

**Celebrating the 30<sup>th</sup> Anniversary of the Promulgation of the  
Basic Law – Back to Basics**

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**I. Introduction**

1. On 4 April 1990, at the 7<sup>th</sup> National People’s Congress (“NPC”), the NPC made a decision that established the Hong Kong Special Administrative Region (“HKSAR”) and adopted the Basic Law of HKSAR which was promulgated by Yang Shangkun, President of the People’s Republic of China (“PRC”), on the same day. 2020 marks the 30<sup>th</sup> anniversary of the Basic Law and it is high time to reflect on the background, purpose and vision of the Basic Law. Despite the fact that the Basic Law has been successfully implemented in Hong Kong over the years, there are still people who do not fully comprehend the Constitution and the Basic Law. Some mistakenly believe that the Constitution does not apply in Hong Kong or even forget that “one country” is the precondition of the “one country, two

systems” principle. There are also people deliberately making statement about the Basic Law selectively, leading to misapprehensions. In view of this, it is time to go back to basics and focus on the foundations, and properly understand and appreciate the fundamental elements and context of the innovative policy of the PRC – the policy of “one country, two systems”. In this connection, the Department of Justice (“DoJ”) organised the Basic Law 30<sup>th</sup> Anniversary Legal Summit - “Back to Basics” (“the Summit”) on 17 November 2020, which we were very privileged to have so many renowned legal professionals, experts and academics with expertise in the Constitution of the PRC and the Basic Law to share their insights, which have greatly inspired the audience. We hope that by going “Back to Basics”, the theme of the Summit, it could help all of us to understand the Basic Law comprehensively and accurately.<sup>1</sup>

2. The national policy of “one country, two systems” was formulated with a view to achieve peaceful reunification. The historical context of Hong Kong made it apt and

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<sup>1</sup> The proceedings of the Summit will be published in due course. The video of the speeches are available in the Hong Kong Legal Hub website:

[https://www.legalhub.gov.hk/events\\_detail.php?l=en&a=115#](https://www.legalhub.gov.hk/events_detail.php?l=en&a=115#)

appropriate for the policy to be adopted upon the resumption of the exercise of sovereignty over Hong Kong.

3. The policy has served HKSAR well and has greatly enhanced our economic growth, not just as a result of the autonomy granted to HKSAR but more so the fact that the HKSAR is an inalienable part of PRC. Without the base of “one country”, the unique and enviable position of HKSAR under “two systems” would not be a reality. As rightly remarked by President Xi Jinping in his speech at the inaugural ceremony of the fifth-term government of the HKSAR in 2017: *“since its return to the motherland, Hong Kong has joined the remarkable journey toward the great renewal of the Chinese nation. As a special administrative region directly under the Central Government, Hong Kong has been re-integrated into PRC’s national governance system since the very day of its return.”* It is imperative that this is fully appreciated and embraced so that the stability and prosperity of HKSAR is not only maintained but advanced.

## II. The “One Country, Two Systems” Policy

### A. Formulation and Development of the National Policy

4. After the Qing Dynasty and the Second World War, the reunification of China has been one of the aims of the State. It is for that reason that the policy of “one country, two systems” was formulated and became a desirable instrument to bring about reunification of Taiwan, Hong Kong, and Macao to the Motherland.
5. While Deng Xiao-ping in 1979 raised the possibility for Hong Kong to maintain a capitalist system after its return to China in 1997,<sup>2</sup> the genesis of the concept of “one country, two systems” was first fleshed out and originally proposed to facilitate peaceful reunification with Taiwan in the form of the “nine principles” put forward by the then Chairman of the NPC Standing Committee (“NPCSC”) Ye Jian-ying that was reiterated in September 1981.<sup>3</sup>

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<sup>2</sup> See 中共中央文獻研究室編, “鄧小平年譜 : 一九七五 - 一九九七 (上册)” (“Deng Xiaoping nian pu: yi jiu ling si-yi jiu qi si (shang ce)”)(中央文獻, 2004) at 500-501.

<sup>3</sup> See “Ye Jianying’s Nine Principles for the Peaceful Reunification with Taiwan (1981)” on the Embassy of the People’s Republic of China in the Republic of Latvia page at <http://lv.china-embassy.org/eng/zt/twwt/t251057.htm>.

6. On 11 January 1982, Deng Xiao-ping coined the term “one country, two systems” in describing the said nine principles, noting: *“The Nine-Point Proposal was put forward in the name of [then CPC Central Committee] Vice Chairman Ye, which in essence can be generalized as ‘one country, two systems’. Two different systems are allowed to co-exist ... By and large, the relevant policies may be applied not just to Taiwan, but also to Hong Kong.”*<sup>4</sup>

7. In gist, the principle of “one country, two systems” was explained by Deng Xiao-ping to mean that *“within the People’s Republic of China, the mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system”*.<sup>5</sup>

## B. Application of the policy to Hong Kong

8. As noted above, the policy of “one country, two systems”

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<sup>4</sup> See Chapter 1.1, “Drafting and Promulgation of the Basic Law and Hong Kong’s Reunification with the Motherland” in “The Basic Law and Hong Kong –The 15th Anniversary of Reunification with the Motherland” published by the Hong Kong SAR Government, at [https://www.basiclaw.gov.hk/en/publications/book/15anniversary\\_reunification\\_ch1\\_1.pdf](https://www.basiclaw.gov.hk/en/publications/book/15anniversary_reunification_ch1_1.pdf) at 9.

<sup>5</sup> “One Country, Two Systems”, 22-23 June 1984, in *Selected Works of Deng Xiao-ping*, Vol. III.

was conceptualised to achieve peaceful reunification and it was first put into practice in Hong Kong.

*(i) Historical Context*

9. In 1840, Britain launched the opium war against China under the pretext of the Qing government's wrongful interference of Britain's sale of opium to China. The Qing government was compelled to sign the unequal Treaty of Nanking, permanently ceding Hong Kong Island to the British. Subsequently, Britain again forced the Qing government to sign the Convention of Peking in 1860 as a result of the Second Opium War launched in 1856, further ceding the southern tip of the Kowloon Peninsula. Finally, in 1898, Britain yet again forced the Qing government to sign the Convention for the Extension of Hong Kong Territory, exploiting the establishment of the sphere of influence in China by imperialist powers, which "leased" the large area of land north of Boundary Street of Kowloon Peninsula and over 200 islets nearby (later called the New Territories) for a term of 99 years until June 30, 1997. The Chinese people

have always opposed these three unequal treaties.<sup>6</sup>

10. From the time of China's Republican Revolution of 1911, China's former successive governments unsuccessfully attempted to abolish the unequal treaties imposed by various big powers, including the three treaties imposed by the United Kingdom.<sup>7</sup> Between 1942 and 1943, the then Nationalist Government of China demanded the return of the Hong Kong area to China, but these demands were rejected by the United Kingdom. Since 1949, the PRC has consistently stated its position that Hong Kong has been part of Chinese territory and China does not recognize the three unequal treaties imposed on China by the imperialists. The Chinese Government has consistently held that at the appropriate time, a negotiated solution to the question would be found; until then, the status quo would be maintained.<sup>8</sup>

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<sup>6</sup> See Ministry of Foreign Affairs of the People's Republic of China, "The Chinese government resumed exercise of sovereignty over Hong Kong", at [https://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18032.shtml](https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18032.shtml).

<sup>7</sup> See speech by Judge Shi Jiu-yong, "'One State, Two Systems', China's Contribution to the Progressive Development of Contemporary International Law" at the *2017 Colloquium on International Law: Common Future in Asia* organized by the Asian Academy of International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 37-44) at 38.

<sup>8</sup> See Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region, "How did the Chinese Government settle the question of Hong Kong through negotiations?" at <http://www.fmcoprc.gov.hk/eng/syzx/yglz/t17767.htm>.

11. Upon the restoration of the PRC's representation in the United Nations in 1971,<sup>9</sup> on 15 June 1972, the United Nations Special Committee on Decolonization adopted a resolution recommending the deletion of Hong Kong and Macao from the list of colonies of the United Nations, which was approved by the 27<sup>th</sup> General Assembly.<sup>10</sup> As Judge Shi Jiu-yong, former President of the International Court of Justice who was involved in the negotiation of the Joint Declaration notes, *“To China, Hong Kong was not a British colony, but under British occupation in consequence of British aggression.....This Resolution of the UN General Assembly is, in a sense, recognition of China's position on the status of Hong Kong and the nature of the three Treaties.”*<sup>11</sup>

12. China's sovereignty and her resumption of the exercise of sovereignty over Hong Kong was not negotiable. As pointed out by Mr Zhang Yong, Vice-Chairman of the

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<sup>9</sup> See United Nations General Assembly Resolution 2758 – “Restoration of the lawful rights of the People's Republic of China in the United Nations”, A/RES/2758 (XXVI) at [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/2758\(XXVI\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2758(XXVI))

<sup>10</sup> See United Nations General Assembly Resolution 2908 – “Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples”, A/RES/2908(XXVII) at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/269/38/img/NR026938.pdf?OpenElement>, which endorsed the report of the Special Committee, including the recommendation of deleting Hong Kong and Macao from its list of colonies.

<sup>11</sup> Speech by Judge Shi Jiu-yong, ““One State, Two Systems”, China's Contribution to the Progressive Development of Contemporary International Law” at the *2017 Colloquium on International Law: Common Future in Asia* organized by the Asian Academy of International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 37-44) at 38.



Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the NPC (“NPCSC”) at the Summit, the “one country, two systems” policy was positioned to achieve reunification of the motherland, as well as serving as a peaceful mean to resolve historical issues associated with Hong Kong, Macau and Taiwan.<sup>12</sup> The “one country, two systems” policy was to be applied to Hong Kong to achieve peaceful reunification, and this intention can be seen in the Preamble of the Basic Law. It is against this context and this basic and fundamental reason why the principle of “one country, two systems” was adopted and applied in the HKSAR. This position of China was stated in unequivocal terms on diverse occasions prior to 1997.

13. In the 1970s, the approaching expiry of the New Territories “lease” in 1997 stirred uncertainties in Hong Kong. Governor MacLehose of Hong Kong visited China in March 1979 to explore the possibility of extending the “lease” of the New Territories. Deng Xiao-ping refused the British request,

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<sup>12</sup> See “Keynote Speech: The Constitution of the People’s Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region”, given by Mr Zhang Yong during the summit: [https://www.legalhub.gov.hk/video/event\\_115\\_2\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_2_en.mp4)

making clear that China will resume the exercise of sovereignty in Hong Kong, and pointed out the possibility for Hong Kong to maintain a capitalist system after its return to China in 1997:

*“...Hong Kong’s special position can be guaranteed in 1997, no matter how this question is solved. To speak more clearly, Hong Kong can continue to implement its capitalist system for a rather long period from this century to early next century, while we, the Mainland, practise socialism.”<sup>13</sup>*

14. In 1982, then British Prime Minister Margaret Thatcher visited China to discuss the future of Hong Kong with Chinese leaders. At the meeting with Deng Xiaoping, Deng expressed, in no uncertain terms, the PRC’s intention to recover Hong Kong in 1997:

*“Our basic position on the question of Hong Kong is*

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<sup>13</sup> See Chapter 2, “Sino-British Negotiations and the Sino-British Joint Declaration” in “The Basic Law and Hong Kong –The 15th Anniversary of Reunification with the Motherland” published by the Hong Kong SAR Government, at [https://www.basiclaw.gov.hk/en/publications/book/15anniversary\\_reunification\\_ch1\\_2.pdf](https://www.basiclaw.gov.hk/en/publications/book/15anniversary_reunification_ch1_2.pdf) at 11.

*clear. There are three major issues involved. One is sovereignty...On the question of sovereignty, China has no room for manoeuvre. To be frank, the question is not open to discussion. The time is ripe for making it unequivocally clear that China will recover Hong Kong in 1997. That is to say, China will recover not only the New Territories but also Hong Kong Island and Kowloon. It must be on that understanding that China and the United Kingdom hold talks on the ways and means of settling the Hong Kong question.”<sup>14</sup>*

15. In a talk with the then British Foreign Secretary, Sir Geoffrey Howe, in July 1984, Deng Xiao-ping further elaborated on what the principle of “one country, two systems” entails:

*“The ‘one country, two systems’ concept was not formulated today. It has been in the making for several years now, ever since the Third Plenary Session of our Party’s Eleventh Central Committee. The idea was first presented as a means of settling the Taiwan and Hong*

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<sup>14</sup> “Our Basic Position on the Question of Hong Kong”, 24 September 1982, in *Selected Works of Deng Xiao-ping*, Vol. III.

*Kong questions. The socialist system on the mainland, with its population of one billion, will not change, ever. But in view of the history of Hong Kong and Taiwan and of their present conditions, if there is no guarantee that they will continue under the capitalist system, prosperity and stability cannot be maintained, and peaceful reunification of the motherland will be out of the question.”<sup>15</sup>*

(ii) The Joint Declaration

16. On 12 July 1983, the Central People’s Government (“CPG”) proposed 12 Principles to resolve the issue of Hong Kong, which later became part of the Sino-British Joint Declaration (“Joint Declaration”).<sup>16</sup> On 19 December 1984, the Joint Declaration which reflected the basic principles and policy of “one country, two systems” was concluded.<sup>17</sup>

17. The Joint Declaration consist of 8 Articles and 3 Annexes.

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<sup>15</sup> “We Shall Be Paying Close Attention To Developments In Hong Kong During the Transition Period”, 31 July 1984, in *Selected Works of Deng Xiao-ping*, Vol. III.

<sup>16</sup> It should be noted that the CPG has by this time already laid the foundations for “one country, two systems” in late 1982 when it passed an amendment to the Constitution and inserted Article 31 – see paragraph 29 below.

<sup>17</sup> The text of the Joint Declaration can be found at <http://www.fmcopec.gov.hk/eng/syzy/yglz/t25956.htm>.

The crucial parts of the main text of the Joint Declaration are in the form of unilateral declarations of both the PRC and the United Kingdom, contained in Articles 1 and 2. Article 1 contains a unilateral declaration by the Chinese side to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories), and to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, while Article 2 of the Joint Declaration is a declaration from the United Kingdom restoring Hong Kong to the PRC with effect from 1 July 1997.

18. Articles 1 and 2 are significant as Article 1 reflects China's persistent position on the question of Hong Kong, while the use of the word "restore" in Article 2 connotes the meaning of Hong Kong being given back as a territory which was taken away from China.<sup>18</sup>

19. In relation to providing the framework of "one country, two systems" in HKSAR, Article 3 of the Joint Declaration is of fundamental importance. It is a declaration unilaterally

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<sup>18</sup> Speech by Judge Shi Jiu-yong, "One State, Two Systems", China's Contribution to the Progressive Development of Contemporary International Law" at the *2017 Colloquium on International Law: Common Future in Asia* organized by the Asian Academy of International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 37-44) at 40.

made by the Chinese Government, and transforms the 12 Principles proposed by the CPG during the negotiations into China's basic policies regarding Hong Kong. The Chinese Government stated unequivocally in Article 3 that the HKSAR, to be established on 1 July 1997, will enjoy a high degree of autonomy, and will be vested with executive, legislative and independent judicial power, including that of final adjudication. The government of the Region will be composed by local inhabitants. The policies stipulated in Article 3 are further elaborated in Annex I to the Joint Declaration. It should also be noted that Article 3 refers to the establishment of the HKSAR is "*in accordance with the provisions of Article 31 of the Constitution of the [PRC]*", indicating in clear terms that the legal basis of implementing "one country, two systems" in Hong Kong is China's Constitution, instead of the Joint Declaration.<sup>19</sup>

20. The Joint Declaration is a treaty made between China and the United Kingdom. The provisions of the Joint Declaration, including its three annexes, have been deposited with the

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<sup>19</sup> "Get the Fundamentals Right and Safeguard the Rule of Law" – Keynote speech by H.E. Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong SAR at the 2019 Colloquium on International Law, organised by the Asian Academy of International Law found at [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zwjg\\_665342/zwbdt\\_665378/t1689388.shtml](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbdt_665378/t1689388.shtml).

United Nations.<sup>20</sup> While the latter part of the preamble of the Joint Declaration states that the two sides “agreed to declare as follows”, as noted above, the crucial parts of Articles 1, 2 and 3 (read with Annex I) are all unilateral declarations made by one side without any reference to the other side. Articles 4, 5 and 6 and Annexes 2 and 3 provide for arrangements during the transitional period, while Articles 7 and 8 are about the implementation and entry into force of the instrument.<sup>21</sup>

21. From the above observations on the content and nature of the Joint Declaration, it can be seen that there is no clause that provides for British rights or obligations to Hong Kong after the city's reunification with the Motherland. Judge Xue Hanqin, Vice President of the International Court of Justice,

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<sup>20</sup> For the United Nations entry on the Joint Declaration, see <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d4d6e&clang=en>.

<sup>21</sup> As noted by Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong SAR:

*“...Article 1 is about China’s decision to resume the exercise of sovereignty over Hong Kong. In Article 2, the UK states that it will restore Hong Kong to China. **These two articles have been fulfilled upon the return of Hong Kong.** In Article 3 and Annex 1, China elaborates its basic policies regarding Hong Kong, **yet with not the least implication of UK’s rights and obligations.** Articles 4, 5 and 6 and Annexes 2 and 3 provide for relevant arrangements during the transitional period, including the administration of Hong Kong, the establishment and operation of a Sino-British Joint Liaison Group, land leases and ratification. Article 7 and 8 are about the implementation and entry into force of the instrument. **All these provisions have been fulfilled with the return of Hong Kong and the completion of ensuing work**” (emphasis added)*

“Get the Fundamentals Right and Safeguard the Rule of Law” – Keynote speech by H.E. Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong SAR at the 2019 Colloquium on International Law, organised by the Asian Academy of International Law, found at [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zwjg\\_665342/zwbd\\_665378/t1689388.shtml](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1689388.shtml).

pointed out during the Summit that, “*after the reunification, the system to be adopted in HKSAR, as well as how to implement its reunification with the motherland, was purely within the ambit of the sovereignty of China from an international law perspective.*”<sup>22</sup> In a speech by Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in HKSAR, he also stated, “*[a]ll legal relations between the UK and Hong Kong created by the instrument had terminated by 1 January 2000 at the latest, when the Sino-British Joint Liaison Group ceased operation. The UK is not entitled to claim any new rights over or obligations to Hong Kong by citing the Joint Declaration. To be brief, the UK has no sovereignty, jurisdiction or right of "supervision" over Hong Kong whatsoever after the latter returned to China.*”<sup>23</sup>

22. The signing of the Joint Declaration marks the final resolution of the Hong Kong question, setting a laudable

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<sup>22</sup> See “Keynote Speech : “*One Country, Two Systems*” and its Contribution to the International Law”, given by Judge Xue Han-qin during the summit:

[https://www.legallhub.gov.hk/video/event\\_115\\_3\\_en.mp4](https://www.legallhub.gov.hk/video/event_115_3_en.mp4)

<sup>23</sup> “Get the Fundamentals Right and Safeguard the Rule of Law” – Keynote speech by H.E. Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong SAR at the 2019 Colloquium on International Law, found at

[https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zwjg\\_665342/zwbd\\_665378/t1689388.shtml](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1689388.shtml).



example on peaceful resolution of historical issues and marking a significant milestone for the reunification of China. As remarked by Judge Shi, the Joint Declaration “*is an unprecedented treatment of invalidity of unequal treaties imposed by big powers in history. This practice can be counted as China’s contribution in the process of progressive development of contemporary international law.*”<sup>24</sup>

23. At the signing of the Joint Declaration, there was also an immediate exchange of memoranda between the two sides dealing with the issue of nationality<sup>25</sup>. This exchange of memoranda between the two sides represent each side’s understanding of the issue of nationality under the backdrop of the Joint Declaration.

24. The British Memorandum to the PRC (“the British Memorandum”) opened with the statement “*In connection with the Joint Declaration...to be signed this day, the Government of the United Kingdom declares that...*”, and stated the United Kingdom Government’s pledge, *inter alia*,

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<sup>24</sup> Speech by Judge Shi Jiu-yong, ““One State, Two Systems”, China’s Contribution to the Progressive Development of Contemporary International Law” at the *2017 Colloquium on International Law: Common Future in Asia* organized by the Asian Academy of International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 37-44) at 40.

<sup>25</sup> The exchange of memoranda can be found at <https://www.cmab.gov.hk/en/issues/jd6.htm>.

not to confer the right of abode in the United Kingdom on holders of the British National (Overseas) (“BN(O)”) passport who are Chinese nationals in Hong Kong. Similarly, the Chinese Memorandum to the United Kingdom opens with acknowledging receipt of the British Memorandum, stating “[t]he Government of the People’s Republic of China has received the memorandum from the Government of the United Kingdom...”, going on to assert that, *inter alia*, “[u]nder the Nationality Law of the People’s Republic of China, all Hong Kong Chinese compatriots...are Chinese nationals”, and then makes the commitment to “permit Chinese nationals in Hong Kong who were previously called ‘British Dependent Territories Citizens’ to use travel documents issued by the Government of the United Kingdom for the purpose of travelling to other states and regions”.

25. A pertinent question would be the nature and legal effect of the memoranda in question, in particular the United Kingdom Government’s pledge as contained in the British Memorandum regarding the conferral of the right of abode to BN(O) passport holders who are Chinese nationals in Hong

Kong. This would depend on whether it could give rise to a binding effect as an unilateral act under international law.

26. According to the International Law Commission's "*Guiding principles applicable to unilateral declarations of States capable of creating legal obligations*"<sup>26</sup> ("Guiding Principles"), declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations,<sup>27</sup> taking into account their content, the factual circumstances in which they were made, and of the reactions to which they gave rise.<sup>28</sup> In the *Nuclear Tests* case, the International Court of Justice also held that a unilateral declaration is binding when the State proclaiming it intends to undertake a legal obligation.<sup>29</sup>

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<sup>26</sup> The International Law Commission's "Guiding principles applicable to unilateral declarations of States capable of creating legal obligations" can be found at [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_9\\_2006.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf).

<sup>27</sup> See Guiding Principle 1, which reads: "*Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.*"

<sup>28</sup> See Guiding Principle 3, which reads: "*To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.*"

<sup>29</sup> *Nuclear Tests (Australia v France) Case*, ICJ Judgment of 20 December 1974, found at <https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf>. The Court held at paragraph 43 that:

*"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an*

27. It is noteworthy that the United Kingdom also considered the provisions contained in the British Memorandum to be of binding effect. For example, in 1985, at the second reading of the Hong Kong Bill in the United Kingdom House of Commons, the then Secretary of State for Foreign and Commonwealth Affairs Sir Geoffrey Howe remarked that the proposed powers to make the amendments to the then nationality legislation are “*necessary as a result of the [Joint Declaration] and the [British Memorandum]*”.<sup>30</sup> Additionally, in his 2008 Review of Citizenship, former Attorney General for England and Wales Lord Goldsmith recognized that to give BN(O)s full British citizenship automatically would be a breach of the commitments made between the PRC and the United Kingdom in the Joint Declaration, noting: “*The only option...would be to offer existing BN(O) holders the right to gain full British citizenship....However I am advised that this would be a*

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*intent to be bound, even though not made within the context of international negotiations, is binding.”*

This was quoted and endorsed in the recent ICJ case of *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, judgment of 1 October 2018, found at <https://www.icj-cij.org/public/files/case-related/153/153-20181001-JUD-01-00-EN.pdf>, at paragraph 146).

<sup>30</sup> See Hansard, House of Commons Debate on the Hong Kong Bill, 21 January 1985, at [https://api.parliament.uk/historic-hansard/commons/1985/jan/21/hong-kong-bill#S6CV0071P0\\_19850121\\_HOC\\_163](https://api.parliament.uk/historic-hansard/commons/1985/jan/21/hong-kong-bill#S6CV0071P0_19850121_HOC_163) at 735.

*breach of the commitments made between China and the UK in the 1984 Joint Declaration on the future of Hong Kong... ”.*<sup>31</sup> On one view, the British Memorandum meets the requirements as set out in the Guiding Principles as creating legal obligations under international law for the United Kingdom, and thereby possibly putting in question the right to revoke arbitrarily according to General Principle 10.<sup>32</sup> This is a complex question involving international law and relations and will no doubt be further deliberated upon.

### C. Legislating the policy

28. Having formulated the policy and decided that it be applied to Hong Kong, the principle of “one country, two systems” has to be realised under the PRC’s constitutional order.

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<sup>31</sup> See Lord Goldsmith QC’s Citizenship Review: “Citizenship: Our Common Bond”, found at <https://web.archive.org/web/20080405223352/http://www.justice.gov.uk/docs/citizenship-report-full.pdf>, at p. 74. Lord Goldsmith has since wrote to the Home Secretary and Foreign Secretary (a copy of the letter can be found at <https://twitter.com/stuartlauscamp/status/1232061916610224129?s=20>) stating that he was only repeating advice given to him by the Foreign Office at the time, and was not his own opinion. His view was that the United Kingdom government can extend full right of abode to BN(O) holders – see <https://www.scmp.com/news/china/diplomacy/article/3051995/britain-could-give-hong-kong-bno-pass-port-holders-right-abode>.

<sup>32</sup> See Guiding Principle 10, which reads: “*A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:*

- (a) *Any specific terms of the declaration relating to revocation;*
- (b) *The extent to which those to whom the obligations are owed have relied on such obligations;*
- (c) *The extent to which there has been a fundamental change in the circumstances.”*

29. China is a unitary state. Unitary states are those with sovereignty resting with the national government, and regional or local units having no independent powers. Sub-national administrations, whether regional or local, can make and implement policy, but they do so by leave of the centre<sup>33</sup>. In the Chinese context, this means that under the constitutional structure of China, power comes from the Central Authorities. As pointed out by Mr Zhang Yong during the Summit, *“in a unitary state like China, the powers of the regional or local units are derived from the national (central) government. Regional or local units therefore, unlike their counterparts in a federal system, do not enjoy any kind of residual powers”*.<sup>34</sup>

30. The highest organ of the state, the NPC, is the only authority with which the power to provide a constitutional framework for the establishment of HKSAR and the implementation of the “one country, two systems” policy is vested under the Constitution.<sup>35</sup> The NPC decided on the establishment of

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<sup>33</sup> See R. Hague, M. Harrop, & J. McCormick, “Comparative Government and Politics: An Introduction” (10 ed.) (Palgrave, 2016) at pp. 182, 184.

<sup>34</sup> See “Keynote Speech: The Constitution of the People’s Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region”, given by Mr Zhang Yong during the summit: [https://www.legallhub.gov.hk/video/event\\_115\\_2\\_en.mp4](https://www.legallhub.gov.hk/video/event_115_2_en.mp4)

<sup>35</sup> Article 31 of the Constitution provides for the establishment of special administrative regions by the state when necessary. The systems to be instituted in special administrative regions shall be

the HKSAR, formulated the Basic Law of the HKSAR which prescribes the system to be instituted in the HKSAR, and retains the power of amendment of the Basic Law.<sup>36</sup> Importantly, as a unitary state, the powers of the branches of the HKSAR government emanate from the Central Authorities.

31. In preparation for the implementation of “one country, two systems”, on 4 December 1982, the 5<sup>th</sup> Session of the 5<sup>th</sup> NPC passed an amendment to the Constitution and introduced Article 31, which provides: *“The state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People’s Congress”*.

32. Subsequent and in light of this amendment to the Constitution in late 1982, the PRC continued the second phase of

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prescribed by law enacted by the NPC in light of specific conditions. Articles 62(2) and 62(14) states that the NPC has the powers and functions to “overseeing the enforcement of the Constitution” and “deciding on the establishment of special administrative regions and the systems to be instituted there”. Article 67(1) of the Constitution states that the NPCSC has the function of “interpreting the Constitution and overseeing its enforcement”.

<sup>36</sup> See Whitepaper issued by the Information Office of the State Council: “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region”, 10 June 2014, Beijing, at [http://english.www.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474982986578.htm](http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm).

diplomatic negotiations in July 1983 with the United Kingdom to resolve issues pertaining to the unequal treaties relating to Hong Kong which ultimately resulted in the Joint Declaration.<sup>37</sup> The above shows that it is not as a result of the Joint Declaration that the principle of “one country, two systems” came into being. On the contrary, it is our country that formulated the policy, prepared the constitutional framework that provided Hong Kong its status as a Special Administrative Region, and finally putting in place the “one country, two systems” policy as enshrined in the Basic Law for the HKSAR.

33. In June 1985, the CPG announced the formation of the Basic Law Drafting Committee and the Basic Law Consultative Committee. The Basic Law was drafted with the active participation of Hong Kong people from all walks of life, and the Consultative Committee was described as “*the largest and the most representative advisory organization in the history of Hong Kong.*”<sup>38</sup> The drafting of the Basic Law took four years and nine months and was a highly engaging

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<sup>37</sup> For more details on the Joint Declaration, please refer to paragraphs 16 – 27 above.

<sup>38</sup> Wang Shu-wen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region*, Beijing: Law Press, 2<sup>nd</sup> English edition, 2009, pp 16-17.



legislative exercise.

34. The legal and political foundation for the drafting and promulgation of the Basic Law is the Constitution of the PRC. The Chief Executive, Mrs Carrie Lam, pointed out in her speech given during the Summit that *“The Constitution and the Basic Law together form the constitutional order of HKSAR. In accordance with Article 31 of the Constitution, the state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People’s Congress. In light of these, one must also be knowledgeable of the Constitution when applying the Basic Law.”*<sup>39</sup>

35. As explained by Mr Zhang Yong during the Summit, *“the constitutional basis of the HKSAR can be found in both the Constitution and the Basic Law.”*<sup>40</sup> Mr Zhang Yong reiterated that China is a unitary state, meaning all powers

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<sup>39</sup> See “行政長官出席《基本法》頒布三十周年法律高峰論壇致辭” (the speech of the Chief Executive in Basic Law 30th Anniversary Legal Summit Back to Basics) (Chinese only) and the video of the speech [https://www.legalhub.gov.hk/video/event\\_115\\_1\\_1\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_1_1_en.mp4)

<sup>40</sup> See “Keynote Speech: The Constitution of the People’s Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region”, given by Mr Zhang Yong during the summit: [https://www.legalhub.gov.hk/video/event\\_115\\_2\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_2_en.mp4)

come from the central authorities, and the powers enjoyed by the HKSAR are authorised by the central authorities. For this reason, the two instruments must be read and interpreted together whilst bearing in mind we are a unitary state. It is only in this context could the structure and interaction of the various organs of HKSAR and the relationship between the roles and duties of the Central Authorities and the HKSAR be properly understood.

36. On 4 April 1990, the decision to establish the HKSAR and the Basic Law was passed by the NPC in the 7<sup>th</sup> NPC congress. Ji Peng-fei, Chairman of the Drafting Committee of the Basic Law, explained in his address to the NPC that the “one country, two systems” policy was the guiding principle in the drafting of the Basic Law:

*““One country, two systems” is the fundamental policy of the Chinese Government for bringing about the country’s reunification. ... The concept of “one country, two systems” and all the principles and policies regarding Hong Kong formulated on the basis of this concept provide the fundamental guarantee for the resumption of*

*China's sovereignty over Hong Kong and the maintenance of Hong Kong's stability and prosperity; they also conform to the basic interests of the Chinese people, particularly those of the Hong Kong compatriots.*"<sup>41</sup>

37. The Basic Law was lauded by Deng Xiao-ping as a “*law of historic and international significance*” and “*a creative masterpiece.*”<sup>42</sup> As pointed out by Judge Xue Hanqin during the Summit, “*The reunification of Hong Kong also set a laudable example for the peaceful settlement of international disputes*”. She further noted that the arrangements of applicability of international treaties in Hong Kong under “one country, two systems” was a creative implementation in the arena of international law.<sup>43</sup> During the summit, Mr Qiao Xiaoyang, Former Chairman of the Committee for the Basic Law of the Hong Kong SAR under the NPCSC, provided six keys to study the Basic Law.

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<sup>41</sup> Ji Peng-fei, *Explanations on “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” and its Related Documents*, Addressing the Third Session of the Seventh NPC on 28 March 1990.

<sup>42</sup> Whitepaper issued by the Information Office of the State Council: “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region”, 10 June 2014, Beijing, at [http://english.www.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474982986578.htm](http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm).

<sup>43</sup> See “Keynote Speech : “One Country, Two Systems” and its Contribution to the International Law”, given by Judge Xue Han-qin during the summit:

[https://www.legallhub.gov.hk/video/event\\_115\\_3\\_en.mp4](https://www.legallhub.gov.hk/video/event_115_3_en.mp4)

These six keys facilitate one to understand the legislative intent of the Basic Law, which is imperative for us to have a comprehensive understanding of the Basic Law. These six keys are as follows: *“First, one must view the Basic Law from the national perspective. Second, it must be understood that the constitutional status of the Basic Law is from the Constitution. Third, the Basic Law is an “authorisation law”. Fourth, the Basic Law should be understood in its entirety. Fifth, the “one country, two systems” principle is the basic for implementing the Basic Law. And sixth, the Basic Law should be implemented with the people and their development in mind.”*<sup>44</sup>

### **III. The Basic Law is Rooted in “One Country”**

38. The purpose and intent of “one country, two systems” is for the provision of peaceful means of resolving the Hong Kong and Taiwan problem<sup>45</sup>. In the context of Hong Kong, this is set out in the Preamble of the Basic Law:

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<sup>44</sup> See the speech of Mr Qiao Xiaoyang given during the “Panel Discussion : The Drafting Process and Legislative Intent of the Basic Law” of the Summit:

[https://www.legallhub.gov.hk/video/event\\_115\\_4\\_en.mp4](https://www.legallhub.gov.hk/video/event_115_4_en.mp4)

<sup>45</sup> See “One Country, Two Systems”, 22-23 June 1984, in *Selected Works of Deng Xiao-ping*, Vol. III.

*“Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the [PRC] has decided that upon China’s resumption of the exercise of sovereignty of Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of [the Constitution], and that under the principle of “one country, two systems”, the socialist system and policies will not be practised in Hong Kong”.*

The NPC’s decision to establish the SAR and its legislative intent in passing the Basic Law, together with the inextricable links to the Chinese culture engrained in every national, is the fundamental reason that HKSAR enjoys all the privileges it has over the years under the “one country, two systems” policy.

39. The importance of the foundation of “one country” is reiterated recently in President Xi’s speech at the inaugural ceremony of the fifth-term government of the HKSAR in 2017:

*“We must both adhere to the “one country” principle and respect the differences of the “two systems”, both uphold the power of the Central Government and ensure a high degree of autonomy in the HKSAR, both give play to the role of the mainland as a staunch supporter of Hong Kong and enhance Hong Kong’s own competitiveness. At no time should we focus only on one aspect to the neglect of the other. Only in this way can we ensure that the ship of “one country, two systems” will break the waves, sail steadily and go the distance.”<sup>46</sup>*

#### A. Basic Law Provisions Reinforcing the Foundation of “One Country”

40. At the outset, the Preamble of the Basic Law sets out the fundamental legislative intent. Article 1 of the Basic Law states that *“The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China”*. Article 2 then provides that the NPC **authorizes** the HKSAR

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<sup>46</sup> President Xi Jin-ping’s speech at meeting marking Hong Kong’s 20<sup>th</sup> return anniversary and inaugural ceremony of the 5<sup>th</sup>-term HKSAR government at <http://www.fmco.gov.hk/eng/Topics/pth/t1646265.htm>.

to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law. These two provisions illustrate the constitutional effect of a unitary state and the fundamental premise upon which the whole Basic Law is framed.

41. Chapter II of the Basic Law emphasises the “one country” aspect. Article 12 states: *“The [HKSAR] shall be a local administrative region of the PRC, which shall enjoy a high degree of autonomy and come directly under the [CPG]”*. Articles 13 and 14 stipulate that the CPG shall be responsible for foreign affairs and defence of Hong Kong respectively. As Mr Zhang Yong explained during the Summit, *“the implementation of the principle of “one country, two systems” had been focusing on the unification of the Motherland, while respecting both historical and actual circumstances.”* He duly noted that the Basic Law was enacted in accordance with the Constitution, signifying the “one country” aspect. He also emphasised that, as a whole, the Constitution applies to the HKSAR. He further observed that in setting out the structure of the HKSAR, two

principles were adhered to: (i) the concept of “Hong Kong people administering Hong Kong” refers to those Hong Kong people who are patriots, and (ii) the high degree of autonomy of HKSAR stems from the authorization of the Central People’s Government.<sup>47</sup> All of the above observations by Mr Zhang Yong echo with the “one country” aspect of the Basic Law.

## B. The Constitutional Order of the HKSAR

### *(i) Source of power and Constitutional duties of the three branches of government*

42. The executive, legislative and judicial institution of the HKSAR are each assigned specific roles and duties, with powers granted under the Basic Law all emanating from the Central Authorities, the PRC being a unitary state. Under the Basic Law, these organs do not have the competency to clothe itself with additional jurisdiction or power beyond what is expressed in the constitutional order laid down in the Basic Law. If any additional powers or mandate is needed

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<sup>47</sup> See “Keynote Speech: The Constitution of the People’s Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region”, given by Mr Zhang Yong during the summit: [https://www.legalhub.gov.hk/video/event\\_115\\_2\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_2_en.mp4)



due to specific circumstances, further endorsement from the Central Authorities is needed. This was exactly what happened when, as a result of the COVID-19 pandemic, the Legislative Council (“LegCo”) election was postponed and the operation of the 6<sup>th</sup> term of LegCo beyond the 4 year term limit set out in Article 69 of the Basic Law<sup>48</sup> had to be dealt with and authorised by the NPCSC.<sup>49</sup> The HKSAR simply does not have the competence to provide power for the LegCo members to continue to discharge duties for not less than one year and such authority must come from the NPCSC.

43. The three branches have separate and distinct functions as explicitly stated in the Basic Law. Such an arrangement means that they interact with each other providing the right checks and balances on the operation of the government as a whole. It is only when the three perform their functions faithfully would the whole system work as envisaged under the Basic Law. In so saying it is by no means suggesting

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<sup>48</sup> Article 69 of the Basic law reads: “The term of office of the Legislative Council of the Hong Kong Special Administrative Region shall be four years, except the first term which shall be two years”.

<sup>49</sup> “Decision of the Standing Committee of the National People’s Congress on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region”, adopted at the Twenty-first Session of the Standing Committee of the Thirteenth National People’s Congress on 11 August 2020. The text of the decision can be found at <https://www.elegislation.gov.hk/hk/A216>.

that the LegCo will pass whatever bill that the executive puts forth, less still that the judiciary will be deprived of the opportunity to rule against the government in any judicial review cases challenging the decisions of the government. On the contrary, the proper discharge of their respective constitutional duties will ensure the legality and propriety of the acts of the executive, the legislature and the judiciary.

44. In accordance with Article 62 of the Basic Law, the Government of the HKSAR is responsible for, *inter alia*, formulating and implementing policies and introducing bills, and drawing up budgets. Article 73 of the Basic Law provides that the Legislative Council of the HKSAR shall, among other things, enact laws as required, and scrutinise budgets. The Basic Law also empowers the courts of the HKSAR to exercise judicial power independently, including that of final adjudication. Article 85 guarantees that the courts of the HKSAR shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

45. It can be seen from a thorough understanding of the Basic Law that the three branches are inter-related with delegated powers and functions to discharge their constitutional duty under the executive-led system. They complement each other with the common goal of “[u]pholding national unity and territorial integrity” and “maintaining the prosperity and stability of Hong Kong”.<sup>50</sup>

(ii) The Chief Executive and the executive led system

46. The HKSAR has an executive led system. As observed by Mr Qiao Xiaoyang during the Summit, “the concept of the “Chief Executive System” has been adopted in Hong Kong’s political system and pointed out that the executive-led system is supported by a number of provisions in the Basic Law.”<sup>51</sup> Articles 43 and 60 state that the Chief Executive (“CE”) shall be the head of the HKSAR and the head of the Government of the HKSAR. As head of both the HKSAR and its government, the CE shall exercise the powers and functions conferred by the Basic Law to discharge his or her duties, and

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<sup>50</sup> Preamble of the Basic Law.

<sup>51</sup> See the speech of Mr Qiao Xiaoyang given during the “Panel Discussion : The Drafting Process and Legislative Intent of the Basic Law” of the Summit:  
[https://www.legalhub.gov.hk/video/event\\_115\\_4\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_4_en.mp4)

is accountable to both the HKSAR and the CPG. Article 48 states that the CE shall lead the Government of the HKSAR (“HKSARG”), sign bills, decide on government policies, etc.

47. Article 62(5) also entrusts the HKSARG with powers and functions to “*draft and introduce bills, motions and subordinate legislation*”. Article 74 precludes the introduction of bills by members of the LegCo in relation to public expenditure or political structure or government operations and requires written consent of the CE for introducing bills relating to government policies. Annex II to the Basic Law further imposes a higher threshold for the passing of motions, bills or amendments to government bills introduced by members of the LegCo (simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies), in contrast with that for bills introduced by the Government (simple majority vote of the members present suffices). All these give substantial control to the executive over bills and motions that may be introduced and passed by the LegCo.

(iii) The HKSAR's Relationship with the Central Authorities

48. While the HKSAR enjoys a high degree of autonomy,<sup>52</sup> there are nevertheless instances where matters are entirely within the purview of the Central Authorities. At the outset, it is trite that the HKSAR, as a local administrative region, has no authority to deal with matters such as foreign affairs and national defence etc., which are matters relating to sovereignty and is within the exclusive purview or management of the Central Authorities as set out in Articles 13 and 14 of the Basic Law.<sup>53</sup>

49. There are also instances where there is significant interplay in the relationship between the Central Authorities and the HKSAR. This can be seen, e.g., in the legislative process of

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<sup>52</sup> See paragraphs 68-70 below on a discussion of Hong Kong's high degree of autonomy.

<sup>53</sup> Article 13 of the Basic Law provides:

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

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

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

Article 14(1) provides:

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

As discussed, the Basic Law is rooted in "one country" and there are provisions in the Basic Law reinforcing the "one country" principle. For more details, please refer to paragraphs 37 and 38 above.

Hong Kong. While the HKSAR enjoys wide legislative power under Article 17 of the Basic Law,<sup>54</sup> power is reserved for the NPCSC to scrutinize and vet laws enacted by the local legislature under Article 17(3).

50. The legislative exercise of Hong Kong almost invariably starts with a bill drafted and proposed by the HKSARG,<sup>55</sup> which will then be passed by LegCo and subsequently signed by the CE<sup>56</sup> in due course. The new law must then be reported to the NPCSC. Under Article 17(3) of the Basic Law, if the NPCSC, after consulting the Committee for the Basic Law of the HKSAR, considers that the law is not in conformity with the provisions of the Basic Law<sup>57</sup> regarding affairs within the responsibility of the Central Authorities or

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<sup>54</sup> Article 17 of the Basic Law provides:

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

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

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

<sup>55</sup> See Article 62(5) of the Basic Law. Members of the LegCo may introduce bills in accordance with Article 74.

<sup>56</sup> See Articles 73(1) and 48(3) of the Basic Law.

<sup>57</sup> Taking into account Article 11 of the Basic Law which provides that any laws passed by LegCo after 1997 must not be in contravention of the Basic Law.

regarding the relationship between the Central Authorities and the HKSAR, the NPCSC may return the law in question and the returned law shall immediately be invalidated. Through this process, the NPCSC exercises an important oversight function of the laws enacted by LegCo.

51. The NPCSC also has a significant role to play in respect of pre-1997 laws. On 23 February 1997, the NPCSC made a decision<sup>58</sup> which stated that it had, in accordance with Articles 8<sup>59</sup> and 160<sup>60</sup> of the Basic Law, declared that those laws previously in force in Hong Kong listed in Annexes I and II thereto were in contravention of the Basic Law and shall not be adopted as the laws of the HKSAR. Paragraph 4 of this decision further provides that laws previously in force in Hong Kong adopted as laws of the HKSAR, shall, as from 1 July 1997, be applied with necessary modifications,

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<sup>58</sup> “Decision of the Standing Committee of the National People’s Congress Concerning the Handling of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China”, found at <https://www.elegislation.gov.hk/hk/capA206>.

<sup>59</sup> Article 8 of the Basic Law provides that the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the HKSAR legislature.

<sup>60</sup> Article 160(1) of the Basic Law provides:

*“Upon the establishment of the [HKSAR], the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the [NPCSC] declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.”*

adaptations, restrictions and exceptions to make them conform with the status of the HKSAR, and the relevant provisions of the Basic Law.<sup>61</sup>

52. Another example of the engagement of the Central Authority's relationship with the HKSAR can be found in the role of the CE. In addition to being accountable to both the CPG and the HKSAR as head of both the HKSAR and the HKSARG,<sup>62</sup> one of the powers and functions that the CE exercises under Article 48 of the Basic Law is the implementation of the directives issued by the CPG in respect of relevant matters provided for in the Basic Law.

53. The case of Democratic Republic of the Congo & Other v FG Hemisphere Associates LLC<sup>63</sup> serves to illustrate how a matter within the purview of the Central Authorities should be handled by the Hong Kong courts. In this case, the Court of Final Appeal ("CFA") considered whether, after 1 July 1997, the courts of the HKSAR can validly adhere to a doctrine of restricted state immunity as a matter of common

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<sup>61</sup> See also other details about the prerogative of the Central Authorities regarding national security as well as Articles 23 and 160 of the Basic Law, please refer to "VI. National Security Law under the Basic Law" below.

<sup>62</sup> For more details on the role of the CE, please refer to paragraph 46 above.

<sup>63</sup> *Democratic Republic of the Congo & Other v FG Hemisphere Associates LLC* (2011) HKCFAR 95



law which would be at variance with the principled policy of absolute state immunity consistently applied by the PRC in its relations with foreign States. The majority held that the answer to this question was certainly “No”, and held that the provisions of the Basic Law “*allocate to the CPG responsibility for the foreign affairs of the Region and exclude the management and conduct of foreign affairs from the sphere of the HKSAR’s autonomy. Because the CPG’s responsibility for foreign affairs is exclusive, subject only to the “external affairs” exception delegated by the CPG under Article 13(3), the institutions of the HKSAR, including the courts of the Region, are bound to respect and act in conformity with the decision of the CPG on matters of foreign affairs relating to the PRC as a sovereign State.*”<sup>64</sup> The majority concluded provisionally that the HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of China, is accordingly a doctrine of absolute immunity. The CFA then sought an interpretation of Articles 13(1) and 19 of the Basic Law from the NPCSC

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<sup>64</sup> Ibid at 324.

pursuant to Article 158(3)<sup>65</sup>. On 26 August 2011, the NPCSC issued an interpretation of Articles 13(1) and 19 of the Basic Law (“the Interpretation”), the effect of which is to confirm the provisional judgment of the majority.

54. Mr Zhang Xiaoming, Deputy Director of the Hong Kong and Macao Affairs Office, rightly pointed out in his speech delivered during the Summit that, *“one should respect the high degree of autonomy of the HKSAR, as well as the full administration of the central government, which is the origin and guarantee of the HKSAR's autonomy.”*<sup>66</sup>

*(iv) Power of the NPCSC to interpret the Basic Law*

55. The Basic Law is a national law adopted by the NPC. The NPC is the highest organ of power in the PRC and the NPCSC is its permanent organ. The interpretation of the Constitution rests with the NPCSC by virtue of Article 67(1), which states: *“The [NPCSC] shall exercise the following functions and powers: (1) interpreting the Constitution and*

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<sup>65</sup> See paragraph 55 below for the text of Article 158(3) of the Basic Law.

<sup>66</sup> See the Welcome Remarks given by Mr Zhang Xiaoming during the Summit:  
[https://www.legalhub.gov.hk/video/event\\_115\\_1\\_2\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_1_2_en.mp4)

*overseeing its enforcement.*” (Emphasis added). The NPCSC also has the power to interpret laws under Article 67(4) of the Constitution.<sup>67</sup> The same is naturally true of the interpretation of the Basic Law as provided for under Article 158 of the Basic Law. In Articles 158(2) and 158(3) of the Basic Law concerning the interpretation of Basic Law, the courts in HKSAR have been authorised to interpret the provisions in specified circumstances:

*“The [NPCSC] shall authorize the courts of the [HKSAR] to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.*

*The courts of the [HKSAR] may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the [CPG], or concerning*

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<sup>67</sup> Article 67(4) of the Constitution provides:

*“The National People’s Congress Standing Committee shall exercise the following functions and powers:*

*...*

*(4) interpreting laws;”.*

*the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the [NPCSC] through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.”*

56. The judiciary in dealing with cases exercising their adjudicative power as set out in the Basic Law can interpret this constitutional document, subject always to the final interpretation by the NPCSC as provided for under Article 158(1) of the Basic Law. The Central Authorities have not derogated from their duties and right to provide a final and conclusive interpretation of the Basic Law and the CFA is to apply such law as propounded in any interpretations made by the NPCSC under Article 158 of the Basic Law to the facts of

the case at hand in adjudicating the cases. During the Summit, Professor Zou Ping-xue, Director of the Center for the Basic Law of Hong Kong and Macao SARs at the Shenzhen University reiterated that “NPCSC’s interpretation of the Basic Law is prescribed by both the Constitution and the Basic Law while the NPCSC’s interpretation of the Basic Law will not damage the rule of law and judicial independence of HKSAR. On the other hand, the overriding status of NPCSC’s interpretation of the Basic Law in HKSAR’s constitutional order had been reaffirmed by numerous judicial decisions of the Hong Kong courts.”<sup>68</sup>

## **VI. National Security Law under the Basic Law**

### **A. National security - Prerogative of the Central Authorities**

57. In my previous article that was published in this very same magazine<sup>69</sup>, I had reiterated that the enactment of the “*Law of the People’s Republic of China on Safeguarding National*

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<sup>68</sup> See the speech of Professor Zou Ping-xue given during the “Panel Discussion: Interpretation of the Basic Law (The Right of Abode case and the Oath-taking case)” of the Summit:

[https://www.legallhub.gov.hk/video/event\\_115\\_5\\_sc.mp4](https://www.legallhub.gov.hk/video/event_115_5_sc.mp4)

<sup>69</sup> *National Security Law – A New Horizon for the Successful Implementation of “One Country, Two Systems”*, Ms. Teresa Cheng, SC, Secretary for Justice, Hong Kong Special Administrative Region of the People’s Republic of China, China Law magazine 2020 No. 4

[https://www.doj.gov.hk/en/community\\_engagement/speeches/20200824\\_sj1.html](https://www.doj.gov.hk/en/community_engagement/speeches/20200824_sj1.html)

*Security in the Hong Kong Special Administrative Region*” (“National Security Law”) by the NPC is both legitimate and constitutional while the National Security Law is in line with the international practice of safeguarding national security. Safeguarding national security is undoubtedly within the purview of the Central Authorities, and is never a matter within the scope of autonomy of the HKSAR under “one country, two systems”. This is the basic principle of national sovereignty and reflects the common practice of states, irrespective of whether they operate as a unitary or federal state. Therefore, the CPG has the greatest and ultimate responsibility for safeguarding national security for all parts of China, including the HKSAR. Support for this can be found in Article 3 of the National Security Law itself, which provides that *“the Central People’s Government has an overarching responsibility for national security affairs relating to the Hong Kong Special Administrative Region.”* During the Summit, Mr Zhang Yong pointed out that such responsibility can be reflected in three aspects: (i) *setting a unified national security standard to be applied in the country as a whole; (ii) to prevent activities endangering national security and (iii) to actively assess the risks associated with*

*national security.*<sup>70</sup>

58. A sovereign state's right to safeguard national security is also recognized internationally under international law. For example, according to the "*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*" unanimously passed by the United Nations General Assembly in 1970, the elements of sovereign equality include, that each State enjoys the rights inherent in full sovereignty and the territorial integrity and political independence of the State are inviolable<sup>71</sup>. The purpose of safeguarding national security is to protect these sovereign rights. As a matter of international law and practice, enacting and implementing national security legislation is without a doubt an inherent right of every sovereign State and falls within the internal affairs of any sovereign State, and

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<sup>70</sup> See the speech of Mr Zhang Yong given during the "*Panel Discussion : The Responsibility of Maintaining National Security under the "One Country" Principle*" of the Summit: [https://www.legalhub.gov.hk/video/event\\_115\\_6\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_6_en.mp4)

<sup>71</sup> According to the *Friendly Relations Declaration*, the principle of sovereign equality includes the following elements:

- (i) States are judicially equal;
- (ii) Each State enjoys the rights inherent in full sovereignty;
- (iii) Each State has the duty to respect the personality of other States;
- (iv) The territorial integrity and political independence of the State are inviolable;
- (v) Each State has the right freely to choose and develop its political, social, economic and cultural systems; and
- (vi) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

should be free from intervention by other States as enshrined in the international law principle of non-intervention.<sup>72</sup>

59. Given that HKSAR has experienced serious social unrest with violent incidents and even acts resembling domestic terrorism since the eruption of the opposition to the proposed legislative amendments to the Fugitive Offenders Ordinance, and also some radicals have been openly advocating “Hong Kong independence” and ideas suggesting separatism; coupled with the fact that HKSAR has failed to discharge its constitutional obligation to legislate for certain specific national security offences in accordance with Article 23 of the Basic Law and it was foreseeable that such obligation could not be fulfilled in the near future, the enactment of the National Security Law is imperative for “one country, two systems” to return to the right track and continue to move forward steadfastly. As Mr Qiao Xiao-yang remarked during the Summit, “*it had come to an unbearable situation*

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<sup>72</sup> For example, the *Friendly Relations Declaration* (1970) reiterates that armed intervention and all other forms of interference violate international law, and the *United Nations Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* (1987), which provides that every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the UN purposes (paragraph 1). **See also** the International Court of Justice case of *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, where the ICJ held that the principle of non-intervention is part of customary international law.



*which compelled the Central People's Government, which shoulders the ultimate responsibility to maintain the prosperity and stability of HKSAR, to act in order to fulfil such responsibility. If the Central People's Government acquiesced, it would have committed a historical mistake.”<sup>73</sup>*

## B. National Security under the Basic Law

60. HKSAR is an inalienable part of the People's Republic of China. The principle of “one country, two systems” has two-fold: (i) upholding national unity and territorial integrity and (ii) maintaining the prosperity and stability of Hong Kong; neither should be neglected.

61. As rightly observed by Mr Zhang Yong during the Summit, *“the Basic Law provides a comprehensive regime in safeguarding national security, which does not confine itself to Article 23. He further explained that such comprehensive regime can be seen in 3 aspects:*

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<sup>73</sup> See the speech of Mr Qiao Xiaoyang given during the “Panel Discussion : The Drafting Process and Legislative Intent of the Basic Law” of the Summit:  
[https://www.legallhub.gov.hk/video/event\\_115\\_4\\_en.mp4](https://www.legallhub.gov.hk/video/event_115_4_en.mp4)

- (i) *The “Principle” aspect: Article 1 of the Basic Law stipulates that the HKSAR is an inalienable part of the People's Republic of China. Article 12 of the Basic Law further provides that the HKSAR shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the CPG. HKSAR, being a local administrative region and a part of the People's Republic of China; with the autonomy coming directly under the CPG, will no doubt has a constitutional responsibility to safeguard national security, like all other local governments under the CPG in China;*
- (ii) *The “CPG” aspect: The CPG is responsible for both foreign affairs and defence of the HKSAR<sup>74</sup>. On the other hand, Article 18 of the Basic Law provides that the NPCSC may add to or delete from the list of national laws in Annex III of the Basic Law, which should confine to those relating to defence and foreign affairs as well as other matters outside the*

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<sup>74</sup> See Articles 13 and 14 of the Basic Law.

*limits of the autonomy of the HKSAR. Article 18 further provides that in the event that the NPCSC decides to declare a state of war or, by reason of turmoil within the HKSAR which endangers national unity or security and is beyond the control of the government of the HKSAR, decides that the HKSAR is in a state of emergency, the CPG may issue an order applying the relevant national laws in the HKSAR.*

(iii) *The “HKSAR” aspect, which has two-fold:*

*On the one hand, Article 160 of the Basic Law provides that the laws previously in force in Hong Kong shall be adopted as laws of the HKSAR except for those which the NPCSC declares to be in contravention of the Basic Law. A number of laws previously in force in Hong Kong are related to safeguarding national security<sup>75</sup>.”*

*On the other hand, the HKSAR has a constitutional obligation to legislate for national security under*

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<sup>75</sup> For example, Sections 2, 6 and 7 of the Crimes Ordinance (Cap. 200).

*Article 23 of the Basic Law.*<sup>76</sup>

62. Having failed to legislate for national security under Article 23<sup>77</sup> of the Basic Law for the past 23 years and without any indication that such obligation could be fulfilled in the near future, the HKSAR became a gaping hole in China’s national security, posing a major security risk to its national sovereignty, unity and territorial integrity.

63. In light of the above, the 13<sup>th</sup> NPC adopted a two-step “Decision and Legislation” approach for enacting and implementing the National Security Law to address the risks posed to national security in HKSAR. In its third meeting on 28 May 2020, the NPC made the “*Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*”<sup>78</sup>, and

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<sup>76</sup> See the speech of Mr Zhang Yong given during the “Panel Discussion : The Responsibility of Maintaining National Security under the “One Country” Principle” of the Summit.

[https://www.legalhub.gov.hk/video/event\\_115\\_6\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_6_en.mp4)

<sup>77</sup> Article 23 of the Basic Law provides that: “*The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.*”

<sup>78</sup> See “*Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*” (Unofficial English Translation) at <https://www.elegislation.gov.hk/hk/A215>

delegated the NPCSC to formulate the national security law.

64. In its 20<sup>th</sup> meeting on 30 June 2020, the NPCSC passed the “*Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*”<sup>79</sup>. Pursuant to the NPC decision and Article 18 of the Basic Law, the National Security Law was added to Annex III of the Basic Law, promulgated and became applicable to the HKSAR.<sup>80</sup>

C. Duty to legislate under Article 23 of the Basic Law to be completed

65. Notwithstanding the passing of the “*Law of People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*”, the HKSAR still has a constitutional duty to legislate for national security as set out in Article 23 of the Basic Law. After the passing of

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<sup>79</sup> See: “*The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*” at [https://www.elegislation.gov.hk/doc/hk/a406/eng\\_translation\\_\(a406\)\\_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf)

<sup>80</sup> Article 18 of the Basic Law provides that national laws shall not be applied in the HKSAR except for those listed in its Annex III. It further confines those national laws that can be added to Annex III to “those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the [HKSAR] as specified by [the Basic Law]”. As national security is within the purview of the CPG, the National Security Law was promulgated and became applicable to the HKSAR on 30 June 2020 following consultation with the Basic Law Committee and the HKSARG.

the National Security Law, Article 7 reiterates the need for HKSAR to complete the task assigned to it: “*The [HKSAR] shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law of the [HKSAR] and shall refine relevant laws.*”

#### D. Only patriots should govern Hong Kong

66. Mr Zhang Xiaoming stressed in his speech delivered during the Summit that “*safeguarding national sovereignty, security and development interests is the primary objective of the “one country, two systems” principle.*” He further observed that: “*it is only natural to require those who govern HKSAR as patriots, and those working within the political structure of HKSAR to uphold the Basic Law and bear allegiance to the HKSAR and the PRC; and to undertake not to do anything that will prejudice PRC’s national interest as well as the prosperity and stability of HKSAR.*” On the other hand, Mr Zhang Xiaoming pointed out that “*the passing of the “Law of People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region” marked the beginning of a new phase of HKSAR, signifying a*

*transition from chaos to governance.” He further noted that: “it is a rule under the principle of “one country, two systems” and now a legal norm that those who love their own nation and Hong Kong should govern Hong Kong, while those who oppose their own nation and deliberately stirring up trouble in Hong Kong should be out of office.”<sup>81</sup>*

## **V. HKSAR Leverages on Two Systems**

67. Apart from the fundamental arm of “one country”, the other tenant in the principle of “one country, two systems” is the demarcation of “two systems” – the socialist system that is present on the Mainland on the one hand, and the capitalist system that is to be continued in Hong Kong unchanged after 1997 on the other. This is provided for under the Basic Law, with Article 5 providing that “[t]he socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years”. Article 11 of the Basic Law also provides that “[i]n accordance with Article 31 of the Constitution of the [PRC], the systems and

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<sup>81</sup> See the Welcome Remarks given by Mr Zhang Xiaoming during the Summit: [https://www.legalhub.gov.hk/video/event\\_115\\_1\\_2\\_en.mp4](https://www.legalhub.gov.hk/video/event_115_1_2_en.mp4)

*policies practised in [the HKSAR], including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law”.*

A. High degree of autonomy

68. Under the Basic Law, the HKSAR enjoys a high degree of autonomy in respect of a broad spectrum of matters which are specifically identified in the Basic Law, such as independent finances,<sup>82</sup> independent taxation system,<sup>83</sup> monetary and financial system,<sup>84</sup> free convertibility and flow of capital,<sup>85</sup> free trade<sup>86</sup> and economic<sup>87</sup> policy, and immigration control.<sup>88</sup>

69. As noted by the Vice President of the Chinese Society of International Law Mr Huang Jin, the characteristics and limits of this autonomy should be kept in mind:

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<sup>82</sup> See Article 106 of the Basic Law.

<sup>83</sup> See Article 108 of the Basic Law.

<sup>84</sup> See Article 110 of the Basic Law.

<sup>85</sup> See Article 112 of the Basic Law.

<sup>86</sup> See Articles 114 and 115 of the Basic Law.

<sup>87</sup> See Article 119 of the Basic Law.

<sup>88</sup> See Article 154 of the Basic Law.



*“[P]racticing a high degree of autonomy in special administrative regions is different from local autonomy in the general sense. Special administrative regions enjoy a higher degree of autonomy with more power...All administrative, legislative and judicial affairs are handled by the special administrative regions on their own accord...The high-level autonomy of the special administrative regions not only possesses characteristics of local autonomy in a unitary country, but also goes far beyond the autonomy power granted by a federation nation to its member. This high-level autonomy of special administrative regions is also acknowledged by the fact that other national laws do not apply to them, except for the Basic Law and those listed in Appendix III to the Basic Law.*

*It must be noted that the autonomy of special administrative regions is only a ‘high degree of autonomy’ and not full autonomy. It is law-based autonomy, not extra-legal autonomy.”<sup>89</sup>*

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<sup>89</sup> Speech by Huang Jin, “Practicing “One Country, Two Systems” through the Rule of Law” at the 2017 Colloquium on International Law: Common Future in Asia organized by the Asian Academy of

70. HKSAR's autonomy under the Basic Law should also be distinguished with the "internal self-determination" of a minority people of a State under international law. Judge Shi notes that such autonomy is normally designed for the protection and preservation of the rights, culture and religious beliefs of the minority people. However, Hong Kong was a part of Guangdong Province before British occupation, and Hong Kong people used the same written language and spoken dialect as the people of Guangdong Province. As such, Hong Kong people is not a minority people of China and would not enjoy the "autonomy" relating to the "internal self-determination" of a minority people of a State.<sup>90</sup>

B. International participation - External affairs as part of foreign affairs

71. It should be borne in mind when discussing HKSAR's external affairs under the Basic Law that it is inherently the

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International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 25-36) at 26-27.

<sup>90</sup> Speech by Judge Shi Jiu-yong, "One State, Two Systems", China's Contribution to the Progressive Development of Contemporary International Law" at the *2017 Colloquium on International Law: Common Future in Asia* organized by the Asian Academy of International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 37-44) at 40.

responsibility of the CPG to handle foreign affairs relating to the HKSAR, and the power by the HKSAR to conduct any external affairs is granted and authorized by the CPG. The conduct of external affairs is plainly part and parcel of foreign affairs. Approval has been obtained from the Central Government before entering into agreements, be they trade related or otherwise, with foreign states or regions. The operations of HKSARG and the CPG in relation to these matters should reflect such fundamental principle. The Former Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs Xu Hong makes this point clear:

*“First, the HKSAR shall not on its own participate in any treaty that is limited to sovereign States only. International treaties to which the HKSAR may become a party using the name “Hong Kong, China” are those not limited to sovereign States. ...*

*Second, the HKSAR’s power to conclude agreements or treaties with foreign States is granted and authorized by the Central Government under the Basic Law. Such*

*power is not an inherent power. The HKSAR has as much power as the Central Government grants.*

*Third, bilateral agreements that the HKSAR may conclude with foreign States on its own are limited to the fields that fall within the HKSAR's autonomy under the Basic Law...Such arrangements are compatible with Hong Kong's status as a local administrative entity. As a matter of fact, the HKSAR's "treaty making" power derives from the Central Government and is subordinate in nature."*<sup>91</sup>

72. The CPG gives the HKSAR the power to conduct external affairs on a broad range of subjects under the Basic Law, with Article 13(3) authorizing the Region to conduct relevant external affairs in accordance with the Basic Law. Article 151 provides that the HKSAR, using the name "Hong Kong, China" may maintain and develop relations and conclude agreements on its own, with foreign states and regions and

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<sup>91</sup> Speech by Xu Hong, "The Successful Implementation of "One Country, Two Systems" Policy in Hong Kong is a Contribution to the Development of International Law – The Case of Application of International Agreements and Treaties in the Hong Kong Special Administrative Region", at the *2017 Colloquium on International Law: Common Future in Asia* organized by the Asian Academy of International Law and the Chinese Society of International Law, available in the conference proceedings (see pp 45-53) at 47-48.

international organizations, in such fields as economic, trade, finance and monetary affairs, shipping, communications, tourism, culture and sports. Under Article 152, representatives of the HKSAR Government may participate in international organizations or conferences in appropriate fields limited to states as members of delegations of the PRC. The HKSAR may also participate in international organizations and conferences not limited to states, using the name “Hong Kong, China”.

73. The HKSAR has made good use of this external affairs power granted under the Basic Law. It has signed over two hundred and sixty bilateral agreements on its own in areas covering free trade, taxation, investment promotion and protection as well as civil aviation. In investment protection alone, HKSAR has signed twenty-two Investment Promotion and Protection Agreements (“IPPAs”) with foreign economies in order to enhance two-way investment flows and boost our economy. These IPPAs cover most of our trade partners, the most recent one with Australia entering into force in January 2020.<sup>92</sup>

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<sup>92</sup> For more details on Hong Kong’s external affairs power, please refer to the “Focus” article, “External Affairs and HKSAR’s Status as an International City” in Issue No. 19, *Basic Law Bulletin*,

74. The participation of the HKSAR in international organizations and conferences not limited to states is also demonstrative of the principle of “one country, two systems” to the international community. It is in the capacity of “Hong Kong, China” that the HKSAR participates as a full member in international organizations of this kind, such as the World Trade Organization, World Customs Organization, the Asia-Pacific Economic Cooperation and the Asia Infrastructure Investment Bank. In contrast, even nations such as Scotland participate in such international organizations as part of the United Kingdom delegation.<sup>93</sup>

75. From the above, the unique application of the “one country, two systems” principle in the Basic Law provides a leverage for HKSAR to participate in international bodies, brings about significant advantages to HKSAR as a gateway to and from China, and promotes investment and encourages trade in the region and beyond.

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2017.

<sup>93</sup> See, e.g. the membership of the World Customs Organization at <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/wco-members/list-of-members-with-membership-date.pdf?db=web> and the World Trade Organization at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

### C. Finance and economy

76. The HKSAR enjoys a high degree of autonomy in the conduct of its economy under the Basic Law.<sup>94</sup> The Hong Kong dollar is the legal tender of the HKSAR and the linked exchange rate system has been maintained. With the strong support of the CPG, Hong Kong has been able to maintain financial stability even during turbulent times including the global financial crisis in 2008. According to the Bank for International Settlements' Triennial Survey of Foreign Exchange and Derivatives Market Turnover published in September 2019, the Hong Kong dollar against US dollar was the most heavily traded currency pair. Hong Kong continues to be the fourth largest global foreign exchange market.

77. As our Country deepens its economic reform and further opens up its financial market, Hong Kong has also benefited from the globalization of the Renminbi ("RMB"). Today, Hong Kong is the world's largest offshore RMB centre.

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<sup>94</sup> See Chapter V of the Basic Law. For more details on the HKSAR's high degree of autonomy in its economy under Chapter V, please refer to the "Focus" article, "Hong Kong thrives as an international business and financial centre under the Basic Law", in Issue No. 20 of *Basic Law Bulletin*, 2018.

Hong Kong continues to flourish as an international financial centre under the Basic Law and is home to many financial institutions. Hong Kong is a major global listing platform for companies from different jurisdictions. In 2019, Hong Kong raised a total of \$314 billion of funds through Initial Public Offerings, ranking first in the world for the seventh time over the past 11 years.

78. The most significant instrument that enhances the economic position of the HKSAR is the "Mainland and Hong Kong Closer Economic Partnership Arrangement" ("CEPA"), signed between the PRC and the HKSAR in 2003. Adopting a "building-block" approach where the scope and content is continuously expanding, CEPA has, for the past 17 years, exponentially expanded the economic development of Hong Kong by providing ample opportunities to interact with the Mainland in the areas of trade in goods and services, investment, and economic and technical cooperation. CEPA is only possible under "one country, two systems". As Professor Zhao Yun, Head of Department of Law at the University of Hong Kong rightly observed during the Summit, *"CEPA is a special trade and economic arrangement made*



*between Mainland and Hong Kong, with reference to relevant World Trade Organisation's practices. CEPA fully reflects the support from the Central People's Government towards both the economic development and the long-term prosperity and stability of HKSAR. From a long-term perspective, the continuous implementation of "one country, two systems" will allow HKSAR to enjoy the best of both worlds and to scale new heights of success.*"<sup>95</sup>

79. The significance of the benefits of CEPA cannot be understated. It can be argued that the favourable treatment as provided for under the provisions of CEPA go far beyond those offered by the Mainland to other countries and regions. Additionally, CEPA's influence does not only extend to economic benefits, with the innovative provisions in CEPA regarding the use of mediation to settle investment disputes under the CEPA Investment Agreement providing for a set of modern, high standard, comprehensive yet flexible mediation rules<sup>96</sup> also serving as a potential model for the use of mediation as a tool to reform Investor-State Dispute

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<sup>95</sup> See the speech of Professor Zhao Yun given during the "Panel Discussion : Implementing "One Country, Two Systems" under the Basic Law and its Benefits to the HKSAR" of the Summit: [https://www.legallhub.gov.hk/video/event\\_115\\_7\\_sc.mp4](https://www.legallhub.gov.hk/video/event_115_7_sc.mp4)

<sup>96</sup> Please refer to <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf> for the full text of the CEPA Investment Mediation Rules.

Settlement.<sup>97</sup>

#### D. Legal and dispute resolution

80. Under “one country, two systems” as implemented in the Basic Law, Hong Kong retains its previous legal system and operates as the only common law jurisdiction in China, positioning itself as an international legal and dispute resolution services hub in the Asia-Pacific region with the support and recognition by the CPG in its “Outline of the 13<sup>th</sup> Five-Year Plan for the National Economic and Social Development”<sup>98</sup> in 2016.

81. Hong Kong’s judiciary is renowned for its independence and respect for the rule of law,<sup>99</sup> with the CFA having established itself as a significant source of jurisprudence for the common law world. The Basic Law, in addition to the non-revolving

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<sup>97</sup> See the Secretary for Justice’s Article “Investor-state dispute settlement reform – Mapping the way forward” published in the Journal of the Hong Kong Institute of Chartered Secretaries, at [https://www.doj.gov.hk/eng/public/sj/20190712\\_sj1.html](https://www.doj.gov.hk/eng/public/sj/20190712_sj1.html), and the closing remarks of the Secretary for Justice at the *ISDS Reform Conference 2019: Mapping the Way Forward*, organized by the Asian Academy of International Law and the Department of Justice of the HKSAR, available in the conference proceedings (see pp. 264-270) at 270.

<sup>98</sup> See Chapter 53, Section 1 of the “Outline of the 13th Five-Year Plan for the National Economic and Social Development” at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103953/126605/F-1757587826/CHN103953%20Eng.pdf>

<sup>99</sup> For more details on the HKSAR’s independent judiciary, please refer to the “Focus” article, “Independence of the judiciary” in Issue No. 16, *Basic Law Bulletin*, 2014.

door mechanism,<sup>100</sup> provides an infrastructure for the judiciary that enhances their discharge of judicial duties in a manner that is conducive to the provision of impartial, independent and professional judgements. This includes the appointment process,<sup>101</sup> the security of tenure,<sup>102</sup> the immunity of judges,<sup>103</sup> and importantly, the expressed provision in Article 85 of the Basic Law that guarantees judicial independence, free from any interference. The Basic Law also permits the CFA to draw on the experience of judges from other common law jurisdictions. To date, 14 eminent judges from apex courts of the United Kingdom, Australia and Canada sit on the CFA as non-permanent judges. Non-permanent judges sit on all types of cases, from commercial, criminal to constitutional and have witnessed Hong Kong's legal system in administering justice. Their participation reinforces that our rule of law and independent judiciary are well recognized internationally.

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<sup>100</sup> Upon appointment, judges at the District Court level and above are precluded from returning to practice in Hong Kong as a barrister or solicitor. This “non-revolving door” system prevents perceived conflicts of interest and enhances the independence of the judiciary.

<sup>101</sup> Article 88 of the Basic Law provides that judges shall be appointed by the CE on the recommendation of an independent commission, while Article 92 provides that judges are appointed based on their judicial and professional qualities. There is no political vetting in the appointment process.

<sup>102</sup> Article 89 of the Basic Law guarantees the security of tenure for judges, and states that they can only be removed for inability to discharge his or her duties or for misbehavior.

<sup>103</sup> Article 85 of the Basic Law provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions.

82. Riding on its strong rule of law, independent judiciary and common law system, Hong Kong has developed into a prime venue for international legal and dispute resolution services through arbitration and mediation. Since 2015, Hong Kong has been among the top five preferred seats for arbitration globally.<sup>104</sup>
83. A number of well-respected international institutions has also chosen to establish a presence in HKSAR outside their home jurisdictions. This melding of local and international arbitral institutions has fostered HKSAR's development as the leading international legal and dispute resolution services hub in the Asia-Pacific region.<sup>105</sup>
84. The signing of different legal arrangements with the Mainland also showcases the strengths of “one country, two systems”. A “game-changer” would be the “Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitration Proceedings by the Courts of

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<sup>104</sup> According to the International Arbitration Surveys conducted by Queen Mary University of London.

<sup>105</sup> For more details on Hong Kong's development as an international legal and dispute resolution services centre, please refer to the “Focus” article, “One Country, Two Systems” and the Development of Arbitration in Hong Kong”, in Issue No. 18, *Basic Law Bulletin*, 2016.

the Mainland and of the HKSAR” signed on 2 April 2019.<sup>106</sup> Under this arrangement, HKSAR became the first, and still the only, jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitration proceedings administered by eligible arbitral institutions would be able to apply to the Mainland courts for interim measures. As Judge Si Yan-li, Deputy Director of the Research Office of the Supreme People’s Court of China, remarked, “*the signing of this arrangement signified the practical support offered by the Central People’s Government towards Hong Kong’s development of legal services and position as the leading centre for international legal and dispute resolution services in the Asia-Pacific Region.*”<sup>107</sup> Riding on the successful implementation of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR (“Arrangement”) signed on June 21, 1999, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (“Supplemental Arrangement”) was also signed between HKSAR and Mainland on 27

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<sup>106</sup> See <https://www.info.gov.hk/gia/general/201904/02/P2019040200782.htm> for the text of the said arrangement.

<sup>107</sup> See the speech of Judge Si Yan-li given during the “Panel Discussion : Implementing “One Country, Two Systems” under the Basic Law and its Benefits to the HKSAR” of the Summit: [https://www.legalhub.gov.hk/video/event\\_115\\_7\\_sc.mp4](https://www.legalhub.gov.hk/video/event_115_7_sc.mp4)

November 2020. Having accrued some two decades of implementation experience, and taking into account feedback from the arbitration sector, the Supplemental Arrangement seeks to amend the Arrangement by:

(a) expressly including the term "recognition" when referring to enforcement of arbitral awards in the Arrangement for greater certainty;

(b) adding an express provision to clarify that a party may apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award for greater certainty;

(c) aligning the definition of the scope of arbitral awards with the prevalent international approach of "seat of arbitration" under the New York Convention; and

(d) removing the current restriction of the Arrangement to allow parties to make simultaneous application to both the courts of the Mainland and the HKSAR for enforcement of an arbitral award.

Undoubtedly, the Supplemental Arrangement will be conducive to the development of Hong Kong's legal and dispute resolution services in the Greater Bay Area, and further enhancing Hong Kong's status as an international legal hub for legal, deal-making and dispute resolution services.

85. Another ground breaking arrangement signed with the Mainland is the “Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong Special Administrative Region”,<sup>108</sup> signed on 18 January 2019. This arrangement, which is modelled on an advanced draft of the “2019 HCCH Judgments Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters” (“2019 HCCH Judgments Convention”) from the Hague Conference on Private International Law, allows for the recognition and enforcement of Hong Kong judgments (which fall within the scope of the arrangement) in the Mainland and vice versa. By including

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<sup>108</sup> See <https://www.info.gov.hk/gia/general/201901/18/P2019011800504.htm> for the text of the said arrangement.

some intellectual property judgments into the scope of the arrangement, this even goes beyond the 2019 Hague Judgments Convention.

86. These measures are only possible due to the policy of “one country, two systems”, showcasing the strengths of HKSAR as a centre for international legal and dispute resolution services in the region due to this policy. From a legal practitioner’s perspective, Mr Edward Liu Yang, Legal Director at Hill Dickinson LLP, opined during the Summit that: *“the reaching of a series of reciprocity arrangements between the Mainland and HKSAR is all because of the Basic Law and the safeguard provided under “one country, two systems”.”*<sup>109</sup>

## **VII. Conclusion**

87. The Basic Law has turned “one country, two systems” into reality. Since 1 July 1997, HKSAR has been thriving. The economy and the provision of financial and legal services in

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<sup>109</sup> See the speech of Mr Edward Liu Yang given during the “Panel Discussion : Implementing “One Country, Two Systems” under the Basic Law and its Benefits to the HKSAR” of the Summit: [https://www.legallhub.gov.hk/video/event\\_115\\_7\\_sc.mp4](https://www.legallhub.gov.hk/video/event_115_7_sc.mp4)



HKSAR continue to increase as a result of the opening up policy in 1978 and China's becoming the second largest economy. By reason of the "one country, two systems" policy, HKSAR has been able to secure arrangements and policy support for the benefit of HKSAR that no other places in the world can. It is imperative that one goes back to basics for the preservation and observance of the purpose and intent underlying the Basic Law with a view to further the "one country, two systems" policy and maintain and advance HKSAR's stability and prosperity.