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RESEARCH ARTICLE

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On the Constitutional Foundations of Hong Kong

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Abstract Hong Kong law is characterized by a mixture of legal sources and traditions, originating from the constitutional government-based structure in the mid-1800s to the new laws, which were promulgated at the beginning of the 20th century. Since Hong Kong's return into the People's Republic of China in 1997, the development and forms of the Hong Kong Special Administrative Region Laws have been influenced by the Constitution of the People's Republic of China of 1982, the Sino-British Joint Declaration of Hong Kong issues of 1984 as well as the Basic Law of the Hong Kong Special Administrative Region of 1990. The government of China continues to undertake measures, promoting a high degree of autonomy within the Hong Kong as well as its political stability and economic prosperity. All these measures contribute to the promotion of the rule of law and unification of China.

Keywords China's Constitution of 1982, Sino-British Joint Declaration, Basic Law of Hong Kong, high degree of autonomy

1 Introduction

For more than one century, Hong Kong had been under the rule of the United Kingdom (the "UK"). In 1842, Hong Kong Island was permanently ceded to the UK by the Qing government under the *Treaty of Nanking*. Parts of the adjacent Kowloon Peninsula and nearby Stonecutters Island were ceded to the UK by the *Convention of Peking* in 1860. Various adjacent lands, known as the New Territories (including New Kowloon and Lantau Island) were then leased to the UK for 99 years under the *Convention for the Extension of Hong Kong Territory*

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in 1898. Until then, the UK occupied the entire island of Hong Kong.[1] Because the 1898 Treaty expired on June 30, 1997, China and Britain conducted frequent negotiations concerning the transfer of Hong Kong beginning in the 1980s. On July 1, 1997, Hong Kong was returned to China as a Special Administrative Region (the "SAR").

This paper discusses the basic structure and some main issues concerning these constitutional instruments of Hong Kong, as well as the document itself; both as a British colony and, since 1997 as a SAR of China. After a short description of the situation from around the middle of the 19th century up to the beginning of the 20th century, the constitutional law of Hong Kong as a SAR of China is dealt with in further detail.

Moreover, this paper will present and examine the differences between the Chinese legal system and other legal systems, the three main bodies of law that currently play an important role for Hong Kong's constitutional law, i.e., the Constitution of the People's Republic of China of 1982, the Joint Declaration of the Government of the People's Republic of China (the "PRC") and the Government of the UK of 1984, and the Basic Law of the Hong Kong SAR of 1990. Finally, the high degree of autonomy preserved and enjoyed by Hong Kong in terms of the SAR will also be discussed.

2 The Source of Hong Kong Constitutional Law during the British Occupation

Source of law is "something (such as a constitution, treaty, statute, or custom) that provides authority for legislation and for judicial decisions; a point of origin for law or legal analysis."[2] In its form, the law of Hong Kong shares certain fundamental characteristics with the common law; it also combines several kinds of law with the English common law as its core content.[3] Its origins include statutory law, common law, equity, customary law and international law. The source of constitutional law in Hong Kong, as to be discussed below, consists of both the above-mentioned forms and origins of law.

2.1 The Orders Concerning Hong Kong as the Colony of the UK

On April 5, 1843, Queen Victoria and the Privy Council issued the *Hong Kong*

[1] Yuankai Xiao, 中英关系与香港问题 (Sino-British Relation and the Question of Hong Kong), (5) 西欧研究 (Journal of Research of West Europe) 13–14 (1992).
[2] Bryan A. Garner ed., *Black's Law Dictionary* (9th edition), West Publishing Co. (St. Paul), at 1523 (2009).
[3] Jinfeng Zhuang, 香港法简论 (Introduction of the Laws of Hong Kong), Shanghai Academy of Social Science Press (Shanghai), at 52–67 (1989).

Charter,[4] declaring Hong Kong and its adjacent lands to be the colony of the UK. On the next day, the British government sent a letter to Henry Pottinger, the first governor of Hong Kong (the "Governor"). This letter, known as *Instructions to Sir Pottinger*, ordered the addressee to organize the Hong Kong government and delegated him with the legislative power.[5] *The Hong Kong Charter* and *Instructions to Sir Pottinger* were the earliest official documents that certified Hong Kong to be a British colony. On February 4, 1861 and October 20, 1898, the British Queen and the Privy Council issued the *Kowloon Order in Council* and *New Territories Order in Council*, declaring that the New Territories and the southern part of Kowloon Peninsula were also under the colonial rule of Britain.[6] On December 27, 1899, the British Queen issued a new order, abolishing Article 4 of the *New Territories Order in Council*. Kowloon, which once belonged to China, was transferred to the rule of the British administration in Hong Kong.[7]

2.2 The Source of Hong Kong Constitutional System

The Colonial Regulations in 1841 set forth the governing principles for the Governor.[8] The regulations were issued by the Privy Council, making specific prescriptions on issues such as financial business, official commissions, the age of officials, professional practice, governmental uniforms, diplomatic manners, etc.

The Colonial Laws Validity Act in 1865 set the rules of general restriction for laws in the colony.[9] *The Letter's Patent* issued on February 17, 1917 and *Gazette of Hong Kong Government* on April 20, 1917 can be deemed as the constitution of Hong Kong at that time.[10] Until 1917 the orders sent by the name of the British Queen to the Governor since *the Hong Kong Charter* in 1843 formed relatively complete legal documents, which established the legal basis for the Hong Kong colonial system.[11] Compared with *The Colonial Laws Validity Act,*

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[4] G. B. Endacott, *An Eastern Entrepôt*, Her Majesty's Stationery Office (London), Document no. 42 (1964).

[5] Xueren Zhang, 香港法概论 (An Introduction of Hong Kong Laws), Wuhan University Press (Wuhan), at 15 (1996).

[6] *British Foreign and State Papers*, vol. 91, 1039–40.

[7] See Zhang, fn. 5 at 16.

[8] Norman Miners, *The Government and Politics of Hong Kong*, Oxford University Press (Oxford/New York/Melbourne), at 57 (1978).

[9] Werner Morvay, *Souveränitätsübergang und Rechtskontinuität im Britischen Commonwealth* (Transition of Sovereignty and Continuity of Law in the British Commonwealth), Springer-Verlag GmbH (Heidelberg), at 16 (1974).

[10] See Annex I of *Laws of Hong Kong*.

[11] Huaqun Zeng, 香港经贸法 (Economical and Trade Laws in Hong Kong), China University of Political Science and Law Press (Beijing), at 7 (1996).

which only contained some rules regarding general restriction, the *Letter's Patent* and *Royal Instructions* set up more special restrictions, among which the position of the Governor was prescribed. Pursuant to Article 2 of the *Letter's Patent*, the Governor could act unilaterally, answerable only to the British royalty. The Governor had the power to legislate together with the legislative bureau (art. 3), distribute land (art. 13), appoint judges and officials (art. 4), etc. Article 9 set the general rules reserved in favor of the British royalty. *The Royal Instructions* issued on February 17, 1917 and the *Gazette of Hong Kong Government* on April 20, 1917 included 37 articles (among which 8 articles were abolished). It was a series of orders conferred to the Governor and the Hong Kong government, made and issued in the name of the British royalty since 1843. As the supplement to the *Letter's Patent*, the *Royal Instructions* provided detailed rules for the execution of the *Letter's Patent*; furthermore, it focused on the supplementary rules of the institutions, competence and working procedures of the administrative bureau, legislative bureau, the appointment and disposal of the members of the council and the conditions under which the Governor was entitled to approve and make legal rules. Under exigent circumstances, the Governor had the power to make regulations and abolish the validity of the then current legal rules.[12] Since the *Letter's Patent* and *Royal Instructions* set out the basic constitutional principles for the Hong Kong government and also served as sources of legislation, the cumulative effect of both instruments was that they operated as the constitution of Hong Kong. However, these instruments fell short of a complete constitution, in the sense that they did not prescribe the relationship between the government and those being governed; neither did it provide the protection of the basic rights and freedom for the Hong Kong people nor the basic principles for the economy, society and other institutions.[13]

Apart from the written constitutional documents, the constitutional practice in Hong Kong also played a significant role. As discussed above, the *Letter's Patent* and *Royal Instructions* expressly prescribed that the Hong Kong government was subject to the administration of the Governor and the Governor shall obey the orders from the British government.[14] However, in practice, the British monarchy seldom intervened in the constitutional practice of Hong Kong by lawful means.[15] On the contrary, the British monarchy in general allowed the

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[12] See Miners, fn. 8 at 55.

[13] Hongyi Chen, Wenmin Chen, 人权与法治——香港过渡期的挑战 (Human Rights and the Rule of Law—Challenges in Hong Kong's Transition), Wide Angle Press Limited (Hong Kong), at 6–7 (1987).

[14] Zepei Li, 香港法律概述 (Introduction of Hong Kong Laws), Law Press (Beijing), at 27 (1987).

[15] See Norman Miners, *Hong Kong under Imperial Rule,* Oxford University Press (Hong Kong), at 70–78 (1987).

Governor to exercise his competence in managing affairs. Therefore, although there exist several constitutional provisions which are restrictive, Hong Kong was still in fact autonomous. Indeed, the principle of rule of law in Hong Kong was still one of the significant principles of its constitutional system.

3 Constitutional Sources of the Hong Kong SAR

At present, the constitution of the Hong Kong SAR is taken from three sources: the 1982 Constitution of China, the 1984 Sino-British Joint Declaration, and the 1990 Hong Kong Basic Law.

3.1 The 1982 Constitution of China

3.1.1 General Description of the Chinese Constitution

Over more than half a century since 1949, the PRC had enacted five constitutional documents: the 1949 Common Principles of the Chinese People's Political Conference and the four Constitutions issued accordingly in 1954, 1975, 1978 and 1982. Like other legal rules in China, these constitutional documents were greatly influenced by Chinese legal thoughts.

If laws around the world can be classified into common law, continental civil law and East-Asian law, the law in China is a mixture of these major legal systems.[16] Within the common law tradition, judge-made law takes precedent over any other source of law where subsequent cases are guided by previous judgments. Case law developed from the judgment of British royal forums and other cases.[17] Contrary to custom and case law, continental civil law jurisdictions prefer statutory law. East-Asian law, which developed from the clan tradition and religion, represents a separate legal system.[18]

Chinese legal thought and the Chinese legal system are greatly influenced by the ideas Confucius and the socialist legal system. In the 1920s, the Kuomintang (Nationalist Party) government of China introduced judicial reform[19] in China, and adopted the continental civil law system which derived mostly from the

[16] See Konrad Zweigert, Hein Koetz, *Einfuehrung in die Rechtsvergleichung* (An Introduction to Comparative Law), J.C.B. Mohr (Paul Siebeck), at 85 (1984).
[17] For more detail, see Dieter Blumenwitz, *Einführung in das angloamerikanische Recht* (An Introduction to the Anglo-American Law) (6th edition), Beck (München), (1998).
[18] For more detail, see Ch'ü T'ungtsu, *Law and Society in Traditional China,* Mouton and Co. (Paris), 1961; Derk Bodde, Clarence Morris, *Law in Imperial China,* Harvard University Press (Harvard), 1967.
[19] Xiutao Han, 近代中国对司法独立的价值追求与现实回归 (China's Pursuit of an Independent Judiciary and Its Reality), (4) 中国法学 (China Legal Science) 167 (2003).

German law. Although the new Chinese government later abolished the laws promulgated by the Kuomintang government which include, among others, *Liu Fa Quan Shu* (major laws in Taiwan of China), the influence from German law remained afterward.[20]

3.1.2 Purpose and Significant Amendments

Since the Third Plenum of the 11th Central Committee of the Communist Party of China in December 1978, the Chinese government committed itself to constitution drafting with the aim of a new constitution clearly expressing the policy of economic and political reform to replace the 1978 Constitution, which "contained rhetoric from the Cultural Revolution."[21] Meanwhile, the new Constitution was adopted as a precondition to China's unification. Thus, the 1982 Constitution contains several new entries, including, among others, the establishment of special economic zones in coastal areas, the expansion of the competence of the Standing Committee of the National People's Conference and the idea of "One China, Two Systems" (art. 31).

3.1.3 Provisions Concerning the National People's Congress

Section 1 of Chapter 3 of the 1982 Constitution provides for the National People's Congress (the "NPC"). Pursuant to Articles 57 and 58, the NPC of the PRC is the highest organ of state power. The NPC and its Standing Committee exercise legislative power. In the 1980s, there were around 3,000 deputies of the NPC.[22] They gathered for a conference once every year, and the conference would last two or three weeks (art. 61.1).[23] Pursuant to Article 62, the NPC exercises the following functions and powers: amending the Constitution;

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[20] August Thönnes, *Das Ende der ungleichen Verträge in China* (The End of the Unequal Treaties in China), Archiv des Völkerrechts (Archives of International Law), at 166–67 (1953/1954).

[21] Oskar Weggel, *Gesetzgebung und Rechtspraxis im nachmaoistischen China* (Legislation and Legal Practice in post-Maoist China), part III, *Das Öffentliche Recht—Verfassungsrecht* (The Public Law—Constitutional Law), (12) China aktuell (Journal of Current Chinese Affairs) 781 (1986).

[22] Kevin O'Brien argues that the deputies of the NPC have neither opportunity nor authority to influence or supervise governmental affairs decisively; with regard to the design and system of the NPC, it is an institution with no legal effect. See Kevin O'Brien, *China's National People's Congress*: *Reform and Its Limits*, 13 Legislative Studies Quarterly 357–58 (1988).

[23] The NPC constitutes deputies elected indirectly from the lower levels, which lack adequate democracy and quality according to the election procedure ensured by art. 34 of the 1982 Constitution of the PRC. See J. Bruce Jacobs, *Elections in China*, (25) Australian Journal of Chinese Affairs 171–99 (1991).

supervising the enforcement of the Constitution; enacting and amending basic laws governing criminal offences, civil affairs, the state organs and other matters.

3.1.4 Article 31 of the 1982 Constitution

Article 31 is one of the new articles in the 1982 Constitution. It provides a legal basis to practice the theory of "One China, Two Systems" proposed by Xiaoping Deng; moreover, it also serves as the legal basis of establishing special economic zones. As a matter of fact, the idea of "One China, Two Systems" refers directly to the return of Taiwan, Hong Kong, and Macao into the mainland of China. Its central point is the "principle of high autonomy," meaning that after unification, Taiwan, Hong Kong and Macao will continue enjoy a high degree of autonomy, they will maintain a separate political system and a capitalist economy instead of the socialism practiced in mainland China.

Article 31 of the 1982 Constitution prescribes 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 specific conditions." The first sentence of this article means that the state is entitled to and has the power to establish special administrative regions. Although all power in the PRC belongs to the people,[24] Article 31 does not concern referenda. The people must exercise state power through the NPC and local people's congresses, because "the National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power."[25] However, some scholars aver that the NPC plays little role in the governmental and political system, since the most important decisions are made within the Communist Party of China (the "CPC") itself.[26]

Attention must be drawn to the fact that the NPC has the power to enact laws practiced in the SAR. Pursuant to Article 31 and 62, the Basic Law of the Hong Kong SAR is subjected directly to the Constitution of the PRC, and can be amended by the NPC. Furthermore, there are two expressions in this article which are quite confusing, they are "necessary" and "in the light of specific conditions." The flexibility rendered by the uncertainty of these two expressions causes more confusion to the reader and affects the authoritativeness that the general public might otherwise feel toward the law.

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[24] See art. 2.1 of the 1982 Constitution of the PRC.
[25] See art. 2.2 of the 1982 Constitution of the PRC.
[26] See the different opinions of Andrew Nathan, *Chinese Democracy*，Alfred A. Knoff (New York), at 193 (1985).

3.2 The 1984 Sino-British Joint Declaration Concerning Hong Kong

3.2.1 Background for the "One Country, Two Systems" and "Special Economic Zone Plan"

If someone has a good understanding of the history of China and the Chinese people, the emergence of the theory of "One Country, Two Systems" and the design for Hong Kong SAR would not be surprising. The ideas that support these theories date back to the Tang Dynasty (from 618 to 907). At that time, when communicating with foreigners, whether in coastal cities or oasis cities of the Silk Road in Middle Asia, the Chinese emperor tried to segregate the foreigners from the Chinese. As a measure of such segregation, he established some special zones and sent officials to these areas.[27] Thus, although the Canton-System[28] is not the precedent of the Chinese policy of "flying areas", it may shed light on establishing special economic zones in the area near Hong Kong and Macao since 1979, which is an example of the so-called "make the past serve the present." In some parts of China, during the period between 1949 and 1978, foreign businessmen were allowed to use capital freely to benefit both themselves and the modernization of China; this is the strategy known as "make what is foreign serve China." In order to realize the unification of China, the idea of special zones was mainly developed and improved by Xiaoping Deng.

It is notable that this type of statehood is different from either the unitary state or federal state in that in a centralized unitary state, the subsidiary regions do not have the independence as proposed in the "one country, two systems" state mode. Similarly, in the traditional federal state, though each state enjoys considerable autonomy, such autonomy is quite restricted. For example, in terms of the constitution of the United States, each state is not entitled to have a separate regime, developing its own currency or organizing its own military force. However, as the discussion below illustrates, the extent of autonomy enjoyed by Hong Kong SAR is more extensive than any traditional federal state such as those in the United States.

3.2.2 Models of Governance Proposed by the UK and China

As the lease of the New Territories enjoyed by the UK expired on July 1, 1997, the UK and the PRC began to negotiate for the ownership of Hong Kong in

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[27] Gilbert Gornig, *Hong Kong*: *Von der britischen Kronkolonie zur chinesischen Sonderverwaltungszone. Eine historische und rechtliche Betrachtung* (Hong Kong: From the British Crown Colony to Chinese Special Administrative Region. A Historical and Legal Analysis), Bibliothek Wissenschaft und Politik (Koeln), at 175 (1998).

[28] See Oskar Weggel, *Taiwan/Hong Kong*, Beck (München), at 20 (1992).

September 1982.

From the outset of the negotiations, the two parties presented two politically divergent positions concerning Hong Kong. The PRC attached great importance to Hong Kong as an inalienable part of the PRC. The UK, however, proposed several solutions for consideration: (1) maintaining the current situation of Hong Kong; (2) intervention by force, as it did one and a half century ago; (3) decision by a referendum; (4) a "condominium" model like the 1978 *Panama Treaty*; and, (5) application of the Macao model.[29]

However, all these plans ended in failure, because most importantly the PRC government insisted that the treaties of 1842, 1860 and 1898 were illegal on the basis that these treaties were unequal treaties; thus "maintaining the current situation" lacked legal basis. The water supply of Hong Kong is dependent on mainland China; accordingly, intervention by force by the UK was absurd, not to mention disproportionate military force in south China. The Chinese government accepted the principle that "Hong Kong should be governed by the people of Hong Kong." However, considering the effect of referendum as a precedent and the possibility of the continued rule of the UK, the Chinese government could not accept this solution either.[30] Given that the purpose of the PRC was to resume sovereignty over Hong Kong, the model of the Panama Treaty was also not an acceptable option. Moreover, the Macao model was a makeshift one because in the 1970s China was politically and economically weak; while in the middle of the 1980s, the Chinese government was capable and resolute enough in solving the Hong Kong issue. The Chinese government eventually prevailed over the UK in the negotiations on the matter regarding the governance model for Hong Kong.

After 22 rounds of negotiations in two years, the Joint Declaration on the Question of Hong Kong between the PRC and the UK (the "Joint Declaration") was initialed on September 26, 1984, signed by the two sides on December 19, 1984 and the ratifications by the two state parties were exchanged on May 27, 1985, when the Joint Declaration came into effect.[31]

3.2.3 Main Content of the Joint Declaration

The Joint Declaration[32] consisted of three parts: the main text, the three

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[29] The 16 square kilometers of Macao was declared to be the territory of the PRC through the amendment of the Constitution of Portugal in 1976, but has been governed by the Portuguese until December 1999. After that, Macao was returned to China as a SAR just like Hong Kong.

[30] Regarding whether self-determination can be applied in Hong Kong, see Chen Wang, 香港回归中国际法的运用 (The Application of International Law in Hong Kong's Return to China), (7) 当代法学 (Contemporary Law Review) 136–37 (2003).

[31] Hong Kong, Government Printer, September 26, 1984.

[32] See Jinghui Yang & Xiangqin Li, 港澳基本法比较研究 (Comparative Research between the Basic Laws of Hong Kong and Macao), Peking University Press (Beijing), at 488–507 (1997).

attachments and two memorandums provided by the Chinese and British governments. The main text of the Declaration includes a short preamble and eight articles. The preamble introduces the purpose of the Joint Declaration, i.e., the specific method as agreed by negotiations, that the historic question of Hong Kong should be settled properly; the maintenance of the prosperity and stability of Hong Kong and the further consolidation and development of the relationship between the two countries on a new basis.

Pursuant to Article 1 and 2, the PRC resumed its exercise of sovereignty over Hong Kong on July 1, 1997 and the UK returned Hong Kong to the PRC on the same day. This act was fundamental and without any restriction.[33] Article 3 of the Declaration provides 12 policies after Hong Kong's return to PRC in 1997 and sets out the constitutional framework for the political systems of Hong Kong. According to these policies and Article 31 of the Constitution of 1982, Hong Kong shall be under the direct administration of the Central People's Government as a SAR that enjoys a high degree of autonomy; there are, however, exceptions to the autonomy clause, of which are issues of diplomatic and national defense affairs (pursuant to art. 3.1 and 3.2).

The current law of Hong Kong shall remain unchanged. The local government of the Hong Kong SAR shall be consisted of the local people of Hong Kong (the first sentence of art. 3.4), which follows the principle of "Hong Kong will be governed by the people of Hong Kong." Article 3 of the Joint Declaration provides provisions on other basic characteristics of the SAR, which will not be specifically discussed here.

The three attachments of the Joint Declaration are: Annex 1 *Specific Explanations on the Basic Policies That Will Be Adopted by the PRC towards Hong Kong*, Annex 2 *On the Sino-British Associated Contact Group* and Annex 3 *On Land Contracts*; each of which has the same effect as the main text (third sentence of art. 8).

3.2.4 Legal Characteristics of the Joint Declaration

First, the Joint Declaration is an international treaty. As a result of the marathon negotiations, what was signed was not a treaty as desired by the UK but a joint declaration. However, the Joint Declaration was not an unbinding expression by the Chinese and British governments. On the contrary, since international legal entities have the capability of making agreements, the two signatories rendered the Declaration with legal effect in Article 8; thus both sides enjoy rights and

[33] Georg Ress, *The Hong Kong Agreement and Its Impact on International Law*, in Jürgen Domes, *Hong Kong—A Chinese and International Concern*, Boulder (London), at 136–37 (1988).

obligations. It is doubtless that these made the Declaration an international treaty.[34] The nature of the Joint Declaration is an international treaty signed by the two countries. Such a legal characteristic is not contradictive to the title of Joint Declaration or any special negotiation technique.[35]

Also, the Joint Declaration is not a guarantee treaty, because there are no provisions regarding measures that can be applied if a dispute or breach occurs. This may possibly be the true intent of one or even both of the contracting parties. It is said that the guarantee was implied outside of the treaty, i.e., the Chinese history demonstrated that China has never breached any international treaty which it had signed.[36]

Finally, it is still disputable as to whether the Joint Declaration can be deemed as a legal state treaty (in German, *Statusvertrag*). A legal state treaty refers to a treaty signed by several countries for the purpose of constituting an association of countries or to ascertain the legal state of a certain area, such as the multi-legal state *Suez Canal Treaty* and *South Pole Treaty*, and the bilateral legal state *1960 Boundary Treaty between China and Burma*. It really depends on the preconditions to be applied. Generally speaking, the legal state (or ownership) of a certain area affirmed by the contracting sides through international treaties should be respected by other countries in the world, even those countries that are not contracting states.[37] If the Declaration creates a law binding on all countries,[38] then the Joint Declaration is not a legal state treaty since it only deals with Hong Kong. If the Declaration creates a state or system to be recognized by the majority of international legal entities,[39] then the Joint Declaration can be deemed as a legal state treaty, since such recognition exists.

3.3 Basic Law of the Hong Kong SAR

Based on the 1984 Joint Declaration, Hong Kong was returned to China in 1997. The Chinese government promised that after the return, the Hong Kong SAR

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[34] Haopei Li, 条约、非条约和准条约 (Treaty, Non-Treaty and Quasi-Treaty), Yearbook of Chinese International Law 28, 51–53 (1987).

[35] See S. L. Karamanian, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 Texas Int'l L. J. 182–83 (1985).

[36] R. Dolzer, *Kein klassischer Garantievertrag* (No Classical Guarantee Contract), Frankfurter Allgemeine Zeitung of April 18, 1988, at 3.

[37] Eckart Klein, *Statusverträge im Völkerrecht*: *Rechtsfragen territorialer Sonderregime* (State Treaties in International Law: Legal Questions of Territorial Special Regime), Springer Verlag GmbH (Heidelberg), at 43 (1980).

[38] Martin P. Scheuer, *Die Rechtslage von Hong Kong und Macau nach den* "*Gemeinsamen Erklärungen*" *vom 19 Dezember 1984 und 13 April 1987* (The Legal Status of Hong Kong and Macao after the "Joint Declaration" on December 19, 1984 and April 13, 1987), Peter Lang (Frankfurt am Main), at 51 (1993).

[39] See Ress, fn. 33 at 150.

would be established and the previous capitalist system would remain unchanged according to *The Basic Law of the Hong Kong SAR of the PRC*. Pursuant to Article 31, 62.3 and 62.13, the legislation of the Basic Law for the SAR is within the competence of the NPC.

3.3.1 The Drafting of the Basic Law

On June 18, 1985, the drafting committee for the Basic Law of the Hong Kong SAR was established by the NPC, with Ji Pengfei as the head of the committee. The committee consisted of 59 members, 36 from the Mainland and 23 from Hong Kong.[40] On July 1, 1985, the committee held its first meeting in Beijing. On December 18, 1985, the consulting committee for the Basic Law of the Hong Kong SAR, consisting of 180 Hong Kong representatives selected from a broad spectrum of the population, was established in Hong Kong, with An Zijie as the head of the committee. The main function of the consulting committee was to collect and organize opinions and recommendations for the draft of the Basic Law from the people in Hong Kong and then submit them to the drafting committee; it also acted as a conduit for consultation. The Draft of the Basic Law (open to opinion) was primarily accomplished by the drafting committee by the end of 1987 and publicized in April 1988. On February 21, 1989, the 6th meeting of the Standing Committee of the 7th NPC issued the Basic Law (draft) and solicited comments from Hong Kong and other areas of the country. After that, every article of the draft was agreed upon by more than two third of the drafting committee membership, and the draft of Basic Law was submitted to the NPC for recording. On April 4, 1990, the Basic Law was adopted at the Third Session of the Seventh NPC.

Moreover, the following three attachments of the Basic Law were also adopted: the Method for the Selection of the Chief Executive of the Hong Kong SAR, the Method for the Formation of the Legislative Council of the Hong Kong SAR and the Voting Procedure and National Laws to Be Applied in the Hong Kong SAR.[41]

3.3.2 Main Content and Legal Characteristics of the Basic Law

The preamble of the Basic Law first introduces the history of Hong Kong and the signing process of the Joint Declaration, pointing out that the peaceful settlement of the Hong Kong issue fulfilled the long-cherished common aspiration of the Chinese people for the return of Hong Kong. Further, the preamble concisely introduces the policies, legal basis and purpose for the establishment of the Hong

[40] See Yang & Li, fn. 32 at 462; for the name list of all the members of the committee, see Dagong Newspaper of June 20, 1985.
[41] See International Legal Materials, Documents 1990, vol. XXIX, 1519–51.

Kong SAR. More specific contents will be referred to in the provisions of the Basic Law. The Basic Law was a domestic law of fundamental importance promulgated by the NPC. It clearly provides the system to be executed in the SAR according to "specific conditions."[42] As a constitutional legal text, the Basic Law is effective in the Hong Kong SAR for at least 50 years; it implements all the basic policies in the Joint Declaration including its attachments.[43]

3.3.3 The Relation between the Basic Law and Other Laws of China

Pursuant to Article 31 of the 1982 Constitution and Article 13.2 of the Joint Declaration, the NPC, through the Basic Law, provides the basic regulations for Hong Kong. From these provisions, the legislative power of the Basic Law of Hong Kong SAR is subject to the NPC, which conforms to Article 62.3 of the 1982 Constitution—the NPC may enact and amend basic laws governing criminal offences, civil affairs, state organs and other matters. In accordance with Article 67.2, the Standing Committee of the NPC only has the power to enact and amend laws that are not within the exclusive domain of the NPC, that is to say, laws enacted by the NPC are basic laws of the state, while those enacted by its Standing Committee are not. Therefore, the distinction between basic law and non-basic law does not depend on the ranking of law, but on the different legislative organs that enact them. In China, the Constitution is the fundamental law of the state, and of the highest degree in terms of hierarchy of norms. The legal status of other laws is equal.[44] The Basic Law of the Hong Kong SAR is based on the Constitution and drafted and enacted by the NPC. Therefore the Basic Law is not local law but is an act that has nationwide effect; "all provinces, the governments of all levels and all countrywide people should comply with it."[45] Thus, it can be seen that the hierarchy of norms of the Basic Law is higher than other laws and statutes in Hong Kong, any law and statute in Hong Kong shall not conflict with the Basic Law.[46]

3.4 Interpretation and Amendment of the Basic Law

Chapter 8 of the Basic Law provides itself with the interpretation and amendment

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[42] See the 2nd clause of art. 31 of the 1982 Constitution of the PRC.
[43] See art. 3.12 of the Joint Declaration, with no guarantee clause at all.
[44] Wanxing Ren, 香港特别行政区基本法概说 (Introduction of the Basic Law of Hong Kong Special Administrative Region), Fangzheng Press (Beijing), at 18 (1997).
[45] Ji'er Huang, 实施基本法的一些我见 (My Perspective on the Implementation of Basic Law), in 中国内地、香港法律制度研究与比较 (Comparative Research between the Laws of the Mainland and Hong Kong of China)，Peking University Press (Beijing), at 138 (2000).
[46] See art. 160 of Hong Kong Basic Law (China).

rules and procedures. Article 158.1 of the Basic Law vests the final authority in the interpretation of the Basic Law exclusively in the Standing Committee of the NPC. Article 158.2 provides that "The Standing Committee of the NPC shall authorize the courts of the Hong Kong SAR to interpret the provisions of this Law which are within the limits of the autonomy of the Region." According to the first sentence of Article 158.3, the courts of Hong Kong may also interpret other provisions of the Basic Law in adjudicating cases.

Corresponding to preceding articles, the second and the third sentences of Article 158.3 provide:

> "However, if the courts of the Hong Kong SAR, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek 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. "

This interpretation rule, however, is not completely consistent with the provisions of the Joint Declaration.[47] Pursuant to the first sentence of Article 3.3 of the Joint Declaration, the Hong Kong SAR shall be vested with independent judicial power, including of the power of final adjudication. There are no restrictions from the literal meaning of this article. Hence, pursuant to this article and Article 3.1 and 2.3 of the Joint Declaration Annex I, the courts of Hong Kong should enjoy the power to interpret the Basic Law.[48] Thus, only after the following three problems have been addressed, may the inconsistency between the Basic Law and the Joint Declaration be satisfactorily explained.

The first problem is the relationship between the Basic Law and the Constitution and other laws, which has been reviewed before. In accordance with Chinese law, the Constitution has the highest degree of legal effectiveness in

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[47] See Scheuer, fn. 38 at 144–46.

[48] Regarding to what extent that Hong Kong court is entitled to implement and interpret the Basic Law, see Hongyi Chen, 回归后香港与内地法制的互动：回顾与前瞻 (Interaction of the Laws between the Mainland and Hong Kong of China after Hong Kong's Return—Retrospect and Prospect), in 中国内地、香港法律制度研究与比较 (Comparative Research between the Laws of the Mainland and Hong Kong of China)，Peking University Press (Beijing), at 10–12 (2000).

terms of hierarchy of norms, thus its effectiveness is no doubt higher than that of any laws and statutes in Hong Kong. Therefore the Standing Committee of the NPC has the power not only to interpret the laws of Hong Kong,[49] but also to overrule them when they are inconsistent with the Basic Law from the perspective of China.[50]

The second problem is how to define the scope of the power of the Committee of the Basic Law and the Court for Final Appeal. As long as the function of the Committee for the Basic Law of Hong Kong has not been substantively defined, the power of the final adjudication for constitutional affairs of Hong Kong will undoubtedly be vested in Beijing.[51] The third problem concerns the high degree of autonomy, which will be discussed later.

Pursuant to Article 159.1 of the Basic Law, the power of amendment shall be vested in the NPC, and the power to propose bills for amendments to the Basic Law shall be vested in the Standing Committee of the NPC, the State Council and the Hong Kong SAR (art. 159.2). However, compared with the former two organs, the power to propose bills for the amendment of the Basic Law will be much restricted.[52]

Furthermore, before a bill of amendment to the Basic Law is put on the agenda of the NPC, the Committee for the Basic Law of the Hong Kong SAR shall study it and submit its opinions.[53] The fourth paragraph of this article provides that no amendment to the Basic Law shall contradict the basic policies established by the PRC regarding Hong Kong, which are the fundamental restrictions for such amendment. By contrast, the amendment of Annex I of the Basic Law Method for the Selection of the Chief Executive of the Hong Kong SAR will be less complex, similar to the provision of Article 7 of this annexure. The amendment provision of Annex II Method for the Formation of the Legislative Council of the Hong Kong SAR and Its Voting Procedures is relatively less restrictive, for such amendment only needs to be reported to the Standing Committee of the NPC to record. The former must be reported to the Standing Committee of the NPC for approval. In general, the descriptions of Article 159 of the Basic Law are identical to the Joint Declaration. As the Basic Law of the Hong Kong SAR is drafted and enacted by the NPC, the power of amendment is no doubt vested in it. By restricting amendment, the two provisions provide the Basic Law with higher stability.

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[49] See art. 67.4 of the 1982 Constitution of the PRC.

[50] See Sebastian Heilmann, *Wie steht es um die Autonomie Hong Kongs* (What about the Autonomy of Hong Kong), (11) China aktuell (Journal of Current Chinese Affairs) 1101 (1997).

[51] Id.

[52] See art. 159.2 of Hong Kong Basic Law (China).

[53] See art. 159.3 of Hong Kong Basic Law (China).

3.5 The Limits on the High Degree of Autonomy of the Hong Kong SAR

The concept of autonomy[54] has different meanings in different contexts. Explained from its semantic meaning, autonomy means that one can make independent decisions without being influenced or interrupted by the outer force.[55] Autonomy under the constitution means that a state endows one or more persons with the power to deal with their own affairs or legal relations.[56] In the context of colonies, autonomy is generally considered as the preliminary phase of independence.[57] However, there are various opinions concerning whether the two concepts of independence and autonomy can be used interchangeably.[58] In China, these two concepts do not share the same meaning. In addition, local administrative regions, autonomous regions and municipalities directly under the central government are all inalienable parts of the PRC.[59]

Pursuant to Article 12 of the Basic Law, Hong Kong shall be a local administrative region of China which enjoys a high degree of autonomy and is under the direct administration of the Central People's Government. Thus, it can be deemed that term "special" as abbreviated in the "SAR" indicates not "independent" but "different" from other administrative regions. The SAR and other administrative regions are the same in that their autonomies are all from the central state and its highest organ of state power—the NPC.

There are many provisions reflecting Hong Kong's autonomy in the Basic Law, such as the Central People's Government not levying taxes on Hong Kong (art. 106); in addition, the Hong Kong SAR shall maintain an independent currency and system regarding its issue (art. 111, in contrast with the U.S. federal government and states mentioned before), current economic policies and free

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[54] See Huaqun Zeng, 试论香港特区高度自治权的基本特征及其对外事务实践 (The Basic Characteristics of the High Degree Self-Autonomy of Hong Kong Special Administrative Region and its Practice in Foreign-Related Affairs), in 中国内地、香港法律制度研究与比较 (Comparative Research between the Laws of the Mainland and Hong Kong of China)，Peking University Press (Beijing), at 570–72 (2000).

[55] See Anthony Neoh, *Hong Kong's Future*: *The View of a Hong Kong Lawyer*, 22 Cal. W. Int'l L. J., 332–33 (1992).

[56] Gerhard Köbler, *Juristisches Wörterbuch* (6th edition) (Legal Dictionary), Verlag Franz Vahlen (München), at 35 (1994). See the 1st clause of art. 28.2 of the Basic Law of the Federal Republic of Germany.

[57] Albert Bleckmann, *Decolonization*, in R. Bernhard (ed.), *Encyclopaedia of Public International Law*, North-Holland (Amsterdam), at 975 (1992). The PRC has always stood against the idea to treat Hong Kong as a colony according to the UN Charter, see 中华人民共和国对外关系概述 (Introduction of the Foreign Relations of China), Shanghai Foreign Language Education Press (Shanghai), at 171 (1984).

[58] See M. Rotter, *Staat* (State), in I. Seidl-Hohenveldern (ed.), *Lexikon des Rechts*/*Völkerrecht* (Encyclopedia of Law/International Law), Luchterhand (Neuwied), at 252 (1985).

[59] See art. 4.3 of the 1982 Constitution of the PRC.

trade (art. 116), current tariff system, financial system and status of a free port (art. 106–14). Hong Kong shall also continue to maintain the status of a transportation hub (especially in shipping and civil aviation) (art. 124–35), and maintain its previous policies concerning culture, religion, welfare and organizational system of government organs (art. 136–49). The laws previously in force in Hong Kong shall be maintained (art. 8, 160), in addition to the Chinese language, English may continue to be used as an official language (art. 9). Furthermore Hong Kong is allowed to use its own regional flag and regional emblem (art. 10) and participate in international affairs using the name "Hong Kong, China" (art. 116, 151). The Hong Kong SAR may maintain and develop relations with relevant parties and organizations in foreign countries and regions independently in fields such as economy, culture, education, sports, medicine and health (art. 149). However, diplomatic powers are not included since they are part of the Central People's Government's functions. In accordance with Article 154 of the Basic Law, the Hong Kong SAR may issue passports and visas on its own and apply immigration controls on the entry, stay and departure from the Region by persons from foreign states and regions. The Hong Kong SAR may also implement immigration restrictions on residents from the Mainland in order to prevent the issue of overpopulation. Under the assistance or authorization of the Central People's Government, Hong Kong may reach visa abolition agreements with foreign states or regions (art. 155),[60] establish official or semi-official economic and trade missions in foreign countries (art. 156) and establish foreign consular and other official or semi-official missions in Hong Kong (art. 157).

The limitations on the high degree of autonomy of Hong Kong mostly refer to the special authority of a sovereignty regarding foreign and defense affairs which should be reserved for the Central People's Government.

Moreover, after careful examination of the articles of the Basic Law, at least twelve express or implied provisions which are restrictive may be found:

(1) As an inalienable part of China, Hong Kong has no right to secede from the PRC (art. 1). This is because the republics of the former Soviet Union seceded from the USSR since they had the constitutional right to do so; China does not want the same history to be replayed in Hong Kong.

(2) Pursuant to Article 7, the land and natural resources within the Hong Kong SAR shall be state property, but the state may authorize individuals, legal persons, or organizations to use and develop those land and resources.

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[60] See Yongping Ge, *Hong Kong und die Europaeische Union, Auch ein Beitrag zur Voelkerrechtssubjektivitaet und Vertragsabschlusskompetenz* (Hong Kong and the European Union, a Contribution to the International Legal Status and Treaty-Making Competence), Goerich & Weiershaeuser (Marburg), at 253–57 (2003).

(3) In accordance with Article 13, the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong SAR, and shall establish a special office in Hong Kong.

(4) Pursuant to Article 14, the Central People's Government shall be responsible for the defense of the Hong Kong SAR, and shall station military forces in Hong Kong. However, the military forces shall not interfere with the local affairs of the Region.

(5) Pursuant to Article 15 and 43 accordingly, the Central People's Government shall appoint the principal officials of the Hong Kong SAR.

(6) Pursuant to Article 17.3, the NPC has the power to repeal laws violating the Basic Law.

(7) Pursuant to Article 18.4, in the event of turmoil within the Hong Kong SAR which endangers the national unity or security that is beyond the control of the government of the Region, the Standing Committee of the NPC may declare a state of war or emergency; and the Central People's Government may issue an order applying the relevant national laws in the Region.

(8) Pursuant to Article 23, the Hong Kong SAR shall enact laws on its own to prohibit any act of treason, secession, or subversion against the Central People's Government or theft of state secrets.

(9) There are restrictions on the qualifications of persons who will be selected as the principal officials of the Hong Kong SAR in Article 44 and 61, and proportion of members of the Legislative Council in Article 67.

(10) Pursuant to Article 157, the establishment of foreign consular and other official or semi-official missions in the Hong Kong SAR shall require the approval of the Central People's Government.[61]

(11) Pursuant to Articles 158 and 159, the power of final interpretation of the Basic Law shall be vested in the Standing Committee of the NPC, and the power of amendment of this law shall be vested in the NPC.

(12) Some national laws shall be applied to Hong Kong, such as the Nationality Law of the PRC, and Regulations of the PRC Concerning Diplomatic Privileges and Immunities, and Resolution on the National Day of the PRC China.[62] Thus, this shows that the high degree of autonomy which the Central People's Government provides to the Hong Kong SAR is not absolute (much less independent), but is relative and restrictive. As a constituent part of China, Hong Kong must be obedient to the leadership and guidance of the Central People's Government, while at the same time exercising a high degree of autonomy and discharging the obligations provided by the Basic Law.

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[61] Yongping Ge, 欧盟与中国关系的现状及发展前景 (Current Relations between EU and China and its Prospect), (4) 德华导报 (German Chinese Post) 14 (2003).

[62] See Annex III of the Basic Law applied in Hong Kong (China).

4 Conclusion

Firstly, with regard to the internal affairs of Hong Kong, the British government has granted Hong Kong a high degree of autonomy. China's leaders have expressed a similar attitude to Hong Kong as well. Secondly, in order to guarantee the high degree of autonomy given to the Hong Kong SAR by law, the NPC must be restrained from any arbitrary interpretation or amendment relating to the constitutional laws of Hong Kong including the 1982 Constitution of China, the 1984 Sino-British Joint Declaration and the Basic Law of the Hong Kong SAR. Finally, over the twelve years since the return of Hong Kong, it can be stated positively that the transfer of Hong Kong sovereignty back to China and the development of Hong Kong society has not led to dire consequences. On the contrary, owing to the Chinese government's fulfillment of its legal obligations and practical commitments as well as the concern and support from international organizations and governments all over the world, Hong Kong has been successful in maintaining its political stability and economic prosperity.

The conduct of the Chinese government bids well not only for the key status of the Hong Kong SAR in the course of China's modernization, but also for the long-term objective of the unification of the motherland after regaining Macao at the end of 1999. This is also favorable for the Mainland of China in its grand objective of building a unified country under the rule of law.

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