

Introduction to the Hong Kong Basic Law

Second Edition

Danny Gittings

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Reviews for the first edition of *Introduction to the Hong Kong Basic Law*

“Danny Gittings’ *Introduction to the Hong Kong Basic Law* fills [a gap in this area of scholarship] and provides an excellent text for students of law and politics in Hong Kong and China. . . . Danny Gittings is unremitting in his efforts to synthesize, critique and re-conceptualise various aspects of the subject . . . the book provides an overall treatment of the Basic Law that is balanced, astute and well-researched. . . . A delightful feature of the book is the ease with which the author guides the reader through some of the very complex issues of law and politics with its smooth, clear and concise writing.”

—Professor Bing Ling, *The China Quarterly*

“As a respected journalist-turned-legal scholar, Gittings is well qualified to explain the Basic Law, to place it in a historical context, and to chart its progress. Although he modestly describes his text as a ‘simple introduction’, it is, in reality, much more than that. *Introduction to the Hong Kong Basic Law* should be read not only by law students but also by anyone who is interested in how Hong Kong is being run after 1997. . . . While any book discussing a sophisticated constitutional document might be forgiven for being somewhat dry and arcane, *Introduction to the Hong Kong Basic Law* is, happily, both interesting and readable, and explains things in a logical way. Gittings, moreover, with his telling prose and perceptive comments, carries the reader with him, from start to finish.”

—Honorary Professor Grenville Cross, *Hong Kong Law Journal*

“Reads more easily than a typical text; students, practitioners or layman readers interested in the ‘one country, two systems’ regime can pick it up over a morning coffee, rather than feel compelled to first assemble pens, highlighters and a note pad before opening these pages.”

—*Hong Kong Lawyer*

“Many of us approach law books with trepidation. But Gittings, a legal academic, used to be a journalist and this shows in his ability to make the book accessible to the general reader. Amid the often technical legal arguments about the Basic Law it is easy to forget what a good story lies behind it. . . . The Basic Law will continue to be central to issues facing the city for years to come. This book enables the reader to quickly acquire a much better understanding of them.”

—Cliff Buddle, *South China Morning Post*

“Knows how to use simple and jargon-free language to explain complex issues. . . . This book is an accumulation of many years of teaching materials and classroom knowledge, and it will be really useful for students of political science and law and teachers of general studies.” [Translated from Chinese]

—Kevin Lau Chun-to, *Ming Pao*

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Preface

This book now appears on the official reading list for most courses in Hong Kong Basic Law and Hong Kong Constitutional Law, from sub-degree level through undergraduate and postgraduate level to both the Hong Kong Bar Association and Law Society of Hong Kong's examinations for overseas lawyers seeking to practise in Hong Kong.

For introductory courses at the sub-degree level, this book aims to provide a one-stop solution so that it should be possible to pass your course without the need to rely on any other text. For students on higher-level courses, this book serves as a useful starting point. With more than 1,500 footnotes pointing to the detailed descriptions of particular issues in other leading works in this area, this book will make it much easier to get a feel for the subject and know where to turn if you need to study any particular issue in more depth.

Although this book is designed to help students, its intended audience is far wider. As a review in the *Hong Kong Law Journal* of the first edition put it, this book is written to be “read not only by law students, but also by anyone who is interested in how Hong Kong is being run after 1997”.

In this second edition, I have sought to preserve the emphasis on a highly readable text that can be easily understood by those with no prior knowledge of the subject. For general interest readers, I would advise skipping the footnotes (which are used to avoid cluttering up the main text) and using the book to get a general feel for the important issues shaping Hong Kong's future.

For that reason, changes in this second edition are confined to essential updates on recent developments. The overall structure of the book remains broadly unchanged from the first edition. However, reflecting some of the concerns that have arisen in Hong Kong following the events of the past few years, I have added a new concluding chapter considering the future of the “one country, two systems” concept.

A word on the numerous references to specific provisions in the Hong Kong Basic Law: in order to make it easier for readers to understand exactly which part of these often lengthy provisions is being described, I have followed the common practice of referring to specific paragraph numbers. So, for example, Article 158(3) denotes the third paragraph of Article 158. Where, as is occasionally the case, the Hong Kong Basic Law uses sub-section numbers, these follow the relevant paragraph number. So, for example, Article 24(2)(3)—which was the subject of one of the first controversies over the Hong Kong Basic Law—refers to the third sub-section of the second paragraph of Article 24.

I owe a debt of gratitude to those who have assisted me so greatly in my understanding of this subject. Particularly to my PhD supervisors, Professors Simon N. M. Young and Richard Cullen, but also to many others who have been so generous with their advice and time, including Professors Albert Chen, Johannes Chan, and Fu Hualing. To Justice Kemal Bokhary, who responded so quickly and enthusiastically to my request for an endorsement of the first edition of this book, I owe a debt of gratitude for his advice and kindness.

My thanks goes also to all those who took the time to read and comment on the first edition of this book, and particularly to the many reviewers of this book for their generous comments and helpful suggestions, which I have tried to incorporate into this new edition wherever possible. Special mention must be made here of Kevin Lau, then editor of *Ming Pao* and a long-time friend, who was the first to review this book within weeks of the publication of the first edition. Only months later, Kevin was the victim of a brutal knife attack that shocked Hong Kong. No one who knows Kevin, and his wife Vivien, can fail to be impressed with the courage and determination which they have since shown in moving on with their lives after this terrible crime, and their example should serve as an inspiration to us all.

I would also like to express my gratitude to all my past and present colleagues at the University of Hong Kong's School of Professional and Continuing Education for their support and encouragement especially Mrs. Y. L. Cheng, Professor Chan Wing Wah, Dr T. M. Kwong, Dr Tommy Ho, and Mr Michael Fisher. Special thanks goes to Susie Han, Clara Ho, Jenifer Lim and all the staff at Hong Kong University Press for bringing this second edition to fruition.

Finally, my most heartfelt thanks go to my parents, without whom I would never have come to Hong Kong and written this book. I will always be grateful to my father, John, for sparking my interest in Hong Kong and China, and changing my life as a result. For my late mother, Aelfthryth, who enjoyed so many happy times in Hong Kong but tragically died shortly before the publication of the first edition of the book, this new edition is dedicated to her memory.

Equally heartfelt thanks go to my incredible wife Candy, for all her support and encouragement. For my children, Rebecca and Mark, I can only hope that Hong Kong will be the sort of place in which they will still wish to live in by the time they are adults.

I have attempted to state the law as it appeared to me as of 1 January 2016. Any mistakes or omissions are, of course, my own.

Danny Gittings
January 2016

Main Abbreviations

The main abbreviations used in the book are:

Cap.	Chapter
<i>HKLJ</i>	<i>Hong Kong Law Journal</i>
HKU	University of Hong Kong
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Legco	Legislative Council
NPC	National People's Congress
PLA	People's Liberation Army
PRC	People's Republic of China
SAR	Special Administrative Region

For abbreviations used for court cases, see “Table of Cases” on page xiii.

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Abbreviations

AC	Appeal Cases	HCB	High Court Bankruptcy Proceedings
CA	Court of Appeal	HKC	Hong Kong Cases
CACC	Court of Appeal Criminal Appeal	HKCFAR	The Authorised Hong Kong Court of Final Appeal Reports
CACV	Court of Appeal Civil Appeal	HKCLR	The Hong Kong Criminal Law Reports
CFA	Court of Final Appeal	HKEC	Hong Kong Electronic Cases
CFI	Court of First Instance	HKLR	Hong Kong Law Reports
DC	District Court	HKLRD	The Authorised Hong Kong Law Reports & Digest
DCCC	District Court Criminal Case	HKLY	Hong Kong Law Yearbook
ECHR	European Court of Human Rights	HKPLR	Hong Kong Public Law Reports
EHRH	European Human Rights Reports	HL	House of Lords
FACV	Final Appeal (Civil)	KB	King's Bench
FAMV	Final Appeal Miscellaneous Proceedings (Civil)	PC	Privy Council
FC	Full Court	QB	Queen's Bench
HC	High Court	US	United States Reports
HCAL	High Court Constitutional and Administrative Law Proceedings		

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Chapter 3

What Is the Hong Kong Basic Law?

The Hong Kong Basic Law may be a “unique document”, as the Court of Appeal observed in *HKSAR v Ma Wai Kwan David*,¹ the first case to consider its nature after the 1 July 1997 handover. But, for all its importance, the Hong Kong Basic Law is a remarkably difficult document to define. Many describe it as Hong Kong’s constitution but, as we will see shortly, that description is not free from dispute. Even calling it simply “the basic law” can be problematic, since it risks confusion with the numerous other Chinese laws that are also called basic laws.

Much of the difficulty in describing the Hong Kong Basic Law stems from its different facets. The product of an international agreement between Britain and China on Hong Kong’s future, the Hong Kong Basic Law is also a domestic law that applies throughout all of China and regulates Hong Kong’s relations with the rest of the country. In addition, as far as Hong Kong is concerned, it performs the roles often associated with a constitution—setting out Hong Kong’s political structure and the rights and duties of its residents. As Chief Judge Chan observed in the *Ma Wai Kwan* case, the Hong Kong Basic Law “has at least three dimensions: international, domestic and constitutional”.²

To understand the nature of the Hong Kong Basic Law, therefore, it is necessary to examine each of these dimensions in turn, and then consider the difficult relationship that exists between the Hong Kong Basic Law and the document from which it must ultimately draw its legal authority, the 1982 Constitution of the People’s Republic of China (or PRC Constitution 1982).

3.1 International Dimension

The international dimension to the Hong Kong Basic Law stems from its birth in the 1984 Joint Declaration on the Question of Hong Kong. This international treaty³ between Britain and China explicitly provided that its most important contents would be replicated in a “Basic Law of the Hong Kong Special Administrative Region of the People’s

1. [1997] HKLRD 761, 773.

2. *Ibid.*

3. The Joint Declaration is generally recognized to have the status of an international treaty, although it does not use the word “treaty” in its title. See further note 30 in Chapter 2 and the accompanying text.

Republic of China”.⁴ As a result, the Hong Kong Basic Law begins by stating that its purpose is “to ensure the implementation of the basic policies of the People’s Republic of China regarding Hong Kong” set out in the Joint Declaration.⁵

That means the Joint Declaration provides the Hong Kong Basic Law with much of its content. Although there are a few areas where critics say the provisions of the Hong Kong Basic Law diverge from those in the Joint Declaration,⁶ these are very much the exception. In most areas, one look at the two documents is enough to see how similar they are. Again and again, the wording used in the Joint Declaration is repeated in similar—sometimes even identical—terms in the Hong Kong Basic Law. Chen (2011) describes this as the “Duplication Phenomenon”.⁷ For instance, many parts of the text of the Preamble and Articles 1–5 of the Hong Kong Basic Law have been copied (with only minor rewording) from the “basic policies” numbers 1–5 listed in paragraph 3 of the Joint Declaration.⁸ When controversies have arisen in recent years over the text of a particular provision in the Hong Kong Basic Law, they often can be traced back to wording that has been copied across from the Joint Declaration. For example, the arguments over the residency rights under the Hong Kong Basic Law of firstly children born in China to a Hong Kong parent and secondly Chinese children born in Hong Kong to non-local parents, which gave rise to two of the most important court cases in the early years of Hong Kong’s constitutional development,⁹ both revolved around provisions in the Hong Kong Basic Law which replicated wording originally used in the Joint Declaration.¹⁰

For that reason, the Joint Declaration, and particularly the basic policies stated in it, remained of some practical importance for many years after 1 July 1997. As an

4. Paragraph 3(12) of the Joint Declaration.

5. Paragraphs 2 and 3 of the Preamble.

6. The most often cited is Article 18(4) of the Hong Kong Basic Law which would allow China to assume responsibility for law and order in Hong Kong in the event of a state of war or emergency, even though paragraph 3(11) of the Joint Declaration unequivocally places responsibility for law and order in the hands of the Hong Kong SAR Government (see further notes 165–171 in Chapter 4 and the accompanying text). For further examples, see Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd edition, 1999) at 67–69 and Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong University Press, 1997) at 147–148.

7. Albert H.Y. Chen, “The ‘Foreign Domestic Helpers Case’: The Relevance of the NPCSC Interpretation of 1999 and the Preparatory Committee Opinion of 1996” (2011) 41 *HKLJ* 621, 629.

8. For instance, almost the entire wording of paragraph 3(1) of the Joint Declaration is repeated in paragraph 2 of the Preamble of the HK Basic Law. For more on the “basic policies”, see “2.2: Sino-British Joint Declaration” in Chapter 2.

9. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. See further “6.4: Constitutional Role of the Court of Final Appeal” in Chapter 6 for more on the constitutional significance of these two cases.

10. These were Articles 24(2)(3) and 24(2)(1) respectively, which both repeated wording originally used in Annex I(XIV) of the Joint Declaration.

international treaty rather than a law, its provisions cannot be directly enforced in the courts as was demonstrated by the case of *Tang Ping Hoi v Attorney General*.¹¹ But because of the Joint Declaration's historical connection with the Hong Kong Basic Law, it has been sometimes used by the courts to help interpret disputed provisions in that document. The guiding principles in this respect were laid down by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration*,¹² when it stated that the Joint Declaration could be used as an aid in interpreting both the "context" and "purpose" of provisions in the Hong Kong Basic Law.¹³

One early example of the use of the Joint Declaration to help interpret disputed provisions in the Hong Kong Basic Law came in the *Ma Wai Kwan*¹⁴ case. In that case, the Court of Appeal held that the common law system automatically continued after 1 July 1997, partly on the basis of the unequivocal reference in the Joint Declaration to how "laws currently in force in Hong Kong will remain basically unchanged" (emphasis added).¹⁵ Another early example came in *Gurung Kesh Bahadur v Director of Immigration*,¹⁶ where the Court of Appeal relied partly on the fact that the right to travel was listed as one of the basic policies in the Joint Declaration, in interpreting an equivalent reference to the right to travel in Article 31 of the Hong Kong Basic Law as requiring the Immigration Department to readmit Hong Kong residents on their return from travels outside the territory.¹⁷

However, Beijing has never been comfortable with an international dimension to the Hong Kong Basic Law. Starting from 2014, there have been attempts to redefine the Joint Declaration as only applicable to the period between its signing and China's resumption of sovereignty on 1 July 1997. Describing the Joint Declaration as having "been fully implemented", Raymond Tam, a senior official in the Hong Kong SAR

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11. [1987] HKLR 324. For more on this case, see further note 32 in Chapter 2 and the accompanying text.
 12. (1999) 2 HKCFAR 4.
 13. *Ibid.* at 28.
 14. [1997] HKLRD 761.
 15. Lawyers for defendants charged with the common law offence of conspiracy to pervert the course of public justice had sought to argue that this offence no longer existed after the 1 July 1997 handover, because the wording of the Hong Kong Basic Law was more ambiguous on this point. The English text of Article 160(1) of the Hong Kong Basic Law says that "the laws previously in force *shall* be adopted" (emphasis added). The lawyers argued this meant that, instead of being automatically adopted, a positive act of adoption was required, something which they claimed had not occurred (see *Ma Wai Kwan* at 772). However, as Chief Judge Chan pointed out (at 775), not only is the Joint Declaration unequivocal on this point, but even the Chinese text of the Hong Kong Basic Law, where "the Chinese characters '採用 *cai yong*' (meaning 'adopt') in Article 160(1) are clearly used in the mandatory and declaratory sense", makes clear there is no need for any such act of adoption.
 16. [2001] 3 HKLRD 32.
 17. *Ibid.* at 42–43. As a result, the Court of Appeal held that it was unlawful to refuse to readmit a Nepalese resident of Hong Kong after a seven-day absence. The decision was upheld in the Court of Final Appeal in (2002) 5 HKCFAR 480, although without further reference to the Joint Declaration.

Government, noted that many of its provisions consist of unilateral statements by the Chinese government rather than joint statements with Britain. According to Cheung (2014), this seems to be an attempt to argue that those parts of the Joint Declaration are “not binding as a matter of international law”.¹⁸ From China’s perspective, the purpose of the Joint Declaration was to regulate the process of returning Hong Kong to Chinese sovereignty. With that task completed, any international dimension came to an end and it is the domestic dimension of the Hong Kong Basic Law that is now paramount, as a national law that applies in Hong Kong and the rest of China.

3.2 Domestic Dimension

It is this status as a national law that allows the Hong Kong Basic Law to set down rules governing the relationship between Hong Kong and the rest of the country, which are binding not just on Hong Kong but also the highest bodies of the Chinese state. As Chief Judge Chan put it in *Ma Wai Kwan*, the domestic dimension to the Hong Kong Basic Law “deals with the relationship between the sovereign and an autonomous region which practises a different system”.¹⁹

The importance of this dimension to the Hong Kong Basic Law is reflected in the entire chapter devoted to this subject; Chapter II on the “Relationship Between the Central Authorities and the Hong Kong Special Administrative Region”. Supplemented by further provisions elsewhere in the Hong Kong Basic Law, these set out the powers that can be exercised over Hong Kong by Central Authorities in China such as the National People’s Congress, its Standing Committee and the Chinese national government, which is officially known as the Central People’s Government, or the State Council.²⁰

This includes, for instance, control over Hong Kong’s defence²¹ and foreign affairs,²² the power to appoint the Chief Executive and the principal officials of the SAR,²³ impose limited types of national Chinese laws²⁴ and reject certain Hong Kong laws

18. See Alvin Y.H. Cheung, “Burying the Joint Declaration: Beijing’s International Law Reaction to the Umbrella Movement” (Social Science Research Network, 27 Dec 2014), which criticizes this line of reasoning as “cherry-picking of provisions” since both China and Britain jointly state in Paragraph 7 of the Joint Declaration that they will implement both the agreement and its annexes in their entirety.

19. *Ma Wai Kwan* at 773.

20. Other Central Authorities in China that have a remit in relation to Hong Kong include the Central Military Commission. Under Article 93 of the PRC Constitution 1982, this body directs the armed forces of China. This includes the People’s Liberation Army garrison in Hong Kong, a point specifically stated in Article 3 of the Law of the PRC on the Garrisoning of the Hong Kong SAR, one of the small number of Chinese national laws which apply in Hong Kong. See further “4.2: Legislative Power” in Chapter 4 for more on the application of Chinese national laws in Hong Kong.

21. Article 14(1).

22. Article 13(1).

23. Article 15.

24. Article 18(3).

as incompatible with the Hong Kong Basic Law,²⁵ determine the number of mainland Chinese allowed to settle in Hong Kong²⁶ and declare a state of war or emergency in extreme circumstances.²⁷

These provisions also restrict the power of Chinese authorities, at the local as well as national level, to interfere in Hong Kong affairs. For instance, they place strict limits on what types of national Chinese laws can be applied,²⁸ as well as the circumstances when Hong Kong laws can be invalidated as incompatible with the Hong Kong Basic Law.²⁹ There is also a strict prohibition on any branch of the Chinese government, whether at a national or local level, interfering “in the affairs which the Hong Kong Special Administrative Region administers on its own”.³⁰ This bars Chinese authorities from interfering in almost all types of local affairs³¹ including, for instance, the extension of land leases,³² Hong Kong’s economic³³ and taxation policies,³⁴ its handling of shipping³⁵ and routine civil aviation issues,³⁶ in addition to numerous other matters.³⁷ This prohibition even extends to any department of the Central Government, or any local government, setting up offices in Hong Kong without the express permission of the Hong Kong SAR Government, in addition to the Central People’s Government³⁸—and requires those which are permitted to open such offices to abide by Hong Kong laws.³⁹

The Hong Kong Basic Law can impose such restrictions on the powers of even China’s highest authorities because of its status as a national Chinese law passed by the National People’s Congress, the highest source of constitutional power in China,⁴⁰ under its authority: “To enact and amend basic laws concerning criminal offences, civil affairs,

25. Articles 17(3) and 160(1).

26. Article 22(4).

27. Article 18(4).

28. Article 18(3).

29. Article 17(3).

30. Article 22(1).

31. Article 16 gives the Hong Kong SAR the power to, “on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law”.

32. Article 123.

33. Article 110(2).

34. Article 108(2).

35. Article 124(2).

36. Article 130.

37. These are among 15 provisions in the Hong Kong Basic Law which explicitly state that specific issues will be handled by the Hong Kong SAR “on its own”. In addition, this is strongly implied, although not explicitly stated, in numerous other provisions in the Hong Kong Basic Law.

38. Article 22(2).

39. Article 22(3). However, in 1998, the Hong Kong legislature controversially enacted a law exempting many Chinese government offices in Hong Kong from a large number of Hong Kong laws, which critics charged was in breach of this provision in the Hong Kong Basic Law. See further note 98 in Chapter 2 and the accompanying text.

40. PRC Constitution 1982, Article 57.

the state organs and other matters.”⁴¹ It is worth noting that the term “basic law” is a generic one which refers to the whole category of laws passed by the full National People’s Congress, rather than only to this one law in particular. Dowdle (2007) notes that: “China has more than sixty ‘basic laws’ in force at present, of which the Basic Law of the Hong Kong SAR is simply one.”⁴² These include the Basic Law of the Macao SAR of the PRC, which sets out a broadly similar framework for one country two systems in the former Portuguese enclave. There are also other basic laws which cover many of the most important parts of the Chinese legal system such as the Criminal Law, General Principles of the Civil Law, Nationality Law, the Legislation Law on the process by which laws are made, the law on how China’s courts operate,⁴³ and some important economic legislation.⁴⁴

The fact that the Hong Kong Basic Law was enacted by the National People’s Congress gives it a very high status within the Chinese legal system. Basic laws rank second only to the Chinese Constitution and above all the various different types of legislation which are enacted by other bodies in China.⁴⁵ In marked contrast to the situation in Hong Kong, where Article 73(1) of the Hong Kong Basic Law vests all power to make primary legislation in the hands of the Legislative Council, the law-making system in China is much more splintered. While the full National People’s Congress is supposed to make all the laws covering the most important national issues,⁴⁶ its Standing Committee also has very sweeping law-making powers.⁴⁷ In the absence of any system of separation of powers, such as that which prevents the executive from making primary legislation in Hong Kong,⁴⁸ numerous branches of the Chinese government also have the power to make various different types of legislation. These include the State Council,⁴⁹ individual

41. PRC Constitution 1982, Article 62(3). In the case of the Hong Kong Basic Law, this is supplemented by Article 62(13) giving the NPC the power: “To decide on the establishment of special administrative regions and the systems to be instituted there.”

42. Michael Dowdle, “Constitutionalism in the Shadow of the Common Law” in Hualing Fu, Lison Harris and Simon N.M. Young (eds.), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave, 2007) at 71.

43. PRC Organic Law of the People’s Courts, passed in 1979.

44. For example, the PRC Patent Law 1984, and the PRC Contract Law 1999.

45. Articles 78 and 79 of the PRC Legislation Law, passed in 2000. See further note 53.

46. In particular, under Article 8 of the PRC Legislation Law, only the NPC and its Standing Committee are supposed to handle measures involving the criminal and judicial systems, or the restriction of individual freedoms. However, in practice, there have been several instances of other state bodies in China enacting measures to restrict individual freedoms.

47. PRC Constitution 1982, Articles 67(2) and (3). This even gives the Standing Committee the power to supplement and amend basic laws, in between annual meetings of the full NPC.

48. In *Leung Kwok Hung v Chief Executive of the HKSAR* (unrep., CACV 73 and 87/2006, [2006] HKEC 816), the Court of Appeal held that making primary legislation in Hong Kong was a task for the Legislative Council, not the Chief Executive. For more on this case, see notes 58–64 in Chapter 5 and the accompanying text.

49. PRC Constitution 1982, Article 89(1).

departments and ministries,⁵⁰ and local governments.⁵¹ Local people's congresses, the local equivalents of the National People's Congress, also have the power to make regulations which have legal effect.⁵²

This proliferation of law-making bodies creates a confusing situation in China, with different bodies passing pieces of legislation that are sometimes in conflict. However, the fact that the Hong Kong Basic Law was enacted by the National People's Congress ensures that it should prevail in the event of any conflict with a piece of legislation passed by another body in China.⁵³

More difficult is whether provisions in the Hong Kong Basic Law have priority over provisions in other basic laws passed by the National People's Congress. That is how some observers interpreted one of the first big controversies concerning "one country, two systems" after the 1 July 1997 handover when Hong Kong resident Cheung Tze Keung, popularly known as "Big Spender", together with several other members of his gang, some of them also from Hong Kong, were tried and convicted in a Guangzhou court under PRC Criminal Law for crimes that included the kidnapping of two prominent Hong Kong tycoons in Hong Kong.⁵⁴

That raised what some called the "chilling precedent"⁵⁵ of Hong Kong people being tried for crimes committed in Hong Kong by Chinese courts under PRC Criminal Law, a law which does not have any direct legal effect in Hong Kong.⁵⁶ There were also suggestions that it raised the issue of whether to give priority to provisions in PRC Criminal Law giving mainland courts jurisdiction over many cases involving crimes committed in

50. PRC Constitution 1982, Article 90.

51. PRC Constitution 1982, Article 107.

52. PRC Constitution 1982, Article 100.

53. See Article 79 of the PRC Legislation Law. This provides that national law (which includes both basic laws enacted by the NPC and other laws enacted by its Standing Committee) has higher legal authority than all other forms of legislation in China, with the exception of the Constitution. Under Articles 67(7) and (8) of the PRC Constitution 1982, the Standing Committee has the power to invalidate any other legislation that it judges to be inconsistent with national laws.

54. For a summary of this case, and the controversy surrounding it, see Choy Dick Wan and Fu Hualing, "Cross-Border Relations in Criminal Matters" in Mark S. Gaylord, Danny Gittings and Harold Traver (eds.), *Introduction to Crime, Law and Justice in Hong Kong* (Hong Kong University Press, 2009) at 233–234.

55. See, for instance, Chris Yeung and Billy Wong Wai-yuk, "Chilling 'Big Spender' precedent", *South China Morning Post*, 28 Oct 1998.

56. The PRC Criminal Law is not listed in Annex III of the HK Basic Law, which contains a list of the only Chinese national laws that have direct legal effect in Hong Kong. See further "4.2: Legislative Power" in Chapter 4 for more on the rules regarding the application of Chinese national laws in Hong Kong.

Hong Kong,⁵⁷ or to those in the Hong Kong Basic Law giving Hong Kong courts jurisdiction over those same cases.⁵⁸

In the “Big Spender” case, the Guangzhou court explained its decision to assert jurisdiction over the case on the grounds that Cheung and his gang had also committed parts of those same crimes on the mainland.⁵⁹ But concerns about the apparent conflict between the two basic laws, and whether this could lead to Hong Kong people being put on trial in mainland courts for crimes committed in Hong Kong, were compounded by another case a year later. In that second case mainland resident Li Yuhui, popularly known as the “Telford Gardens poisoner”, was tried and convicted in a Shantou court under PRC Criminal Law for crimes committed entirely in Hong Kong.⁶⁰ This was another case which, under the Hong Kong Basic Law, clearly could have been tried by the Hong Kong courts instead.⁶¹

Tsang (2001) argues that trying these two cases on the mainland undermined the special nature of the Hong Kong Basic Law.⁶² However, these—and later similar cases where crimes committed in Hong Kong were also tried in mainland courts⁶³—all involved crimes either partly committed on the mainland or where the suspect was a mainland

57. Notably Article 6, which appears to give mainland courts jurisdiction over any cases where either the preparations for, or the consequences of, the crimes take place on the mainland, and Article 7, which gives mainland courts wide extra-territorial jurisdiction over crimes committed by Chinese citizens “outside the territory of the People’s Republic of China”.

58. Article 19(2) gives the Hong Kong courts jurisdiction over all cases in Hong Kong, with the limited exception of those types of cases (e.g., those involving accredited foreign diplomats) which they were also precluded from hearing prior to 1 July 1997. See further “6.5: Limits on Courts” in Chapter 6.

59. See *Public Prosecutor v Zhang Ziqiang* (Criminal Case No. 468/1998 of the Guangzhou Intermediate People’s Court) where the court cited, among other factors, the fact that “the plotting, planning and other preparatory work to implement the offences occurred in the Mainland”. As a result, the court concluded it had jurisdiction over all criminal acts by the accused (including those committed in Hong Kong) under Article 24 of PRC Criminal Procedure Law.

60. H.L. Fu, “The Battle of Criminal Jurisdictions” (1998) 28 *HKLJ* 273, 276.

61. Unlike the “Big Spender” case, the court in this case did not explain the legal grounds for its decision to assume jurisdiction over the case. The Hong Kong SAR Government [in Secretary for Justice Elsie Leung, “Viewing the Jurisdictional Issue from a Proper Perspective” (Jan 1999) *Hong Kong Lawyer* 56–57] sought to rationalize the case as an example of the wide extra-territorial jurisdiction granted to mainland courts under Article 7 of PRC Criminal Law (see note 57). However, this rationale raises further issues, since it means treating Hong Kong as “outside the territory of the People’s Republic of China” for the purposes of this provision.

62. Steve Tsang, “Commitment to the Rule of Law and Judicial Independence” in Tsang (ed.), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press, 2001) at 9.

63. One of the most famous examples was the trial and conviction in a Shenzhen court in 2007 of those responsible for a high-profile murder committed at the Luk Yu teahouse in Hong Kong. However, this case attracted far less controversy than either the “Big Spender” or the “Telford Gardens poisoner” cases, a point discussed further in Danny Gittings, “Changing Expectations: How the Rule of Law Fared in the First Decade of the Hong Kong SAR” (July 2007) 7 *Hong Kong Journal*.

resident. So they can also be seen as simply examples of concurrent jurisdiction, where two courts have jurisdiction over a case and so a decision needs to be taken as to which is better placed to try that case.

In cases involving crimes committed by Hong Kong residents entirely in Hong Kong, there have been several statements from legal scholars and law officers in the Hong Kong SAR Government officials asserting that the provisions in the Hong Kong Basic Law should prevail in ensuring that such cases are always tried in Hong Kong.⁶⁴ However it is not clear how far these statements represent the stance of the Central Government on this point, and it is possible to interpret the PRC Criminal Law in a way that would appear also to give mainland courts' jurisdiction over many cases involving events entirely in Hong Kong.⁶⁵

In any case, the wide provisions in PRC Criminal Law, which appear to give the mainland courts' jurisdiction over any crime that results in "consequences" on the mainland,⁶⁶ mean that it often would be easy for Chinese authorities to assert some mainland connection and so deny that any particular case involves events entirely in Hong Kong.⁶⁷ Concerns on this point were heightened in early 2016 by commentaries about the mysterious disappearance from Hong Kong of Lee Bo, a publisher of books considered highly sensitive by the mainland leadership, who subsequently spent nearly three months assisting a criminal investigation on the mainland.⁶⁸ In a series of strong-worded commentaries, the *Global Times*, a newspaper under the auspices of the Chinese Communist Party, defended the jurisdiction of mainland authorities to investigate Lee's actions in Hong Kong on the grounds that these actions had consequences for public order on the mainland.⁶⁹

The special status of the Hong Kong Basic Law within the Chinese legal system is *also* reflected in the provisions in Article 159 which make it more difficult to amend the Hong Kong Basic Law than any other basic law in China,⁷⁰ with the sole exception of

64. See, for example, Fu, "The Battle of Criminal Jurisdictions" (see note 60) at 276, and Leung, "Viewing the Jurisdictional Issue from a Proper Perspective" (see note 61) at 57.

65. This depends on whether the extra-territorial jurisdiction over Chinese citizens granted to the mainland courts under Article 7 of PRC Criminal Law (see note 57) includes Chinese citizens resident in Hong Kong. However, Fu (see note 60) argues that, in this context, Chinese citizens should be interpreted as only referring to mainland residents.

66. See Article 6, explained further in note 57 earlier.

67. See, however, the suggestion by Priscilla Leung Mei-fun [in *The Hong Kong Basic Law: Hybrid of Common Law and Chinese Law* (LexisNexis, 2006) at 305] that the Hong Kong Basic Law is a "special" law on the specific situation in Hong Kong, and that the general principle in the Chinese legal system is that such "special provisions" normally prevail over "general provisions" in other laws such as the PRC Criminal Law.

68. See page 314 for more on suspicions that Lee Bo was illegally abducted from Hong Kong by mainland security agents, and the implications for one country, two systems.

69. See further Shen Renping, "Maliciously stirring up conflict harms Hong Kong", *Global Times*, 5 Jan 2016, and Stuart Lau, "Vanishing freedoms? Disappearance of bookseller Lee Bo raises questions about jurisdiction and rights in Hong Kong", *South China Morning Post*, 10 Jan 2016.

70. See further "7.5: Amendment" in Chapter 7 for more on the restrictions on amendments stipulated in Article 159.

the Macao Basic Law.⁷¹ Article 159(4) is usually also interpreted as making it impossible to amend the Hong Kong Basic Law at all in any way which would breach the basic policies set out by China in the Joint Declaration,⁷² the document that gives the Hong Kong Basic Law its international dimension. However, Ling (2000)⁷³ has expressed doubts about whether this particular restriction is legally enforceable.⁷⁴

3.3 Constitutional Dimension

The Hong Kong Basic Law's domestic dimension as a national law has occasionally raised doubts about whether it has any constitutional dimension at all, a conclusion which threatens to undermine the extent to which it protects Hong Kong's high degree of autonomy.⁷⁵

Zhang (1988) was one of the first to deny the existence of any constitutional dimension to the Hong Kong Basic Law, instead describing it as simply one of many basic laws enacted by the National People's Congress: "There are those who call the Basic Law Hong Kong's 'little constitution', but as has been seen, this appellation is quite inappropriate."⁷⁶ More recently, Pang (2013) has elaborated on this point, explaining that the objection to the use of this term is "because the core term of 'mini-constitution' is still 'constitution'".⁷⁷

Some common law scholars have expressed similar views. Dowdle (2007) argues that, "simply calling the Hong Kong Basic Law a 'Basic Law' did not endow it with some uniquely 'constitutional' essence".⁷⁸ But Dowdle agrees that its contents, as opposed to its title, do give the Hong Kong Basic Law such a "constitutional essence".⁷⁹ From the Hong Kong perspective, it is difficult to see how anyone could deny that to be the case, since the Hong Kong Basic Law performs the roles normally associated with a written constitution.

71. Article 144 of the Macao Basic Law imposes similar restrictions on its amendment to those contained in the Hong Kong Basic Law.

72. However, see note 254 in Chapter 7 and the accompanying text for a possible different interpretation of Article 159(4).

73. Bing Ling, "The Proper Law for the Conflict Between the Basic Law and Other Legislative Acts" in Johannes M.M. Chan, H.L. Fu, and Yash Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000) at 163.

74. See further page 262.

75. See further pages 66–67.

76. Zhang Youyu, "The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression" (1988) 2 *Journal of Chinese Law* 5, 7–8.

77. Pang Jiaying, "On the Ultimate Authority of the Constitution of the People's Republic of China in the Special Administrative Regions" (Dec 2013) 3, *Academic Journal of "One Country, Two Systems"* (English Edition) 111, 113.

78. Dowdle, "Constitutionalism in the Shadow of the Common Law" (see note 42) at 71.

79. *Ibid.*

Although written constitutions vary from country to country, both in form and content, de Smith and Braizer (1994)⁸⁰ suggest that they generally have at least two characteristics in common. Firstly, they constitute a higher source of law that is superior to other, ordinary, laws.⁸¹ Secondly, they set out the organization and functions of the different branches of the governmental structure.⁸² In addition, constitutions often include a section setting out guarantees of fundamental human rights.⁸³

From all these perspectives, the Hong Kong Basic Law fits the definition of a constitution. Its provisions make clear that it constitutes a higher source of law, which prevails over other inconsistent laws in Hong Kong. Article 8 stipulates that sources of law previously in force in Hong Kong prior to 1 July 1997 can only remain in force if they do not “contravene” the Hong Kong Basic Law, while Article 160(1) gives the National People’s Congress Standing Committee the power—at least at the time of the 1 July 1997 establishment of the Hong Kong SAR⁸⁴—to invalidate any laws found to be “in contravention” of the Hong Kong Basic Law. In addition, Article 11(2) requires all new laws enacted by the legislature of the Hong Kong SAR to comply with the Hong Kong Basic Law.⁸⁵ As a result, both the National People’s Congress Standing Committee in 1997,⁸⁶ and the Hong Kong courts subsequently,⁸⁷ have declared provisions in various Hong Kong laws to be invalid, after finding them to be in contravention of the Hong Kong Basic Law.

Equally, the contents of the Hong Kong Basic Law bear all the hallmarks of a constitution. Chapter IV, the longest chapter in the Hong Kong Basic Law, is devoted to setting out the organization and functions of the different branches of Hong Kong’s governmental structure. Consisting of 62 articles, its importance is evident from the fact that Chapter

80. Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin, 8th edition, 1998).

81. *Ibid.* at 4–5.

82. *Ibid.*

83. *Ibid.* at 7.

84. Article 160(1) is ambiguous about who should invalidate any laws found to be inconsistent with the Hong Kong Basic Law *after* 1 July 1997, stating only that: “If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.” In practice, this power has been usually exercised by the Hong Kong courts since 1 July 1997, although Article 17(3) also gives the Standing Committee a limited power to invalidate certain categories of laws which it deems inconsistent with the Hong Kong Basic Law. For more on Article 17(3), see further “4.2: Legislative Power” in Chapter 4.

85. This does not, however, directly cover the small number of PRC national laws which are not enacted by the legislature but instead applied in Hong Kong through promulgation by the Chief Executive. See further note 151 in Chapter 4 and the accompanying text.

86. See Decision of the Standing Committee of the NPC on Treatment of the Laws Previously in Force in Hong Kong in Accordance With Article 160 of the Basic Law of the Hong Kong SAR of the PRC (23 Feb 1997), which is described in more detail in “2.6: Through Train” in Chapter 2.

87. See further “6.2: Judicial Review” in Chapter 6 for more on the court’s exercise of this power.

IV comprises nearly 40% of the 160 articles in the Hong Kong Basic Law. Its six sections go into considerable detail on the organization and functions of the Chief Executive; Executive Authorities (which refers to what is generally described, in everyday language, as the Hong Kong SAR Government); Legislature; Judiciary; District Organizations responsible for advising on, and running, services at a local level; and Public Servants (which refers to both civil servants and employees of other publicly owned bodies).⁸⁸

In addition, Chapter III of the Hong Kong Basic Law includes generous guarantees of fundamental human rights that are similar, or perhaps even more extensive, than those in many other constitutions.⁸⁹ For instance, Article 27 of the Hong Kong Basic Law guarantees freedom of speech, press, assembly, association, procession and demonstration in wording almost identical to that which protects the same rights in theory, although not necessarily in practice,⁹⁰ under Article 35 of the PRC Constitution 1982. Most foreign constitutions also contain similar provisions. For instance, freedom of speech and of the press is commonly protected in constitutional documents around the world.⁹¹

In some respects, the list of rights contained by the Hong Kong Basic Law goes even further than many other constitutions. In *Gurung Kesh Bahadur v Director of Immigration*,⁹² the Court of Appeal described the provisions in Article 31 of the Hong Kong Basic Law on the right to travel as “probably wider than those contained in any other constitutional document”.⁹³ That right is not, for instance, explicitly mentioned in the US Constitution, although it nonetheless has been firmly established as a constitutional right by the US Supreme Court.⁹⁴

So it is hardly surprising that the Hong Kong Basic Law is commonly referred to in Hong Kong as the SAR’s mini-constitution. In *Ng Ka Ling v Director of Immigration*,⁹⁵ the Court of Final Appeal described the Hong Kong Basic Law as both a national law and “the constitution of the Region”, noting that: “Like other constitutions, it distributes and

88. For more on the provisions on governmental structure, see further “Chapter 5: System of Government”.

89. For more on the provisions on rights and duties, see further “Chapter 8: Protection of Human Rights”.

90. This is largely because the rights listed in the Chinese constitution are not, in contrast to those listed in the Hong Kong Basic Law, generally enforceable in the courts. See further note 123 in Chapter 6 and note 140 in Chapter 8.

91. See, for example, the 1st Amendment to the US Constitution 1791, Section 5(i) of the German Basic Law 1949 and Section 2 of the Canadian Charter of Rights and Freedoms 1982. A rare exception is the Commonwealth of Australia Constitution Act 1900, which focuses much more on governmental structure and does not explicitly mention either of these freedoms.

92. [2001] 3 HKLRD 32.

93. *Ibid.* at 43.

94. For a brief summary of the main US Supreme Court cases on this point and their relevance to Hong Kong, see *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, 496–497.

95. (1999) 2 HKCFAR 4.

delimits powers, as well as providing for fundamental rights and freedoms.”⁹⁶ While that conclusion can be hardly faulted as far as the contents of the Hong Kong Basic Law are concerned, placing too much emphasis on this constitutional dimension can give rise to problems, especially when the use of a shortened title such as “the Basic Law” appears to overlook the fact that there are also many other basic laws which have been enacted by the National People’s Congress.⁹⁷

The potential for such problems is well demonstrated by the reaction to one aspect of the decision in *Ng Ka Ling*, where the Court of Final Appeal used this constitutional dimension to assert a jurisdiction to invalidate any other laws enacted by the National People’s Congress if they were found to be inconsistent with the Hong Kong Basic Law: “As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid.”⁹⁸ That provoked a brief constitutional crisis, as mainland legal scholars and government officials denounced the Court of Final Appeal’s assertion of such a jurisdiction in strident terms.⁹⁹ The crisis was only resolved when the court issued an unprecedented supplementary judgment, which essentially rephrased its assertion of such a jurisdiction in more conciliatory terms.¹⁰⁰

Despite that uproar over the Court of Final Appeal’s attempts to use the constitutional dimension to the Hong Kong Basic Law to assert a jurisdiction over actions of the National People’s Congress, some mainland officials and scholars seem to have softened on the more general issue of whether there is any constitutional dimension to the Hong Kong Basic Law at all.

Huang and Zhuang (2007)¹⁰¹ describe it as a “unique national basic law” that is “significantly different from other basic laws in the aspects of content, effectiveness of application, as well as interpretation and amendment”.¹⁰² In a survey of the literature of leading mainland law scholars on the subject, Lee and Chen (2007)¹⁰³ find broad support for their conclusion that the Hong Kong Basic Law can best be characterized as a “Special Law of the Constitution”.¹⁰⁴ What that means is that, while the Hong Kong Basic Law is not a constitution in itself, it plays an important constitutional role in supplementing the provisions of the national constitution when it comes to their application in the Hong Kong SAR.

96. Ibid. at 26.

97. See further note 42 earlier in this chapter and the accompanying text.

98. *Ng Ka Ling* at 26.

99. See further notes 202–205 in Chapter 6 and the accompanying text.

100. *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141.

101. Huang Laiji and Zhuang Jinfeng, “On the Creativity of the Basic Law and Its Contribution to Jurisprudence” in *Seminar on Review and Prospect of the Basic Law: Collection of Articles 2007* (One Country Two Systems Research Institute, 2010) at 33–44.

102. Ibid. at 36–37.

103. Lee Simon Hoey and Chen Junhao, “The Basic Law Is a Special Law of the Chinese Constitution” in *Seminar on Review and Prospect of the Basic Law: Collection of Articles 2007* (see note 101) at 487–527.

104. Ibid. at 507–510.

That, in turn, raises the difficult issue of the precise nature of the relationship between the Hong Kong Basic Law and the often conflicting provisions of the PRC Constitution 1982.

3.4 Relationship with Chinese Constitution

The first law listed at the start of Volume 1 of the Laws of Hong Kong is not the Hong Kong Basic Law. Instead, it is the Constitution of the People's Republic of China 1982, the fundamental document that sets out the structure of the Chinese state, the rights and duties of its citizens, and the principles under which the country is governed.

Initially, there was some debate about whether this actually means that the Chinese Constitution is part of the laws of Hong Kong, especially since much of the PRC Constitution 1982 is about the socialist system that is not practised in Hong Kong, and some parts of the constitution are clearly incompatible with Hong Kong's way of life.¹⁰⁵ When controversy first arose about the Hong Kong SAR Government's decision to add the PRC Constitution 1982 to the start of a new edition of the Laws of Hong Kong after the 1 July 1997 handover,¹⁰⁶ the Hong Kong SAR Government insisted the constitution was being included simply "for reference purposes"¹⁰⁷ in order to "enable users to have a complete picture" of Hong Kong's constitutional framework, and that this did not necessarily mean it was actually part of the laws of Hong Kong.¹⁰⁸ However, the Chinese government has unequivocally stated its belief that the PRC Constitution 1982 applies in Hong Kong.¹⁰⁹ In addition, several provisions in the constitution have been cited in the courts in a number of cases.¹¹⁰ So the issue would now appear to be beyond doubt.

105. Ghai argues that the Hong Kong Basic Law "is intended to be self-contained" and that the provisions of the PRC Constitution 1982 do not directly apply in Hong Kong, with the exception of Article 31. See Yash Ghai, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure" in Chan, Fu and Ghai (eds.), *Hong Kong's Constitutional Debate* (see note 73) at 45.

106. See Margaret Ng, "PRC Constitution Made Part of Laws of Hong Kong?" (Oct 1998) *Hong Kong Lawyer* 21–22, and the question asked by Martin Lee in Legislative Council, *Official Record of Proceedings, Hong Kong Hansard* (10 Feb 1999).

107. See Secretary for Constitutional Affairs Michael Suen in Legislative Council, *Official Record of Proceedings, Hong Kong Hansard* (10 Feb 1999).

108. Tony Yen, "The PRC Constitution and Hong Kong Law" (Dec 1998) *Hong Kong Lawyer* 16.

109. See, for instance, the White Paper issued by the Information Office of the State Council, *The Practice of the "One Country, Two Systems Policy" in the Hong Kong Special Administrative Region* (10 June 2014), part V(2).

110. These include *Ng Ka Ling* (1999) 2 HKCFAR 4, 12, *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 321 and *Ting Lei Miao v Chen Li Hung* [1999] 1 HKLRD 123 (CA). In the latter case, Justice Rogers stated (at 140) that "clearly parts of the Constitution are applicable in Hong Kong", although he also suggested that the application of other parts of the constitution "may be altered by the Basic Law". Although part of a dissenting judgment, there is nothing to suggest that the other two judges disagreed on this point.

The placing of the PRC Constitution 1982 ahead of the Hong Kong Basic Law at the start of Volume 1 of the Laws of Hong Kong accurately reflects the fact that the Hong Kong Basic Law, just like all other laws in China, is ultimately enacted under the authority of the PRC Constitution 1982, and highlights some of the difficulties involved in having to rely in this way on a document from such an extremely different legal system.

Both in its Preamble and again in Article 11(1), the Hong Kong Basic Law makes clear that it is enacted in accordance with the PRC Constitution 1982, citing, in particular, Article 31 of the constitution. This is the vaguely worded provision that was added as part of the passage of a new constitution in 1982,¹¹¹ with the intention of enshrining in legal form the policy of “one country, two systems”.

The problem is that, whatever its intention, Article 31 makes no mention of one country, two systems. It simply allows the Chinese state to create Special Administrative Regions, a new type of local administrative unit of which Hong Kong became the first on 1 July 1997,¹¹² and permits the National People’s Congress to enact laws prescribing the systems to be followed in such regions.¹¹³ But Article 31 gives no guidance on what systems are allowed under such laws, beyond the vague statement that this will be decided “in the light of the specific conditions”. In particular, it does not specifically allow such systems to contravene other parts of the constitution.

The solution adopted by the drafters of the Hong Kong Basic Law was to state in Article 11(1) of that document that, in accordance with Article 31 of the PRC Constitution 1982, the “systems and policies” to be followed in Hong Kong, including the “social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems and the relevant policies” would be based on the Hong Kong Basic Law. This implies that there is no need to follow for Hong Kong to follow the provisions in the PRC Constitution 1982 on these matters. However, the vague wording of Article 31 has long given rise to concern about whether it provides a sufficient legal basis for the enactment of a Hong Kong Basic Law which, in providing for a separate system for Hong Kong, contradicts some of the most fundamental principles in the PRC Constitution 1982.¹¹⁴

111. The 1982 constitution replaced the 1978 constitution, which had become outdated following the end of the Cultural Revolution and the start of economic reforms in China.

112. Macao became China’s second Special Administrative Region on 20 December 1999.

113. This is supplemented by Article 62(13) of the PRC Constitution 1982, which lists one of the NPC’s powers as being: “To decide on the establishment of special administrative regions and the systems to be instituted there.”

114. See, for instance, Siu K. Lee, “Much Ado About Something” (July 1999) *Hong Kong Lawyer* 26, 27. For a detailed comparison of the provisions in the PRC Constitution 1982 with those in the Hong Kong Basic Law, see Lee and Chen, “The Basic Law Is a Special Law of the Chinese Constitution” (see note 103) at 491–505.

For instance, Article 5 of the Hong Kong Basic Law specifically states that: “The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.”¹¹⁵ That runs directly counter to Article 1 of the PRC Constitution 1982, which describes the socialist system as the “basic system of the People’s Republic of China”—with no mention of any exceptions—and even prohibits “[s]abotage of the socialist system by any organization or individual”. Some rights guaranteed under the Hong Kong Basic Law would also appear to run counter to the PRC Constitution 1982. For instance, while the Hong Kong Basic Law guarantees the right of Hong Kong residents “to raise a family freely”,¹¹⁶ the constitution makes provision for China’s one-child policy by allowing the state to restrict population growth¹¹⁷ and imposes a duty on married couples to use birth control.¹¹⁸ Similarly, while religious freedom is guaranteed in unqualified terms under the Hong Kong Basic Law,¹¹⁹ it is limited to “normal religious activities” under the PRC Constitution 1982 and subject to several restrictions.¹²⁰

That puts the Hong Kong Basic Law in the uncomfortable position of contradicting many parts of the higher law from which it draws its authority without, given the vague wording of Article 31, any clear legal basis for doing so. As the eminent English legal scholar Sir William Wade stated in a much-quoted opinion to the Law Society of Hong Kong in 1988: “It is thus clear, at least in the eyes of an English lawyer, that the Chinese Constitution and the Basic Law will inevitably be in conflict.”¹²¹ Fu (2000) argues that, “the constitutionality of the Basic Law may be doubtful”.¹²² That would, at least in theory, open the door to provisions in the Hong Kong Basic Law being declared invalid, by reason of their inconsistency with a higher law, in this case the PRC Constitution 1982.

Not surprisingly, this possibility caused much concern during the drafting of the Hong Kong Basic Law and led to several proposals being put forward to try to resolve the

115. For more on the meaning of Article 5, see further “9.1: What Does 50 Years Mean?” in Chapter 9.

116. Article 37.

117. Article 25 states that: “The state promotes family planning so that population growth may fit the plans for economic and social development.”

118. Article 49 includes a provision stipulating that: “Both husband and wife have the duty to practise family planning.”

119. Articles 32(2) and 141.

120. Article 36 states that: “The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.”

121. “Opinion on the Draft Hong Kong Basic Law” reprinted in Hungdah Chiu (ed.), *The Draft Basic Law of Hong Kong: Analysis and Documents* (School of Law, University of Maryland, 1988) at 81–91.

122. See for instance Fu Hualing, “Supremacy of a Different Kind: The Constitution, the NPC and the Hong Kong SAR” in Chan, Fu and Ghai (eds.), *Hong Kong’s Constitutional Debate* (see note 73) at 98–99.

conflicts between the wording of the Hong Kong Basic Law and the PRC Constitution 1982. One solution would have been to amend the constitution, an idea put forward by Wade,¹²³ who suggested that the entire Hong Kong Basic Law be treated as an amendment to the constitution,¹²⁴ and by the Basic Law Consultative Committee. Other suggestions, also put forward by the Basic Law Consultative Committee, included setting up a committee to try to resolve conflicts between the two documents, and either interpreting the constitution to make clear which parts do not apply in Hong Kong or writing a similar provision into the Hong Kong Basic Law.¹²⁵

None of these suggestions were ultimately accepted. However, China did take one smaller step to address the concerns that had been expressed about the constitutional validity of the Hong Kong Basic Law. This was the adoption of a formal decision of the National People's Congress, on the same day as the promulgation of the Hong Kong Basic Law, which stated that the Hong Kong Basic Law was in accordance with PRC Chinese Constitution 1982 because it was enacted based on the provisions of Article 31 and "in the light of the specific conditions of Hong Kong".¹²⁶ Although this made no attempt to address, let alone resolve, the actual conflicts between the Hong Kong Basic Law and the constitution, as a formal decision of China's highest legislative body which is also responsible for supervising the constitution,¹²⁷ it did lay to rest any doubts about the constitutionality of the Hong Kong Basic Law.

From the perspective of mainland law scholars, this was never a problem in any case. After all, the wording of the Chinese Constitution does not carry the same legal weight as similar documents in non-Communist countries.¹²⁸ Its provisions are not generally enforceable in the courts,¹²⁹ and have even been ignored by Chinese leaders when it suited their purposes to do so.¹³⁰ If a legal rationale is needed to explain away the

123. "Opinion on the Draft Hong Kong Basic Law" (see note 121) at 83.

124. In fact, the Hong Kong Basic Law was passed with the support of more than two-thirds of the members of the NPC, after being submitted by its Standing Committee, so fulfilling the two requirements for an amendment of the PRC Constitution 1982 stipulated in Article 64 of the constitution. However, it was never described as a constitutional amendment by either the NPC or its Standing Committee, and the idea that it can be treated as one has been described as far-fetched. See Lee, "Much Ado About Something" (see note 114) at 28.

125. Consultative Committee for the Basic Law of the Hong Kong SAR, *Final Report on the Relationship Between the Basic Law and the Constitution* (Feb 1987) at 10–12.

126. Decision of the NPC on the Basic Law of the Hong Kong SAR of the PRC (4 April 1990).

127. PRC Constitution 1982, Article 62(2). Under Article 67(1), a similar power is also vested in the NPC Standing Committee.

128. See Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 4th edition, 2011) at 49–52.

129. *Ibid.* at 47–48. See further note 123 in Chapter 6.

130. One of the best known examples is the decision to allow Chinese peasants to lease land during the early stages of economic reforms in the early 1980s even though, at that stage, this was still explicitly forbidden by Article 10 of the PRC Constitution 1982. Only in 1988 was Article 10 finally amended to legitimize a practice that had been already taking place, contrary to the constitution, for several years.

conflicts between a Hong Kong Basic Law based upon Article 31 of the constitution and the other provisions elsewhere in the constitution, it can be found in the principle under the Chinese legal system that “special provisions” prevail over conflicting “general provisions”.¹³¹ As a result, Li (2000) argues that “Article 31 of the Constitution is a special provision, and the effect of special provisions surpasses that of general provisions.”¹³²

So, however extensive the conflicts between the wording of the Hong Kong Basic Law and the PRC Constitution 1982, in practice there was never much prospect of this having any effect on the legal status of the Hong Kong Basic Law.

131. See further note 67 on the application of a similar principle in arguing that the “special” nature of the Hong Kong Basic Law allows it to prevail over other more “general” basic laws.

132. Li Zaishun, “The Comprehensive Grasping of the ‘One Country, Two Systems’ Concept Is the Key to the Correct Implementation of the Hong Kong Basic Law”, Constitutional Law Conference on Implementation of the Basic Law: A Comparative Perspective, 29 April 2000. Xiao Weiyun [in *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, English edition, 2001) at 83] cites several other examples elsewhere in the PRC Constitution 1982 where “specific provisions” are believed to prevail over conflicting “general provisions”.

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Notes:

For ease of reference, wherever possible index entries refer to footnotes accompanying the relevant text (using the abbreviation “n” for footnote). For example, “10n2” refers to footnote 2 on page 10. Authors of sources listed in the bibliography are included in the index wherever they are cited in the main text.

In addition to the main abbreviations listed on page xi and used throughout this book, the following additional abbreviations are used in the index:

CE	Chief Executive
CFA	Court of Final Appeal
CPG	Central People’s Government
HK	Hong Kong
HKBL	Hong Kong Basic Law
HKSAR	Hong Kong Special Administrative Region
JD	Joint Declaration
JORC	Judicial Officers Recommendation Commission
NPCSC	National People’s Congress Standing Committee

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