

Several Issues Concerning the Relationship between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region

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The Basic Law for the Special Administrative Region of Hong Kong (Basic Law) devotes one chapter to the relationship between the Central Government of the People's Republic of China (PRC) and the Hong Kong Special Administrative Region (SAR).¹ As this author understands it, the term "relationship between the Central Government and the Hong Kong SAR" refers to the relationship engendered by the Central Government's exercise of jurisdiction over the Hong Kong SAR. In general, this relationship can be divided into three kinds of situations:

First, affairs affecting national sovereignty and the overall interests of the nation as a whole shall be managed by the Central Government, and the Hong Kong SAR must submit to the leadership of the Central Government.

Second, local matters of the Hong Kong SAR shall be managed by the Hong Kong SAR itself, but some of these local matters will be overseen by the Central Government.

Third, other local matters shall be managed by the Hong Kong SAR without interference by the Central Government.

The task of the Basic Law is to clearly delineate these three categories so that the Central Government and the Hong Kong SAR will have rules to follow in handling affairs which involve their relationship.

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1. Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee (compiled Dec. 1987) ch. 2, reprinted in *Jibenfa Gezhang Tiaowen Caogao Huibian*, Wen Wei Pao, Dec. 13, 1987, at 6 [hereinafter Collection] (available in English from the Secretariat of the Consultative Committee for the Basic Law).

During the process of drafting the Basic Law, the chapter covering the relationship between the Central Government and the Hong Kong SAR generated quite a bit of controversy. In particular, there were unusually heated disputes over the issues mentioned above — issues which neither the fundamental policy of the Chinese Government nor the Sino-British Joint Declaration on the Question of Hong Kong (Joint Declaration) directly addresses.²

The Basic Law drafting stage, wherein subcommittees drafted separate texts relating to specific topics, was recently concluded. Except for the provisions in chapter eight on the Hong Kong SAR flag and emblem, which are incomplete because the flag and emblem patterns have not yet been worked out, the text of the nine other chapters and the preface has already appeared in draft form. Moreover, the Secretariat of the Basic Law Drafting Committee has already entitled the draft: "Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee" (Collection). The Collection is not a formal draft; it must undergo several revisions before it is established as the formal draft. However, after two and one-half years of hard work by the Basic Law Drafting Committee, the Collection, representing an intermediate step in the drafting process, has already become the focus of much attention. Recently, Hong Kong periodicals have begun to publish frequent commentaries on the Collection. This present commentary is a preliminary inquiry into several issues involving the relationship between the Central Government and the Hong Kong SAR within the context of the Collection.

I. SOVEREIGNTY

The Hong Kong SAR constitutes one level of the PRC's local administrative regions. The nation enjoys complete sovereignty over the Hong Kong SAR, just as it does over all provinces, autonomous regions, and municipalities directly under the control of the Central Government. The state's sovereignty over the Hong Kong SAR is exercised by the Central Government. Therefore, in stipulating the relationship between the Central Government and the Hong Kong SAR, the Basic Law must give ample attention to this point.

Foreign affairs and national defense are fundamental symbols of national sovereignty. By definition, every united sovereign nation's foreign affairs and national defense are exclusively managed by its

2. See A Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366 [hereinafter Joint Declaration].

central government. It is therefore natural that these two powers belong to the Central Government.

In addition to foreign affairs and national defense, there are other matters affecting the interests of the nation as a whole which should be managed by the Central Government, not by local administrative regions. For example, the Joint Declaration refers to Chinese nationals. What is a Chinese national? This must be stipulated by the state nationality law: the Hong Kong SAR cannot by itself stipulate the standards for Chinese nationality. Such things should be under the jurisdiction of the Central Government.

Some people claim that since the Joint Declaration provided that "the Hong Kong SAR will enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibility of the Central People's Government,"³ the affairs to be managed by the Central Government are strictly limited to foreign affairs and national defense; all other affairs are within the scope of the Hong Kong SAR's high degree of autonomy and should be managed by the Hong Kong SAR. It must be pointed out that this is a misinterpretation of the Joint Declaration. This sentence of the Joint Declaration only says that foreign affairs and national defense shall be managed by the Central Government. It does not say that the affairs managed by the Central Government are limited to foreign affairs and national defense. Even looking at the Joint Declaration itself, it can be seen that those matters stipulated to be managed by the Central Government are not restricted to foreign affairs and national defense.

The Joint Declaration stipulates:

[t]he chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government.⁴

It is, therefore, clear that the Central Government has the power to appoint the chief executive and principal officials. Similarly, it is also provided in the Joint Declaration that:

[t]he above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region

3. Joint Declaration, *supra* note 2, para. 3(2).

4. *Id.* para. 3(4).

of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.⁵

It is thus also evident that the Central Government has the power to formulate the Basic Law. Thus, the view that the Central Government manages only foreign affairs and national defense while the Hong Kong SAR manages all other affairs does not conform with the Joint Declaration.

That national sovereignty over the Hong Kong SAR is exercised by the Central Government is not only supported by the fact that the Central Government manages affairs concerning sovereignty and overall national interests, but is also manifested by the Central Government's supervisory power over the autonomy of the Hong Kong SAR. Local autonomy in all countries is supervised by the national government. If the localities were free from national supervision, they would not be autonomous but independent. The Hong Kong SAR enjoys a high degree of autonomy. But this is only to say that its level of autonomy is high relative to "ordinary" autonomy. It is still autonomy and not independence. Therefore, there should be no doubt that the Central Government should have supervisory power over the manner in which the Hong Kong SAR exercises its autonomy. Naturally, the supervision by the Central Government over the Hong Kong SAR does not cover all matters. Principally, the Central Government's supervision is over whether the Hong Kong SAR is exercising its autonomy in accordance with the Basic Law. In addition, such supervision is itself carried out in accordance with the stipulations of the Basic Law. The Central Government will not interfere with particular affairs of the Hong Kong SAR.

The Collection stipulates that "[t]he Hong Kong SAR is a local administrative region of the PRC with a high degree of autonomy directly under the Central People's Government."⁶ This article clarifies the position of the Hong Kong SAR and its hierarchical relationship in the national system of administrative regions. Generally, China's local administrative regions are divided into three levels: provinces, counties, and towns.⁷ Autonomous regions and municipalities directly under the Central Government are on the same level as provinces. In stipulating that the Hong Kong SAR is directly under the Central Government, this article makes clear that the Hong Kong

5. *Id.* para. 3(12).

6. Collection, *supra* note 1, art. 11.

7. Some regions have an additional level between the province and county levels, but this is the exception.

SAR is on the same administrative level as a province, an autonomous region, or a municipality directly under the control of the Central Government. They have an equal status. This general provision manifests the concept of national sovereignty.

The Central Government's powers, as stipulated by chapter two of the Collection include the following:

(1) Responsibility for the foreign affairs of the Hong Kong SAR;⁸

(2) Responsibility for the defense of the Hong Kong SAR;⁹

(3) Power to appoint the chief executive and principal officials of the executive authorities of the Hong Kong SAR;¹⁰

(4) Power to review whether laws enacted by the Hong Kong SAR legislature conform to the Basic Law and to legal procedures;¹¹

(5) Power to direct the Hong Kong SAR government to implement certain national laws.¹²

The first three of these powers have already been clearly stipulated by the Joint Declaration as powers belonging to the Central Government. The Joint Declaration does not directly address the fourth and fifth powers. However, they are powers that are within the scope of national sovereignty, and must, therefore, be held by the Central Government. These two powers are discussed in more detail below.

Article 22 of the Collection stipulates that "[t]he Hong Kong SAR shall make laws to prohibit any activity that would damage the unity of the State or subvert the Central People's Government."¹³ The criminal laws of all nations maintain that activities that undermine national unity or subvert the lawful government by illegal means are crimes against which strong measures should be taken. Such protective measures are essential to safeguard national sovereignty and unity. Due to the implementation of the "one country, two systems" policy, the PRC criminal law will not be put into effect in the Hong Kong SAR. It is absolutely necessary, therefore, that the Basic Law require the Hong Kong SAR to legislate prohibitions of the above criminal activities.

From the state of affairs described above, it can be seen that chapter 2 of the Collection amply reflects the sovereignty of the State

8. Collection, *supra* note 1, art. 13.

9. *Id.* art. 14.

10. *Id.* art. 12.

11. *Id.* art. 16.

12. *Id.* art. 17.

13. *Id.* art. 22.

over the Hong Kong SAR, while at the same time limiting areas that are managed by the Central Government to only those that are essential for the implementation of state sovereignty. This provides broad leeway to the Hong Kong SAR in carrying out the policy of "one country, two systems." This author believes that this is the correct way to handle the issue of sovereignty.

II. A HIGH DEGREE OF AUTONOMY

Chapter 2 of the Collection makes the broadest possible allowances for the high degree of autonomy of the Hong Kong SAR. Article 15 of the Collection stipulates:

[t]he Hong Kong SAR shall be vested with the executive power. It shall, in accord with the relevant provisions of this law, on its own manage affairs relating to finance, monetary affairs, the economy, industry and commerce, trade, taxation, the postal service, civil aviation, maritime affairs, transportation, fisheries and agriculture, civil service, home affairs, labor, education, medical and health affairs, social welfare, recreation and culture, municipal construction, town planning, housing, land and real property, public order, immigration, climatology, communications, science and technology, sports and other executive affairs.¹⁴

It is apparent from this provision that the Hong Kong SAR enjoys extremely broad executive powers. Besides explicitly enumerating twenty-nine different executive matters to be handled by the Hong Kong SAR, this provision allows for "other" aspects of the Hong Kong SAR's executive powers. This clearly indicates that executive affairs which the Hong Kong SAR can handle by itself are not limited by the twenty-nine mentioned above. In fact, as long as they are local executive affairs, the Hong Kong SAR has the power to handle other affairs by itself without any limitation.

Article 16 of the Collection stipulates that the Hong Kong SAR enjoys the power to legislate.¹⁵ The provisions do not impose any limitations on the power to legislate, and it should be interpreted as saying that the Hong Kong SAR legislature has the power to enact laws regarding any matter within the scope of its high degree of autonomy. The second clause of article 16 stipulates that "[l]aws enacted by the Hong Kong SAR legislature shall be reported to the National Peo-

14. *Id.* art. 15.

15. *Id.* art. 16.

ple's Congress Standing Committee for the record."¹⁶ The phrase "report[ing] . . . for the record" refers to the manner in which the National People's Congress (NPC) Standing Committee will be informed of the enactment of a law; it does not mean that the approval of the NPC Standing Committee is needed. This clause states further that "[s]uch reporting shall not affect the coming into operation of the laws."¹⁷ Thus, as soon as a law enacted by the Hong Kong legislature has completed the legislative process, it can go into effect, and its effectiveness is not delayed because of the reporting process. This further clarifies that "reporting" does not imply "approval." Why must laws enacted by the Hong Kong SAR legislature be reported to the Central Government "for the record?" Because the laws of the Hong Kong SAR are part of the law of the PRC. Naturally, the Central Government has to be informed of new laws enacted by the Hong Kong SAR.

Article 18 of the Collection stipulates that "[t]he Hong Kong SAR shall be vested with independent judicial power, including that of final adjudication."¹⁸ Independent judicial power means that the Hong Kong SAR judiciary will not be subject to any interference. Presently, the Hong Kong courts are not vested with the power of final adjudication. The court of final adjudication is the Judicial Committee of the Privy Council. After 1997, the Hong Kong SAR will establish a court of final adjudication, and all litigation will be finally adjudicated locally and not referred to Beijing. The power of final adjudication is conferred on the Hong Kong SAR in order to implement the policy of "one country, two systems," so that its present legal system can be preserved. When compared with the present situation, this provision will greatly increase the judicial powers vested in the Hong Kong SAR.

The second clause of article 13 stipulates, "[t]he Central People's Government authorizes the Hong Kong SAR Government to deal with on its own relevant external affairs in accordance with this Law."¹⁹ "In accordance with this Law" as stated in this provision refers to the series of provisions contained in chapter seven, "The External Affairs of the Hong Kong SAR." This chapter confers on the Hong Kong SAR the broad power to handle for itself external affairs in the areas of economics and culture. Included among these are the powers to independently maintain and develop relations with various countries, regions, and relevant international organizations,

16. *Id.*

17. *Id.*

18. *Id.* art. 18.

19. *Id.* art. 13.

and to conclude and observe relevant agreements using the name "Hong Kong, China;" to send representatives acting as members of the PRC delegation to take part in international organizations and conferences whose memberships are limited to states; to take part in international organizations and conferences not limited to states, using the name of "Hong Kong, China;" and to establish official or semi-official economic and trade bodies in foreign countries.

From the provisions enumerated above, it can be seen that the high degree of autonomy enjoyed by the Hong Kong SAR is already very broad and vastly exceeds the power enjoyed by ordinary local autonomous regions. However, the Collection also takes into consideration the possibility that new situations might arise in the future that cannot now be foreseen. If such situations arise, the Hong Kong SAR may need new powers in addition to the powers currently conferred. Therefore, article 19 was added, which stipulates that "[t]he Hong Kong SAR shall be vested with other powers conferred by the NPC, the NPC Standing Committee and the State Council."²⁰ The phrase "other powers" refers to powers other than those enumerated above. The National People's Congress, the NPC Standing Committee and the State Council can all confer powers, but who will actually confer powers will depend on under whose scope of authority such power falls.

In order to guarantee non-interference with a high degree of autonomy for the Hong Kong SAR, the Collection specifically contains the following additional provisions:

(1) Military forces stationed in the Hong Kong SAR for the purpose of defense shall not interfere in the local affairs of the Hong Kong SAR;²¹

(2) The departments under the Central Government, and the provinces, autonomous regions and municipalities directly under the Central Government shall not interfere in the affairs administered by the Hong Kong SAR on its own in accordance with the Basic Law;²²

(3) Members of the military forces, all offices established in Hong Kong by the departments under the Central Government, the provinces, autonomous regions and municipalities directly under the Central Government, and their personnel shall abide by the laws of the Hong Kong SAR.²³

20. *Id.* art. 19.

21. *Id.* art. 14.

22. *Id.* art. 21.

23. *Id.* art. 14; art. 21.

III. RESIDUAL POWERS

The issue of residual powers was one of the most controversial questions in the drafting of the Basic Law. Residual powers, according to common understanding, refer to those powers that fall outside the scope of powers that have been clearly divided between the Central Government and a local government. Many different views have been expressed on this question, but the two principal ones are as follows: (1) the Basic Law should stipulate that residual powers belong to the Hong Kong SAR; and (2) there is no question of residual powers as to the Hong Kong SAR, so the Basic Law should not include any provisions on this point.

When the Drafting Committee was determining the structure of the Basic Law during the second plenary session, it adopted the second view mentioned above and did not consider residual powers a matter which should be addressed by the Basic Law. The Special Subcommittee on the Relationship Between the Central Government and the Hong Kong SAR also adopted this position and did not draft any provisions concerning residual powers. It is this author's opinion that this method of dealing with residual powers is entirely correct.

Whether the Basic Law should cover residual powers is a question of principle. It implicates China's state system, especially the nature and status of special administrative regions, and the origins of power, as well as a whole series of other critical issues. Therefore, we must adopt a prudent attitude toward this issue. The question of residual powers usually exists in countries with a federal system. The provinces or states of a federation were originally sovereign states; however, when they united together to form a federation, each conferred a portion of their powers to the federal government for its administration while the residual powers remained in the hands of each province or state. Therefore, the constitutions of federations always clearly provide that residual powers reside in each province or state. This type of provision is entirely appropriate, and even if it were not clearly stipulated, constitutional interpretation should also require such a result.

China's situation is different. China does not have a federal system, but has a unitary system. A locality's powers are not inherent in themselves, but are conferred by the state. Neither before nor after the establishment of the Hong Kong SAR does it possess independent sovereignty. The Hong Kong SAR's high degree of autonomy is conferred by the state through the Basic Law, and it cannot enjoy powers that were never conferred. So how can there be any residual powers? If one insists that there are residual powers, then these powers can

only belong to the Central Government and not to the Hong Kong SAR. Advocating the position that residual powers reside in the Hong Kong SAR confuses China's unitary system with the federal system. This confuses the special administrative region with a province or state of a federation and completely turns on its head the origin of the special administrative region's power. Obviously, this is something that we cannot accept.

Some may say they acknowledge that the status of a special administrative region is not the same as a province in a federation, and that the power of a special administrative region is conferred by the state. But why can the state not confer residual powers on the Hong Kong SAR in order to put the Hong Kong people at ease? If the question is put in this way, then the nature of the problem is changed. It is no longer a question of whether or not residual powers should belong to the Hong Kong SAR, but one of whether or not the state needs to confer residual powers on the Hong Kong SAR. Considering the question from the aspect of what the Hong Kong SAR needs, it is this author's opinion that the response should be in the negative. As was stated above when discussing the high degree of autonomy enjoyed by the Hong Kong SAR, the powers conferred on the Hong Kong SAR are already very broad. It is very difficult to imagine what other powers must supplement those already conferred for the Hong Kong SAR to be able to implement a high degree of autonomy. As a result of the provisions in article 19 of the Collection, if a situation arises where the appropriate powers are found to be lacking, then new powers can be conferred on the Hong Kong SAR by the highest organs of authority in the state or by the Central People's Government.²⁴ This cannot become a problem, so the people of Hong Kong should not be worried.

IV. REVIEW OF LAWS ENACTED BY THE HONG KONG SAR LEGISLATURE TO DETERMINE WHETHER THEY ARE IN ACCORDANCE WITH THE BASIC LAW

The Hong Kong SAR is not a state and thus cannot enjoy the unlimited legislative power of a state. The legislative power of the Hong Kong SAR has as its limits the scope of the high degree of autonomy provided for in the Basic Law. The Hong Kong SAR has the power to legislate on any matters within the scope of its high degree of autonomy. Only the Central Government can legislate on matters that fall outside of this scope, for example, on foreign affairs and defense. The Hong Kong SAR does not have legislative authority

24. *Id.* art. 19.

over these matters. Because the Hong Kong SAR must legislate within the scope stipulated by the Basic Law, the issue arises of reviewing laws enacted by the Hong Kong SAR legislature to determine whether they are in accordance with the Basic Law.

The Joint Declaration provides: "[l]aws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid."²⁵ This provision only requires that laws enacted by the legislature must be in accordance with the Basic Law and legal procedures. It says nothing about who decides whether the laws enacted are in accordance with the Basic Law and legal procedures or how to handle laws which do not accord with the Basic Law and legal procedures. All of these issues were left for the Basic Law to resolve.

Article 16 of the Collection offers the following method for resolving these issues:

(1) The power to review laws enacted by the Hong Kong SAR legislature to determine whether they are in accordance with the Basic Law and legal procedures rests with the NPC Standing Committee;

(2) Before the NPC Standing Committee makes a decision as to whether laws enacted by the Hong Kong SAR legislature are in accordance with the Basic Law and legal procedures, it must first seek the opinion of the Hong Kong SAR Basic Law Committee;

(3) If the NPC Standing Committee determines that any law of the Hong Kong SAR is not in accordance with the Basic Law or legal procedures, it may remand the relevant law to the Hong Kong SAR for reconsideration or repeal it. The NPC Standing Committee shall not, however, amend the law in question;

(4) Any law which is remanded for reconsideration or repealed by the NPC Standing Committee shall immediately cease to have force, but the loss of force of a law shall not have retroactive effect.²⁶

According to provisions of China's Constitution, the NPC Standing Committee has the power to review local regulations enacted by the organs of state power in the provinces, autonomous regions, and municipalities directly under the Central Government and can repeal those local laws and regulations that contravene the Constitution, statutes, or administrative regulations.²⁷ Laws enacted by a SAR are a type of local regulation. Therefore, the review by the NPC Standing

25. Joint Declaration, *supra* note 2, Annex I, sec. II.

26. Collection, *supra* note 1, art. 16.

27. ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution of the People's Republic of China) art. 67, sec. 8 (1982).

Committee of laws enacted by the Hong Kong SAR legislature, as provided in the Collection, is in keeping with the spirit of the Constitution.

With respect to the issue of review, however, there are different points of view. Some people advocate that when the NPC Standing Committee determines that a certain law of the Hong Kong SAR does not accord with the Basic Law or legal procedures, it should not itself take any action with regard to the law, but should hand it over to the court of final adjudication of the Hong Kong SAR to rule on its compliance with the Basic Law and legal procedures. If the result of the court's ruling is that a portion of the law or the entire law does not accord with the Basic Law or legal procedures, then the court has the power to declare that portion of the law or the entire law invalid. In reality, this proposition gives the power of reviewing whether laws are in accordance with the Basic Law and legal procedures to the Hong Kong SAR court of final adjudication, but merely adds a single procedural limitation in that the court of final adjudication cannot initiate the exercise of the power because the issue must first be presented to the court by the NPC Standing Committee.

Even putting aside for a moment the question as to whether this method of review contravenes the Constitution, it is also not in keeping with the conventions of common law. According to the common law, courts can only review the constitutionality of a law while adjudicating an actual case. To conduct the examination of a law outside of an adjudication and to review its constitutionality is a practice that has never existed in the common law. Take, for example, the court with the most influence on legislation, the United States Supreme Court. It can only review the constitutionality of the laws actually involved in a particular case while in the process of adjudicating that case, and it cannot depart from the case to conduct a review of laws enacted by the United States Congress. Adopting the above method of review would in fact be giving the courts a new function that is completely incompatible with its present responsibilities and work methods. The result would be a dramatic change in the common law judicial system. It is doubtful whether this method of review is feasible. The fact that many people in the Hong Kong legal community oppose this method indicates that this issue requires further examination.

The Collection stipulates that when the Standing Committee of the NPC determines that a certain law does not accord with the Basic Law or legal procedures, it may adopt either of the following two means of handling the matter: remand the law to the Hong Kong

SAR for reconsideration, or repeal the law.²⁸ This kind of flexible approach is undoubtedly correct. Laws which do not accord with the Basic Law or legal procedures may arise in innumerable forms. A law may fundamentally violate the Basic Law, or it may generally conform to the Basic Law with some specific aspect in violation of the Basic Law. Once it is clear there is a violation of the Basic Law, one must also determine what provision is violated and whether it is a general principle or a specific provision. There is also a distinction to be made according to the seriousness of the violation of legal procedures. Generally speaking, if the violation of the Basic Law or legal procedures is not so serious as to warrant repeal, it is most appropriate to remand the law for reconsideration. The Collection also stipulates that the Standing Committee of the NPC may only remand or repeal legislation which violates the Basic Law or legal procedures, but may not amend such a law. This stipulation is made out of respect for the legislative powers that the Hong Kong SAR enjoys. It is the correct approach.

According to the Collection, the legal effect of these two actions is the same.²⁹ Laws that are either remanded to the Hong Kong SAR for reconsideration or those that are repealed shall immediately lose force. Some feel that the legal effects of these two actions should be different. There is no question that laws repealed by the Standing Committee of the NPC should immediately lose force. These people feel, however, that if the law is not repealed but is merely remanded for reconsideration, it should only be suspended. Others believe that suspending such laws would place them in an uncertain status, and would actually create additional legal problems; it would, therefore, be better to have such laws lose effect immediately so as to facilitate implementation. This problem should be studied further.

The Collection stipulates that the loss of force of a law will not have retroactive effect.³⁰ Legal acts committed pursuant to that law before its legal effect was lost are still valid and are not affected by the law's loss of force. The goal of this provision is to protect the legitimate rights and interests of the parties concerned to prevent them from being harmed by later changes in the law. However, there are disagreements over this provision. Some feel that whether or not the invalidation should have retroactive effect depends on specific circumstances. If a penal law stipulates that a certain act constitutes a crime, and that law is declared to be invalid, its invalidation should have

28. Collection, *supra* note 1, art. 16.

29. *Id.*

30. *Id.*

retroactive effect on judgments based on such a law; otherwise, it would be unfair to the convicted person. This question also merits further consideration.

V. THE ENFORCEMENT OF NATIONAL LAWS

The term "national laws" as used in this discussion refers to laws formulated by the highest organ of state powers — the NPC and its Standing Committee. Due to the implementation of the principle of "one country, two systems," the Hong Kong SAR, within the scope of its high level of autonomy, will have its own laws. Thus, generally, national laws need not be enforced in the Hong Kong SAR. Everyone is agreed on this point. What people disagree on is whether there are certain national laws which should be enforced in the Hong Kong SAR, and, if so, which national laws, and what the enforcement procedures in Hong Kong should be.

One opinion is that no national laws should be enforced in the Hong Kong SAR, in accordance with section II of Annex I to the Joint Declaration: "[t]he laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature"³¹ Those who hold this opinion say that this provision of the Joint Declaration, which discusses laws to be implemented in the Hong Kong SAR, only mentions three types of laws: the Basic Law, existing Hong Kong laws, and laws enacted by the Hong Kong SAR legislature. It does not mention national laws, so obviously national laws should not be enforced in the Hong Kong SAR.

The question is how this passage from Annex I should be interpreted. We know that paragraph 3 of the Joint Declaration expresses the Chinese government's fundamental policy toward Hong Kong,³² and that Annex I is the elaboration of this fundamental policy.³³ Thus, paragraph 3 of the Joint Declaration and Annex I are united to form a complete whole. In elucidating the meaning of this language of Annex I, we must start off by reviewing the whole document. Only by relating relevant portions of the complete documents can we ascertain the correct meaning. One cannot merely take this passage out of context and attempt to ascertain its meaning while ignoring paragraph 3 of the Joint Declaration and the remainder of Annex I. A correct interpretation cannot be reached in this fashion.

31. Joint Declaration, *supra* note 2, Annex I, sec. II.

32. *Id.* para. 3.

33. *Id.* Annex I.

Looking at the question of the laws from this broad viewpoint, one can clearly see that the affairs handled by the Hong Kong SAR are limited by the scope of the Hong Kong SAR's autonomy, while national affairs such as foreign relations and national defense, as well as other matters affecting the rights and interests of the entire nation, must be managed by the Central Government. In handling these matters, the Central Government primarily relies on the relevant laws enacted by the highest organ of state power. Therefore, such national laws must be enforced in the Hong Kong SAR. Otherwise, the Central Government will have no means of managing these affairs.

Some ask whether it is possible for the Central Government merely to issue directives while allowing the Hong Kong SAR to enact the appropriate laws, so that national laws need not be enforced in the Hong Kong SAR. Such a system is premised on the assumption that the Hong Kong SAR has the authority to legislate such matters. However, the Hong Kong SAR does not possess legislative authority over foreign relations, national defense, or matters involving the nation as a whole. Therefore, this method is unworkable. Of course, the statement above that the Hong Kong SAR cannot legislate in these areas refers only to primary laws. It is not intended to imply that the Hong Kong SAR cannot enact supplementary legislation, such as detailed rules and regulations for the implementation of such laws in accordance with the provisions of national laws.

The Collection stipulates:

The laws enacted by the National People's Congress and its Standing Committee shall not apply in the Hong Kong SAR except for the following:

- (1) laws concerning defense and foreign affairs;
- (2) other laws relating to the expression of national unity and territorial integrity which, in accordance with the provisions of this Law, are outside the scope of the high degree of autonomy of the Hong Kong SAR.³⁴

This author is of the opinion that the position taken by the Collection is correct, but the linguistic expression in some places, such as in section II, requires further deliberation and improvement.

Because national laws will generally not be enforced in the Hong Kong SAR, if a national law is to be enforced there, it must be enforced through definite legal procedures. The Collection further stipulates:

34. Collection, *supra* note 1, art. 17.

Regarding the laws set out in (1) and (2) above, those which need to be applied in the Hong Kong SAR shall be applied by way of proclamation or legislation by the Hong Kong SAR Government upon the directive of the State Council.

Except in emergencies, the State Council shall consult with the Hong Kong SAR Basic Law Committee and the Hong Kong SAR Government before giving the above-mentioned directive.

If the Hong Kong SAR Government does not act in accordance with directives given by the State Council, the State Council may apply the above-stated law in the Hong Kong SAR by issuing an order.³⁵

It should be explained that the Hong Kong SAR Basic Law Committee mentioned in the above provisions is a consultative organ whose establishment the Drafting Committee plans to propose to the NPC. There will be participation by Hong Kong representatives on the committee. By requiring the State Council to consult with this committee prior to issuing directives to the Hong Kong SAR, Hong Kong has a greater opportunity to express its views on the matter.

VI. STRUCTURAL ISSUES

Finally, an issue concerning the structure of the Basic Law must be addressed: should the Basic Law contain a chapter specifically dedicated to discussing the relationship between the Central Government and the Hong Kong SAR.

In the earliest stages of examining the structure of the Basic Law, people had different ideas on this subject. Many felt that the issue of the relationship between the Central Government and the Hong Kong SAR is extremely important and should be the subject of a special chapter in the Basic Law. But others felt that there are numerous instances where the Basic Law touches on the topic of the relationship between the Central Government and the Hong Kong SAR, so it would be difficult to amass all such provisions into a single chapter. Eventually, because more people favored the first approach, the Drafting Committee decided on the present structure with a special chapter on this topic. Having gone through the first stage of drafting, a few problematic issues have emerged.

Structurally, the Basic Law currently contains a preamble and ten chapters. The ten chapters are arranged in the following order:

35. *Id.*

general provisions; the relationship between the Central Government and the Hong Kong SAR; fundamental rights and duties of Hong Kong SAR inhabitants; the political structure; the economy; education, science, and culture; external affairs; the regional flag and regional emblem; the interpretation and amendment of the Basic Law; and supplementary provisions. The general provisions include those applicable to the entire Basic Law, and they are generally the most important provisions.

Viewing the Collection in its entirety, many of the provisions concerning the relationship between the Central Government and the Hong Kong SAR should be included in the General Provisions, such as those concerning the Hong Kong SAR being directly under the jurisdiction of the Central People's Government, the Central Government being responsible for managing foreign affairs and national defense matters, as well as those dealing with the high level of autonomy to be enjoyed by the Hong Kong SAR. However, these provisions must all be included in the chapter concerning the relationship between the Central Government and the Hong Kong SAR because it comprises an independent chapter. A problem therefore arises: because all of the most important provisions cannot be included among the General Provisions, this chapter seems somewhat lacking in substance. On the other hand, if there is to be a special chapter dealing with the relationship between the Hong Kong SAR and the Central Government, then all provisions relating to this question should be included in that special chapter. However, because there are other chapters, and some provisions on the relationship between the Hong Kong SAR and the Central Government are more directly linked to these chapters, such provisions must be put in these chapters. For example, many of the provisions of chapter seven (External Affairs) touch on the relationship between the Central Government and the Hong Kong SAR; thus, they are all contained in chapter seven. The same situation arises within the provisions concerning the power to interpret and amend the Basic Law. Thus, the chapter concerning the Central Government-Hong Kong SAR relationship has not been able to achieve its original goal of concentrating all such provisions touching on this relationship into one chapter.³⁶

36. The author raises the issue of the structure of the Basic Law not in order to deprecate the current method of devoting an independent chapter to the relationship between the Central Government and the Hong Kong SAR, but rather in order to point out that problems still exist and that we must further explore them so as to improve the Basic Law.

CONCLUSION

The policy foundation of the Basic Law is based on the Central Government's guiding policy towards Hong Kong as publicly announced and elaborated in the Joint Declaration.³⁷ The Joint Declaration embodies the guiding policy and principles regulating the relationship between the Central Government and the Hong Kong SAR. The key to many issues can be found there, such as the position of the Hong Kong SAR and its hierarchical relationship within the national administrative system;³⁸ the powers of the Central Government to handle foreign relations and defense affairs,³⁹ to appoint the chief executive and principal officials,⁴⁰ and to formulate a basic law;⁴¹ and the high degree of autonomy of the Hong Kong SAR,⁴² which includes executive power,⁴³ legislative power,⁴⁴ independent judicial power,⁴⁵ the power of final adjudication,⁴⁶ and the power to handle external affairs.⁴⁷ In drafting the Basic Law, these issues will be resolved simply by codifying these guiding principles from the Joint Declaration into law and legal clauses.

Because the guiding policies contained in the Joint Declaration do not address some issues, difficulties remain in drafting the chapter covering the relationship between the Central Government and the Hong Kong SAR. No ready-made answers can be found in China's stated Hong Kong policy for questions such as: to whom do the residual powers belong, whether national laws have any effect in the Hong Kong SAR, who reviews whether laws enacted by the legislature of the Hong Kong SAR conform to the Basic Law and how will they be reviewed, and whether there should be a limitation on the scope of the jurisdiction of the Hong Kong SAR courts. These issues are requiring us, the drafters of the Basic Law, to employ our creative powers. Taking into account the actual situation in Hong Kong, we must seek a resolution in accordance with the principles and spirit of China's fundamental policy towards Hong Kong.

37. Joint Declaration, *supra* note 2.

38. *Id.* para. 3(2).

39. *Id.*

40. *Id.* para. 3(4).

41. *Id.* para. 3(12).

42. *Id.* para. 3(2).

43. *Id.* para. 3(3).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* para. 3(10).