

26th October, 1989

THE DRAFT BASIC LAW :

LIST OF PROPOSALS BY THE BUSINESS & PROFESSIONAL

GROUP OF MEMBERS OF THE BASIC LAW CONSULTATIVE COMMITTEE

CTRL NO	ACT-8809
DATE REC'D	6 JUL 1989
CLASS NO	HLB 342-202
VENDOR NO	222 122
REBOUND	

Introduction

The Business and Professional Group of Members of the Basic Law Consultative Committee have obtained an Opinion from Sir Zelman Cowen Q.C. and Sir William Wade Q.C.

Counsel in their Preamble made the following comments:-

"First, it is impossible to read the Joint Declaration and the Draft Basic Law without being impressed by the very extensive internal autonomy which these instruments are designed to confer upon Hong Kong during the fifty-year period beginning in 1997. The philosophy of "one country, two systems" is carried to great lengths, conflicting in many ways with the political, legal and administrative systems of mainland China. Taken at face value, the terms secured for Hong Kong in the next half-century are remarkably favourable. It cannot be denied that China has a legitimate interest in seeing that Hong Kong does not abuse its special political and legal privileges, and in being concerned in Hong Kong's defence, foreign affairs and, in the last resort, public order. The provisions of the DBL for these purposes seem, on the whole, to be based on reasonable premises. The whole picture, of course, is now distorted by the events of June 1989. But the fact remains that, contrary to much misguided comment in the press and elsewhere, Hong Kong is intended to enjoy fifty years of genuine internal autonomy, secured,

so far as possible, by international agreement. The Joint Declaration is not a mere declaration of policy: it is a formal agreement, in effect a treaty (see its 7th paragraph), binding both Britain and China, and giving Britain a direct interest in seeing that it is properly implemented in the Basic Law and otherwise. We make this observation from a general political standpoint purely."

Counsel went on to observe that "on closer inspection, the Draft Basic Law reveals defects which may gravely weaken Hong Kong's intended autonomy". Counsel then outlined in their Opinion the defects that exist and their proposed solutions.

Arising out of that Opinion the proposals set out below are made by the Business and Professional Group of the BLCC.

1. The Need to Enhance the Powers of the Committee for the Basic Law

Proposal : The Draft Basic Law should include provision for the Constitution of the Committee for the Basic Law and for enhancing its position in the following ways:-

- (i) The Standing Committee of the NPC should delegate to the Committee determinative power, as opposed to its merely advisory function as presently intended.
- (ii) The Committee should have jurisdiction to resolve questions arising under Articles 8, 17, 18, 157, 158 and 159 of the draft Basic Law. It should also have jurisdiction to determine any questions as to whether affairs are within the responsibility of the Central

People's Government or involve the relationship between the Central Authorities and the Region when such questions are referred to it by the Central People's Government or the Hong Kong Special Administrative Region.

- (iii) The membership from both the CPG and HKSAR sides should be persons of eminence, judicially or legally qualified.

Explanation : It is a major defect of the DBL that there is no provision for the judicial settlement of differences of view between the CPG and HKSAR on questions of interpretation of the Basic Law. The function of the Committee for the Basic Law as described in the DBL is advisory only. What is really required is that the Committee be given determinative power and that it be composed of qualified lawyers, preferably with judicial experience.

Questions concerning Articles 8 and 159 (previous Hong Kong laws inconsistent with the Basic Law) need adding to the list of Articles (see (ii) above) expressly within the Committee's jurisdiction. In addition, it would be convenient for either government to be able to refer any other questions that may arise as to whether any matters are within the responsibility of the Central People's Government or involve the relationship between the Central Authorities and the Region.

Set out in Appendix II is a suggested revised version of the Proposal for the establishment of the Committee for the Basic Law contained in the Appendix to the DBL. This version inter alia specifies in paragraphs 6 & 7 the questions which the Committee will have jurisdiction to determine, thus saving the need for

individual references in the relevant Articles of the DBL (which can accordingly be deleted). It is suggested that these provisions for the establishment of the Committee be incorporated into the DBL by a new Article (possibly to be numbered 158A) of which a draft is set out in Appendix I.

2. Conflict between the Basic Law and the Constitution of China

Proposal : The Basic Law should provide that the Basic Law shall have full effect notwithstanding any inconsistent provision of the Constitution. Alternatively, Article 31 of the Constitution of China could be amended to provide the same by a two-thirds vote of the NPC.

Explanation : There is a risk that the validity of parts of the Basic Law and future Hong Kong legislation may be called into question in the Hong Kong courts on the ground that they are overridden by inconsistent provisions in the Constitution of China.

Accordingly, it needs to be made clear that the Constitution of China does not invalidate any provision of the Basic Law. It is thus suggested that a new Article providing that the Basic Law should have full effect notwithstanding any inconsistent provision of the Constitution be incorporated into the DBL (possibly to be numbered 11A) of which a draft is set out in Appendix I.

3. An Authentic English Text

Proposal : The Basic Law should provide that there will be an authentic English text for use in the Hong Kong courts which will

be enacted by the Hong Kong SAR Legislature after approval by the CPG.

Explanation : As English will continue to be the language of the law and the superior courts of Hong Kong, it is essential that there be an English version of this fundamental law which cannot be challenged on the ground of inconsistency with the Chinese version. It is suggested that a new Article providing for an authentic English text be incorporated into the DBL (possibly to be numbered 11B) a draft of which is set out in Appendix I.

4. Policy Guidelines

Proposal : The permissive "may" should be substituted for the imperative "shall" in the following articles of Chapters IV, V and VI of the DBL which are statements of policy and intention only and are not stipulated in the Sino-British Joint Declaration :

65, 106, 107 (para. 2), 117, 118, 137, 139, 143, 144, 146

There should also be added to Article 157 a clause providing that the Basic Law should be interpreted liberally according to its purpose.

Explanation : Many of the provisions in these chapters are statements of intent only which as presently drafted would unduly restrict the Legislature. Furthermore, it is not intended that they should create legal rights justiciable in Court. Those not stipulated in the Joint Declaration should accordingly be amended as proposed. This will be assisted by an addition to Article 157

providing that the Basic Law should receive such liberal interpretation as will best fulfill its purpose and intent.

5. Legislative Power

Proposal : Article 17 of the Basic Law should be amended in order to clarify beyond doubt that legislative power is given to the HKSAR in respect of all matters save those which are expressly reserved to the CPG.

Explanation : Article 17 provides that the Hong Kong SAR shall be vested with legislative power but it does not make it clear that this power covers everything except defence, foreign affairs and the national laws listed in Annex III. It is most important that Hong Kong's general power of legislation should be clearly stated, in accordance with the Joint Declaration (Annex I, Part I, second paragraph) which gives unrestricted legislative power to Hong Kong except for defence and foreign affairs.

6. Defence and Emergency Powers

Proposal : Article 18 of the DBL should provide that it is for the Chief Executive of the Hong Kong SAR to decide whether turmoil is beyond the control of the Region.

Explanation : While the declaration of a state of war and the subsequent application of the relevant laws must remain the prerogative of the sovereign government, internal emergencies should so far as possible be handled within the Region and pursuant

to its own laws. Since Hong Kong's autonomy includes responsibility for public order under Article 14, it should be for the Chief Executive, who will be in the best position to assess the situation, to decide whether the emergency is beyond control under Hong Kong's own laws.

7. Application of PRC Laws to Hong Kong

Proposal : Article 18 of the DBL should be amended so that the power of the Standing Committee of the NPC to make additions to the list of laws in Annex III is subject to the consent of the government of Hong Kong in each case.

Explanation : The addition of further national laws to Annex III necessarily means a reduction of Hong Kong's autonomy. The Basic Policies stated in Annex I, Part II, third paragraph of the Joint Declaration define what are to be the laws of the Hong Kong SAR without including any PRC laws. Any departure from the Basic Policies should be by agreement only, being contrary to the Joint Declaration.

8. "Acts of State" and "Facts of State"

Proposal : Article 19 needs to be redrafted to make it clear that the reference to "acts of state" is intended to refer to the existing common law doctrine presently existing in Hong Kong law. The reference to "facts of state" should be clarified so that it is clear that it is a reference to those facts which according to existing Hong Kong laws would be determined by the government.

Explanation : The present draft is unclear in that the reference to "acts of state" might be interpreted to mean all executive acts, rather than the narrow common law concept of Acts of State which refers to matters beyond the jurisdiction of the courts, such as invasion of a foreign territory or blockade of a foreign port. The expression "facts of state" is unknown in English law but is presumably intended to mean facts which the courts under present procedures require to be proved by a certificate from the government e.g. whether a foreign government is recognized or a particular person is a diplomat. These meanings need to be made clear.

9. Administrative Autonomy

Proposal : Article 22 of the DBL should be amended to make it clear that the CPG itself cannot interfere in the administration of the Region.

Explanation : The article as presently drafted, while making it clear that departments of the CPG as well as provinces and the like under the CPG may not interfere, does not clarify whether the CPG itself can interfere.

10. Entrenchment of International Covenants and the Bill of Rights

Proposal : Article 39 should be amended so that the Bill of Rights, if and when enacted by the Hong Kong legislature, is protected in the same way as the International Covenants.



Explanation : The provisions of the International Covenants will be entrenched by Article 39 but the same protection will not be enjoyed by any rights under a Hong Kong Bill of Rights which are additional to those contained in the Covenants.

11. The Chief Executive

Proposal : Article 43 should be amended to delete the requirement that the Chief Executive be accountable to the CPG. Article 52 should also be amended to provide that the Chief Executive shall resign on a vote of no confidence by the Legislative Council if carried by a two-thirds majority since the Chief Executive should be made accountable to the Legislative Council in all respects and not merely in the four respects stated in Article 64.

Explanation : The Joint Declaration by paragraph 3(12) requires that the Basic Law should stipulate the Basic Policies of the PRC elaborated in Annex I. Part I of the Basic Policies in its third paragraph states that "The executive authorities shall abide by the law and shall be accountable to the legislature." This means general and not limited accountability and necessarily includes the Chief Executive and excludes accountability to the CPG. It is most important that the Chief Executive should always have the confidence of the Legislative Council. Otherwise he may be influenced so as to act against the interests of Hong Kong as understood by the Legislative Council, and contrary to Hong Kong's autonomy.

1) vote of no confidence by  $\frac{2}{3}$  major.

12. International Agreements

Proposal : Article 152 of the DBL should be amended so that the application to the Hong Kong SAR of international agreements to which the PRC is or becomes a party is subject to the consent of the government of Hong Kong.

Explanation : This proposal is a safeguard against some possible international agreement which the PRC might make and apply to the Hong Kong SAR concerning matters vested in the Hong Kong SAR by the CPG under the Joint Declaration and the Basic Law and therefore incompatible with Hong Kong's autonomy.

13. The Power of Interpretation

Proposal : Article 157 of the DBL should provide that interpretation shall be consistent with the established basic policies of the PRC regarding Hong Kong.

Explanation : Article 158 already contains this provision and in principle it ought to be included similarly in Article 157.

14. Rejection of Previous Hong Kong Laws

Proposal : Article 159 of the DBL should be amended so that the power of the Standing Committee of the NPC to declare previous Hong Kong laws to be inconsistent with the Basic Law is restricted to laws affecting the responsibility of the Central Authorities or the relationship between the Central Authorities and the Region.

Explanation : This restriction on the power of the Standing Committee applies to Article 17, dealing with post-1997 Hong Kong laws, and the same restriction should be added to Article 159, dealing with pre-1997 laws. Laws which do not affect the responsibility of the Central Authorities or the relationship between the Central Authorities and the Region need not concern the CPG. In any event, pre-1997 laws dealing with internal Hong Kong SAR matters which are inconsistent with the Basic Law will be declared inconsistent by the Hong Kong SAR courts in accordance with Article 8.

Appendix I

Proposed Revisions to the DBL

<u>Article No.</u>	<u>Proposal No.</u>	<u>Proposed Revision</u>
New	1	"There shall be a Committee for the Basic Law of the Hong Kong Special Administrative Region with the powers and functions authorised by the National People's Congress as set out in Annex IV. The composition, powers and functions of the Committee shall not be changed without the agreement of the Government of the Hong Kong Special Administrative Region." (see Appendix II)
New	2	"This law shall have full effect notwithstanding any inconsistent provision of the Constitution of the People's Republic of China, which is hereby modified in accordance with the policy of "one country, two systems""
New	3	"The Legislative Council of the Hong Kong Special Administrative Region shall enact an English language version of this Law, after approval of the text by the Standing Committee of the National People's Congress."
17	1, 5	1st sentence of 2nd paragraph to read :-  "Laws enacted by the legislature of the Hong Kong Special Administrative Region in accordance with this Law may provide for the government of the Region in all matters not specifically reserved by this Law to the Chinese People's Government, the National People's Congress or its Standing Committee. Such laws shall be reported ..."  Delete ", after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region," in the 1st sentence of the 3rd paragraph.
18	1, 6, 7	In the 3rd paragraph delete "consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and" and replace with "obtaining the consent of".  In the 4th paragraph, delete "or, by reason of turmoil ... state of emergency". Add a new 5th paragraph :-  "The Chief Executive of the Hong Kong Special Administrative Region may declare,

by reason of turmoil within the Hong Kong Special Administrative Region which the government of the Region finds to be beyond its control, a state of emergency and decree the application of emergency laws in the Region".

- 19                    8                    Replace 3rd and 4th paragraphs with :-
- "Courts of the Hong Kong Special Administrative Region shall accord due recognition to acts of the Central People's Government which according to the laws of Hong Kong are acts of state. Courts of the Region shall obtain a statement from the Chief Executive on questions of fact which according to the laws of Hong Kong are properly determinable by the sovereign government.
- Before issuing such a statement on any such question of fact which is within the responsibility of the Central People's Government, the Chief Executive shall obtain a certificate from that government"
- 22                    9                    Opening words to read :-
- "The Central People's Government and its departments ..."
- 39                    10                    Add "or those of the Bill of Rights Cap. x of the laws of the Hong Kong Special Administrative Region" at the end of the 2nd paragraph.
- 43                    11                    Delete "the Central People's Government and" in the 2nd paragraph.
- 52                    11                    Replace (2) & (3) with :-
- "(2) when the Legislative Council has passed by a two-thirds majority a vote of no confidence in him/her"
- 152                   12                    Delete "after seeking the views" and replace with "subject to the consent" at the end of the 1st paragraph.
- 157                   1, 4, 13            1st paragraph to be replaced with :-
- "The power of interpretation of this Law in respect of provisions concerning the responsibility of the Central People's Government or the Relationship between the Central Authorities and the Region shall be vested in the Standing Committee of the National People's Congress"
- Delete 4th paragraph and add :-

"This Law shall receive such fair and liberal interpretation as will best ensure the fulfilment of its purpose according to its true intent and spirit.

All interpretation of this Law shall be consistent with the established basic policies of the People's Republic of China regarding Hong Kong."

158 1

Delete 3rd paragraph.

159 14

Delete "this Law" at the end of the 1st sentence and replace with :-

"the provisions of this Law regarding affairs within the responsibility of the Central Authorities or the relationship between the Central Authorities and the Region."

Appendix II

Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region of the Standing Committee of the National People's Congress

1. The Committee shall be called "The Committee for the Basic Law of the Hong Kong Special Administrative Region of the Standing Committee of the National People's Congress".
2. The National People's Congress authorises the Committee to exercise the powers and functions hereby given to the Committee.
3. The Committee for the Basic Law shall consist of a Chairman and [four] members. The Chairman shall be appointed by the Chairman of the Standing Committee of the National People's Congress and the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region acting jointly. Two members shall be appointed by the Standing Committee of the National People's Congress. The other two members shall be appointed by the Chief Executive of the Hong Kong Special Administrative Region in the same manner as judges of the courts of Hong Kong. The Chairman and members shall be persons of eminence and shall have judicial or substantial legal experience. The Chairman shall be removable by the Chairman of the Standing Committee and the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region acting jointly after resolutions authorising his removal have been adopted by the Standing Committee and the Legislative Council of Hong Kong. Members appointed by the Chief Executive of Hong Kong shall be removable in the same manner as other judges of

the courts of Hong Kong. They shall have the same rights and immunities as judges of the courts of Hong Kong.

4. The Committee for the Basic Law shall hear and determine any question concerning this Law which has been referred to it in accordance with this Law by the Central People's Government or by the Government of Hong Kong.
5. The Committee for the Basic Law shall make decisions by majority vote and individual opinions may be given. It shall make such rules for its procedure as it may think fit. Its rules may make provision for allowing any person or body to appear before it as *amicus curiae* if they show good cause why this should be allowed.
6. The Central People's Government and the Government of the Hong Kong Special Administrative Region shall at any time be entitled jointly or severally to refer to the Committee for the Basic Law any question as to whether affairs are within the responsibility of the CPG or involve the relationship between the Central Authorities and the Region and shall both accept the decision of the Committee as binding.
7. Without prejudice to the generality of the right on the part of either the Central People's Government or the Government of the Hong Kong Special Administrative Region to refer any question to the Committee for the Basic Law set out in clause (6) herein, if at any time the Standing Committee of the National People's Congress or the State Council of China proposes to exercise any power or function concerning or arising under Articles 8, 17, 18, 157, 158 or 159 of this Law they shall before taking action inform the Chief Executive of Hong Kong. The Chief Executive may thereupon, within



thirty days, refer the matter to the Committee for the Basic Law for determination according to this Law and in that case the power or function shall not be exercised until the Committee has determined that the proposed action will be in accordance with this Law.

THE DRAFT BASIC LAW FOR HONG KONG

OPINION

of

Sir Zelman Cowen and Sir William Wade

The Opinion is arranged in four Parts as follows.

Paragraph numbers are in brackets.

Part A Preliminaries

Part B The four fundamental issues listed in para. 9 of Instructions,

- (i) Conflict with the Constitution of China (5);
- (ii) The need for a constitutional court (14);
- (iii) Responsibility of the Executive - checks and balances (24);
- (iv) The "high degree of autonomy" in three aspects :
  - (a) legislative power (32);
  - (b) the power of interpretation (38);
  - (c) the power of amendment (45).

Part C The thirteen points listed in para. 17 of Instructions,

in so far as not covered in Part B.

The substantial items are -

- (i) Defence and emergency powers (49);
- (ii) The power to reject Hong Kong legislation (53);
- (iii) Application of PRC laws to Hong Kong (58);
- (iv) Jurisdiction over PRC "acts of state" (63);
- (v) Administrative autonomy (71);
- (vi) Entrenchment of International Covenants and Bill of Rights (73);
- (ix) Bills in the Legislative Council (79);
- (x) Vested interests in the Basic Law - "pockets of power" (83).

Part D General comments and conclusions

PART A - PRELIMINARIES

1. We would make three general observations at the outset.

2. First, it is impossible to read the Joint Declaration and the Draft Basic Law without being impressed by the very extensive internal autonomy which these instruments are designed to confer upon Hong Kong during the fifty-year period beginning in 1997. The philosophy of "one country, two systems" is carried to great lengths, conflicting in many ways with the political, legal and administrative systems of mainland China. Taken at face value, the terms secured for Hong Kong in the next half-century are remarkably favourable. It cannot be denied that China has a legitimate interest in seeing that Hong Kong does not abuse its special political and legal privileges, and in being concerned in Hong Kong's defence, foreign affairs and, in the last resort, public order. The provisions of the DBL for these purposes seem, on the whole, to be based on reasonable premises. The whole picture, of course, is now distorted by the events of June 1989. But the fact remains that, contrary to much misguided comment in the press and elsewhere, Hong Kong is intended to enjoy fifty years of genuine internal autonomy, secured, so far as possible, by international agreement. The Joint Declaration is not a mere declaration of policy: it is a formal agreement, in effect a treaty (see its 7th paragraph), binding both Britain and China, and giving Britain a direct interest in seeing that it is properly implemented in the Basic law and otherwise. We make this observation from a general political standpoint purely.

3. Our second observation is that, on closer inspection, the Draft Basic Law reveals defects which may gravely weaken Hong Kong's intended autonomy. In our view the most serious defects are two, one political and one legal. The political defect is that the Chief Executive of Hong

Kong is to be given too much independent power and too little accountability to the Legislative Council. The danger is that he may be open to influence which may undermine Hong Kong's "high degree of autonomy". We do not believe that this situation is in accordance with the Joint Declaration. The legal defect is the absence of any machinery for settling disputes over the respective powers of China and the Hong Kong Special Administrative Region. The Joint Declaration and the DBL have much to say about the division of responsibilities after 1997, but nothing to say about who is to have the last word when the inevitable demarcation disputes arise. In federal systems, where there is a constitutional division of responsibilities, there must necessarily be a supreme court to settle arguments about the limits of powers. Hong Kong's position within China will not be that of a federal province, since the guarantee behind the Basic Law is not the Constitution of China itself but the treaty represented by the Joint Declaration. Nevertheless there is an analogy in the legal division of responsibilities, and the need for a legal umpire is equally great. Who is to decide, for example, when the CPG maintains that some future Hong Kong enactment is contrary to the Basic Law, but Hong Kong maintains the contrary? This problem recurs in a number of contexts and is central to the whole question of the efficacy of the Basic Law. Yet neither the Joint Declaration nor the Draft Basic Law offers any solution. Both these instruments therefore seem much less satisfactory than at first sight. Fundamental amendments in the DBL are needed, both in these and in other respects.

4. Our third observation is that our Opinion is necessarily that of British lawyers, interpreting the constitutional instruments according to ordinary British legal principles. We consider only the English text of the DBL, although the Chinese text is to prevail in case of conflict, according to the footnote which prefaces the English translation.

Whether our interpretations will prove correct in radically different circumstances after 1997 is obviously questionable. Furthermore, when acute international disputes arise, political pressures may be too strong for technical legal solutions unless there is some settled system of conventions and practices - something that is conspicuously lacking in the relationship between Hong Kong and China. All that we say must be taken subject to this caveat.

#### PART B - THE FOUR FUNDAMENTAL ISSUES

##### B-(1) - The Chinese Constitution and the "Two Systems"

5. The first of the fundamental questions put to us concerns the status of the Basic Law under the Constitution of China. Will the conflict between the fundamentals of the Chinese and Hong Kong systems of government create constitutional and legal problems and reduce the high degree of autonomy which Hong Kong is intended to enjoy?
6. The whole conception of "one country, two systems" is of course predicated on the successful coexistence of two quite incompatible philosophies of government. This is perfectly clear from the Joint Declaration. The question is whether the Chinese Constitution, as it now stands, can accommodate this conflict or whether some amendment ought to be sought to make the position clear. The objective is agreed on all sides. The problem is merely one of technique.
7. There is no need to point out all the numerous conflicts. Examples are abundant throughout the Constitution of China, for instance in Article 1 (the socialist system), Articles 2 and 3 (government by people's congresses), Article 6 (socialist public ownership of the means

of production), Articles 9 and 10 (state ownership of mineral resources, mountains, urban land, etc.), Article 15 (planned economy on the basis of socialist public ownership). On the other hand Article 31, incorporated in the 1982 Constitution for the specific purpose of providing for Hong Kong, allows "the state" to establish special administrative regions whose systems "shall be prescribed by law enacted by the National People's Congress in the light of specific conditions". On the other hand, again, Article 5 lays down: "No laws or administrative or local rules and regulations may contravene the Constitution." There is nothing to indicate how these contradictory articles are to be reconciled. What would be the position in Hong Kong, for example, if the Chinese government should lay claim to some piece of urban land under Article 10 and insist that the contrary provisions of the Basic law (e.g. Article 7) were nullified by Article 5?

8. From the Chinese point of view, if we understand correctly, a problem of this kind would hardly be recognised. There is no constitutionalism in China of the kind so familiar in western countries. Some Chinese lawyers argue that the Constitution ought to be treated as fundamental law, but others, apparently the majority, recognise no such thing. In practice the Constitution seems to be regarded more as a statement of policy than as a juridical instrument. "The Chinese employ what is described as legislative implementation of their national constitution, i.e. the constitution is interpreted by the NPC or its Standing Committee and takes on life only when its principles are enacted into legislation. There is no judicial review of legislative acts in China." (CWR Journal, p.134). The Constitution provides no sanctions for its enforcement, no court has jurisdiction to nullify a law passed by the National People's Congress, and there is no report of any such question ever having been raised. The only guardian of the Constitution is the NPC and its Standing Committee, who under Articles

62 and 67 have the duty to supervise its enforcement and to interpret it. For these various facts see The Basic Law and Hong Kong's Future, chapter 4, pp.58, 68, 69. The NPC, having itself enacted the Basic Law, would be most unlikely to overrule its provisions as being unconstitutional - unless, of course, there should be a significant change in Chinese political thought.

9. Nevertheless there are obvious possibilities of trouble when Hong Kong is brought under the Constitution of China. The contradictory provisions ought to be reconciled. Since the policy is agreed on both sides, there should be no objection in principle from China.

10. The simplest device, which might be the most acceptable to China as not requiring an alteration of the Constitution itself, would be for the Chinese government to ensure that the Basic Law was enacted by the National People's Congress by a two-thirds vote as a constitutional amendment under Article 64. The Basic Law should have an additional clause such as -

"This law shall have full effect notwithstanding any inconsistent provision of the Constitution, which is hereby amended to the extent necessary."

Alternatively, the last few words might read:

"... which is hereby modified in accordance with the policy of "one country, two systems.""

11. The next best alternative, perhaps, would be to insert a new clause in Article 31. Just as the Constitution provides for areas of regional autonomy by Article 4 and then provides in detail for their institutions in Articles 112-122 (supplemented by Article 62(13)), so it would be

logical and symmetrical for the Constitution to provide for the Basic Law of a special administrative region by adding a clause to Article 31 on these lines:

"Where a Basic Law for a special administrative region is so enacted, it shall have full effect notwithstanding any inconsistent provision of the Constitution."

A clause of this kind would have to be enacted as a constitutional amendment by a two-thirds majority vote.

12. A similar suggestion is made in the CWR Journal, p.70: that Article 31 should be amended so as to stipulate that

"Within a specified period of time, special administrative regions will not be bound by certain provisions of the Constitution."

As it stands this would be excessively vague, but if "inconsistent provisions" were substituted for "certain provisions" it might be satisfactory.

13. Any of these suggested provisions would establish beyond doubt that the Basic Law was the paramount law of Hong Kong and that all its rules about amendment, interpretation, etc., would operate without any risk from the Constitution of China.

#### B-(ii) - The Need for a Constitutional Court

14. As we observed in our preliminary remarks, an outstanding weakness of the DBL, as also of the Joint Declaration, is that no satisfactory provision is made for the resolution of differences of opinion over the



division of powers between the CPG and Hong Kong. On the Chinese side this is not surprising, since as pointed out above, constitutional litigation is unknown in China and the extent of government powers is a matter for political, not legal, determination. But it is surprising that no legal safeguards were secured by the British side, particularly since the Joint Declaration has the force of an international treaty only and has no means of enforcement other than diplomacy. The provisions for Hong Kong's "high degree of autonomy" demand that there should be a clear separation and allocation of powers as between the CPG and Hong Kong, and it is of the greatest importance that this should operate smoothly. British colonial constitutions, as also the federal constitutions of Canada and Australia, have always contained judicial machinery for settling arguments about powers. Yet they are conspicuous by their absence in the Joint Declaration and the DBL. The danger of insoluble disputes is obvious.

15. In the Appendices of the DBL booklet there is indeed a proposal by the Drafting Committee that a "Committee for the Basic Law of the Hong Kong Special Administrative Region" should be established under the Standing Committee of the NPC, with six mainland and six Hong Kong members, including lawyers, "to study questions concerning the implementation of articles 17, 18, 157 and 158 of the Basic Law;" and those Articles contain requirements that the proposed Committee shall be consulted by the Standing Committee of the NPC before it issues rulings under them. (We think that Articles 8 & 159 ought to be included also.) Similar suggestions were put forward in the CWR Journal (pp.116, 143). But an advisory committee of this kind, which will merely give its views to a non-judicial body, is a far cry from the judicial procedure which the situation demands. It can be said in its favour that the proposal at least shows a consciousness that there is a need for machinery for the resolution of demarcation disputes, and that it is quite possible

that such a committee would prove helpful in the absence of anything better, especially if it has strong legal membership. But what is really required is a constitutional court which can determine judicially and independently the disputes about powers to which the Basic Law is sure to give rise. The Foreign Affairs Committee of the House of Commons, in its recent report (HC 281, 28 June 1989) now calls for a "Joint Constitutional Court situated in Hong Kong which will continue to interpret the laws in accordance with the legal principles which have hitherto held sway in the Territory" (para. 2.8). We are in agreement with the Committee and we are asked to advise on the possibility of setting up some such court as the Committee recommend.

16. The composition of a joint constitutional court presents the obvious problem that China and Hong Kong ought to be equally represented, yet the number of judges ought to be an odd number in order to prevent deadlocks. A court which can be deadlocked is most unlikely to be satisfactory and we think that an odd number of judges is essential. This could be achieved in a variety of different ways, all of which are open to objection in one way or another. It could be provided that the president of the court should be appointed jointly by the Chinese and British Governments, they being the two parties to the Joint Declaration and Britain having a continuing interest in its observance; or by a joint China - Hong Kong commission (compare Article 87 of the DBL); or jointly by the Chairman of the Standing Committee of the NPC and the Chief Justice of Hong Kong, they being the two individuals primarily concerned with interpretation of the Basic Law. An alternative scheme would be to appoint joint presidents of the court, one from mainland China and one from Hong Kong, but to give the joint presidents only a single vote, so that they would have to agree before casting it. Yet a further possibility - though probably a remote one in terms of practical politics - would be to appoint a chairman from some

foreign country by mutual agreement between the CPG and Hong Kong. This was the arrangement in the case of Cyprus under the constitution of 1960, when because of the antagonism between the Greek and Turkish communities the constitutional court was composed of one Greek and one Turkish judge with a German academic lawyer as president. It was not a successful experiment, since the German president resigned in 1963, complaining of pressure put on him. Quite apart from the improbability of securing Chinese consent, we would not recommend that solution for Hong Kong. After 1997 the CPG and the Hong Kong government are going to have to work out their modus vivendi and this will require them to agree on many matters. We hope that it is not necessary to assume that disagreement is inevitable. At any rate, there is no escaping the problem and some way of harmonising the views of the two sides will have to be found.

17. On the whole we would favour a joint court of five members, two appointed by the Standing Committee of the NPC and two by the Chief Executive of Hong Kong on the recommendation of the Article 87 commission, with a president appointed by the chairman of the Standing Committee (or his deputy) and the Chief Justice of Hong Kong in collaboration. Our least favoured alternative for the appointment of the president is a commission, since the fewer the people concerned, the less dissention there is likely to be. The Hong Kong members should have the same tenure and independence as the higher Hong Kong judges. The Chinese members ought to be subject to similar conditions, if that can be secured. Removal of the president should require the consent of the two governments. Decisions should be by a majority and individual opinions should be allowed. We do not attach importance to the title "constitutional court". In reality the court will necessarily be constitutional, but it could also be entitled "Court of Interpretation", "Basic Law Court", "Court of Conflicts" (compare the French Tribunal des

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Conflicts), "Court of Arbitration" or even "Special Court". In our opinion, there will be no infringement of sovereignty as the court will not have jurisdiction to interpret the Chinese Constitution. Indeed, the Chinese Constitution will not be involved, and the power of interpretation of the DBL can be delegated to the proposed court in the same way as is already provided in Article 157.

18. The jurisdiction of the joint constitutional court ought in our opinion to be conferred on the principle that as much jurisdiction as possible ought to be left to the ordinary courts of Hong Kong which in a wide range of cases will be able to interpret the Basic Law under the provisions of Article 157. The joint constitutional court should be invoked only where unilateral action by the CPG would otherwise infringe Hong Kong's autonomy. The machinery would be for negotiation, but we suggest that it might be as follows. First, whenever the Standing Committee of the NPC are disposed to take action under Articles 17, 18, 157, 158 or 159, or the State Council are disposed to take action under Article 158, the government of Hong Kong should be notified beforehand and should then be entitled to refer the matter to the joint constitutional court. That court would then hear argument by the two governments and would have discretionary jurisdiction, to be exercised sparingly, to admit any individual or organisation to appear as *amicus curiae*. The court's decision would be accepted as binding by both governments. This would be a strictly limited jurisdiction, to be invoked only by the Hong Kong government when it disagreed with some action proposed by China under the Articles referred to above. In that way the minimum complication would be introduced into the regular legal system of Hong Kong while the essential protection of Hong Kong's autonomy would be secured.

19. In the second place it should be provided that either government might state a case for the opinion of the joint constitutional court on any question concerning the Basic Law. That would cover any cases which might fall outside the specified Articles, for example if the CPG intended to requisition land in Hong Kong "for defence" but the Hong Kong government claimed that it was really wanted for other purposes or if Hong Kong intended to take some action which China believed to be contrary to the Basic Law. It would enable the court's opinion to be taken before such intention is carried out. In this way there might be established a practice of non-contentious judicial review of the kind discussed in the CWR Journal (p.142) as "review principaliter" (i.e. in the abstract, detached from any litigation) as opposed to "review incidenter". In principle we are in favour of this.

20. The primary rule which we recommend for limiting the jurisdiction of the joint constitutional court would enable it to rule on all the matters enumerated in para. 12 of our Instructions, but only where the CPG was disposed to take action. We think that in other cases it would be greatly preferable for the Court of Final Appeal of Hong Kong to exercise its own jurisdiction under the authorisation due to be given by the Standing Committee of the NPC under Article 157. We do not therefore propose that any Hong Kong court should be required, or even empowered, to refer matters to the joint constitutional court. In our opinion the Court of Final Appeal ought whenever possible to resolve constitutional questions for itself and so build up its own body of precedents. In the early period after 1997 it is possible that great numbers of constitutional points will be raised by litigants in the Hong Kong courts and if they all had to be referred to the joint constitutional court there would be great confusion, inconvenience and delay; and also, probably, unwelcome political controversy. Under the scheme which we propose the cases coming before the joint constitutional



court would be relatively few and we think that it will be for the benefit of Hong Kong's autonomy that they should be as few as possible.

21. The legitimate interest of the CPG in the proper administration of the Basic Law has to be acknowledged. The difficulty of persuading them of the need for a joint constitutional court will lie in the fact that there is no system of constitutional adjudication in China. They will need to be convinced of the logic of the British system of resolving problems of division of powers. We hope that it will prove possible to persuade them that a judicial system will be the system most likely to give satisfaction on both sides and that by minimising political controversy it will assist the smooth accession of Hong Kong to China.

22. We have put forward what seem to us to be the best suggestions for the constitution and jurisdiction of the suggested court, without going into the many variations of detail which would be possible. We quite understand that variations of detail may be preferred and may prove necessary in the course of negotiation. The important matters are the central principles.

23. A draft of a possible Article constituting the court is annexed to this Opinion.

B-(iii) - Responsibility of the Executive - Checks and Balances

24. It is of vital importance for the autonomy of Hong Kong that the executive power should be fully accountable to a legislature which itself is freely chosen in Hong Kong. Unless these relationships are established, all the other provisions for autonomy may be undermined by political pressures.

25. The Joint Declaration expressly provides for the correct chain of responsibility in Annex 1, Part 1, third paragraph:

"The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature."

The DBL, however, fails to carry out this plan. Article 43 provides that the Chief Executive

"shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law."

And Article 64 makes the Hong Kong Government "accountable to the Legislative Council" in four specific respects, of which the only important ones are implementing legislation and obtaining approval for taxation and expenditure. This is a severely limited accountability. The Chief Executive and the Government are given various powers and functions by Articles 48 and 62 respectively, but they include little accountability. If these express heads of accountability are to be the only ones covered by the words "in accordance with the provisions of this Law" in Article 43 there will be little accountability indeed.

26. The Chief Executive is in fact given a position of power and independence by the DBL. He is to hold office for five years, with the possibility of one renewal, and the only circumstances under which he must resign, apart from incapacity, are when the Legislative Council three times passes a bill over his veto, with an intervening dissolution, or when the Legislative Council twice rejects an important bill, again with a dissolution intervening (Article 52). These are cumbersome procedures and will certainly not give the Legislative

Council effective control over the Chief Executive or make him accountable to it. We agree with the comments of the Foreign Affairs Committee of the House of Commons in their report already cited (para.15) that "the Chief Executive resembles much more a President than a Prime Minister"; that "the balance is weighted over much in favour of the Chief Executive"; and that "in order to guarantee a high degree of autonomy, it is necessary that, where there is an irreconcilable conflict between the Legislative Council and the Chief Executive, the Chief Executive should resign" (paras.3.20, 3.21, 3.22).

27. The powerful and virtually irremovable Chief Executive provided for in the DBL is evidently modelled on the Governor of Hong Kong, who under the present constitution of Hong Kong, which remains in a primitive colonial form, has in law complete power and is responsible only to the British government in London. The scheme of the DBL is broadly to continue these arrangements, substituting Beijing for London, subject only to the very limited accountability in Hong Kong already mentioned. In our opinion this scheme is in clear conflict with the Joint Declaration and a serious danger to Hong Kong's promised autonomy. The only real security for autonomy is to make the tenure of the Chief Executive dependent upon the continuing confidence and support of the people of Hong Kong as expressed in the Legislative Council, so that if at any time a vote of no confidence is carried against him in the Legislative Council, he must resign.

28. A presidential-type constitution with a separation of powers between executive and legislature is, in other words, unsuitable for Hong Kong after 1997. As the House of Commons Foreign Affairs Committee put it (para.3.21), "The balance of power between executive and legislature must be such that the legislature is able to keep a proper check on the executive". This is impossible where a President has a



fixed term of office and cannot be removed except by slow and clumsy procedures such as passing legislation over his veto, refusing to vote supply or impeachment. It seems to us self-evident that the British model of responsible government, i.e. government continuously enjoying the confidence of Parliament, is what is needed - and what the Joint Declaration intended. It could be simply incorporated by the DBL by inserting in Article 52:

"(2) when the Legislative Council has passed [by a two-thirds majority] a vote of no confidence in him/her."

Paragraphs (2) and (3) of the present draft would then become unnecessary, though they could be retained if desired.

29. The DBL contains other indications of the powerful position of the Chief Executive vis-a-vis the Legislative Council, for example his power to dissolve it under Article 50. But none of them will matter much if the fundamental principle of responsible government is firmly established in the way that we think essential.

30. The method of appointment of the Chief Executive will have an important bearing upon his accountability to the Legislative Council. The choice of method will be very much a matter of internal Hong Kong politics, and proposals range from election by the whole electorate to election by an electoral college composed of members of the Legislative Council, leading members of the community, and so forth. The DBL in Article 45 (ignoring the contradictory third paragraph) leaves the question open as between election and local consultations, though making "general election" the ultimate aim. The point we would make here is that, unless there is to be a party system like the British, there is no guarantee that a Chief Executive, whether elected by universal suffrage



or an electoral college, will enjoy the confidence of the Legislative Council. Logic therefore points towards choice of the Chief Executive by the Legislative Council itself, so that they will be in harmony from the start. Logic likewise points to the selection of all members of the Legislative Council by general election, as Article 67 declares to be the ultimate aim, though meanwhile making no specific provisions. We fully understand that there may have to be a long transitional period and that there are objections to universal suffrage in the near future because it may stir up antagonisms, party politics and other disturbing influences, with the danger of destabilising society and imperilling Hong Kong's smooth accession to China. Choice of the Chief Executive by a broadly based electoral college, as advocated by the Business and Professional Group on whose behalf we are instructed, may well prove satisfactory in the interim period before the Legislative Council is fully elected. These are essentially matters for decision in Hong Kong which will not directly affect its autonomy vis-a-vis China, and it is probably not for us to go further into them.

B-(iv) - Threats to the "High Degree of Autonomy"

31. The fourth fundamental issue which we are asked to consider by paras. 9 and 16 of our Instructions is whether the "high degree of autonomy" promised by the Joint Declaration is achieved by the DBL. In our preliminary remarks we drew attention to what we regard as the two most serious threats to Hong Kong's autonomy, namely the inadequate accountability of the Chief Executive and the lack of any procedure for resolving disputes over the division of powers. Other dangers are to be feared in a number of the specific provisions and situations catalogued in para. 17 of our Instructions. Three of these are of special

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importance and we therefore proceed to discuss them at this point. They are -

- (a) legislative power;
- (b) the power of interpretation;
- (c) the power of amendment.

The remaining questions will be discussed in Part C. In fact the whole of this Opinion is an attempt to assess the degree of autonomy which the DBL will provide, and we will summarise our conclusions in Part D.

B-(iv)-(a) - Legislative Power

32. It is abundantly clear, in our opinion, that the Hong Kong legislature is intended to have general legislative power over all the laws of Hong Kong save only in certain defined areas. The Joint Declaration provides for this in Part II of Annex I, stating that the Hong Kong legislature is to be able to amend any pre-1997 law and also to enact valid legislation in accordance with the Basic Law. No other limit is mentioned. If the Hong Kong legislature were not to have this general legislative power, the promised high degree of autonomy would be illusory.

33. The DBL effectuates this policy through a group of scattered provisions. General legislative power is conferred by Article 72(1) ("To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures"), no limits being expressed. Power to amend pre-1997 law is conferred by Article 8. Article 11 invalidates laws which are inconsistent with the Basic Law. Article 18 provides that National (i.e. Chinese) laws shall not be applied in the HKSAR

unless listed in Annex III; and that the laws so listed "shall be confined to those relating to defence and foreign affairs as well as other laws outside the limits of the autonomy of the Region as specified by this Law". An example of a law falling within these last words would be a law of the NPC amending the Basic Law, which unless so listed could not apply to Hong Kong, being a national law. Article 20, providing that additional powers may be granted to Hong Kong by the Central Authorities, is in our opinion neutral in this matter and contains no implication that Hong Kong's legislative power is limited.

34. Despite this clear picture, we understand that some eminent authorities have expressed the opinion that Hong Kong is not intended to have general legislative power over all matters not expressly mentioned in the Basic Law - a very grave possibility if it is taken seriously.

35. If those opinions were correct, Hong Kong's legislative powers would be restricted to matters authorised expressly or impliedly in the Basic Law, such as amending pre-1997 laws (Article 8), treason etc. (Article 23), human rights (Article 39), finance (Article 109), social welfare (Article 144), labour law (Article 146) - there will be many other examples. But many other articles, e.g. Articles 118, 135, 137, 138, 142, do no more than authorise the Hong Kong government to "formulate policies". They confer no power to legislate. Yet legislation will often be needed to carry out the policies. We regard this as a strong indication that the draftsmen took it for granted that Hong Kong would possess general legislative power in all areas other than defence and foreign affairs and legislation conflicting with the Basic Law.

36. Suppose, for example, that the Hong Kong government wished to introduce dog licensing. No specific power to legislate about this is

conferred by the DBL. Unless it is covered by the general power, Hong Kong's degree of autonomy will be low indeed. Or suppose, to take a more serious example, that new criminal offences need to be created to counter some new abuse. The DBL is silent as to the criminal law. It would be absurd if Hong Kong could not legislate for this reason. Unless Hong Kong has general legislative power, there will be a great many such matters on which there will be a legislative vacuum, because it would plainly be wrong for the NPC to legislate - and, again, a very low degree of autonomy would result.

37. The risk is plainly too serious to be ignored and some clarifying provision is essential. Our instructions suggest that there should be a "paramount clause", as by adding to the first sentence of Article 17:

"... to enact laws for the peace, order and good government of the Region and all other matters except those reserved by this Law for the Central People's Government."

We agree with the intention of this proposed amendment. But on its words there might still be argument about what matters were reserved for the CPG, if the Chinese contended that they included the residual area as mentioned above; and the "peace, order and good government" formula, used in so many colonial constitutions to indicate general legislative power, might not be understood by the Chinese. We would suggest instead that the second sentence of Article 17 should read:

"Laws enacted by the legislature of the Hong Kong Special Administrative Region in accordance with this Law may provide for the government of the Region in all matters not specifically reserved by this Law to the Chinese People's Government, the National People's Congress or its Standing Committee. Such laws shall be reported, etc."



We think that the words "not specifically reserved" should make it impossible for there to be any further misunderstanding about general legislative power or about the meaning of the general sweep-up clause of Article 18 ("other laws outside the limits of the autonomy of the Region").

B-(iv)-(b) - The Power of Interpretation

38. The power of interpretation of the Basic Law is vested by Article 157 in the Standing Committee of the NPC. The Standing Committee is required to authorise the courts of Hong Kong to interpret the Basic Law in adjudicating cases, but on any point relating to the responsibility of the CPG or its relationship with Hong Kong the court must refer to the Standing Committee and accept its interpretation. In all cases the Standing Committee must first consult its Committee for the Basic Law.

39. All comment from the British and Hong Kong sides has been highly critical of this Article since it commits interpretation, which ought to be a judicial function, to a non-judicial body. It exposes the gulf between British and Chinese constitutional thinking, there being in China no conception of constitutional judicial review, as already mentioned (para.8). When committed to a non-judicial body such as the Standing Committee, the power of interpretation is in effect a power of legislation and in this case it may amount to a power of constitutional amendment, treating the Basic Law as constitutional for this purpose, as in substance it is.

40. Yet the power of amendment of the Basic Law, vested in the NPC by Article 158, is confined within the limits of the "established basic policies" of the PRC, which must mean those annexed to the Joint

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Declaration. A first comment on Article 157, accordingly, is that the power of interpretation ought to be similarly confined. All interpretation should be consistent with the Joint Declaration. The Basic Law needs to be firmly linked to the Joint Declaration in Article 157 just as much as in Article 158. This could be done by a short addition such as -

"All interpretation of this Law shall be consistent with the Sino-British Joint Declaration."

The Joint Declaration is referred to in this summary way in the Preamble and we take it that that suffices.

41. A second comment is that there is no reason why the Standing Committee should be empowered to interpret provisions of the Basic Law which are the sole concern of Hong Kong. The DBL contains a great many of these. If for example it is alleged that some discriminatory action violates Article 25 ("All Hong Kong residents shall be equal before the law"), the true meaning of that Article should be no concern of the Standing Committee. The first paragraph of Article 157 ought therefore to read as follows.

"The power of interpretation of this Law in respect of provisions concerning the responsibility of the Central People's Government or the Relationship between the Central Authorities and the Region shall be vested in the Standing Committee of the National People's Congress."

42. There would still be cases, however, where there was argument about the division of responsibilities as between the two governments, and unless some acceptable judicial procedure can be devised Hong Kong's autonomy will be at risk. The Foreign Affairs Committee of the House of Commons, in para. 2.8 of their Report already cited (para.15), saw the

solution in a joint constitutional court situated in Hong Kong. We have already expressed our agreement with that proposal and put forward a scheme for such a court and explained the jurisdiction which, in our view, should be conferred upon it. It would allow the CPG or the government of Hong Kong to refer to the court any proposed ruling of the Standing Committee, whether or not arising out of a case before a Hong Kong court. That would be, in our opinion, much the best of the solutions which seem to be practicable at the present stage.

43. If a joint constitutional court cannot be constituted, everything possible should be done to strengthen the position of the Standing Committee's Committee for the Basic Law, which as proposed in an Appendix to the 1989 draft is at least to have equal representation from Hong Kong, including lawyers, among its twelve members. The Standing Committee might be asked to observe a convention that it should always accept its committee's advice, much as the Queen accepts the advice of the Judicial Committee of the Privy Council. If such a convention could be established, legislative interpretation would be effectively superseded and Hong Kong's autonomy would be better protected.

44. For purposes of interpretation we think also that it is important that there should be an authentic English text of the Basic Law. A footnote to the Resolution of the Standing Committee of the NPC printed as a preface to the DBL states that in case of discrepancy the Chinese version is to prevail, though it is not clear what authority this note will have. If it is legally effective, there are likely to be many arguments in the higher Hong Kong courts, whose normal language is English, based on the superior force of the Chinese text and many difficulties will arise. Hong Kong itself is already adopting a policy of enacting legislation in both languages, both versions to be equally authentic (The Basic Law and Hong Kong's Future, p.192). It is the



English version of the Basic Law which will most often require to be interpreted and it is obvious that there ought to be an authentic English text of it, as with Hong Kong legislation generally. This could be provided by Hong Kong legislation and it would be desirable to obtain the approval of the CPG to the English text.

B-(iv)-(c) - The Power of Amendment

45. The power to amend the Basic Law is vested in the NPC by Article 158. Amendments may be proposed by the Standing Committee of the NPC, the State Council and Hong Kong; but proposals from Hong Kong are to require the consent of two-thirds of the Hong Kong deputies to the NPC, two-thirds of the members of the Legislative Council and the Chief Executive. In all cases the Committee for the Basic Law is to study the amendment and submit its views.

46. An important restriction in this Article is that "No amendment of this law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong". This is a reference to the Joint Declaration, where those policies are set out in Paragraph 3 under twelve heads and extended in further detail by the "elaboration" of the CPG in Annex I. The Joint Declaration, however, is expressly referred to only in the Preamble to the DBL. Although there can be no doubt what the final words of Article 158 must mean, an express reference to the Joint Declaration would be preferable, similar to that recommended above (para.41) in the case of Article 157.

47. Since the basic policies are very far-reaching, and since they contain all the important principles for assuring Hong Kong's autonomy, the result is that the power of amendment will be available only for

relatively minor matters and ought not to represent a threat to autonomy. A large part of the Basic Law will consist of the translation into legal language of the basic policies, so that its primary provisions will not be subject to amendment.

48. There remains the problem of how to settle differences of opinion between the two governments if the validity of some amendment should be disputed. The Committee for the Basic Law, being advisory only, does not seem satisfactory for this purpose. Once again, the right solution is to be found in a constitutional court, and we have included Article 158 in our recommendation above (para.18), that the constitutional court should determine the question if Hong Kong wished to dispute any proposal by the CPG. If the validity of an amendment should come into question in the Hong Kong courts, this would presumably involve "the responsibility of the Chinese People's Government or the relationship between the Central Authorities and the Region", so that the court would have to seek an interpretation from the Standing Committee. But if the constitutional court should be established, the Hong Kong government could obtain a reference to it under the scheme which we have proposed (para.18).

#### PART C - MISCELLANEOUS QUESTIONS

##### C-(1) - Defence and Emergency Powers

49. Article 14 of the Draft Basic Law states categorically that, while the CPG is to be responsible for defence of the HKSAR, the Hong Kong government is to be responsible for the maintenance of public order in Hong Kong. The CPG's military forces in Hong Kong are not to interfere in local affairs and are to "abide by the laws of the HKSAR". That

formula does not make it entirely clear whether these military forces are to be subject to the ordinary jurisdiction of the Hong Kong courts. On the face of it they should be, since an obligation "to abide by the laws" necessarily includes submission to the jurisdiction which enforces those laws, which is part and parcel of those laws themselves.

50. Article 14 seems accordingly basically reasonable. In particular, its provision that in times of need the Hong Kong government may ask for assistance from the CPG garrison is well formulated, since it leaves the initiative to the Hong Kong government.

51. Overriding emergency powers are however reserved to the CPG by Article 18, fourth paragraph, and in the context of the martial law imposed on protesting students and others in mainland China recently, are naturally a source of anxiety. They provide that in wartime or "by reason of turmoil within the HKSAR which is beyond the control of the Region" the Standing Committee of the NPC may decide that the Region is in a state of emergency, whereupon the State Council may decree the application of relevant national laws. Martial law could therefore be imposed upon Hong Kong at the will of the Chinese authorities and it might override all the civil liberties and judicial protection which the Basic Law provides. It could be argued, perhaps correctly on a strict reading of the English text, that "turmoil ... which is beyond the control of the Region" implies an objective test, so that the question whether the turmoil is beyond control is a jurisdictional fact, i.e. a condition precedent, to be determined by the Hong Kong courts on evidence before the Standing Committee can have power to intervene. It is not as if the article said "which the Standing Committee considers to be beyond the control, etc.". But in the sort of situation contemplated by Article 18, where immediate and drastic emergency action is likely to

be required, it would be quite unrealistic to expect this argument to be decisive.

52. The principle of English law is that the legality of martial law is a justiciable issue, and that the use of force to any extent by the military is justified only where the court is satisfied that there was either a state of war or else a state of such disorder that the ordinary courts were unable to function: see Ex parte Marais [1902] A.C. 109; R. v Allen [1921] 2 I.R. 241. But if a difference of opinion should arise between Hong Kong and China as to whether "turmoil" in Hong Kong was "beyond the control of the Region", it would, once again, be quite unrealistic to expect it to be settled by legal argument. A much better safeguard would be to provide that the Hong Kong government should be allowed to decide whether matters had gone beyond its control. This would not be unreasonable, or in any way contrary to the scheme of the Basic Law, since the Hong Kong government is, after all, the authority responsible for public order in the Region under Article 14, it will be in the best position to judge the situation, and it is the natural authority to bear the responsibility. Article 14 already provides that the Hong Kong government may "in times of need" ask the CPG for assistance from the garrison and thus provides the model which Article 18 ought to follow. It is understandable that the draftsmen of the Basic Law thought it right to retain an ultimate emergency power for the CPG. But when such very extensive responsibilities are entrusted to Hong Kong by that law in almost every other respect, it is surely right that the responsibility for public order should include the duty to say when the situation is beyond control. We would therefore recommend that in the fourth paragraph of Article 18 the words "which is beyond the control of the Region" should be replaced by

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"which the government of the Region finds to be beyond its control",

A more precise alternative would be "declares to be beyond its control".

A parallel is provided by Section 119 of the Constitution of Australia:

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

That is exactly the substance of the rule required.

C-(ii) - The Power to Reject Hong Kong Legislation

53. Article 17 of the DBL empowers the Standing Committee of the NPC to return, and thereby nullify, any Hong Kong enactment which they consider to be contrary to the Basic Law's provisions about the CPG's responsibilities or the relationship between the CPG and Hong Kong. This provision could amount to a power of veto over legislation which is considered to offend in either of the two respects mentioned.

54. The CPG admittedly have a legitimate interest in seeing that Hong Kong legislation does not trespass outside its allotted territory and usurp the CPG's responsibilities. On the other hand, as we have already pointed out (para.3), the situation is one which cries out for some system of impartial judicial determination of the kind which the DBL fails to supply. If a joint constitutional court can be established, as suggested above (para.15), the best solution will have been found. Failing that, there is no alternative to leaving one side or the other to decide in its own discretion whether any given Hong Kong law does or does not infringe the CPG's powers of position under the Basic Law.

55. The objection to leaving the decision to the Standing Committee of the NPC is that the Committee is not a judicial body and at least in the eyes of a British lawyer it is wrong for such a body to decide questions of law which should be determined judicially. As can be seen from the Journal of Chinese Law, Spring 1988, p. 76, it has been suggested by some of the Chinese drafting committee that the Standing Committee should refer such questions to the Hong Kong Court of Final Adjudication for judicial decision. We would strongly advise an amendment to this effect, if it can be secured. The deletion of this part of Article 17 would be both harder to obtain in the negotiations and also less satisfactory, since there would then be no express provision about these conflicts and there might be troublesome controversies about who had jurisdiction to enforce the provision in Article 11 that no Hong Kong enactment should be inconsistent with the Basic Law.

56. This part of Article 17 differs in an important respect from its predecessor in that it restricts the Standing Committee's interventions to cases where Hong Kong enactments are considered to infringe "the responsibility of the Central Authorities or the relationship between the Central Authorities and the Region." Unlike the 1988 version, it gives no power to intervene in other conflicts between Hong Kong legislation and the Basic Law, which the courts of Hong Kong will be left to adjudicate under Article 157. This is a substantial improvement, provided always that the Article is interpreted fairly.

57. The Standing Committee is also given power by Article 159 to reject any pre-1997 Hong Kong laws which it considers to be inconsistent with the Basic Law. But this Article does not contain the restriction mentioned in the preceding paragraph. It seems clear that it ought to do so. Disputes ought also to go to the constitutional court and we have included Article 159 in its suggested jurisdiction (para.18).

C-(iii) - Application of PRC Laws to Hong Kong

58. In general the laws of the PRC are not to apply in Hong Kong, as Article 18 provides. But exception is made for a group of laws listed in Annex III. This is a departure from the 1988 Draft, which specified only PRC laws relating to defence and foreign affairs "as well as other laws which give expression to national unity and territorial integrity". That formula was criticised as dangerously imprecise, and it has now been replaced by the specific list in Annex III to which no objection can be raised in its present form.

59. But the new draft would allow the Standing Committee of the NPC to make additions to or deletions from the list in Annex III, which is to be confined to laws "relating to defence and foreign affairs as well as other laws outside the limits of the autonomy of the Region as specified by this Law". This version seems even more objectionable than the 1988 draft, since it is open to all the arguments over legislative power discussed above (para.34), which have to be settled before we can say what the "limits of the autonomy of the Region" may be. The acceptability of this part of Article 18 therefore stands or falls with the resolution of those arguments, which as we have already emphasised is a vital question.

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60. This problem, like so many others, would disappear if a joint constitutional court could be constituted to which the Hong Kong government could refer the legality of any addition to Annex III proposed by the Standing Committee.

61. Failing a constitutional court, some safeguard against improper additions to Annex III ought to be sought by negotiation. The Joint Declaration, in Annex I, Part II, 3rd paragraph, stated what were to be

the laws of Hong Kong without any mention of PRC laws; and in Annex I, Part I, 2nd paragraph it mentioned only "defence and foreign affairs" as exceptions to Hong Kong's legislative power. Any addition to Annex III of the Basic Law will be an extension of the PRC's powers at the expense of Hong Kong's autonomy and a departure from the Joint Declaration. It should therefore be a matter for negotiation and agreement as each case arises and not a unilateral power of the CPG. We do not suggest that there are any sinister intentions behind the new version of Article 18, but a loophole of this kind ought to be closed as a matter of principle. We would hope that this should not prove difficult.

62. As to the provisions about "turmoil" and emergency laws in the final paragraph of this Article, see paras. 52-53, above. It would be more consistent with Hong Kong's autonomy, which includes responsibility for public order (Article 14), if Hong Kong's own emergency laws rather than Chinese national laws were to be specified.

C-(iv) - Jurisdiction over PRC "Acts of State"

63. The independent judicial power of the Hong Kong courts, and their power of final adjudication, is assured by Article 19. But there are mysteries about this article. In the first place, it is footnoted as not having been adopted, having failed by two votes to obtain a two-thirds majority in the Drafting Committee. It is not therefore clear why it is printed in the revised draft, or what other version, if any, is likely to be preferred. Secondly, its provisions about "acts of state" and "facts of state" are not clear. Since this Article is the primary provision about the powers of the Hong Kong courts, it is of great importance.



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64. Plainly it is indispensable that the first two paragraphs of Article 19 should stand. But since they appeared in identical words in the 1988 DBL, we assume that there is no controversy about them.

65. The third paragraph of this Article, on the other hand, proved acutely controversial. In its 1988 form (then Article 18) it provided that the Hong Kong courts were to have no jurisdiction over "cases relating to defence and foreign affairs, which are the responsibility of the Central People's Government and cases relating to executive acts of the Central People's Government". The first part of this formula was objectionable as conflicting with Article 157, third paragraph, which gives the Hong Kong courts qualified jurisdiction over "affairs which are the responsibility of the Central People's Government", i.e. defence and foreign affairs, and also as conflicting with the provision of Article 14 that members of the CPG's Hong Kong garrison shall abide by the laws of Hong Kong, which as we have already indicated should mean that the Hong Kong courts should have jurisdiction over them. The second part was fundamentally unacceptable in that it appeared to exempt all executive action taken by the CPG from the jurisdiction of the Hong Kong courts, thus violating the rule of law.

66. In the 1989 DBL, so far as it may go in its "not adopted" form, both these restrictions have disappeared. It is now provided merely that the Hong Kong courts shall have no jurisdiction over "cases relating to the acts of state". If these words (ignoring the misused "the") are to be given their ordinary legal sense, according to British law, they are a major improvement. There is no longer any restriction relating to defence and foreign affairs. The change from "executive acts" to "acts of state" alters the sense entirely, since in British law acts of state are immune from judicial review only if committed outside the jurisdiction and (usually) against foreign nationals. Examples of

acts of state are the annexation and administration of foreign territory, the blockading of foreign ports, the invasion of a foreign country (as in the Suez fighting in 1956) and acts of warfare (as against Argentina in 1982). In British law, and thus in the law of Hong Kong, it is always for the court to determine whether the Crown's plea of act of state is justified: see for example Johnstone v Pedlar [1921] 2 A.C. 262 and Nissan v Attorney-General [1970] A.C. 179, both rejecting such pleas. The fundamental point for present purposes is that, as the House of Lords made clear in the former case, act of state cannot be pleaded for acts done within the realm, i.e. within the area in which the legal system operates. Otherwise there would be a wide breach in the rule of law. Under the new version of Article 19, according to these rules, the Hong Kong courts will be deprived of jurisdiction only over acts of the CPG committed outside Hong Kong and also (though this is probably theoretical) outside mainland China. They could not therefore determine the legality of Chinese acts of hostility against, for example, Taiwan. But the Hong Kong courts would be able to reject any plea of act of state in respect of anything done in Hong Kong itself. In other words, the CPG is fully subject to the law of Hong Kong within the SAR. The position therefore seems satisfactory - but it depends entirely upon Article 19 being adopted in its provisional form, and upon our understanding of the words "the acts of state" being right. If they are to mean "acts of the state", then all the objections to the 1988 version still apply. Clarification and reassurance are here indispensable.

67. There is then the curiously worded clause about "facts of state", an expression not familiar in British law. We understand that it is intended to mean facts which the courts require to be proved by a certificate from the government, for example certifying whether some foreign government is or is not recognised, whether some person is or is

not an accredited diplomat, or whether some place is or is not part of the territory of some foreign country. If that is correct, the procedure laid down in Article 19, requiring the Hong Kong court to obtain a statement from the Chief Executive, who in turn must obtain a certificate from the CPG, is in effect the same as the court should follow in any case. To this there can be no objection as regards the external affairs of the CPG. But under Articles 149-156 Hong Kong is to enjoy external affairs powers of its own, so that it may enter into international agreements independently of China and continue to observe treaties to which China is not a party. These also may require "facts of state" to be certified, for example whether some island is part of Malaysia for the purposes of a trade agreement between Malaysia and Hong Kong. This should not be the concern of the CPG and the final certifying authority should be the Chief Executive.

68. We do not think that Article 12-1 of the new PRC Administrative Litigation Law, to which our Instructions draw attention, affects the position in any way. It appears to provide that People's Courts are not to allow suits challenging government actions concerned with defence or diplomacy, and "state acts" appears to mean merely "acts of the state".

69. As invited by our Instructions we have redrafted Article 19 to take account of our various criticisms. We suggest that it should read as follows.

(1st and 2nd paragraphs stand unchanged)

"Courts of the Hong Kong Special Administrative Region shall accord due recognition to acts of the Central People's Government which according to the laws of Hong Kong are acts of state. Courts of the Region shall obtain a statement from the Chief Executive on questions of fact which according to

the laws of Hong Kong are properly determinable by the sovereign government.

Before issuing such a statement on any such question of fact which is within the responsibility of the Central People's Government the Chief Executive shall obtain a certificate from that Government."

70. In this context we ought to draw attention to the possible dangers of Article 152, first paragraph, which allows the CPG to provide for the application to Hong Kong of international agreements to which the CPG is a party. The danger is that the CPG might enter into some such agreement which might be completely repugnant to the Joint Declaration and the Basic Law, yet might enforce it in Hong Kong through national legislation added to Annex III under Article 18, third paragraph. The problem here is analogous to the classic problem in federal countries, as to whether the central government's treaty-making power can be used so as to invade the independent powers of the provinces. The dilemma must be resolved one way or the other. Since Hong Kong is permitted to have its own independent status in foreign affairs under Articles 149-156, it can claim, unlike federal provinces, to have an international status of its own. It would therefore seem right to resolve the dilemma in favour of Hong Kong. We would recommend that the final words of Article 152, first paragraph, should be made to read:

"... and subject to the agreement of the government of the Region."

C-(v) - Administrative Autonomy

71. We are asked whether Article 22 would allow the CPG, as opposed to its departments, to interfere in the administration of Hong Kong. We do not think that there is any such implication in the omission of mention

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of the CPG itself in the Article. The CPG would be entitled to interfere only if it had some positive legal warrant to do so, and there is nothing of that kind in the Basic Law. It is clear from Article 100 that the Hong Kong government is to be the employer of its public servants and Article 98 provides that they shall be responsible to that government. No further assurance would seem to be needed. If nevertheless it should be felt necessary, a simple amendment of the opening words of Article 22 would be to make them read:

"The Central People's Government and its departments ..."

72. We are also asked whether immigration control over persons coming from other parts of China is to be the responsibility of the Hong Kong government. Article 22, fourth paragraph, leaves this obscure. We think that the answer should certainly be in the affirmative if control is exercised at the point of entry, since that will be in Hong Kong territory where the Hong Kong government will be in charge. But that would not prevent the CPG exercising control at the point of departure, just as it does over Chinese citizens who need internal passports for journeys within China. Once again, a simple amendment would clarify the matter.

C-(vi) - Entrenchment of International Covenants and Bill of Rights

73. An important question is what will be the status of the two international covenants mentioned in the Joint Declaration (Annex I, Part XIII) and in the DBL (Article 39). Will they become enforceable by the Hong Kong courts so that, since no amendment of the Basic law can contravene Part XIII (Article 158, last paragraph), they will be entrenched as fundamental law and unalterable either by the CPG or by

Hong Kong legislation? And if not, is there any means by which they could be so entrenched?

74. The two covenants are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Joint Declaration (as above) provides that "as applied to Hong Kong" they "shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region"; and a further paragraph provides that any legal restriction on the rights and freedoms of Hong Kong residents "shall not contravene the provisions of the preceding paragraph of this Article". These clauses are by no means easy to interpret. Even if our favourable interpretation of them is thought to be right, the legal position may appear too doubtful to be secure, so that a clarifying amendment of the DBL ought to be sought.

75. As we understand, the words "as applied to Hong Kong" do not refer to any Hong Kong legislation specifically applying the covenants; they refer merely to the fact that the covenants apply to Hong Kong as international agreements to which Britain is a party, acting on behalf of Hong Kong; and to various reservations which Britain made in respect of Hong Kong (those relating to the Covenant on Civil and Political Rights are set out in Civil Liberties in Hong Kong (ed. Wacks), pp.38-40). The covenants are not enforceable in the Hong Kong courts, having the status merely of treaties not incorporated by local legislation. But Article 39 provides that they "shall be implemented" through the laws of Hong Kong, thus making it clear that it is for Hong Kong to incorporate them to such extent as it may wish. As we understand, it is now proposed that a Bill of Rights should be enacted in the near future, well before 1997.

76. To the extent that the covenants may thus be incorporated into Hong Kong law, they would then in our opinion be effectively entrenched by Article 39, paragraph two. Any attempt to repeal or cut down the covenants would "contravene the provisions of the preceding paragraph", i.e. the covenants as "implemented through the laws" of Hong Kong, and is therefore prohibited. As thus implemented, the covenants become legally enforceable as part of the Basic Law - and irrevocably, since no amendment can contravene the "established basic policies" (Article 158, last paragraph) and one of those policies (Part XIII of Annex I) is that the covenants "as applied to Hong Kong shall remain in force". Though the wording of these clauses is not as watertight as could be wished, we think nevertheless that provisions of the covenants incorporated in a Bill of Rights or similar legislation enacted by the Hong Kong legislature are intended to be protected against amendment by later legislation either of China or of Hong Kong itself.

77. Any provisions in such a bill of Rights which went beyond the terms of the international covenants would not enjoy the protection of Article 39, second paragraph, and would therefore be subject to the power of the Hong Kong legislature to amend or repeal them. According to standard British legal theory, such provisions could not be entrenched, since the Hong Kong legislature would not be able to fetter the powers of its successors. But in the new situation which will obtain when Hong Kong leaves the British constitutional system, there is the possibility that the Hong Kong Court of Final Appeal might decide to treat the Bill of Rights as fundamental law and enforce any entrenching provision contained in it, for example that amendment or repeal should require a three-quarters majority. We do not think that Article 18, first paragraph, continuing "the laws previously in force in Hong Kong", would be any impediment to this possibility, since those laws are freely alterable by the Hong Kong legislature and the Bill of Rights could be

held to have altered them. We should add that the argument of this paragraph leads into deep constitutional waters on which we can supply more information if desired. Our practical advice would be to avoid them by seeking an amendment of the DBL Article 39, second paragraph, so as to make it protect not only the international covenants but also the Bill of Rights as and when enacted by Hong Kong. Comprehensive entrenchment could then be secured.

C-(vii) and (viii) - The Chief Executive

78. As emphasised above (paras.24-30), we regard it as of prime importance that the Chief Executive should be accountable to the Legislative Council in accordance with the Joint Declaration. If that is secured, we do not consider that the powers of the Chief Executive under Articles 49-52 are excessive. If it is not secured, we consider that there could be dangers threatening Hong Kong's autonomy.

C-(ix) - Bills in the Legislative Council

79. We are asked if there are objections to Article 73, which restricts the rights of members of the Legislative Council to introduce bills of certain kinds.

80. It is normal to restrict the rights of private members of a legislature to introduce bills proposing public expenditure. An example is Section 56 of the Constitution of Australia:

"A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of



the appropriation has in the same session been recommended by message of the Governor General to the House in which the proposal originated."

Accordingly we see no objection to the corresponding provision of Article 73. But the restriction of the introduction of bills relating to "the structure and operation of the government" is in our opinion excessive, since these are matters with which private members of the legislature ought to concern themselves and about which they ought to be able to propose reforms. We know of no such restriction in other legislatures.

81. The final restriction on "bills relating to government policies" is not only objectionable, as we think, but also hopelessly vague. There will be few bills which cannot be said to relate to some government policy, either positive or negative, and therefore the proposed restriction would give the Chief Executive a veto over most private members' bills.

82. We would recommend that the final sentence of the Article be deleted and that the words "or the structure and operation of the government" should be excised from the second sentence.

C-(x) - Vested Interests under the Basic Law - "Pockets of Power"

83. Our Instructions draw attention to the possibility that the Hong Kong legislature may be unable to legislate as it may think necessary for the public benefit in cases where specific articles in the Basic Law protect self-interested groups whose activities may in the future prove to be contrary to the general welfare. Under Articles 140 and 141, for

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example, religious and professional organisations might claim that their previous practices were sanctified and made permanent. Under Article 143 subsidised non-governmental organisations and their employees might claim to have vested rights which the legislature could not alter. A variety of other examples are given in The Basic Law and Hong Kong's Future, chapters 11 and 14 (Nihal Jayawickrama and Henry Litton). It ought to be made clear that there can be no "entrenched pockets of power", as they are called by Henry Litton (ibid., p.286).

84. Our instructions suggest that the problem might be solved by incorporating into Article 17 the "paramount clause" mentioned earlier under which the Hong Kong legislature would be authorised to legislate generally for the "peace, order and good government" of the Region. But in this case we are clearly of opinion that the proposed clause would not be effective. For here we are confronted by specific provisions of the Basic Law, which by Article 11 the Hong Kong legislature will be powerless to alter. A "paramount clause" will not be paramount and no general formula will suffice.

85. It is pointed out in the comments cited above, as well as in the memoranda from the International Fiscal Association (*passim*) and the OMELCO Standing Panel on Constitutional Development (pp.29, 30) (enclosures 11 and 12 of our Instructions) that these problems arise from the failure of the DBL to distinguish between legal restrictions and statements of policy. Many of the provisions in Chapters V and VI of the DBL are evidently intended to be statements of intention or of policy only and not to create legal rights or interests which might restrict the powers of the Hong Kong legislature. The same applies to parts of Chapter IV, e.g. Article 99. The memoranda suggest, accordingly, that the provisions which are really statements of policy would be better taken out of the DBL itself and put into an annex of

"policy guidelines" which would not be given legal effect. But the memoranda were written a long time ago and it may be that matters are now too far advanced to make it practical politics to ask for such a drastic surgical operation to be performed on the DBL.

86. We think, in any case, that the root of the problem is the failure of the draftsmen to distinguish between mandatory and permissive provisions, as is pointed out by Nihal Jayawickrama (cited above) at p. 236. The object of the Articles in question must surely be to allow the Hong Kong government to follow its previous policies, in so far as it may wish, without interference from the CPG, rather than to impose on it an obligation to do so. All lawyers know how often there is confusion between "shall" and "may". Possibly also there has been a simple failure in translation. In a number of the Articles in Chapters V and VI an amendment of "shall" to "may" would solve the problem.

87. We would therefore advise that all the potentially troublesome Articles should be revised and converted into permissive terms. An alternative solution, though less satisfactory since it would leave a lot of inept language in Chapters V and VI, would be to add to the second sentence of Article 11 so as to make it read:

"No law enacted by the legislature of the Hong Kong Special Administrative Region shall be inconsistent with this Law, except that the legislature may provide as it may think fit for the modification of any rights, interests or expectations arising under Chapters V and VI of this Law and of the policies therein mentioned."

We see no way out of this impasse other than by amendment of the DBL. Claims to "pockets of power" will be claims to constitutionally entrenched rights and something will have to be done to disentrench

them. But since this problem ought not to concern the CPG, it may not be difficult to secure the necessary amendment(s).

88. As regards the suggestion of a "peace, order and good government" clause for the purpose of conferring general legislative power, see above (para.38) on the problem of general power.

C-(xi) - Separation of Law and Policy Issues

89. This is part of the problem of "pockets of power" just discussed (para.83).

C-(xii) - The Power of Interpretation

90. Already discussed (para.39).

C-(xiii) - The Power of Amendment

91. Already discussed (para.46).

PART D - GENERAL COMMENTS AND CONCLUSIONS

92. We have made many criticisms of the Draft Basic Law, but we in no way question the good intentions of its draftsmen. It is inevitable that there will be defects and incongruities in an attempt to bring within a single constitutional system two countries whose laws and philosophies of government are probably as disparate as any in the world. In China there appears to be no conception of constitutional judicial review, or even of legal remedies against public authorities (though now we note the new Administrative Litigation Law, due to take effect in 1990). The Chinese courts appear to play no part in public law in the way that they so conspicuously do in the British, American and European systems. The approach to drafting on the Chinese side, therefore, is not that of a British draftsman, who must keep his eye continually on the meaning likely to be given to his words by a court of law, and must strive to attain a precision which will be proof against misinterpretation. A constitutional instrument like the DBL will be regarded on the Chinese side as as much a statement of policy as a code of enforceable law - if not more so. But this cannot be satisfactory to Hong Kong. Having been promised a high degree of autonomy under the Joint Declaration, Hong Kong is entitled to expect that its autonomy will be given a firm legal basis - something for which the Constitution of China makes no provision. The viewpoints of the two countries are entirely different. If Hong Kong's autonomy is to be given the protection which Hong Kong can fairly expect, flexibility on the Chinese side will be necessary.

93. The 1989 draft of the Basic Law is a substantial improvement over the 1988 draft in certain respects. But a number of its main defects remain. The 1988 draft was subjected to a great deal of criticism, much of it well-founded, as is clear from the materials furnished to us such

as The Basic Law and Hong Kong's Future and The Journal of Chinese Law (Spring 1988). If there is to be a satisfactory Basic Law, some key provisions will have to go back into the melting pot and be reconsidered without prejudice. The argument will have to be purged of semantics and conducted in terms of realities. In reality, for instance, the Basic Law and the Constitution of China will be in conflict, and it will make no sense to argue that no constitutional amendment is needed. Another reality is that the Basic Law will in fact be a constitution in much the same sense as the constitution of Massachusetts or the constitution of New South Wales. Another is that Hong Kong will in substance be in the position of a federal province since the CPG will not have power to invade its area of autonomy - see Article 18. Another is that the Hong Kong legislature will have to possess general legislative power. Objections based on misconceptions about federalism will have to be squarely faced and refuted. Yet another reality is that there are bound to be differences of opinion about the division of powers, causing much discontent if there is no impartial tribunal to settle them. It will be in the interests as much of China as of Hong Kong that the Basic Law should produce the minimum of friction. China could fairly be asked to acknowledge that the autonomy promised to Hong Kong by the Joint Declaration, which was made in the legal environment of the British system, should be secured by legal means such as a constitutional court.

94. One object of the intergovernmental negotiations, which we understand are due to be held later this month, ought therefore to be to open the way to a thoroughgoing review of the DBL, aimed at obtaining a number of radical changes.

95. The whole subject of the division of powers will need special attention in any such review. In constitutions such as those of Canada and India the respective powers of the central and provincial

legislatures are collected together into lists and defined with care. There is nothing like this in the DBL, which contains too many phrases like "affairs which are the responsibility of the Central People's Government" and "laws outside the limits of the autonomy of the Region" without explaining in any clear manner what these affairs and laws are.

96. In this Opinion we have concentrated on the legal and constitutional deficiencies of the DBL as we see them, and have said little about the future political structure of Hong Kong. We have made an exception for the position of the Chief Executive, since we see in that position a potential danger to Hong Kong's autonomy. On the other hand we do not comment on the composition of the Legislative Council and other aspects of the "progress towards democracy" which is much discussed by politicians. We venture to think that those matters are best left to the citizens of Hong Kong and that Hong Kong's autonomy will not be affected, whether the speed of progress is accelerated or reduced. Rightly or wrongly, we have made Hong Kong's autonomy our primary concern throughout.

ANNEX

The Basic Law Court

1. There shall be a Basic Law Court consisting of a President and four members. The President shall be appointed by the Chairman of the Standing Committee of the National People's Congress and the Chief Justice of the Court of Final Appeal of Hong Kong acting jointly. Two members shall be appointed by the Standing Committee of the National People's Congress and two members shall be appointed by the Chief Executive of Hong Kong in the same manner as judges of the courts of Hong Kong. The President shall be removable by the Chairman of the Standing Committee and the Chief Justice acting jointly after resolutions authorising his removal have been adopted by the Standing Committee and the Legislative Council of Hong Kong. Members appointed by the Chief Executive of Hong Kong shall be removable in the same manner as other judges of the courts of Hong Kong. They shall have the same rights and immunities as judges of the courts of Hong Kong.
2. The Basic Law Court shall hear and determine any question concerning this Law which has been referred to it in accordance with this Law by the Central People's Government or by the Government of Hong Kong.
3. The Basic Law Court shall take decisions by majority vote and individual opinions may be given. It shall make such rules for its procedure as it may think fit. Its rules may make provision for allowing any person or body to appear before it as amicus curiae if they show good cause why this should be allowed.



4. The Central People's Government and the Government of Hong Kong shall at any time be entitled jointly or severally to refer any question concerning this Law, whether or not raised in litigation, to the Basic Law Court and shall both accept the decision of the Court as binding.
  
5. If at any time the Standing Committee of the National People's Congress or the State Council of China proposes to exercise any power or function under Articles 17, 18, 157, 158 or 159 of this Law they shall before taking action inform the Chief Executive of Hong Kong, who may within thirty days refer the matter to the Basic Law Court for determination according to this Law and in that case the power or function shall not be exercised unless the Court has determined that the proposed action will be in accordance with this Law.

Zelman Cowen

Oriel College, Oxford

H.W.R. Wade

Gonville and Caius College, Cambridge

5 September 1989

一九八九年十月二十六日

基本法草案：

基本法工商專業界諮委

建議書

前言

工商專業界諮委成員收到 Sir Zelman Cowen Q.C. 及 Sir William Wade Q.C. 一份意見書。

兩位法律顧問在其意見書的前言中作出下列的評語：

「第一，閱讀聯合聲明及基本法草案時不可能沒有這樣的印象，即上述文件的目的是授予香港自一九九七年開始的為期五十年的期間極為廣泛的內部的自治。對「一國兩制」的原則作了極大的引伸，因此在很多方面與中國大陸的政治、法律及行政制度互相矛盾。從字面上看來，為香港在未來半個世紀所取得的條件是相當有利的。無可否定的是，中國有合法的權益要看到香港不濫用其特別的政治及法律特權，並且要關心香港的國防、外交事務以至社會治安。基本法草案的條文就上述目的而言，總的說來顯然是基於合理的前提。當然這整個情景在現在因為一九八九年六月的事件而受到歪曲。但事實仍然是，與新聞界及其他方面的誤導的評論相反，使香港享受五十年真正的內部自治的意向，仍然由國際協議盡可能地給予保證。聯合聲明並不單是一項政策的聲明：聯合聲明是一項正式協議，事實上是對英國及中國兩國具有約束力的一項條約（見聯合聲明第七段），並給予英國一項直接權益，要看到聯合聲明在基本法中及以其他方式得到正當實現。我們純粹是從一個總的政治立場上提出這一看法。」

法律顧問們繼續指出「在更仔細的檢查後，基本法草案暴露了缺點，這些缺點可能嚴重削弱香港的意向中的自治」。法律顧問們接着在意見書中提出了存在的缺點及他們建議的解決方法。

工商專業界諮委根據意見書提出下列建議。

1. 需要擴大基本法委員會的權力

建議：基本法草案應該制定基本法委員會的法規，並以下列方式增強委員會的地位：

- (i) 全國人民代表大會常務委員會應授與基本法委員會決定權，而非僅是目前意向中的諮詢職能。
- (ii) 委員會須有司法權解決由基本法草案第八、十七、十八、一百五十七、一百五十八及一百五十九條所產生的問題；中央人民政府或香港特別行政區把是否是屬於中央人民政府管理的事務或中央和香港特別行政區關係的問題提交給委員會時，委員會應有司法權決定任何此類問題。
- (iii) 由中央人民政府及香港特別行政區派出擔任基本法委員會成員的必須是傑出的，司法上及法律上合資格的人仕。

解釋：基本法的一個大缺點是，當中央人民政府及香港特別行政區在基本法的解釋的問題上有觀點的分歧時如何從司法上去解決沒有規定。基本法草案中所描述的基本法委員會的職能只是諮詢性的。真正需要的是基本法委員會能被授予決定權及此委員會應該由合資格的律師，最好是有司法經驗的律師所組成。

有關第八及第一百五十九條的問題（與基本法相抵觸的香港原有法律）應該明確地列入屬於委員會的司法管轄權範圍的一系列條文中（見上文（ii）所列）。此外，雙方政府可以對於是否屬於中央人民政府管理的事務或中央和香港特別行政區關係所引起的任何其他問題提出來這將是很方便的。

本文附件二開列出了經修訂過的設立基本法委員會的建議，設立基本法委員會的建議在基本法草案的附件中已載明。這一建議的第6、7段具體列出基本法委員會將有權管轄的問題，這樣就可以避免在基本法草案的有關條款中分別提出（凡分別提出之處均相應地被刪除）。因而建議把有關建立基本法委員會的這些規定，作為一新條款寫入基本法草案中（可能的話作為第一百五十八條甲款寫入，建議文本見本文附件一）。

## 2. 基本法與中國憲法的矛盾

建議：基本法全面應規定，基本法如果與憲法有任何不一致之處，基本法仍全面有效。另外一種作法是，可修改中國憲法第三十一條，規定由全國人民代表大會以全體代表的三分之二以上通過。

解釋：可能的危機是基本法的某些部份的有效性及香港未來法例的某些部份的有效性，可能被香港法院基於這些部份因與中國憲法的條文相抵觸而變為無效而加以質疑。因此，有需要明確指出中國憲法不使基本法任何條款無效。建議的作法是，在基本法草案中寫進一新條款（可能作為第十一條（一）款），規定基本法即使與憲法條文不一致，基本法仍充分有效，該條款見附件一所載。

## 3. 有效的基本法英文文本

建議：基本法應該規定要有一份有效的基本法英文文本以便在香港法院使用，這一文本經中央人民政府批准後，由香港特別行政區立法機關立法制定。

解釋：由於英語將繼續是法律語言並在香港高級法院中使用，因此基本法必須有一英文文本，這一英文文本不能因與中文文本不一致而受到質疑。建議的作法是，在基本法草案中寫進一新條款，規定須有一英文文本（可能作為第十一條（二）款），該條款見附件一所載。

#### 4. 指導性方針政策

建議：基本法草案的第四、五及六章的強制性的「必須」應用允許性的「可以」代替，因為第四、五及第六章只是政策及意向的聲明，在中英聯合聲明中沒有規定：

65, 106, 107 (第二段), 117, 118, 137, 139, 143,  
144, 146

在第一百五十七條中應該加進一句，規定基本法應該按照基本法的目的作寬鬆的解釋。

解釋：上述各章的許多條款在目前的基本法草案中僅作為意向的聲明，這些條款將對立法機關產生不適當的限制。此外，這些條款的意向不是為了創立出可由法院判決的法定權利。凡沒有在聯合聲明中作出規定的條款，均應按照上述建議作出修改。在第一百五十七條中增加一項規定，即對基本法的解釋應寬鬆，以使基本法的目的及意向得到充份的體現，這將對這個問題有所幫助。

#### 5. 立法權

建議：基本法的第十七條應該修改，以便明確地澄清香港特別行政區被授予對除基本法明文規定保留給中央人民政府的事務以外的所有其他事務的立法權。

解釋：第十七條規定香港特別行政區享有立法權，但該條並未明確說明此種權力包括除國防、外交事務及附件三所列出的全國性

法律以外的一切事務。應該明確地提出按照聯合聲明規定（附件一，第一部份第二段）的香港的普遍立法權，這是極為重要的，聯合聲明規定，除外交、國防事務之外，香港享有無限制的立法權。

#### 6. 國防及緊急時期權力

建議：基本法草案第十八條應該規定，由香港特別行政區行政長官決定發生的動亂是否是香港特別行政區所不能控制。

解釋：一方面，宣佈戰爭狀態以及隨後的有關法律的實施須是中央政府所擁有的特別權力。另一方面，內部的緊急狀態應該儘可能由特別行政區根據特別行政區本身的法律處理。既然香港自治包括第十四條規定的負責維持社會治安，因此應該由行政長官（行政長官也是最能正確估計局勢的人）決定緊急狀態是否是香港法律本身所不能控制的。

#### 7. 在香港施行中國全國性的法律

建議：基本法草案第十八條應該修訂，使全國人民代表大會常務委員會對於基本法附件三的法律作出增添的權力，應該限於每作出一次增添時須取得香港政府同意。

解釋：對附件三的全國性法律作出增添就意味着削弱香港的自治。聯合聲明附件一中華人民共和國政府對香港的基本方針政策的具體說明第二部份第三段確定了什麼是香港特別行政區實行的法律，而並沒有包括任何中華人民共和國的法律。由於對基本方針政策的任何背離違背聯合聲明，所以應該在雙方商定後才能實行。

8. 「國家行爲」及「國家事實」

建議：第十九條應該重寫，以明確指出該條提及的「國家行爲」的意向是指現存香港法律中的普通法的原則。「國家事實」的提法應該澄清，以便明確所指的是按照現存香港法律應由政府確定的那些事實。

解釋：目前的草案並不明確，因而「國家行爲」的提法可能被解釋為指所有行政行爲，而不是普通法的國家行爲的狹義的概念，普通法對國家行爲的狹義的概念是指法院管轄權以外的事務，諸如侵畧外國領土或封鎖一外國港口。英國法律中並沒有「國家事實」這一詞，但相信這一詞的意思是指按照目前程序規定法院需要政府發給證明文件證明的事實，例如，一外國政府是否得到承認，或某一人是否一外交官。「國家行爲」及「國家事實」的意義需要澄清。

9. 行政自治

建議：基本法草案第二十二條應該修改以明確中央人民政府本身不能干預香港特別行政區自行管理的事務。

解釋：第二十二條目前的寫法是中央人民政府所屬的部門、各省、自治區、直轄市均不得干預，但是並沒有明確中央人民政府本身能否干預。



10. 確立國際公約及人權法案

建議：第三十九條應該修訂，使人權法案經過香港立法機關立法規定之後應受到與國際公約同樣的保障。

解釋：國際公約的條款通過第三十九條得到確立，但是香港的人權法案所規定的任何權利不會受到同樣的保障，因為人權法案規定的權利是附加於國際公約所載的權利以內。

11. 行政長官

建議：第四十三條應修訂，刪除要求行政長官對中央人民政府負責。第五十二條應修訂，規定行政長官在立法會以三分之二的大多數投不信任票時，行政長官應辭職，因為應該使行政長官不僅是在第六十四條所述的四方面、而是在所有方面向立法會負責。

解釋：聯合聲明第三（十二）段要求，關於中華人民共和國對香港的基本方針政策和聯合聲明附件一對基本方針政策的具體的說明，將以基本法規定之。基本方針政策的第一部份的三段說明「行政機關必須遵守法律，對立法機關負責」。這意味着全面而不是有限度的負責，並且必須包括行政長官，並且排除對中央人民政府負責。行政長官必須經常得到立法會的信任，這是十分重要的。否則行政長官可能受影響而在行事時與立法會所理解的香港的利益背道而馳，並違反香港的自治。

12. 國際協議

建議：基本法草案第一百五十二條應該修訂，中華人民共和國締結的或行將締結的國際協議在香港特別行政區實施，須徵詢香港特別行政區政府的同意。

解釋：這個建議是一種保障，免於中華人民共和國可能締結的某些國際協議並實施於香港特別行政區時牽涉中央人民政府按照聯合聲明及基本法授予香港特別行政區權力的某些事務，從而與香港的自治不相容。

13. 解釋權

建議：基本法草案第一百五十七條應該規定對基本法的解釋，須符合中華人民共和國對香港的基本方針政策。

解釋：第一百五十八條已經載有這一規定，原則上這一規定應同樣地包括在第一百五十七條內。

14. 拒絕香港原有法律

建議：基本法草案第一百五十九條應該修訂，使全國人民代表大會常務委員會宣佈與基本法相抵觸的香港原有法律，只限於影響中央人民政府管理的事務或中央人民政府與香港特別行政區關係的法律。

解釋：對全國人民代表大會常務委員會的權力的這一限制適用於第十七條的有關一九九七年後的香港法律，同一限制也應適用於第一百五十九條的有關一九九七年以前的法律。不影響中央人民政府管理的事務或者中央人民政府與香港特別行政區的關係的法律是與中央人民政府無關。無論如何，有關香港特別行政區內部事務的一九九七年前的法律與基本法相抵觸時，可由香港特別行政區法院按照第八條規定宣佈與基本法相抵觸。

附件一

建議對基本法草案的修改

<u>條款</u>	<u>建議</u>	<u>建議修改</u>
新條款	1	「設立香港特別行政區基本法委員會，委員會權力及職能由全國人民代表大會授予，如附件四所載列（見附件二）。未經香港特別行政區政府的同意不得改變委員會的結構、權力及職能。」
新條款	2	「本法即使與憲法條文不一致，亦全面有效，此種不一致憲法條文現按照「一國兩制」政策加以修改」
新條文	3	「本法的英文文本經由全國人民代表大會常務委員會批准後，由香港特別行政區立法會制定。」
第 17 條	1, 5	第二段第一句行文：—  「除本法具體規定屬於中央人民政府、全國人民代表大會或其常務委員會管理的事務以外，香港

特別行政區立法機關可根據本法就香港特別行政區政府的所有事務制訂法律。上述法律須報全國人民代表大會 . . . . .」

從第三段第一句中刪除「在徵詢其所屬的香港特別行政區基本法委員會後」。

第 18 條

1, 6, 7

在第三段中，刪除「徵詢其所屬的香港特別行政區基本法委員會和香港特別行政區政府的意見後」，並代入「取得香港特別行政政府的同意後」。

在第四段中，刪除「或者因香港特別行政區內 . . . . . 的動亂 . . . . . 進入緊急狀態」。增添第五段：—

「香港特別行政區行政長官因香港特別行政區內發生香港特別行政區政府不能控制的動亂，可宣佈香港特別行政區進入緊急狀態，並且發佈命令在香港特別行政區實施緊急狀態的法律」。

第 19 條 8

用以下一段替代第三、四段

「香港特別行政區法院須按照香港法律對國家行為的規定正式承認中央人民政府的行為。香港特別行政區法院應該向行政長官取得證明文件，證明根據香港法律須由中央人民政府審理的國家事實的問題。

行政長官在發出證明文件證明屬於國家事實的任何問題之前，須取得中央人民政府的證明書。」

第 22 條 9

本條開始的行文是：—

「中央人民政府及其所屬部門  
.....」

第 39 條 10

第二段第二句末加入「或與香港特別行政區法律第 X 章人權法案的規定相抵觸。」

第 43 條            11                    在第二段中刪除「中央人民政府和」。

第 52 條            11                    用下列一段代替（二）及（三）：  
： -

「（二）因立法會以全體成員三分之二多數對行政長官投不信任票。」

第 152 條           12                    第一段刪除「在徵詢香港特別行政區政府的意見後」，代入「在徵得香港特別行政區政府的同意後」。

第 157 條           1, 4, 13            第一段應改為： -

「對本法關於中央人民政府管理的事務或中央和香港特別行政區關係條款的解釋權屬於全國人民代表大會常務委員會」

刪去第四段，加入：

「對本法的解釋須公正及寬鬆，  
以按照本法真正意向及精神使本  
法的目的得到充分的體現。」

「對本法的一切解釋須符合中華  
人民共和國對香港的既定的基本  
方針政策。」

第 158 條 1

刪去第三段：—

第 159 條 14

刪除第一句第三行的「為同本法  
相抵觸者外」，而代入：

「 . . . . . 為同本法有關中央人  
民政府管理的事務或中央和香港  
特別行政區關係的條款相抵觸者  
外， . . . . . 」



附件二

香港特別行政區基本法起草委員會

有關

成立全國人民代表大會常務委員會

香港特別行政區基本法委員會

的

建議

1. 委員會名為「全國人民代表大會常務委員會香港特別行政區基本法委員會」。
2. 委員會由全國人民代表大會授權行使在此賦予的權力及職能。
3. 基本法委員由一位主席及〔四位〕成員組成。主席須由全國人民代表大會常務委員會委員長及香港特別行政區終審庭首席法官共同委任。基本法委員會二位成員由全國人民代表大會常務委員會委任。另二位成員由香港特別行政區行政長官委任，委任方法與香港法院法官委任方法相同。委員會主席及成員須由傑出人仕擔任，並須有司法或豐富法律經驗。常務委員會委員長及香港特別行政區終審庭首席法官經人大常務委員會及香港立法會決議授權，可以撤換基本法委員會主席。由行政長官委任的基本法委員會成員的撤換方法與撤換香港法庭法官的方法相同。基本法委員會成員與香港法庭的法官享有同樣的權利及豁免權。
4. 基本法委員會須聽取及決定中央人民政府或香港政府根據本法提交的有關本法的任何問題。

5. 基本法委員會用多數票方法作出決定，並且允許提出個人意見。基本法委員會可以為其本身程序訂立該委員會認為適當的規例。基本法委員會的規例可以規定，允許任何人或團體出席委員會作為「委員會之友」，如果這些個人或團體有充分理由應被允許出席的話。
6. 中央人民政府及香港特別行政區政府在任何時候須有權共同地或個別地向委員會提交有關是否屬於中央人民政府管理的事務或中央和香港特別行政區關係的任何問題，雙方須接受基本法委員會的決定，基本法委員會的決定並對雙方有約束力，並須接受基本法委員會的決定為有約束力者。
7. 除不得妨礙本文第（6）條所載中央人民政府或香港特別行政區政府任何一方均有權向基本法委員會提出任何問題的總的規定外，如果全國人民代表大會常務委員會或國務院在任何時候建議行使本法的第八、十七、十八、一百五十七、一百五十八或一百五十九條規定下的任何權力或職能時，全國人民代表大會常務委員會或中國國務院在採取行動之前須通知香港的行政長官，香港的行政長官可以在三十天內將問題提交給基本法委員會以按照本法作出決定，在此情況下，須在基本法委員會決定建議中的行為符合本法之後，全國人民代表大會或中國國務院方可行使上述權力或職能。

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