparatus. The contents of the examinations in the late Qing period involved writing essays on the classic Confucian works in certain strict forms and in designated script. See, for instance, Ichisada Miyazaki, *China’s Examination Hell: The Civil Service Examinations of Imperial China*, Conrad Schirokauer trans. (New York: Weatherhill, 1976).

⁶⁰ Qu Tongzu, *Law and Society in Traditional China* (Westport, Conn.: Hyperion Press, 1980).

schools of thought which existed during the Spring-Autumn and Warring States Periods were the Taoists, the Legalists, the Moists, the Yin-yang, the Logicians, etc. The Taoists advocated the happy agreement between nature and humans and the denial of any intentional elaboration and intervention into nature. The Legalists elaborated a theory of rewards and punishment as stimulants and deterrents to human action and emphasized the importance of the law being made known, and its just application without discrimination. The founder of the Mo school advocated the doctrine of mutual love and great abhorrence of all war. The flourishing of various schools of thoughts emerged due to the instability of society after the reign of the King of Zhou shrank and feudal lords struggled for hegemony.

The highest authority the ancient Chinese ruler claimed derived from the *Tian ming* (天命 Mandate of Heaven), which was in essence a moral authority. The founder of the Zhou Dynasty seemed to have given ‘the Mandate’ a historical setting that ensured its persistence as a fundamental and essential factor in the Chinese theory of government. The founder of Zhou, a royal vassal of the previous Kingdom of Shang, extinguished the rule of the Shang Dynasty in the name of *Tian ming* when the wickedness of the ruler of the previous dynasty became so outrageous that it was no longer possible to refrain from ‘carrying out the punishment of heaven’.⁶¹ This version is completely in accord with the propaganda that the Zhou promulgated to justify conquest and mollify the conquered.⁶² At the beginning of the Zhou Dynasty, *Tian ming* was a moral idea to a large extent. The

⁶¹ See, Si-Ma Qian (司马迁), *Shi Ji* (史记 Record of the history of China) 4.10-22, chapter on the Shang Dynasty in Chinese history.

⁶² Herrlee G. Creel, *The Origins of Statecraft in China. Vol1: the Western Chou Empire* (Chicago and London: University of Chicago Press, 1970), p.62.

first kings of the Zhou Dynasty exercised their authority through setting an example, both in morality and in the ritual of sacrifice.

This moral justification of ruling lasted until feudalism collapsed, and a highly centralized bureaucratic empire, the Qin, was founded.⁶³ From the advent of the Han Dynasty, the 'Mandate of Heaven' was underpinned by Confucian thought which provided the dominant guidance in terms of individual behaviour as well as the relationship between ruler and subjects. In Confucian thinking, 'law does not come down from Heaven, nor does it arise from Earth. It is nothing else but something that comes forth from among men, consonant with their ideas'.⁶⁴ Therefore the ideal state is that every man should develop his 'Ren' (仁), fellow-feeling, to the maximum degree.⁶⁵ Only by doing so, can the ruler construct a world of the *Da Tong* (Great Commonwealth),⁶⁶ in which the doctrine of 'Ren' rules.⁶⁷

From the Han Dynasty, owing to the advocacy of the scholar Dong Zhongshu (179-104 BC),⁶⁸ the works of Confucius and his followers were adopted as the ruling ideology that guided the relations between the rulers and their subjects. The

⁶³ Patricia Ebrey, *The Aristocratic Families of Early Imperial China* (Cambridge: Cambridge University Press, 1978), p.118.

⁶⁴ Benjamin I. Schwartz, 'Primacy of the Political Order in East Asian Societies: Some Preliminary Generalizations' in S. R. Schram (ed.), *Foundations and Limits of State Power in China* (Hong Kong: Chinese University Press, 1987).

⁶⁵ *Ren* is considered as the root of all Confucian ethical and political thought. In the works of Mencius, 'Ren' is what constitutes humanity.

⁶⁶ *Da Tong* (Great Commonwealth 大同) is an ideal society in the imagined political thought of political thinkers during the Spring-Autumn period (770-476BC) and the Warring States period (476-221BC). In their thought, the Great Commonwealth is the fullest expression of the perfect personality of the Universe.

⁶⁷ Liang Qichao, *History of Chinese Political Thought during the Early Tsin period*, L. T. Chen trans. (London: K. Paul, Trench, Trubner, 1930).

⁶⁸ Dong Zhongshu (董仲舒) was a scholar during reign of Emperor Wu of the Han dynasty (汉武帝). See also, Michael Loewe, 'Imperial Sovereignty: Dong Zhongshu's Contribution and his Predecessors', in S. R. Schram (ed.), *Foundation and Limits of State Power in China* (Hong Kong: Chinese University Press, 1987).

emperor's authority, then, was legitimated by a Confucian cosmology that placed him at the pivot between the cosmic natural order and the human social order—the son of heaven. The political theories of Confucius applied humanism to the affairs of the state. Orderly political life must come from orderly private lives. Since the latter are inseparable from notions of virtue and rites, political order, to be good and stable, must also proceed from those notions. Therefore, the emperor's observance of proper rituals and ceremonies was supposed to ensure harmony between and within the natural and social orders.

Confucianism provided the systematic theory of the ruler and the subjects in imperial China. As mentioned above, Dong Zhongshu interpreted Confucius' work and founded a theoretical framework combining Confucianism with statecraft.⁶⁹ Dong succeeded in presenting imperial government as a legitimate means of organizing people in a manner and in a place that fitted with other elements of the universe.⁷⁰ The authority of a sovereign derived from his responsibility for seeing that his subjects' lives conformed to an order. For this purpose he had to establish suitable norms and patterns of behaviour and practise a technique of observation so as to acquire an insight into the inner workings of the universe and the relationship between humans, Heaven and Earth.⁷¹

⁶⁹ See, Qian Duansheng (also, Ch'ien Tuan-sheng), *The Government and Politics of China* (Cambridge, Massachusetts: Harvard University Press, 1950), p.24. See also, Michael Loewe, 'Imperial Sovereignty: Dong Zhongshu's Contribution and His Predecessors', in Stuart R. Schram (ed.), *Foundations and Limits of State Power in China* (Hong Kong: Chinese University of Hong Kong, 1987), pp.33-58.

⁷⁰ Michael Loewe, 'Imperial Sovereignty: Dong Zhongshu's Contribution and His Predecessors', in Stuart R. Schram (ed.), *Foundations and Limits of State Power in China* (Hong Kong: Chinese University of Hong Kong, 1987), pp.33-58.

⁷¹ Ibid.

It should be noted that Confucius' own formulation, in its highly elliptical way, had stressed the obligations of the ruler just as much as those of the subjects. Mencius had suggested that the subject's duty of loyalty was discharged when the ruler no longer behaved as a ruler should, but had turned into an oppressive tyrant. For later thinkers, however, the theory tended to put more emphasis on the duty of the subject. Some compared this relationship and these logics with those between father and son, saying that the relations of sovereign-subject and of father-son belong to the eternal principle of the cosmos, from which there is no escape between Heaven and Earth.

Confucian thought continued to be the official ideology until the end of the Qing Dynasty (1644-1911). This can be seen from the successive editions of the ceremonials of the Great Qing,⁷² which affirmed the connexion between universal order and the ceremonies and customs observed by the dynasty. The principal idea in the late Qing period was that the authority and interests of the state were inseparably linked with the emperor's supreme, single and indivisible power. It was the emperor's seal on the edicts that compelled obedience. However, traditional Confucian thought was questioned by reformers, scholars and social elites when the Qing governance was severely challenged by foreign invasion and internal uprisings. Near the end of imperial China, the leader of the 'one hundred days reform',⁷³ Kang Youwei, seeking to endow imperial sovereignty with new legitimacy, advocated a constitutional monarchy in China. Kang claimed that monarchy without restriction

⁷² *Wu Chao Hui Dian* (Ceremonials of the Great Qing 五朝会典) is the Qing code which provided guidance for the administration.

⁷³ In 1898, reformers led by Kang Youwei and Liang Qichao succeeded in persuading the then Qing emperor, Guangxu, to introduce a series of measures towards constitutional monarchy. The reform lasted for just one hundred days and eventually failed. In Chinese history, this is usually called 'Bai Ri Wei Xin' (百日维新 one hundred days reform).

was unrealistic and contrary to nature, threatening social harmony and stability and ultimately rendering all government impossible.⁷⁴ His antagonists insisted that state authority had to be undivided in order for it to be effective; the monarchy was essentially a unifying force. The imperial monarchy, based on the exercise of moral virtue, was the embodiment of the Confucian moral and social system and hence the only institution capable of safeguarding it.

The revolution led by Sun Yat-sen eventually put the cyclical rise and fall of imperial dynasties to an end. Although the Republic of China failed to form an internationally independent and internally effective governing state, with Sun Yat-sen champion of the democratic ideas of the West, Chinese political thinking was set on a new course and began to follow the main currents of the West. This is the case when the PRC succeeded in presenting a revolutionary alternative, harnessing the bulk of China's population (the peasantry) into a new regime that broke the bonds of the past and began the effort to build a modern China.⁷⁵

6.2.3 Mao Zedong's thought on the distinction between state system and system of government and contemporary thinking

The PRC during Mao Zedong's era was often described as a 'totalitarian regime',⁷⁶ which featured one-party rule, thorough penetration of the state into and overriding all aspects of individual and social life, highly personalized and concentrated power, and continuous social movements. Fairbank famously commented in 1966 that the

⁷⁴ See, Wang Hui, *Xiandai Zhongguo Sixiang de Xingqi* (Beijing: Shenghuo Dushu Xinzhi Sanlian Shudian, 2008), Ch. 7, 737-831.

⁷⁵ Miller, H. Lyman, 'The Late Imperial Chinese State', in David Shambaugh (ed.), *The Modern Chinese State* (Cambridge: Cambridge University Press, 2000).

⁷⁶ Vivienne Shue, *the Reach of State: Sketches of the Chinese Body Politic* (Stanford, California: Stanford University Press, 1988).

‘People’s Middle Kingdom’⁷⁷ amounted to Marxism in a Confucian mould in the sense that Mao ruled as a new emperor and the state bureaucracy acted for the benefit of the Party leader, with party cadres and intellectuals recapitulating the roles of the scholar-officials and gentry of the old order.⁷⁸ Teiwes argues that:

The Chinese revolution left a diverse legacy for the Maoist state. It included a disciplined party machine with established norms, but also with a charismatic leader with the prestige and authority to alter those norms if he saw fit. It further included a deep commitment to the unity that had been crucial to success, but also an intellectual outlook that validated struggle against unhealthy trends and deviant individuals. The legacy also involved a highly pragmatic and cautious approach to policy.⁷⁹

China’s conception of sovereignty and the state was deeply influenced by Mao’s theory on the people’s democracy.⁸⁰ In his *On the New Democracy*, Mao distinguishes the state system from the system of government. Mao explained the state system in terms of class struggle. The question of the state system was the question of the status of the various social classes in the state, i.e., which class controls the political power of the state. For instance, during the first ten years of the PRC (1949-1959), when construction of the socialist system was still to be accomplished, the new democratic state system was marked by the joint dictatorship

⁷⁷ ‘Middle Kingdom’ is a literal translation of ‘China’ (中国).

⁷⁸ John King Fairbank, ‘The People’s Middle Kingdom’, (1966) 44 (4) *Foreign Affairs* 574-586, cited in H. Lyman Miller, ‘the Late Imperial State’, in David Shambaugh (ed.), *The Modern Chinese State* (Cambridge University Press, 2000), p.40. See also, Franz Schurmann, *Ideology and Organization in Communist China* (Berkeley: University of California Press, 1966), ch.3.

⁷⁹ Friderick C. Teiwes, ‘The Chinese State during the Maoist Era’, in David Shambaugh (ed.), *The Modern Chinese State* (Cambridge University Press, 2000), p.111.

⁸⁰ Mao Zedong introduced the term ‘People’s Democracy’ in May 1939, in his speech on the twentieth anniversary of the Fourth of May Movement. In that speech, Mao defined the basic tasks of the Party as destroying imperialism and feudal forces, transforming the semi-colonial and semi-feudal position, and establishing a people’s democratic system. In 1949, characterizing the new people’s democratic regime, Mao made use of a distinction he had employed in *On the New Democracy* between the ‘state system’ and the ‘system of government’. See, Mao Zedong, *Xin Minzhu Zhuyi Lun* (新民主主义论 On the New Democracy), in January 1940. Also, *Cambridge History of China* (Cambridge: Cambridge University Press, 1994), vol.15, p.6.

of the various revolutionary classes, led by the working class and with the worker-peasant alliance as the foundation.⁸¹ The system of government, on the other hand, is a matter of how political power is organized, the form in which one social class or another chooses to arrange its apparatus of political power to oppose its enemies and protect itself.

According to Mao Zedong, the state system and the system of government are interrelated. The numerous types of state system in the world can be reduced to three basic kinds according to the class character of their political power: (1) republics under bourgeois dictatorship; (2) republics under the dictatorship of the proletariat; and (3) republics under the joint dictatorship of several revolutionary classes. Before the completion of socialist reform in China, China should develop a state system of the third kind.⁸² To realize this goal, the state structure would be organized according to the principle of 'democratic centralism'. Mao saw Western democratic systems in modern states as monopolized by the bourgeoisie which had become simply an instrument for oppressing the common people. In China a proper expression of the people's will could only be established through the system of democratic centralism, because only a government based on democratic centralism could fully express the will of all revolutionary people and fight the enemies of the revolution most effectively.

Furthermore, most Chinese works on political science during Mao's era were informed by the Marxist canon as well as Mao Zedong's own thought. The Marxist

⁸¹ See, e.g. 'The Road to Normalisation 1977-79' in *Cambridge History of China* (Cambridge: Cambridge University Press, 1994), Vol. 15. See also Mao Zedong, *The Political Thought of Mao Tse-Tung*, Stuart R. Schram trans. (Harmondsworth, Penguin, 1969).

⁸² See, Mao Zedong, *Xin Minzhu Zhuyi Lun* (新民主主义论 On the New Democracy), in January 1940.

tradition regards the state apparatus as the instrument of dominant class rule but also as the potential seat of corruption and final betrayal of the socialist revolution. Therefore, Marxist analysts believed that states could indeed wither away. However, they also claimed that, during the process of socialist construction, seizure of power by a Marxist party must necessarily be followed by the consolidation of strong state power.

Certain theoretical dilemmas were deliberately avoided in contemporary orthodox Chinese political theory. One example is the role of the Chinese Communist Party. Under Leninist principles, the communist party is the ultimate authority of the political system. It sets overall policy; lays down the political line which is meant to guide all specific policies, and orders all other institutions to do its bidding. As the vanguard of the proletariat, the party should take the leading role in decision-making.⁸³ In theory, this may conflict with the people's democracy, which basically means that all the citizens should have the right to decide the final norm of the community they live in. During Mao's period, the Chinese Communist Party was organized as a parallel hierarchy to the government structure, as a nationwide set of committees designed to provide overall guidance and leadership to all the other parts of the system. One scholar pointed out that in China, since legality and democracy are conditioned by the needs of socialism, the Communist Party in its leadership role, in turn, defines the latter needs. As a consequence, no principle, however normatively stated in the constitution or law, is permitted to conflict with the policy needs of the Communist Party.⁸⁴

⁸³ See, Vladimir Lenin, *State and Revolution* (London: Martin Lawrence, 1933).

⁸⁴ Hingdah Chiu, 'Socialist Legalism: Reform and Continuity in post-Mao's People's Republic of China', *Occasional Papers: Reprint Series in Contemporary Asian Studies*, No. 1, 1982 (46).

The distinction between the state system and the system of government in Mao's theory signifies the tension between the locus of sovereignty and the form of government. Alternatively, this tension can be interpreted as the foundation of the Chinese constitutional order. The state system informs who has the sovereignty; the question of how the government is to be constituted should be in the form of a Constitution.

The nature of the Chinese state changed remarkably in the era of Deng Xiaoping, when the task of the state was transformed, and so was the role of the Party in the system of governance. In the early 1980s, when Deng began to address the issue of political reform, several issues were of primary concern: the over-concentration of power, the inefficient bureaucracy, and political structures that inhibited economic growth.⁸⁵ The adoption of a new Constitution in 1982 signifies a new era of reform and opening-up, not only in terms of the economy, but also in the form of government.

In the post-Mao era, the government has undertaken several successive waves of retrenchment, downsizing, and streamlining in attempting to improve efficiency and economies of scale.⁸⁶ The nature of the state has changed from a proactive agent of social-political change to a facilitator of economic development and reactive arbiter of social-political tensions. Shue observes that 'the Chinese state withdrew from its

⁸⁵ See, Deng Xiaoping, 'On reform of the Political Structure', in *Selected Works of Deng Xiaoping: 1982-1992* (Beijing: Foreign Languages Press, 1994). Deng emphasized that 'we should separate the Party from the government and decide how the Party can exercise leadership most effectively... and transfer some of the powers of the central authorities to local authorities in order to straighten out relations between the two'. The purposes of this transfer of power from the centre are 'to bring the initiative of the masses into play, to increase efficiency and to overcome bureaucratism'.

⁸⁶ Numerous books have contributed to the study on the relationship between central and local in China. For instance, Linda Chelan Li, *Centre and Provinces 1978-1993: Power as Non-zero-sum* (New York: Oxford University Press, 1998); Wei Hongying, *Xianzheng Jiagou xia de Difang Zhengfu Moshi Yanjiu* (Study on Local Government Modes Under the Framework of Constitutional Politics in China) (Beijing: Zhongguo Shehui Kexue Chu Ban She, 2004).

former all-intrusive and hegemonic roles in the life of the nation'.⁸⁷ David Shambaugh also indicates several macro transitions that the Chinese state has undergone and suggests that the Party has in many ways 'withdrawn' from society and its former all-intrusive control.⁸⁸

6.3 The status of the HKSAR in the context of the sovereignty discourse

The question arises how the concept of sovereignty helps address the challenge posed by 'one country, two systems'. Chinese officials and scholars have consistently argued that, although the HKSAR enjoys a high degree of autonomy, in terms of the sovereignty issue, the HKSAR is no different from any other parts of the PRC. This section will focus on the issue of 'residual power',⁸⁹ which had been a central debate in relation to the PRC-Hong Kong relationship during the drafting process of the Basic Law and still serves as one of the critical questions posed to contemporary thinking on the status of the HKSAR in the context of Chinese sovereignty.

In the context of the state structure of the PRC, apart from the SAR, regional autonomy has been divided into three categories: (1) regional autonomy in ethnic minority provinces; (2) provincial governments under the Central People's Government; and (3) special economic zones (SEZ) such as Shenzhen, Zhuhai, Xiamen, and Hainan Province. In the case of Hong Kong, given China's long

⁸⁷ Vivienne Shue, *The Reach of the State: Sketches of the Chinese Body Politics* (Stanford, California: Stanford University Press, 1988).

⁸⁸ David Shambaugh, 'Introduction: The Evolving and Eclectic Modern Chinese State', in David Shambaugh (ed.), *The Modern Chinese State* (Cambridge: Cambridge University Press, 2000).

⁸⁹ According to the report on residual power prepared by the Consultative Committee for the Basic Law, the concept of 'residual power' has been referred to in various contexts but there is no commonly accepted definition, in particular, it is not clearly distinguished from similar terms such as 'grey area' and 'undefined power'. See, *Final Report on Residual Power*, Special Group on the Relationship between the Central Government and the SAR, 10 February 1987.

history of governing peripheral regions, it would be not so surprising for Chinese leaders to propose to solve the historical question of Hong Kong through the creative arrangement of 'one country, two systems'.⁹⁰ After all, this is all about accommodating a unique, different system within one single, uniform sovereign authority. This arrangement has revealed that this far-sighted idea is not based on any modern state theory; rather, it has emerged out of political wisdom and prudence, with consideration of the overall state interests of the PRC in mind.

The different understanding of the status of the HKSAR has been explicitly demonstrated in terms of the Chinese concept of sovereignty *versus* residual power. In a sense, the residual power issue was brought up as a counter argument to the Chinese version of sovereignty when the relationship between the Central Government and the SAR was being dealt with during the drafting process of the Basic Law.⁹¹ According to the report of the Consultative Committee on the Basic Law (BLCC), 'residual power' refers to powers other than those clearly divided between the Central Government and the SAR. The powers of the Central Government and the SAR which defy any clear division (grey area) and powers which require division in the light of future conditions (undefined powers) shall be referred as other terms.⁹²

⁹⁰ I would like to thank Professor Tim Murphy of the London School of Economics for this point. I also note that Jiang Shigong, a scholar from the Peking University, has argued that 'the Basic Law followed the traditional wisdom of governing border regions in China's long history, such as the governing of Tibet since the Qing dynasty'. See, Jiang Shigong, *Zhongguo Xianggang* (China's Hong Kong) (Hong Kong: Oxford University Press, 2008). Also see, Jiang Shigong, 'Written and Unwritten Constitutions: a New Approach to the Study of the Constitutional Government in China' (2010) 36 *Modern China* 12-46, 39.

⁹¹ See, *Wen Wei Po*, 4 April 1986.

⁹² *Final Report on Residual Powers*, the Consultative Committee for the Basic Law, February 1987.

The argument in support of the residual power claims that, in accordance with ‘one country, two systems’, Hong Kong may handle unpredicted affairs with greater flexibility. Reserving this power for Hong Kong will also enhance the confidence of the people of Hong Kong people to put into effect the Central Government’s promise. These arguments are totally in line with Western thinking on the individual and sovereignty.

On the other hand, the argument against residual power seeks support by referring to the state theory of China. It was argued that the relationship between the Central Government and Hong Kong is not one comparable with those in a federal government.⁹³ In a country with a unitary system like China, Hong Kong does not enjoy independent sovereignty before or after the establishment of the SAR. Sovereignty belongs exclusively to China. This is reflected in the Hong Kong Basic Law, which explicitly states that the NPC authorizes the HKSAR to exercise a high degree of autonomy in accordance with this law.⁹⁴ In addition, the HKSAR may enjoy other powers granted to it by the NPC, the NPCSC or the Central People’s Government (CPG).⁹⁵

But is China’s conception of sovereignty plausible? After discussion on western and Chinese concept of sovereignty in previous sections, it can be seen that in general theory, concept of sovereignty is divorced from the form of government it takes; it expresses the quality of the relationship between the state and its people. The concept of sovereignty gradually evolves from an omnipotent, transcendent

⁹³ Ibid.

⁹⁴ Article 2 of the Hong Kong Basic Law.

⁹⁵ Article 20 of the Hong Kong Basic Law.

figure, during the evolution to the nation-state in the Europe, into a symbol of internal and external independence. The concept of sovereignty in the modern sense only keeps its absoluteness in theory; the constitution, as the third order of the political,⁹⁶ has inherited the political dimensions of sovereignty and hence can only be understood correctly by recognizing its political dimension as well as its normative legal dimension.

In correspondence, during the imperial China period, no traces of similar concept had shown. Chinese traditional thinking on the emperor and his subjects was based on *Tian ming*, which invoked Heaven as the source of highest moral authority of an emperor. Hence, the necessary conditions for the modern concept of sovereignty and state to develop were missing. During the modernization of China, especially its state-building, China rejected the intervention of foreign countries, and emphasized the mobilization of its people into a multi-ethnic yet still single nation.

China's state theory resembles its Western counterparts in the sense that it distinguishes between the nature of the state and the form it takes. This suggests Chinese leaders' pragmatic thinking and problem-resolving attitude regarding its territorial disputes, and the final settlement of the question of Hong Kong. However, it should be noted that the relational aspect of sovereignty has been overlooked in Chinese theory. The concept of sovereignty in China emphasizes the abstract, ultimate authority of state sovereignty, though it is rarely explained that how the will of the people is communicated, transformed, and realised in the state.

⁹⁶ See, Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), pp.42-44. See also, Martin Loughlin, 'Constitutional Law: the Third Order of the Political' in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-layered Constitution* (Oxford; Portland, OR: Hart Publishing, 2003), pp. 27-52.

In terms of the status of Hong Kong within Chinese sovereignty, we find theoretical difficulties in defending both the Chinese concept of sovereignty and Hong Kong's request for residual power. Applying the concept of sovereignty to the Chinese situation, it can be seen that the appeal to a unitary state structure to defend the claim that Hong Kong's autonomy derives from the centre over-simplifies the concept. The PRC taking a unitary form of state does not suggest that sovereignty resides in the NPC, nor in any Central Authorities. In fact, sovereignty resides in the political relationship between sovereignty and the people. In order to support its claim that autonomy of the HKSAR is delegated to it by the NPC, the mainland China has to reconceptualise its understanding of sovereignty.

The Basic Law restrains Chinese sovereignty itself, but this self-limitation is a way of realizing sovereignty. In other words, it is the actualization of China's resumption of sovereignty over this territory. The Basic Law therefore takes the mission of enabling the sovereign to exercise its power over Hong Kong. The limitation on sovereignty within the Basic Law, based on consideration of Hong Kong's special circumstances, is also in the interests of Chinese sovereignty itself. On the other hand, if Hong Kong cannot convincingly argue for self-entrenchment of the Basic Law's constitutional nature, then the judicial independence of Hong Kong needs to accommodate other types of interpretation originating from an alien system; i.e., the legal and political system of the PRC.

This leads us to the next question of the status of the Basic Law within the Chinese constitutional order. The debate on residual power related to Hong Kong and the PRC does not suggest much on the form of government, nor on the constitutional arrangement between the PRC and its SAR. The question remains whether the Basic

Law constitutes an exception to the Chinese Constitution. In other words, does the principle of ‘one country, two systems’ suggest ‘one country, two constitutions’, or ‘one country, two legal orders’?

The people in Hong Kong understand the Basic Law as a constitutional guarantee which preserves the status of Hong Kong both in political and legal terms. However, the central authorities of the PRC deem the Basic Law to be a political guarantee in a legal form. The Basic Law does not in any way limit the ability of the sovereign to legislate. Obviously, it is not enough to analyse the Hong Kong issue only from the point of view of the central-local relationship. Article 31 of the Chinese Constitution implies the speciality of the SARs and this is not in any sense comparable to the status of any other local governments in the PRC. The issue can only be fully addressed and developed in a constitutional discourse; in particular, the implication of Article 31 of the Chinese Constitution and Article 159 of the Basic Law in terms of this special constitutional relationship between the HKSAR and the PRC. The relationship between the Chinese Constitution and the Basic Law requires further exploration. This will be the task of the next chapter.

7 Chapter VII

The Concept of the Constitution in China and the Status of The Hong Kong Basic Law

This chapter discusses the status of the Hong Kong Basic Law in the Chinese constitutional order in what might be called an age of constitutional pluralism.¹ As demonstrated in the previous chapter, the issue of the HKSAR cannot be fully and precisely addressed in terms of a sovereignty-autonomy dichotomy; the special nature of this relationship should be examined through the lens of the conception of a constitution.

This chapter will first examine the concept of a constitution in general, and in particular, its relationship with sovereignty. Sovereignty and constitution are inextricably linked. Sovereignty expresses the political bond between the state and the people, while the principal method by which this sovereign will is expressed is through the medium of the law.² A constitution bears both normative and political aspects. Sovereignty expresses the relationship between state and people, while a modern concept of constitution is the medium through which sovereignty is expressed in norms.

¹ See, e.g., Neil Walker, The Idea of Constitutional Pluralism, (2002) 65(3) *Modern Law Review* 317-359; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004); Jürgen Habermas, 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship' in *The Inclusion of the Other: Studies in Political Theory*, Ciaran Cronin and Pablo De Greiff (eds.) (Polity Press, 1999), pp.105-128.

² Martin Loughlin, 'Ten Tenets of Sovereignty' in Neil Walker (ed.) *Sovereignty in Transition* (Hart Publishing: Oxford, Portland, Oregon, 2003), p.56-57.

In the light of constitutional theory, this chapter continues a detailed exploration of the peculiar Chinese concept and practice of constitutional development. This chapter shows that the fundamentality of the written constitution is recognized; however, the safeguard of its supremacy entails more difficulties. This chapter discusses the role of the Standing Committee of the National People's Congress (NPCSC) and the Supreme People's Court (SPC) in safeguarding the supremacy of the Constitution of the PRC. Although the function of interpreting the Constitution is now vested with the NPCSC, there are neither precedents nor any procedure in terms of constitutional interpretation so far. In addition, the design of the current Constitution makes it impossible to review and ensure the constitutionality of national legislation in China. Legislative interpretation by the NPCSC is of the same nature as and deemed to be a necessary supplement to or clarification of the meaning of legislative provisions. By contrast, in defending the consistency of legal norms and the supremacy of the Constitution, the SPC has assumed a relatively minor and restricted role.

Drawing on general constitutional theory and taking into consideration Chinese constitutional theory, this chapter examines the status of the Basic Law within the Chinese constitutional order and the nature of its interpretation, with the purpose of analysing the status of the Hong Kong Basic Law in Chinese constitutional discourse and therefore the nature of the special constitutional relationship between HKSAR and the PRC.

This chapter argues that the ever-developing constitutional relationship can only be rightfully examined through the lens of taking the constitution as the third order of political.³ In China, the fundamentality of a written constitution, after all, is a

³ Martin Loughlin, 'Constitutional Law: the Third Order of the Political' in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-layered Constitution* (Oxford; Portland, OR: Hart Publishing, 2003), pp. 27-52.

declaration of the highest authority. The adoption of a written constitution not only demonstrates the existence of democracy to a certain extent; it also tries to build a systematic, coherent socialist legal system. More importantly, the Constitution realizes its mission as a 'secondary rule' to empower the political institutions of law-making. Put differently, the Constitution represents sovereignty in the sense that it establishes the absolute and final authority of rule-making.

Taking into consideration of the political aspect of a constitution and its relationship with sovereignty, it becomes clear that in terms of the interpretation of the Basic Law, the HKSAR judiciary needs to justify its power of constitutional adjudication in the new constitutional order under the Chinese sovereignty. The Basic Law expresses the relationship between the host state and Hong Kong, and this shall not fall into the terrain of the Hong Kong judiciary to decide unilaterally. The Basic Law cannot be entrenched by the judiciary through constitutional adjudication.

Therefore, from the perspective of the theory of public law, the Basic Law stands both inside and outside the Chinese Constitution. After analysing the unique nature of the Basic Law, this chapter concludes that the meaning of the Basic Law can only be found in an evolving process in which both Hong Kong and the PRC play an essential part. Furthermore, this chapter shows that instead of adding complexity to China's route towards constitutionalism, the challenge posed by the Basic Law offers the PRC a better chance to reflect on its route towards constitutionalism.

7.1 The Constitution as the fundamental law of a state

The concept of a modern constitution as the fundamental charter for a state derives from the social contract tradition, although it also has origins in the natural law tradition. Contrasting views can be traced back to Thomas Paine's famous claim, 'a constitution is a thing antecedent to a government, and a government is only the

creature of a constitution’,⁴ and Hegel’s view that a constitution ‘only develops from the national spirit’.⁵ A constitution embodies these two features; at the same time, it is the tension between the two that gives the dynamic of the development of a modern constitution. They are mixed, compatible and mutually enforceable.

Distinguishing itself from positive law, a modern constitution is deemed to be a fundamental document from which all the laws of a state derive their legitimacy. From the perspective of positivism, all laws are the commands of a sovereign; they are of equal status under the sovereign and are backed by state machinery to enforce them. However, a constitution as a charter between a state and its citizens is actually an authorization for a parliament to enact laws for the state. In other words, it is an authorisation conferring power on political institutions. Sovereignty is exercised only through certain forms; this is what a constitution is.

The political aspect of a constitution derives from its nature as an expression of sovereignty. Constituent power builds the foundation of a constitution. As argued by Loughlin, sovereignty is itself a relational concept, ‘expressing the quality of political relationship that is formed between the state and the people, or the sovereign and its subject’.⁶ Therefore the constitutional framework instituted for the exercise of governmental power of the state must be understood as an explication rather than a division of sovereignty.⁷ The concept of a modern constitution has both political and legal dimensions, since a proper understanding of the constitution requires that the

⁴ Thomas Paine, *Rights of Man* [1791] in his *Rights of Man, Common Sense and Other Writings*, Mark Philp (ed.) (Oxford: Oxford University Press, 1995), p.122.

⁵ G.W.F. Hegel, *The Philosophy of Mind* [1830], W. Wallace (trans.) (Oxford: Clarendon Press, 1971), §540.

⁶ Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), p. 83.

⁷ Ibid.

meaning of constitution be understood as definition of the political relationship between the state and the people.

7.1.1 Dimensions of a constitution

In the Western experience, the dual nature of the constitution, or the tension between its normative part and its political nature, constitutes the dynamic of constitutional development. In modern times, intellectual debates during the Weimar period in Germany attracted much attention especially regarding sovereignty and the state. In fact, the debate in Weimar period between Hans Kelsen and Carl Schmitt demonstrated the opposing views towards the nature of a constitution.

In the 1920s, neo-Kantians endorsed a gradualist and morally inflected doctrine of evolution towards a common economy, and they argued that the evolution of society towards a condition of greater justice and equality should not be viewed merely as a social or material process; instead, they claimed that social development could not be separated from legal evolution, and all wider social progress must be steered by moral law.⁸ In Kelsen's theory of basic norms, the state cannot be defined as a state if it does not act as a bearer of a legal order, or as a 'system of norms'.⁹ Kelsen ascribed to the state an irreducibly normative character, and saw the depoliticization of the state, and its construction as a neutral objective legal order.¹⁰ In Kelsen's view, normative form of the state is derived from the exclusively ideal realm of norms, which are distinct from and unaffected by natural or sociological facts. The state, he claimed, validates its power and legitimacy through reference to a pure realm of

⁸ Jeffrey Seitzer and Christopher Thornhill, 'An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context', in Carl Schmitt, *Constitutional Theory*, Jeffrey Seitzer trans. and ed. (Duke University, 2008), p.5.

⁹ Hans Kelsen, *General Theory of Norms*, Michael Hartney trans. (Oxford: Clarendon Press, 1990).

¹⁰ See, above no. 7, pp.5-6.

objective legal norms and to the processes through which these norms are applied, not to any material, historical, or sociological processes that lead to or influence its constitution.¹¹

By contrast, Schmitt rejected the suggestion that the state is bound by any measurable legal standards or by any obligations that might be imposed on it, independently or externally, through the medium of law. Sieyes' theory of constituent power and constituted power was translated by Carl Schmitt and made into his own notion of constitution-making power. Schmitt claimed that constitutional legitimacy is rooted in a concrete and substantial will. Against the thinking that politics are determined by laws, which are enshrined in the constitution, and that legality is a constitutional determinant and a precondition of all legitimacy, he argued that legality is a formal condition that must be given meaning and content by a prior structure of legitimacy. Legitimacy can only be obtained through representation of a unified will or the historical existence of a people, and this must be presupposed as the origin of the constitution, and indeed of all law. In short, the constitution is seen as united with the state, representing a uniform political will that cannot be reduced to formal or autonomous legal principles. The constitution of the state is always the inner political will of the state. The constitutional law of the state, based on the will of the state, must prevail over all other laws. Constitutional law is seen as both the form and will of the state.¹²

In Schmitt's theory, the state does not have a constitution, which forms itself and functions 'according to' a state will. The state *is* a constitution, in other words, an

¹¹ Ibid.

¹² Jeffrey Seitzer and Christopher Thornhill, 'An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context', in Carl Schmitt, *Constitutional Theory*, Jeffrey Seitzer trans. and ed. (Duke University, 2008), p.13.

actually present condition, ‘a status of unity and order’.¹³ A proper understanding requires that the meaning of the term constitution be limited to the constitution of the state, that is to say, the political unity of the people.¹⁴ In this stance, it means a complete condition of political unity and order. On the other side, a constitution can also refer to a closed system of norms, and, then, in the same way, to designate a unity, but an ideal, not a concrete existing unity. The constitution of the state is always the inner political will of the state.

Recent decades have seen the revival of the tradition of emphasizing a constitution’s normative aspect, i.e., free-standing constitutionalism as a replacement of sovereignty as the highest order. One example is John Rawls’ public reason, which, in a constitutional regime with judicial review, is the reason of its supreme court.¹⁵ According to Rawls, constitutional democracy is dualist in form: ‘it distinguishes constituent power from ordinary power as well as the higher law of the people from the ordinary law of legislative bodies’.¹⁶ The constituent power, as Rawls argues, fundamentally differs from democratic will. Here Rawls abstracts ‘public reason’ as a common truth perceived by the people who constitute themselves under a constitutional democracy; this truth cannot be conveyed by the congress, or any representative institution, since it is decisively not the democratic collective expression of will. In this sense, public reason can be explained as some basic concepts, or reasons, expressed by the judiciary through the process of adjudication.

¹³ Carl Schmitt, *Constitutional Theory*, Jeffrey Seitzer trans. and ed. (Duke University, 2008), pp.59-60.

¹⁴ *Ibid.*, p.59.

¹⁵ John Rawls, ‘The Idea of Public Reason’ in *Political Liberalism* (New York: Columbia University Press, expanded version, 2005), 212-254. Also, John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 65 *University of Chicago Law Review* 765.

¹⁶ John Rawls, ‘The Idea of Public Reason’ in *Political Liberalism* (New York: Columbia University Press, expanded version, 2005), p.233.

However, the political nature of a constitution should not be ignored, especially in an era when ‘the contemporary challenges to constitutional doctrine require a return to state-based concepts’.¹⁷ In recent decades, constitutional jurisprudence has been contested in the West due to the growing range of governmental functions exercised through supra-or transnational institutional arrangements.¹⁸ Tierney suggests that one fundamental theoretical presupposition of narrow legal positivism is that sovereignty can be understood hermeneutically or internally. It offers a vision from inside the box of politically-deracinated legal power. But it overlooks the extent to which the legal box itself exists within, and is in many ways conditioned by, the political environment from which it generates its own strength and its own legitimacy.¹⁹

7.1.2 Constitutional review

Since *Marbury v. Madison*,²⁰ in which the US Supreme Court of the United States of America established the principle that it is up to the court to interpret the constitution and to declare legislation inconsistent with the constitution void, the issue of judicial review has attracted enormous attention. It is said that the main purpose of American judicial review was to protect the considered judgments of the people, as represented in the extraordinary law of the Constitution.²¹ Ely argues that ‘the central function, and it is at the same time the central problem of judicial review’ is that ‘a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like’.²²

¹⁷ Martin Loughlin, ‘In Defence of Staatslehere’, *Der Staat* (Berlin: Durcker und Humblot) 48(1) (2009), pp.1-28.

¹⁸ Ibid.

¹⁹ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004), p.13.

²⁰ *Marbury v. Madison* 5 US (1 Cranch) 137 (1803)

²¹ Bruce Ackerman, *We the People* (London: Belknap Press of Harvard University Press, 1991).

²² J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Massachusetts; London: Harvard University Press, 1980), pp.4-5.

There have long been various styles in interpreting the constitution. Formalists insist that the meaning of texts is usually or always a simple matter of fact. The task of interpretation is to uncover that fact. Bork and Scalia represent the judges and scholars in the formalist tradition. As summarized by Robert H. Bork, the popular support for judicial supremacy rests upon the belief that the court is applying fundamental principles laid down by the American founding fathers.²³ In attacking judicial activism, Bork argues that legislation is far more likely to reflect the majority sentiment while judicial activism is likely to represent an elite minority's sentiment. Justice A. Scalia insists 'judges have no authority to pursue those broader purposes or write those new laws', and 'a text should be constructed reasonably, and contain all that it fairly means'.²⁴ This is, according to Justice Scalia, because the distinctive problem of constitutional interpretation is not that special principles of interpretation apply, but because the usual principles are being applied to an usual text,²⁵ and the objective of judicial inquiry is not what the framers intended, but what they said.²⁶ Therefore, the role of a judge is to look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law.²⁷

Contrary to this line of thinking, Dworkin argues for a morality-based third way in between legal positivism and natural law, for law is not a set of given data, conventions or physical facts, but what lawyers aim to construct or obtain in practice. Sunstein also argues that the conception of neutrality is implausible, because the

²³ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), p.16.

²⁴ A. Scalia, *A Matter of Interpretation: Federal courts and the Law* (Princeton, NJ: Princeton University Press, 1997), p.23.

²⁵ Ibid, p. 37.

²⁶ Ibid, p.16.

²⁷ Ibid, p.17.

meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles, and these are inevitably and always a product of substantive commitments.²⁸ Constitutional interpretation inevitably requires us to use principles external to the Constitution. In a way, both Dworkin and Sunstein agree that in the interpretation of a constitution, in particular in the so-called hard cases, there is little instruction either from the text itself or from previous principles. However, Dworkin invokes at this point the perspective of moral reasoning, focusing his argument on the unavoidable moral commitment of the judges in judicial practice.²⁹

The scholarly debate demonstrates the diverse understanding of the nature of a constitution and constitutional adjudication. Since a constitution is widely deemed to be a considered judgment of the people in the broad sense of commitment to a contract, the contradiction between judicial review and democracy has been debated for decades. In theory, for a modern written constitution is a result of the exercise of popular sovereignty, its recognition involves the most comprehensive mobilization of the public to express their views on the kind of government with which they want to live. The most important function of a constitution is to lay down the essential principles of a government. At the same time, a liberal democratic constitution must be based on the guarantee of the individual's freedom of expression, and a procedure for the will of the public to be expressed must be sufficiently considered. The liberal ideal and democracy are not in contradiction; the paradox can be fixed, as advocated

²⁸ Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993), p.8.

²⁹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977).

by Habermas, who claims that co-originality of democracy and rights is a philosophical, rational explanation of an ideal liberal democratic constitution.³⁰

The above discussion on the debate between Carl Schmitt and Hans Kelsen, and on the nature of constitutional adjudication in the United States, has shown that the nature of a constitution relates to not only legal and normative aspect. The tension between constituent power and constitutive power, between legal sovereignty and political sovereignty, has always served as the dynamic for the constitution to evolve. Public law is the normative structure concerned with those precepts of '*droit politique*' that establish and maintain public authority. Therefore, argued by Loughlin, 'the appropriate starting point must be to begin by treating constitutional law as a third order of the political'.³¹ Conflicts relating to the first order of the political provide the essence of the political; while the conduct of politics--the second-order--requires the virtue of prudence to be cultivated. Constitutional law pertains to establishing a framework through which the sovereign authority of the state can be recognised. The intrinsic political character sovereignty gives the political aspect of a constitution.

7.2 The concept of constitution in China

7.2.1 *The Constitution as the fundamental law of the state*

The Chinese word for 'constitution' --'xian fa'--has been used since ancient times. Originally it simply referred to the rules or regulations that provided how an

³⁰ Jurgen Habermas, 'Constitutional Democracy: paradoxical union of contradictory principles?' (2001) 29 *Political Theory* 766.

³¹ Martin Loughlin, 'Constitutional Law: the Third Order of the Political' in Nicholas Bamforth and Peter Leyland (eds.), *Law in a Multi-layered Constitution* (Hart Publishing: Oxford, 2003), p.27-51, 41.

organization was to be constituted. The modern idea of constitution was introduced to China at the beginning of twentieth century and has widely spread since then. In the PRC, the Constitution is usually referred to as ‘*gen ben da fa*’,³² and ‘*mu fa*’,³³ which explicitly reveals its status both in the legal system and political discourse.

The text of the Chinese Constitution is easily recognizable as an instrument comparable to the constitution of a Western country.³⁴ As a legal document of the highest authority, it devises the system of government and incorporates the fundamental rights of citizens. On the other hand, the Chinese Constitution also contains particular characteristics that reflect China’s own history and the complexities of the Chinese situation. In terms of substance and the political thinking behind the textual document, the Chinese Constitution presents a mixture of Western influences, Chinese history and politics, and the thinking of Chinese leaders. Since the Republican era (1911-1949), traditional Chinese philosophy on the transcendent nature of the emperor has been replaced by the belief that the people should be the source of power. This was widely acknowledged by Sun Yat-sen,³⁵ who insisted that, in order to accomplish a constitutional regime, the people should be educated first in

³² ‘*Gen Ben Da Fa*’ (根本大法) literally means the fundamental law of the highest authority.

³³ ‘*Mu Fa*’ (母法) literally means the mother law of all laws.

³⁴ Drawing on the historical experience of some countries, the United Kingdom still has no written constitution; all the acts adopted the Parliament are of the highest legal force. The constitution in the UK is composed by certain acts of Parliament, political conventions, and authorities and writings of prominent writers on the constitutional law. Recent years have seen certain constitutional changes in the UK. For instance, the Parliament passed the Human Rights Act 1998. See, Jeffery Jowell and Oliver Dawn (eds.), *The Changing Constitution* (6th edition, Oxford; New York: Oxford University Press, 2007). In the case of the USA, a written constitution precedes all the existence of the government (exactly coinciding with what Thomas Paine famously claims). The bill of rights is in the form of constitutional amendment. Given the strict requirements in the procedure, only 27 amendments have been officially adopted since 1789, when the US Constitution came into force. This might constitute one of the reasons for the American style of judicial review, i.e., the courts can review the constitutionality of legislation, although the development of judicial review in US history is much complicated.

³⁵ See, Julie Lee Wei, Ramon H. Myers and Donald G. Gillin (eds.), *Prescriptions for Saving China: Selected Writings of Sun Yat-Sen* (Stanford, Calif: Hoover institution press, 1994).

the Western value of democracy before they are entitled to introduce a constitutional regime.³⁶

The fundamentality of the written constitution has been commonly recognized as one of the most salient features of the Chinese Constitution. This fundamentality has been elaborated in Chinese constitutional theory from the following perspectives. Firstly, in substance, the Chinese Constitution embodies the nature of the state and its system of government, and reflects various political strengths of a society and guarantees citizen rights.³⁷ The basic principles of state and society are of a fundamental nature which reflects the main characteristics and directions of a country's political, economic and cultural life. It is observed that the constitution is the fundamental law of a state, because it is the legalized form of a democratic system and the reflection of the contrast between different social classes.³⁸ In the view of Mao Zedong, a constitution is a fundamental charter which is the recognition of democratic reality after revolutionary struggle.³⁹ Strongly influenced by Mao's thought, the Chinese Constitution of 1954 is said to be an 'epitome of the historical experience of more than a hundred years of heroic struggles by the Chinese people'.⁴⁰ It was designed to entrench the country's gradual transition towards socialist society and to celebrate the overthrow of the rule of imperialism and feudalism.

³⁶ Sun Yat-sen, 'The Three People's Principles and the future of the Chinese people: A speech given at a Tokyo gathering to celebrate the first anniversary of the publication of *Min Pao* on December 2, 1906', Julie Lee Wei, E-su Zen and Linda Chao (trans.), in Wei, Myers and Gillin (eds.), *Prescriptions for Saving China: Selected Writings of Sun Yat-Sen* (Stanford, Calif: Hoover institution press, 1994).

³⁷ Xu Chongde (ed.), *Zhongguo Xianfa* (中国宪法 Chinese Constitution) (Renmin University Press, 2nd edition, 1996).

³⁸ Wu Jialin (ed.), *Xianfa Xue* (宪法学 Study on the Constitution) (Beijing: Qunzhong Press, 1983), pp. 21-40.

³⁹ See, Mao Zedong, *Lun Xin Minzhu Zhuyi Xianzheng* (论新民主主义宪政 On New Democratic Constitutionalism) (Peking: Foreign Language Press, 1960).

⁴⁰ Liu Shaoqi, *Report on the Draft Constitution of the People's Republic of China* (Peking: Foreign Language Press, 1962).

Secondly, in a legal sense, the supremacy of the Chinese Constitution of 1982 is confirmed in its preamble, which declares that the Constitution is ‘the fundamental law of the state and has supreme legal force’ and requires ‘the people of all nationalities, all state organs, the armed forces, all political parties, all social organizations, enterprises and institutional units’ to ‘uphold the dignity of the Constitution and ensure its implementation’. Article 5 further requires that ‘no laws or administrative or local regulations may contravene the Constitution’, and ‘all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws’. This provision is widely considered as a watershed as the Chinese Communist Party determined at that time to rule the country through law, and divert the Party’s focus towards party administration and policy-formulation.

Thirdly, the Constitution in China distinguishes itself from other legislation in its strict procedure for enactment, adoption and amendment.⁴¹ For example, making a new constitution requires the solicitation of public opinion, including the general public and various organizations. During the constitution-making history of the PRC, all proposals for enacting a constitution were initiated by the Chinese Communist Party (CPC). It is not clear whether any other party or organization is allowed to make such a proposal. Given the nature of the Constitution, it seems that the amendment to the Constitution enables the CPC to adjust its policy to changing circumstances.

⁴¹ Law Faculty of the Renmin University, *Zhongguo Xinafa Jiaocheng* (中国宪法教程 Textbook on Chinese Constitution) (Renmin University Press, 1988), p.9.

The rigidity of a written constitution is best demonstrated in the restriction on the amendment procedure. Article 64 of the 1982 Constitution provides that on a proposal by the NPCSC or one-fifth of the deputies to the NPC, the NPC may adopt an amendment by a vote of more than two-thirds of all the deputies to the Congress. In contrast, laws and resolutions only require a simple majority vote. The number of institutions entitled to propose legislative bills is also much larger than in the case of amendment to the Constitution.⁴² However, the requirement of a two-thirds majority does not mean rigidity, considering the character of Chinese politics. Furthermore, according to reports on the previous four amendments to the 1982 Constitution,⁴³ these amendments were all proposed by the CPC.

Take the amendment to the Constitution in 2004 for example. The CPC established a group for constitutional amendment headed by Li Peng, then chairman of the NPCSC. The group drafted an opinion. After the general approval of the political bureau of the central committee of the CPC, this draft opinion was distributed within the party institutions to solicit opinions. Other democratic parties,⁴⁴ organizations and independent representatives, and law and economics experts were consulted. The central committee of the CPC subsequently formulated a recommendation. On 22

⁴² In the case of national legislation of the NPC, the following institutions may submit legislative bills to the NPC: the NPCSC, the State Council, the Central Military Commission, SPC, SPP, special committees of the NPC, or a delegation or a group of thirty or more deputies to the NPC.

⁴³ See, for instance, Tian Jiyun, *Guanyu Zhonghua Remin Gongheguo Xianfa Xiuzheng'an (cao'an) de Shuoming* (关于中华人民共和国宪法修正案(草案)的说明 Elaborations on the draft amendment to the Constitution of the PRC) on 9 March 1999; Wang Zhaoguo, *Guanyu Zhonghua Remin Gongheguo Xianfa Xiuzheng'an (cao'an) de Shuoming* (关于中华人民共和国宪法修正案(草案)的说明 elaborations on the draft amendment to the Constitution of the PRC) on 8 March 2004.

⁴⁴ China advocates a multi-political party system under the leadership of the Communist Party. Deng Xiaoping pointed out in 1979 at the second meeting of the fifth Chinese Political Consultative Committee these political parties had contributed to the democratic revolution and socialist country construction and they have already become a part of socialist workers and political coalition of pro-socialism patriotic and political force serving for socialism under the leadership of the CPC. In 1993, the amendment to the 1982 Constitution added: 'The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come'.

January 1999, the central committee of the CPC proposed the amendment to the Constitution to the NPCSC. The NPCSC, in accordance with its competence under Article 64 of the Constitution, proposed the (draft) amendment for NPC deliberation.

It is also true that a constitutional amendment was unavoidable when China began its reform and opening-up policy under which some of the previous tasks and ideology of the state needed to be replaced or accommodated to changing circumstances. In recent years' amendments to the Constitution, China have shown an intention of integration with the outside world on some universally shared values, such as the inclusion in the Constitution of the aim of building a country under the rule of law and the protection of private property.⁴⁵ At the same time, the amendments serve to remove barriers to economic growth and provide ideological guidance to the Party. In fact, Zheng Yongnian argues this might also be another test of the CPC leaders' efforts in ideology building.⁴⁶ From the perspective of elite politics, from the third generation onwards, the CPC leaders have to justify and strengthen their leadership through ideological construction. Only when the leaders succeed in enlisting this new ideology into the constitution of the Party, then the Constitution of the state, can the leadership finally find recognition.

In short, the fundamentality of the Constitution is exhibited in substance, in legal form and in its rigidity of amending procedure. It should be noted that although the Constitution in the Chinese legal system is of the highest authority, under the current

⁴⁵ In the 1999 amendment to the Constitution, a new paragraph was added to Article 5, which reads, 'The People's Republic of China governs the country according to law and makes it a socialist country under rule of law'. It was also added that 'The State protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over the individual and the private sectors of the economy'. See, Amendment to the Constitution of the PRC, adopted at the Second Session of the Ninth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 15 March 1999.

⁴⁶ Zheng Yongnian, *Chinese Communist Party as Organisational Emperor* (Routledge, 2010)

constitutional design, the practicality of ensuring the constitutionality of laws is in doubt. No distinction has been made between the power of constitution-making and national legislation by the NPC/NPCSC. The NPC as the highest state organ exercises not only a national legislative function, but is also responsible for amendment of the Constitution and supervision of the implementation of the Constitution.⁴⁷ Furthermore, although the NPC enjoys certain exclusive legislative functions,⁴⁸ the NPCSC enacts and amends all laws except those to be enacted and amended by the NPC.⁴⁹ When the NPC is not in session, the NPCSC may partially supplement and amend laws that the NPC has enacted, provided that these changes will not contravene the laws' basic principles.⁵⁰ Therefore the provisions in the Legislation Law on the exclusive legislative power of the NPC may not be practicable in terms of the NPC and its Standing Committee.

7.2.2 Constitutional review by the NPCSC

China's debates in recent years on supervision of the Constitution, and judicial protection of constitutional rights, have divided into two positions. One argues solidly within the framework that the current Constitution provides or tolerates. The other focuses on the fundamental principles and political theory underpinning a modern constitution in general, arguing that the legitimacy of a constitution is based on its protection of citizens' rights and its provision of the manner which the government is instituted.⁵¹

⁴⁷ Articles 62(1), 62(2), and Article 64 of the 1982 Constitution.

⁴⁸ Articles 7 and 8 of the Legislation Law of the PRC, adopted at the third session of the Ninth NPC on 15 March 2000.

⁴⁹ Ibid.

⁵⁰ Here there might be another problem of who will decide whether this has arisen. In reality, this situation has never occurred.

⁵¹ For the contrasting views among Chinese scholars, see e.g. Tong Zhiwei, 'Xianfa Shiyong Ying Yixun Xianfa Benshen Guiding de Lujing' (宪法适用应依循宪法本身规定的路径 The implementation of the Constitution should follow the route that the Constitution has provided) (2008)

The debate over constitutional review in China is different from the arguments in Western constitutional theory on the issue of judicial interpretation. In the light of the circumstances in China, the following questions require further consideration. First, whether constitutional norms are subject to review; second, whether constitutional norms are subject to judicial interpretation, and if so, the authority of this interpretation. The scope of constitutional review is directly linked to the ‘supervision’ of the constitution. The function of constitutional review in China also refers to maintaining the coherence of the legal system and removing any unconstitutional legislation or acts. In theoretical debates, questions are raised as to who is eligible to exercise this function of reviewing constitutionality, the SPC or the NPCSC.

Constitutional review, when it refers to review of the constitutionality of national legislation, i.e., NPC or NPCSC legislation, cannot exist in China due to the institutional design of the Constitution itself. The NPC and its Standing Committee are both the national legislature and the organs in charge of the implementation of the Constitution. The NPC and its Standing Committee have official roles in safeguarding the Constitution: the NPCSC takes the function of interpreting the Constitution and the law;⁵² both the NPC and the NPCSC are responsible for supervising the enforcement of the Constitution.⁵³ Although the current constitution makes a distinction between ‘interpretation of the constitution’ and ‘interpretation of the laws’, both vested in the NPCSC, no interpretation has been issued in the name of

6 *Zhongguo Faxue*; He Weifang, *Sifa de Linian yu Zhidu* (司法的理念与制度 Concepts and Institutions of Judicature) (Beijing: University of Politics and Law Press, 1998).

⁵² Article 67 of the Chinese Constitution of 1982.

⁵³ Article 62 (2) and Article 67 (1) of the 1982 Constitution.

constitutional interpretation in China.⁵⁴ Nonetheless, it is one of the functions written into the Constitution and has been mentioned in official documents as an approach for adjusting the Constitution to changing circumstances because the procedure is more flexible than constitutional amendment.⁵⁵ However, so far there is no procedural provision on the exercise of constitutional interpretation.⁵⁶

The current Constitution and laws have established a hierarchy of legality. The NPC has the power to alter or annul any inappropriate laws enacted by its Standing Committee; the NPCSC has the power to annul any local decrees and administrative regulations which contradict the Constitution and laws.⁵⁷ Although the State Council (i.e., the Central People's Government, CPG) and provincial level congresses are also entitled to alter or annul any inappropriate rules or regulations in accordance with their competence, it is evident that only the NPC and the NPCSC exercise their function in the name of constitutional review.

Vertically speaking, the NPCSC has a constitutional role regarding the central-local relationship in terms of review of the constitutionality of any local decrees. The provincial people's congresses are vested with the power to legislate on local issues. This local regulation only has legal effect within the boundary of the province; in the

⁵⁴ It is arguable whether the NPCSC's interpretation of the Hong Kong Basic Law shall be counted as 'constitutional interpretation'. This will be examined in the last section of this chapter. It is also argued that the decision of the NPC on the constitutionality of the Basic Law, issued together with the Basic Law, should be considered as an interpretation of the Chinese Constitution. See, Wang Zhenmin, *Zhongyang Yu Tebie Xingzhengqu Guanxi: Yizhong Fazhi Jiegou de Jiexi* (中央与特别行政区关系: 一种法治结构的解析) (Beijing: Qinghua University Press, 2002), p.325.

⁵⁵ See, e.g. 'Zhongguo de Fazhi Jianshe' (中国的法治建设 Efforts and Achievements in Promoting the Rule of Law in China), white paper published by the Chinese government, 2008.

⁵⁶ Wang Zhaoguo, *Guanyu Zhonghua Renmin Gongheguo Xianfa Xiuzheng'an (cao'an) de Shuoming* (关于中华人民共和国宪法修正案(草案)的说明 Elaboration on the drafting amendments to the Constitution of the PRC), addressed to the second session of the tenth NPC on 8 March 2004.

⁵⁷ Article 62 and 67 of the 1982 Constitution.

legal hierarchy of mainland China, it is inferior to the laws passed by the NPC/SC, and the administrative regulations passed by the State Council. It is also required by law that local regulations should be reported to the NPCSC and the State Council for record and they are subject to supervision and review.⁵⁸

It is argued by a Chinese scholar that the reason for the lack of constitutional interpretation in China is that ‘in our country, as yet there is no specific procedure for the NPCSC to exercise its power to interpret the Constitution, so this type of interpretation has not been practiced’.⁵⁹ It has been contended that discussions on the interpretation issue have generally failed to distinguish between the exercise of the constitutional power to interpret laws and the power to interpret the Constitution and supervise its enforcement.⁶⁰ Furthermore, it should be noted that, although in theory the Constitution is the highest legal norm, its enactment, amendment and interpretation are the responsibilities of the NPC, which is also in charge of the state legislative function. This arrangement does not appropriately distinguish a constitution from other legislation. It could lead to serious conflicts of interest and degrade the status of the constitution.

Although in recent years the NPCSC has proceeded with circumspection in exercising its function of supervising unconstitutional activities, and has provided a more detailed procedure for filing records (Bei’an) to ensure the consistency of laws

⁵⁸ Articles 63-70 of the Legislation Law of 2000.

⁵⁹ Cai Dingjian, ‘Constitutional Supervision and Interpretation in the People’s Republic of China’, (1995) 9 *Journal of Chinese Law* 219-245

⁶⁰ Sophina Woodman, ‘Legislative Interpretation by China’s National People’s Congress Standing Committee: A power with roots in the Stalinist conception of law’, in Hualing Fu, Lison Harris and Simon N.M. Young (eds.), *Interpreting Hong Kong Basic Law: The Struggle for Coherence* (Palgrave MacMillan, 2007).

with the Constitution,⁶¹ the NPCSC is reluctant to exercise constitutional review. A leading case was a written request for review of the constitutionality of regulation of police powers, after *Sun Zhigang* was detained and beaten to death by the police on the basis that he was not carrying his identity card and was thus treated as a vagrant.⁶² Three legal scholars, in accordance with the provisions in the Legislation Law that organizations and citizens can make a written request to the NPCSC for interpretation, submitted a written request to the NPCSC asking for review of the constitutionality of the regulations.⁶³ In the end, the NPCSC passed a law on the same matter and as a natural result, the administrative regulations lapsed. The NPCSC deliberately avoided a possible case of constitutional review.

7.2.3 The constitutional role of the courts in China

Judicial interpretation in China is restricted in its authority and scope. It is well known that judicial interpretation enjoys a lower status than legislative interpretation in China. According to the '1981 Resolution',⁶⁴ the Supreme People's Court (SPC) will exercise its judicial interpretation in cases where specific application of laws and decrees in court trials is raised. This interpretation, however, is not ultimate. If interpretation by the SPC and the SPP are at variance in principle, an application shall be submitted by the SPC and the SPP to the NPCSC for interpretation or

⁶¹ The NPCSC added one office below the Legislative Affairs Commission in May 2004 to deal with the filing record of administrative regulations and local decrees and local regulations. On 19 December 2005, the Council of Chairmen of the NPCSC passed two procedures for reviewing the regulations, local decrees, local regulations, and judicial interpretations.

⁶² For scholarly discussion on Sun Zhigang case, see, for instance, Keith J. Hand, 'Using Law as Righteous Purpose: the Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China', (2006-07) 45 *Columbia Journal of Transitional Law* 114-195.

⁶³ Three young legal scholars, named Xu Zhiyong, Teng Biao, and Yu Jiang submitted a formal petition to the NPCSC requesting for a review of the constitutionality of the relevant administrative regulation with the Constitution, 14 May 2003.

⁶⁴ *Resolution by the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law*, adopted at the nineteenth meeting of the Standing Committee at the fifth NPC on 10 June 1981.

decision. In addition, according to the ‘Supervision Law’,⁶⁵ the interpretations issued by the SPC and the SPP shall be filed for the record with the NPCSC within thirty days after they are announced to the public.⁶⁶ This law also provides that certain governmental organizations,⁶⁷ if they consider the judicial interpretation to be inconsistent with the law, can formally request an interpretation by the NPCSC.⁶⁸ If the Law Committee and relevant special committee of the NPC consider the interpretation issued by the SPC or the SPP contradictory to the law, and the SPC or SPP refuses to amend or repeal it, the NPCSC is entitled to demand the SPC or SPP to amend or repeal certain interpretations, or sponsor a legislative interpretation itself, and report it to the Council of Chairmen to put it on the agenda for NPCSC deliberation.⁶⁹

Judicial interpretation in China is also restricted in its scope. One example is that administrative regulations are interpreted by the State Council or relevant ministries, while the local legislations passed by the local people’s congresses are to be

⁶⁵ *Law of the PRC on Supervision by the NPCSC at all Levels* (adopted on the twenty-third session of the Standing Committee of the tenth NPC on 27 August 2006)

⁶⁶ *Sifa Jieshi Bei'an Shenchu Gongzuo Chengxu* (司法解释备案审查工作程序 Working Procedure on Filing Record and examination of Judicial Interpretation), passed by the chairman committee of the tenth NPCSC on 20 December 2005.

⁶⁷ Article 32 of the ‘Supervision Law’ provides: ‘Where the State Council, the Central Military Commission or the standing committee of the people’s congress of a province, autonomous region or municipality directly under the Central Government, deems that the interpretations for specific application of law, made by the Supreme People’s Court or the Supreme People’s Procuratorate, contravene the provisions of the law, or where the Supreme People’s Court deems that such interpretations made by the Supreme People’s Procuratorate contravene the provisions of the law, or vice versa, they made submit a written request to the Standing Committee of the National People’s Congress for review, the working office of which shall send the matter to the special committee concerned for review and comment’. It is also stipulated in this article that where state organs other than the ones mentioned above, public organizations, enterprises and institutions or citizens deem that judicial interpretations to contradictory with the law, they may submit to the NPCSC written suggestions for review.

⁶⁸ Although this could be a way to address any injustice caused by courts, it is nonetheless not helpful in establishing the courts’ authority in China.

⁶⁹ *Wei Yuan Zhang Hui Yi* (委员长会议 Council of Chairmen) of the NPCSC consists of the Chairman, Vice Chairmen and Secretary-General. It is responsible for dealing with the major routine work of the NPCSC.

interpreted by the provincial people's congresses.⁷⁰ In addition, with respect to administrative law in China, there is a distinction between abstract administrative acts, which refer to the law-making function of the administration, and concrete acts which refer to the daily administrative act. The courts are not allowed to challenge the constitutionality of administrative regulation itself.⁷¹

Furthermore, there are few rules and regulations on how the judiciary should exercise this interpretation function. According to one stipulation issued by the SPC in 1997,⁷² the deliberation of the judicial committee of the SPC is a legal procedure for the adoption of a judicial interpretation. Divisions directly under the SPC which are responsible for adjudication are entitled to make a proposal, through negotiation with the research division, and submit it to the deputy president of the SPC for approval. This is the only procedural requirement. In practice, the outputs of judicial interpretation are split into three main categories: interpretation, provision and reply.⁷³ Concerning the question of how to implement a certain law or how a certain law should be applied, it should use the format of 'interpretation'; if the SPC needs to make certain provisions related to guidance for adjudication, it should use 'provision'; in other replies to provincial level supreme courts, or the military courts of the People's Liberation Army, the SPC should use 'reply'.

⁷⁰ *Resolution by the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law*, adopted at the nineteenth meeting of the Standing Committee at the fifth NPC on 10 June 1981.

⁷¹ See, s.12 (2) of *The Administrative Litigation Law of the PRC* (adopted by the seventh NPC on 4 April 1989 and took effect from 1 October 1990).

⁷² *Zuigao Remin Fayuan Guanyu Sifa Jieshi Gonguo de Ruogan Guiding* [1997] 15 (最高人民法院关于司法解释工作的若干规定 Certain Stipulations on Judicial Interpretation issued by the Supreme People's Court of the PRC).

⁷³ In general, *Jie Shi* (解释 interpretation), *Da Fu* (答复 reply), *Gui Ding* (规定 provision) are adopted according to the circumstances. All the judicial interpretations will be published in the Gazette of the Supreme People's Court and have binding force on lower courts.

Nonetheless, recent years interesting cases have emerged together with scholars advocating courts take a more aggressive attitude in constitutional cases. Among them, two cases have attracted much attention from the media and academics in terms of their implications for paving the way for constitutional review in China. The first case is *Li Huijuan*. Li, an intermediate court judge, repealed a local regulation adopted by the People's Congress of Henan Province on the grounds that this local legislation contradicted with a national legislation.⁷⁴ In this case, the question was which law should be applied to calculate the price of corn. According to the 'Seeds Law' adopted by the NPCSC, the price should be calculated in the market price; while the local regulation passed by the People's Congress of Henan stated that the price should be calculated as the price 'guided by the government'. The presiding judge, Li Huijuan, decided that the local regulation was invalid since it was inferior to the law passed by the NPCSC.

In another case, the applicant, *Qi Yuling*, requested compensation for infringement of the right to education. The Supreme People's Court, upon an enquiry for clarification from the High Court of Shandong Province, replied in a judicial interpretation that educational rights are fundamental citizens' rights protected by the Chinese Constitution.⁷⁵ This has been called the first constitutional case in China and

⁷⁴ For the documents discussed here, see, *Henan Sheng Renmin Daibiao Dahui Changwu Weiyuanhui Yu Ren Chang Fa[2003] 18 Hao Wenjian* (河南省人民代表大会常务委员会豫人常法[2003]18号文件 Document of the Standing Committee of the People's Congress of Henan Province [2003] 18) and *Henan Sheng Luoyang Shi Zhongji Remin Fayuan (2003) Luo Min Chu Zi Di 26 Hao Minshi Panjueshu* (河南省洛阳市中级人民法院(2003)洛民初字第 26 号民事判决书 Civil Judgment by the Intermediate Court of Luoyang City, Henan Province).

⁷⁵ See, *Zuigao Renmin Fayuan Guanyu yi Qinfan Xingmingquan de Shouduan Qinfa Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Mingshi Zeren de Pifu* 最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育权的基本权利是否应承担民事责任的批复 Reply by the Supreme People's Court on Whether the Defendant Should Take Responsibility When Basic Education Right Protected by the Constitution Was Infringed Through the Way of Violating Citizen's Name Right), (2001) *Fa Shi* (法释 Legal Interpretation) 25. It should be noted that on 18

has triggered vehement debate on whether the judiciary is eligible to assume the interpretation function protecting citizen rights, and whether this should be an alternative route toward constitutionalism in China. This interpretation referred to the rights guaranteed in the Constitution and it might pave the way to protection of individual rights through the courts.

In terms of the constitutional role of the courts in China, both cases are significant. The judge in the first case conducted a review of legislation on the basis of constitutionality. Considering the current Chinese political system, this is rare and almost unthinkable. The second case is widely considered as one of the milestones in the debates on China's route towards constitutionalism. The reason is simple: in China, the Constitution has no direct legal force in the courts;⁷⁶ it must be implemented through other laws or regulations. In terms of citizen rights and freedoms, so far, there are few laws or regulations on the basis of which the public can claim rights. If the courts are able to rely on the Constitution to adjudicate, this would be a significant step.

In China, one cannot pursue protection on the grounds of infringement of rights guaranteed in the Constitution. Although the 2004 amendment to the Constitution has incorporated the clause 'the state respects and protects human rights' into the

December 2008, the Supreme People's Court issued its decision declaring twenty-seven judicial interpretations before the end of the year 2007 void and not applicable. The list includes the SPC's reply on the *Qi Yuling* case. Some scholars view this abolition of interpretation of *Qi Yuling* as signaling that the SPC is functioning politically, and tends to confine itself within an inferior position to the NPC and its Standing Committee. For discussions, see, (2009) 3 Fa Xue (法学 Legal Science), (2009) 4 Fa Xue (法学 Legal Science).

⁷⁶ The SPC made clear in a reply in 1955 that it was not appropriate to rely on the Constitution as guidance in criminal cases. The Constitution is a fundamental law and it should be implemented through other laws. See, Zuigao Remin Fayuan Guanyu zai Xingshi Anjian Zhong Buyi Yuanyin Xianfa Zuo Lun Zui Ke Xing de Yiju de Fuhuan (最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函), 30 July 1955.

Constitution to guarantee its implementation at the constitutional level,⁷⁷ civil liberties in China are only safeguarded in various election laws, and Laws of Assemblies, Processions and Demonstrations.⁷⁸ So far there is no national law in the field of freedom of the press, religion and political association; these areas are only covered by various administrative regulations.⁷⁹

It is still hard to imagine the courts taking on the responsibility to interpret the Constitution in China. Scholars who are against a role for the judiciary in the interpretation of constitutional rights have argued that constitutional adjudication would be in conflict with the fundamental political system in China, and thus could be considered to be unconstitutional itself. For instance, Jiang Shigong claims that public power must be stipulated unequivocally in law. Since the Chinese Constitution has stipulated that the NPCSC exercises the function of interpreting and supervising the Constitution; these stipulations have rejected the judiciary's power to interpret the Constitution.⁸⁰

In summary, despite the desire of the NPCSC to ensure the authority of the Constitution, it should be pointed out that this supervision of the Constitution by the

⁷⁷ Wang Zhaoguo, *Guanyu Zhonghua Renmin Gongheguo Xianfa Xiuzheng'an (cao'an) de Shuoming* (关于中华人民共和国宪法修正案(草案)的说明 Elaboration on the drafting amendments to the Constitution of the PRC), addressed to the second session of the tenth NPC on 8 March 2004.

⁷⁸ *Zhonghua Renmin Gongheguo Jihui Youxing Shiwei Fa* (中华人民共和国集会游行示威法 Laws of the PRC on Assemblies, Processions and Demonstrations), passed by the NPCSC on 31 October 1989.

⁷⁹ See, White paper published in 2008 by the Chinese government, *Zhongguo de Fazhi Jianshe* (中国的法治建设 Efforts and Achievements in Promoting the Rule of Law). It should be noted that according to Article 8 of the *Legislation Law*, affairs of 'mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person' shall only be governed by law. They are within the exclusive legislative power of the NPC/SC.

⁸⁰ See, Jiang Shigong, 'Shui Lai Jieshi Xianfa? --Cong Xianfa Wenben Kan Woguo de Eryuan Xianfa Jieshi Tizhi' (Who interprets the Constitution?--The dual systems of constitutional review in China analyzing from the text of constitution), (2003) *Zhongwai Faxue* 513; Jiang Shigong, 'Xianfa Sifa hua de Beilun' (Paradoxes in Discourse of Constitutional Adjudication) (2003) 2 *Zhongguo Shehui Kexue*.

NPCSC remains unrealistic in protecting citizens' constitutional rights against infringement from unconstitutional activities due to the procedure and function of the NPCSC. But the argument that the judiciary is the appropriate institution to exercise this constitutional jurisdiction lacks support from current constitutional principles.

7.3 The status of the Hong Kong Basic Law within the Chinese constitutional order

Article 31 of the Chinese Constitution stipulates that the system of a SAR is to be provided by the NPC by law. The theoretical implication of this arrangement challenges the conception of constitution and raises the question of right explanation of this constitutional relationship between Hong Kong and the PRC, in particular, of how to address the status of the Basic Law in the Chinese constitutional order in light of the general theory of sovereignty and constitution.

The nature of the Basic Law in the context of the PRC constitutional order is a key question to understanding the interpretation of this law. Should the Basic Law be deemed as one of the national laws of the PRC, or as a constitutional arrangement made between the PRC and the HKSAR, or rather as equivalent to an amendment to the Chinese Constitution? This issue relates to general constitutional theory, the Chinese understanding of the constitution, and the special nature of the Basic Law itself.

In the final report on the relationship between the Basic Law and the Constitution in 1987,⁸¹ the Consultative Committee for the Basic Law highlighted four related questions on this matter. The first was the constitutional basis of 'one country, two

⁸¹ *Final Report on the Relationship between the Basic Law and the Constitution* prepared and issued by the special group on the relationship between the Central Government and the SAR, Consultative Committee for the Basic Law of the HKSAR, 10 February 1987.

systems' and the Basic Law; the second was the relationship between the Joint Declaration and the Basic Law; the third was the status of the Basic Law in the Chinese legal system; the final question was the applicability of the Chinese Constitution to Hong Kong and whether any conflict between the two documents could arise.

This report concluded that the function of the Basic Law was similar to that of a constitution. This conclusion was based on two grounds. First, the intention of the NPC in enacting the Basic Law was to maintain the existing system in Hong Kong, including the previous political system developed under British jurisdiction. The Basic Law takes the place of the Letters Patent and Royal Instructions as the constitution of the SAR in grounding the legitimacy of the political and social system of the SAR. Secondly, a comparison between the Constitution and the Basic Law in reference to the legal structure reveals that they are both constitutional in nature, performing the function of a constitutional document.⁸²

So far, the following concerns have been expressed in terms of the status of the Basic Law in the Chinese constitutional order. The first question concerns the constitutionality of the Basic Law itself, which aims at accommodating a capitalist system in Hong Kong within the Constitution of the PRC. Although China has promised that the socialist system would not be practised in the HKSAR and that Hong Kong's previous capitalist system and way of life shall remain unchanged for fifty years, legal scholars still have doubts. The question arose as to what limits might apply to the broad powers of the NPC to establish a new political-economic

⁸² Ibid, *Final Report on the Relationship between the Basic Law and the Constitution*, pp.3-4.

system in a SAR—does the Chinese Constitution authorize the NPC to create any system it deems fit?

The second related issue is how the system of a SAR is incorporated into the Chinese governmental system. Prior to the diplomatic negotiations between the Chinese and British governments on the question of Hong Kong, Article 31 of the Chinese Constitution of 1982 had provided that ‘the State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of specific conditions’. In theory, Article 31 of the Chinese Constitution only serves as the legal basis for the establishment of a new SAR within the sovereignty of the PRC. This is a unique stipulation in the form of the state, since it only provides that a new form of sub-state government shall be established and its fundamental systems will be provided in a basic law, without listing in detail what the system should be. By comparison, the Chinese Constitution has a separate section on organs of self-government of ethnic autonomous regions (EAR). The distribution of governmental power has been stipulated in detail in terms of central-local relations, including the legislative power of the people’s congress of an EAR,⁸³ the power of an EAR in administering its finances,⁸⁴ and in independent administration of education, science, culture, public health affairs in its respective area.⁸⁵

The third issue is the status of the Basic Law in the overall Chinese legal system. As mentioned above, Chinese scholars would rather consider the Basic Law as

⁸³ Article 116 of the 1982 Constitution.

⁸⁴ Article 117 of the 1982 Constitution.

⁸⁵ Article 119 of the 1982 Constitution.

ordinary legislation in the Chinese legal system since it belongs to the category ‘national law’ legislated by the NPC.⁸⁶ It was particularly emphasized by a key member of the Drafting Committee for the Basic Law (BLDC) that the Basic Law will be legislation enacted pursuant to the Constitution of the PRC, and the Basic Law is not itself a ‘constitution’.⁸⁷ It is argued that although the Basic Law will have the highest legal effect among Hong Kong’s laws, it will neither be constitutional in character, nor, in any way, be placed on an equal plane with the Constitution of the PRC. Furthermore, the drafting process of the Basic Law had demonstrated its statutory character of the Basic Law. After all, Hong Kong status will be conferred upon it by the national constitution. It could not be otherwise, for China is a unitary country.⁸⁸ Therefore, this has become an issue of accommodating a lower-level constitutional arrangement within the framework of the highest legal order of a state, rather like Tierney’s argument on accommodation and integration as a way to manage national diversity in a plural- national state.⁸⁹

The final question is the applicability of the Chinese Constitution to the HKSAR. This is both a theoretical and a technical question. Mainland scholars insist that due to the nature of state, there can only be one Constitution in the PRC. The Chinese Constitution is applicable to Hong Kong in general. Technically it is hard to point out which provisions of the Chinese Constitution should be applied in Hong Kong; however, provisions dealing with the basic political system, such as the creation of

⁸⁶ 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’, *The Basic Law Reference Paper* (7), prepared by the Secretariat of the Consultative Committee for the Basic Law.

⁸⁷ Ibid.

⁸⁸ Ibid. p.2.

⁸⁹ Stephen Tierney, ‘Giving with One Hand: Scottish Devolution within a Unitary State’, (2007) 5 (4) *I•CON* 730-753.

the governmental system of the PRC, should be applicable.⁹⁰ It is argued that in relation to provisions of the national government system, national defence, foreign affairs, and the national constitutional and legal interpretative system, the Chinese Constitution shall be applicable to the HKSAR.⁹¹ The counter-argument is that the Basic Law is an exception to the Chinese Constitution and the Basic Law itself excludes the application of the Constitution.⁹² It is argued that the Basic Law is based on Article 31 of the Chinese Constitution which is a '*proviso*' of the Constitution. According to the principle that special legislation is superior to ordinary legislation, it can be claimed that as long as the Basic Law is consistent with Article 31 of the Chinese Constitution, it is not necessary to attend to other provisions of the Constitution.

To some extent, efforts have been made by the NPC to reduce the concerns of contradiction between the Chinese Constitution and the Hong Kong Basic Law. The NPC eventually adopted a resolution confirming the consistency of the Basic Law with the Chinese Constitution.⁹³ The Hong Kong Basic Law also explicitly defines that national laws shall only be applied to the HKSAR after they are listed in Annex III following legal procedures. Furthermore, in certain circumstances, the Basic Law Committee, composed by six members from the HKSAR, including legal experts,

⁹⁰ Xiao Weiyun, 'Zhonghua Remin Gongheguo Xianfa Yu Xianggang Jibenfa de Guanxi' (The Relationship between the Constitution of the PRC and the Hong Kong Basic Law), in Xiao Weiyun, *Lun Xianggang Jibenfa* (Essays on the Hong Kong Basic Law) (Beijing: Peking University Press, 2003), pp.44-72.

⁹¹ Wang Zhenmin, 'A Decade of Hong Kong Basic Law Actualization' in Ming K. Chan (ed.), *China's Hong Kong Transformed: Retrospect and Prospect beyond the First Decade* (Hong Kong: City University of Hong Kong Press, 2008), 155-172.

⁹² Yash Ghai, 'The Imperatives of Autonomy: Contradictions of the Basic Law' in Johannes Chan and Lison Harris (eds.), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005), pp.29-44.

⁹³ *Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (adopted at the third Session of the seventh National People's Congress on 4 April 1990).

must be consulted. For instance, Articles 17, 18, 158 and 159 of the Basic Law make it a condition that the NPC/SC must consult the Basic Law Committee before making final decisions. More importantly, Article 159 of the Basic Law restricts the capacity of the NPC to amend the Basic Law, providing that ‘no amendment to this law shall contravene the established basic policies of the PRC regarding Hong Kong’.⁹⁴

In this way, the central authorities confine themselves to a certain terrain: affairs related to the central authorities, or to the demarcation of the boundaries between the SAR and the central authorities. However, this is a sovereign decision in order to enable the central authorities to achieve their goals. The Chinese government never accepts the argument that the power of the central authorities is confined to foreign affairs and defence. The Basic Law clearly states that the NPC authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the Basic Law.⁹⁵ The HKSAR may enjoy other powers granted to it by the NPC or the Central People’s Government.⁹⁶ The Basic Law also explicitly expressed that all the powers are derived from Chinese sovereignty. More importantly, the central authorities have reserved the essential powers of interpretation and amendment to the Basic Law.⁹⁷

Our next task is to examine whether the Basic Law can be entrenched through

⁹⁴ Article 159 of the Hong Kong Basic Law reads, ‘no amendments to this Law shall contravene the established policies of the People’s Republic of China regarding Hong Kong’.

⁹⁵ Article 2 of the Basic Law.

⁹⁶ Article 20 of the Basic Law.

⁹⁷ Article 158 and 159 of the Basic Law.

judicial practice in the post-1997 period. As discussed in previous chapters, the interpretation power of the NPCSC has long been criticized by some Hong Kong scholars on the grounds that it is exercised *outside* the Hong Kong Basic Law and has jeopardized the independence of the Hong Kong judiciary. On the other hand, if the Basic Law is only treated as a national law in the PRC, the guarantee of the high degree of autonomy of the HKSAR might be cast in doubt.

In my view, the Basic Law does possess a certain constitutional character. The Basic Law is of the highest legal authority in the SAR; it is the source of governmental legitimacy in the SAR; and its provisions protect human rights. In substance, the Basic Law is not only a domestic law whose legitimacy comes from sovereignty; it is also an actualization of China's promise in the Joint Declaration. As discussed in Chapter III, the Liaison Group between the Chinese and British governments involved cooperation during drafting the Basic Law. The whole drafting history involved unprecedented procedures, such as the solicitation from opinions of the general public twice in Hong Kong, each lasting several months. In Chinese law-making history, this procedure has only been adopted in making the Constitution.

However, it is very hard to see how the Basic Law can be entrenched through a judicial process of interpretation of this law in the HKSAR. Although the courts of the HKSAR treat the Basic Law as a free-standing constitution and adopt a rights-based approach to its interpretation, little distinction has been made between statutory construction and constitutional interpretation. The courts of HKSAR insist that as a judiciary in a common law legal system, the common law approach must be adhered to, including the application of doctrines of statutory construction. At the

same time, the courts of the HKSAR seek to emulate the courts of United States of America, positioning themselves as the guardian of the Basic Law.

Secondly, the procedure for selection of judges almost excludes the participation of sovereign authorities of the PRC. The Basic Law provides that the Chief Executive appoints the judges in accordance with the recommendation of a committee of judicial practitioners composed of nine members, including three judges, the Secretary for Justice of the HKSAR Government, the chairmen of the Bar Association and Law Society, and prominent social figures. The work of this committee is never revealed to the public. The Chief Executive has the power to appoint the so-called prominent members; however, at least five other members are from the same legal training background. It is also not clear whether the Chief Executive can reject the committee's recommendation. The Central People's Government subsequent appointment of the Chief Judge of the High Court and the Chief Justice of the CFA becomes more or less a rubber stamp.

More importantly, according to the Basic Law, the Central Authorities of the PRC reserve two essential powers: interpretation and amendment of the Basic Law. In other words, the constitutional relationship between the HKSAR and China cannot exclude the participation of China. If the distinction between constituent power and constituted power, between legitimacy and legality is recognized, the Basic Law, as a realization of Chinese sovereignty, inherently bears the dimension of political relationship between Hong Kong and the PRC. Therefore it shall not lie within the terrain of Hong Kong to decide exclusively on the meaning of the Basic Law.

The Basic Law is taken as a constitution in Hong Kong, but if it *is* a constitution, the political dimension of a constitution shall not be overlooked. The Basic Law indeed is an expression of the relationship between Hong Kong and its host state. The interpretation exercised by the Hong Kong judiciary, therefore, must be restricted in the sense that Hong Kong, no matter how high the degree of autonomy it has, must exercise within its legitimacy as a local government. In the meantime, as argued in previous chapter VI, the PRC's claim of sovereignty must also take consideration of opinions in Hong Kong since this is what exactly sovereignty involves.

In summary, the crucial issue here is the constitutional and legal basis of the enactment of the Basic Law and its status in the Chinese constitutional order. Debates on the constitutionality of the Basic Law itself, and the application of the Chinese Constitution within the SAR, have exactly demonstrated the different understanding of the most basic but fundamental concept of sovereignty and constitution. This question of the relationship between the Basic Law and the Chinese Constitution is itself a reflection of diversity in understanding the issue of sovereignty and 'residual power', as discussed in the previous chapters. The theory of relational sovereignty is illuminating in understanding the nature of the Hong Kong Basic Law. The tension can only be reduced by involving two sides of the constitutional relationship between the HKSAR and the PRC.

7.4 Reflections on China's road towards constitutionalism

Although the constitutional review practice in the HKSAR has no immediate effect on mainland China, the unique arrangement of the Basic Law does offer the Chinese side an opportunity to reflect on its conceptual basis for sovereignty-based argument and explain its governmental system using knowledge acceptable to both sides of the

constitutional relationship. This part discusses the debates over constitutional adjudication and whether the judiciary is suitable to take on the responsibility of constitutional review in China.⁹⁸

To Western scholars, constitutionalism is ‘one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse’.⁹⁹ Traditionally constitutionalism is linked to the limitation of government. Carl Friedrich describes constitutionalism as centrally concerned with the limitation on government actions and contrasts constitutional government with arbitrary government power. The classic Friedrichian definition of constitutionalism, in a slightly different form, is ‘an institutionalized system of effective regularized restraints on governmental action’.¹⁰⁰ McIlwain insisted that ‘constitutionalism has one essential quality; it is a legal limitation on the government’.¹⁰¹

Generally speaking, the touchstone of constitutionalism is the concept of limited government under a higher law. Constitutionalism can refer to a complex of ideas, attitudes and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law. It is

⁹⁸ According to the decision of the NPCSC on the interpretation issue in 1981, both the Supreme People’s Court and the Supreme People’s Procuratorate are bestowed with the power of interpretation in the process of application of law. The term ‘judiciary’ in China usually entails the courts and the procuratorates. The term ‘judicial interpretation’ shall include interpretations issued by both the SPC and the SPP. This section mainly discusses the role of the court, in particular, the SPC in the constitutional context of the PRC.

⁹⁹ Thomas C. Grey, ‘Constitutionalism: An Analytic Framework’, in J. Roland Pennock and John W. Chapman (eds.), *Constitutionalism: Nomos XX* (New York University Press, 1979).

¹⁰⁰ See, Roland J. Pennock, John W. Chapman (eds.), *Nomos, XX. Constitutionalism* (New York: New York University Press, 1979).

¹⁰¹ Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (New York: Cornell University Press, 1947), p.21.

commonly recognized that the concept of the constitution itself embodies both the element of democracy and the protection of individual rights. A constitution is a realization of popular sovereignty in that the people deliberately, by consent, choose their government.

In traditional constitutionalism, the enforcement of constitutional limits ultimately depended upon the goodwill of public officials, for traditional constitutionalism was external to the institutions it limited, thus constitutionalism could not by itself, and in a way that was internal to the polity, guarantee that its requirements were met. In tandem with the emergence of the secular state and the rise of popular sovereignty, this traditional constitutionalism was transformed when the theory of absolute sovereignty was supplanted by that of popular sovereignty, under which government should be based on the consent of its governed.

The hallmark of modern constitutionalism is its reliance upon formal limitations on political power that is directly tied to popular sovereignty. More importantly, the government itself is established by rights-bearing individuals who believe the power of government should be under their control. There are some other evolutions in Western constitutionalism. Many states in their constitutions explicitly provide that some specific norms are not subject to change unless in accordance with extremely strict procedures.

In recent years, some positive changes have emerged with regard to strengthening the authority of the Constitution and the protection of citizen rights. The

judicialization of the Constitution (*Xianfa Sifa Hua*)¹⁰² is under discussion among Chinese scholars, judges and lawyers.¹⁰³ Recent scholarly debates have demonstrated that the issue of the compatibility of Western constitutional values with the Chinese political and social system has also been aired. The view that the independence of the judiciary should be enhanced is gaining currency, mainly among legal professionals.

Despite the restrictions of the current political system, Chinese scholars' debate on constitutional adjudication has never come to an end. Since 2001, there have been strong voices in academia as well as among practitioners that the judiciary in China should take the responsibility to defend constitutional rights and play a role in safeguarding a unified constitutional system in China. As argued by Huang Songyou, then a senior judge of the Supreme People's Court,¹⁰⁴ it is the courts' duty to apply the Constitution as paramount law and to rule inconsistent legislation invalid.¹⁰⁵ He claims it is a necessary part of the nature of a judiciary that judges interpret and apply laws according to their sincere understanding and it is also an essential component of

¹⁰² This term was first used by Hu Jinguang, a professor of constitutional law at the Renmin University, Beijing. In an article of 1993, 'An Exploration of the Inevitability and Feasibility of Judicialization of the Constitution', Hu introduced the term 'judicialization' reinforcing the argument that the court system could make progress on a limited form of judicial review, or constitutional rights enforcement, without the creation of an independent constitutional review mechanism. However, it is Wang Lei's book, *Xianfa de Sifahua* (Judicialization of the Constitution, or Constitutional Law Applied in Courts) (Beijing: Chinese Politics and Law University Press, 2002) that drew the most attention from scholars, made this term more often cited and triggered a debate on this important part of constitutional law: the role of the courts in implementation of a constitution, and its legitimacy, institutional design and philosophical foundations.

¹⁰³ For Chinese scholars' works, see e.g. Chen Yunsheng, *Xianfa Jiandu Sifahua* (Judicialization on Constitutional Supervision) (Beijing: Peking University Press, 2004); Wang Lei, *Xianfa de Sifahua* (Constitutional Law applied in Courts) (Beijing: Chinese Politics and Law University Press, 2002); Zhou Wei, *Xianfa Jiben Quanli Sifa Jiuji Yanjiu* (Research on the Remedy of Basic Constitutional Liberties) (Beijing: China Public Security University Press, 2003).

¹⁰⁴ Huang Songyou was removed from his post in the SPC in 2008 and was later convicted of corruption. See, official website of the Xinhua agency: <http://www.xinhuenet.com>, 29 October 2008, or the official website of the NPC or the SPC on appointments and removals from office. Nothing related to his administrative work or the judicial work he was charged with during the time he held office in the SPC was mentioned.

¹⁰⁵ See, e.g. Huang Songyou, 'Xianfa Sifahua Jiqi Yiyi' (Judicialisation of the Constitution and its Implications), *Renmin Fayuan Bao* (人民法院报 Newspaper of the People's Courts), 13 August 2001

judicial power.¹⁰⁶ The SPC as the apex of the judicial organs usually understands the legislative intention and state policy best, hence its function in maintaining the consistency of the legal system and judicial innovation.¹⁰⁷

For example, it is advocated that direct or indirect application of the Constitution should be introduced in the field of private relations to resolve disputes related to constitutional rights between citizens and consequently to protect citizen's basic rights.¹⁰⁸ Cai Dingjian claims that the current implementation mechanism in China can be divided into three types of power: supervision power of the Constitution; interpretation of the Constitution and judicialization. The interpretation power vested in the NPCSC should not be understood to exclude interpretation of the Constitution by other branches of government; it just refers to the highest (ultimate) authority on the same matter.¹⁰⁹ Interpretation and application of the Constitution by the judiciary is not prohibited, although the judicial interpretations are inferior to the NPCSC's interpretation. The Constitution should be a fundamental instrument to protect citizens' rights and the last remedial method for individual rights.¹¹⁰ Paul Gewirtz holds a similar view. He argues that 'the most basic question is whether the PRC Constitution is "law" at all ... my specific point here is that constitutional interpretation in the PRC will not develop into something significant and something similar to constitutional interpretation in other countries until there is a decisive

¹⁰⁶ Huang Songyou, 'Sifa Jieshi Quan: Lilun Luoji yu Zhidu Jiangou' (司法解释权: 理论逻辑与制度架构 Judicial Interpretation Function: Theoretical Reasoning and Systemic Structure) (2005) 2 *Zhongguo Faxue* (中国法学 China Legal Science) 3-14.

¹⁰⁷ Ibid.

¹⁰⁸ Cai Dingjian, 'Zhongguo Xianfa de Siyouhua Zhilu (Privatization of the Chinese Constitution), (2004) 5 *Zhongguo Shehui Kexue* (Chinese Social Sciences) 2-13.

¹⁰⁹ Ibid.

¹¹⁰ Cai Dingjian, 'Guanyu Shenme Shi Xianfa' (On What is [a] Constitution), (2002) 1 *Zhong Wai Fa Xue* 92-101.

crystallization of the idea that the PRC constitution is law and indeed “superior” law’.¹¹¹

Western scholars have proposed some useful perspectives. In terms of the process of constitutionalism, Peerenboom points out the characteristic of the beginning of ‘nascent but limited constitutionalism during the authoritarian period, including the development of constitutional norms and the strengthening of institutions with limited judicial independence’,¹¹² and that legal reforms in these Asian states began to empower legal institutions and give rise to constitutional norms, although in most cases, judicial independence remained limited, until after democratization.¹¹³ More generally, he claimed, the Constitution has provided the basis for a rule of law government in which state actors must act in accordance with law and be held accountable for their decisions.

Issues have been raised as to whether the case of Hong Kong has set a new level to the Chinese constitutionalism. In other words, does the case of Hong Kong within the PRC suggest a multi-layered constitutionalism? What is the role of Hong Kong in building the Chinese constitutionalism? These questions were raised after the examination of the constitution review practice in the HKSAR in Chapter IV, and the interpretations conducted by the NPCSC in Chapter V. After further theoretical analysis on the concept of sovereignty and constitution, it was suggested that the answer would become clearer.

¹¹¹ Paul Gewirtz, ‘Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics’ (2001) 31 *Hong Kong Law Journal* 200-223, 208.

¹¹² Randall Peerenboom, ‘Law and Development of Constitutional Democracy in China: Problems or Paradigm?’ (2005-06) *Columbia Journal of Asian Law* 185.

¹¹³ *Ibid*, p.204.

As indicated in Chapter VI and this Chapter, I follow the concept of sovereignty as a relational concept and the constitution as the normative structure concerned with the creation and on-going dynamics of public authority. Re-conceptualising Chinese official perception of sovereignty is necessary, as explained in the previous Chapter; on the other hand, the court-centred conception of constitutional law in the HKSAR fails to address the public law relationship between legality and legitimacy since the normative aspect of the constitution presupposes its political dimension.

The challenges arising in the Hong Kong/PRC relationship share certain similarities with the European debate when ‘contemporary sub-state nationalist challenges as an implicit demand for a rethinking of orthodox state-centred assumptions concerning both the nature of *demos* and the empirical and normative dimensions of constituted authority within plurinational states’,¹¹⁴ and concerns with the adaptability and flexibility of the conception of sovereignty have been raised. The Hong Kong issue, however, has little to do with protection of local culture, or ethnicity. It is created for the essential political reason to accommodate another system under Chinese sovereignty. Constitutional pluralism in China suggests not merely a regime of central-local relations; it indicates the existence of normal/special rules.

Under the arrangement of the Basic Law, the interpretation of this law is vested in the NPCSC, and the NPCSC authorises the courts of the HKSAR to interpret this law during adjudication. In this way, the power of interpretation is allocated and divided.

¹¹⁴ Stephen Tierney, ‘“We the Peoples”: Constituent Power and Constitutionalism in Plurinational States’ in Martin Loughlin and Neil Walker (eds.) *The Paradox of Constitutionalism* (Oxford University Press, 2007), p. 229-245, 231.

However, this does not in any sense mean a division of sovereignty. The Hong Kong issue is not concerned with a local demand for a high degree of autonomy, nor does it involve identity/loyalty. The accommodation of Hong Kong within the PRC sovereignty is only one of the means by which China deals with demands from pluralisms.

In short, my observation is that, for the constitutional practice in the HKSAR to be sustained in the new constitutional order under the Chinese sovereignty, both sides have to make compromises in practice and try to reach common ground in theory. If rightly understood, the principle of ‘one country, two systems’ does not suggest a separate constitutional order; there is no ‘one sovereignty, two constitutions’ but ‘one sovereignty, two legal orders’.

Conclusion

This chapter has demonstrated that both in Western theory and in the Chinese context, the special character of a written constitution is recognized. A constitution distinguishes itself from other positive law in terms of the relations it intends to regulate: that of the state and individuals in a society. This distinction between a constitution and other law requires that constitutional interpretation needs to justify itself at the level of political theory.

This chapter finds that in China, the fundamentality of the Constitution is not fully guaranteed in law and institutional design. The current Chinese system lacks a distinction between legislative interpretation and constitutional interpretation. The constitutional review by the NPCSC is not sufficient and the role of courts in China is restricted in authority and scope. The dual identity of the NPC makes the

protection of the higher legal status of the Constitution impossible. In particular, the supremacy of the Constitution must be distinguished from the supreme status of the NPC.

This chapter concludes that the Hong Kong Basic Law is best seen as a restriction made by the sovereign itself, and therefore also a sovereign decision. Positioning the issue of Hong Kong in the broader picture of the PRC, the principle of ‘one country, two systems’ does not suggest two constitutional orders; the high degree of autonomy that the HKSAR enjoys needs to be accommodated with a single national Constitution. A modern constitution represents the highest authority; hence it should be the highest image of sovereignty. The Basic Law derives from a sovereign decision, and has to evolve within the framework that this sovereignty decides.

The original intention of ‘one country, two systems’ to accommodate capitalism in the SAR and socialism in the mainland under Chinese sovereignty has gradually been transformed into an interpretation on whether the Basic Law should be regarded as an entrenched constitution. Hong Kong might be given a separate legal system, in the sense of the reservation of a common law legal system, legal profession, institutions and autonomy in the administration of justice; however, this system is not constitutionally entrenched. Apart from the normative dimension of a constitution, the political dimension, i.e., the constitution as the third order of political can help us resolve the theoretical difficulties. Simply put, the principle of ‘one country, two systems’ does not suggest a separate constitutional order; there is no ‘one sovereignty, two constitutions’ but ‘one sovereignty, two legal orders’. The SAR cannot entrench itself; the constitutional relationship between the HKSAR and the PRC involves evolution through political prudence exhibited by the political participators. In interpreting the Basic Law, the courts of the HKSAR take on a political function,

although they always claim that independence of the judiciary is the cornerstone of Hong Kong's success and the social values that the SAR upholds.

Finally, in an era of pluralistic modes of constitutional discourse, the Hong Kong case could be a very good vehicle for examining the reconcilability of the Western model of constitutionalism with the Chinese route towards constitutionalism. It makes us reflect on the theoretical basis for Chinese constitutionalism and achieve a better understanding of the contemporary Chinese political and legal systems.

8 Chapter VIII

Conclusion

This thesis examines the constitutional relationship between the Hong Kong Special Administrative Region (HKSAR) and the People's Republic of China (PRC) under the principle of 'one country, two systems'. It investigates the sustainability of constitutional review practised in the HKSAR within the political and legal system of the PRC in the post-1997 era. Theoretical questions regarding the compatibility of the practice of constitutional review in Hong Kong have been raised, particularly with respect to the constitutional interpretation of the Hong Kong Basic Law.

This thesis has undertaken a detailed examination of the status of the HKSAR within the Chinese legal and political system, observed from a 'Hong Kong-within-PRC' perspective. Against the background of over a decade of implementation of the Basic Law, this thesis brings together two opposing sides of the argument regarding the nature of the constitutional relationship between the HKSAR and the PRC. One is grounded in the claim of sovereignty, asserting that the Basic Law is itself a norm decided by the sovereign authority and that the high autonomy of the HKSAR, which is guaranteed by the Basic Law, is derived from this sovereignty and is, in the end, an exception to the norm of the PRC. On the other side, it is argued that the Basic Law has crystallized the promise of the Chinese government, entrenched in the Basic Law itself, that the basic policies cannot be changed.

This thesis argues that an all-or-nothing approach to examine the Hong Kong/PRC relationship can be replaced by an alternative approach. This alternative approach suggests that both mainland China and Hong Kong should make compromises towards their conceptions of sovereignty and constitution. Research has been conducted in three related aspects. First, it reviews the constitutional framework of the PRC and Hong Kong respectively. Second, it examines the role for Hong Kong judiciary and the NPCSC in interpreting the Basic Law. Third, theoretical analysis on the concept of sovereignty and constitution, in light of Western theories and Chinese thinking, has been conducted. The thesis concludes that the Hong Kong Basic Law suggests a new type of constitutional relationship between the PRC and the HKSAR. The Basic Law serves as a basic framework through which the Central Authorities of the PRC and Hong Kong are enabled to evolve in an on-going process of constitutional norm formation. The constitutional relationship between the HKSAR and the PRC can only proceed by re-conceptualising sovereignty and constitution: recognition of relational nature of sovereignty from the Central Authorities, and recognition of the political dimension of the Basic Law from the HKSAR. The principle of ‘one country, two systems’ does not suggest a separate constitutional order; there is no ‘one sovereignty, two constitutions’ but ‘one sovereignty, two legal orders’. The constitutional relationship between the HKSAR and the PRC involves evolution through political prudence exhibited by the political participators of both sides.

8.1 Locating the issue of Hong Kong within the system of the PRC: the challenge of constitutional accommodation

In this thesis, I examined, first, the governmental system of the PRC and Hong Kong in order to explain the political circumstances that led to the resumption of

sovereignty by the PRC over Hong Kong. It began with two chapters on the PRC and Hong Kong respectively, offering a detailed explanation of each constitutional, legal and political system. The legal and political systems of China are examined in Chapter II, horizontally and vertically, in particular focusing on the distribution of government power and the role of Constitutions in it. In Chapter III, I have, first, reviewed the history of the settlement of the question of Hong Kong in order to highlight the key features of pre-1997 governance, and pointed out that the system underwent transformation between 1985 and 1997, when representative government and the BORO were introduced to Hong Kong. Through the study of the institutional relationship within the HKSAR and its relationship with the Central Authority, this chapter demonstrated the dynamics of political development in the SAR, which focuses on the fundamental changes in Hong Kong's constitutional order. It highlights some uncertainties of the political system of Hong Kong, in particular, regarding the dual accountability of the Chief Executive, and the executive-led doctrine and executive-legislative relationship in the Basic Law and the political dynamic for Hong Kong's democratic future.

As shown in Chapter II and III, in order to accommodate the territorial pluralism raised by the principle of 'one country, two systems', the Chinese Constitution of 1982 has introduced Article 31 which authorizes the NPC to legislate for the to-be-created SAR. Both the drafting period and the later implementation of the Hong Kong Basic Law have encountered struggles for integrating a high degree of autonomy of Hong Kong into the Chinese sovereignty.

The accommodation of the system of the SAR into the Chinese sovereignty is unique both in form and in substance. The Basic Law itself is a legal form of

guarantee provided by the Chinese Government for the continuity of the capitalist system after China resumed the exercise of sovereignty of Hong Kong. As a fundamental document, it grants a high degree of autonomy to the SAR and delimits the relationship between the Central Authorities of the PRC and the Region. The Basic Law, which was drafted by the NPC, albeit with participation from drafters from Hong Kong, is taken by the PRC as a form that realises the principle of ‘one country, two systems’. Resuming the exercise of sovereignty over Hong Kong, one of the world’s key financial centres with its own banking system, currency, and independent policy-making in finance and taxation, undoubtedly brings with challenges in governance and in the theory of sovereignty.

Challenges have been raised regarding how to address the Hong Kong issue in the Chinese conception of sovereignty and constitution. There are divergent understandings of the Basic Law and this difference in understanding the nature of the Basic Law leads to further divergence of the understanding of Hong Kong-China relations. With regard to the relationship between ‘one country, two systems’, Chinese scholars have articulated the idea that ‘one country’ and ‘two Systems’ are not equal in status; the first always takes precedence over the latter, since one unitary country is the precondition of developing and protecting the autonomy of its special administrative region. It has been suggested that this constitutes the foundation of the Hong Kong Basic Law as well. On the other hand, from the Hong Kong perspective, the Basic Law is more seen as a firewall against the socialism and party-state practised in the PRC. The rule of law is highly appraised as one of the cornerstones of the success of Hong Kong in the past, and has been a foundation of Hong Kong constitutional principles. The doctrine of the rule of law, as explained in Hong Kong

by scholars and politicians, means the rule of the Basic Law. To a certain extent, the Basic Law has become a sacred text, and its interpretation belongs to the courts of Hong Kong, because the independence of judiciary is retained and guaranteed in the Basic Law. The result of this logic apparently would be that Hong Kong courts, especially the Court of Final Appeal, shoulder the role of guardian of Hong Kong's rule of law and the authority of Basic Law.

Locating the Hong Kong issue within the overall picture of the PRC, two points require to be clarified. First, we need to address the autonomy of the HKSAR in a sovereignty discourse and ask, in particular, whether the HKSAR has a residual power and whether the PRC can justify itself reserving all the powers except those that have already been explicitly authorized to the HKSAR. The issue of Hong Kong attracts more work in Chinese theory over the dichotomy between unitary and federalist states, which is far from answering the question that the SAR has put forward convincingly.

Second, examination on the status of Basic Law in the Chinese constitutional order is necessary: in particular, does the Basic Law acquire the status of a constitution? Can the Basic Law be entrenched through constitutional adjudication by the Hong Kong courts? What is the relationship between the Basic Law and the Chinese constitution?

Owing to different understandings of the nature of the Basic Law, tensions over the interpretation of the Basic Law have gradually become a main area of debate. It is commonly accepted in Hong Kong that the essential role of the judiciary is to maintain the principles and parameters of the Basic Law. On the other hand, according to the Basic Law, the NPCSC is endowed with the ultimate power to

interpret and amend the Basic Law. Chapter IV and V examined in detail how the Basic Law has been interpreted by the courts of Hong Kong and the NPCSC.

8.2 The role Hong Kong judiciary and the NPCSC in struggle for authority of the Basic Law

In order to address the nature of the settlement of the question of Hong Kong, I have explored the implementation of the Basic Law through the political and legal disputes on the interpretative function of the Hong Kong courts and the NPCSC respectively. Chapter IV and V together have illustrated the different approaches undertaken by the Hong Kong judiciary and the NPCSC in interpreting the Basic Law. More importantly, I have tried to demonstrate that the Basic Law, once brought into force, starts to serve as a conceptual basis for the development of an evolving process of new constitutional norm-formation. This could be said to be the second-order legislation of the Basic Law.

Chapter IV expounded the constitutional jurisprudence developed by the Hong Kong judiciary since 1997. It investigated the significance of several landmark cases in the history of Hong Kong's constitutional development. The post-1997 era saw the growing role of the judiciary in Hong Kong with respect to interpretation of the Basic Law. After further examination of the interpretation of this law, it is evident that Hong Kong sees the Basic Law as a constitution entrenched through constitutional adjudication, and the power of the central authorities of the PRC should be confined to that has been explicitly provided in the Basic Law. However, this interpretation, grounded on the principle of judicial independence guaranteed in the Basic Law, faces the limitation in that the courts of the HKSAR overlook two aspects. One is the

restriction on Hong Kong's autonomy under Chinese sovereignty; the other is the status of the Basic Law in the Chinese system.

Interpretations of the Basic Law delivered by the NPCSC have been examined in Chapter V. It also analysed the interpretative function of the NPCSC in the Chinese legal system. The status of law in the Chinese legal system is determined by the level of the political institution in the state system, which is exactly the reason why the Basic Law is argued to be in the category of national law under the Chinese legal system: it is a law drafted, enacted and promulgated by the NPC. Chinese scholars argue that the Hong Kong Basic Law is a national law enacted under the Chinese Constitution and is an extension of the Chinese Constitution to the HKSAR. Accordingly, it should not be detached from the Chinese Constitution and allowed to develop in a completely different way.

It has been demonstrated in Chapter V that China insists the power of interpretation of the Basic Law by the NPCSC derives from the Chinese Constitution, and this interpretation has the same legal effect as the legislation. Its legal basis lies in the fundamental political system of the people's congresses. Under the political system of China, the interpretation of the NPCSC is deemed to be part of the legislation function. The interpretations of the Basic Law produced by the NPCSC since 1999 demonstrate that China will not hesitate to show its sovereign authority over Hong Kong when it comes to the issue of national interests even if it faces criticism as a result. Although Chinese officials and scholars claim that China has no greater

interest in Hong Kong apart from maintaining its stability and prosperity,¹ it is also in China's interest not to be influenced by the system of the HKSAR.

Having considered the specific situation of mainland China and Hong Kong, questions concerning the compatibility of the two legal systems have been raised. The interpretation of the Basic Law, as have shown in Chapter IV and V, has become an issue that defines the functions of political institutions between the HKSAR and the Central Authorities of the PRC, thus a matter of delineation of political power within a state, and a constitutional question at a state level. Therefore, it is necessary to address the issue at a more fundamental level.

8.3 Development of thesis in the context of sovereignty and constitution

I have argued that the confusions on the interpretation of the Basic Law can only be resolved by undertaking conceptual analysis of two fundamental concepts: sovereignty and constitution. The norm of the Basic Law is not fixed; it evolves through an on-going process in which the participators in Hong Kong and mainland China define the norms through interpreting the Basic Law. Only by acknowledging the relational nature of sovereignty, and the political dimension of a constitution, can we explain correctly the relationship between the Hong Kong Basic Law and the Chinese Constitution.

This thesis takes the questions of sovereignty and constitution as its central focus. In particular, it asks whether there are legitimate and sufficient grounds for China's

¹ Geping Rao and Zhenmin Wang, 'Hong Kong's "One Country, Two Systems" Experience under the Basic Law: Two perspectives from Chinese legal scholars', (2007) 16 *Journal of Contemporary China*, 341-358. For speeches on this issue by Chinese senior officials, see, e.g. speech of Wu Bangguo on the seminar commemorating ten years of implementation of the Hong Kong Basic Law, *Xinhua News*, 12 June 2007. In this speech, Wu made clear his view that the capitalist system and policy practised in the HKSAR is conditioned by the principle of 'one country' where the socialist system is practised in the majority place. Wu is currently serving in the post of chairman of the NPCSC. He is also a member of the standing committee of the political bureau of the Chinese Communist Party.

often-cited principle that the autonomy of Hong Kong is authorized by the NPC, or for the Hong Kong claim that the high degree of autonomy of the HKSAR is guaranteed in the Basic Law and that the Basic Law is entrenched as a constitution for Hong Kong through the judicial practice of constitutional review. This exploration of the theoretical aspect of the Hong Kong-PRC relationship tried to answer, first, whether the case of Hong Kong has already changed the nature of the unitary state. I sought to explain, secondly, the nature of the Basic Law within the Chinese constitutional order, and its relation with the Chinese Constitution. After examination of the concept of sovereignty and state, a conclusion on the constitutional relationship between the HKSAR and the PRC is then drawn.

Hence, the final two chapters of this thesis, in the light of the general theory of sovereignty and constitution, examined the Chinese rhetoric of sovereignty and the nature of a constitution in China. More specifically, this thesis further explores the implications of China's conception of sovereignty and constitution in understanding the constitutional relationship between Hong Kong and the PRC.

Chapter VI examined the general theory of sovereignty and China's traditional thought on sovereignty. In particular, it considered how the concept of sovereignty helps in understanding the challenges brought by the principle of 'one country, two systems'. This chapter has shown that the necessary condition of the Western concept of sovereignty was missing in imperial China. In contrast with Western theory of sovereignty, the concept of sovereignty in China has been primarily used in the sense of emphasizing state independence, rebuttal of interference from other countries, and the determination of maintaining a unitary country.

In terms of the status of Hong Kong within Chinese sovereignty, I find theoretical difficulties in defending both the Chinese concept of sovereignty and Hong Kong's claim to 'residual power'. On the face of it, the high degree of autonomy of Hong Kong restrains Chinese sovereignty; self-limitation is actually one way of realization of sovereignty. However, China's assertion of sovereignty based on the unitary form of state, without further elaboration of the theoretical aspect of this special constitutional arrangement, will not result in consensus with Hong Kong in a modern world. From the perspective of China, it is still facing a re-conceptualization of the principle of 'one country, two systems' as a pluralistic conception of Chinese sovereignty, taking into consideration issues of China's central-regional relations, regional identity and local autonomy in a centralized state. Since the dispute on the issue of residual power did not suggest much on the form of government, nor the constitutional arrangement between the PRC and its SAR, the Hong Kong issue can only be fully addressed and developed in a constitutional discourse.

The paradoxical nature of the relationship between the Basic Law and the Chinese Constitution has been addressed in Chapter VII. Western public law theory helps us better understand the dual nature of a constitution: its normative and political dimensions. As the third order of the political, a constitution evolves alongside the practice of politics. As discussed in previous chapters, the Hong Kong Basic Law bears a dual nature from the beginning: it actualizes the high degree of autonomy which was initially promised by the Chinese government in the Joint Declaration into a legal form. On the other hand, it realizes the NPC's constitutional responsibility in Article 31 of the 1982 Constitution to provide a basic system for a SAR that the state may establish when necessary.

As shown in Chapter VII, the Chinese Constitution—as the apex of Chinese legal system—is asserted to be the legal basis for the Basic Law. Article 31 of the 1982 Constitution of the PRC provides a legal basis for the establishment of a new SAR. This is a unique stipulation since it only states that a new form of a sub-state government shall be established and its fundamental systems will be established in a basic law, without delimiting the boundary between the high degree of autonomy and sovereignty in the Constitution itself. This chapter concludes that Article 31 has brought normative change to the 1982 Constitution of the PRC; it is equivalent to a constitutional amendment and introduces a nascent and unique mode of central-local relationship. At the same time, the normative changes provide a framework within which further development of a new autonomy becomes possible. The autonomy bestowed on the SARs substantially accommodates another fundamentally distinct social and legal system. The Basic Law itself is seen as serving as a conceptual basis for both Hong Kong and the PRC to evolve in a constitutional discourse.

After analysing the unique nature of the Basic Law, this chapter drew the conclusion that the meaning of the Basic Law can only be found in an evolving process in which both Hong Kong and the PRC play an essential part. The principle of ‘one country, two systems’ does not suggest a separate constitutional order; there is no ‘one sovereignty, two constitutions’ but ‘one sovereignty, two legal orders’. The constitutional relationship between the HKSAR and the PRC can only evolve through political prudence exhibited by political participators.

The implementation of the Hong Kong Basic Law can be seen as an evolving process. Since the Basic Law has been put into force from 1 July 1997, it has started to serve as a conceptual basis for the development of an evolving process of new constitutional norm-formation. The most essential account shall be the evolving rule-formation process, which might include interpretations of the Hong Kong Basic Law by the NPCSC, and those by the courts of Hong Kong. This could be conceived as the second-order legislation of the Basic Law. It is acknowledged that the basic requirement for a legitimate and workable constitution is consensus among its participators. However, in the case of Hong Kong/PRC, basic consensus still needs to be worked out in terms of understanding Hong Kong's status in the constitutional order of the PRC under the arrangement of 'one country, two systems'.

First, the Chinese conception on sovereignty is under demand to make necessary adjustment. From the perspective of the PRC, it needs to re-conceptualize the principle of 'one country, two systems', taking into consideration China's central-regional relations, and regional identity and local autonomy in a centralized state. As indicated in Chapter VI and VII, by recognising the relational aspect of the concept of sovereignty, the correct understanding of the Chinese sovereignty and the autonomy of the HKSAR shall not prevent Hong Kong from participating in the norm-formation of the Basic Law. Chinese sovereignty must undertake a reconceptualization that is conducive to the integration of the voice of Hong Kong being taken.

Second, Hong Kong has to recognise the political dimension of the Basic Law and put itself in a position within the PRC constitutional order. As indicated in Chapter

VII, Hong Kong is not able to justify the status of the Basic Law as an entrenched constitution by way of constitutional jurisdiction. The role of the NPCSC which represents the central authority's power to exercise the function of constitutional interpretation shall not be excluded from the Hong Kong system.

Looking into the future, the issue of Hong Kong poses challenges to Chinese government's capacity of governance and China's conception of sovereignty and fundamental law of a constitution. At the same time, it has been pointed out in Chapter VII that China is still feeling its way towards constitutionalism. Constitutional review in China is very much restricted both in scholarly debates and in practice. The constitutional role of the NPC as both constitution-making and national legislature, and the role of the NPCSC as both national legislature and the institution to interpret the constitution and law, seem to suggest that constitutional review of national legislation is unworkable by the NPCSC itself. The status of the judiciary under the people's congress system as examined in chapter II, and the status of judicial interpretation by the Supreme People's Court, indicate that the extremely restricted role of the SPC in the Chinese constitutional discourse. Furthermore, as we can see from Chapter II, the constitution in China is first considered as political declarations of the orientation of the state, a legal form of the Party's ideology and policy, political confirmation of citizen's liberty, and institutional design of political institutions.

Although currently we hardly see any convergence between Hong Kong based constitutionalism grounded in the principle of judicial independence with that of mainland China, the issue of Hong Kong does require mainland China to reflect and conceptualize its theory of sovereignty to meet the contemporary challenges. This

reconceptualization can only be done by recognizing the relational nature of sovereignty, and by accepting Hong Kong's voice in an open process. The Basic Law, as a normative expression of the political relationship, will continue to evolve due to its inherent tension.

In summary, this thesis has analysed the constitutional status of Hong Kong within a broader system of the PRC after the transfer of sovereignty in 1997, from a legal-political perspective. The status of the Hong Kong Basic Law within the constitutional order of the PRC has demonstrated that the Basic Law is better seen as a restriction made by the sovereign itself, and therefore as a sovereign decision. In an era of constitutional pluralism, the case of Hong Kong could be a very good example to explore the form of state and foundation of a constitutional order in China. It also offers us a perspective to reflect on the fundamental theoretical issues in order to achieve a better understanding of the contemporary Chinese political and legal systems.

The Basic Law is both a wedge separating the two systems and a bridge that connects the HKSAR and the mainland with the objective to 'maintain the metaphorical and institutional distance', as well as 'assert sovereignty and achieve unity'.² This chapter has shown that, instead of adding complexity to China's route towards constitutionalism, the challenge of the Basic Law offers the PRC a better chance to reflect on its route towards constitutionalism.

The conclusion can be drawn that the Hong Kong Basic Law represents a new constitutional relationship between Hong Kong and the PRC in which neither of the

² Peter Wesley-Smith, 'Law in Hong Kong and China: The Meshing Systems' (1996) *Annals of the American Academy of Political and Social Science* 106.

two sides is able to maintain its previous doctrines and principles without recognizing fundamental changes. I have argued that the Basic Law implies a new type of constitutional relationship between the PRC and the HKSAR. Under this unique relationship, the Basic Law provides a framework through which both the Central Authorities of the PRC and Hong Kong are able to evolve in an on-going process of constitutional norm-formation. The essential features of the Basic Law mirror those of a written constitution in which certain terms are fixed although more are left blank for the participants to determine in an evolving process. Similarly, the norm that defines the relationship between Hong Kong and China is not fixed; the content of this relationship is continuously developed through the framework of the Basic Law and ultimately determined through the interpretation of this law.

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