

The Political Organization of the Hong Kong Special Administrative Region

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The Basic Law, to be formally enacted by the National People's Congress of the People's Republic of China (NPC) in the early 1990s, will determine the political organization of the Hong Kong Special Administrative Region (Hong Kong SAR) after July 1, 1997. While the Basic Law is to be developed on the basis of the Sino-British Joint Declaration,¹ which not only embodies the political arrangements for the peaceful transition of sovereignty in 1997, but also lays down the basic framework for political, social and economic autonomy of the future Hong Kong SAR government — the legitimacy of the Basic Law and of the Hong Kong SAR derives from article 31 of the Chinese Constitution.² Moreover, it is the NPC which is vested with the authority to enact laws governing the systems to be instituted in special administrative regions in China³ and the NPC's Standing Committee which has the exclusive right to interpret the Chinese Constitution,⁴ which will decide on the exact political organization of the Hong Kong SAR government.

Since the Basic Law Drafting Committee has not yet produced a formal draft at the time of this writing, any discussion concerning the future political organization of the Hong Kong SAR government must necessarily be speculative. Nevertheless, it is possible to have a worthwhile discussion that is based on the Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee (Collection)⁵ compiled by the Basic Law Drafting Committee and based on the debate that has taken place in Hong

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1. 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, Sept. 26, 1984, 23 I.L.M. 1366, 1984 [hereinafter Joint Declaration].

2. "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 31 (1982) [hereinafter PRC CONST.].

3. *Id.*

4. PRC CONST., *supra* note 2, art. 67.

5. *Jibenfa Gezhang Tiaowen Caogao Huibian* (A Collection of Draft Provisions of the Basic Law), reprinted in Wen Wei Po, Dec. 13, 1987, (Hong Kong ed.) [hereinafter Collection].

Kong and in China since the drafting process has begun. The discussion is especially worthwhile when the focus is shifted away from the structure itself to the problems relating to political organization that have arisen or are likely to arise.

The following discussion considers two issues that are likely to have a bearing on the shaping of the Hong Kong SAR government's political structure: the selection of key Hong Kong officials and the election of NPC delegates.

I. DIRECT ELECTION WITH UNIVERSAL SUFFRAGE

One of the most heatedly debated issues is whether or not in the selection of the chief executive and of the members of the legislature of the Hong Kong SAR government will be by direct election. The Joint Declaration specifies that the "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."⁶ In Annex I of the Joint Declaration, the Chinese government further elaborates that the legislature should be constituted by elections.⁷ If the word "elections" is to be given its conventional meaning in standard international political practices—direct election with universal suffrage⁸—then it seems that the Chinese government has either reconsidered its agreement to

6. Joint Declaration, *supra* note 1, para. 3(4). It is difficult to know what exactly is the meaning of and procedure for "consultations" as stated in the Joint Declaration. The most obvious reference may be to the use of "consultation" in the selection of representatives to the Chinese People Political Consultative Congress as prescribed by its organization law approved September 1949. Zhongguo Renmin Zhengzhi Xieshang Huiyi Zhuzhi Fa (The Organization Law of the Chinese People's Political Consultative Conference) ch. 2, in 1 ZHONGYANG RENMIN ZHENGFA FALING HUIBIAN: 1949-1950 (A Collection of Laws of the Central People's Government: 1949-1950) 9 (1982). According to this law, representatives to the Congress are chosen by its national committee through consultation, and the national committee is in turn elected at the national meeting of the Congress by all its representatives to the Congress. *Id.* arts. 2, 3, 14. In other words, consultation in this case refers to a circular process of selection: the national committee chooses the representatives, who in turn elect the national committee. The beginning of the process is the formation of an organizing committee which selects the representatives of the first Congress. Yet there is no provision whatsoever governing the procedure for the formation and composition of the organizing committee. See also the later charters of the Chinese People's Consultative Conference: Zhongguo Renmin Zhengzhi Xieshang Huiyi Zhangcheng (The Charter of the Chinese People's Consultative Conference) in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN: 1954.9-1955.6 (COLLECTION OF LAWS AND REGULATIONS OF THE PRC: SEPT. 1954 - JUNE 1955) 545 (1981) (adopted in 1954); Zhongguo Renmin Zhengzhi Xieshang Huiyi Zhangcheng (The Charter of the Chinese People's Consultative Conference) in 1982 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO 984 (adopted on Dec. 11, 1982).

7. Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong, Joint Declaration, *supra* note 1, Annex I, sec. I.

8. For a general discussion of standard electoral practices, see Rokkan, Electoral Systems, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 6-21 (D. Sills ed. 1968).

the Joint Declaration, or interpreted it in an unconventional way. Chinese officials serving as advisors to the Central Government on issues relating to the drafting of the Basic Law, especially those from the State Council's Office of Hong Kong and Macao Affairs, have repeatedly hinted at the difficulty and unwisdom of introducing direct elections with universal suffrage for the selection of both the chief executive and the legislature for the Hong Kong SAR.

Moreover, of the four proposed methods listed in the Basic Law Draft Collection for the selection of the chief executive, only one is by means of direct election.⁹ As for the selection of members of the legislature, all three methods listed are mixtures of different modes of election: direct election with universal suffrage, indirect election by functional constituencies, and election by a small electoral college which is not itself constituted by public election.¹⁰ In all three methods, the share of seats in the legislature to be selected by direct election occupies between twenty and thirty percent. Again, if the term "election" in the Joint Declaration is interpreted as referring exclusively to direct election with universal suffrage, then all three proposed methods for the selection of the legislature would seem to contradict the principle laid down in Annex I. Consequently, many people in Hong Kong believe that there is a real possibility that the Chinese citizens of Hong Kong may have only limited direct participation in the selection of either the chief executive or the legislature of the new Hong Kong SAR government. Indeed, should the Basic Law, as eventually enacted by the NPC, stipulate methods for selecting the chief executive and the legislature which do not allow for significant participation by the Hong Kong public through direct elections, such as consultation or a mixed mode of direct and indirect elections, it is possible that such a system of political organization, and arguably one less democratic to the extent that direct participation by the citizenry is limited, could be frozen in place indefinitely, until such time as the Hong Kong SAR government under the "one country, two systems" principle is finally abolished.

A system of election that is not based on universal suffrage would differ from the practice in the mainland. Of course, the political

9. See Collection, *supra* note 5, art. 45. The four methods are as follows:

(1) Election by a large electoral college with wide representation. (2) Direct election with one person one vote but candidates have to be nominated by a certain number of members of the legislature (e.g. 10% of the total membership). (3) Election by officially approved functional constituencies. (4) For the first three terms, selection through local consultation by a board of advisors. After that, election by an electoral college from among three candidates nominated by the board of advisors and agreed upon by the central government. *Id.*

10. *Id.* art. 64.

organization of the Hong Kong SAR government was intended by the British and the Chinese governments to be different from that found in China. This was the purpose behind the signing of the Joint Declaration, which contains specific clauses regarding the political, economic and social organization of the Hong Kong SAR that are legally binding on both governments. The inclusion of article 31 in the 1982 Constitution was also meant to confirm the constitutional legitimacy of establishing special administrative regions with political, economic and social organization different from those based upon the general principles laid down in the constitution. It is therefore not surprising that the political organization of the Hong Kong SAR government should be different from those of the central and local governments.

However, universal suffrage is a fundamental political right of Chinese citizens under the Constitution,¹¹ and the burden is on the Chinese government to explain, both to the future citizens of the Hong Kong SAR and to the Chinese citizens in the mainland, why the former can not enjoy the rights extended to every Chinese citizen by the Constitution. The Chinese government might try to justify it by referring to the temporary or transitory nature of the Hong Kong SAR. In support of that argument, the Chinese can point to the absence of any specification in the Constitution as to the political organization of the special administrative regions or their formal relations to the central government, and also to the fact that their very existence depends totally on the discretion of the NPC.¹² Limiting the rights of the Hong Kong people, however, would not be an advisable choice for the Chinese government if it is concerned with the political stability of the future Hong Kong SAR government. Above all, the Hong Kong people have not displayed much enthusiasm and faith in the PRC government's promise of a high degree of autonomy for the Hong Kong SAR, nor have they expressed great confidence in the communist regime. They naturally expect to secure greater guarantees from the Basic Law, including political participation. Their frustration in this regard may breed discontent and unwillingness to accept the legitimacy of the future Hong Kong SAR government.

II. SELECTION OF NPC REPRESENTATIVES

Although the Joint Declaration does not discuss the issue of representation of the Hong Kong SAR in the NPC, it is likely that the Hong Kong SAR would send its own representatives to the NPC. The question which then emerges concerns the method of selecting

11. PRC CONST., *supra* note 2, art. 34.

12. *Id.* art. 31.

these representatives. According to the Chinese Constitution, NPC representatives are elected on the basis of universal suffrage of all Chinese citizens over eighteen years of age¹³ and in accordance with Chinese election law.¹⁴ Consequently, the NPC representatives from Hong Kong cannot be chosen from among the members of the Hong Kong SAR legislature in the event that the latter, under the Basic Law, are elected through a system not in conformance with Chinese election law. Rather, they would have to be elected separately through the universal suffrage of the Chinese citizens of Hong Kong. The outcome would then be the parallel operation of two groups of legislators in Hong Kong: the local legislators who do not derive their mandate from universal suffrage but are legitimized by the Basic Law, and the central legislators who are elected on the basis of universal suffrage as provided for by the Constitution. This would be a very strange political arrangement in the Chinese context and may become the source of instability for the political organization of the Hong Kong SAR. While the Chinese government could try to overcome the problem by continuing the current practice of appointing local Hong Kong Chinese as representatives to the NPC, this practice is unconstitutional.¹⁵ Moreover, to adopt a system of appointment not sanctioned by the constitution would undermine the legal basis of the whole Basic Law exercise as well as any discussion concerning the political organization of the Hong Kong SAR government.

Even if the representatives of the Hong Kong SAR to the NPC will be appointed rather than chosen by some form of local election, their very operation in Hong Kong will still create an alternative source of political legitimacy for the Hong Kong SAR government. This would be especially true with regard to the relation between the Hong Kong SAR government and the central government.

The following figure shows the relations among the various political organs in the Hong Kong SAR and the central government

13. *Id.* art. 34.

14. *Id.* art. 59. The text of the Chinese election law may be found in Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanjufa (The Election Law of the National People's Congress and Local People's Congresses of the People's Republic of China) in SHIYONG FALÜ SHOUCÉ (Practical Handbook of Law) 77-95 (Li Shengping & Li Dun eds. 1986) (hereinafter Election Law).

15. See *supra* text accompanying note 13. There have been arguments which insist on the constitutionality of the present method of electing NPC representatives from local Hong Kong Chinese by the Guangdong Provincial People's Congress. At least formally, however, these NPC representatives represent only the Guangdong population and not the Chinese population in Hong Kong still under British Sovereignty. And even if they only represent Guangdong, their most recent election in February 1988 violates the specific requirements of Chinese election law which states that the number of candidates should exceed that of NPC seats being contested. Election Law, *supra* note 14, art. 27.

according to the principles laid down in the Joint Declaration, the Chinese Constitution and the election law for the NPC and the local people's congresses.

In the figure, the only bodies that have direct political relations to the central government at the Hong Kong SAR level are the chief executive and the Hong Kong SAR representatives to the NPC: the former by means of appointment by the Central People's Government, i.e., the State Council,¹⁶ and the latter because they are themselves members of the NPC. The Hong Kong SAR legislature has an institutional relationship with the central government primarily through its relations with the chief executive. According to the figure, if a system of direct election with universal suffrage is not adopted for the selection of either the chief executive or the legislature, there would exist two parallel systems of political representation not only within the Hong Kong SAR, but also in the relationship between the Hong Kong SAR and the central government. With respect to representation within the Hong Kong SAR, the adoption of consultation for the selection of the chief executive and a mixed mode of election for the selection of the chief executive and the legislature would create overlapping, but not identical, bases of political legitimacy among the Chinese citizens of the Hong Kong SAR. As for the representation to the central government, since the selection of representatives of the Hong Kong SAR to the NPC in accordance with the Chinese Constitution and election law requires direct election on the basis of universal suffrage, these NPC representatives would enjoy a wider basis of political legitimacy than the chief executive and the Hong Kong SAR legislature.

Under these circumstances, it is possible that the NPC representatives might evolve into an alternative source of political legitimacy and political action in the Hong Kong SAR. Also, the NPC representatives may serve either as the political tool of the NPC against the particular interests of the Hong Kong SAR government, or as the politically representative vehicle of the Chinese citizens of the Hong Kong SAR against a not-so-democratic Hong Kong SAR government. Unless the NPC is not to play an active political role in the country after 1997, which is an unlikely scenario given the trend of the NPC's increased political involvement since the beginning of the economic reforms and the increasing commitment of the post-Mao leadership to the rule of law, the political orientation and the potential role of these NPC representatives could become important institutional factors in determining the outcome of negotiations both

16. PRC CONST., *supra* note 2, art. 85.

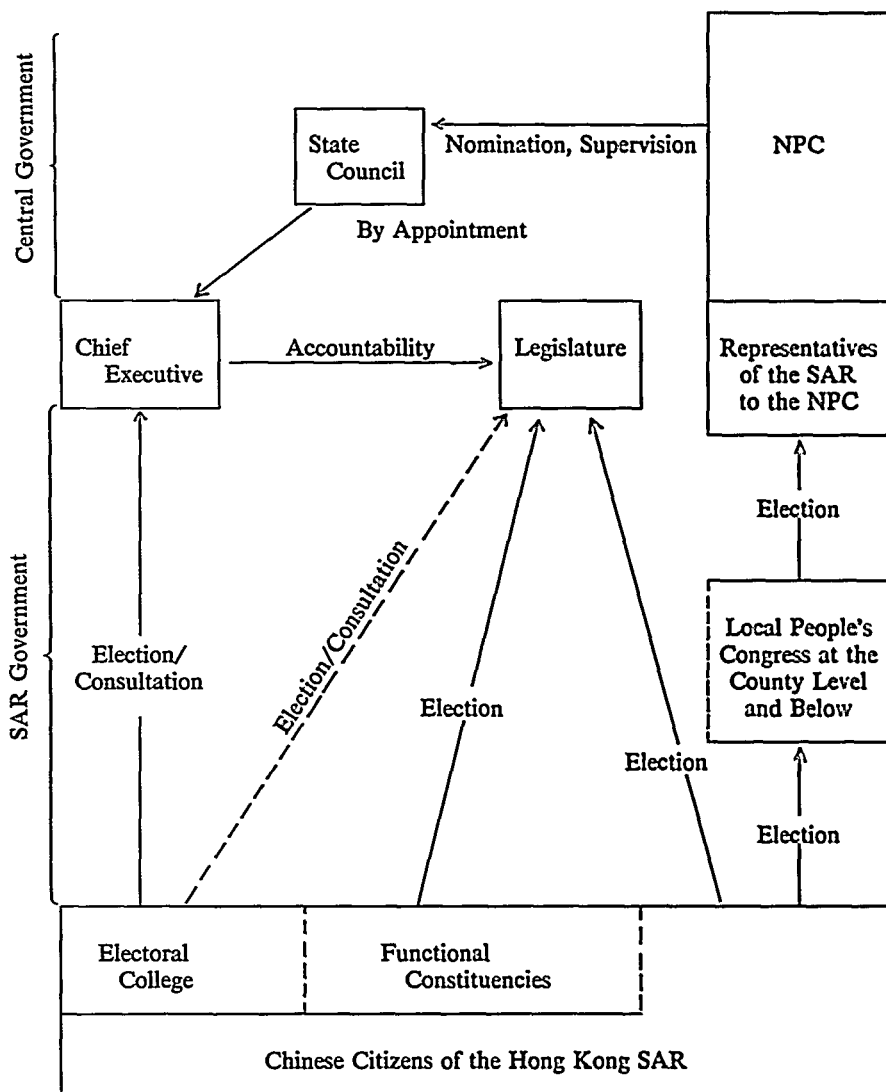


Figure 1
The Likely Political/Power Relations Among Different Bodies at the Central and SAR Government Levels.

between the central government and the Hong Kong SAR government and among the various political forces within the Hong Kong SAR. Additionally, the presence of NPC representatives who are elected on the basis of universal suffrage could also serve as a constant pressure on the less democratic political organization of the Hong Kong SAR.

III. SELECTION OF THE FIRST CHIEF EXECUTIVE AND LEGISLATURE

The Collection has proposed the inclusion of special provisions in the Basic Law for the selection of the first chief executive and legislature under Chinese sovereignty. This proposal is an attempt to resolve the difficulty created by an unwillingness on the part of the Chinese government to recognize the legitimacy of any form of consultation and/or election in the Hong Kong territory while it is still under British rule. But the new Hong Kong SAR government has to be in place on July 1, 1997. So, should the Chinese prevail on this issue, it is possible that the Basic Law will stipulate two different systems for selecting the Hong Kong SAR government: one to apply only to the selection of the first government, which perhaps would be a less democratic system involving primarily consultation or election by electoral college, to be followed thereafter by another system of selection more consistent with the democratic institution laid down by the Chinese Constitution for the selection of NPC representatives. Such an arrangement would probably satisfy the requirements of the Chinese government, alleviate concerns over the lack of democratic institutions in the Hong Kong SAR and help preserve a high degree of autonomy for the people of Hong Kong.

IV. CONCLUSION

As the Basic Law is in the process of being drafted, it still will be modified through consultation with the Hong Kong people. Therefore, it may be too early to speak definitively about the future political organization of the Hong Kong SAR. The above discussion, however, serves to highlight some issues that may have lasting influence on Hong Kong's political development. It does not rule out, however, the possibility that these issues will be addressed by the Basic Law Drafting Committee and resolved satisfactorily.