Second, creating an interim body would retard progress towards a Legislative Council fully elected through geographical constituencies, despite the provision in Art 68 of the Basic Law that 'The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.' Annex II lays down the framework for the composition of the legislature in the first three terms only, remaining silent on its subsequent terms though recognising that the method of forming the Legislative Council may be changed after the year 2007. The fourth term is impliedly scheduled to begin in 2007 (see Art 69) — but the existence of the provisional legislature for one year would postpone the end of the third-term Legislative Council to 2008, contrary to the intent of the Basic Law. This problem could be solved by shortening the life of the provisional legislature to three months.

*Stephen Law Shing-yan**

Nationality and the Right of Abode

On 23 May 1996 the Standing Committee of the National People's Congress (NPCSC) of the PRC adopted the Decision Concerning the Interpretation of the Implementation of Chinese Nationality Law in Hong Kong. It sought thereby to resolve some important questions as to the status of the residents or former residents of Hong Kong who may wish to return to live in the Hong Kong Special Administrative Region as permanent residents. The Decision gives effect to the recommendations of the Preparatory Committee (which in this regard rejected the recommendations of the Preliminary Working Committee). The Decision is important not only for the substantive provisions it makes but the style and method of doing so — which demonstrate the significance of the power of interpretation of the Basic Law vested in the NPCSC.

The manner in which the Basic Law deals with the question of nationality and residence illumines both the complexities of the past and the imperatives of 'one country, two systems.' The claims of 'one country' required that Chinese nationality laws should apply in the Hong Kong Special Administrative Region (HKSAR). At the same time the distinctiveness of the HKSAR could only be maintained if a different regime of quasi-nationality were established for Hong Kong — for two reasons. The first is connected with autonomy which requires a distinction between Chinese nationals on the mainland and Chinese nationals with an established link with Hong Kong. The second reason is connected with the cosmopolitan character of Hong Kong, where people of

* A recent graduate of the Faculty of Law, University of Hong Kong. The author would like to thank Mr Kwong Ying-wai for his comments on an early draft of this note.

different nationalities live and work and for the most part the law makes no distinction among them. This meant that Chinese nationality could not be the exclusive basis of rights and obligations.

Chinese isolation, especially since 1949, emphasised the 'nationalistic' or even the chauvinistic aspect of nationality, sharpening the distinction between citizens and foreigners. The very origins of the nationality laws in China lie in the assertion of a broad concept of Chinese sovereignty, to prevent ethnic Chinese from falling under foreign dominion. It rests on the transmission of nationality through descent (jus sanguinis) and prohibits the divestment by a Chinese of his or her nationality except with the permission of the Chinese government. Although in the 1950s this stance was modified by giving overseas Chinese the right to choose to become citizens of the country of their residence, in China itself nationality is used to distinguish foreigners from nationals in a number of ways.

Hong Kong, on the other hand, has achieved its cosmopolitanism by negating, for the most part, the principle of nationality, especially once a person had been admitted to the territory. For entitlement to reside in Hong Kong, for a long time birth in the territory was more important than nationality. There was little discrimination in commerce and industry on the basis of nationality, and not much in politics.

The need to marry these contrasting attitudes was complicated by doctrinal differences between Britain and China on the status of nationality under British rule, stemming from the British assertion, and the Chinese denial, of British sovereignty. Therefore while the UK conferred British nationality on those Chinese who had been born in Hong Kong during the British regime or naturalised there, the PRC regarded all Chinese in Hong Kong as Chinese nationals and bound by its Nationality Law. These differences precluded a Sino-British agreement on nationality in the Joint Declaration. While not irrelevant, they were not of major significance to the arrangements for the future, particularly as the UK had, since the 1960s, gradually detached British nationals by virtue of their connection to Hong Kong from the general scheme of United Kingdom citizenship. Thus while the nationality matter is dealt with in separate memoranda (outside the framework of the Joint Declaration) by the UK and the PRC, signalling formal differences, agreement was reached in the Declaration on the rights and obligations of residents of different nationalities.

Following the Joint Declaration, the central concept in the Basic Law is the right of abode, which right distinguishes the permanent residents of Hong Kong from other residents. The only relevant nationality is that of China; in the Joint Declaration its primary importance lay in its connection with establishing the right of abode for certain groups, although in the Basic Law, following principally the Chinese resentment at the 1990 British Nationality (Hong Kong) Act, it has assumed a greater significance, restricting certain offices to

nationals. Questions of Chinese nationality are not determined by the Basic Law, but by the Chinese Nationality Law 1980. Its application to Hong Kong is more problematic than may have been initially realised.

The Basic Law refers to those persons who would have the right of abode as 'permanent residents of the HKSAR' (Art 24). This concept is basic to the exercise of rights and duties as well as the exercise of power. While rights under the Basic Law are granted to all residents (those given permission by the immigration authorities for ordinary residence), rights to vote and stand for elections as well as employment in the public services are restricted to permanent residents. Certain posts (the Chief Executive, the Chief Justice, the Chief Judge, the Speaker of the legislature, and 80 per cent of the seats in the legislature) can only be held by permanent residents who are also Chinese nationals and, except in the case of legislators, have lived in Hong Kong for at least twenty years, while senior offices in government are confined to permanent residents who are Chinese nationals. In neither case should these persons have the right of abode in a foreign country. In this way various objectives are met: the assertion of sovereignty by confining positions of power and authority to Chinese nationals, 'Hong Kong people ruling Hong Kong' by requiring substantial connection with Hong Kong, and accepting a degree of cosmopolitanism.[1]

Who is a Chinese national for the purposes of this article will be determined by the Chinese Nationality Law. Although the Chinese Memorandum to the Joint Declaration states that all Hong Kong Chinese are 'compatriots,' the situation appears to be less clear cut (even assuming the PRC position that Chinese sovereignty over Hong Kong remained undiminished over 150 years of British rule). There are two principal provisions for the acquisition of Chinese nationality: (a) birth in China of at least one parent who is a Chinese national; or (b) birth outside China of at least one parent who is Chinese, provided that neither of the parents has settled abroad and the person himself or herself has not acquired a foreign nationality on birth (Art 5). Since about 50 per cent of the Hong Kong Chinese were born in Hong Kong under the British regime (as British subjects) of parents who had settled there, if Hong

[1] Broadly speaking, there are two categories of persons who qualify for the right of abode (ie, permanent residency), Chinese nationals and others; the conditions for the acquisition of the right vary as between them. Chinese nationals acquire the right of abode in one of three ways: (a) if they were born in Hong Kong before or after the transfer of sovereignty (Art 24(1); (b) have ordinarily resided for a continuous period of not less than seven years before or after the transfer of sovereignty (art 24 (2); or (c) born to persons covered by (a) and (b) outside Hong Kong (Art 24(3)). It will be obvious that persons in categories (a) and (b) need have no real or continuing connections with Hong Kong. The Basic Law will thus grant the right of abode to various groups who did not enjoy it before, of which the most prominent is the children born to illegal Chinese immigrants between 1982 and 1 July 1997. The right to abode of those in under Art 24(2) should be placed in the context of the rules for the migration to Hong Kong of Chinese mainlanders. Those wishing to enter Hong Kong will require the permission of Central People's Government, which in turn will consult the HKSAR government (Art 22). Traditionally a daily quota of immigrants has been agreed between the PRC and Hong Kong authorities; those issued with one way exit permits by China up to the quota (currently set at 150) have been accepted by Hong Kong authorities.

Kong were to be regarded as an overseas place, a large section of the people of Hong Kong would not be Chinese. Nor is it clear that their parents, even if born in China, would have remained in China, for many of them have settled in Hong Kong and acquired British nationality by naturalisation (which is a condition for the loss of Chinese nationality under Art 9).

These difficulties are overcome if British sovereignty and the consequences of British legislation on nationality are disregarded, which is the Chinese position. But there are still numerous Hong Kong Chinese who have acquired Canadian, Australian, New Zealand, American, or other nationality after settlement in these countries and who would therefore have ceased to be Chinese. The statement in the Memorandum therefore has to be qualified by the terms of the Nationality Law. Whether these persons have the right of abode will consequently depend on the law governing non-Chinese nationals.

This provides that are three categories of 'others' who would have the right of abode : (a) persons who entered Hong Kong with valid travel documents, have ordinarily resided there for a continuous period of seven years and have taken Hong Kong as their place of permanent residence before or after the transfer of sovereignty (Art 24(4)); (b) children under 21 years born in Hong Kong before or after the transfer of sovereignty of a person in category (a) (Art 24(5)); and (c) those who had the right of abode in Hong Kong only before the transfer of sovereignty and do not acquire it under any of the preceding categories (art 24(6)).

While the right of abode might be as defined in previous laws, those entitled to it are not necessarily co-extensive with those under the previous arrangements. Only in the last of the categories will reference be made to the previous laws (Schedule 2(1) of the Immigration Ordinance). The majority of those in this category will have a right of abode elsewhere and hence will not qualify for the right in the HKSAR.

These provisions of the Basic Law raise a number of issues. I want to mention just two. The first concerns the availability of consular or diplomatic protection to the Hong Kong people who have a foreign nationality. The statement in the British Memorandum had promised the holders of an appropriate status (ie BN(O)s) diplomatic protection in third countries (ie outside the UK, the HKSAR, or the mainland PRC). The Chinese Memorandum stated that such persons would not be entitled to British protection in the HKSAR or other parts of the PRC, which could be interpreted to mean that they could obtain British protection elsewhere. However this is unlikely to be the PRC position as it is inconsistent with the PRC non-recognition of any British nationality in relation to ethnic Chinese in Hong Kong. It is also unlikely that under international law Britain could claim to extend diplomatic protection to them since they will cease to have any effective link with Britain (this would not apply to those who were granted British citizenship under the 1990 British

Nationality (Hong Kong) Act, since they have the right of abode in the UK). But China has not maintained this position either in relation to Hong Kong Chinese who obtained UK citizenship through connection with the UK or who obtained other foreign nationality after an appropriate period of residence there. This conclusion follows from Art 9 of the Chinese Nationality Law under which a Chinese national loses his or her nationality on settlement and naturalisation abroad.

The second issue concerns the position of those Hong Kong Chinese people who have taken foreign citizenship in Hong Kong or have gone and acquired a foreign citizenship abroad (many of whom may wish to return to Hong Kong). Would they be able to secure the diplomatic protection of their states of citizenship? And do they enjoy the right of abode in Hong Kong? The answers to both questions turn on whether in these circumstances they have ceased to be Chinese nationals, for if they are still Chinese, diplomatic protection cannot, at the least, be invoked against China and they would in all probability have the right of abode under either Art 24(1) or Art 24(2) of the Basic Law. Chinese law does not recognise dual nationality for any Chinese national (Art 3). Most jurisdictions which have a similar rule provide that their nationality is lost automatically on the acquisition of a foreign nationality. Under Chinese law, however, two conditions have to be satisfied before Chinese nationality is lost: settlement abroad and the acquisition of a citizenship through naturalisation or some other voluntary act (Art 9). Those who have acquired foreign citizenship in Hong Kong (for what is generally referred to as 'passports of convenience') therefore remain Chinese and will presumably retain the right of abode. Others will lose their Chinese nationality only if they are regarded as having settled abroad. The nationality law does not provide a definition of 'settled'; usually it would mean that the foreign place had been chosen for habitual and relatively permanent residence, and presumably the requirements necessary for the acquistion of a foreign nationality would normally amount to 'settlement.' However many of these persons maintained links with Hong Kong as well and their real intention may have been to secure the foreign nationality as an insurance policy.

Obviously no general conclusion is possible and the matter would have to be decided on a case by case basis taking into account individual circumstances and intentions. There is little doubt that some persons had indeed 'settled' abroad (in which case they would have lost their Chinese nationality) but then decided to return to Hong Kong or might so decide in the future. Being no longer Chinese nationals they would not be covered by the Basic Law provisions regarding the right of abode of Chinese nationals. Instead they would be covered by Art 24(4), and would have to establish ordinary residence for seven years continuously before qualifying for the right. Equally they would be entitled to the consular protection of their new states.

It is clear that the former solution was inconvenient to what are termed 'returnees,' and the latter was inconvenient to the PRC. Much anxious thought was given to how the return of migrants could be facilitated by granting them the right of abode. The PWC (many of whose members hold foreign passports) recommended that if a migrant returned before 1 July 1996, he or she would be treated as having the right of abode (without stating any legal basis for it); this view appears to have been accepted by the Hong Kong and Macau Affairs Office. However, the Preparatory Committee broadened the recommendation and removed the deadline of 1 July 1996 (again, it would seem, without any careful analysis of the legal provisions). It has proposed to the NPCSC that if a migrant or indeed an ethnic Chinese resident in Hong Kong with a foreign passport did not declare his or her foreign nationality to the Immigration Department in Hong Kong (and if they did not use the foreign passport for entry to or exit from the HKSAR or other parts of the PRC) they would be regarded as Chinese nationals and would retain their right of abode. But the corrollary is that they would have to give up their right to foreign consular protection - something China has been particularly anxious to ensure. The NPCSC has already provided an interpretation of the Nationality Law to give effect to this recommendation. While this might achieve the right of abode for Chinese foreign citizens, it is unlikely to deprive them of foreign consular protection since under international law consular protection is a right of a state and not of its citizens, and therefore not something that they can barter away.

This is not, however, generally realised, and the PRC offer may be regarded by those who acquired foreign nationality to remove their liability to what they feared might be arbitrary PRC treatment and to leave Hong Kong as a poisoned chalice. Deprived of foreign consular protection, they may have little protection against acts in Hong Kong or other parts of the PRC violating their rights. Equally, it would seem that they can leave Hong Kong only on HKSAR or PRC travel documents, and although the Basic Law recognises the right to leave the HKSAR, it also seems to envisage either that the person has a valid travel document or special authority.

Some of the assumptions of the Joint Declaration about the cosmopolitan character of Hong Kong and the potential of Hong Kong people ruling Hong Kong have been attentuated, first in the departure from the Joint Declaration in the Basic Law and second in the interpretations placed on the provisions of the Basic Law. As to the first, the reservation of particular posts to Chinese nationals will exclude foreign residents who have traditionally played an active role in the life of the city. The further confinement of some of these posts to those without the right of abode in a foreign country will exclude many Chinese with long-term connections with Hong Kong. Restrictions relating to the right of abode in a foreign country were introduced in response to the British granting of UK citizenship on a number of Hong Kong people through the 1990

legislation as well as the acquisition by Hong Kong Chinese of other nationalities. Unlike Britain, other countries do not have the concept of the right of abode; the reference in the Basic Law must be to a status which enables one to enter and leave a country at will — and would thus cover those with the 'green card' in the US and with permanent residency in Canada, Australia, and New Zealand. It is thus wider than nationality and may cover a large number of Hong Kong people. It is not clear how far the NPCSC ruling regarding foreign nationality will affect the returnees in this regard

The result is that the key policy makers will be Chinese nationals who are permanent residents without any significant connections with foreign states. They would not enjoy, at least in the Chinese view, foreign consular protection - which some Hong Kong people might regard as increasing their dependence on the HKSAR and Central authorities. These developments and considerations are likely to affect the autonomy of the HKSAR.

Yash Ghai[*]

[*] Sir Y K Pao Professor of Public Law, University of Hong Kong.