The Basic Laws of Hong Kong and Macau as Internationally Shaped Constitutions of China and the Fall Off of "One Country, Two Systems"

Miguel Angelo Loureiro Manero de Lemos*

In the face of unrest, the message from Beijing is that "it is very wrong for some locals to describe the Basic Law as Hong Kong's constitution." This hardened position of the central authorities of the People's Republic of China is not in tune with the internationalized constitutional status of Hong Kong and is contributing to a fundamental breach of the international obligations assumed by China in the Joint Declaration on the question of Hong Kong.

* © 2019 Miguel Ângelo Loureiro Manero de Lemos. The author is assistant professor at the Faculty of Law of the University of Macau. Any comments to miguelma@umac.mo. Thanks to Danny Gittings, Luis Pessanha, Paulo Cardinal, Wang HuaTing and participants at the Illinois-Bologna Conference on "Constitutional History: Comparative Perspectives," Bologna, Italy, November 13 & 14, 2017, for their comments and suggestions. Great research assistance by Xiao Yulin and Wayne Yuan. Thanks also to the editors of the Tulane Journal of International and Comparative Law for their intense footnoting efforts. Special thanks to Calla Chau, Simon Young, and Zhai XiaoBo.

I. STRUCTURE OF THE ARTICLE

Part I is a brief introduction to the structure, topics and claims of the present Article. Part II provides the reader with a brief historical account of the internationally shaped legal status of Hong Kong and Macau. Section A "declares" that the nineteenth century treaties signed by China with Britain and Portugal were valid treaties. However, claims on their invalidity played a crucial role in the twentieth century legal history of these territories. Section B "elaborates" on why the Joint Declarations signed by China in the 1980s with the United Kingdom (U.K.) and Portugal are true treaties. These "declarations" and "elaborations" are necessary because many deny the binding force of the rules of all these treaties. Section C introduces the concept of "Basic Law" and asserts that a "Basic Law" is a special type of legal instrument created by the Joint Declaration on the Question of Hong Kong (Joint Declaration). Subsequently, another "Basic Law" appeared in the Joint Declaration on the question of Macau. Before these treaties, this type of legal instrument did not exist in the Chinese constitutional order.

Part III delves into the legal nature of the Basic Laws. Section A introduces the "one country, two systems" principle and the legal contours of Article 31 People's Republic of China (PRC) Constitution and suggests that any type of legislation, including constitutions, might be adopted under this provision. This Section demonstrates that the Basic Laws are legislation adopted under Article 31 and there are no grounds for the assertion by many scholars that the "Basic Laws" are "basic laws" adopted under Article 62(3) of the PRC Constitution. The similarity of the wording between these two types of legal instrument seems to have erroneously led many to assume that their legal nature is analogous. Section B explains how the Basic Law of Hong Kong carves out exhaustively the constitutional framework of the new Hong Kong. Section C refutes the rationale that the PRC Constitution must apply in Hong Kong. No legal document enables the conclusion that rules of the PRC Constitution apply in Hong Kong, and such an application is not necessary. In Hong Kong, only its internationally shaped constitution applies.

Part IV deals with the controversial issue of interpretation of the Basic Law of Hong Kong. Section A introduces the reader to the moment when the Standing Committee of the National People's Congress decisively rejected the internationalized constitutional nature of the Basic Law, illegally amended it, and signaled the application of the PRC Constitution in Hong Kong. Section B deals with the issue of amendment of the Basic Law. A proper understanding of the issue of amendment is

crucial to attain the proper solution for the issue of interpretation. Section C puts forward the issue of interpretation as a simple solution. The Standing Committee only has to seriously treat the Basic Law as a constraint on its power of issuing interpretations. Section D expounds the list of illegitimate interpretations of the Standing Committee, leading to the conclusion that the PRC is in breach of the Joint Declaration rule that Hong Kong "will be vested with independent judicial power of final adjudication free from interference."

Part V stresses that the most essential feature of constitutions is that they are a limit on power. As the internationally shaped Basic Laws are supposed to work as constraints on the power of the central authorities of China, they must be treated as constitutions.

II. THE JOINT DECLARATIONS AS TRUE TREATIES

A. The Old Treaties

In 1843, as a consequence of article III of the Treaty of Nanking, the island of Hong Kong turned into a colony of Great Britain.[1] In 1860, the Convention of Beijing extended the colony to the Kowloon peninsula.[2] In addition to these two "cession treaties," the Second Convention of Beijing, in 1898, saw China and Britain agree on a ninety-nine-year lease over the

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1. This conclusion flows from the English version of the treaty:

> His Majesty the Emperor of China *cedes* to Her Majesty the Queen of Great Britain, etc. *the island of Hong-Kong*, to be *possessed in perpetuity* by Her Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, etc. *shall see fit to direct*.

Treaty of Nanking, Gr. Brit.-China, Aug. 29, 1842, *reprinted in* 2 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES: WITH A CHRONOLOGICAL LIST OF TREATIES AND OF REGULATIONS BASED ON TREATY PROVISIONS, 1689-1886, at 108 (Shanghai, The Inspector General of Customs 1887) [hereinafter 2 TREATIES, CONVENTIONS] (emphasis added). The same conclusion does not flow clearly from the Chinese version. As explained below, it is the English version that accurately depicts the nature of the legal transaction that took place. The treaty was signed on 29 August 1842 and it put an end to the First Opium War (1839-42). *Id.*

2. This conclusion flows from Article VI of the English version:

> His Imperial Majesty the Emperor of China agrees to *cede* to Her Majesty the Queen of Great Britain and Ireland, and to Her Heirs and Successors, *to have and to hold as a dependency* of Her Britannic Majesty's *Colony of Hongkong*, that portion of the township of Cowloon . . . .

Convention of Beijing, Gr. Brit.-China, Oct. 24, 1860, *reprinted in* 2 TREATIES, CONVENTIONS, *supra* note 1, at 188 (emphasis added). The same conclusion does not flow clearly from the Chinese version. As explained below, it is the English version that accurately depicts the nature of this second legal transaction. The treaty was signed on 24 October 1860, and it put an end to the Second Opium War (1856-60). *Id.* at 185.

New Territories.[3] During seven decades, approximately 300 to 400 so-called "unequal treaties" were concluded between "foreign powers" and China, epitomizing the collapse of the Confucian Chinese traditional "world order" in which the "Middle Country" was the center of the world.[4]

Notwithstanding later and present objections about the unequal nature of all these treaties, little can be put forward to support the thesis of their invalidity at the time of conclusion.[5] Although the two "cession treaties" were not only manifestly unequal but also concluded under the threat of use of military force,[6] they were no exception to this state of affairs.[7] At a period in the history of humankind when war was seen as a legal institution[8] or a natural function of states,[9] the validity of these types of legal settlements forced upon the losing side of a war was not really an issue.[10] It was only later, first, with the Pact of the League of Nations and, later, with the Charter of the United Nations, that international legal limits emerged to curb the powers of victors of war.[11] Until those moments, their powers were almost unlimited.[12]

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3. The treaty was signed in Beijing on 9 June 1898, and ratifications were exchanged in London on 6 August 1898. Convention Respecting an Extension of Hong Kong Territory, U.K.–China, pmbl. June 9, 1898, T.S. No. 16.

4. For an extensive description of the regime associated with the unequal treaties and of the Confucian "world order" where "[f]or thousands of years, as there was no equal relations between states, international law was impossible," see Wang Tieya, *International Law in China Historical and Contemporary Perspectives*, *in* 221 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 212-15, 237 (1990).

5. As international law experienced important modifications in the eighteenth and nineteenth centuries, the distinction between equal and unequal treaties was abandoned. Its revival in the twentieth century, and accompanying claim of invalidity, was as a consequence of efforts of Chinese legal scholars to challenge the unequal treaties' system. In any case, reliance on the distinction between equal and unequal treaties made by classical scholars of international law is unwarranted, as these scholars did not suggest that unequal treaties were invalid. *See* DONG WANG, CHINA'S UNEQUAL TREATIES NARRATING NATIONAL HISTORY 47-48 (2005).

6. Unlike the two "cession" treaties, there is little dispute as to the circumstance that the Second Convention of Beijing was not negotiated under the threat of use of military force. PETER WESLEY-SMITH, UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES 184 (1980).

7. WANG, *supra* note 5, at 47-48 (on the "legal challenges mounted by the Foreign Ministry [of China] to the "standard" interpretation of the treaties as a source of international law [and] the Beijing government . . . recourse to the concept of invalidity of forced treaties and the doctrine of *rebus sic stantibus* which had not been generally accepted principle of international law").

8. Wang Tieya, *Unequal Treaties and China,* 11 U. MACAU L. REV. 41, 42 (2011) (explaining that historically war was seen as a legal institution).

9. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 78 (5th ed. 2011).

10. *See* WESLEY-SMITH*, supra* note 6, at 184.

11. *See* Covenant of the League of Nations; U.N. Charter.

12. THEODOR MERON, BLOODY CONSTRAINT WAR AND CHIVALRY IN SHAKESPEARE 43 (1998). As of today, treaties imposed by force or with the threat of use of force are void. Vienna

Moreover, little can be used to sustain the view that, as China was allegedly not a civilized nation, no international law regulated the issue. It is undisputable that, at the time, many "civilized/uncivilized" considerations characterized some of the writing of international law amongst western writers.[13] These considerations even received "official acknowledgment" in some of the most important international law instruments of the end of the nineteenth and beginning of the twentieth centuries.[14] However, the manner in which "foreign powers" concluded treaties with China must mean that, for the relevant purpose, China was considered a legitimate subject of international law or, at least, a country able to conclude international agreements.[15] Although the "formal and systematic" introduction of international law in China only took place in the 1860s,[16] there is no convincing argument that supports the idea that China considered itself unable to enter into agreements with other countries.[17]

Likewise, there is little to sustain the suggestion—grounded on the Chinese version of the "cession treaties" and the Chinese imperial view of the world order—that no international agreements were concluded or that

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Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 52 [hereinafter Vienna Convention].

13. Hungdah Chiu, *Communist China's Attitude Toward International Law*, 60 AM. J. INT'L L. 245, 250 (1966) (on how "[b]efore the 1950's, there was a general tendency among Western writers to define international law as a body of legally binding rules governing relations among civilized countries" and on how such "limitation of the application of international law to "civilized states" [was] severely criticized by writers in Communist China").

14. Preamble of The Hague Conventions of 1899 and 1907 on the laws of war: "[T]he High Contracting Parties think it right to declare that . . . populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages *established between civilized nations* . . . ." Laws and Customs of War on Land (Hague, II) pmbl., July 29, 1899, T.S. No. 403; Laws and Customs of War on Land (Hague, IV) pmbl., Oct. 18, 1907, T.S. No. 539; Statute of the Permanent International Court of Justice of 1920, art. 38 ("The Court . . . shall apply . . . *the general principles of law recognized by civilized nations*.").

15. Anthony Dicks, *Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong*, 95 CHINA Q. 427, 441-42 (1983) (how the British viewed Hong Kong as acquired territory obtained by a "legally binding transfer of the entire rights in respect of that territory from one sovereign to another").

16. Tieya, *supra* note 4, at 224 (who nonetheless provides examples of earlier reluctant but overt Chinese reliance on international law).

17. International agreements were not new to China. Preceding the Treaty of Nanking, the first modern treaty concluded by China was the Treaty of Nerchinsk of 1689. Several other treaties on border issues were concluded during the pre-Nanjing period with neighboring Russia. Treaty of Nerchinsk, China-Russ., Aug. 27, 1689, *reprinted in* 2 TREATIES, CONVENTIONS, *supra* note 1, at 3.

no cessions of territory took place.[18] It is true that, at times, the wording of the Chinese version of the agreements makes the "cession treaties" seem more like imperial grants than real treaties.[19] Nonetheless, the usage of the "softer" terms in the Chinese version merely reflects a "domestic way" to appease the sense of greatness of the Chinese Emperor and not a genuine belief or conviction that no treaties were concluded or no cessions of land took place.[20] Tellingly, both in English and Chinese, the titles of the documents are not "Imperial Grant" but "Treaty" and "Convention" (条约).[21] Many other indicia also reveal that the Chinese wording does not accurately translate the nature of the whole issue.[22] To begin with, the documents bear all the hallmarks of international agreements: In addition to being named "treaties," they included preambles, articles with rights and obligations for both parties,[23] provisions for the exchange of ratifications (or otherwise entry into force), and signatures of both parties.[24] Second, the formalities to be undertaken by both parties for the entry into force of the treaties did indeed occur.[25] Third, their overall

18. Dicks, *supra* note 15, at 444-45. The suggestion is mainly based upon the Chinese wording of Article III of the Treaty of Nanking and Article VI of the first Convention of Beijing.

19. In the Chinese version, the relevant part of Article III of the Treaty of Nanking roughly translates as follows: "[T]he Great Emperor of Qing Dynasty *permits* the Island of Hong Kong to be *given* to the British monarch and Her Heirs and Successors, for them to govern as they see fit *for a long time*." Treaty of Nanking, *supra* note 1 (emphasis added). The expression translated as "given" (给予) can also be translated as "granted." The word "cede" in the English version was a technical term unknown to Chinese law at the time. The expression translated as "for a long time" (长远) can also be, less literally, translated as "permanently" or "in perpetuity." Article VI of the Convention of Beijing roughly translates as follows: "[T]he great emperor of Qing Dynasty *decides to grant* this area [a portion of Kowloon] to the British monarch and Her Heirs and Successors to be a part of Hong Kong . . . ." *See id.* (emphasis added). The expression "decides to grant" (帝定'. . .'付与) can also be translated by "ordered to give" or "decided to give."

20. This conclusion is reinforced by the circumstance that the Chinese texts submitted to the Emperor were different from the ones negotiated with the British, "obviously in order to conceal the true character of the agreement." Dicks, *supra* note 15, at 444-45.

21. The Chinese word "条约" may be translated into English as "treaty," "pact," or "convention." While in English, the two treaties were titled with different words, in Chinese the same word was used (*Treaty* of Nanking (南京*条约*); *Convention* of Beijing (北京*条约*)). *See* Treaty of Nanking, *supra* note 1; *see* Convention of Beijing, supra note 2.

22. *See* Treaty of Nanking, *supra* note 1, at 107; *see also* Convention of Beijing, *supra* note 2.

23. Although clearly unequal, the treaties also provided obligations to Britain. *See* Treaty of Nanking, *supra* note 1, at 107, 111; Convention of Beijing, *supra* note 2, at 189.

24. *See* Treaty of Nanking, *supra* note 1, at 112; *see also* Convention of Beijing, *supra* note 2, at 189.

25. Ratifications of the Treaty of Nanking were exchanged in Hong Kong on 26 June 1843. An account on the rather lengthy and formal process of ratifications of the Treaty of Nanking can be found in R. Derek Wood, *The Treaty of Nanking: Form and the Foreign Office*, 24 J. IMPERIAL & COMMONWEALTH HIST. 181 (1996). The Convention of Beijing entered into force with its

content does not leave doubts as to the existence of a transfer of territory that is non-revocable at the will of the transferor. [26] None of the linguistic versions lead to the conclusion that the Emperor of China had such a revoking power. [27] The unacceptability of a different interpretative conclusion is all the more manifest in that it would place China in a higher negotiating position while in reality Britain had the upper hand.[28] Finally, it is also illuminating that no contemporaneous document or declaration can be found in which those treaties were considered invalid. There is also no trace of opinions that international law did not apply or that the treaties did not constitute international agreements nor were there arguments regarding the inoperability of the transfers of territory. In other words: "intention," "wording," and "context and purpose"[29] all point in the same direction.

Thus, albeit illegitimate in the eyes of a delayed world conscience, the point is, there is no reason to shy away from the statement that—according to the law in force at the time those treaties were concluded—valid transfers of sovereignty over the island of Hong Kong and the Peninsula of Kowloon did effectively take place.[30] Great Britain became not only the de facto but also the de jure sovereign over these territories. Of course, a lease over the New Territories did not suggest a similar "transfer of property."[31] The fact that the British—moving "expediently"[32] and illegally beyond the realm of law—"effectively equated lease to

signature by both parties on 24 October 1860 in connection with the ratification with the Treaty of Tientsin of 1858 (article VII of the Convention of Beijing).

26. *See* Treaty of Nanking, *supra* note 1; *see also* Convention of Beijing, *supra* note 2, at 188.

27. *See* Treaty of Nanking, *supra* note 1; *see also* Convention of Beijing, supra note 2.

28. The notion that the Emperor kept a, somewhat undefined, power to revoke a "permission" for Britain to occupy the island of Hong Kong and Kowloon ends up using the superiority of the Emperor to unpersuasively suggest that no meaningful international law effects derive from those agreed provisions. Dicks, *supra* note 15, at 445-46. Nonetheless, as will be shown throughout this Article, those notions that things are not really what they prima facie appear to be and that there are privileges, rights, or powers that are not really transferred and are always at risk of being recalled, or exercised concurrently, by the entity that grants them, are notions that continue to play a relevant role in the story of Hong Kong and Macau.

29. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Points*, 28 Brit. Y.B. Int'l L. 1, 6-10 (1951) (explaining the different schools of thought with regards to interpretation of treaties).

30. Peter Wesley-Smith, *Unequal Treaties*, 11 UNIVERSIDADE DE MACAU: BOLETIM DA FACULDADE DE DIREITO, Avo V, at 35 (2011); WANG, *supra* note 5, at 47-48.

31. For an extensive legal analysis of this lease, see WESLEY-SMITH, *supra* note 6.

32. *Id.* at 178.

cession"[33] is an important "first episode" in this long story of rules not being treated as true rules and a meaningful historical fact to understand the "legal account" narrated in this Article.[34]

The validity and effectiveness under international law of the Treaty of Beijing of 1887 between Portugal and China over Macau[35] is even less open to debate, as no threat of force occurred.[36] The fact that the Portuguese might have taken advantage of Chinese vulnerability at the time cannot lead to the conclusion that somehow the treaty was illegally forced upon China. Unlike the Treaty of Nanking, this treaty did not operate as a cession of the territory to Portugal but as a recognition that the territory would be perpetually under Portuguese "possession."[37] In reality, Portugal had not only been asserting a de jure sovereignty since the end of the eighteenth century but had also imposed a de facto sovereignty for almost four decades.[38] Also unlike the case of Hong Kong, China's recognition was supplemented by an obligation on the part of Portugal to never alienate the territory to others without China's permission.[39] Thus,

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33. YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND BASIC LAW 8 (2d ed. 2009).

34. *Id.* at 8-11 (quoting Wesley-Smith on how "Britain could not legitimately claim that the concept of a "cession for a term of years" necessarily flows from the general words of the leasehold treaty" and affirming that "[c]ertainly the early Chinese experiences with British versions of "legality" can hardly have inclined them to value international law or "constitutionalism").

35. The treaty was signed on 1 December 1887 and ratified on 28 April 1888. Treaty of Beijing, China-Port., Dec. 1, 1887, *reprinted in* GODFREY E.P. HERTSLET, TREATIES, ETC., BETWEEN GREAT BRITAIN AND CHINA AND BETWEEN CHINA AND FOREIGN POWERS; AND ORDERS IN COUNCIL, RULES, REGULATIONS, ACTS OF PARLIAMENT, DECREES, ETC., AFFECTING BRITISH INTERESTS IN CHINA 422 (3d ed. 1908).

36. On the Treaty of Beijing of 1887, see FRANCISCO PEREIRA, PORTUGAL, A CHINA E A QUESTAO DE MACAU 41-46 (1995).

37. The Portuguese version of Article 2 of the Protocol of Lisbon roughly translates as follows: "China confirms the perpetual occupation and government of Macau and its dependencies by Portugal like any other Portuguese possession." *Id.* The Protocol is "annexed" to the Treaty of Beijing and its article 2 becomes applicable by force of Article II of the treaty. The Chinese version roughly translates as follows: "[I]t is set according to China's determination that Portugal will be permanently stationed in and govern Macau and all areas that belong to Macau. There is no difference between the governance of Macau and the governance of other Portuguese territories." *Id.*

38. PEREIRA, *supra* note 36, at 35-40 (on how the Portuguese stopped paying "rent" for the occupation of Macau, conferred the status of foreign authority to the Chinese authorities' representatives in Macau and submitted the Chinese population to the fiscal and criminal jurisdiction of the Portuguese authorities).

39. The Portuguese version of Article 3 of the Protocol of Lisbon roughly translates as follows: "Portugal obliges itself to never alienate Macau and its dependencies without China's agreement." Article 3 becomes applicable by force of article III of the Treaty of Beijing 1887. The Chinese version roughly translates as follows: "[I]t is set according to Portugal's promise that, without China's first consenting, Portugal will never let go Macau to other countries." The expression translated as "let go" (让与) can also be, less literally, translated as "transfer"; the

Portuguese "possession" over the territory was akin to a "slightly limited" sovereignty.[40]

B. The New Treaties

With the founding of the PRC in 1949, it became increasingly clear that China would not accept the status quo generated during the nineteenth century.[41] In March 1972, after taking up its seat in the United Nations, the PRC lettered the United Nations Decolonization Committee that "[t]he settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right and do[es] not at all fall under the normal category of colonial territories."[42] Following this letter, a large majority of the international community implicitly endorsed China's stance that Hong Kong and Macau were not colonized territories by a 99 to 5 vote in the General Assembly of the United Nations.[43] From this moment on, it is not legally clear whether sovereignty over Hong Kong and Macau still remained, respectively, with Britain and Portugal.[44] The apparent

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expression translated as "first consenting" (首肯) can also be, less literally, translated as "approval" or "permission."

40. Portuguese sovereignty was limited not in time but in the sense that it did not include the full extent of powers that are normally associated with the concept, namely an unimpeded right to alienate parts of your own territory. That would require the consent of the "other sovereign." On the status of the territory at the time, see Antonio Saldanha, *O Estatuto Internacional de Macau* [*The International Statute of Macau*], 42 U. MACAU L. REV. 131 (2011).

41. Huang Hua, Permanent Rep. of China to the U.N., *Letter Dated 8 March 1972 from the Permanent Rep of China to the United Nations Addressed to the Chairman of the Special* Committee, United Nations, U.N. Doc. A/AC. 109/396 (Mar. 8, 1972).

42. *Id.*

43. G.A. Res. 2908 (XXVII), Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Nov. 2, 1972). The United States, Britain, France, Portugal, and South Africa opposed this U.N. Resolution, which did not include Hong Kong and Macau in the list of colonized territories. Arguably, the ninety-nine countries' vote signified that the United Nations would be a stranger to the matter, the people of Hong Kong and Macau did not have a right to self-determination, and that the territories would not become independent; instead, they would eventually have to be restored to China.

44. In *Eichman*, the Supreme Tribunal of Israel reminded the world that

> while it must be conceded that the General Assembly cannot enact new law, it has already adopted resolutions declaring what it finds to be an existing rule of international law . . . . If fifty-eight nations unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and *agreement by a large majority would have great value in determining what is existing law*.

See CrimA Attorney Gen. of the Gov't of Israel v. Eichmann 36 PD 18 (1962) (Isr.) (emphasis added). On the heavy weight that declarations might have in determining extant customary international law, see INT'L LAW ASS'N, LONDON CONFERENCE 2000: FINAL REPORT OF THE COMMITTEE, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 54 (2000), https://www.law.umich.edu/facultyhome/drwcasebook/Documents/

acquiescence of the British and the Portuguese[45] favors a negative answer. Be that as it may, formally, the Portuguese Constitution only recognized Macau as merely "under the administration" of Portugal in 1976[46] and the British emphasized for even longer their sovereign rights.[47]

Reality has it that the position of the international community, in association with other vicissitudes of history,[48] paved the way for a peaceful solution of the questions over the two territories. In 1984 and 1987, two new international treaties were signed between the PRC, on the one side, and the U.K. and the Republic of Portugal, on the other side, "on the questions" of Hong Kong and Macau.[49] Irrespective of the uncertainty on the question of when exactly sovereignty was restored to China, there should not be much doubt that—from the moment those treaties entered into force—sovereignty over the territories was Chinese.[50] Albeit the administration still lay with the former "masters" for around another decade, until the territories finally "returned to the embrace of the motherland."[51] Today, the territories are Special Administrative Regions

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Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf. According to Wang Tieya, the emergence of the principle of the sovereign equality of states as *jus cogens* turned unequal treaties imposed by the force or the threat of use of force into void treaties. Tieya, *supra* note 8, at 43. In terms of extant law, this is a highly contentious statement. *See also* Wesley-Smith, *supra* note 30. It is not clear whether Professor Wang's statement entails the retroactive invalidity under international law of the cessions of territory operated into the nineteenth century. Such a proposition would be entirely novel.

45. China's request for the United Nations to remove Hong Kong and Macau from the list of colonies did not meet the objection of Britain or Portugal. *See* Johannes Chan, *From Colony to Special Administrative Region*, *in* LAW OF THE HONG KONG CONSTITUTION 16 (Johannes Chan SC & C.L. Lim eds., 2d ed. 2015); Ming K. Chan, *Different Roads to Home: The Retrocession to Hong Kong and Macau to Chinese Sovereignty*, 12 J. CONTEMP. CHINA 493, 499 (2003) [hereinafter Chan, *Different Roads to Home*].

46. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 292 (as modified by Law 1/89 Apr. 25, 1976).

47. The Hong Kong Act of 1985 only provided for the termination of British sovereignty over Hong Kong as from 1 July 1997. The Hong Kong Act of 1985, Public General Acts and Measures, Part I, 1985 c. 15 § 2(2) (Eng.).

48. PEREIRA, *supra* note 36, at 61-73.

49. *See* Joint Declaration on the Question of Hong Kong, China-UK, Dec. 19, 1984, 1399 U.N.T.S. 23, 391; *see also* Joint Declaration on the Question of Macau, China-Port., Mar. 22, 1988, 1498 U.N.T.S. 25, 805.

50. *But see* WANG, *supra* note 5, at 47-48 (on the more implausible but "not entirely facetiously" possibility of considering that the Joint Declaration on the Question of Hong Kong is an unequal treaty concluded under the threat of the use of force and, hence, void); Wesley-Smith, *supra* note 30.

51. Thus, "end[ing] past humiliation and mark[ing] a major step forward toward the complete reunification of China." President Xi Jinping, Speech at Meeting Marking Hong Kong's 20th Return Anniversary (July 1, 2017).

(SARs) of the PRC, and the exercise of sovereignty by the PRC is subject to the terms set out in the new treaties for a period of fifty years.[52]

"Aware" that the "unequal treaties," particularly the ones that transferred the island of Hong Kong and the Kowloon peninsula to Britain, do not provide the "most reliable and secure" grounds for a transfer of sovereignty over pieces of land,[53] the founding documents of the SARs insist, rather subtly, on the invalidity of the nineteenth century treaties.[54] The preambles of the Basic Laws read that Hong Kong and Macau have been "part of the territory of China since ancient times" that were "occupied" or "gradually occupied" by, respectively, Great Britain and Portugal.[55] From the perspective of the Basic Laws—on the pretense that there were no nineteenth century treaties[56] and that "natural territory and political sovereignty" can be the grounds for a sound application of international law—China not only had a natural and political legitimate claim over Hong Kong and Macau but was always the "true sovereign" over the territories.[57] On that basis, the new treaties were only about the resumption of the exercise of sovereignty.[58]

In the Joint Declaration, while the PRC declared that it would resume the "exercise of sovereignty" over Hong Kong, the U.K. declared it would "restore Hong Kong" to China."[59] In the Joint Declaration on the question of Macau, the PRC and Portugal declared that "Macau . . . *is* Chinese territory."[60] While this clause in the Joint Declaration on the Question of Macau is the natural outcome of the fact that the Portuguese Constitution had for a decade surrendered sovereignty over Macau, the simultaneous

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52 *See* Joint Declaration on the Question of Hong Kong, *supra* note 49; *see also* Joint Declaration on the Question of Macau, *supra* note 49.

53. *See* WESLEY-SMITH, *supra* note 6, at 188.

54. *See* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (H.K.); AOMEN JIBEN FA [BASIC LAW OF THE MACAU SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (Macau).

55. *Id.*

56. The Basic Laws do not include any reference to these treaties. *Id.*

57. On this "natural territory and political sovereignty . . . bound by [Confucian] natural emotions . . . forming a unique patriotic sentiment" and the "strong legitimacy for China's resumption of sovereignty" grounded on the concept of "civilizational state" and flowing from "historical traditions . . . rather than . . . from social contract in modern state theory," we often say that "Hong Kong has been part of the territory of China since ancient times." The words "since ancient times" carry more legitimacy than "laws and treaties." SHIGONG JIANG, CHINA'S HONG KONG: A POLITICAL AND CULTURAL PERSPECTIVE 84 (1st ed. 2017).

58. *See* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (H.K.); AOMEN JIBEN FA [BASIC LAW OF THE MACAU SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (Macau).

59. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 2.

60. Joint Declaration on the Question of Macau, *supra* note 49, para. 1.

presence of two clauses in the Joint Declaration is the two parties confirming that they would not agree.[61]

The long-held disagreement and ambiguities about the legality under international law of the old treaties, the scarring 100 years of humiliating "colonization" of parts of China created by the treaties, and the abovementioned "New Territories" "first episode" of rules not being treated as true rules are three important factors that help to understand the oddities that came along with the new treaties.[62] The oddest of propositions is that the Joint Declaration is not to be considered a true treaty.[63] This is suggested in academic statements[64] and by officials of the PRC, whom often "flirt" with the idea.[65] Three themes are recurrent: the (current) nonbinding nature of the Joint Declaration, the unilateral character of the declarations made by China in it, and the exclusively domestic nature of the whole question of Hong Kong.[66] The academic and official parlor is patently disconnected from international law.[67] The Joint Declaration is a "proper negotiated settlement of the question of Hong Kong."[68] For the purpose of finding out whether this settlement is a treaty,

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61. *See* LAW OF THE HONG KONG CONSTITUTION, *supra* note 45.

62. GHAI, *supra* note 33, at 8-11.

63. JIANG, *supra* note 57, at 84. Debate is particularly heated in the case of Hong Kong, but the situation is virtually the same in Macau. For the sake of brevity, most of this Article will only address the Hong Kong case.

64. *Id.*

65. The most recent brawl over the issue was sparked by a Chinese Foreign Ministry spokesman statement that the treaty had become "a historical document that no longer has any realistic meaning" and did not have "any binding power on how China administers Hong Kong." While clarifying his colleague's remarks, another official (Xu Hong, the director general of the Chinese foreign ministry's treaty and law department and former secretary in the Sino-British Joint Liaison Group between 1992 and 1996) conceded that the treaty was "not without [legally] binding effect." But he dismissed that "binding nature" by pointing out three "facts":

> (1) "its main text *only* mentioned Britain would 'restore' Hong Kong to China, but included *no provision* for [China's] rights and responsibilities after the handover";
> (2) "China's basic Hong Kong policies, elaborated in annex I of the Joint Declaration, were a '*unilateral*' declaration over which Britain had no say";
> (3) "China made it clear in the 1980s that how it handled Hong Kong after the handover was a *domestic matter*, and that it was only '*out of cordiality*' that it agreed in the treaty to make 'some introductions' about its policies for the city. Just imagine, how would China sign something that would let Britain interfere in its *domestic affairs*?"

Joyce Ng, *Beijing Says Sino-British Treaty on Hong Kong Handover Still Binding but Does Not Allow UK to Interfere*, SOUTH CHINA MORNING POST (July 8, 2017), http://www.scmp.com/news/hong-kong/politics/article/2101823/we-still-recognise-sino-british-joint-declaration-legally (emphasis added).

66. JIANG, *supra* note 57, at 84; Ng, *supra* note 65.

67. Paulo Cardinal, *Macau: The Internationalization of an Historical Autonomy*, 41 BOLETIN MEXICANO DE DERECHO COMPARADO 654-57 (2008).

68. Joint Declaration on the Question of Hong Kong, *supra* note 49, pmbl.

the label is irrelevant.[69] The facts are that the parties negotiated and agreed on an international law solution for the issue. Both parties duly carried out the ratification of the deal. Hence, there can be no doubt that the Joint Declaration is a bilateral treaty.[70]

This means *pacta sunt servanda*: i.e., "Every treaty in force is *binding* upon the parties to it and must be performed by them in *good faith*."[71] As the name indicates, the Joint Declaration contains several "declarations," most of them from the PRC, declaring twelve basic policies regarding Hong Kong.[72] But the fact that, de facto, they called the clauses of the treaty "declarations" does not deprive them of legal force because they are, de jure, rules of a treaty. Annex I (which contains an elaboration of those basic policies)[73] is also binding. Actually, as provided for in paragraphs 3(12), 7 and 8 of the text of the Joint Declaration, Annex I has the same binding effectiveness as the text.[74] With a span period of

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69. As provided for in the Vienna Convention, "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation.*" Vienna Convention, *supra* note 12, art. 2, para. 1(a) (emphasis added).

70. The parties also deposited with the United Nations this "highest form of legal settlement." Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, *reprinted in* 6 ASIAN J. PUB. ADMIN. 3, 5 (1984) [hereinafter Draft Agreement].

71. Vienna Convention, *supra* note 12, art. 26; U.N. Charter art. 2; G.A. Res. 2625 (XXV) (Oct. 24, 1970); N. Atl. Coast Fisheries (U.K. v. U.S.), 11 R.I.A.A. 167, 196 (Perm. Ct. Arb. 1910).

72. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3. These twelve basic policies are related with (1) sovereignty and the decision to establish a Hong Kong Special Administrative Region; (2) the authority of the Central People's Government and the high degree of autonomy; (3) powers of the Region and preservation of previous laws; (4) composition of the government and appointment and selection of the Chief Executive and principal officials, continuation of previous employment in the public departments, and future employment of British and other foreign nationals; (5) preservation of social and economic systems, life-style, and protection of rights and freedoms; (6) preservation of the status of a free port and a separate customs territory; (7) preservation of the status of an international financial center, free flow of capital, and free circulation and conversion of the local currency, independent finances, and taxation system; (9) economic relations with the United Kingdom and other countries; (10) preservation and development of economic and cultural relations and conclusion of agreements with states, regions, and international organizations; travel documents for entry into and exit from Hong Kong; (11) maintenance of public order; (12) adoption of a Basic Law in which all these basic policies remain unchanged for 50 years. *See id.*

73. Title of Annex I is "Elaboration by the Government of The People's Republic of China of Its Basic Policies Regarding Hong Kong." The elaborations are very detailed, and the twelve policies mentioned in the text of the Joint Declaration are sometimes repeated in the same, similar or different form. Joint Declaration on the Question of Hong Kong, *supra* note 49, annex I.

74. "The above-stated basic policies . . . and the elaboration of them in *Annex I* to this Joint Declaration will be stipulated . . . and they will remain unchanged for 50 years"; "[t]he Government of the United Kingdom and the Government of the People's Republic of China *agree to implement*

fifty years (i.e., until 2047 when the Joint Declaration effects expire), China obliges itself to implement those basic policies and their elaboration.[75] The declarations about the basic policies and the elaborations apply *in toto* and they constitute commands not only to the future organs of Hong Kong but also to the highest organs of the PRC.[76]

The one most outstanding of the commands is, in short, "one country, two systems." Half a year prior to the signing of the Joint Declaration, Deng Xiaoping aptly unveiled the core of the separation of systems embodied in this principle: while the one billion people from the Mainland "maintain" the socialist system, Hong Kong "continues" with its own system.[77] This outstanding command is enshrined in a declaration in paragraph 2(5) and, most powerfully, in its elaboration in Annex I: "the socialist system and socialist policies shall not be practiced [in Hong Kong] for 50 years."[78]

All the declarations and elaborations are to be interpreted according to the normal rules of interpretation of a treaty, and they are not to be interpreted only through the lens of the party identified in the treaty as having declared or elaborated them.[79] As such, the circumstance that the basic policies were declared and elaborated by the PRC does not mean that, in order to attain their correct interpretation, one should rely solely, or even more, on the Chinese understanding of them.[80] In other words, the other party's point of view is just as important.[81] As such, the Joint Declaration's contribution to the "one country, two systems" principle,

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the preceding *declarations* and the *Annexes* . . ."; "[t]his Joint Declaration and its *Annexes* shall be *equally binding*." *Id.* paras. 3 (12), 7-8 (emphasis added).

75. *Id*.

76. *See id.*

77. *See* Deng Xiaoping's full remarks in Deng Xiaoping, *One Country, Two Systems*, SELECTED WORKS DENG XIAOPING (June 22-23, 1984), https://dengxiaopingworks.wordpress.com/2013/03/08/one-country-two-systems/. For a deeper understanding of how the separation of systems was idealized by Deng Xiaoping, see the whole volume III of the *Selected Works of Deng Xiaoping*. Deng Xiaoping, *Selected Works Vol. 3 (1982-1992)*, SELECTED WORKS DENG XIAOPING, https://dengxiaopingworks.wordpress.com/selected-works-vol-3-1982-1992/ (last visited Aug. 16, 2018). Section IV.D and Part V of this Article explain how current realities are not in tune with the original separation of systems embodied in the principle "one country, two systems."

78. Paragraph 2(5) reads that "[t]he current social and economic systems in Hong Kong will remain unchanged, and so will the life-style." The elaboration in Annex I also reads that "Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years." Joint Declaration on the Question of Hong Kong, *supra* note 49, art. 3, para. 5, annex 1.

79. Vienna Convention, *supra* note 12, pmbl., art. 31.

80. Cardinal, *supra* note 67, at 637, 654, 655.

81. Significantly, the "several times longer" than the text "elaboration" is the result of British pressure. *See* DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 17 (Hong Kong University Press, 2nd ed. 2016).

which in the future would be implemented in Hong Kong, was formed of the relationship between the PRC and the U.K.[82]

The combined effect of the "declarations" and "elaborations" resulted in an impressive array of legal obligations that the PRC is required to observe for fifty years from 1 July 1997.[83] In order to determine accurately the content of all these obligations, the "declarations" and "elaborations" are to be interpreted in good faith taking into consideration their "ordinary meaning," "context," and "object and purpose."[84] The obligation that, more than any other, is still in need of an accurate determination is the one enshrined in the twelfth basic policy.[85]

C. What Is a "Basic Law"?

It was in 1984—in the most solemn moment of the long process that led to the adoption of the Basic Laws of Hong Kong and Macau—that, for the first time, the expression "Basic Law" appeared in a legally binding document.[86] According to the twelfth basic policy, the "*basic policies* . . . and the *elaboration* of them . . . will be stipulated, *in a Basic Law* . . . *by the National People's Congress* of the People's Republic of China . . . and they will *remain unchanged for 50 years*."[87]

The expression "Basic Law" (基本法) has long been used in constitutional law jargon—both in Chinese and English—to describe constitutions or constitutional laws.[88] At the time, the most well-known of these sort of constitutional documents were the Basic Law for the Federal Republic of Germany (德意志联邦共和国基本法), which is still today

82. Cardinal, *supra* note 67, at 637, 654, 655 (elaborating on the "self-limitation on sovereignty . . . articulated in the "One Country, Two Systems" strategy).

83. The legal duties that the treaty imposed on Britain related mainly to the transitional period that ended on 30 June 1997. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3(12).

84. Article 31 of the Vienna Convention reads: "A treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*"; "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the *text* . . . its *preamble* and *annexes*." Vienna Convention, *supra* note 12, art. 31 (emphasis added).

85. In the view of the author of this Article, the fact that, as of yet, there were no significant endeavors to unveil the exact content of this policy is one of the factors that better helps to explain the "constitutional limbo" in which Hong Kong finds itself today. See *infra* Section II.C.

86. Joint Declaration on the Question of Hong Kong, *supra* note 49.

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

88. António Katchi, As Fontes Do Direito Em Macau, Dissertação de mestrado em Ciências Jurídico-Políticas 281 (Faculdade de Direito da Universidade de Macau 2004).

Germany's Constitution, and the Basic Laws of Israel (以色列基本法),[89] which are still today the constitutional laws of the State of Israel. Actually, in constitutional theory, it is very common to treat the concepts of "constitution," "fundamental law," and "basic law" interchangeably.[90]

Chinese and British negotiators alike were certainly aware of all this.[91] Thus, it is right to assume that the parties had a constitutional document in mind when they decided to use the expression "Basic Law" (基本法) in the Joint Declaration.[92] The assumption that both parties had a constitutional document in mind is all the more plausible because the German "Basic Law" and the Israeli "Basic Laws" are so-called because they were supposed to act like interim constitutional pieces of legislation that, in the future, would be replaced by a constitution. Although constitutionalism was in its first steps in China, and the British had, strictly speaking, no domestic written constitution,[93] the idea that an "interim-50-years-written" constitutional document was "hovering" over the

89. According to the official website of the Ministry of Foreign Affairs of the People's Republic of China, in Israel there is no formal written constitution, only eleven basic laws. *See Yī sè liè guó jiā gài kuàng* (以色列国家概况) [*Israel Country Profile*], ZHŌNGHUÁ RÉNMÍN GÒNGHÉGUÓ WÀIJIĀOBÙ (中华人民共和国外交部) [MINISTRY FOREIGN AFF. CHINA], https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/yz_676205/1206_677196/1206x0_677198/ (last visited Sept. 7, 2018).

90. J.J. GOMES CANOTILHO, DIRETITO CONSTITUCIONAL E TEORIA DA CONSTITICÃO [CONSTITUTIONAL LAW AND THEORY] 58, 67, 69 (7th ed. 2003).

91. In Chinese, the concepts of "Fundamental Law" or "Basic Law(s)" are normally translated using the expression "基本法" (Basic Law). The following additional examples illustrate how in Chinese the expression "Basic Law" (基本法) is widely used to refer to constitutions or constitutional laws that are labeled as "Fundamental Law" or "Basic Law"—Equatorial Guinea: *Fundamental Law* of the Republic of Equatorial Guinea (赤道几内亚共和国*基本法*), Hungary: *Fundamental Law* of Hungary (匈牙利*基本法*), Oman: The *Basic Law* of the Sultanate of Oman (国家*基本法*), Saudi Arabia: *Basic Law* of Saudi Arabia (沙特阿拉伯王国治国*基本法*), Ukraine: *Fundamental Law* of Ukraine (乌克兰*基本法*), Vatican City State: *Fundamental Law* of Vatican City State (梵蒂冈城邦*基本法*). The constitution of the "state" of Palestine is "The Palestinian *Basic Law*" (巴勒斯坦*基本法*). According to the official website of the Ministry of Foreign Affairs of the People's Republic of China, the Constitution of Sweden (瑞典（王国）宪法) is "composed of three basic laws" (三个基本法组成). *See Ruì diǎn guó jiā gài kuàng* (瑞典国家概况) [*Sweden Country Profile*], ZHŌNGHUÁ RÉNMÍN GÒNGHÉGUÓ WÀIJIĀOBÙ (中华人民共和国外交部) [MINISTRY FOREIGN AFF. CHINA], https://www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/oz_678770/1206_679594/1206x0_679596/ (last visited Sept. 7, 2018).

92. JI BĚN FǍ DÍ DÀN SHENG (基本法的诞) [THE BIRTH OF BASIC LAW] 112 (1990).

93. Nonetheless, a European constitution was already applicable throughout the United Kingdom. Case C-213/89, The Queen v. Sec'y State for Transp. *ex parte* Factortame Ltd., 1990 E.C.R. I-2433. On the supremacy of European law over laws, including constitutions, of the Member States of the European Union: Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 3.

negotiations is also palatable.[94] Unfortunately, resorting to preparatory works or other sources seems to be of no avail in order to find out with all certainty why the expression "Basic Law" was chosen,[95] albeit the constitutional nature of the whole arrangement in preparation is manifest from the nature of thing itself,[96] public contemporary documents,[97] and British recently declassified negotiation papers.[98]

Nonetheless, resorting to preparatory works is only a supplementary means of interpretation,[99] and other sources are not legally decisive. Article 31 of the Vienna Convention enshrines the main rules of interpretation. Thus, paying special attention to Vienna's concepts of "good faith," "ordinary meaning," "context," "object," and "purpose," this Article will explore the path opened by Professor Gomes Canotilho in his article *Words and Men*.[100] We will also pay special homage to the

94. The adoption of such temporary written constitutional documents in China would not be a novelty. *See* JIANG, *supra* note 57, at 137-38 (about the "17-Article Agreement" for the Peaceful Liberation of Tibet that only guaranteed to keep the system of "theocratic serfdom" in place in Tibet unchanged for a period of ten years).

95. A few scholars from Mainland China have orally conveyed to the author of this Article that the source of inspiration was the German Basic Law.

96. The "manifest," the "nature of things," or the "basic common sense" has always been a part of (international) law. An "old" ordinance might be of help. "Matters, that are clear by the light and law of nature, are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterward." *See* Theodor Meron, *On Custom and the Antecedents of the Martens Clause in Medieval and Renaissance Ordinances of War*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: VÖLKERRECHT, EUROPARECHT, STAATSRECHT: FESTSCHRIFT FÜR RUDOLF BERNHARDT 177 (Ulrich Beyerlin et al. eds., 1995). While analyzing this ordinance, Professor Meron seems to suggest that "common sense" or the "dictates of public conscience" have long been a source of international law.

97. Draft Agreement, *supra* note 70, at 177.

98. *See* Letter from Hong Kong Dept. to Foreign & Commonwealth Office (July 10, 1984) (on file with Margaret Thatcher Foundation). Preparatory works or other sources also do not unveil the reason why the parties "felt the need" to specify in the treaty that the task to "enact and promulgate the Basic Law" lay with a specific organ of the PRC: The National People's Congress (NPC). From the point of view of international law, it would have sufficed to state that the PRC would enact and promulgate the Basic Law. The specific organ of the PRC, which would then be assigned that task, would be a purely internal matter to be decided by the PRC itself. Possibly, the reference to the NPC was an "innocent" allusion to Article 31 of the PRC Constitution. *See infra* Section III.A. As plausibly, the circumstance that the NPC is not only the "the highest organ of state power" (Article 57 PRC Constitution) but also the only organ in the PRC with constituent power was similarly "hovering" over the negotiations. On the constituent power of the NPC, see *infra* Parts II, III, particularly, Section III.B.

99. Vienna Convention, *supra* note 12, art. 32.

100. *See* Gomes Canotilho, *As Palavras e os Homens, reflexões sobre a Declaração Conjunta Luso-Chinesa e a institucionalização do recurso de amparo de direitos e liberdades na ordem jurídica de Macau*, 1999 REVISTA JURÍDICA DE MACAU, NÚMERO ESPECIAL SOBRE O DIREITO DE AMPARO EM MACAU E NO DIREITO COMPARADO.

following Confucius's *maxim*: "those who do not know the meaning of words cannot know men." While searching for the intent of the men involved in the Basic Law's long-in-the-making process, the objective will be to find the true meaning of the Joint Declaration's "Basic Law," a meaning that cannot be left to the will of only one of the parties.[101]

For this purpose, two additional "declarations" are immediately of matter. The second basic policy[102] reads that the SAR "will be directly under the authority of the Central People's Government [and] will enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People's Government." The third basic policy[103] declares that the SAR "will be vested with executive, legislative and independent judicial power, including that of final adjudication." While envisioning the creation of a new SAR within the PRC, by the PRC itself, the parties agreed, first, on a strongly worded statement regarding the Central Government's supremacy. Second, they agreed on a neat division of power between central authorities (in charge of foreign and defense affairs) and the highly autonomous SAR (in charge of every other affair[104] and with the distinct power of final adjudication). Thus, in spite of the strong wording about the Central Government's supremacy, the foundational distribution of sovereign power between "Beijing" and "Hong Kong" that would have to be enshrined in the Basic Law is manifest. Such a distribution of power entails, naturally, limitations to

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101. Hereinafter, whenever the expression "Basic Law" is used, it refers to the Basic Law of Hong Kong. Unless otherwise provided, the analysis also applies to the Basic Law of Macau.

102. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 2(3).

103. *Id.* para. 3(3).

104. This conclusion is conveyed by the word "except" in Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 4(3). On its face, there would be no room to argue that the word "except" (除 . . . 外) leaves the door open for an interpretation that extends the affairs within the responsibility of the central authorities to other areas. However, there is one relationship—later branded in the Basic Law "Relationship Between the Central Authorities and the Hong Kong Special Administrative Region"—which blurs the clear-cut division of power resulting from those provisions. Its existence is implicitly foreseen in many provisions of the Joint Declaration (for example, the provisions that mention the Region will come under the central government, the provisions that establish that the Chief Executive and other Principal Officials will be appointed by the central government, or those that mention the need to report certain acts to the central authorities). Wu Jianfa, *Several Issues Concerning the Relationship Between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65, 67 (1988). The adoption of the Basic Law itself is a task that is expressly assigned by the Joint Declaration to the central authorities and not to Hong Kong. Moreover, there are other issues related to "[u]pholding national unity and territorial integrity"—later branded in the Basic Law as "other matters outside the limits of the autonomy of the Region as specified by this Law" and dealt with in Annex III of the Basic Law (*see infra* Part III), which clearly lie outside the autonomy of the SAR. For example, matters related to the national capital, the national flag and anthem, the limits of territorial waters, or Chinese nationality.

power.[105] For instance, the declaration that the power of final adjudication is to rest with the SAR is concomitantly a command for the central authorities to abstain from any actions that interfere with an effective enjoyment of such power.[106]

The "constitutional sensation" that flows from these two declarations is intensely strengthened by the reading of the whole treaty. Suffice it to say that the Joint Declaration includes the "general principles" that in the future would be applicable in Hong Kong, the "fundamental rights and duties" of Hong Kongers, the "political structure" of Hong Kong, and a whole set of other "constitutional" issues.[107] In other words, it is safe to conclude that the picture one has—already at this moment—about the future Basic Law is that of a constitutional document that would cover virtually everything normally found in a constitution.

As it turned out, the picture converted into reality: the Basic Law that came to be is a mostly refined, comprehensive version of the Joint Declaration.

III. THE BASIC LAWS AS TRUE CONSTITUTIONS

A. Article 31 of the PRC Constitution ("One Country, Two Systems")

Conversations between Britain and China about the future of Hong Kong were already underway when a new version of the PRC Constitution was adopted on December 4, 1982.[108] In tune with the new second paragraph of Article 1, which reads that "[t]he socialist system is the basic system of the [PRC],"[109] innovative constitutional provisions were inserted under Article 31[110] setting forth that "[t]he state may establish special administrative regions *when necessary*. The *systems* to be

105. Cardinal, *supra* note 67, at 637, 655.

106. Part IV of this Article will analyze whether the PRC is duly observing this command. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3(4).

107. *See* Joint Declaration on the Question of Hong Kong, *supra* note 49.

108. Grant Newsham, *Rethinking Hong Kong a Blueprint for the Future*, 1 UCLA PAC. BASIN L.J. 247, 247 (1982) (conversations between Britain and China about the future of Hong Kong).

109. English translation taken from the official website of the NPC. *Constitution*, NAT'L PEOPLE'S CONGRESS, http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm (last visited July 1, 2018). The expression corresponding to the word "basic" (根本) can also be translated into English as "fundamental," "foundation," or "root." XIANFA [CONSTITUTION] art. 1, para. 2 (2004) (China).

110. According to the official explanation, this innovation was designed for the problem of Taiwan and similar ones (i.e., the questions of Hong and Macau). Francisco Pereira, *A Constituição Chinesa. A Lei Básica. A Autonomia de Macau*, 11 UNIVERSIDADE DE MACAU: BOLETIM DA FACULDADE DE DIREITO, Avo V, at 72-76 (2011).

instituted in special administrative regions shall be *prescribed by law* enacted by the National People's Congress *in the light of the specific conditions*."[111]

Article 31 is the provision that gives constitutional form to the "one country, two systems" principle.[112] Legally, the cleanest depiction of what Article 31 entails is perhaps that of Professor Cai Dingjian: Article 31 is an authorization for the NPC to legislate for special regions; the questions of which systems are to be implemented in these regions are ones of great principle; because they are of great principle they necessarily require a clear-cut special law; for that reason only the NPC has the power to enact such kind of law.[113]

The current version of the PRC Constitution was adopted by the NPC.[114] The PRC Constitution provides that the NPC has the power to amend the "constitution" (憲法) under Article 62(1) and the power to adopt "basic laws" (基本法律) under Article 62(3). The fact that a special article was adopted for the specific purpose of legislating the systems to be instituted in the special administrative regions indicates that the legislation to be adopted under Article 31 is not an amendment of the Constitution, under Article 62(1), and is not a basic law of Article 62(3).[115] The indication that a *tertium genus* type of legal instrument is here at stake also defies the idea that this unusual "specific conditions" provision only embraces infra-constitutional legislation.[116]

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111. XIANFA [CONSTITUTION] art. 31 (1982) (China).

112. Historically, the origins of this "[un]precedented imaginative response to the special circumstances" of China disclose not only a centuries long connection with Chinese imperial policies in relation to frontier issues but also two recent links. Margaret Thatcher, Speech Signing the Joint Declaration (Dec. 19, 1984) (on file with Margaret Thatcher Foundation). First, there is a link with the "failed experiment" of the "the tiny region under [communist] control in a country controlled by the Nationalist" during the anti-Japanese War in the late 1930s and early 1940s, which ended with "China plunged into a prolonged civil war." INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 2 (Hualing Fu et al. eds., 2007) [hereinafter INTERPRETING HONG KONG'S BASIC LAW]. Second, there is a link with Mao Zedong's thoughts on how to govern Tibet. JIANG, *supra* note 57, at 95 (surveying "a series of constitutional documents or constitutional conventions" issued by the central authorities and dating back to the Qing government in the 18th century). It is also of historical significance that Article 31 was devised for the objective of peaceful coexistence and solution of international disputes through negotiations and for the purpose of national reunification of China in accordance with Chinese realities. PEREIRA, *supra* note 36, at 76; *see also* Deng Xiao Ping, *The Principles of Peaceful Coexistence Have a Potentially Wide Application*, ARCHIVE.ORG (Oct. 31, 1984), https://archive.org/stream/SelectedWorksOfDengXiaopingVol.3/Deng03_djvu.txt.

113. CAI DINGJIAN, CONSTITUTION: AN INTENSIVE READING 232 (2004).

114. XIANFA [CONSTITUTION] (1982) (China).

115. *Id.* arts. 31, 62.

116. *But see* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 3, 4 (on the "clear superiority of the PRC Constitution," the question of compatibility or constitutionality

In Article 31, the NPC authorizes itself broad powers, flexibility, and discretion.[117] This authorization is unsurprising given that, constitutionally, the powerful NPC is the supreme organ of the PRC with both constituent and legislative power.[118] Naturally, no complicated legal parameters are enshrined in Article 31. Homage to pragmatism and not to dogma, under Article 31, limits are not legal limits. While opening the door for different political, administrative, legal, and social systems,[119] in practice the effect of Article 31 is that, under it, "anything goes."[120] As limits are political, let the "specific conditions" guide the way.[121] In other words, when one looks at the context of the NPC's decision to constitutionally enshrine the "one country, two systems" principle, it is safe to conclude that the precise nature of the legislation that might be adopted under Article 31 was not of real concern.[122] At the precise moment Article 31 was adopted, there was no legislation in the PRC named or titled "Basic Law" (基本法).[123]

As of today, many scholars conflate the "Basic Law" with the "basic laws" adopted by NPC under Article 62(3) of the PRC Constitution.[124]

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of the Basic Law vis a vis the PRC constitution and "connections" and "points of intersection" between one and the other).

117. GHAI, *supra* note 33, at 56.

118. Politically, however, the role of the NPC is overshadowed by the role of the Communist Party. *See* Hualing Fu, *Supremacy of a Different Kind the Constitution, the NPC, and the Hong Kong SAR*, *in* HONG KONG'S CONSTITUTIONAL DEBATE, CONFLICT OVER INTERPRETATION 103 (Johannes M.M. Chan et al. eds., 2000) [hereinafter HONG KONG'S CONSTITUTIONAL DEBATE]; *see also* Lison Harris, *China's Constitutionalism*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 247.

119. GuoBin Zhu, *The Composite State of China Under "One Country, Multiple Systems" Theoretical Construction and Methodological Considerations*, 10 INT'L J. CONST. L. 272, 276 (2012) (explaining how Article 31 allows different political, administrative, legal, and social systems to coexist).

120. Nonetheless, the question might have been whether "Article 31 is subject to the Preamble and Article 1" and, thus, whether "they are [to be] read as prescribing fundamental limits on the governance and economic structures that are permitted in the PRC." INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 3. The "no socialist policies and systems" scheme engendered by the Joint Declarations and the Basic Laws provide a negative answer, at least temporarily and to specific parts of the PRC.

121. XIANFA [CONSTITUTION] art. 31 (1982) (China).

122. *Id.*

123. On the nature of this type of instrument, see also *supra* Section II.C.

124. Paradigmatically, Michael Dowdle, considers,

> Interpretative arguments that hinge on a claim that Hong Kong's Basic Law is a "constitution" invariably overlook the fact that the term *basic law* is a well-established class of non-constitutional, statutory legislation in the PRC's Constitution. China has more than sixty "basic laws" in force at present, of which the Basic Law of Hong Kong is simply one. Contrary to what many in Hong Kong's interpretative community

Such conflation is also now enshrined in the Legislation Law of the People's Republic of China adopted in 2000[125] (Legislation Law PRC).[126] Tellingly, in Hong Kong, one of the three current leading constitutional law books profusely emphasizes the hierarchical inferiority of the Basic Law vis-a-vis the PRC Constitution on that same basis.[127] This conflation easily leads to the stance that the Basic Law is of a socialist nature and hierarchically inferior to the PRC Constitution.[128] The academic and legislative conflation is baffling, as even the Chinese expression "basic laws" (基本法律), used in Article 62(3) of the PRC Constitution,[129] is not the same as the one used in the Joint Declaration and in the Basic Law.[130]

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presumed, at least in the 1990s, simply calling the Hong Kong Basic Law a "Basic Law" did not endow it with some uniquely "constitutional" essence, per se.

Michael Dowdle, *Constitutionalism in the Shadow of the Common Law*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 71.

125. The Legislation Law of the People's Republic of China adopted by the 3rd Session of the Ninth National People's Congress on 15 March 2000. According to its Article 1, the law was enacted in accordance with the Constitution with a view to standardizing legislation, establishing a sound legislative system of the State, establishing and improving the socialist legal system with Chinese characteristics, safeguarding and developing socialist democracy, promoting the government of the country according to law and building a socialist country under the rule of law. Legislation Law PRC, arts. 42, 47, 88.

126. Articles 7 and 8 of the Legislation Law PRC place the Basic Laws at the same level as all other national laws and subject to the same amendment procedures. Article 7(2) and Article 8(3) Legislation Law PRC read together convey the message that the laws adopted for the SARs are just normal "basic laws." *See id.* The Legislation Law PRC is not a law that was added to Annex III of the Basic Law. Thus, there is no question of it being in force in Hong Kong.

127. GITTINGS, *supra* note 81, at 53. The other two major constitutional law books are more cautious but also assume the superiority of the PRC Constitution and its applicability in Hong Kong. GHAI, *supra* note 33, at 199, 383; C.L. Lim & Johannes Chan, *Autonomy and Central-Local Relations*, *in* LAW OF THE HONG KONG CONSTITUTION, *supra* note 45, at 50-51.

128. Iong Cheon, *Anotações À Lei Básica Da Raem* [*Annotations to Raem's Basic Law*], 19 UNIVERSIDADE DE MACAU: BOLETIM DA FACULDADE DE DIREITO 15 (2005). On the Basic Law as a "socialist document" that operates dialectically, see Robert Morris, *Forcing the Dance, Interpreting the Basic Law Dialectically*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 97-106.

129. According to the English translation of the PRC Constitution provided on the NPC's website (http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm), Article 62(3) states that "The National People's Congress exercises the following functions and powers: 'to enact and amend basic laws governing criminal offences, civil affairs, the State organs and other matters.'" XIANFA [CONSTITUTION] art. 62 (1982) (China). Other translations use the expression "basic statutes" instead of the expression "basic laws." *See* Chen Yifeng, *The Treaty-Making Power in China Constitutionalization, Progress, and Problems*, *in* ASIAN YEARBOOK OF INTERNATIONAL LAW 62 (B.S. Chimni et al. eds., 15th ed. 2009); KEYUAN ZOU, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 88 (2006).

130. The Basic Law, in tune with what was provided for in the Joint Declaration, is titled "The *Basic Law* of the Hong Kong Special Administrative Region of the People's Republic of China" (中华人民共和国香港特别行政区*基本法*). XIANGGANG JIBEN FA [BASIC LAW OF THE HONG

The plain and decisive fact is that the two most important documents adopted for the solution of the question of Hong Kong do not mention Article 62(3) of the PRC Constitution.[131] In fact, no official decision or legislation for Hong Kong refers to the "Basic Law" as one of the laws of Article 62(3).[132]

If one could identify an official source of law that is contemporaneous with the adoption of the Basic Law from which to identify the "Basic Law" with the "basic laws" adopted under Article 62(3), there would be an important argument to support the proposition that the Basic Law is not a law with constitutional value within the hierarchy of sources of the PRC.[133] However, as there is no such source, the answer must be found elsewhere.[134]

At the time, and while working under the sole "one country constitution," it is very probable that in the spirit of many of the drafters of the Basic Law, a unified country should only have one constitution and many certainly felt that "[t]he draft Basic Law can be nothing but a

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KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] tbl. of contents (H.K.) (emphasis added); *see* Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3(12).

131. Joint Declaration on the Question of Hong Kong, *supra* note 49; XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA].

132. Ji Pengfei's "authoritative" explanations about the Basic Law are along the same lines. According to these explanations there are two grounds for adopting the Basic Law: a political one (i.e., the principle "one country, two systems") and a constitutional one (i.e., Article 31 of the PRC Constitution). Ji Pengfei, Dir. of the H.K. & Macau Affairs Office, Addressing the Third Session of the Seventh National People's Congress (Mar. 28, 1990) (China).

133. On the sources of the Basic Law, see Paulo Cardinal, *The Constitutional Layer of Protection of Fundamental Rights in The Macau Special Administrative Region*, 3 REVISTA DO DIREITO PUBLICO 211, 212-62 (2010) (identifying two sources: the Joint Declaration—as the hetero foundation and demanding 12 commandments, among other roles—and, naturally the PRC constitution, most especially—but not only—its article 31).

134. Why scholarly opinion relies so heavily on Article 62(3) without legislative or historical backup is not easy to grasp. Perhaps in the spirit of many, the reasoning is that if the Joint Declaration speaks of "Basic Law" and Article 62(3) of the PRC Constitution speaks of "basic laws" then the "Basic Law" is one of the "basic laws." Confusion might also be potentiated by the fact that the NPC's decisions to establish the SARs and its systems are grounded on Article 62(13) of the PRC Constitution. Also of relevance is that—although in many scholarly pieces one finds the conflation and in oral discussions many scholars end up defending it—there are also many constitutional law scholars, in Hong Kong, Macau, and Mainland China, who normally refrain from using the term "Basic Law" when they refer to the "basic laws" of Article 62(3) and who refrain from using the expression "basic laws" when they talk about the "Basic Laws" of Hong Kong or Macau. That suggests that the perception of the (normative) difference between the two types of legal instrument runs deep.

statutory law."[135] But these mindsets alone cannot be the guide that ultimately provides the outcome to the more fundamental doubts raised by this unparalleled document.[136]

B. Structure, Content and Procedure of Adoption

No one denies that the structure of the Basic Law is typically that of a constitution.[137] However, this does not accurately depict what the Basic Law came to be. Turning a theoretical conception into a political reality,[138] and translating its "internationality" and those questions "of great principle" into "nationalized" rules, the Basic Law carves out completely the constitutional framework of the new Hong Kong.[139]

Starting in its Preamble, one can immediately appreciate its constitutional and international dimensions. On the one hand, it claims a long-held sovereignty,[140] it mentions the future resumption of the exercise of sovereignty,[141] and it twice emphasizes the fact that the Basic Law is made "in accordance" with the PRC Constitution.[142] On the other hand, the Preamble alludes twice to the Sino-British Joint Declaration,[143] leaving no doubts that the Basic Law is enacted "in order to ensure the implementation" of the basic policies "elaborated" in the Sino-British Joint Declaration.[144] Put together, these two dimensions signify, first, that the PRC Constitution does not stand in the way of the enactment of the Basic Law[145] and, second, that the function of the Basic Law is to

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135. 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*, 2 J. CHINESE L. 5, 7 (1988).

136. *See also* Cardinal, *supra* note 133 (on the need of "extremely pragmatic and innovative" analysis).

137. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] tbl. of contents (H.K.).

138. Shigong Jiang, *Textualism, Structuralism and Originalism: The Art of the NPC Standing Committee's Interpretations of the Basic Law*, 29 SOC. SCI. CHINA 76, 77 (2008).

139. However, authors assume that this is not the case. GHAI, *supra* note 33, at 215, 205; LAW OF THE HONG KONG CONSTITUTION, *supra* note 45; *see also* Cardinal, *supra* 133, at 221 (considering that a few *chunks* of the [PRC Constitution] can be considered applicable).

140. "Hong Kong has been part of the territory of China since ancient times." XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (H.K.).

141. *Id.*

142. "[I]n accordance with the provisions of Article 31 of the Constitution." "In accordance with the Constitution." *Id.*

143. *Id.*

144. *Id.*

145. Its enacting is constitutionally permitted by the Constitution as a whole by means of Article 31. XIANFA [CONSTITUTION] art. 31 (1982) (China).

implement the twelve basic policies of Joint Declaration.[146] The inextricable linkage between the Basic Law and the Joint Declaration also means that the drafters of the Basic Law were acutely aware of the need to set up a stable legal framework that would remain fundamentally unchanged for a minimum period of fifty years, as agreed upon in the international treaty.[147]

In the first Chapter, "General Principles," of its nine chapters, the Basic Law kicks off with Article 1 by stating that the "[t]he Hong Kong Special Administrative Region *is* an *inalienable* part of the People's Republic of China" (the PRC "one country" sovereignty).[148] In tune with the first basic policy of the Joint Declaration[149] and with the beginning of the second paragraph of the Preamble of the Basic Law, "in order to safeguard the unity and territorial integrity of the country,"[150] the content of the first provision of the Basic Law unveils its "first" most important sub function, to safeguard the "one country" principle. In tune with the second basic policy of the Joint Declaration, Article 2 of the Basic Law determines that the "National People's Congress *authorizes* the Hong Kong Special Administrative Region to exercise a *high degree of autonomy* and enjoy *executive, legislative and independent judicial power, including that of final adjudication*" (Hong Kong's part of the "two systems").[151] This "authorization provision"[152] unveils the "second" most

146. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl (H.K.); Joint Declaration on the Question of Hong Kong, *supra* note 49.

147. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl (H.K.); Joint Declaration on the Question of Hong Kong, *supra* note 49.

148. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 1. (H.K.).

149. In accordance with the Joint Declaration's first basic policy, the PRC's decision to establish a new SAR was adopted "in order to safeguard the unity and territorial integrity of the country." Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3(1).

150. Wording based on the Chinese original of the Basic Law. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (H.K.).

151. *Id.* art. 2.

152. This general authorization by the NPC in Article 2 is coupled—in other places of the Basic Law—by other two specific authorizations: one by the Central People's Government in relation to external affairs that the SAR can conduct on its own; and one by the Standing Committee to Hong Kong courts in relation to the interpretation of the Basic Law. The discussion about the nature of all these authorizations has obscured the debate about the nature of the relationship (unitary or federalist) between the central authorities and Hong Kong. *See* Zhu, *supra* note 119, at 276; *see also* Bing Ling, *Subject Matter Limitation on the NPCSC's Power to Interpret the Basic Law*, 37 H.K. L.J. 619, 634-39 (2007). It serves the purposes of this Article to merely note that these authorizations by different organs mean that—while adopting the Basic Law—the NPC is

important sub function of the Basic Law, to ensure a high degree of autonomy for Hong Kong.[153] Together with Articles 3, 4, 5, and 6 ("Hong Kong people governing Hong Kong," "safeguard [of] rights and freedoms," "[no] socialist system and policies," "right of private ownership," respectively), the first two articles of the Basic Law render the core of the principle "one, country, two systems."[154] Although one needs to go into more detail to understand better the extent of autonomy that flows from these provisions, there is general agreement as to the fact that the resulting autonomic status cannot be matched by virtually any other region or federated state in the world.[155]

Nonetheless, Chapter II ("Relationship Between the Central Authorities and the Hong Kong Special Administrative Region") quickly dispels illusions about a de facto sovereignty that might result from that autonomy, as it places the region "directly under the Central People's Government" (Article 12) and sets forth several powers of the central authorities over different aspects of the Region's activity.[156] Articles 13

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acting as the representative of the whole State. As all the authorizations are made in the Basic Law itself and not through specific individual acts of each of those organs, only by amendment of the Basic Law by the NPC can these authorizations be scrapped. This conclusion does not leave room to argue that, while those powers were authorized to the SAR, the center can also exercise them "in parallel" whenever it deems fit. In case "authorized powers" were not "truly in the hands" of Hong Kong, the whole autonomic system would be in permanent risk of collapse. That exercise of "parallel powers" by the center would not accord not only with the idea of stability—for, at least, fifty years—of the system established in the Basic Law, but also with the fact that the Basic Law cannot be amended—for that period—in contravention with the basic policies established in the Joint Declaration. Denis Chang, *In Search of Pragmatic Solutions*, *in* THE BASIC LAW AND HONG KONG'S FUTURE 272 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988) (on a "real division of powers" and absence of "concurrent jurisdiction" as a prerequisite for achieving a high degree of autonomy); *see also* Albert Chen, *Autonomy*, *in* THE BASIC LAW AND HONG KONG'S FUTURE, *supra*, at 302.

153. Article 1 "one country" function precedes the Article 2 "two systems" one. This should be highlighted because, very often, it is assumed that the most important function of the Basic Law is to protect the autonomy of Hong Kong or the separation of (mainly, economic) systems. Paradigmatically, see the general purport of the stance of GHAI, *supra* note 33, at 139. This stance is consistent with the view that the PRC Constitution applies in Hong Kong: as "one country" is ensured by the constitution itself, Article 1 of the Basic Law merely restates a fact. As further explained throughout this Article, ironically, the emphasis on the Basic Law as an instrument whose main aim is to protect autonomy contributes to a denial of the constitutional status both of Hong Kong's autonomy and of the "law" that ensures that autonomy.

154. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] arts. 3-6 (H.K.).

155. Zhu, *supra* note 119, at 274 (elaborating on how the Hong Kong SAR "represents a reconstructing of state organization and a new model of autonomy [demonstrating] a paradigm shift in the theory of Chinese constitutional law").

156. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 12 (H.K.).

and 14 lay down rules concerning powers of the responsibility of the central government (i.e., foreign affairs and defense).[157] In relation to "one country" issues, one can also find in this chapter a supervisory power of the Standing Committee to reject local laws,[158] a power of the same body to determine national laws that apply locally,[159] and restrictions on the powers of courts over acts of state.[160] Article 18(4) sets the powers to be exercised by the central authorities in case of war or emergency.[161] The possibility of unfettered extension of national laws to Hong Kong provided for in this provision conveys the message that "two systems" is subordinate to "one country."[162] Significantly, Article 18(4) is also the sole instance where the "high degree of autonomy" might be legitimately curtailed by the central authorities.[163]

At this stage of the explanation, it is already safe to conclude that, while enacting the Basic Law, the NPC is performing the constituent function of distributing or allocating the most vital powers that exist in any organized political society ruled by law.[164]

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157. Nonetheless, in Article 13(3), the Central People's Government authorizes Hong Kong—through an implicit remission to Chapter VII—to conduct on its own a wide range of powers relating to external affairs. *Id.* art. 13, para. 3. For example, Hong Kong participates in international organizations, issues its own passports, has its own currency and border controls, and may conclude visa abolition agreements with foreign states or regions.

158. *Id.* art. 17, para. 3.

159. *Id.* art. 18, para. 3.

160. *Id.* art. 19, para. 3.

161. *Id.* art. 18.

> In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

162. In "one country" there are to be "two systems." In the mind of many, the socialist system is the first one and the capitalist the second one, and the "basic" socialist system is somewhere along the line (in any case, after fifty years) predestined to swallow the "peripheral" capitalist one. Literally, however, there is no precedence of one system over the other. Logically, there is no law of nature that makes the swallowing inevitable. The only literal and logical precedence is that of "one country." That is why the "high degree of autonomy" might be, for the sake of the "national unity and territorial integrity" that war or turmoil might seriously threaten, curtailed in war or emergencies. Contrastingly, "one country" cannot be curtailed in any event. *Id*. art.1.

163. *Id*. art. 18.

164. In effect, the constituent power is always a question of authority and power to establish the fundamental organization of a community. CANOTILHO, *supra* note 90. Of course, all these constituent rules—on the distribution of powers and the terms of the relationship between the central authorities and the SAR—bind all these actors, including the highest organs of the PRC.

The following chapters are, similarly, constitutionally remarkable, as the Basic Law goes on to define, in 19 articles, the "Fundamental Rights and Duties" of Hong Kong Residents (Chapter III) and, in 61 articles, the "Political Structure" of the SAR (Chapter IV).[165] Chapter V is on the "Economy" and Chapter VI on "Education, Science, Culture, Sports, Religion, Labor and Social Services."[166] It has a chapter on "External Affairs" (Chapter VII) and a sophisticated chapter on "Interpretation and Amendment of the Basic Law" (Chapter VIII). The final chapter (Chapter IX) consists of a supplementary provision.[167] The Basic Law has two annexes (Annex I and II) about the method of electing political organs and a third one (Annex III) related to "one country" national laws to be applied in the SAR.[168] There is a total of 160 articles, excluding the annexes.[169]

In short: it is impossible to deny the constitutional bearing of the provisions of the Basic Law. The constitutional nature of the structure and content of the whole document is also obvious. Just compare it with the respectable Preamble and the meager four chapters and 138 articles of the PRC Constitution. Considering all this, to label the Basic Law a "mini-constitution," as it often happens,[170] is silly.[171]

The process that led to the adoption of the Basic Law lasted more than a decade.[172] In the initial stages of the process, the principle "one

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Highlighting the importance of these limits and restrains on these organs, see Chen, *supra* note 152, at 298.

165. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] chs. III, IV (H.K.).

166. *Id.* chs. V, VI.

167. *Id.* ch. IX.

168. *Id.* annex I-III.

169. *Id.* ch. IX.

170. The labelling goes far back. *See, e.g.*, Joseph Cheng, *The Draft Basic Law Messages for Hong Kong People*, *in* 5 THE DRAFT BASIC LAW OF HONG KONG ANALYSIS AND DOCUMENTS (Hungdah Chiu et al. eds., 1988); *see also* Tin Wai, *What Will the Basic Law Guarantee: A Study of the Draft Basic Law from a Political and Comparative Approach*, *in* 5 THE DRAFT BASIC LAW OF HONG KONG ANALYSIS AND DOCUMENTS, *supra*, at 49.

171. Actually, it has undertones of disrespectfulness to Hong Kong and Macau Chinese citizens: to call the constitutional document that presides over the Chinese citizens of the Mainland (the PRC Constitution) a true constitution but labeling the constitutional documents (the Basic Laws) that preside over Hong Kong and Macau Chinese citizens as mini-constitutions diminishes the Chinese citizens of Hong Kong and Macau. The disrespectfulness is sometimes hidden behind the cover of a philosophical and political analysis. SHIGONG JIANG, CHINA'S HONG KONG: A POLITICAL PERSPECTIVE 113-15, 125-34 (China Academic Library, 2017) (on the "mini-constitution," Hong Kongers paradoxical situation and the "relationship between the center and the periphery, the main body and the supplement, the majority and the minority, and the mainland and the frontier [demonstrating] the Confucian ethic of differential mode of association, such as respect for seniority and hierarchy").

172. GITTINGS, *supra* note 81, chapter 2.

country, two systems" was politically devised and, subsequently, "constitutionalized" in Article 31 of the PRC Constitution in 1982. This overlapped in time with the difficult negotiation of the Joint Declaration, which successfully led to its adoption in 1984. By 1985, the NPC itself had ratified the Joint Declaration.[173] This unusual move, by which the NPC took charge of the ratification power constitutionally assigned to its Standing Committee, attests to the constitutional nature of the process.[174] As emphasized by Professor Wang Tieya, this decision of the NPC was "extraordinary."[175] The subsequent truly unprecedented special procedure of back and forth debates, which lasted about five years,[176] corroborates that nature. Indeed, it is palpable that—guided by the Joint Declaration and while trying to find not only "the essential dimensions" but all the dimensions of the "organizational stability and the political, historical, economic and social identity of the territory"[177]—the drafters of the Basic Law were determined to not leave anything out and to exhaustively set up the constitutional framework of the new Hong Kong.[178]

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173. Tieya, *supra* note 4, at 321, 328.

174. According to the PRC Constitution, after the State Council concludes treaties and agreements with foreign States (Article 89(9)), it is up to the Standing Committee to decide on their ratification (Article 67(14)). Subsequently, "in pursuance of the decisions of the Standing Committee," they are ratified by the President of the People's Republic of China, on behalf of the People's Republic of China (Article 81). XIANFA [CONSTITUTION] arts. 66, 81, 89 (1982) (China).

175. Tieya, *supra* note 4, at 321, 328.

176. The Basic Law was drafted by the Basic Law Drafting Committee, which was constituted in June 1985. A Basic Law Consultative Committee was established in December 1985. A largely participated first consultation to the Hong Kong people was carried out from May to September of 1986. A first draft was published in April 1988 and a second one in February 1989. In the wake of the Tiananmen incidents, a second less participated consultation period of five months ended in October 1989. The Basic Law was enacted on 4 April 1990. On the "participatory" though not "democratic" process of drafting the Basic Law, see Simon N.M. Young, *Legislative History, Original Intent, and the Interpretation of the Basic Law*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 24. *See also* Chan, *Different Roads to Home*, *supra* note 45. For a vivid account of the early story of the process and the composition of the committees, see Emily Lau, *The Early History of the Drafting Process*, *in* THE BASIC LAW AND HONG KONG'S FUTURE, *supra* note 152, at 90. The Basic Law Drafting Committee (composed not only of Mainland members (36) but also of Hong Kong people (23)) and the Basic Law Consultative Committee (composed only of Hong Kong persons (180) who brought the views of the Hong Kong population to the process) have carried out a legitimating function in the making of the Basic Law. *See* PEREIRA, *supra* note 36, at 140-42; *see also* JIANG, *supra* note 57, at 138-41 (highlighting the social contract (constitutional) nature of the "political negotiation process between the mainland (central government) and Hong Kong").

177. Gomes Canotilho, *The Autonomy of the Macau Special Administrative Region: Between Centripetism and Good Governance*, *in* ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS—PERSPECTIVES OF EVOLUTIONS: ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 745, 749 (Jorge Oliveira & Paulo Cardinal eds., 2009).

178. Yash Ghai, *Litigating the Basic Law Jurisdiction, Interpretation and Procedure*, *in* HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 118, at 45.

All this is strong evidence that the Basic Law—a project that was anticipated twelve years (and approved seven years) before it entered into force and that projected itself at least until 2047, hence deserving to be celebrated as an extraordinary feat in international constitutional history—was intended to be "self-contained."[179]

During this long process, the relationship between the PRC Constitution and the Basic Law was debated, but attempts to clarify the issue proved illusory.[180] Notwithstanding, the debates contributed to two important outcomes. First, the drafters decided that certain national laws would be included in an annex to the Basic Law and that these national laws would (only) apply in Hong Kong "by way of promulgation or legislation *by the Region*."[181] There was no indication that the PRC Constitution (or any of its rules or logics) was to apply in Hong Kong. The second outcome is enshrined in another extraordinary decision of the NPC adopted in the same day of the enacting of the Basic Law. In this decision the NPC made two declarations: (1) the Basic Law is consistent with the Constitution because it is enacted under Article 31 of the PRC Constitution and in light of the specific conditions;[182] (2) the systems, policies, and laws to be instituted in Hong Kong have their grounds in the Basic Law.[183] Put together, these two statements powerfully convey the message that the Basic Law is the sole underpinning of the future constitutional framework of Hong Kong.[184]

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179. *Id.*

180. Different explanations for this in GHAI, *supra* note 33, at 61-62; LAW OF THE HONG KONG CONSTITUTION, *supra* note 45.

181. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 18. (H.K.).

182. The official English translation of this "consistency declaration" is "[t]he *Basic Law* of the Hong Kong Special Administrative Region *is constitutional as it is enacted in accordance with the Constitution* of the People's Republic of China and in the light of the specific conditions of Hong Kong." *Id.* (emphasis added). A literal translation of the Chinese original (香港特別行政區基本法是根據《中華人民共和國憲法》、按照香港的具體情況制定的，是符合憲法的) depicts less ambiguously the purport of the "consistency statement" therein embodied: "The Basic Law of the Hong Kong Special Administrative Region, *formulated in accordance* with the "Constitution of the People's Republic of China," *is consistent* with the Constitution." *Id.* (emphasis added).

183. The full quote of the English official translation is "[t]he *systems, policies and laws* to be instituted after the establishment of the Hong Kong Special Administrative Region *shall be based on the Basic Law* of the Hong Kong Special Administrative Region." *Id.* (emphasis added).

184. This second outcome is an extraordinary move for three reasons. First, the NPC had never adopted such a type of decision. Subsequently, it adopted a similar decision only in relation to the Basic Law of Macau. Second, it "allowed" to "overcome the seemingly irresoluble contradiction" between the PRC Constitution and the Basic Law. Third, because the NPC "called onto itself" the power of interpretation, which under Article 64(1) of the PRC Constitution is vested in its Standing Committee. Pereira, *supra* note 110.

Immune to what all this suggests, the steady trend today is that the PRC Constitution applies—at least in some form and to some extent—in Hong Kong.[185] While, in the initial stage of the SAR, the Government of Hong Kong "insisted" that the PRC Constitution was included in a new edition of the *Laws of Hong Kong* for "reference purposes" only,[186] the Central Government has already made it abundantly clear that the PRC Constitution "is applicable throughout the territory of the People's Republic of China, including [Hong Kong]."[187] If one couples this statement with the scholarly backed "clear superiority"[188] of the PRC Constitution and decisions of the Hong Kong courts that cited its provisions, there might well be reason to say that the "issue would now appear to be beyond doubt."[189]

C. Does the PRC Constitution Apply in Hong Kong?

In search for a convincing explanation for the perplexities such an application would entail, Professor Danny Gittings wonders whether "a legal rationale is needed to explain away the conflicts between a Hong Kong Basic Law based on Article 31 of the Constitution and the other provisions elsewhere in the Constitution."[190] Gittings explains that the rationale can be found in the principle under the Chinese legal system that

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185. JIANG, *supra* note 57, at 135.

186. Sec'y for Constitutional Affairs Michael Suen, *Legislative Council, Official Record of Proceedings*, HONG KONG HANSARD (10 Feb 1999); GITTINGS, *supra* note 81, at 50.

187. INFO. OFFICE OF THE STATE COUNCIL, THE PRACTICE OF THE "ONE COUNTRY, TWO SYSTEMS" POLICY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION (June 2014).

188. INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 3 (stating that the clear superiority of the PRC Constitution is a given). Interestingly, the editors of Interpreting Hong Kong's Basic Law also state that

> [t]he PRC Constitution has been forced to produce a deviant political system, which is so different that it has to be kept at a distance. . . . The Basic Law forms the *only valid constitutional connection* between HKSAR laws and the PRC Constitution. *There is no other official means* by which PRC laws (*including the PRC Constitution*) may be applied in Hong Kong.

Id. (emphasis added). On its face, this statement does not support the "clear superiority" of the PRC Constitution. Some could even be tempted to say that such a statement kind of implies the opposite. Indeed, "if the applicability of the Constitution is determined by its compatibility to the Basic Law, then the Basic Law is elevated to a position higher than the Constitution." Fu, *supra* note 118 (stating that "[t]here is no support, whatsoever, for this extreme position" and elaborating on the "divisibility" of the PRC Constitution). Suffice to say that such an extreme position would not be at odds with the view that the Joint Declaration Basic Policies' are supposed to work, during fifty years, as an international and domestic constraint not only to the legislative power of the PRC considered as a whole but also to the constituent power of the NPC. On this, see also the "true story" described below in Section III.C.

189. GITTINGS, *supra* note 81, at 50.

190. *Id.* at 53-54.

"special provisions" prevail over conflicting "general provisions."[191] Arguably, this explanation is a camouflaged way of arguing that the rules of the Basic Law are constitutional rules because, at the end of the day, if the rules of the Basic Law prevail over the rules of the PRC Constitution, there seems to be really no point in arguing that the Basic Law is a nonconstitutional inferior law.[192]

Be that as it may, the crux of the problem is that, when one treats the Basic Law as an nonconstitutional inferior law, one opens the door for the PRC Constitution, its logics and provisions to pervade the whole autonomic system.[193] If this could take place, the Basic Law—a carefully drafted "creative masterpiece"[194]—would, in effect, be a legal document with holes everywhere, allowing for autonomy to be "snatched away" whenever it is deemed politically necessary. As will be discussed, although all this pervasion is at odds with both the Joint Declaration and

191. *Id.* at 54.

192. An elaborate analysis in defence that the Basic Law is not, formally, a constitutional law, in João Albuquerque, *Lições de Direito Constitucional*, *in* 2 LEI BÁSICA DA REGIÃO ADMINISTRATIVA ESPECIAL DE MACAU (Ano Lectivo de 2015/2016) (not yet published) (considering that the Basic Law although not formally constitutional is a special law with a higher status than normal laws and is constitutional in substance).

193. In effect, if the rules of the PRC Constitution are hierarchically superior, then it is possible that the rules on amendment of the Basic Law have to be reconciled with the rules on amendment of the PRC Constitution and unwritten legislative practice, leading to the conclusion that the Basic Law rules on this are not true rules; the rules on interpretation of the Basic Law have to be reconciled with the rules on interpretation of the PRC Constitution, as understood by the Standing Committee, leading to the conclusion that there are no true limits to an interpretation by the Standing Committee; the whole process set up for the Standing Committee to add a law to Annex III and for that law to be implemented in the SAR does not have to be in conformity with Article 18(3) of the Basic Law, leading to the conclusions that a promulgation of an "added to Annex III law" by the Chief Executive does not have to be in conformity with the Basic Law and that other sorts of decisions and inferior legislation, which the central authorities can adopt under the PRC Constitution, might potentially be used to circumvent the procedure established in Article 18(3). These examples are by no means exhaustive. Opposition between the socialist provisions of the PRC Constitution of Chapter I (General Principles), Chapter II (The Fundamental Rights and Duties of Citizens), and Chapter III (Structure of the State) of the PRC Constitution and the "corresponding" provisions of the Basic Law occurs in no small measure. XIANFA [CONSTITUTION] (1982) (China); XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.).

194. At the end of their task, the drafters of the Basic Law were superbly complimented by Deng Xiaoping:

> [Y]ou have produced a law that is of historic and international significance. By historic I mean it is significant not only for the past and the present but also for the future. By international and far-reaching I mean it is significant not only for the Third World but for all mankind. This document is a creative masterpiece.

Deng Xiaoping Theory, *90th Anniversary of Communist Part of China 1921-2011*, CHINA DAILY, http://www.chinadaily.com.cn/china/cpc2011/2010-09/15/content_12474319_5.htm (last updated Sept. 15, 2010).

the Basic Law—and, hence, legally untenable—it is today part of the legal humus of Hong Kong.[195]

Although sometimes the theory seems to be that the whole of the PRC Constitution applies in Hong Kong, the intended message is that only parts of the PRC Constitution apply.[196] In his informative insight into *China's Hong Kong*, Professor Jiang Shigong asks whether the PRC Constitution comes into force in Hong Kong and states that, legally, this "question seems like a dumb one. The Constitution is the fundamental law of the country, and since Hong Kong is part of China, how could the law be not effective in Hong Kong?"[197] Jiang offers the parameter according to which the problem is to be handled: "we have to distinguish which parts of the Constitution fall into the category of 'one country' and which fall into that of 'socialism.' The former applies to Hong Kong while the latter does not."[198] Predominantly, scholarly opinion reasons along the same lines because "general principles"[199] or "legal logic"[200] so command.[201] The general trend is to argue that the provisions of the PRC Constitution on the unity and integrity of the state, powers of the sovereign organs and national symbols, apply.[202]

However, there is absolutely no need or contextual interpretative reason for the "one country" provisions of the PRC Constitution to apply because the text of the Basic Law and its Annex III have all the necessary "one country" rules relating to the unity and integrity of the state, powers of the sovereign organs and national symbols.[203] Moreover, if these

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195. *See infra* Part IV.

196. The "irony" is exemplified by the declaration by members of the Basic Law Drafting Committee that the PRC Constitution "as a whole is applicable to Hong Kong, but it does not mean that all is applicable." Fu, *supra* note 118, at 100.

197. JIANG, *supra* note 57, at 135.

198. *Id.*

199. "[S]ince the HKSAR is a region of the PRC and under its sovereignty, the constitution should apply." GHAI, *supra* note 33, at 215.

200. Lim & Chan, *supra* note 127.

201. Unsurprisingly, no detailed criteria are provided to distinguish the "one country" constitutional provisions that apply from the "socialist" ones that do not. The absence of scholarly devised detailed criteria is connected with the circumstance that even the most, *prima facie*, undisputable "one country" provisions disclose, upon closer inspection, socialist characteristics. In fact, socialism pervades completely the constitutional system of the PRC Constitution. For instance, it is an awesome job to try to disentangle the peculiar "distribution" of powers between the sovereign organs from the socialist nature of the exercise of power that underlies the whole system. *See infra* Part IV.

202. JIANG, *supra* note 57, at 135.

203. In case more "one country" rules are necessary, the Standing Committee has the power to add them to Annex III. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL

provisions of the PRC Constitution were meant to be applied in Hong Kong, the Hong Kong courts might need to interpret them or to ask the Standing Committee for their correct interpretation as it occurs in relation to the provisions of the Basic Law.[204] It is telling that the Basic Law neither grants permission for the Hong Kong courts to interpret the provisions of the PRC Constitution nor does it have any rules related with such provisions.[205] In the same way, the Basic Law does not make room—under Articles 17 and 160—for the possibility of the Standing Committee to reject a Hong Kong law in case it contravenes the PRC Constitution.[206] All in all, in case some provisions of the PRC were to apply in Hong Kong, the Basic Law should have provided some form of clear notice. It did not.[207]

ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] arts. 1-2, 5, 10, 12-15, 17-18, 23, 158-59, annex 3 (H.K.); *see also* Fu, *supra* 118, at 102.

204. The relevant part of Article 158 of the Basic Law reads,

> [I]f the courts of the Region . . . need to interpret the *provisions of this Law* concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region . . . the courts of the Region shall . . . seek an interpretation of the relevant provisions from the Standing Committee . . . .

XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158 (emphasis added).

205. If the drafters' intention was for the PRC Constitution provisions to be applicable in Hong Kong, then it would have been normal course to set out a similar procedure for the interpretation of those provisions of the PRC Constitution or, at least, to state that the courts in Hong Kong do not have the power to interpret those provisions and must seek an interpretation from the Standing Committee. *Id.*

206. Article 17 of the Basic Law speaks of laws of the Region that might be returned by the Standing Committee if they are "not in conformity with the provisions of *this Law*." *Id.* art. 17. (emphasis added). Article 160 of the Basic Law speaks of the adoption of "the laws previously in force . . . as laws of the Region except for those . . . in contravention of *this Law*." *Id.* art. 160.

207. Also worth noting is that the latest episode of the whole interpretation saga (which will be addressed in Part IV) took place when the Standing Committee issued an interpretation of the Basic Law in order to disqualify certain young elected legislators—who were keen on the idea of independence for Hong Kong—from their seats in the territory's Legislative Council. *See* Joyce Ng et al., *Barred Hong Kong Localists Vow to Keep Fighting After High Court Decision*, SOUTH CHINA MORNING POST (Nov. 15, 2016), https//www.scmp.com/news/hong-kong/politics/article/2046162/hong-kong-courtrules-localist-lawmakers-must-vacate-legco. In a curious legal twist—not the subject of much attention—that interpretation was issued because those "legislators" did not truthfully pledge their respect for the "Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China." No official in Hong Kong has had to pledge respect for the PRC Constitution, but solely to the Basic Law. A pledge for the PRC Constitution would most probably be required in case the PRC Constitution applied in Hong Kong or was hierarchically superior to the Basic Law. This is an additional argument in favor of the stance that the PRC Constitution does not apply in Hong Kong.

Legal documents are to be interpreted in good faith.[208] That is certainly true of the Joint Declaration, and there is no reason for the same idea to not apply to the Basic Law.[209] Surely, a good faith interpretation of the "wording," "context," "object," and "purpose" of the Joint Declaration does not lead to the conclusion that the "combined will" of the PRC and the U.K. was that the rules of the socialist PRC Constitution would apply in Hong Kong.[210] Similarly, an interpretation based on the "legislative intent" of the Basic Law[211] or on its "contextual" and "purposeful" reading[212] leads to the same outcome. The NPC "constitutional" decision mentioned above ("[t]he systems, policies and laws to be instituted [in Hong Kong] shall be based on the Basic Law")[213] points in the same direction. As there is no real support in the Joint Declaration or in the Basic Law and accompanying decisions for the proposition that the PRC Constitution or some provisions thereof apply in Hong Kong, the "dumb" position that the PRC Constitution does not apply prevails.[214] Symbolism apart, as the rules of the PRC Constitution are not included within the territorial law of Hong Kong, it does not make much sense to put the PRC Constitution at the top of the pyramid of the rules applicable in Hong Kong.[215] As such, there is no reason to assert a hierarchical relationship

208. For international treaties, see Vienna Convention, *supra* note 12, art. 31, para. 1.

209. This is especially true taking into account that the Basic Law is an implementation of the Joint Declaration. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (H.K.).

210. *See* Joint Declaration on the Question of Hong Kong, *supra* note 49.

211. This is how the Standing Committee described its approach to interpretation. The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Tenth Session of the Standing Committee of the Ninth National People's Congress on 26 June 1999) [hereinafter Interpretation *Ng Ka Ling*]. On the controversial use of legislative intent in the interpretation of the Basic Law, see INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 5; Young, *supra* note 176, at 24.

212. This is how the Court of Final Appeal of Hong Kong described its approach to interpretation in *Ng Ka Ling v. Director of Immigration*, [1999] 2 H.K.C.F.A.R. 4 (C.F.A.) (H.K.).

213. This decision is also in tune with paragraph 3 of the Preamble of the Basic Law, which indicates that all the systems to be practiced in Hong Kong are to be grounded on the Basic Law. Paragraph 3 reads "[i]n accordance with the Constitution of the People's Republic of China, the National People's Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *prescribing the systems to be practised in the Hong Kong Special Administrative Region*." XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] pmbl. (H.K.) (emphasis added).

214. *But see* GHAI, *supra* note 33, at 215, 205; Lim & Chan, *supra* note 127.

215. In a symbolic sense, the Government of Hong Kong's initial "insistence" that the PRC Constitution was included in a new edition of the Laws of Hong Kong for "reference purposes" only, is perfectly adequate. Sec'y for Constitutional Affairs Michael Suen, *supra* note 186; GITTINGS, *supra* note 81, at 50.

between the PRC Constitution and the Basic Law[216] or to shy away from stating that the Basic Law is at the same hierarchical level as the PRC Constitution.[217]

In short, conflicts between the PRC Constitution and the Basic Laws are only apparent because their jurisdictional scope does not overlap: "river water does not intrude well water."[218] From this perspective, the constitutional autonomy of Hong Kong[219] is flawlessly contained in its constitutional document.[220] As already unveiled, the domestic ground that sustains the stance put forward in this Article is that the provisions enshrined in Article 31 of the PRC Constitution permit different constitutional arrangements for the SARs. The stance that Article 31 is a form of "anything goes" is really just implying that it empowers the NPC to establish constitutions to parts of China with no need to additionally amend the PRC Constitution.[221] This means that Article 31 consists of an authorization for "deferred" or "delayed" constitutional decisions that comprise international (Hong Kong and Macau) or "internal" (Taiwan)

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216. Yu Xingzhong, *Formalism and Commitment in Hong Kong's Constitutional Development*, in INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 183, 190, 191 (criticizing the notion that a hierarchical relationship between the two constitutional systems must exist).

217. *Id.* In the constitutional territorial order of the Mainland, the PRC Constitution is at the top; in the constitutional territorial order of Hong Kong, the Basic Law is at the top; in the constitutional territorial order of Macau, the Basic Law of Macau is at the top. The constitutional principles designed in each of the three separate constitutional documents are commanding, respectively, in each of the three jurisdictions.

218. In 1989, Jiang Zemin, the then-President of the PRC, used this literary saying to convey the message that Hong Kong should not interfere in Mainland China and that Mainland China would not intrude in Hong Kong. As highlighted by Deng Xiaoping, one system should not undermine the other system. Wen Qing, *"One Country, Two Systems": The Best Way to Peaceful Reunification*, BEIJING REV., http://www.bjreview.com.cn/nation/txt/2009-05/26/content_197568.htm (last updated May 26, 2009).

219. i.e., the autonomy that is "recognized and ensured at a constitutional level to a territorial entity." Canotilho, *supra* note 177, at 749.

220. This naturally signifies that the constitutional principles devised for Hong Kong must be upheld as the rule of recognition in Hong Kong law. Xingzhong, *supra* note 216, at 195. *But see* Bing Ling, *The Proper Law for the Conflict Between the Basic Law and Other Legislative Acts of the National People's Congress*, *in* HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 118, at 155.

221. In a sense, the new constitutional laws adopted under Article 31 are a concretization of what Article 31 truly entails and, in that sense, further amendments of (*rectius*, new additions to) the constitutional system of the PRC considered as a whole. A more "hidden" function of Article 31 is that of avoiding political difficulties that would arise in case it was necessary to substantially amend the PRC Constitution itself. Fu Hualing, Zhai Xiaobo, *What Makes the Chinese Constitution Socialist?*, 16 INT'L J. CONST. L. 2, (2018) (on what makes the PRC constitution a socialist constitution and the still, at present, dire state of constitutionalism in the PRC).

constitutional negotiated arrangements[222] and subsequent implementation of those arrangements. As highlighted in the Joint Declarations and in the preambles of the Basic Laws, the domestic birthplace of the Basic Laws and their source of internal legitimacy lie within the PRC Constitution as a whole and, particularly, Article 31.[223]

The following is a summary of the "true story": China was about to resume sovereignty over territories that belonged to other countries for a long time.[224] In the same vein that the PRC gained new powers in relation to these territories, it also acquired the corresponding constituent power.[225] However, in order to resume that sovereignty, the PRC concluded international treaties in which it agreed that, for a period of fifty years, it had to respect international rules concerning its exercise of sovereign power over the new SARs.[226] That constituent power was internationally

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222. Another "hidden" function of Article 31 is to authorize the PRC to conclude international treaties that are fundamentally at odds with the "General Principles" of the PRC Constitution. In this sense, Article 31 "opens the PRC door" to the possibility of agreeing with other countries upon deviant or rogue constitutional systems. Cardinal, *supra* note 67, at 659 ("The PRC Constitution opens the door in Article 31, the NPC may even be the key to that door, but the creators and delivers of the autonomy institution, or the parents, are the signatory parties."). Thus, upon ratification by the NPC, the treaties where these constitutional systems are devised become part of the constitutional system of the PRC, and as such, their function is to work as a constraint not only on the legislative power of the state but also on its constituent power. Otherwise, in case, at the domestic level, the PRC could—through the invocation of existing (or new) constitutional or legislative norms—"eliminate" or "neutralize" the guarantees enshrined in the Joint Declaration, the guarantees would not work as true guarantees. *Id.*; CANOTILHO, *supra* note 90; *see Exchange of Greek and Turkish Populations, Advisory Opinion*, 1925 P.C.I.J. (ser. B) No. 10 (Feb. 21); *see also The Greco-Bulgarian Communities, Advisory Opinion*, 1930 P.C.I.J. (ser. B) No. 17 (July 31) (on the relation between international law and nationals constitutions); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4).

223. As such, although none of its rules are actually applicable within the territorial law of the SARs, the PRC Constitution as a whole, and especially its source of the Basic Law and the SAR provisions (Articles 31 and 62(13) of the PRC Constitution), are "well present" in Hong Kong and Macau. In this sense, it is correct to treat the PRC Constitution, as highlighted in its preamble, as the "fundamental," "base," or "root" law (根本法) of the land, not only because it covers 1.3 billion Chinese from the Mainland, but also because it is one of the legal instruments that serves as grounds for the existence of the constitutions of the 7 million Chinese from Hong Kong and Macau. Joint Declaration on the Question of Hong Kong, *supra* note 49; *see also* Joint Declaration on the Question of Macau, *supra* note 49, pmbl.

224. On this "resumption of sovereignty" as a "resumption of the exercise of sovereignty," see *supra* Section II.B. *See also* Joint Declaration on the Question of Hong Kong, *supra* note 49; Joint Declaration on the Question of Macau, *supra* note 49.

225. PEREIRA, *supra* note 36, at 130-31 (elaborating on how the unity of the State and the effective exercise of sovereignty by the PRC is ensured in the Joint Declaration through the "devolution to the sovereign organs of the PRC of the legislative constituent power, the power to appoint the most important political officials of the Region and the functions of defence and foreign affairs").

226. One can speak here of a "self-limitation of sovereign powers." Pereira, *supra* note 110.

and domestically constrained because that resumption of sovereignty demanded that the constitution in these territories of new constitutional orders be very different from the PRC's own preexisting constitutional order and much alike the ones that already existed there before.[227] This was required by the Joint Declarations, their entry into force in the domestic legal system of the PRC and their guiding principles on autonomy and continuity.[228] China was about to assume a limited sovereignty, to welcome those preexisting legal orders and to slightly turn them into something unique of its own.[229]

In other words: on 4 April 1990 and 31 March 1993,[230] in tune with its ratification of constitutional treaties[231] with the U.K. and Portugal, and after unprecedented constituent procedures, the NPC did not spell it out but—while adopting the Basic Laws—it was exercising its limited constituent power; not its "free constituent power" nor, *a fortiori*, its legislative power. The NPC "tried to square the circle," as it attempted to reconcile the fact that Hong Kong and Macau are merely "special administrative regions" under the "central government" with the fact that, at the same time, they required constitutions of their own.[232] Formally, the

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227. This is the natural consequence of the maintenance of the fundamental characteristics of the legal system previously in force. Joint Declaration on the Question of Hong Kong, *supra* note 49; Joint Declaration on the Question of Macau, *supra* note 49.

228. As put forward in *HKSAR v. Ma Wai Kwan, David*, 29 July 1997,

> [T]he intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system except those provisions which contravene the Basic Law has to continue to be in force. The existing system must already be in place on 1st July 1997. That must be the intention of the Basic Law.

HKSAR v. Ma Wai Kwan, David [1997] 1 H.K.L.R.D. 5, 6 (C.F.A.) (H.K.).

229. *But see* Chinese President Xi Jinping Speech Delivered at the Meeting Celebrating the 20th Anniversary of Hong Kong's Return to the Motherland and the Inaugural Ceremony of the Fifth-Term Government of the Hong Kong Special Administrative Region (July 1, 2017), http://www.xinhuanet.com/english/2017-07/01/c_136409940.htm ("Hong Kong's return completed a major transformation of its constitutional order"). Although not in tune with the law as it ought to be, President Xi's statement might be a correct analysis of what actually took place. See *infra* Parts IV-V.

230. Respectively, at the Seventh National People's Congress at its Third Session and at the Eighth National People's Congress at its First Session. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.); AOMEN JIBEN FA [BASIC LAW OF THE MACAU SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (Macau).

231. Katchi, *supra* note 88 (stating that the Joint Declaration is an international constitutional convention with a regional scope and explaining how the Joint Declaration "internationalizes" constitutional questions and is located at a higher level than the Basic Law).

232. *See supra* Section II.C.

NPC did not express the will to enact constitutions or constitutional laws and, certainly, while some sensed the constitutional nature of those moments, others perhaps thought that ordinary pieces of legislation of the PRC were being enacted.[233] But the NPC's directed mandate and the impossibility of disentangling the international and constitutional dimensions of the whole issue, sent it unmistakably into a new path.[234] Representing the "second stage of the state-building after the first one of 1949"[235] and translating into reality the "internationally constrained" Deng Xiaoping's entire vision of the Chinese political system, two moves were made well beyond the then-extant constitutional system established in the PRC Constitution and, as a result, a second, and then a third, constitution of China were born.[236]

However, the strongly worded central authorities' official stance today is that "[i]t is very wrong for some locals to describe the Basic Law as Hong Kong's constitution."[237] This is a rebuke to the most prominent of these locals (i.e. the highest court of Hong Kong).[238] No other organ contributed more to the unusual vitality of these types of statements than the Standing Committee.

IV. THE RULES OF THE BASIC LAWS AS TRUE RULES

A. Introduction

The main proposition of this Article, namely that the Basic Law is an internationally shaped true constitution that is designed to prevent the PRC Constitution, its rules and its logics to apply in Hong Kong, allows for the alleged complex questions, in relation to the amendment and interpretation

233. *See supra* Section III.A.

234. PEREIRA, *supra* note 36, at 134 (on the self-limited sovereignty of the PRC) *See also* Cardinal, *supra* note 67, at 637, 655 ("Without question, the Joint Declaration constitutes a limitation on the exercise of sovereignty . . . . It is, however, a limitation freely created and desired by the two sovereign states in the normal exercise of their international legal powers.).

235. Jiang also notes that, as the people from Hong Kong were absent from the process of the founding of the PRC and of adoption of the PRC Constitution, "the Basic Law drafting process was in fact the delayed constitutional recognition of the PRC by the people of Hong Kong. It supplied the missing social contract, i.e. the Constitution, between Hong Kongers and mainlanders." JIANG, *supra* note 57, at 151.

236. *Id.*

237. Li Fei, Basic Law Comm. Chairman, Speech at Basic Law Seminar in Commemoration of the 20th Anniversary of the Establishment of the Hong Kong Special Administrative Region (Nov. 16, 2017).

238. *See infra* Section IV.A.

of the Basic Law, to be simply tackled.[239] When due account is paid to an internationalized constitutional approach to these issues, the proper reading of the Basic Law is rather uncomplicated. The "complexity" only arose because rules and logics of the PRC Constitution were "called in" on the first episode of the "interpretation saga."[240]

In brief, this is what took place. In *Ng Ka Ling (1)*, faced with a defeat of its position in the Court of Final Appeal of Hong Kong (CFA), and with an allegedly problematic situation on the ground, the Government of Hong Kong decided to go beyond the words of the Basic Law and asked for the help of the central authorities.[241] In the end, the

239. Following on the footsteps of Professor Yash Ghai's "fundamental question" in relation to the provenance of the Basic Law (i.e., "whether it is to be treated as Chinese law requiring the application of Chinese rules of interpretation or as an instrument embedded in the common law given that the underlying law of the HKSAR will be the common law," GHAI, *supra* note 33, p. 191), the debate about some of the most important issues surrounding the Basic Law has been contaminated by a "Chinese Law vs Common Law" struggle. A good example is the following "exchange" in relation to the power of constitutional control of Hong Kong courts over acts of the NPC and its Standing Committee. Professor Albert Chen argues that "within the Chinese constitutional system . . . the implementation of the constitution and the avoidance of legislative actions contravening it depends entirely on the self-awareness and self-restrain of the NPC" and its Standing Committee. Chen's suggestion is that courts in Hong Kong cannot pronounce on the validity of the decisions of these organs. This is a consequence of the circumstance that "the NPC and its Standing Committee are the highest organs of state power" and that they are "the sole and exclusive" guardians of the Constitution and its implementation. Albert Chen, *The Court of Final Appeal's Ruling in the "Illegal Migrant"—Children Case Congressional Supremacy and Judicial Review*, *in* HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 118, at 77. Commenting on Chen's view, Professors Chin Lim and Johannes Chan state that "[p]erhaps the most difficult notion of all, from a common law perspective, is that such an arrangement leaves little room for the separation of powers in Hong Kong, and in particular the independence of the Judiciary." Lim & Chan, *supra* note 127. One should move beyond this "traditional struggle" because the reading of most contentious issues surrounding the Basic Law must be solved not according to a "Chinese law way" or a "common law way" but according to the "international way" enshrined in the Joint Declaration. As the Basic Law is the result of an obligation deriving from the Joint Declaration, a treaty that is in force within the PRC constitutional system, it is inextricably linked to it, and in many aspects, it enshrines a unique "internationally shaped" reading. Yu Xingzhong argues that "recent constitutional scholarship in Hong Kong has left much to be desired" due to a lack of articulation of the "common-law part of Hong Kong's constitutional tradition in line with the provisions and spirit of the Basic Law." Xingzhong, *supra* note 216, at 193. It is the view of the author of this Article that Hong Kong constitutional scholarship's lack of exploration of an international approach is much more unfortunate. It must be noted that many of the questions relating to the internationalized constitutional framework for Hong Kong are identical in Macau's internationalized constitutional framework. Macau's legal system is a civil-law system. Accordingly, no one has ever suggested that the solution for those questions in Macau should follow a common law approach. This means that, both in Hong Kong and Macau, those questions are primarily "internationalized constitutional questions" that should be solved according to an "internationally shaped" approach.

240. Interpretation *Ng Ka Ling*, *supra* note 211.

241. Press Release, Chief Exec. Report to State Council, Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the

Standing Committee decided to support the position of the government by issuing an interpretation of the Basic Law[242] without a request from the CFA to that effect.

The Standing Committee must have been aware that the article of the Basic Law about the interpretation of the Basic Law (Article 158) was construed in order to prevent the Standing Committee from issuing *proprio motu* interpretations.[243] The construction of the drafters, as reflected "on the face of" Article 158,[244] involved intervention by the Standing Committee only if the courts in Hong Kong "seek an interpretation . . . through the Court of Final Appeal of the Region." However, because the CFA did not duly seek an interpretation,[245] the Standing Committee reacted and "decided"[246] it had to "change" the "understanding" about Article 158(1), "transforming it into an 'operation provision' in emergencies."[247] While (re)acting in this fashion,[248] the

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Basic Law of Hong Kong (May 20, 1999), https://www.info.gov.hk/gia/general/199906/10/0610094.htm.

242. Interpretation *Ng Ka Ling*, *supra* note 211.

243. See the account of the drafting history of Article 158. For the purposes of this Article, a *proprio motu* interpretation is an interpretation of the Basic Law without a request of the CFA [hereinafter, *proprio motu* interpretation]. The drafting history of Article 158 is rather uncomplicated. *See infra* Part III.

244. Cora Chan, *The Legal Limits on Beijing's Powers to Interpret Hong Kong's Basic Law*, HKU LEGAL SCHOLARSHIP BLOG (Nov. 3, 2016, 11:12 PM), http//researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html.

245. P.Y. Lo, *Rethinking Judicial Reference*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 157 (elaborating on the "institutional reluctance" of the CFA to make judicial references).

246. "Before making its judgment, the Court of Final Appeal *had not sought* an interpretation of the Standing Committee . . . in compliance with the requirement of Article 158(3) . . . . Moreover, the interpretation . . . is not consistent with the legislative intent. *Therefore*, . . . the Standing . . . *has decided* to make . . . an interpretation . . . ." Interpretation *Ng Ka Ling*, *supra* note 211, at 112 (emphasis added); *see* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.).

247. Shigong Jiang, *Sīfǎ zhǔquán zhī zhēng, cóng wújiālíng àn kàn 'réndà shì fǎ' de xiànzhèng yì hán* (司法主权之争, 从吴嘉玲案看'人大释法'的宪政意涵) [*The Contest of Judicial Sovereignty: On the Constitutional Meaning of the 'NPCSC Interpretation' Through the* Ng Ka Ling *Case*], 3 TSINGHUA L. REV. 24-27 (2009); Jiang, *supra* note 138, at 88.

248. This reaction was not merely the Standing Committee's response to the lack of request from the CFA but also its response to the circumstance that the CFA had simultaneously asserted constitutional jurisdiction to review the acts of the Standing Committee. The Mainland scholarly reaction to such an assertion speaks volumes. "[T]he judgment which said that the CFA could review whether a decision of the NPC Standing Committee was consistent with the Basic Law was patently wrong." (quoting Xiao Weiyun). The circumstance that the jurisdiction of the CFA is, in nature, that of a sovereign power was considered "ridiculous" (quoting Shao Tianren). Xiao Weiyun, *Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal*, in HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note

Standing Committee illegally amended the Basic Law and rammed the PRC Constitution, its rules, and its logics right through Hong Kong.

Under a socialist constitution, the rather unencumbered powers of interpretation of the Standing Committee comprise the interpretation of the PRC Constitution itself, according to Article 67(1) of the PRC Constitution, and the interpretation of statutes, according to Article 67(4) of the PRC Constitution.[249] By not failing to invoke the latter provision in its first interpretation of the Basic Law,[250] the Standing Committee subtly conveyed the message that that provision of the PRC Constitution has effects within the territorial law of Hong Kong.[251] Not as subtly, it denied the constitutional nature of the Basic Law. While interpreting the Basic Law, the Standing Committee sees itself as interpreting a simple statute under Article 67(4) of the PRC Constitution. Moreover, as the Standing Committee powers of interpretation and amendment of statutes are rather amalgamated,[252] it might have been as a matter of course that, in the face of an "emergency situation," it decided to amend the Basic Law's interpretation scheme through interpretation.[253] The legal reality, though, is that, under the Basic Law, it has no power to do so. The power of amendment belongs to the NPC.[254]

118, at 55-6; Fu, *supra* note 118, at 102. Apparently, these comments represent the views of the Central People's Government and were issued under its instruction. Fu, *supra* note 118, at 102.

249. XIANFA [CONSTITUTION] art. 67 (1982) (China).

250. The Standing Committee invoked this provision of the PRC Constitution in all its subsequent interpretations of the Basic Law. Conversely, in all of its interpretations it failed to mention the international origin of the Basic Law. This must mean that it does not consider the Joint Declaration of any relevance for the purposes of interpretation of the Basic Law.

251. The most benign interpretation of the Standing Committee's stance is that Article 158 of the Basic Law is not a rule that functions on its own. It functions within the context of, and has to be interpreted in tune with, Article 67 (4) of the PRC Constitution. Possibly and less benignly, the Standing Committee is of the opinion that Article 158 is not even supposed to function as a true rule in case that is politically unacceptable. On law and international law as an instrument of politics in China, see Chiu, *supra* note 13, at 246-47.

252. For example, Article 47 of the Legislation Law PRC states that "[t]he legal interpretation adopted by the Standing Committee of the National People's Congress has the same effect as the laws enacted by it." Legislation Law PRC, arts. 42, 47, 88.

253. P.Y. Lo, *Two Kinds of Unconstitutional Constitutional Interpretations in China's Hong Kong*, INT'L J. CONST. L. BLOG (Dec. 23, 2016), http//www.iconnectblog.com/2016/12/twokinds-of-unconstitutional-constitutional-interpretations/; Chan, *supra* note 244 (elaborating on why the Standing Committee "should not be allowed to bypass [the amendment] procedure through the backdoor of interpretation").

254. *But see* GITTINGS, *supra* note 81, at 261 (affirming that, as there is no equivalent in Article 158 to Article 159 (4), "it would, in theory, be possible to achieve through interpretation what is theoretically forbidden through amendment"). However, there is no way around the fact that to achieve an amendment through interpretation still constitutes an amendment. In other words, the line between what is permissible interpretation and what is already law creation has to be drawn somewhere. The drawing of this line is a thorny issue. Nonetheless, according to the

B. Amendment of the Basic Law

Article 159 of the Basic Law[255] includes four paragraphs: the first vests the NPC with the power of amendment; the second relates to competence and procedure to issue amendment proposal bills; the third relates to consultation of the Committee for the Basic Law; the fourth with prohibition of an amendment that contravenes the PRC's basic policies regarding Hong Kong.

Given that the NPC defined the specific rules under which an amendment of the Basic Law is to be carried out, basic principles of interpretation dictate that an amendment of the Basic Law is only possible according to the rules defined in Article 159.[256] The rules of the PRC Constitution on amendment of the PRC Constitution or "other Mainland laws"[257] are irrelevant. Otherwise, the result is legal chaos.[258] This is because the PRC Constitution, naturally, does not set complicated limits to the amendment of laws of its legislative organ.[259] Therefore, to allow for the application of the provisions of the PRC Constitution would mean

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Basic Law, one thing is "amending" the Basic Law and another is "interpreting" the Basic Law. Competence and procedure are different. *See* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.).

255. Article 159 reads:

> (1) The power of amendment of this Law shall be vested in the National People's Congress; (2) The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People's Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region; (3) Before a bill for amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views; (4) No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.

XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 159 (H.K.).

256. In other words, the assumption must be that, although the Basic Law vested the NPC with the power of amendment in the first paragraph of Article 159, the NPC can only proceed while respecting the rules and procedure set out in the following three paragraphs. *Id.*

257. Namely, Articles 62 (1) (3), 64, 67 (2) (3), and 72 of the PRC Constitution. XIANFA [CONSTITUTION] art. 62, 64, 67, 72 (1982) (China).

258. A simple reading of the relevant articles is sufficient in order to grasp this circumstance. *See* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] arts. 62, 64, 67, 72 (1982) (China).

259. XIANFA [CONSTITUTION] art. 62, 64, 67, 72 (1982) (China).

that puzzling substantive and procedural twists to Article 159 were possible.[260]

The most interesting question in Article 159 relates to its fourth paragraph, which elevates the prohibition of amendment in contravention to the "established basic policies of the People's Republic of China regarding Hong Kong" to a "super constitutional rule."[261] Paragraph 4 has to be interpreted in tune with Article 5 and paragraphs 2 and 3 of the Preamble of the Basic Law.[262] The obligation flowing from these fragments of the Basic Law read together is not that the Basic Law cannot ever be amended contrary to the basic policies established in the Joint Declaration, but rather that it cannot be modified in conflict with those basic policies during a period of fifty years.[263] This cannot take place even in circumstances where a proposal for amendment gathers the support of the two-thirds majority of the NPC, the majority required to amend the PRC Constitution.[264] Such a legal move means that the session of the NPC that adopted the Basic Law "tied the hands" of future NPC sessions for the

260. If the case was otherwise, and the PRC Constitution applies, several consequences follow. Contrary to Article 159 (1) of the Basic Law, the Standing Committee could—as provided for in Article 67 (3) of the PRC Constitution—change the nonfundamental aspects of the Basic Law when the NPC is not in session. Contrary to Article 159 (2): "[D]eputies to the National People's Congress and all those on its Standing Committee have the right, in accordance with procedures prescribed by [a Mainland China] law, to submit bills or proposals . . . ." (Article 72 of the PRC Constitution); a bill from the SAR does not have to respect all that cumbersome process set out in Article 159 (2), enabling the delegation of the SAR to the National People's Congress to present a bill even if it does not gather the consent of anyone else in the SAR. Contrary to Article 159 (3), the Committee for the Basic Law does not have to study the bill and submit its views. Contrary to Article 159 (4), the amendment does not have to respect the basic policies of the People's Republic of China regarding Hong Kong. *Id.*; XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 159 (H.K.).

261 XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 159 (H.K.).

262. Article 5 reads "The *socialist system and policies shall not be practised . . .* and the *previous capitalist system and way of life* shall remain *unchanged for 50 years*." *Id.* pmbl., art. 5 (emphasis added). "The *basic policies* [. . .] *have been elaborated* by the Chinese Government *in the Sino-British Joint Declaration*." *Id.* pmbl., art. 5, para. 2 (emphasis added). "[T]he National People's Congress *hereby enacts the Basic Law . . . in order to ensure the implementation of the basic policies . . . .*" *Id.* pmbl., art. 5, para. 3 (emphasis added).

263. *Id.*

264. *See* Chen Zhizhong, *The Joint Declaration and International Law*, 11 UNIVERSIDADE DE MACAU: BOLETIM DA FACULDADE DE DIRETIO 90, 91-92 (2011) (highlighting—alluding to words of Professor Wang Tieya, a member of the Drafting Committee of the Basic Law—that "[e]ven [if] there will be something [that changes] in the Constitution, the [basic] polices will be still unchanged, because they have become conventional obligations").

period of fifty years.[265] This outcome was not unintentional.[266] The drafters knew that, in order to ensure stability and respect for the international treaty that had already entered into force in the constitutional system of the PRC, and which effects would last until 2047, an amendment of the Basic Law could not be subject to "politics as usual"[267]—including the kind of politics that takes place annually at the NPC. Thus, they found a simple and elegant solution, they "super-constitutionalized" the "basic policies" that were set up in the Joint Declaration and prohibited actions of the highest organ of the PRC against those policies.[268]

Some scholars have argued that the specific session of NPC did not have such power and, hence, future sessions could not be bound.[269] In effect, this argument equates to stating that Article 159(4) is a mere declaration of intention and not a true rule.[270] However, given that Article 159(4) is a provision of the Basic Law, it cannot be convincingly argued that it is not in fact a rule in the same way as other rules of the Basic Law. It is true that, in the use of its ordinary legislative power, that specific session of the NPC could not bind future sessions.[271] However, in the use of its constituent authority, the NPC has such a power. A constituent authority has the inherent power of setting procedural or substantive limits to the amendment of the constitutions it creates.[272]

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265. To put it into a "common law" wording: those policies are entrenched. In words more familiar under customary constitutional theory, it means that the constituent power has established substantive limits to the amendment of the Basic Law. While the PRC Constitution's stability is guaranteed by the two-thirds majority that is necessary to amend it, the Basic Law's fifty-year stability is guaranteed by that entrenchment. XIANFA [CONSTITUTION] art. 72 (1982) (China); XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 159 (1982) (H.K.).

266. JIANG, *supra* note 57, at 142-43; *see also* Zhizhong, *supra* note 264; Chan, *supra* note 244 (alluding to the "onerous procedure for amending the Basic Law").

267. JIANG, *supra* note 57, at 142-43.; *see also* Zhizhong, *supra* note 264; Chan, *supra* note 244 (alluding to the "onerous procedure for amending the Basic Law").

268. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 159 (H.K.).

269. Professor Albert Chen argued that the doctrine of congressional supremacy means there are no limits to the power of the NPC. Chen, *supra* note 239, at 77. Professor Bing Ling stated that "[t]o allow the NPC to bind its future successors on substantive matters would be repugnant to the sovereign status of the people." Ling, *supra* note 220, at 163. Professor Danny Gittings looks at the provisions of Article 159 "more as a declaration of principle." GITTINGS, *supra* note 81, at 262.

270. GITTINGS, *supra* note 81, at 262.

271. Ling, *supra* note 220, at 163.

272. In the same vein, while adopting the PRC Constitution, the NPC set up a formal "two/third in favor" limit to the amendment of the Constitution. No one has ever argued that this limitation is invalid, unconstitutional, or otherwise *ultra vires*. Similarly, the argument that Article 159 (4) is unconstitutional (as would naturally be the case in case one of the provisions of the

The amendment process set up in Article 159 of the Basic Law and, especially, its substantive limitation to the amendment power of the supreme organ of the PRC, vividly exemplifies how the constituent power created a true constitution and made that move well beyond the constitutional system previously established in the PRC Constitution.[273] In turn, a vivid example of how the PRC, at the 4 April 1990 gathering, "slightly mingled" Hong Kong's preexisting legal order with something very peculiar to its own preexisting constitutional system is Article 158 of the Basic Law.[274]

C. Interpretation of the Basic Law

Symmetrically to Article 159, Article 158[275] also contains four paragraphs: the first vests the Standing Committee with the power of interpretation; the second authorizes Hong Kong's courts the power to

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inferior law is in contravention with the higher law) is flawed because the NPC—in that "unprecedented constituent move" mentioned above—declared the whole of the Basic Law to be consistent with the Constitution. *See supra* Part III.

273. No one better than *Ng Ka Ling (1)* "characterized" in one sentence the significance of this fact and its connection to the nature of the document itself. In a part of the judgment titled "Approach to Interpretation of the Basic Law" and while emphasizing the purpose of Basic Law of implementing the Joint Declaration, the CFA stated that "[t]he Basic Law is an *entrenched constitutional* instrument to implement the *unique* principle of 'one country, two systems.'" Interpretation *Ng Ka Ling*, *supra* note 211.

274. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 159 (1982) (H.K.).

275. Article 158 reads:

> (1) The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress; (2) The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region; (3) The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected; (4) The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

Id.

interpret on their own the provisions within the limits of the autonomy of the Region (autonomy provisions); the third relates to how and by whom other provisions (one country provisions) are to be interpreted; the fourth relates to consultation of the Committee for the Basic Law.[276]

Given that the NPC defined the specific rules under which interpretation of the Basic Law is to be carried out, basic principles of interpretation dictate that an interpretation of the Basic Law is only possible according to the rules defined in Article 158.[277] The rules of the PRC Constitution on interpretation of the PRC Constitution or other "Mainland laws" are irrelevant.[278]

If the case was otherwise, there would be legal chaos. This is because, under the PRC Constitution, the Standing Committee's interpretation powers are rather unencumbered.[279] Therefore, to allow for the application of the provisions of the PRC Constitution would mean that the Standing Committee could interpret the Basic Law as it pleases (no subject-matter restrictions) and when it pleases (on its own volition or *proprio motu*).[280]

This would be contrary to Article 158 of the Basic Law.[281] Although the first paragraph of Article 158 assigns the interpretation power to the Standing Committee, the following paragraphs authorize Hong Kong courts that same power and define the (only) procedure under which an interpretation by the Standing Committee might take place.[282]

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276. *Id.*

277. In other words, the assumption must be that, although the Basic Law vested the Standing Committee with the power of interpretation in the first paragraph of Article 158, the Standing Committee can only proceed while respecting the rules and procedure set out in the following three paragraphs. *Id.*

278. Namely, article 67 PRC Constitution. XIANFA [CONSTITUTION] art. 67 (1982) (China).

279. *Id.*

280. If the case was otherwise, and the PRC Constitution applies, several consequences follow. Contrary to Article 158 (2), the Standing Committee can interpret all the provisions of the Basic Law and not only the ones on matters related to the powers of the central authorities. Contrary to Article 158 (3), the Standing Committee does not have to wait for a request of the CFA to issue an interpretation and, hence, it can issue an interpretation before, during, after, and independently of, judicial proceedings; can interpret all provisions at the request of anyone or any organ and, of course, even *proprio motu*; can interpret all the provisions not only in order to help in the adjudication of proceedings but to determine the outcome of all judicial proceedings, governmental decisions, etc; and can issue an interpretation that affects "judgments previously rendered." Contrary to Article 158 (4), the Committee for the Basic Law does not have to be consulted. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158 (H.K.).

281. *Id.*

282. *Id.*

As mentioned above, the authorization here at stake is created by the Basic Law and not through a specific individual act of the Standing Committee.[283] Accordingly, in the same vein as the other authorizations that can be found throughout the Basic Law, only by amendment of the Basic Law can the authorization be scrapped.[284] Moreover, as the power of interpretation was authorized to Hong Kong courts, there is no room to argue that the Standing Committee kept a "parallel" power of interpretation that it can exercise whenever it deems fit.[285]

Article 158 is the product of the awesome challenge faced by the drafters between "sovereignty" and "autonomy." On the one hand, there is the need to uphold that the ultimate decision power over "one country affairs" lies in the center.[286] On the other hand, there is the need to respect the demands from the principle that Hong Kong shall have an "independent judicial power, including that of final adjudication," and to assuage fears that the SAR's autonomy would be compromised.[287] The final version of Article 158 accurately reflects the simple and elegant balance devised by the drafters.[288] From the standpoint of Hong Kong courts, this balance might be summarized as follows: firstly, they interpret on their own the "autonomy provisions"; secondly, under certain circumstances, they have to trigger an interpretation from the Standing Committee on the "one country provisions."[289] From the standpoint of the Standing Committee, as follows: the Standing Committee has no power to interpret "autonomy provisions"; it has the power to interpret "one country provisions" but only upon request of the CFA.[290]

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283. *See supra* Section III.B.

284. *See supra* Section III.B.

285. *See supra* Section III.B.

286. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3 (2).

287. *Id*. para. 3 (3).

288. For the explanations of the drafters for the ultimate solutions that made their way into Article 158, see *Report by the Subgroup on the Relationship Between the Central Authorities and the HSKAR on the Amendment of Articles*, *in* COLLECTION OF DOCUMENTS OF THE EIGHTH PLENARY SESSION OF THE DRAFTING COMMITTEE FOR THE BASIC LAW OF THE HKSAR 5 (Secretariat of the Consultative Comm. for the Basic Law trans., Jan. 1989) (ebook).

289. HONG KONG BASIC LAW HANDBOOK 431, 432 (Kemal Bokhary et al. eds., 2015) (discussing such a triggering obligation as a "precisely defined duty").

290. Chan, *supra* note 244 ("not[ing] that the drafting of Article 158 of the Basic Law was inspired by the European Union's preliminary reference procedure, which mandates member state courts to seek reference from the European Court of Justice when they have to interpret a point of EU law [and informing that a] construction of the EU provision that corresponds to Article 158(1) to grant the European Court of Justice a plenary, free-standing power of issuing interpretations of EU law had been proposed by an EU jurist, but rejected by the European Court of Justice").

This balance is now wrecked as *proprio motu* interpretations by the Standing Committee over miscellaneous provisions of the Basic Law have illegitimately reduced the intended effect of Article 158 to near complete irrelevance.[291] "Firmly grounded" on the "plenary power" that the Standing Committee has under Article 158(1), courts and scholars in Hong Kong do not, in general, question the legitimacy of this course of action.[292] The more widespread position might be described as follows: the Standing Committee has a general power of interpretation under Article 158(1), but when interpretation arises in the context of adjudication, the rest of Article 158 must be adhered to.[293] Two arguments are used to support this position. The first is that, since the Standing Committee has "plenary authority" and the courts only "limited derivative authority,"[294] it is "obvious" that the Standing Committee can issue an interpretation on all provisions of the Basic Law and that its interpretation is binding on all institutions of the SAR.[295] The second is that it cannot be argued that an interpretation by the Standing Committee must wait for a request from the CFA because "interpretations are generally issued independently of court cases under the Chinese legal system."[296] The "socialist outcome" of these two arguments put together is that the Standing Committee's powers of interpretation under the Basic Law are virtually the same as under the PRC Constitution.[297]

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291. The only paragraph of Article 158 that has not yet been ruined is the one that requires the Standing Committee to "consult its Committee for the Basic Law." XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158 (4) (1982) (H.K.).

292. The fact that Professor Yash Ghai, a staunch defender of Hong Kong's autonomy, expressed early on the view the power of the Standing Committee is "plenary in that it covers all provisions of the Basic Law [and it] may be exercised in the absence of litigation" might have contributed to this general positioning of courts and scholars. In Lau Kong Yung, a Hong Kong court used Professor Yash Ghai's view on the issue to "authoritatively" support its stance and affirm that "[t]he power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms." Lau Kong Yung v. Dir. of Immigration, [1999] 10 H.K.C.F.A.R. 1, 31 (C.F.A.) (H.K.).

293. *Id.* at 84-85 (the argument follows closely that of Sir Anthony Mason NPJ.).

294. Young, *supra* note 176, at 17; Po Jen Yap, *Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions*, 6 CHINESE J. INT'L L. 543, 554 (2007).

295. As put forward in *Lau Kong Yung*, "[a]rticle 158(1) is plainly a power to give an authoritative interpretation of the Basic Law binding on all institutions in the Region. There was no occasion to spell out the obvious in the Basic Law." [1999] 10 H.K.C.F.A.R. at 87 (C.F.A.). This assertion overlooks the fact that Article 158 (3) does actually state that the courts have to follow the Standing Committee's interpretations in the context of the provisions (one country provisions) in relation to which, supposedly, that obligation is most obvious.

296. GITTINGS, *supra* note 81, at 236.

297. Possibly the only meaningful differences being that courts and judges in Hong Kong would not go as far as to propose what logically would seem to be the natural outcome of

However, the exercise of judicial power and the system of interpretation under the PRC Constitution was "always" at odds with Hong Kong's judicial power and system of interpretation.[298] Under the PRC Constitution, the assignment of interpretative power to the Standing Committee is a specific consequence of a socialist principle, the principle of democratic centralism.[299] This principle means that all the organs of the state come under the unified leadership of the central authorities.[300] This includes the "judicial power," which is under the supervision and control of the NPC and its Standing Committee.[301] Democratic centralism is the underlying reason why, in Mainland China, the judiciary does not have a real "institutional and functional independence."[302]

On the contrary, the true independence of Hong Kong courts has "always" been the subject of praise and perhaps its most distinctive feature vis-a-vis the Mainland.[303] This true independence has "always" included a "free from interference" power to interpret the law.[304] These considerations should have long alerted scholars and judges for the improbability that "socialist outcome" was ever intended.[305] While the system in Mainland China was (and is) set up in a "socialist constitution"

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interpreting the first paragraph in such an "independent" way. Namely, that, under the first paragraph, the Standing Committee could be even allowed to not follow the third paragraph rule that "judgments previously rendered shall not be affected" and that it is not similarly obliged to follow the fourth paragraph rule that it must "consult its Committee for the Basic Law before giving an interpretation". *See* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158 (3) (4) (1982) (H.K.).

298. Peter Wesley-Smith, *The Present Constitution of Hong Kong*, in THE BASIC LAW AND HONG KONG'S FUTURE, *supra* note 152, at 10, 16.

299. DINGJIAN, *supra* note 113, at 301. On the socialist nature of such a power, see Sophia Woodman, *Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law, in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 229 (considering that the better categorization for the Standing Committee's power of interpretation is that of a "substantive power through which the NPC expresses its will and settles a problem"). *See also* Yash Ghai, *The Political Economy of Interpretation*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 129.

300. JIANFU CHEN, CHINESE LAW CONTEXT AND TRANSFORMATION: REVISED AND EXPANDED EDITION 141 (2d ed. 2015).

301. XIANFA [CONSTITUTION] arts. 3, 128 (1982) (China).

302. GHAI, *supra* note 33, at 45.

303. *See* Wesley-Smith, *supra* note 298, at 10, 16.

304. Surely, the maintenance of the independent judicial system was one of the essential parts of the previous system and the assumption can only have been that that would not change. *See id.*

305. On some acknowledgment in Mainland scholarship that this socialist outcome was, in fact, not intended, see Lo, *supra* note 253 ("It has been adequately recognized in Mainland legal scholarship that the original thought (or even design) of Article 158 of the Basic Law is for the 'normal' mode of the NPCSC interpreting a provision of the Basic Law satisfying specified criteria based upon a reference from the CFA.").

in tune with socialist logics, the current Hong Kong system is set up according to the delicate balances that had to be reached during the drafting process of the Basic Law.[306] That is the reason why the whole of Article 158 stands to exist and, specifically, why the obligation for Hong Kong courts to follow the Standing Committee's interpretations can only be found in one paragraph, specifically the third paragraph.[307] This paragraph deals precisely with situations in which the CFA, while adjudicating a case concerning "one country provisions," seeks an interpretation from the Standing Committee.[308]

The balance above summarized is well supported by the drafting history of Article 158, of which a brief account will suffice. Essentially, there were three major drafts.[309] The wording of the first and second major drafts was clear-cut, the Standing Committee could interpret any provision of the Basic Law and it could do it *proprio motu*. The courts of the SAR would have always to follow those interpretations.[310] In contrast, the third

306. *Deng Xiaoping Theory*, *supra* note 194 ("[A]fter five years of hard work [the drafters] produced . . . a creative masterpiece . . . .").

307. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158 (H.K.).

308. The "artificial partition" between paragraph (1) and paragraphs (2), (3) and (4)—according to which paragraph (1) functions kind of independently from the rest of the article—would lead to the odd conclusion that the courts do not have to follow an interpretation of the Standing Committee if such an interpretation is issued outside adjudication or is related to "autonomy provisions." *Id.*

309. *See* Ling, *supra* note 152, at 625-33 (detailed analysis of the drafting history). The first draft is of November 1986; the second one, of April 1988; the third, of January 1989.

310. The first draft consisted of three sentences:

> The power of interpretation of the Basic Law is vested in the NPCSC[;] The courts of the HKSAR while adjudicating cases before them may interpret those provisions of the Basic Law which are within the autonomy of the HKSAR[;] *If the NPCSC has interpreted any provision of the Basic Law*, then the courts of the HKSAR *shall adopt the same interpretation of that provision* when applying it.

Martin Lee, *A Tale of Two Articles*, *in* THE BASIC LAW AND HONG KONG'S FUTURE, *supra* note 152, at 312 (emphasis added). The second draft consisted of four sentences:

> The power of interpretation of the Basic Law is vested in the NPCSC [;] *When the NPCSC makes an interpretation of a provision of the Basic Law*, the courts of the HKSAR, in applying that provision, *shall follow the interpretation of the NPCSC* . . .[;] The courts of the HKSAR *may interpret the provisions of this Law* in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defense, foreign affairs and other affairs and other affairs administrated by the Central Government, the HKSAR, before making their final judgment on the case, *shall seek an interpretation* of the relevant provisions from the NPCSC[;] [t]he NPCSC shall consult its Basic Law Committee of the HKSAR before giving an interpretation of this Law.

Id. at 320 (emphasis added). A personal account of the early drafting history can be found in *id.* at 309-25.

and final draft (which corresponds to today's Article 158) introduced two radical changes.[311]

First, it introduced the above-mentioned authorization for the courts of Hong Kong to interpret—on their own—"autonomy provisions."[312] Second, it placed the obligation for the courts of Hong Kong to follow the interpretation of the Standing Committee to that third paragraph, which only mentions "one country provisions" and only provides for an intervention of the Standing Committee upon request of the CFA.[313]

These two changes suggest that the drafters realized that if the power of interpretation was not authorized to Hong Kong in the same vein that other powers were authorized, there would be no true "independent judicial power, including the power of final adjudication."[314] The changes also suggest that the drafters realized that to grant the Standing Committee the same interpretation power as the Standing Committee has under the PRC Constitution would signify that a manifestly socialist mechanism would apply in Hong Kong in contravention with the Joint Declaration.[315]

Accordingly, the drafters considered that the Standing Committee should have no power to interpret "autonomy provisions" and no *proprio motu* power.[316] Cleverly and legitimately, they also carved out a mechanism to deal with "one country affairs," mandating the CFA to seek an interpretation from the Standing Committee whenever "one country affairs" need to be addressed during adjudication.[317]

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311. Major changes according to *Report by the Subgroup on the Relationship Between the Central Authorities and the HSKAR on the Amendment of Articles*, *supra* note 288, at 5. The legal community's unwelcoming reception to, and suggestions for amendment of, the second draft has surely contributed to such "major changes." *See, e.g.*, Chang, *supra* note 152, at 271, 273; Chen, *supra* note 152, at 297; Lee, *supra* note 310, at 322; Wai, *supra* note 170, at 87; William Wade, *Opinion on the Draft Basic Law*, *in* 5 THE DRAFT BASIC LAW OF HONG KONG ANALYSIS AND DOCUMENTS, *supra* note 170, at 87, 88.

312. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 158(2).

313. *See id*. art. 158 (3).

314. As required by the Joint Declaration. Joint Declaration on the Question of Hong Kong, *supra* note 49, para. 3 (3).

315. *Id*. para. 3 (5), annex 1.

316. Since, as already demonstrated, the intention of the drafters was for the NPC to go so far as to even "curtail" its own normal powers of amendment, there can be no surprise that they ultimately also intended to "curtail" the powers of the Standing Committee with regards to interpretation. The better and simpler rationale for the whole issue is the drafters trusted Hong Kong courts to interpret "autonomy provisions" on their own and trusted that, in case a "one country provision" issue would arise in adjudication, the CFA would duly seek an interpretation of the Standing Committee. Perhaps they trusted too much, but that is beside the point.

317. As mentioned, this mechanism was inspired by the European Union's preliminary reference procedure. *See* Chan, *supra* note 244. According to this procedure, courts of the Member States of the European Union have to seek reference from the European Court of Justice when they

D. Breach of the Joint Declaration

While the "creative powers" of the drafters were able to find room for a balanced and witty solution in keeping with "the principles and spirit" of the basic policies set out in the Joint Declaration,[318] the wrecking of the drafters well thought out solution is contrary to the PRC's international obligations. The following brief account of some of the post-handover actions of the Standing Committee illustrates the way in which the wrecking unfolded.[319]

In 1999,[320] in its already mentioned first *proprio motu* and *ex post* judgment interpretation, albeit "called" by the executive authorities of Hong Kong, the Standing Committee in fact reversed a decision of the CFA on the issue of who is entitled the (constitutional) right of abode in Hong Kong.[321]

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have to interpret European Union law. Under the version of the treaty in force at the moment in which Article 158 of the Basic Law was being discussed, the relevant provision of the European treaties provided that when a question about European law "is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice" In tune with the part of this provision that refers to "case pending," the repeated reference in Article 158 of the Basic Law to "adjudication of cases" means that the courts interpret the Basic Law because they have to decide the cases before them, not to give advisory opinions. Vallejos v. Comm'r of Registration, [2013] 16 HKCFAR 45, para. 103 (C.F.A.) (H.K.). Thus, the courts do not have a power, similar to the one that the Standing Committee has in relation to the PRC Constitution and other Mainland laws, of issuing interpretations how and when they please. The courts interpret the Basic Law in order—and only—to adjudicate judicial cases. Similarly, within the domain of the Basic Law and the high degree of autonomy it aims to uphold, the Standing Committee, upon request of the CFA, only legitimately issues interpretations in order to help a case to be properly adjudicated; not in order to pursue any other judicial, political, executive, or legislative purposes.

318. Jianfa, *supra* note 104, at 82 (appealing, at some moment between the second and third drafts, to the creative powers of the drafters to complete their task with success).

319. Before the handover, there were three important moves of the Standing Committee not addressed in this Article. According to Ghai, in all three the Standing Committee has modified the law rather than interpret it: "In several respects the decisions of the [Standing Committee] are directly contrary to the law it is suppose to interpret." GHAI, *supra* note 33, at 225. A different view can be found in JIANG, *supra* note 57, ch. 12.

320. Interpretation *Ng Ka Ling*, *supra* note 211.

321. For an extensive discussion of this interpretation, see HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 118.

In 2004,[322] in its second *proprio motu* interpretation and in the absence of court proceedings, the Standing Committee "reacted to calls for democracy" by taking control of the changes in the electoral system.[323]

In 2005,[324] in the context of an interpretation issued again as the result of a "call" from the executive authorities of Hong Kong,[325] it issued a third *proprio motu* interpretation in "anticipation of the commencement of legal proceedings," and it decided the length of the term of office of the new Chief Executive.[326]

The fourth *proprio motu* interpretation was issued in 2016.[327] In a blatant demonstration of its omnipotence, the Standing Committee "finally" decided to interfere directly with court proceedings.[328] In effect, it "adjudicated itself" the outcome of the proceedings, disqualifying two elected "young legislators" from office.[329]

These interpretations and their actual content mean that the outcome of "past, present and future" proceedings in the courts of Hong Kong that touch upon sensitive issues are permanently at risk of being politically

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322. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.) (Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article 3 of Annex II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Eighth Session of the Standing Comm. of the Twelfth Nat'l People's Cong. on 6 April 2004)).

323. *See* Michael Davis, *Interpreting Constitutionalism and Democratization in Hong Kong*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 77, 79-80.

324. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.) (Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (adopted by the Standing Comm. of the Twelfth Nat'l People's Cong. on 27 April 2005)).

325. *See* Rep. to the State Council Concerning the Submission of a Request to the Standing Committee of the National People's Congress Regarding the Interpretation of Article 53(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (April 6, 2005).

326. *See* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 4; *see also* Lin Feng & P.Y. Lo, *One Term, Two Interpretations*, *in* INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 146, 153.

327. Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the Standing Committee of the National People's Congress (adopted by Standing Comm. of the Twelfth Nat'l People's Cong., Nov. 7, 2016).

328. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.); *see also* Lo, *supra* note 253 (on the "process of the deliberation for the adoption of this interpretation [which] was initiated by the NPCSC's meeting of chairmen and [took place] in the same week as the CFI heard oral arguments on the legal proceedings commenced to disqualify . . . two legislators on account of their [illegal] oath taking").

329. *See* Lo, *supra* note 253.

decided in Beijing as a result of political considerations of the central authorities themselves and/or of the Hong Kong Government.[330]

The Standing Committee interpretations are coupled by a 2014 White Paper in which the Central Government professes that "some [in Hong Kong] are even confused or lopsided in their understanding of 'one country, two systems' and the Basic Law." The Central Government also claims for the first time the exercise of "comprehensive jurisdiction" or "overall jurisdiction" over Hong Kong both under the Constitution and under the Basic Law and affirms that judges are to be patriotic.[331] In the same year, the Central Government barred Members of the Foreign Affairs Committee of the British parliament from entering Hong Kong because "issues related to Hong Kong [are] China's internal affairs."[332]

To sum up, while Deng Xiaoping foresaw with praise the ability of the Hong Kong Chinese to handle affairs on their own with last resort intervention by the central authorities in situations of turmoil,[333] in today's reality, the central authorities do not trust that the Hong Kong people are able to handle important challenges on their own. The more poetic version of the current situation is "river water is intruding the well water."[334] This intrusion is a serious blow to Hong Kong's supposed high degree of autonomy, rule of law, and judicial independence.[335]

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330. It is no secret that both the whole process that leads to the issuance of a *proprio motu* interpretation by the Standing Committee and the actual content of the interpretation are, in tune with the nature of such power under the PRC Constitution, much more influenced by the politics of the moment than by anything that resembles an impartial judicial decision-making process grounded on the rule of law. There is vast scholarly support for this assertion. *See* Xingzhong, *supra* note 216, at 187; *see also* Ghai, *supra* note 299, at 133; *see also* Feng & Lo, *supra* note 326; Chan, *supra* note 244. For a different view, see Jiang, *supra* note 138, at 90.

331. INFO. OFFICE OF THE STATE COUNCIL, *supra* note 187. On this white paper and its "troubling implications," see HONG KONG BASIC LAW HANDBOOK, *supra* note 289, at 3-4, 46-47.

332. Alice Woodhouse, *Summon Chinese Ambassador over Hong Kong Entry Ban, British MPs Urge David Cameron*, SOUTH CHINA MORNING POST (Dec. 11, 2014), http//www.scmp.com/news/hong-kong/article/1660363/summon-chinese-ambassador-over-hong-kong-ban-british-mps-urge-pm. Many other actions by the Central Government do not seem to fall short from outright interference. Allegedly, these actions include "[attempts] to disbar pro-democracy legislators [and] 'blatant . . . pressure on Hong Kong's judges.'" *China Is Threatening the Rule of Law in Hong Kong*, ECONOMIST (Aug. 24, 2017), https//www.economist.com/news/leaders/21727069-britains-silence-deafening-china-threatening-rule-law-hong-kong. These examples refer to the jailing of pro-democracy activists in August 2017 for their roles in the "Umbrella Movement" protests that swept through the territory in 2014. Not surprisingly, in February 2018, most probably as a result of the Central Government's censorship policy in the Mainland, the author of this Article was unable to open in Beijing the two previous hyperlinks.

333. Deng Xiaoping, Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region (Apr. 16, 1987).

334. *See supra* Section III.C

335. *See* GHAI, *supra* note 33, at 138.

The result is that the PRC is in clear breach of its obligations under the Joint Declaration.[336] At stake is primarily the "declaration" in the text of the Joint Declaration that Hong Kong will be vested with an "independent judicial power, including the power of final adjudication."[337] The "elaboration" of the "declaration" in Annex I is also of import.[338] On the one hand, it underscores the preservation of the previous judicial system and its "independent" and "free from any interference" exercise.[339] On the other hand, it provides that that system will "be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication."[340] The manifest objectives of these changes were that of bolstering the autonomy of the Region, rather than diminishing it, and of preventing cases in Hong Kong to be ultimately decided in Beijing, be it by a judicial (the Supreme People's Court) or political (the Standing Committee) body.[341] It is rather manifest from the "declaration" and "elaboration" read together that a situation in which the Standing Committee holds a "general and unqualified power" to "finally adjudicate cases" through interpretation is not in tune with the Joint Declaration.[342]

The status quo is that the Standing Committee can freely issue interpretations *proprio motu* or on the request of the Hong Kong government.[343] Accordingly, nothing prevents (1) the Standing Committee from disavowing all Basic Law interpretations made by the CFA, and (2) the government of Hong Kong from "asking for the help" of the Standing Committee in order to get a reversal of the CFA's decisions.[344] The interpretations of 1999, 2004, 2005, and 2016 demonstrate that the

336. Joint Declaration on the Question of Hong Kong, *supra* note 49, paragraph 3 (5), annex I.

337. *Id.* art. 3, para. 3.

338. *Id.* annex 1, para. 2.

339. *Id.*

340. *Id.*

341. The last instance in the previous system was the Privy Council in London, an independent judicial body, which when hearing appeals from Hong Kong, it was to be considered a Hong Kong court. *See* Wesley-Smith, *supra* note 298, at 10, 16.

342. This interpretation of the "declaration" and its "elaboration" is confirmed by the Basic Law. Articles 2, 8, 9, 18, 19, 80, 81, 84, 85, 87, 88, 89, 92, and 93 all point into the same direction. As the CFA emphasized in *Stock Exchange of Hong Kong v. New World Development*, "[t]he purpose of [these] provisions . . . is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the Mainland, its continuity with what went before and safeguarding the independence of the judiciary." [2006] 2 HKLRD 518. ¶ 45 (C.F.A.) (H.K.).

343. *See supra* Section IV.C.

344. *Id.*

status quo is far from purely theoretical. The Standing Committee has demonstrated its willingness to assert its "*proprio motu* final adjudicator authority" over questions, including the constitutional right of abode, electoral process, Chief Executive term of office, and right to sit in the legislature—all of which touch the core of Hong Kong's constitutional organization.[345] In other words, through a remarkably precision-guided illegal exercise of interpretative power, the Standing Committee fundamentally changed a vital aspect of the fifty years division of powers between the Central Authorities and the SAR.[346] In doing so, it turned itself into Hong Kong's "undisputed final adjudicator"[347] and eliminated the autonomy of Hong Kong "when and where that autonomy [most] matters."[348] Given that the "independent" and "free from interference" final adjudication power of Hong Kong courts is one of the fundamental premises of the treaty, a "material" or "fundamental" breach of the Joint Declaration stands to exist.[349]

There are also sufficient grounds to assert a violation of the Joint Declaration by virtue of an illegal use of socialist logics in Hong Kong.[350] The above described use by the Standing Committee in Hong Kong of a "general and unqualified" and "before, during, or after proceedings" socialist *proprio motu* interpretative power is not in accord with the Joint Declaration's command that "the socialist system and socialist policies shall not be practiced [in Hong Kong] for 50 years."[351]

More broadly, the erosion of the internationalized constitutional nature of the Basic Law resulting from the actions of the Standing Committee and the other described actions of the Central Authorities accentuate the seriousness of the breach.

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345. Ghai, *supra* note 299, at 138.

346. On this division of powers, *see supra* Section III.B.

347. In the same vein, see the comments on judicial independence made by Johannes Chan. HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 118, at 70.

348. Ghai, *supra* note 299, at 138. The hard truth is that the constitutional autonomy of Hong Kong "has no [meaningful] meaning" if its most important constitutional developments are shackled by to the modus operandi and logics of the other system. Similarly, see Xingzhong, *supra* note 216, at 190.

349. Report of the International Law Commission on the Work of Its Eighteenth Session, [1966] 2 Y.B. Int'l L. Comm'n 254, U.N. Doc. A/CN.4/SER.A/1966/Add.l (elaborating on fundamental or material breaches of treaties).

350. On the socialist prohibitions of the Joint Declaration, see *supra* Section II.B. *See also* Chan, *supra* note 244 (on how the circumstance "that the NPCSC possesses plenary powers of interpreting the Basic Law downgrades all guarantees [of the Basic Law] from [legal] guarantees to mere promises the delivery of which is at the grace of the Chinese Communist Party: they could be taken away by the NPCSC in the name of 'interpretation.'").

351. On this command, see *supra* Section II.B.

V. CONCLUSION

The old treaties were treaties but not equal and hence invalid.[352] The new treaties are joint declarations and not really treaties.[353] The Basic Law is like a constitution, but it is a basic law and not really a constitution.[354] Rules of the Basic Law are mere declarations of intention and not really rules.[355]

There is something wrong in this story, as the impression is that legal documents and the rules contained therein are meaningless.[356] This is not reasonable and it is not what international law, and law in general, is all about, except perhaps under a system where law is an instrument of politics.[357] Rules are "inherently imperfect" and issues of interpretation of laws and of evolution of law by judicial and other types of decisions "will always remain, given the imperfections of human language."[358] However, within the boundaries of what is reasonable, there is ample room for an application of law that still corresponds to a rule of law. It is true that, from the nineteenth-century illegal handling of the New Territories to the controversial last British governor democratic reforms, behavior not in tune with the rules of the game is no rare part of this story. But the law on murder does not stop being law just because a human being kills another.[359]

It is suggested that what is remarkable is how "very cautiously" the Standing Committee has been in exercising its power.[360] It is true that at least in relation to uncontroversial autonomic matters, in which the "larger China" is clearly not an interested party, the central authorities have kept

352. *See supra* Part II.
353. *See supra* Part II.
354. *See supra* Part III.
355. *See supra* Part IV.
356. Chan, *supra* note 244.
357 *Id*. (on how "the Basic Law may not mean what it says"). According to Chan, "[t]he Basic Law has become a self-referential game." The NPCSC does not have a principled approach to interpreting the law. In line with Leninist legal tradition, the law is viewed by the Chinese Government as a mere tool to facilitate Party agenda. Interpretations are issued to suit the political exigencies of the day. The NPCSC has used interpretations to add things to the law. To them, the line between an interpretation and amendment of the law is thin.
358. KENNETH GALLANT, THE PRINCIPAL OF LEGALITY IN INTERNATIONAL AND COMPARATIVE LAW 408 (2009).
359. *See Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U.S.*), Judgement, 1986 I.C.J. Rep. 14 para. 186 (June 27) (within the context of violations of customary law); *see also International Committee of the Red Cross Response of Jean-Marie Henckaerts to the Bellinger/Haynes, Comments on Customary International Law Study*, 46 INT'L LEGAL MATERIALS 959, 961 (2007) ("A violation of existing rules . . . that is all it is, a violation. Such violations are not of a nature to modify existing rules; they cannot dictate the law.").
360. GITTINGS, *supra* note 81, at 6, 310.

it at bay.[361] Yet, a certain political community is only truly grounded on the rule of law if the organs of power follow the rules when it is difficult to do so. The fact that organs of power follow the rules when it is expedient and easy to do so does not count for much. Only when it is not convenient to follow the rules of the game does one really discover whether the normative force of a constitution is strong or weak and whether the rule of law or raw political power prevails. It is undeniable as to who has had the upper hand in this game so far. The normative force of Joint Declarations and Basic Laws is colliding with the normative force of facts, and consequently, law is gravitating around itself.[362]

The "millenary sagesse" of Chinese thought [363] is glowingly displayed in Article 31 of the PRC Constitution, the Joint Declarations, and the Basic Laws—less so, it appears, in the current decisions of the highest authorities of the PRC. At present, the "fundamental contradiction" is no longer between the capitalist and socialist system or the material and cultural needs of the people and the delay in social production.[364] The equally fundamental contradiction is now between, on the one hand, the actions and words of the Chinese that devised the principle "one country, two systems," the Joint Declarations and the Basic laws, and the equilibria that they found in the name of a greater objective and, on the other hand, the actions and words of the Chinese who presently sit in the Standing Committee and other places, both in the Mainland, Hong Kong, and Macau. They are entrusted with the implementation of the worldwide respected "one country, two systems," and their actions, so far, do not live

361. This "hands-off" approach is highlighted also by INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 4. The fact that the Standing Committee acts in relation to Hong Kong somewhat differently from what is its normal mode of action when it acts within the territorial order of the Mainland might be used to argue that the Standing Committee understands that the "second system" must function according to its own logics. However, the meshing between Article 67 (4) of the PRC Constitution and Article 158 of the Basic Law and the resulting modus operandi described in Part IV reveals that it does not grasp the extent to which that system should function on its own. It might not be easy for the same organ to act with two (very) different heads (one for the Mainland and one for Hong Kong) but that is what "one country, two systems" requires. In any case, that "hands-off" approach might also be reason to hope that it might not be that difficult for the Standing Committee to take a step back and hand back to Hong Kong the full extent of autonomy that the city is supposed to have.

362. Anticipating this scenario, see Canotilho, *supra* note 100, at 116.

363. *Id.* at 107.

364. This was the fundamental contradiction identified by the Statute of the Chinese Communist Party approved on 6 September 1982. Statute of the Chinese Communist Party (Sept. 6, 1982) (China).

up to the promise enshrined in the principle. They are at risk of squandering this intangible political and legal heritage of humanity.[365]

In 2011, it was certainly optimism that led the authors of the leading textbook *Law of the Hong Kong Constitution* to affirm in its Preface that "we believe the health of the Basic Law is assured."[366] It is a constitution because all concerned appear to treat it as such, and what it contains is law because courts and others treat it so."[367] These assertions did not provide the whole picture then and continue to not provide it today. The law as it stood and the law as it stands does not correspond to such optimism. Hence, the posture must be to highlight what is wrong in order for what is desirable, the law as it ought to be from the start, to become part of reality. The fact that powers that are to be exercised exclusively by the SARs, at least for 50 years, are, at present, being exercised in a concurrent way by the central authorities ought to be treated as a violation of the Basic Laws and the Joint Declarations rather than a mere fact worth noting. Contrary to the "reasonable" and "appeasing" message of the editors of *Interpreting Hong Kong's Basic Law: The Struggle For Coherence*, the much in need unquietness does not relate to a "struggle for coherence" in the interpretation of the Basic Laws.[368] Instead, the "struggle" continues to be for the unravelling of the Basic Laws' true nature or "soul."

The constitutional documents of the SARs are titled "Basic Laws" and not "constitutions."[369] In a sense, to call them "Basic Laws" obscured that true nature or "soul." Apart from the name, in all other aspects, they are constitutions. These constitutions are not without flaws. Nevertheless, contrary to the idea sometimes conveyed, what is truly remarkable is how perfect they came to be. As to whether this is surprising, the long-minded path to the adoption of the Basic Laws and the resumption of sovereignty

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365. The (negative) value of the current "one country, two systems" experience for a possible negotiated solution of the Taiwan issue is also apparent. Early skepticism about the applicability of the Hong Kong model to Taiwan can be found in Byron Weng, *The Hong Kong Model of 'One Country, Two Systems Promises and Problems*, *in* THE BASIC LAW AND HONG KONG'S FUTURE, *supra* note 152, at 73, 84-88.

366. Lim & Chan, *supra* note 127.

367. *Id.*

368. INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 1:

> Although the distinct ideological settings of the NPCSC and the Court of Final Appeal . . . mean that they will inevitably disagree over the interpretation of the Basic Law, the two systems must avoid becoming locked, or being seen to be locked, in a battle for "the soul of Hong Kong; instead the struggle must be towards coherence.

369. *See* XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.); AOMEN JIBEN FA [BASIC LAW OF THE MACAU SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (Macau).

are testimony to the unique moment that they represent: "fulfilling the long-cherished common aspiration of the Chinese people for the recovery" of territories "taken away" from China in less proud episodes of its history.[370] Rising to the moment, the drafters had indeed brought about extraordinary legal documents.

It is not too late for scholars, judges, government officials, and others to refresh lost notions and to look at the Basic Laws in tune with their true international and constitutional nature and not according to their official labels.[371] Then, perhaps, a more balanced perspective of what is really at stake and more in tune with Deng Xiao Ping's ambitious literary labelling of the Basic Law of Hong Kong as a "masterpiece of the human creativity" of "historical and international significance"[372] might emerge. It is possible. It was possible for Germany—its extraordinary constitutional jurisprudence emanating from its Basic Law, and its "dialogues" with that other ultimate guarantor of that other "European Constitution" officially known as the "Treaty of Lisbon."[373] It was possible for Israel—its Basic Laws, the poignant intelligence of *Eichmann*, and the robust checks on

370. XIANGGANG JIBEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (H.K.).

371. Particularly, as there is not much hope that the central authorities "take a step back" (Woodman, *supra* note 299, at 238) and enforce their constitutional commitments to Hong Kong seriously (but see a more hopeful approach enshrined in the "interface model" of Xingzhong, *supra* note 216, at 1913), it is necessary that an independent judiciary that "speaks for" Hong Kong's Constitution decisively assumes its constitutional obligations and tries harder to "give autonomy and separateness genuine prospects." Peter Wesley-Smith, *Law in Hong Kong and China: The Meshing of Systems*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 117 (1996); INTERPRETING HONG KONG'S BASIC LAW, *supra* note 112, at 11. Particularly, the CFA will be on the line. In spite of its venerable efforts to find innovative confront-avoidance devices (*see, e.g.*, Ng Ka Ling v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 4 (C.F.A.) (H.K)), it must seriously ponder a more confrontational tack. Similarly, putting forward different "soft" and "hard" forms of control over acts of the central authorities (Chan, *supra* note 244). Two moves are essential: first, the CFA should assert it will not give effect to *proprio motu* interpretations; second, it should also assert that it holds the power to not give effect to acts of the Standing Committee that are adopted outside the scope of the powers that the Standing Committee has under the Basic Law, namely acts that encroach upon the constitutional autonomy of the SAR or that amount to an amendment of the Basic Law. If it does just this, "it will surely be regarded by the Central Authorities as 'turning rogue.'" Lo, *supra* note 253. But the alternative is to go down in history as the "quasi-independent/quasi-last-adjudicator/quasi-of-final instance" CFA.

372. *Deng Xiaoping Theory*, *supra* note 194.

373. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 Dec. 2007. See also the famous *Solange* cases decided by the German Federal Constitutional Court. John Vervaele, *European Criminal Law and General Principles of Union Law*, *Research Papers in Law,* 5/2005 EUR. LEGAL STUD. 3; Joachim Wieland, *Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht*, 5 EJIL 3 (1994); Anthony Arnull, *Editorial*, 30 EUR. L. REV. 606 (2005).

power emanating from its "constitutional court."[374] The Hong Kong Basic Law is capable of achieving the same.

That balanced perspective also does not require a "breakthrough in common constitutional theory." This not yet truly acknowledged leap forward already took place with the invention of the Basic Laws. It humbly requires the recognition that a constitution limits the power of the State.[375] Anchored in remarkable Joint Declarations and on a pragmatic Article 31, the Basic Laws set—in unprecedented and peculiar ways—limits to power and thus merit to be treated as constitutions. The issue should have become—as timely cautioned and as powerfully suggested by the words "one country, two systems"—"one country, two constitutions."[376]

Beyond the official labels, surely the intention behind this long process was not to create an ill-advised distinction between the Chinese of the Mainland and the Chinese of Hong Kong and Macau. According to such distinction, the Chinese of the Mainland have the "Fundamental Principles" according to which their community works, their "Fundamental Rights," and their core "Political Organization" established in a "superior" and "true" constitutional law.[377] Contrastingly, the Chinese of Hong Kong and Macau have such principles, rights, and organization enshrined in "inferior" and "non-true" constitutional laws.[378] In the end of one more "dialog between men and their words,"[379] it is safe to conclude that the "men" involved in the process did not intend such a distinction. But as their will was not clearly expressed, we dug deeper into their "words." Now, we "know" them.

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374. *See* CrimA 336/61 Att'y-Gen. of the Gov't of Israel v. Eichmann (1962) (Isr.); *see also Yĭ sè liè guó jiā gài kuàng* (以色列国家概况) [*Israel Country Profile*], *supra* note 89.

375. C.J. FRIEDREICH, TRANSCENDENT JUSTICE: THE RELIGIOUS DIMENSION OF CONSTITUTIONALISM 17 (1964).

376. Canotilho, *supra* note 100 (recitius, three constitutions).

377. The PRC Constitution that enshrines such true constitutional principles, rights, and rules. *Id.*

378. The Basic Laws that do not enshrine such true constitutional principles, rights, and rules.

379. A *polis* dialogue in the words of Canotilho. Canotilho, *supra* note 100.