

A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law

XIAO WEIYUN*

In December of 1987, the Hong Kong Special Administrative Region of the People's Republic of China Basic Law Drafting Committee (Drafting Committee) held its Sixth Plenary Session and discussed the preliminary provisions drafted by the Special Subcommittee on the Political System.¹ These provisions comprise two chapters in the Basic Law: chapter four on the political system of the Hong Kong Special Administrative Region (SAR), and the chapter ten appendix. Chapter four is divided into six sections, dealing in turn with the chief executive, the executive branch, the legislature, the judiciary, the district organizations² and the civil service. Chapter ten deals primarily with the creation of the initial Hong Kong SAR government. This article has been written with reference to these preliminary provisions, taking into consideration that the text will undergo many revisions and changes. Therefore, this represents only a preliminary inquiry into the issues concerning the proposed political system of the Hong Kong SAR under the Basic Law.

I. PRINCIPLES GOVERNING THE CREATION OF THE POLITICAL SYSTEM

In studying the possible alternative structures of the political system of the Hong Kong SAR, it is necessary to decide, in general, which primary principles should be followed before making any final determinations.

The primary authorities for the laws and policies of the Basic Law of the Hong Kong SAR are the Constitution of the People's Republic of China and the Sino-British Joint Declaration on the

* Professor of Law, Beijing University; member of the Hong Kong Special Administrative Region of the People's Republic of China Basic Law Drafting Committee; Co-chairperson of the Special Subcommittee on the Political System.

1. For a text of the preliminary provisions, see *Jibenfa Gezhang Tiaowen Caogao Huibian*, Wen Wei Po, Dec. 13, 1987, at 6, 7, 8 [hereinafter Wen Wei Po].

2. For example, the Urban Council, the Regional Services Department and the District Board.

Question of Hong Kong (Joint Declaration)³ wherein the government of the PRC elaborated its basic policies regarding Hong Kong.⁴ However, drafting a Basic Law of this sort is an unprecedented effort, and there is no existing law to use as a reference. Other than the provisions on the judicial system and the civil service, the Joint Declaration deals with the political system in very general terms. This has created particular difficulties for drafting the sections on the political system. In addition, people from different sectors of the Hong Kong community still hold widely differing opinions concerning the political system of the Hong Kong SAR. Therefore, it is critical to resolve at the outset the question of which principles to follow in drafting the provisions on the political system.

Naturally, there are some principles which govern both the drafting of the sections of the Basic Law on the political system and the drafting of the entire Basic Law. However, there are other principles which are useful as a general guide only in drafting the provisions on the political system. In the author's opinion, the following principles are those that must be adhered to in drafting the provisions on the political system.

A. The Spirit of the Joint Declaration and the Principle of "One Country, Two Systems"

The entire Basic Law should completely and genuinely implement the spirit of the Joint Declaration and the general principle of "one country, two systems." The political system sections of the Basic Law should put this spirit and this principle into practice with particular emphasis and accuracy. In Annex I of the Joint Declaration, China focuses on expounding the issues concerning the political system of the Hong Kong SAR and the policy of "one country, two systems."⁵ This attention illustrates the importance China attaches to following this principle in structuring the political system of the Hong Kong SAR. The Joint Declaration states that the government of the United Kingdom will restore Hong Kong to China and that the Chinese government will resume the exercise of sovereignty over Hong Kong on July 1, 1997. The question of the transferral of power and sovereignty over the territory of Hong Kong is first a political ques-

3. See THE JOINT DECLARATION OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON THE QUESTION OF HONG KONG, at 5, 7 (Foreign Languages Press 1984) [hereinafter JOINT DECLARATION].

4. *Id.* Annex I.

5. *Id.* secs. I-IV.

tion. It is also a question of the principles governing the political system.

There is a great deal in the substance of the Joint Declaration concerning economics, education and culture, which relates to the question of the development and prospects of Hong Kong over the next fifty years. To arrive at a satisfactory draft of the provisions on the political system, it is also necessary to implement the spirit of the Joint Declaration in these areas.

B. Upholding National Unity and Implementing a High Degree of Autonomy

Safeguarding the unity of the country and the integrity of the territory are prerequisites to implementing a high degree of autonomy in the Hong Kong SAR. The preeminence of safeguarding the unity of the country and integrity of the territory is reflected in the Joint Declaration⁶ and in the Sino-British negotiations.⁷ In discussing Article 31 of the Constitution, former Chairman of the National People's Congress, Peng Zhen, pointed out that "[w]e are absolutely unequivocal on the principle of safeguarding China's sovereignty, unity and territorial integrity."⁸ However, at the same time, he pointed out:

[A]fter peaceful reunification, Taiwan can enjoy a high degree of autonomy as a special administrative region. This autonomy means, among other things, that the current social and economic systems in Taiwan, its way of life and its economic and cultural relations with foreign countries will remain unchanged.⁹

The Joint Declaration clearly states that the Hong Kong SAR will enjoy a high degree of autonomy,¹⁰ which is also the basic spirit and stance of China's constitution¹¹ and government. If the autonomy of the Hong Kong SAR's political system is neglected, then the policy of "one country, two systems" cannot be realized.

6. *Id.* at 1, 2.

7. XIANGGANG NIANJIAN (Hong Kong Annual Reports) [Hong Kong] sec. III, at 18 (1985).

8. *Guanyu Zhonghua Renmin Gongheguo Xianfa Xiugai Caoan de Baogao*, ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution of the People's Republic of China) at 72 (1982) [hereinafter PRC Const.], *trans. in Report on the Draft of the Revised Constitution of the People's Republic of China*, BEIJING REV., Dec. 13, 1982, at 9, 21.

9. *Id.*

10. JOINT DECLARATION, *supra* note 3, at 2.

11. PRC Const., *supra* note 8, art. 31.

C. *Economic Growth and Social Stability*

Maintaining the economic prosperity and social stability of Hong Kong is an essential goal of the Basic Law. It has already been clearly stated in the Joint Declaration that the current social and economic systems of Hong Kong will remain unchanged.¹² This means that the capitalist economy has to be preserved; only by doing so can the prosperity of Hong Kong's economy be enhanced, the material and cultural standards of living of Hong Kong residents continue to be raised and the stability of Hong Kong society continue to be ensured. The preservation of most of the present Hong Kong system will also benefit the economic development of the Chinese mainland. Correspondingly, the design of the political system must be conducive to the economic prosperity and social stability of Hong Kong.

Maintaining a prosperous economy does not involve simply protecting the interests of a certain sector of the community; it requires taking all the different sectors into account and properly resolving the conflicting interests between them in order to insure the stability of Hong Kong society.

D. *Retain Merits of the Current Institutions and Increase Democratic Participation*

There are various reasons why the economy in Hong Kong was able to develop to its present scale and pace. One reason is that the political structure contains some qualities favorable to economic development, which should be retained. The civil service and advisory system¹³ are suited to the British administration of Hong Kong and promote the development of the economy. In the future, the Hong Kong SAR can also utilize them to promote Hong Kong's economy.

Naturally, those things in the political structure that are the products of colonialism or whose substance is contrary to the spirit of the Joint Declaration, should be discarded. The policy of "Hong Kong people administering Hong Kong" (*Gangren zhi Gang*), should truly be put into practice so that the democratic participation of the Hong Kong SAR residents can develop in a gradual and orderly fashion.

E. *Begin from the Realities of Hong Kong*

The reason for proposing the policy of "one country, two sys-

12. JOINT DECLARATION, *supra* note 3, at 4.

13. See discussion *infra* at 104.

tems" and establishing the Hong Kong SAR is to maintain China's sovereignty, unity and territorial integrity, while considering the history and practical circumstances of Hong Kong. Similarly, it is necessary to start from the actual conditions of Hong Kong when drafting the terms of the Hong Kong SAR political system; we cannot mechanically reproduce the political structure of other countries or systems. Since the Hong Kong SAR is not an independent state, models such as the "parliamentary system" or the "presidential system" cannot be arbitrarily adopted.

Can the system of the People's Congress¹⁴ of the mainland be copied? Of course not. The People's Congress system was formed by the Chinese people through the long process of revolution and socialist construction, so it is primarily suited to the conditions of the mainland.

Can Hong Kong retain its political structure intact beyond July 1, 1997? Naturally, this cannot be the case either. In order to maintain prosperity and stability and to facilitate the smooth transfer of authority from Britain to China, we should be mindful of the practical conditions of Hong Kong and try not to dramatically or rapidly alter the current system.

II. SOME FEATURES OF THE CURRENT POLITICAL STRUCTURE IN HONG KONG

Before debating the future political system of the Hong Kong SAR, we should first examine the current political structure of Hong Kong. It is necessary to understand which institutions will *not* be conducive to the prosperity and stability of Hong Kong if they continue to exist after 1997, and which institutions *will* be of benefit to the future development of Hong Kong. The former should, of course, be abandoned, but the latter may either be retained or appropriately modified.

One important characteristic of the current political structure of Hong Kong is that political power is highly centralized in the Governor. The Governor of Hong Kong is the Queen of England's representative in Hong Kong, is the highest authority in the administration of the Hong Kong government and is the nominal commander of the Hong Kong military. As the head of government, the Governor presides over Executive and Legislative Council meetings.¹⁵ According to the Executive Committee of the Basic Law Consultative Commit-

14. PRC Const., *supra* note 8, arts. 2, 3.

15. Hong Kong, pt. III, at 13 (1986).

tee of the Hong Kong SAR,¹⁶ the Hong Kong Governor currently has fifteen primary powers and responsibilities, which include: presiding over Executive Council meetings; nominating non-official members of the Executive and Legislative Councils, judges and heads of departments (whose appointment is then confirmed by the Foreign and Commonwealth Office of Great Britain); and directly or indirectly appointing high level public servants. This demonstrates that considerable powers and responsibilities are concentrated in the office of the Hong Kong Governor.

Although legally the power of final resolution of questions in Hong Kong rests with the Crown as exercised through the Foreign and Commonwealth Office in London, this power is seldom exercised.¹⁷ For example, according to the provisions of the Letters Patent,¹⁸ when a bill passed by the Legislative Council is sent to the Hong Kong Governor for approval, the Governor must, on the basis of directives issued directly by the British Crown or indirectly through a government minister, decide whether or not to approve the bill or whether to reserve the decision for the Crown. Although the Crown has this legal authority, it has not been exercised for many years.¹⁹

In reality, the Hong Kong Governor exercises both executive and legislative powers. As chairman of the Legislative Council, the Governor must sign all laws passed by the Legislative Council before the laws can take effect.²⁰ Therefore, the Legislative Council does not enjoy complete legislative authority and the title "Legislative Council" is not an accurate reflection of its actual role.

The Governor has authority to submit bills to the Executive Council, to solicit opinions of Council members and to make decisions.²¹ The Governor discusses all matters with the Executive Council, excepting dismissals, disciplinary actions and some other matters.²² The Executive Council, therefore, is merely another advisory organ for the Governor. The Chief Secretary is the Governor's chief policy advisor and the official head of the civil service of the Hong Kong government.²³ The work of the various government

16. Xingzheng Jiguan de Zucheng yu Zhiquan (The Organization and Powers of the Executive Branch) (adopted Sept. 8, 1987) at 1 (materials available from the Secretariat of the Drafting Committee for the Basic Law) [hereinafter Executive Branch].

17. See N. MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 65, 66 (1986).

18. See Letters Patent, arts. 7-12, in *id.* at 327.

19. N. MINERS, *supra* note 17, at 66.

20. Executive Branch, *supra* note 16.

21. Royal Instructions, art. 11, in N. MINERS, *supra* note 17, at 332.

22. *Id.* art. 10.

23. N. MINERS, *supra* note 17, at 91.

departments are supervised and coordinated by the Chief Secretary.

All operations of government are tightly controlled from the centre. This highly centralized system was designed to ensure that the Governor is fully informed of what is going on and is in a position to exercise effective control, since he is constitutionally responsible for every executive act of government, and is ultimately answerable to the Secretary of State in London for all that is done in Hong Kong.²⁴

While a political structure with centralized authority is appropriate to the British administration of Hong Kong, it is not suited to the gradual establishment and development of a democratic system in the Hong Kong SAR. The chief executive of the Hong Kong SAR should not have the same degree of authority that is currently enjoyed by the Governor of Hong Kong. On the other hand, the executive branch needs a certain amount of authority to carry out its functions efficiently and to meet the needs of economic development and administrative supervision. Therefore, to overly circumscribe the authority of the chief executive and the executive branch would be adverse to the prosperity and the stability of the Hong Kong SAR.

Hong Kong has a civil service that was formed over a long period of time. There are set procedures for recruitment, employment, review, discipline, training and supervision,²⁵ which are suited to Hong Kong and will preserve the stability of the civil service and the continuity of Hong Kong's current policies. The civil service system and Hong Kong's district organizations may be retained in their basic forms.

Another characteristic of Hong Kong's political structure is the existence of more than three hundred advisory organizations. These can largely be divided into five categories: official and non-official organizations that provide suggestions to department heads, official and non-official organizations that provide suggestions to the government, and committees responsible for implementing specific matters. Although these are not executive organizations, they are beneficial and suited to the administration of the highly centralized Hong Kong government.²⁶ The retention of these institutions will further the development of democracy in the Hong Kong SAR.

24. *Id.*

25. See generally M. MUSHKAT, *THE MAKING OF THE HONG KONG ADMINISTRATIVE CLASS* (1982).

26. See Hong Kong, *supra* note 15, at 20.

III. THE CHIEF EXECUTIVE AND THE EXECUTIVE BRANCH OF THE HONG KONG SAR

The chief executive will occupy an important position in the Hong Kong SAR. According to the Joint Declaration and the provisions drafted by the Special Subcommittee on the Political System of the Drafting Committee,²⁷ not only will the chief executive hold the position of head of the Hong Kong SAR, but he or she is also responsible for the executive branch of the Hong Kong SAR. That is to say, the chief executive of the Hong Kong SAR has two roles. As head of the Hong Kong SAR, he or she represents the Hong Kong SAR in corresponding with the Central Government, answers to the Central Government in accordance with the provisions of the Basic Law and also represents the Hong Kong SAR in certain diplomatic ceremonies. As chief executive, he or she is also responsible to the Hong Kong SAR and its residents. This arrangement is conducive to strengthening the unified leadership of administrative work, raising the effectiveness of the work of government administration and improving the working relations between the Central Government and the Hong Kong SAR.

On the selection of the chief executive of the Hong Kong SAR, the Joint Declaration requires that he or she "be selected by election or through consultations held locally and be appointed by the Central People's Government."²⁸ However, the Joint Declaration does not stipulate how to hold elections or consultations. There is great disagreement among people from the various sectors of the Hong Kong community over the method of selecting the chief executive. In a report to the Special Subcommittee on the Political System, this author compiled twenty-six different plans and suggestions representing the opinions of different sectors of the Hong Kong community in August 1986. In two 1987 documents, the Basic Law Consultative Committee compiled thirty-nine suggestions.²⁹ This situation clearly shows that the divergence in opinion is very large.

In a report to the Sixth Plenary Session of the Drafting Committee on December 12, 1987,³⁰ the Special Subcommittee on the Political System summarized the various suggestions into four proposals for the selection of the chief executive: first, selection by an electoral

27. Wen Wei Po, *supra* note 1, at 6.

28. JOINT DECLARATION, *supra* notes 3, at 3, 8.

29. Xingzheng Zhanguan de Chansheng (The Selection of the Chief Executive); Xingzheng Zhanguan de Chansheng Fangfa Fangan Guina Baogao (The Collection of Proposals on the Method of Selecting the Chief Executive) (materials available from the Secretariat of the Drafting Committee for the Basic Law).

30. Wen Wei Po, *supra* note 1, at 6.

college with broad representation; second, nomination by members of the legislature (e.g., 10%) and a direct "one person one vote" election by the entire Hong Kong community; third, election by functional constituencies; and fourth, selection of the first three chief executives by a local advisory body through consultation and referral to the Central Government for approval, with each succeeding chief executive elected by an electoral college from among three candidates nominated by an advisory body. Essentially, these four proposals reflect the divergence of opinion that exists among the different sectors of the Hong Kong community and among the members of the Basic Law Consultative Committee on the method of selecting the chief executive. There needs to be further examination and discussion of these proposals and careful selection of the one that is in keeping with the Joint Declaration and that is feasible and acceptable to the majority of Committee members and to the Hong Kong community. The proposal chosen should also be conducive to the prosperity and stability of Hong Kong, to democratic participation by all sectors of the community and to a smooth transition of sovereignty and implementation of the principles of "Hong Kong people administering Hong Kong" and "gradual, orderly progress."

Special circumstances surrounding the selection of the first chief executive of the Hong Kong SAR on July 1, 1997, still need to be considered. According to the provisions of the Joint Declaration:

[D]uring the transition period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability. . . .³¹

Since until July 1997 Hong Kong will remain under the administration of the United Kingdom, it will be difficult to follow strict election procedures, such as organizing voter registration, partitioning voting districts, nominating candidates, holding election races and casting ballots, in accordance with legal procedures. Consequently, the chief executive will be incapable of being elected in accordance with a complete and formal election law. This problem is both legally and practically difficult to resolve. The Special Subcommittee on the Political System is in the process of searching for a practical and practicable method to select the first chief executive, which is in keeping with the Joint Declaration.

31. JOINT DECLARATION, *supra* note 3, at 5.

The report of the Special Subcommittee on the Political System to the Sixth Plenary Session of the Drafting Committee proposed a total of seventeen powers and responsibilities for the chief executive of the Hong Kong SAR,³² which can be placed into three categories. The first is in the political and legal areas, for example, directing the Hong Kong SAR government, executing laws, formulating policies, announcing executive orders, approving proposals submitted to the legislature concerning taxation or spending of governmental funds, deciding whether government officials will testify in the courts or the legislature, dissolving the legislature in accordance with law, approving the expulsion of criminal offenders who threaten public security, pardoning or reducing the punishment of criminal offenders and dealing with such matters as petitions and appeals from Hong Kong residents. Second is the appointment and dismissal of various personnel, for example, reporting and challenging the appointment or dismissal of principal officials to the Central People's Government and appointing and removing judges of all levels and public employees in accordance with legal procedures. Third is the handling of matters delegated by the Central Government, for example, implementing the directives issued by the Central Government, and managing foreign and other affairs as delegated by the Central Government.

Judging from the powers and responsibilities of the chief executive as enumerated above, the proposed provisions of the Basic Law are more appropriate for the Hong Kong SAR than the present system. First, the powers of the chief executive are not as great as those of the present governor, and he or she cannot exercise both executive and legislative powers. If the authority of the chief executive were too great, perhaps tending towards a dictatorship, it would be very disadvantageous to Hong Kong since the Central Government will not be able to interfere in matters that belong within the scope of SAR autonomy. The authority of the chief executive as currently proposed is more appropriate; it cannot be dictatorial, yet he or she still has the necessary authority to supervise the work of the executive branch. Second, not only does the chief executive have the authority to resolve problems independently so as to fulfill the functions of administration, but he or she also has the assistance of executive assemblies to help him or her make policy decisions and provide opportunities for consultation and group discussion. Third, the chief executive and the legislature each act as a check on the other's powers. The chief executive, acting in accordance with specific legal procedures, can dissolve the legislature, and the legislature, acting in accordance with

32. Wen Wei Po, *supra* note 1, at 6.

legal regulations, can effect the resignation of the chief executive.³³ This helps to prevent the chief executive from doing things against the advice of others and is conducive to cooperation between the legislature with the chief executive.

The Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee (Collection)³⁴ stipulates that the executive branch of the Hong Kong SAR be composed of permanent Hong Kong residents and that principal officials be Chinese citizens who are permanent Hong Kong residents and have ordinarily resided continuously in Hong Kong for fifteen years. The chief executive, moreover, must be at least forty years old and have lived in Hong Kong for twenty years.³⁵ These requirements not only conform to the principle of "Hong Kong people administering Hong Kong," but also preclude members of the Central Government and Chinese nationals of any province, autonomous region or municipality from participating in the work of the Hong Kong SAR executive branch,³⁶ thus implementing China's basic policies regarding Hong Kong, as elaborated in the Joint Declaration, and ensuring a high degree of autonomy for the Hong Kong SAR.

This high degree of autonomy is also reflected in the authority exercised by the executive branch of the Hong Kong SAR. The executive branch has the authority to: first, determine and carry out policies; second, administer financial, banking, economic, industrial and commercial, trade, tax, postal, civil aviation, naval, transportation, fishing, agriculture, public relations, labor, educational and other administrative affairs; third, conduct foreign affairs as empowered by the Central People's Government; fourth, compile and submit the budget and the final accounts; five, draw up and submit proposed laws, bills and supplemental regulations; and sixth, exercise other powers stipulated in the Basic Law.³⁷ It can be seen from the authority of the executive branch that the scope of duties of the executive branch is relatively comprehensive and extremely broad. Although the authority to conduct national defense and foreign affairs belongs to the Central Government, the executive branch of the Hong Kong SAR still has the authority to conduct such foreign affairs as empowered by the Central Government.

The Executive Assembly of the Hong Kong SAR is an organization that assists the chief executive in formulating policies. Its mem-

33. For a more detailed discussion of these checks, see discussion *infra* at 108-11.

34. Wen Wei Po, *supra* note 1.

35. *See id.* at 6.

36. This is also true of the legislature and the judiciary.

37. Wen Wei Po, *supra* note 1, at 7.

bers are appointed by the chief executive from the principal officials of the executive branch, members of the legislature and the public at large. Except in emergency situations and matters relating to the appointment and removal of personnel and disciplinary sanctions, the chief executive must consult with the Executive Assembly before making important policy decisions, proposing a bill to the legislature, drafting supplementary regulations or adjourning the legislature.³⁸

It is necessary and beneficial to establish the Executive Assembly. First, since the Executive Assembly contains members of the legislature, they can voice the opinions of the legislature when the chief executive is deciding a problem; this method facilitates mutual cooperation and communication between the executive and the legislative branches. Having members of the community in the Executive Assembly allows the chief executive to frequently hear the opinions of members of the community and facilitates his or her understanding of the conditions of various aspects of the community. Second, the procedure of requiring the chief executive to consult members of the Executive Assembly when making important policy decisions can compensate for the possibility that the review of a problem by a single person may be insufficient. Third, since the Executive Assembly has some characteristics in common with the present Executive Council, unnecessary changes in the political system can be avoided in July 1997, and social and political stability can be maintained. However, the Executive Assembly's title, responsibilities and the appointment and dismissal of its members are somewhat different from the current Executive Council.

IV. THE LEGISLATURE OF THE HONG KONG SAR

The bills passed by the current Legislative Council of Hong Kong have to be approved by the Governor of Hong Kong, with London having the final decision.³⁹ By contrast, the legislature of the Hong Kong SAR will be one that enjoys a high degree of autonomy and much greater authority than the current Legislative Council. It can be seen from the Collection that the legislature has duties and authorities in ten areas,⁴⁰ which can be divided into five categories. First, the authority to legislate, that is, the authority to promulgate, abolish and amend laws in accordance with the provisions of the Basic Law and legally prescribed procedures. Second, the authority to examine the budget and public expenditures, including the author-

38. *Id.* at 6.

39. N. MINERS, *supra* note 17.

40. Wen Wei Po, *supra* note 1, at 7.

ity to approve the budget and final accounts and to approve taxation and public expenditures on the basis of proposals and examinations of the executive branch. Third, the authority to inquire, that is, the right to receive the administration report from the chief executive and debate its contents, debate any questions concerning the public welfare and inquire into the work of the executive branch. Fourth, the authority of appointment and removal, that is, authority to approve the appointment or the removal of judges of the court of final appeal as well as of the Chief Judge of the High Court. Fifth, the authority to impeach. Where a chief executive has engaged in illegal acts of a serious nature or acts which violate his or her duties and responsibilities, the legislature can impeach him or her in accordance with the law.

In addition, this high degree of autonomy enjoyed by the legislature is also reflected in the provisions stipulating that the legislature is to be formed by permanent residents of Hong Kong in accordance with the relevant provisions of the Basic Law, that the laws it promulgates need only be reported to the Standing Committee of the NPC for the record, and that such reporting requirements do not affect the validity of such laws.

As for the method of constituting the legislature, the majority of the members of the Drafting Committee and those of the Consultative Committee favors a mixed election process that combines direct and indirect election. Differences of opinion have long existed in various sectors of the Hong Kong community with regard to the method of election. In the Final Report on the Legislature,⁴¹ the Special Subcommittee on the Political System of the Consultative Committee collected twenty-one proposals put forward by members of various sectors of the Hong Kong community concerning the method of creating the legislature and its composition. Members of the Special Subcommittee on the Political System of the Drafting Committee also advanced three proposals illustrating the divergent views existing in the Hong Kong community: first, a mixed election process that is a combination of direct and indirect elections; second, election by functional constituencies; and third, a "one person one vote" election based on geographical area. The method of election that has been written into the Collection is the first method, which is also the one favored by the majority of the Special Subcommittee.

There are basically three views as to how mixed elections can be implemented. One system would require fifty percent of the members

41. Lifa Jiguan (The Legislature) (adopted June 12, 1987) at 6 (materials available from the Secretariat of the Drafting Committee for the Basic Law).

of the legislature be elected by functional constituencies, twenty-five percent be elected directly from electoral districts and twenty-five percent be elected by an electoral college, but approval of twenty-five percent of the seats being elected directly is contingent on whether there is a electoral college present. Another system would require that no less than fifty percent of the seats be filled by direct popular election, no more than twenty-five percent of the members be elected by functional constituencies and no more than twenty-five percent of the seats be filled by election from local councils such as the District Board, the Urban Council or the Regional Council. A third system would require that thirty percent of the members, at least one-third of whom are to be principal officials with the rest being members of the executive assembly or other members of the community, be nominated and elected to the legislature by an advisory body from among non-advisory-body-members; that forty percent be elected by the functional constituencies; and that thirty percent be directly elected from each district. However, the holding of a direct election is contingent upon the existence of an advisory body. The main disagreements among the three views concerns the ratio of directly elected members to indirectly elected members and whether or not to use an electoral college or an advisory body in indirect elections.

It is necessary to carefully consider these differences and discuss how to resolve them. In order to do so, the Special Subcommittee on the Political System proposed the addition of an article embodying a new idea: the method of election of the legislature may be modified as actual circumstances of the Hong Kong SAR change. Such modifications must be passed by a two-thirds majority of the legislature of the Hong Kong SAR, approved by the chief executive and reported to the Standing Committee of the NPC for approval.⁴² In view of the disagreement over the election process and the difficulty of achieving complete unanimity of opinion at the present time, the addition of this new article makes it possible to modify the election process at the appropriate stage. Moreover, by making the modification process relatively easy, it should be possible to close the distance between the divergent views and for the disagreement to be eventually resolved.

V. CHECKS AND COOPERATION BETWEEN THE EXECUTIVE BRANCH AND THE LEGISLATURE

In the elaboration of its basic policies regarding Hong Kong in Annex I to the Joint Declaration, the Chinese Government pointed out that “[t]he executive authorities shall abide by the law and shall

42. A similar provision has been added to the method of choosing the chief executive.

be accountable to the legislature."⁴³ There are differences of opinion among the members of the Drafting Committee and some people of Hong Kong as to the meaning of the word "accountable." Currently the relevant provision in the Collection states:

[T]he executive authorities shall abide by the law and shall be accountable to the legislature in the following ways: to carry out the laws passed by the legislature and those which are already in effect; make regular administrative reports to the legislature; respond to the inquiries of members of the legislature; and obtain legislative approval for taxation and public expenditures.⁴⁴

In the author's opinion, this is a relatively good formulation. First, the provision contains explicit requirements that are completely in accordance with the substance of the Joint Declaration. Second, by quoting at the very beginning two phrases from Annex I, the provision affirms that the executive must abide by the law and be accountable to the legislature.⁴⁵ The provision then immediately specifies the meaning and substance of "accountable" in four phrases. Third, according to the opinions of a few members of the Drafting Committee who personally attended the negotiations between China and Great Britain, this explanation of the substance of "accountable" is consistent with their assessment of the actual situation of those negotiations and with the understanding of the substance of the word "accountable" at that time. Fourth, and more importantly, the provision correctly provides for the separation of duties and for a restrictive relationship between the executive and legislative branches. The responsibilities of the governmental organs are complicated and numerous; consequently, there should be a clear and appropriate separation of duties such that the chief executive is responsible for the supervision of administrative work and the legislature is responsible for making and amending laws. This provision clearly contemplates a proper separation of responsibilities and powers. Moreover, the operation of the legislature as a check upon the executive branch is apparent in the four situations described in the provision. This type of restrictive relationship is appropriate and correct.

The restrictive relationship between the chief executive and the legislature is built into both the legislative and the budgetary processes.⁴⁶ The Special Subcommittee on the Political System

43. JOINT DECLARATION, *supra* note 3, at 8.

44. Wen Wei Po, *supra* note 1, at 7.

45. JOINT DECLARATION, *supra* note 3, Annex I.

46. See Wen Wei Po, *supra* note 1, at 6, 7.

pointed out that after the chief executive has solicited the opinions of the executive assembly, he or she can dissolve the legislature under one of the following situations: first, when the legislature refuses to pass the budget, spending provisions bills or other important bills that the chief executive considers to be essential to the interests of the Hong Kong SAR, and when, after consultation, an agreement still cannot be reached between the executive and the legislature; or second, when the legislature passes new or amended laws the content of which the chief executive considers not to be consistent with the interests of the Hong Kong SAR and which he or she sends back for reconsideration, and subsequently, after the legislature again passes the original bill with a two-thirds majority, the chief executive once again refuses to sign it. The Subcommittee also pointed out that the chief executive must resign if he or she dissolves the legislature after twice refusing to sign a bill passed by the legislature, and the newly elected legislature again passes the original bill by a two-thirds majority, or where the legislature is dissolved after it refuses to pass the financial budget or other important bills and the newly selected legislature continues to refuse to pass the disputed bill.

This type of restrictive relationship between the executive and legislative branches is derived from the actual circumstances of the Hong Kong SAR. It ensures that the government organs of the Hong Kong SAR will be able to work more smoothly and effectively and guarantees the stability and prosperity of Hong Kong. The Basic Law will not adopt the typical cabinet system method, that is, where the parliament can cast votes of no confidence for the cabinet and the cabinet minister or president can dissolve the parliament. In a country with a multi-party system where no single party is able to hold a majority of the seats in parliament, such a system usually leads to frequent cabinet changes. This results in very unstable governments and affects the country's economic development and social stability. Therefore, it is not suitable to adopt a cabinet system in the Hong Kong SAR similar to that found in a sovereign country; such an adoption could easily create turbulence in the political situation and would not be beneficial to the lives of Hong Kong's residents and the prosperity of the economy.

It should be added that the provisions of the Collection stipulate that the chief executive is also the head of the executive branch.⁴⁷ Since the executive branch is accountable to the legislature, it naturally follows that the chief executive and the principal officials he or

47. *Id.* at 6.

she nominates and whom the Central Government appoint are accountable to the legislature.

Although the Basic Law establishes a restrictive relationship between the executive and legislature, it also stresses their mutual cooperation. The cooperation between the executive and the legislature should be an important starting place for drafting the Basic Law provisions on the political system. It is not appropriate to slight either the restrictive or the cooperative component in the relationship between the executive and the legislative branches. Stressing only the restrictive component will not facilitate the work of the Hong Kong SAR, nor will it be conducive to its economic prosperity and social stability; rather, it will cause frequent impasses and continuous disputes in the work of the Hong Kong SAR executive and legislative branches. Therefore, the relationship between the executive branch and the legislature is not a matter of which is superior and which is inferior, the leader and the led, the stronger and the weaker, the dominator or the dominated, but is a matter of the two mutually cooperating for the benefit of the prosperity and stability of Hong Kong.

VI. THE JUDICIARY OF THE HONG KONG SAR

In accordance with the spirit of the Joint Declaration, the Hong Kong SAR will establish a court of final appeal. Aside from the changes brought about by the establishment of the Hong Kong SAR court of final appeal, the present judicial system in Hong Kong will be maintained.

The Basic Law will realize the aim of maintaining the substance of the previous judicial system of Hong Kong in several ways. First, the system of appointment and removal of judges will remain basically unchanged. Second, the system of appointment and removal of judicial officers other than judges will be unchanged. Third, judges and other judicial officers previously in office may all remain in employment with their seniority preserved and their pay, allowances, benefits and conditions of service no less favorable than before. Fourth, as for judges and other judicial officers who retire or leave office in accordance with the relevant regulations, including those who did so before the establishment of the Hong Kong SAR, the government of the Hong Kong SAR will pay them or their dependents all pensions, gratuities, allowances and benefits due to them on terms no less favorable than before, irrespective of their nationality or place of residence. Fifth, the independence of the judiciary and the jury system will remain unchanged. Sixth, principles of criminal and civil procedures and rights enjoyed by parties to litigations which were

previously suited to Hong Kong will be preserved. Finally, in adjudicating a case, the courts may refer to precedents in other common law jurisdictions.⁴⁸ These examples reflect the high degree of judicial autonomy which will be enjoyed by the Hong Kong SAR.

In defining the jurisdiction of the courts of the Hong Kong SAR, it should be clearly provided that the adjudicatory authority belongs to the courts of the Hong Kong SAR and that neither the executive nor the legislature of the Central Government or of the Hong Kong SAR may intervene. The jurisdiction of the courts of the Hong Kong SAR should also be clearly specified, so that the courts have guidance and know which cases they have jurisdiction over.

“Adjudicatory authority” and “power of final judgment” are related but different concepts. “Adjudicatory authority” refers to the authority to hear and decide a case, whereas “power of final judgment” refers to the authority to render a final judgment on a case over which a court has adjudicatory authority, so that it is not possible to appeal the case elsewhere. To disregard this principle is to undermine the power of final judgment and to encroach upon the principle that courts should enjoy such power. The issue of properly demarcating the court’s jurisdiction and making it clear which cases a court may or may not adjudicate does not relate to the question of the power of final judgment. The jurisdiction of a court in any place or locale is limited. A district and its district court have certain jurisdictional limits, and a higher level court and a district court should each have its own jurisdictional territory. It is completely appropriate that the Basic Law should clearly define the jurisdiction of the courts of the Hong Kong SAR.

The courts of the Hong Kong SAR generally have jurisdiction over cases that occur within the administrative region. Nevertheless, since these are only courts of a local administrative region, they have no jurisdiction over cases that touch on national diplomatic affairs or defense issues. It has further been suggested that courts of the Hong Kong SAR should have no jurisdiction over the administrative behavior of the Central People’s Government, acts of a purely political nature, or over acts committed in the name of the state. These views are all proper, and this demarcation of jurisdictional competence does not affect the court’s power of final judgment. Naturally, the courts have jurisdiction over cases involving any act of a commercial nature, regardless of whether or not they are acts of the government.

In order to implement the general policy of “one country, two systems” and to preserve the existing judicial system of Hong Kong in

48. *Id.* at 7, 8.

substance, the Collection also provides that the courts of the Hong Kong SAR can, through consultation and in accordance with the law, contact and provide judicial assistance to other local judicial organs in the rest of the country. Under the assistance and authorization of the Central Government, the government of the Hong Kong SAR can make appropriate arrangements with foreign states to provide reciprocal judicial assistance. The above provisions reflect the equal status of the courts of the Hong Kong SAR and local courts in the rest of the country — neither is under the authority of the other — and is a concrete expression of the high degree of judicial autonomy enjoyed by the Hong Kong SAR.

CONCLUSION

The enactment of the Basic Law is unprecedented, and completing the drafting of the provisions relating to the political system is a difficult task. After nine months of preparation and twenty-one months of drafting by the special subcommittees, the Collection containing 172 provisions has been prepared, including sixty-three provisions drafted by the Special Subcommittee on the Political System. Although these are only initial provisions, and repeated amendments and further consultations will be necessary, it is nevertheless a creation of something out of nothing. It is a solid beginning that has provided the early foundations for an important task.

