

PART I

CONSTITUTIONAL LAW OF THE HKSAR

Introduction

Section I The Basic Law of the HKSAR

Section I contains the first group of key legal instruments forming the constitutional system of Hong Kong: the Basic Law.

On 1 July 1997, Hong Kong formally transformed from a dependent territory of the United Kingdom to become the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). With China's resumption of sovereignty over Hong Kong, a "New Constitutional Order" (*per* Yash Ghai *) was thereby established.

According to Article 31 of the PRC Constitution, China's national legislature — the National People's Congress (NPC) — adopted the Basic Law of the Hong Kong Special Administrative Region ("the Basic Law") on 4 April 1990, laying down the political, social, and economic systems to be practised in post-1997 Hong Kong. As explained by former Chief Justice Andrew Li, the Basic Law is both "a national law" of the PRC as well as the "constitution of the Region".[†]

Section II NPC Decisions and Interpretations

Section II contains the second group of key legal instruments forming the constitutional system of Hong Kong: the Decisions of the NPC and its Standing Committee (the NPCSC). Notably, the Instruments listed in this section follow a numbering scheme that does not adhere to the informal numbering patterns used by some government sources. Nor is the numbering scheme chronological one, rather it is based on the nature, kind, and category of the documents concerned, making it more conducive for teaching and learning.

In the years leading up to 1997, the NPC and the NPCSC adopted a series of "Decisions" (Instruments 1–6) to supplement the Basic Law and to ensure a seamless transition to the "New Constitutional Order". These include a Decision on the constitutionality of the Basic Law (Instrument 1), the formal establishment of the HKSAR (Instrument 2), the method of the formation of the First Government and the First Legislative Council of the HKSAR (Instrument 3), the establishment of a Committee for the Basic Law under the NPCSC (Instrument 4), the legal effect of the English text of the Basic Law (Instrument 5), and the treatment of the laws previously in force in Hong Kong (Instrument 6). The State Council also promulgated an "Order" (Instrument 7) to set out the boundary of the new Special Administrative Region.

The Basic Law contains three Annexes: Annex I "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region", Annex II "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures", and Annex III "National Laws to be Applied in the Hong Kong Special Administrative Region". Under the procedures stipulated in the Basic Law, Annexes I and II were amended in 2010 as part of a constitutional reform to increase democratic participation in the elections of the Chief Executive and the Legislative Councillors (Instruments 8–9).

Under Article 18 of the Basic Law, national laws of the PRC shall not be applied in Hong Kong except for those listed in Annex III to the Basic Law, and the NPCSC may add to or delete from the list of laws in Annex III through prescribed legal procedures. By 2020, a total of 14 national laws had been applied to the HKSAR through Annex III by the NPCSC (Instruments 10–14), with the most recent one

* Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edition, Hong Kong University Press 1999).

† *Ng Ka Ling v The Director of Immigration* [1999] 1 HKC 323, para. F.

being the *Law on Safeguarding National Security in the Hong Kong Special Administrative Region*. The laws listed in Annex III shall be applied locally by way of promulgation or legislation by the HKSAR.

After the Handover, the NPC and the NPCSC also adopted eight stand-alone Decisions on Hong Kong-related legal issues. The first group of these Decisions (Instruments 15–18) concerns the democratic reform to achieve “universal suffrage” in both Chief Executive and Legislative Council elections. In 2017, the NPCSC approved a co-location arrangement between Guangdong Province and the HKSAR for establishing a Mainland Port Area in Hong Kong (Instrument 19). In May 2020, the NPC decided to authorize the NPCSC to enact a national security law for Hong Kong (Instrument 20). Finally, in August and November 2020, the NPCSC adopted two Decisions regarding the postponement of the Legislative Council election and the qualification of certain Legislative Councillors (Instruments 21–22).

Apart from issuing legally-binding “Decisions”, the PRC Constitution also confers on the NPCSC the power to interpret laws with both retrospective and prospective effects.* Article 158(1) of the Basic Law again sets out that “[t]he power of interpretation of this Law shall be vested in the [NPCSC]”. Before 1997, the NPCSC had already adopted an interpretation concerning the implementation of the Nationality Law in Hong Kong (Instrument 23). After the establishment of the HKSAR, the NPCSC has issued five interpretations to the Basic Law (Instruments 24–28), examining issues ranging from the right of abode (Instrument 24) to the oath-taking requirement for public officers (Instrument 28).

Section III The Constitution of the PRC

Section III contains the Constitution of the PRC. Last amended in 2018, it is the direct source of authority for establishing the HKSAR and for enacting the Basic Law of Hong Kong. Apart from the provisions directly related to the SAR, including Article 31 and Article 62(14), scholars have doubted whether the rest of the PRC Constitution is also applicable in Hong Kong. However, according to a White Paper released by the State Council in 2014, the Central People’s Government took the view that “[a]s the fundamental law of the country, the Constitution, with supreme legal status and the highest legal authority, is applicable throughout the territory of the People’s Republic of China, including the HKSAR”.†

Section IV Selected National Laws as Applied in the HKSAR

Section IV includes the full text of two important national laws that have been applied in the HKSAR by way of promulgation through Annex III of the Basic Law.

The Law on the Garrisoning of the Hong Kong Special Administrative Region (“Garrison Law”) was adopted by the NPCSC on 30 December 1996. Pursuing to Article 14 of the Basic Law, the Garrison Law was enacted to “ensure the lawful performance of functions and responsibilities by the military forces stationed by the Central People’s Government in the [HKSAR] for defence, and to maintain the sovereignty, unity and territorial integrity of the State and the security of Hong Kong”. It consists of 6 Chapters and 30 Articles.

The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“Hong Kong National Security Law”) was adopted by the NPCSC on 30 June 2020 and took effect on the same day. It was enacted according to the NPC Decision in May 2020 (see Section II, Instrument 20) to establish and improve the “legal system and enforcement mechanisms” for the HKSAR to safeguard national security in light of the Anti-Extradition Bill Protests

* Constitution of the People’s Republic of China, Art. 67(4).

† Information Office of the State Council, *The Practice of the “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region* (June 2014).

in 2019 and the failure of the HKSAR Government to enact a national security law on its own under Article 23 of the Basic Law.

Section V Sino-British Joint Declaration

Lastly, Section V contains the Joint Declaration on the Question of Hong Kong. It was signed by the governments of the PRC and the United Kingdom on 19 December 1984 and came into effect on 27 May 1985. In the Joint Declaration, China declares that it will “resume the exercise of sovereignty over Hong Kong” with effect from 1 July 1997 and lists out its basic policies regarding Hong Kong, which will later be stipulated in the Basic Law. The Joint Declaration includes three Annexes: Annex I (Elaboration by the Government of the People’s Republic of China of its Basic Policies Regarding Hong Kong), Annex II (Sino-British Joint Liaison Group), and Annex III (Land Leases). It also contains two memoranda exchanged between the parties. While the Chinese side insists that the Joint Declaration is a “historical document” that lost its practical significance following the enactment of the Basic Law,^{*} the British government still views it as a legally valid treaty.[†]

* *Reuters*, “China says Sino-British Joint Declaration on Hong Kong no longer has meaning”, 30 June 2017, available online at: www.reuters.com/article/us-hongkong-anniversary-china-idUSKBN19L1J1.

† *Ibid.*

SECTION I

THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA*

(Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990; Promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990; Effective as of 1 July 1997)

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* Please also see —

- a. Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see Instrument 1 in Part I, Section II of this volume); and
- b. Decision of the Standing Committee of the National People's Congress on the English Text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted on 28 June 1990) (see Instrument 5 in Part I, Section II of this volume).

- Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region
- Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures
- Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region

Preamble

Hong Kong has been part of the territory of China since ancient times; it was occupied by Britain after the Opium War in 1840. On 19 December 1984, the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong, affirming that the Government of the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, thus fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong.

Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems", the socialist system and policies will not be practised in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.

In 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, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong.

Chapter I General Principles

Article 1

The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.

Article 2

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, in accordance with the provisions of this Law.

Article 3

The executive authorities and legislature of the Hong Kong Special Administrative Region shall be composed of permanent residents of Hong Kong in accordance with the relevant provisions of this Law.

Article 4

The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.

Article 5

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

Article 6

The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

Article 7

The land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the government of the Region.

Article 8

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 9

In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.

Article 10

Apart from displaying the national flag and national emblem of the People's Republic of China, the Hong Kong Special Administrative Region may also use a regional flag and regional emblem.

The regional flag of the Hong Kong Special Administrative Region is a red flag with a bauhinia highlighted by five star-tipped stamens.

The regional emblem of the Hong Kong Special Administrative Region is a bauhinia in the centre highlighted by five star-tipped stamens and encircled by the words "Hong Kong Special Administrative Region of the People's Republic of China" in Chinese and "HONG KONG" in English.

Article 11

In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.

Chapter II

Relationship between the Central Authorities and the Hong Kong Special Administrative Region

Article 12

The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.

Article 13

The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.*

The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs.

The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

Article 14

The Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region.

The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.

Military forces stationed by the Central People's Government in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the Region. The Government of the Hong Kong Special Administrative Region may, when necessary, ask the Central People's Government for assistance from the garrison in the maintenance of public order and in disaster relief.

In addition to abiding by national laws, members of the garrison shall abide by the laws of the Hong Kong Special Administrative Region.

Expenditure for the garrison shall be borne by the Central People's Government.

Article 15

The Central People's Government shall appoint the Chief Executive and the principal officials of the executive authorities of the Hong Kong Special Administrative Region in accordance with the provisions of Chapter IV of this Law.

Article 16

The Hong Kong Special Administrative Region shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law.

Article 17

The Hong Kong Special Administrative Region shall be vested with legislative power.

Laws enacted by the legislature of the Hong Kong Special Administrative Region must be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People's Congress shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.

* See Interpretation of Paragraph 1, Article 13 and Article 19 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 at the Twenty Second Session of the Standing Committee of the Eleventh National People's Congress on 26 August 2011) (see Instrument 27 in Part I, Section II of this volume).