Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region

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INTRODUCTION

Despite the democratic aspirations of the reformist minority in Hong Kong, the drafting of the Basic Law of the Hong Kong Special Administrative Region (SAR) of the People's Republic of China (PRC) is dominated by the political realities that first brought British Prime Minister Margaret Thatcher to the conference table in Beijing in 1982. Two years later, these negotiations produced a draft of what is now 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 (Joint Declaration).[1] It was initialed by representatives of the U.K. and PRC governments in 1984 and was subsequently ratified and came into force on May 27, 1985. The document consists of a Joint Declaration, three Annexes and an associated Exchange of Memoranda, all of which should be considered together as a guide to the drafting and interpretation of the Basic Law itself.

I. POLITICAL REALITIES AND THE SUBSTANCE OF THE JOINT DECLARATION

For a clear understanding of the Joint Declaration, it is essential to distinguish between the document's unilateral and bilateral statements. The two governments agreed "that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the future strengthening and development of the relations between the two countries on a new basis."[2] It was to this

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1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 23 I.L.M. 1366 (1984) [hereinafter Joint Declaration].

2. *Id.*, preamble.

end that the declarations were made.

The declarations consist of eight paragraphs, the first three of which are actually unilateral statements. The first and third paragraphs are unilateral declarations by the Government of the PRC. The second paragraph is a unilateral declaration by the Government of the United Kingdom. Paragraphs four through seven are joint declarations made primarily to deal with the transitional period between the entry into force of the Joint Declaration and the date of the actual hand-over of Hong Kong. The eighth paragraph is a general provision relating to the ratification, entry into force and equal binding validity of the Joint Declaration and its Annexes.

According to the first paragraph, "the Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997."[3] In the second paragraph, "the Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997."[4]

These two paragraphs reveal a certain degree of reciprocity: China will recover Hong Kong from Britain, which in turn will restore Hong Kong to China. Yet, the language also reflects a difference in opinion as to the current status of sovereignty over Hong Kong. China insists that it has never lost sovereignty over Hong Kong and so will "resume" the exercise of sovereignty over Hong Kong as of July 1, 1997. On the other hand, although the U.K. does not mention sovereignty explicitly in the text, by using the word "restore" in pagagraph two, the U.K. proposes that Hong Kong was originally part of China, but is currently under British sovereignty. Despite this disagreement, the two parties share the view that the hand-over will be an act of reunion that conforms to the common aspirations of the entire Chinese people.

Paragraph three, the second of China's unilateral declarations, pronounces the following basic PRC policies regarding the Hong Kong SAR: that China will establish a Hong Kong SAR upon resuming the exercise of sovereignty over Hong Kong; that it will maintain there the capitalist system and life-style; that the Hong Kong SAR will enjoy a high degree of autonomy; that China's stated basic policies regarding Hong Kong will be stipulated in a Basic Law

3. *Id.* para. 1.
4. *Id.* para. 2.

to be promulgated by the National People's Congress (NPC); that these basic policies will remain unchanged for 50 years; and that all of the policies regarding the SAR are China's internal affairs and it will not tolerate any foreign intervention.[5] Prior to the signing of the Joint Declaration, China had made clear that whether or not any agreement could be reached between the U.K. and China over the question of Hong Kong, China would apply to Hong Kong the policies outlined in this paragraph.

The rationale for these policies was dictated by what China perceived to be the realities of "the question of Hong Kong, which is left over from the past"[6] and by her national interests. Embodied as they are within a unilateral declaration, these policies did not constitute a promise made in order to induce the U.K. to restore Hong Kong to China. The common understanding of the U.K. and China is that the implementation of these policies, including the drafting of the Basic Law of the Hong Kong SAR, is the exclusive responsibility of the PRC. Neither the British Parliament nor the present Hong Kong legislature will in any way be involved.

This state of affairs is reflected in the constitution of the Basic Law Drafting Committee (Drafting Committee).[7] Each of the drafters of the Basic Law (including those from Hong Kong, who comprise less than half of the committee) has been individually appointed by the NPC. None serves in a representative capacity. The Drafting Committee is a work unit organized under the NPC and is not itself the legislature that will enact the Basic Law.

The Basic Law will be enacted by the NPC, which represents the entire Chinese people.[8] The inhabitants of Hong Kong are only to be consulted through a local Consultative Committee. Hong Kong presently has political representation on the NPC via delegates from Hong Kong, but they are elected from Guangdong Province and cannot be elected locally while Hong Kong is still under British rule. These delegates are not directly involved in the drafting of the Basic Law, but they may play an important role when the final draft is presented for discussion by the NPC and its subordinate organs.

This outline of the political realities that have shaped the Joint Declaration is an essential backdrop to intelligent analysis of the draft

5. *Id.* para. 3.

6. *Id.*, preamble.

7. This was a decision of the Third Session of the Sixth National People's Congress on Establishing the Drafting Committee for the Basic Law for the Hong Kong SAR of the People's Republic of China.

8. THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 2 (1982) [hereinafter PRC CONST.].

of the Basic Law. Whatever the media may transmit, exaggerate or suppress, and however articulate the minority reformists may be, the realities remain the same. The Basic Law will be domestic PRC legislation, implementing China's own policies toward Hong Kong. The will of the entire Chinese people, as expressed through their representatives at the Plenary Session of the NPC, will decide the final shape of the Basic Law. The drafting process thus represents a further elaboration of the basic PRC policies that are more fully explained in Annex I to the Joint Declaration.

However, the drafting of the Basic Law is also an interpretive process, whose main purpose is to ensure stability and prosperity after the restoration of the territory to its original rightful owners (the Chinese people). The Joint Declaration is conservative in spirit and aims to accomplish this goal by maintaining the current economic system and life-style in Hong Kong. The key words in the Joint Declaration are *recover*, *resume*, *restore*, *remain*, *maintain*, *retain* and *continue*. In contrast, reformist ideas have been kept to a minimum and remain rather vague.

II. The Basic Law and Political Reform

If the Basic Law is to be true to the letter and spirit of Annex I, it cannot be a mere restatement of the political ideals of the local minority reformists. That the reformists may, in varying degrees, eventually be disappointed does not mean that China's declared policies toward Hong Kong will not have been fully and successfully implemented. Reform was never the goal. The goals are the recovery of Hong Kong, the maintenance of its prosperity and stability, the maintenance of the current capitalist system and life-style, and the further strengthening and development of U.K.-PRC relations. In the long run, however, the alienation of an articulate, up-and-coming generation of Hong Kong residents can hardly be conducive to the maintenance of prosperity and stability. The spirit of reform is a fact of life in Hong Kong that must be taken into consideration in the drafting process, albeit with caution, to ensure that fundamental or drastic redistribution of powers and benefits, which would endanger Hong Kong's prosperity and stability, will not result.

The vocal minority, which has been pressing for the legislature to be constituted through direct election with universal suffrage, employs numerous common arguments in support of democracy. They fail to recognize, however, that the Basic Law will probably answer many democratic concerns. It is quite possible that the SAR legislature may be open to non-Chinese citizens, and that the chief

executive, members of his advisory council and the principal officials may be Chinese citizens who are also local inhabitants of the SAR. The basic principle that political rights are rights of citizens seems to have escaped the attention of Hong Kong's "democrats." This alone is sufficient to demonstrate the immaturity of the "democratic" movement in Hong Kong. Nevertheless, the desire for increased participation in policy decisions and community affairs is in itself laudable and augurs well for successful home rule under the "one country, two systems" formula.

III. THE DRAFTING PROCESS

The draft compilation, as presented for discussion at the Sixth Plenary Session of the Drafting Committee held in December 1987, consists of 172 articles.[9] It is an unedited collection of all the articles so far drafted by all five of the special subcommittees and represents the result of almost three years of work. The articles as they now stand are cumbersome and repetitive. The subcommittees have tried to incorporate the opinions and suggestions of the corresponding subcommittees of the Consultative Committee. Practically every word and phrase of Annex I to the Joint Declaration has been reproduced more than once.

Annex I itself is a detailed document referring to matters of principle and policy alike. With regard to the political and economic scheme to be instituted in the Hong Kong SAR, Annex I meticulously enumerates almost all the systems that are currently in effect in Hong Kong which are to be maintained.[10] Although Annex I embarks on this exhaustive list, it does not actually delineate any of the systems in detail.

The document also stipulates that the Hong Kong SAR may, on its own, decide policies in many specified areas. Vesting these policy-making powers in the SAR government will ensure that the Hong Kong SAR will indeed enjoy a high degree of autonomy as promised.

Provisions relating to the political system are fragmentary. The few features described may be quoted as follows:

> The government and legislature of the Hong Kong SAR shall be composed of local inhabitants. The chief executive

9. Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee (Secretariat of the Drafting Committee for the Basic Law comp. Dec. 1987) (translated by the Consultative Committee for the Basic Law).

10. For example, the judicial, public service, economic, trade, monetary, financial, taxation, shipping management and shipping regulation, civil aviation management and educational systems are enumerated.

> of the Hong Kong SAR shall be selected by election or through consultations held locally and be appointed by the Central People's Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong SAR and appointed by the Central People's Government. The legislature of the Hong Kong SAR shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature . . . . Taxation and public expenditure must be approved by the legislature . . . [and there is to be] accountability to the legislature for all public expenditure.[11]

Clearly, much of the power structure remains unspecified. While idealists proclaim that the consultative and drafting processes should be a search for the popular will of the Hong Kong people, which they optimistically presume to correspond with their own reformist ideas, pragmatists stick closely to the spirit of Annex I in assessing the relevance of demands for radical change. Consequently, the draft articles relating to the power structure, as they now stand, reflect a substantial diversity of opinion. However, a consensus is emerging, and the political system subcommittee met again in late January 1988 to work on the more controversial clauses.

Meanwhile, a select group of vice-chairmen of the Drafting Committee has been charged with the duty to prepare an overall draft based on the articles already drafted by the various subcommittees. It is expected that the unnecessary repetitions will be eliminated in this overall draft, which will be presented for discussion by the Seventh Plenary Session of the Drafting Committee scheduled for late April 1988. The Seventh Plenary Session will adopt and release a draft for public consultation.

IV. LEGAL ISSUES

In the drafting process, legal aspects have not engaged the attention of the drafters as much as the author of this article would have liked. However, the Drafting Committee is composed not simply of lawyers, but also includes people from a cross section of the Hong Kong community, as well as experts in various fields and officials from the mainland. Given the fact that each of these people has particular special interests, it is an achievement that legal questions such as the interpretation of the Basic Law, the jurisdictional limits of the SAR courts, the review of the "constitutionality" of laws enacted by

11. Joint Declaration, *supra* note 1, Annex I.

the SAR legislature, the application of a certain amount of national laws within the SAR, the resolution of conflicts between mainland and SAR laws, and the amendment of the Basic Law have been raised in the discussions at all.

A. Interpretation of the Basic Law and Review of SAR Legislation

Those who consider law an interpretive concept[12] cannot fail to appreciate the importance of provisions relating to the interpretation of the Basic Law. The Chinese Constitution of 1982 provides that the Standing Committee of the NPC exercises the function and power to interpret laws.[13] Annex I is silent on the question of interpretation of the Basic Law. The final resolution of this question remains to be decided.

The question of the interpretation of the Basic Law is particularly relevant to the legislative powers of the SAR. Annex I provides that the legislature of the SAR

> may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the NPC for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.[14]

This raises the question as to which organ should be vested with the authority to decide whether or not the laws enacted by the SAR legislature are "in accordance with the Basic Law and legal procedures." In other words, who should have the power to review the validity or "constitutionality" of SAR legislation?

Some commentators are of the opinion that the adoption of a written Basic Law does not really change the relationship between the legislature and the judiciary in Hong Kong. These people reason that because the Hong Kong courts now have jurisdiction to decide whether Hong Kong legislation is *ultra vires* (beyond the authority granted to the Hong Kong legislature by the Letters Patent or the Royal Instructions, Hong Kong's present constitutional documents), the power to review the "constitutionality" of SAR legislation should also be vested in the SAR courts. This view draws a simple equal sign between *ultra vires* and "unconstitutionality." However, when one

12. *See generally* R. DWORKIN, A MATTER OF PRINCIPLE (1985); R. DWORKIN, LAW'S EMPIRE (1986).

13. "The Standing Committee of the People's Congress exercises the following functions and powers: . . . (4) To interpret statutes. . . ." PRC CONST., *supra* note 8, at art. 67.

14. Joint Declaration, *supra* note 1, Annex I.

recalls that the Basic Law includes guarantees of basic rights and liberties as well as provisions concerning the relationship between the Central Government and the SAR, it is obvious that the matter is not so simple. Furthermore, unlike the present arrangement of appeal to the Privy Council in Great Britain, the SAR courts will be vested with the power of final adjudication. It would be strange to implement the "one country, two systems" policy by giving SAR courts the power of final adjudication over disputes which concern the "constitutionality" of SAR legislation and affect the relationship between the Central Government and the SAR. It would amount to establishing the supremacy of the SAR judiciary not only over the SAR executive and legislature, but also over the Central Government in all matters covered by the Basic Law.

B. Administrative Review

Annex I also provides that "[e]very person shall have the right to challenge the actions of the executive in the courts."[15] This general principle is consistent with current Hong Kong law and practice, but in the context of the Basic Law, which will include provisions governing the division of power between the Central Government and the SAR, this clause may incorrectly give the impression that the SAR courts shall have competence to review executive acts of the Central Government. This idea is clearly inconsistent with the SAR being "directly under the authority of the Central People's Government."[16] Consequently, it has been proposed that the Basic Law should stipulate that the executive acts of the Central Government (including decisions on, *inter alia*, foreign affairs and defense) are not subject to judicial review in the SAR. Anyone who advocates otherwise should first consider the effects of having to relax the principle prescribed by Annex I of vesting the power of final adjudication in the SAR courts. For even if Central Government organizations should agree to accept the jurisdiction of the SAR courts to review their executive acts vis-à-vis the SAR (of which the likelihood is very small), it would then be only reasonable to expect the Supreme People's Court to be granted jurisdiction to review decisions of the SAR courts in this area. Such an arrangement would be extremely complicated and undesirable.

Whenever constitutional review is discussed, the approach to judicial review of *Marbury v. Madison*[17] naturally springs to mind. Whatever advantages the *Marbury* position may hold for resolving

15. *Id.*
16. *Id.* para. 3.
17. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

problems internally within the SAR (including perhaps human rights issues), it would appear that judicial review does not itself contain the solution to those problems which are unique under the "one country, two systems" arrangement. Even if some of the drafters should now fail to appreciate the full implications of the fact that the highest court in the SAR, the Final Court of Appeal, will only be the supreme judicial organ in the SAR and will not be the supreme court of the whole nation, the reality of the situation will no doubt dawn upon them well before the final draft of the Basic Law sees the light of day. Cases such as *Nicaragua v. United States*[18] emphasize that when a "powerful, recalcitrant defendant" challenges the court's right to decide a case, the court's judgment may be ignored and result in the court being doomed to a "role of inconsequence."[19] When even the United States, which claims to uphold the principle of rule of law, ignores the judgment of the International Court of Justice in *Nicaragua*, should we place any hope in the Central Government's voluntary submission to the jurisdiction of the SAR courts?

C. Review and the Drafting Process

Attempts have been made by some drafters to intertwine the questions of the interpretation of the Basic Law and the jurisdictional limits of the SAR courts. For instance, one draft excludes from SAR subject-matter jurisdiction disputes involving the relationship between the Central Government and the SAR, as well as executive acts of the Central Government. As a possible alternative to this approach, the common law act of state doctrine[20] has been explored. Suggestions have been made to limit SAR jurisdiction over acts of state to the questions of their effects and possible compensation thereunder, but not to extend SAR jurisdiction to their actual validity. The idea of concurrent jurisdiction over a small category of subjects (for instance, treason and espionage) has also been touched upon. Another proposed draft excludes foreign affairs and defense, which Annex I clearly stipulates to be the responsibilities of the Central Government. Yet another draft excludes "political questions." All the proposals

18. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27, 1986).

19. Glennon, *Protecting the Court's Institutional Interests: Why not the Marbury Approach?*, 81 AM. J. INT'L. L. 121 (1987).

20. Salaman v. Secretary of State of India in Council (C.A.) [1906] 1 K.B. 613; Johnstone v. Pedlar, 2 A.C. 262 [1921]; R.V. Bottrill, ex p. Kuechenmeister (1947) K.B. 41; Nissan v. Attorney General 1970 A.C. 179; Walker v. Baird 1892 (Nfld.) A.A 491; Buron v. Denman 76 Rev. Rep. 554 (1848); Burmah Oil Co. v. Lord Advocate (1965) A.C. 75; Foighel, *A Framework for Local Autonomy: The Greenland Case*, in MODELS OF AUTONOMY 51 (DINSTEIN ed. 1981).

are, in fact, attempts to define justiciability so as to implement the "one country, two systems" concept. So far, the solution to this problem has not yet emerged.

D. Applicability of National Legislation

1. Examples of National Legislation Applicable to the SAR

Another legal question brought forth in the discussions concerns the application, within the SAR, of certain national laws. For instance, under the "one country, two systems" concept, the whole of the PRC can have but one nationality law defining PRC citizenship.[21] The SAR cannot have its own nationality law and so there can be no "SAR citizens." The inhabitants of the SAR will consist of Chinese citizens and aliens. It is clear that the Nationality Law will be one of the national laws applicable in the SAR.

Another case in point is the collection of election laws in China.[22] Although China has never forfeited sovereignty over Hong Kong, it has historically arranged for delegates from Hong Kong to be elected in Guangdong Province. Once China resumes the exercise of sovereignty over Hong Kong, delegates to the NPC will, of course, be locally elected. China's election laws are national laws and will apply in the SAR, although they will be distinct from laws for election to the local legislature and local district boards.

These national laws are part of the Chinese socialist legal system. They are subject to different rules of construction than are statutes under the common law system practiced under British rule. This discrepancy leads to the following questions: (1) Should the SAR courts have jurisdiction to apply these national laws? (2) If so, should the SAR courts also be granted the power to interpret these laws? (3) If so, what rules of construction should apply? These issues have not yet been the subject of any proposed clauses, despite the fact that the

21. Zhonghua Renmin Gongheguo Guojifa (The Nationality Law of The People's Republic of China) (promulgated May 10, 1980) ZHONGHUA RENMIN GONGHEGUO FALU HUIBIAN 1979-1982 (COLLECTION OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982) 200 (1985) [hereinafter LAWS OF THE PRC].

22. Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Zuzhifa (Organic Law of the National Peoples's Congress of the People's Republic of China) (promulgated Dec. 10, 1982) LAWS OF THE PRC, *supra* note 21 at 369; Zhonghua Renmin Gongheguo Guowuyuan Zuzhifa (Organic Law of the State Council of the People's Republic of China) (promulgated Dec. 10, 1982) *id.* at 380; Zhonghua Renmin Gongheguo Difang Geji Renmin Daibiao Dahui he Difang Geji Renmin Zhengfu Zuzhifa (Organic Law of the Local People's Congresses and the Local People's Governments at Different Levels of the People's Republic of China) (promulgated Jan. 1, 1980) *id.* at 56; Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanjufa (Election Law of the National People's Congresses and the Local People's Congresses at Different Levels of the People's Republic of China) (promulgated Jan. 1, 1980) *id.* at 70.

problems involved are similar to those that arise in connection with the interpretation of the Basic Law. While it is still not clear whether the Basic Law is a law arising under the common law, the socialist legal system, or a new mixed system, it is at least beyond doubt that the Nationality Law and the national election laws are only part of the socialist legal system. It is also beyond doubt that they will apply in the SAR. It is generally believed that in a society committed to the rule of law, one cannot permit a situation to exist in which the courts are powerless to enforce applicable laws. Therefore, it seems inevitable that the SAR courts will be granted jurisdiction to apply these national laws.

2. Models for Resolving the Problem of Interpreting and Applying National Statutes such as the Basic Law

The question of interpreting national legislation remains unanswered, but a variety of solutions to this problem does exist. Lord Denning's remarks on the application and interpretation of European Community Law in England are instructive as to the common law attorney's approach to the difference between applying and interpreting a statute:

> The first and fundamental point is that the Treaty [of Rome] concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the Common Market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back .... It is important to distinguish between the task of interpreting the Treaty — to see what it means — and the task of applying it — to apply its provisions to the case at hand. Let me put on one side the task of applying the Treaty. On this matter in our courts, the English judges have the final word. They are the only judges who are empowered to decide the case itself. They have to find the facts, to state the issues, to give judgment for one side or the other, and to see that the judgment is enforced.
>
> Before the English judges can apply the Treaty, they have to see what it means and what is its effect. In the task of interpreting the Treaty, the English judges are no longer

> the final authority. They are no longer in a position to give rulings which are of binding force. The supreme tribunal for interpreting the Treaty is the European Court of Justice, at Luxembourg.[23]

This passage supports the argument that the separation of the functions of interpretation and application is permissible in the common law system and is not contrary to the principle of an independent judiciary. The Hong Kong SAR courts, however, may be unable to follow this approach in certain situations because, while the Treaty of Rome concerns only those matters which have a European element, the Basic Law both stipulates the relationship between the Central Government and the SAR and provides for the distribution of powers and functions within the SAR in addition to its guarantees for basic human rights. Furthermore, there is as yet no clear principle for identifying portions of the Basic Law, the interpretation of which should be reserved to the Standing Committee of the NPC, but whose application remains within the competence of the SAR courts.

The features that distinguish the EEC/U.K. situation from the Central Government/Hong Kong SAR situation are noteworthy. In the case of the application of European Community law by the U.K. courts, appeal lies to the European Court of Justice,[24] a court based in Luxembourg that operates independently of all other Community institutions. In the case of the application of China's national laws by the SAR courts, the power of final adjudication is vested in the SAR courts. Therefore, there should be no appeal to Central Government institutions. Furthermore, if interpretation of these national laws is reserved for the Standing Committee of the NPC there is still no clear indication that the Standing Committee will in this connection perform a purely judicial function independently of its executive (policy-making) and legislative functions.

A system similar to that of the Treaty of Rome envisages a supranational court along the lines of the European Court of Justice, the supreme arbiter of Community law. The Treaty of Rome stipulates that "member states undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of

23. H.P. Bulmer, Ltd, v. V.J. Bollinger S.A., 1974 Ch. 401, at 418-19. *See also* L. COLLINS, EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM Ch. 3 (3d ed. 1984); and Jacobs, *When to Refer to the European Court*, 90 Law Q. Rev. 486 (1974), in regard to the procedure of referring to the Court of Justice for a preliminary ruling under article 177 of the EEC Treaty. This procedure has been proposed as a model for referring the interpretation of certain sections of the Basic Law to the Standing Committee of the NPC for a "preliminary" ruling, which in fact would be final and binding on SAR courts.

24. Treaty of Rome, 1957, 298 U.N.T.S. 11, art. 136.

settlement other than those provided for therein."[25] This model cannot be precisely followed in the Hong Kong SAR under the "one country, two systems" formula, although the PRC Constitution also envisages the Standing Committee of the NPC as the supreme arbiter of all Chinese law. What the Basic Law will stipulate in regard to the interpretation and application of the Basic Law and those national laws which will apply in the SAR remains an open question. Ideally, precise provisions will be contained in the Basic Law, failing which, at least some basic procedural principles should be prescribed.

Research on other models of autonomy reveals that the terms of reference of the Commission on Home Rule in the *Greenland* case provide that the introduction of home rule should be within "the framework of the unity of the realm."[26] China's "one country, two systems" policy regarding Hong Kong also assumes that national unity is to be preserved. Consequently, attempts have been made to introduce the concept of a Basic Law Committee modelled on the Board prescribed by the Greenland Home Rule Act. The Act may be described as follows:

> Article 18 of the Home Rule Act regulates the manner in which conflicts arising in relation to the division of powers between the home rule authorities and the national authorities are to be resolved. A board is to be established, consisting of two members appointed by the government, two members appointed by the home rule authorities, and three Supreme Court Justices to be appointed by the Chief Justice of the Supreme Court, one of whom is to be appointed chairman. A decision is to be considered final when the four members appointed by the government and the home rule authorites are in agreement. Otherwise, an issue is to be decided by the three Supreme Court Justices.[27]

The model of the Greenland Board would appear to require a great deal of modification before it could be adopted. The proposed Hong Kong SAR Basic Law Committee described below indicates a preference for a consultative organ consisting of individuals.

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25. *Id.* art. 193.

26. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

27. Foighel, *supra* note 20.

E. The Current Role of the Drafting Committee and the Status of the Drafting Process

Numerous obstacles face the Drafting Committee. Perhaps the greatest frustration is the lack of time; many other problems are demanding the attention of the drafters, all of whom have their own full-time occupations and are also charged with the responsibility of maintaining close contacts with the Consultative Committee. A second frustration is the need to render complicated English legal concepts into everyday Chinese expressions simple enough for laypersons. A third frustration is the nearly impossible task of compressing all the necessary provisions into principles appropriate for constitutional documents. The entire process becomes all the more formidable in the face of the vast differences between the socialist and common law legal systems.

The latest development in the drafting process is the emergence of a new model for a Hong Kong SAR Basic Law Committee. The fourteenth session of the Central Government/SAR Relationship Subcommittee, held on December 16, 1987, decided that when the draft of the Basic Law is submitted to the Standing Committee of the NPC, the Drafting Committee shall simultaneously submit a separate proposal to the Standing Committee, stating that a "Hong Kong Special Administrative Region Basic Law Committee" should be established and providing guidelines for the structure and functions of this committee.

Based on the discussions at that session, a first draft of such a proposal has emerged. The proposed Basic Law Committee will be a work unit under the Standing Committee of the NPC. It will be a consultative organ performing research and making recommendations to the NPC, or to the Standing Committee of the NPC, on the following matters: (1) the conformity of SAR legislation to the Basic Law and legal procedures, (2) the application of national laws in the SAR, (3) the interpretation of the Basic Law and (4) the amendment of the Basic Law.

According to the proposal, members of the Hong Kong SAR Basic Law Committee will be appointed by the Standing Committee of the NPC and will consist of individuals from the mainland and from Hong Kong, including members of the legal profession. The exact number and the ratio of the mainland-to-Hong Kong members remain to be decided. All but one of the members of the subcommittee share the opinion that because the Hong Kong SAR Basic Law Committee will be an organ under the Standing Committee of the NPC and not an organ of the SAR, its composition, functions and

powers should not be prescribed by the Basic Law. One member, however, believes that the committee's role should be prescribed in the Basic Law. This minority opinion has been recorded in the draft proposal. The draft proposal itself is, of course, subject to approval and adoption by the Seventh Plenary Session of the Drafting Committee to be held in late April this year.

It is hoped that the establishment of the Basic Law Committee will provide an institution capable of aiding in the resolution of the types of problems noted above. While the Standing Committee of the NPC, as provided by article 25(c) of the PRC Constitution, is the supreme arbiter of all Chinese law, it is hoped that, in the exercise of its functions and powers in this connection, the Standing Committee will not only observe socialist norms but will also give consideration to the values, principles and practices to which Hong Kong is accustomed. The Basic Law will engender a new body of law and practice, which will partake of the characteristics of both the common law and socialist legal systems and will, the drafters hope, be acceptable to both sides.

CONCLUSION

The few months remaining between now and the Seventh Plenary Session promise to be an exciting time. Although not too many subcommittee sessions have been scheduled, intensive preparatory work is underway. The consultative activities that will follow the publication of the full draft are expected to take two years. At least two more plenary sessions are planned for consideration of public reactions to the draft. Amendments may ensue. It is, therefore, altogether too early to expect the final word on any clause or issue.