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Department of Justice  
The Government of the Hong Kong  
Special Administrative Region

# Basic Law: Selected Drafting Materials and Significant Cases

Volume One

Compiled and Edited by  
the Department of Justice



**BASIC LAW:  
SELECTED DRAFTING MATERIALS AND  
SIGNIFICANT CASES  
Volume One**

Edited by  
Constitutional and Policy Affairs Division  
Department of Justice  
Government of the Hong Kong Special Administrative Region

Department of Justice of the Government of the Hong Kong Special  
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## Preface

Year 2022 marks the 25th anniversary of the establishment of the Hong Kong Special Administrative Region (“HKSAR”) of the People’s Republic of China and the return of Hong Kong to the Motherland after the end of the colonial rule. With the staunch support of the country, Hong Kong has successfully implemented “one country, two systems” over the last 25 years while maintaining its role as an international metropolis. This considerable achievement fully reflects the incomparable advantage that Hong Kong enjoys being a community with a shared future with the Motherland.

### **Unprecedented system innovation**

Against the historical backdrop of reform, opening-up and socialist modernization in the 1980s, the Communist Party of China, then led by Mr Deng Xiaoping, innovatively put forward the great creation of “one country, two systems”, namely, under the premise of one country, the main body of the country shall practise socialism while Hong Kong, Macau and Taiwan shall practise capitalism. Guided by the principle of “one country, two systems”, the question of Hong Kong left over from history was successfully resolved through diplomatic negotiations with the United Kingdom of Great Britain and Northern Ireland. This marked a significant step towards realizing the complete reunification of the Motherland.

Throughout world history, restoration of full exercise of sovereignty inevitably leads to war and bloodshed. Nevertheless, under the guiding principle of “one country, two systems”, our country was able to uphold the principle of national reunification and reiterate that the issue of sovereignty was non-negotiable while being magnanimously tolerant, and pragmatic in its negotiations with the United Kingdom, which resulted in the signing of the Sino-British Joint Declaration by the leaders of both countries in 1984. On 1 July 1997, our country resumed the exercise of sovereignty over Hong

Kong and realized its peaceful return without the use of any force.

As accurately pointed out by Mr Deng Xiaoping, “‘one country, two systems’ is workable... and will serve as an example to the world of how issues left over from history can be resolved between countries.”<sup>1</sup> Xue Hanqin, Vice-President of the International Court of Justice of the United Nations, once described “one country, two systems” as an innovative practice in international law, and pointed out that the return of Hong Kong has set a model for the peaceful settlement of disputes between countries and the practice of international law.<sup>2</sup>

### **Be our own master**

At its third session on 10 April 1985, the Sixth National People’s Congress (“NPC”) decided that the Basic Law Drafting Committee would be established to work on the drafting of the Basic Law. In the same year, 180 members with different backgrounds, from different political spectra and sectors of the Hong Kong community assembled together and witnessed the establishment of the Basic Law Consultative Committee (“BLCC”). Comprising eight special groups, the BLCC was tasked to conduct in-depth study and consultation on Hong Kong’s various arrangements after the reunification. The consultation lasted for more than four years, and is the longest and largest in scale in Hong Kong’s history. The Basic Law is the fruit of a concerted effort of Hong Kong people from all walks of life seeking common ground, and building consensus on important constitutional provisions for Hong Kong’s future. It was finally adopted by the NPC on 4 April 1990 and becomes the constitutional document of the HKSAR.

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1 Deng Xiaoping, “We Shall Be Paying Close Attention to Developments in Hong Kong during the Transition Period” (31 July 1984) in *Selected Works of Deng Xiaoping*, Vol. III, People’s Publishing House (1st ed. October 1993) p. 68.

2 “‘One Country, Two Systems’ and Its Contribution to the International Law” delivered at the Basic Law 30th Anniversary Legal Summit themed “Back to Basics” on 17 November 2020.

The formulation of the Basic Law fully reflects that Hong Kong people have become the master of our own in the postcolonial era. The Basic Law states that the aim of selecting the Chief Executive and electing all members of the Legislative Council by universal suffrage will ultimately be achieved in the HKSAR. This clearly illustrates the Central Government's sterling support for democratic development of Hong Kong. Hong Kong residents have since enjoyed much greater room for political participation and ample democratic rights.

### **Strong vitality of “one country, two systems”**

The 25 years' practical experience in the implementation of “one country, two systems” since reunification has clearly demonstrated that further enhancement of the policy and its implementation is essential for the long-term prosperity and stability of Hong Kong. It chimes with the fundamental interests of the country and the nation, as well as the overall and long-term interests of Hong Kong.

Admittedly, it can never be a smooth ride. The journey has sometimes followed a straight track, but there are also twists and turns. As an unprecedented creation, “one country, two systems” has no readily available experience to draw on, and has inevitably encountered new situations and new issues in its operation. It is necessary to make continuous explorations and press ahead through implementation.

With the support from the Central Government, the Hong Kong community has generally been striving ahead and making dedicated efforts for advancement over the last 25 years. By upholding the premise of “one country” and leveraging the strength of “two systems”, Hong Kong has been integrating proactively into national development, and making the most of our own unique advantages and professional strength to facilitate the country's further comprehensive reform.

President Xi Jinping highly commended the successful implementation of “one country, two systems” in Hong Kong: “As

fully evidenced by its implementation, ‘one country, two systems’ is not only the best solution to the Hong Kong question left over from history but also the best institutional arrangement for the long-term prosperity and stability of Hong Kong after its return to the Motherland. It is a workable solution and an achievable goal welcomed by the people.”<sup>3</sup> *The Resolution of the Central Committee of the Communist Party of China on the Major Achievements and Historical Experience of the Party over the Past Century* also underlines the need to uphold “one country, two systems” and affirms its implementation as a resounding success with worldwide recognition.

The original aspiration and the right way forward remain unchanged. As long as we stay committed to the original aspiration of “one country, two systems”, hold firm in fostering proper awareness of “one country”, and stand firm in upholding the “one country” principle, “one country, two systems” will be the best institution and arrangement for the maintenance of Hong Kong’s long-term prosperity and stability. Hence, it is not necessary to change the capitalist system and way of life specified in the Basic Law as well as the common law system in Hong Kong, all of which will continue to operate. As accurately pointed out by Mr Deng Xiaoping, “Our policy on Hong Kong will not change for 50 years after it is reunited with the Motherland in 1997... there will be even less need to change after the 50-year period. Hong Kong’s status will not change, nor will our policy towards Hong Kong...”<sup>4</sup> Mr Deng also stated that, “As a matter of fact, 50 years is only a figure of speech. Even after 50 years our policy will not change either. That is, for the first 50 years it cannot be

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3 Speech delivered by President Xi Jinping at the meeting celebrating the 20th Anniversary of Hong Kong’s Return to the Motherland and the Inaugural Ceremony of the Fifth-term Government of the Hong Kong Special Administrative Region.

4 Speech delivered by Deng Xiaoping at a meeting with the members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region (16 April 1987)

(<https://www.basiclaw.gov.hk/filemanager/content/tc/files/anniversary-reunification15/anniversary-reunification15-appendix6.pdf>) (Chinese version only).

changed, and for the second there will be no need to change it.”<sup>5</sup>

### **Staying true to the original aspiration, back to the basics**

Reviewing the original aspiration of “one country, two systems” and the Basic Law, it is the mission of the Department of Justice (“DoJ”) to promote proper knowledge of the rule of law, to enhance public awareness of the Constitution and the Basic Law, and to foster an accurate understanding of national security. In the past two years, DoJ organized a series of events and legal forums to promote the Constitution and the Basic Law. Experts and scholars were invited to speak on legal topics such as the Constitution, the Basic Law and the National Security Law to rebut misconceptions. The “Vision 2030 for Rule of Law” has also been launched to take forward the rule of law education and nurture a culture of law abidance through a series of events.

In view of the existence of twisted understanding of Hong Kong’s constitutional order in the community in 2019 and the spread of false information prepared by anti-China forces seeking to jeopardize Hong Kong, DoJ decided in 2020 to publish this book to clear up confusion and to foster proper understanding. Efforts have been made to include in this book selected drafting materials and relevant discussions of the Basic Law. It also features notable cases relating to the Basic Law from July 1997 to December 2021. DoJ will make its best endeavour to update this book where necessary, in particular the part on notable cases.

I would like to take this opportunity to extend my heartfelt appreciation to each and every member of DoJ including all government counsel who have contributed to the publication of this book, in particular colleagues of the Basic Law Unit. My special thanks goes to Dr Simon Hoey Lee, author of *Overview of the Drafting Process of the Basic Law of Hong Kong*, for collating and compiling

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5 “We Should Draw on the Experience of Other Countries” in *Selected Works of Deng Xiaoping*, Vol. III, People’s Publishing House (1<sup>st</sup> ed. October 1993) p. 267.

materials related to the Basic Law. I would also like to thank China Legal Services (H.K.) Ltd. for providing professional translation and editing services. I am truly grateful for their contribution.

Lastly, I hope this book could clear up misconceptions and eliminate mistakes so that the community can acquire an accurate and comprehensive understanding of the Constitution and the Basic Law, as well as the HKSAR's constitutional order established therein. I also hope that this book could serve as a foundation for the study of the Basic Law and inspire the public to have more in-depth learning and research of the Constitution and the Basic Law.

Ms Teresa Cheng, SC

Secretary for Justice

Hong Kong Special Administrative Region

21 January 2022

## Foreword I

Year 2022 marks the 25th anniversary of the establishment of the Hong Kong Special Administrative Region of the People's Republic of China and the implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"). The Department of Justice of the Government of the Hong Kong Special Administrative Region compiled and published the *Basic Law: Selected Drafting Materials and Significant Cases* to celebrate the great cause, which is a move of profound significance. At the invitation of Ms Teresa Cheng Yeuk-wah, the Secretary for Justice, by a letter, I write this Foreword.

President Xi Jinping stated explicitly that the Central Government should follow two principles in the implementation of the "one country, two systems" policy. First, the Central Government remains firm to this policy and will keep the policy unchanged and unswerving. Secondly, the policy must be implemented fully and accurately to keep the practice of "one country, two systems" in Hong Kong on the right track always, and away from distortion or deviation. In my opinion, keeping "one country, two systems" policy unchanged and unswerving as well as the practice of "one country, two systems" away from distortion or deviation constitute the distinct theme for promoting "one country, two systems" in the new era.

The Central Government remains committed to the "one country, two systems" policy. From the 18th National Congress of the Communist Party of China onwards, the Central Government has reiterated repeatedly that "one country, two systems" is the best solution to the historical questions of Hong Kong and Macao as well as the best institutional arrangement to maintain the long-term prosperity and stability of the two regions upon their return to the Motherland. The Central Government has made "adhering to 'one country, two systems' and moving toward national reunification" as one of the 14 basic strategies for upholding and developing socialism with Chinese



characteristics in the new era, which is also an important part of Xi Jinping's *Thought on Socialism with Chinese Characteristics for a New Era*. The Central Government has made it clear that upholding "one country, two systems", maintaining the long-term prosperity and stability of Hong Kong and Macao, and promoting the peaceful reunification of the country constitute one of the significant strengths of China's state institution and governance system; and that upholding and improving the mechanism of "one country, two systems" is an important task for upholding and developing socialism with Chinese characteristics as well as advancing the modernization of China's system and capacity for governance. The recently adopted *Resolution of the Central Committee of the Communist Party of China on the Major Achievements and Historical Experience of the Party over the Past Century* discussed at length the "one country, two systems" policy and its implementation. The study of this Resolution reminds me of Deng Xiaoping's two discourses on "remaining unchanged for 50 years". On each occasion, he began with China's national development strategy and pointed out sharply that our reference to "50 years" is neither casual nor impulsive but has taken into consideration China's practical reality and development needs. Should the above be appreciated, and should people acquire an accurate understanding of our basic position and the underlying reasons for the catchphrase and the formulation of the policy, they would acknowledge our commitment, and realize that we would not change. In the new era, the Central Government would continue to promote "one country, two systems" as a national strategy. As long as we understand the above, we will appreciate the strong will and steadfast commitment embedded in the statement "keeping 'one country, two systems' policy unchanged and unswerving".

The Central Government has steered the implementation of "one country, two systems" in the new era to a right direction. Ensuring that "one country, two systems" is neither bent nor distorted in practice, and ensuring that the policy remains unchanged and unwavering are two sides of the same coin and they complement each other. Since the 18th National Congress of the Communist Party of China,

President Xi Jinping has made a series of important speeches on “one country, two systems” and the work regarding Hong Kong and Macao, and proposed many important ideas and perspectives. What have impressed me most during my study of the above can be summarized in the following ten focal points. First, it must be reiterated that “one country, two systems” is a holistic concept, in which “one country” is the premise and basis for the implementation of the “two systems”, and the “two systems” are subordinate to, derived from and unified under “one country”. Second, it must be reiterated that the Constitution of the People’s Republic of China (“Constitution”) and the Basic Law together formulate the constitutional basis of a special administrative region, and both the Constitution and the Basic Law should be strictly adhered to and their authority should be upheld. Third, it must be reiterated that Hong Kong and Macao have been reincorporated into the national governance system from the day on which they returned to the Motherland, so they must safeguard the constitutional order of the Special Administrative Regions as prescribed by the Constitution and the Basic Law. Fourth, it must be reiterated that the socialist system upheld by the main body of the country is the premise and the guarantee for Hong Kong and Macao to practice capitalist system and maintain their prosperity and stability. Hong Kong and Macao must duly respect the socialist system practised by the main body of the country. Fifth, it must be reiterated that our country is a unitary state and the Central Government has an overall jurisdiction over all local administrative regions including the Hong Kong and the Macao Special Administrative Regions. Sixth, it must be reiterated that the high degree of autonomy of the Hong Kong and the Macao Special Administrative Regions is not inherent but authorized by the Central Government; that the Central Government has the power to supervise the high degree of autonomy and no one is allowed to fight the Central Government in the name of “high degree of autonomy”; and that it is necessary to firmly implement the fundamental principle of patriots administering Hong Kong and Macao and to ensure that the political power of the Special Administrative Regions is firmly held in the hands of patriots. Seventh, it must be reiterated that any activity that

endangers national sovereignty and security, challenges the leadership of the Central Government and the authority of the Basic Law of the Special Administrative Regions, or any attempt to use Hong Kong and Macao for infiltration and sabotage activities against the Mainland would have crossed the line of “one country, two systems”. Such activities or attempts are absolutely impermissible. Eighth, it must be reiterated that the Chief Executives and the Special Administrative Region Governments must be given all the support in the administration of the Regions in accordance with the law to discharge their powers and functions proactively, to lead and unite people from all walks of life in Hong Kong and Macao, to pursue development, promote harmony, protect and improve people’s livelihood, to implement democracy in an orderly manner, to maintain social stability, and to fulfill their constitutional responsibilities to safeguard national sovereignty, security and development interests. Ninth, it must be reiterated that Hong Kong and Macao should be encouraged to seize major opportunities brought by the implementation of national strategies such as the “Belt and Road Initiative” and the development of the Guangdong-Hong Kong-Macao Greater Bay Area. The two Regions should facilitate the country’s opening up on all fronts more actively; they should take initiative to integrate into the country’s overall development; they should participate in the practice of national governance in a more proactive manner; and they should promote cultural exchanges with other parts of the country more actively in order to pursue new development and make new contribution. Tenth, it must be reiterated that patriotic education should be strengthened among young people in Hong Kong and Macao. The force of patriots, who love their country and their regions, should be developed and nurtured such that compatriots in Hong Kong, Macao and the Mainland would share together the historic responsibility of national rejuvenation and take pride in a strong and prosperous China. President Xi Jinping has made several important speeches on “one country, two systems” and provided insightful guidance. The above ten focal points have been engraved in my mind because, from my long-term experience working on Hong Kong and Macao affairs, I

know very well that the above important speeches made by President Xi Jinping have illuminated the right direction for the implementation of “one country, two systems”. They are very specific and are of practical guiding significance. In other words, if anything goes wrong with these ten aspects, the practice of “one country, two systems” will be deviated and distorted, let alone be implemented steadfastly and successfully.

Upon returning to the Motherland, Hong Kong has been reincorporated into the national governance system, and the implementation of “one country, two systems” has achieved a widely recognized success globally. However, there are still sabotaging forces attempting to lead the practice of “one country, two systems” into astray and attempting to manipulate “one country, two systems” to achieve their political goal of jeopardizing China and ruining Hong Kong. What we witnessed on the streets of Hong Kong in 2019 was the height of such sabotaging force, from which we have learnt a lesson. History is the best textbook. In order to safeguard the peace of Hong Kong and the wellbeing of its residents, we are bound to stand our ground and confront this sabotaging force firmly. Speaking of this, I would like to share with you two speeches made by Deng Xiaoping. The first one was made at the meeting with the delegations from Hong Kong and Macao attending the National Day celebrations in October 1984, right after the signing of the Sino-British Joint Declaration. Deng Xiaoping said, “With regard to the Sino-British Joint Declaration, not only do we know that we shall abide by it, but we are also convinced that the British will do the same, and we are still more convinced that our Chinese compatriots in Hong Kong will do so. However, we should keep in mind that there are bound to be people who do not want to abide by it strictly. There will be certain factors that might cause disturbances, disorder and instability. To be honest, these factors will not come from Beijing, but we cannot exclude the possibility that they exist inside Hong Kong or that they will come from certain international forces.” The second speech was made at the meeting with the members of the Drafting Committee for the Basic Law of Hong Kong in 1987. Deng Xiaoping said, “Don’t ever think that everything

would be all right if Hong Kong's affairs were administered solely by Hong Kong people while the Central Government had nothing to do with the matter. That simply wouldn't work — it's not a realistic idea. The Central Government certainly will not intervene in the day-to-day affairs of the special administrative region, nor is that necessary. But isn't it possible that something could happen in the region that might jeopardize the fundamental interests of the country? Couldn't such a situation arise? If that happened, should Beijing intervene or not? Isn't it possible that something could happen there that would jeopardize the fundamental interests of Hong Kong itself? Can anyone imagine that there are in Hong Kong no forces that might engage in obstruction or sabotage? I see no grounds for taking comfort in that notion. If the Central Government were to abandon all its power, there might be turmoil that would damage Hong Kong's interests. Therefore, it is to Hong Kong's advantage, not its disadvantage, for the Central Government to retain some power there. You should soberly consider this point: Isn't it possible that there might some time arise in Hong Kong a problem that could not be solved without Beijing's intervention? In the past when Hong Kong ran into a problem there was always Britain that could intervene. There will always be things you will find hard to settle without the help of the Central Government. It is the policy of the Central Government that the interests of Hong Kong should not be harmed, and we also hope that nothing will happen in Hong Kong that will harm its interests or the interests of the country as a whole. But what if something did happen? I should like to ask you to think this over and take it into consideration when drafting the Basic Law." Reviewing those statements made by Deng Xiaoping more than three decades ago in light of the significant measures taken by the Central Government in the midst of the devastating situation in Hong Kong, I trust you will definitely find that the Central Government's policies have always been consistent: it would take into account all kinds of intricacies and make its position clear at the up-front. The constitutional order of a special administrative region prescribed by the Constitution and the Basic Law has immense institutional strengths, and is able to withstand all sorts of risks and challenges provided that

the power of the Central Government can synthesize with the high degree of autonomy of the special administrative region.

I prepare the above on the eve of the publication of this book, *Basic Law: Selected Drafting Materials and Significant Cases*, in order to highlight the following points. First, “one country, two systems” constitutes an important part of China’s state institution and governance system. Its implementation is primarily the task of the Central Government who also bears the ultimate responsibility for it. One can only fully and accurately appreciate the essence of “one country, two systems” and the provisions of the Basic Law if one adopts the perspective of the Central Government and shares its vision. Secondly, the fundamental purpose of the Central Government in formulating and implementing “one country, two systems” is to safeguard national sovereignty, security and development interests and to ensure the long-term prosperity and stability of Hong Kong. This original intent has never changed and will not change. The legislative intent of the Basic Law is to achieve this fundamental purpose. Whether the Basic Law has been implemented completely and faithfully must be measured by reference to the above fundamental purpose. Thirdly, the Basic Law is a living law. The problems that the Basic Law seek to resolve will change with times and the corresponding solutions offered by the Basic Law shall ride on the contribution and wisdom from generation to generation. The answer must be rooted in the original intent of the Basic Law but be abreast with the times, bearing marks distinctive of the era.

Qiao Xiaoyang

Former Chairperson of the Basic Law Committee

of the HKSAR of the NPCSC

13 December 2021

## Foreword II

My relationship with Hong Kong begins with my participation in the Sino-British Joint Liaison Group before the city's return to the Motherland. The Basic Law of the Hong Kong Special Administrative Region ("Basic Law") has been kept on my desk ever since the day of its promulgation in 1990, and has served as a reference of authority for me when dealing with Hong Kong matters. I am pleased to learn about the first-time compilation and publication by the Department of Justice of an important sourcebook on the Basic Law, *Basic Law: Selected Drafting Materials and Significant Cases*. At the invitation of Ms Teresa Cheng, Secretary for Justice, and at the commission of Mr Xia Baolong, Vice-Chairman of the National Committee of the Chinese People's Political Consultative Conference and Director of the Hong Kong and Macao Affairs Office of the State Council, I have been entrusted with the task of writing a foreword for the book. I would like to start by offering my warmest congratulations on the publication of this book.

*Basic Law: Selected Drafting Materials and Significant Cases* is rich in content. This book collates information including materials on the drafting history of the Basic Law, relevant cases on its implementation, the interpretations of it by the Standing Committee of the National People's Congress and the decisions of the National People's Congress ("NPC") and its Standing Committee concerning Hong Kong, making it a more complete record of the entire process in respect of the formulation and implementation of the Basic Law. It would be conducive to facilitating the proper awareness, understanding, promotion and implementation of the Basic Law, as well as ensuring the steadfast and successful implementation of "one country, two systems" in Hong Kong.

Upon the establishment of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on 1 July 1985, with the concerted efforts of various



sectors and experts from the Mainland and Hong Kong, as well as the active participation of the Hong Kong community, the Basic Law, a “law of historic and international significance”, was completed after four years and eight months. Since the return of Hong Kong to China, the Central Authorities have all along acted in strict adherence to the Constitution and the Basic Law, and supported the administration and improvement of people’s livelihood in accordance with the law by the Chief Executive and the Government of the Special Administrative Region (“SAR”). The executive-led political structure of the SAR established by the Basic Law has operated effectively, and the rights and freedoms enjoyed by Hong Kong residents in accordance with the law have been fully protected. Hong Kong has embarked on the wide road to complementary and joint development with the Mainland, and the implementation of “one country, two systems” has achieved universally recognized success.

For a period of time, Hong Kong found itself in a very difficult situation, where various intricate factors both within and outside Hong Kong had triggered rampant anti-China activities seeking to disrupt Hong Kong. In the face of new situations and new issues arising from the practice of “one country, two systems”, the Central Authorities have fully, faithfully and unswervingly implemented the principle of “one country, two systems”. The Central Authorities have upheld and enhanced the “one country, two systems” regime, stood firm that Hong Kong shall be administered in strict accordance with the law, safeguarded the constitutional order of the SAR established by the Constitution and the Basic Law, exercised overall jurisdiction over the SAR, and put the principle of “patriots administering Hong Kong” into practice. The theory of “one country, two systems” and the implementation of the Basic Law have witnessed new developments, demonstrated mainly in the following four areas:

**First, the Central Authorities’ overall jurisdiction over the SAR has been further consolidated.** In June 2014, the Information Office of the State Council issued a white paper entitled “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special

Administrative Region”, in which it is clearly stated that “the central government exercises overall jurisdiction over the HKSAR”. In recent years, in the implementation of “one country, two systems”, the Central Authorities have stood firm in upholding and implementing overall jurisdiction over the Hong Kong and Macao SARs. Overall jurisdiction is a clear embodiment of “one country” and, together with the “high degree of autonomy of the SAR”, constitute the core contents of “one country, two systems”. To implement the overall jurisdiction of the Central Authorities is to uphold their leadership over the SAR Government and the patriotic forces, their power of decision on the basic systems of the SAR, and their decision-making power in respect of major issues concerning the long-term stability and prosperity of the SAR. The implementation of overall jurisdiction has been specifically manifested in the Central Authorities’ efforts to promote the establishment and improvement of the legal system and enforcement mechanisms for the HKSAR to safeguard national security, the enactment of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (hereinafter referred to as the “National Security Law”), and the improvement of the electoral system of the HKSAR. At the same time, as safeguarded by the Basic Law, the HKSAR has exercised a high degree of autonomy in accordance with the law, fully utilized its institutional strengths and faithfully carried out its primary executive, legislative and judicial responsibilities. It has achieved stable economic growth while maintaining effective and efficient governance. Its status as an international financial centre, shipping and trade centre and an international aviation hub has been further consolidated and enhanced. Its education, medical and healthcare, culture, sports and social security sectors have continued to scale new heights. Hong Kong has secured greater room for its long-term stability and prosperity.

**Second, national security has been safeguarded effectively in the SAR.** President Xi Jinping has reiterated that “national security is the cornerstone of national stability”. Safeguarding national

security is a matter of top priority for our country. The Central Government has an overarching responsibility for national security affairs relating to the SAR. In view of the specific circumstances of Hong Kong at the time, the NPC adopted, as a special arrangement under “one country, two systems”, Article 23 of the Basic Law which provides that the HKSAR shall enact laws on its own to prohibit seven types of acts that endanger national security. The HKSAR has a constitutional duty to safeguard national security, but has failed to legislate on Article 23 of the Basic Law for 23 years since its return to the Motherland, leaving a gaping loophole putting national security seriously at risk. The Central Authorities cannot just sit back and allow internal and outside hostile forces to manipulate Hong Kong’s overt failure in safeguarding national security to perpetuate various acts of secession and subversion, to organize and carry out terrorist activities, and to interfere with the HKSAR’s affairs. The Central Authorities have instead acted decisively to enact and implement the National Security Law. At its 3rd Session on 28 May 2020, the 13th 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”. On 30 June 2020, the Standing Committee of the 13th NPC passed at its 20th Session the National Security Law to establish at the national level the basic legal system and enforcement mechanisms for the HKSAR to safeguard national security. The National Security Law has provided a clear legal basis for the effective prevention, suppression and punishment of acts and activities that seriously endanger national security, effectively forestalling and managing national security risks. Since the implementation of the National Security Law, the HKSAR Government, with the strong support of the Central Authorities, has been resolutely enforcing the law. Violence and chaos have been stopped in accordance with the law. Social order has been restored and further strengthened, enabling a good development trend for Hong Kong society.

**Third, the principle of “patriots administering Hong Kong”**

**has been fully and faithfully upheld.** “Patriots administering Hong Kong” is the essence of “one country, two systems” and is fundamental to national sovereignty, security, development interests, as well as the long-term prosperity and stability of Hong Kong. Mr Deng Xiaoping once clearly pointed out that, “the criteria for a patriot are to respect one’s own nation, sincerely support the resumption of the exercise of sovereignty over Hong Kong by the Motherland, and not to impair Hong Kong’s prosperity and stability.” The above criteria must be adopted in selecting and appointing the administrators of Hong Kong. On 7 November 2016, the Standing Committee of the 12th NPC specifically made an interpretation of Article 104 of the Basic Law, establishing that “[t]o uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and to bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China” are the legal requirements and preconditions for standing for election in respect of or taking up the relevant public office. This has provided legal safeguards for “patriots administering Hong Kong”. The “Decision on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region”, adopted by the Standing Committee of the 13th NPC at its 23rd Session on 11 November 2020, further specifies that once it is decided in accordance with law that a Legislative Council member does not meet the above legal requirements and preconditions, he or she will be immediately disqualified from being a member of the Legislative Council. The Decision has improved the legal system of “patriots administering Hong Kong” at the constitutional level. The adoption of the “Decision on Improving the Electoral System of the Hong Kong Special Administrative Region” at the 4th session of the 13th NPC on 11 March 2021, and the adoption of the amended Annex I and Annex II to the Basic Law of the HKSAR at the 27th session of the Standing Committee of the 13th NPC on 30 March 2021 have further strengthened the foundation of “patriots administering Hong Kong” at the institutional level, ensuring that the authority to administer the HKSAR is firmly kept in the hands of patriots. Under the new

electoral system, the elections of the Election Committee and the Seventh Term Legislative Council of the HKSAR were successfully held, allowing Hong Kong people to be the master of their own through exercising their democratic rights. With the implementation of the principle of “patriots administering Hong Kong”, a political landscape with broad representation and balanced participation from all segments of society has been established. The upholding of the principle of “patriots administering Hong Kong” has been proved essential to solving the deep-seated conflicts and problems of Hong Kong society and ensuring Hong Kong’s lasting prosperity and stability.

**Fourth, the SAR has further integrated into the national development.** Under the principle of “one country, two systems” and the Basic Law, it is a matter of course for Hong Kong and Macao to integrate into the national development. This not only responds to the call of the times during reform and opening up, but also meets the objective needs for exploring new room and new directions for development and injecting fresh impetus for the two regions. In recent years, our country has strategically and comprehensively strengthened the integration of Hong Kong and Macao into the national development, and has earnestly promoted mutually beneficial cooperation between the Mainland and the two places by stepping up efforts to further open up the Mainland’s markets to both regions and promoting the enhancement of the closer economic partnership arrangements with Hong Kong and Macao; deepening the financial cooperation between the Mainland and Hong Kong and expediting mutual access to the markets of both places; enhancing cooperation and exchanges between the Mainland and the two regions in areas such as social policies, livelihood, culture, education and environmental protection, advocating the commencement of cooperation in innovation and technology between the Mainland and the two regions and supporting small, medium and micro enterprises as well as young people of Hong Kong and Macao to start and develop businesses in the Mainland; facilitating the co-building of quality living area in the

Greater Pearl River Delta (“PRD”), enhancing the implementation of the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area (“GBA”), promoting high-quality GBA development, expediting the development of Guangdong-Hong Kong-Macao cooperation platform with regard to Qianhai, Nansha, Hengqin etc.; taking forward the development and opening up of the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone and the Guangdong-Hong Kong-Macao Intensive Cooperation Zone in Hengqin as well as supporting Hong Kong and Macao in playing an important role in the Pan-PRD Region cooperation and promoting the development of major cooperation platforms across provinces and regions in the GBA. With more in-depth cooperation with the Mainland, Hong Kong and Macao are set to jointly contribute to the development of our Motherland and enter a new era of the great rejuvenation of our nation.

The Communist Party of China has weathered the storm in the last century, and our country has embarked on a new journey of building a modern socialist nation. At its 6th plenary session, the 19th Central Committee of the Communist Party of China adopted the Resolution of the Major Achievements and Historical Experience of the Party over the Past Century, with “one country, two systems” embedded as a major component. The extraordinary journey taken by Hong Kong in the last 25 years since its return to the Motherland has fully demonstrated that the implementation of “one country, two systems” is conducive to safeguarding the fundamental interests of the country, of Hong Kong and of the people of Hong Kong. Standing at a new starting point in history, I sincerely hope that the HKSAR will proceed along the right direction of “one country, two systems” to safeguard the constitutional order established by the Constitution and the Basic Law, firmly implement the National Security Law and build a stable and cohesive society. I also hope that the HKSAR will fully implement the principle of “patriots administering Hong Kong” by forming a governing team composed of patriots to guide Hong Kong people and work together towards achieving good governance,

advancing the economy, improving people's livelihood, resolving deep-seated conflicts, and truly heightening the sense of achievement and well-being of its people.

May I wish Hong Kong an even brighter and more promising tomorrow!

Deng Zhonghua  
Deputy Director  
Hong Kong and Macao Affairs Office  
State Council  
26 January 2022



### Foreword III

Upon Hong Kong's return to the Motherland on 1 July 1997, the Hong Kong Special Administrative Region ("HKSAR") was established in accordance with Article 31 of the Constitution of the People's Republic of China ("PRC Constitution") implementing the policy of "one country, two systems". This policy has two attributes. First, the HKSAR shall come directly under the Central People's Government ("CPG"). Second, except for defence and foreign affairs, Hong Kong shall exercise a high degree of autonomy. Besides, after Hong Kong's return to China, there are three areas which shall remain unchanged for 50 years, namely Hong Kong's previous capitalist socio-economic system, way of life and fundamental laws. Hong Kong shall also maintain two statuses, namely the status as an international financial centre and the status of a free port. The two attributes of the policy serve to manifest "one country" and uphold national unity and territorial integrity, whereas the three areas to remain unchanged and the two statuses to be maintained highlight the "two systems" and maintain the prosperity and stability of Hong Kong.

The Basic Law of the HKSAR ("Basic Law") is the basis which ensures the smooth implementation of the "one country, two systems" policy. The CPG undertook to enact the Basic Law in the Sino-British Joint Declaration, with its framework outlined therein and in its Annex. Meticulously drafted by the Basic Law Drafting Committee, this piece of law took over four years to complete upon extensive consultation with different sectors of the community by the Basic Law Consultative Committee, during which there were repeated discussions and debates with various opinions gathered. These materials which relate to the drafting of the Basic Law are highly instrumental to the thorough understanding, faithful observance and strict implementation of the Basic Law.

To Hong Kong, the Basic Law is more than just a piece of law which every person residing in Hong Kong has an obligation to

understand, observe and uphold. It is also a constitutional document bearing general features of a constitution, such as stipulating the composition of the executive authorities, legislature, judiciary and other authorities of the HKSAR; providing for the enactment of laws; safeguarding the freedoms and rights of its residents; and specifying the powers of, and the procedures for, the interpretation and amendment of the Basic Law.

Over the past 24 years since Hong Kong's return to the Motherland, the Basic Law has generally been implemented smoothly in Hong Kong. The courts of the Region, especially the Court of Final Appeal ("CFA"), have handed down a number of judgments in accordance with the provisions of the Basic Law and interpreted some of the controversial articles. However, if one does not fully understand the background and the situations concerning the implementation of the Basic Law, misconceptions can easily arise. Two of the more important ones, if left uncorrected, may, over time, jeopardize or even undermine the policy of "one country, two systems".

The first misconception is that some people, due to non-acceptance or lack of understanding, ignore the importance of "one country" and only focus on and emphasize "two systems", misconceiving that a high degree of autonomy is equal to full autonomy. Some radicals are even heading towards the wrong direction of independence. In fact, without "one country", how can there be "two systems"? "One country" is the foundation from which the "two systems" are derived. As the principal basis of the basic policies of the PRC regarding Hong Kong, this national policy has already been stipulated in the Sino-British Joint Declaration, repeatedly discussed during the formulation of the Basic Law, clearly stated in its drafting documents, and prescribed in the text of the Basic Law, particularly in the Preamble and the General Principles in Chapter I. Hence, there is absolutely no room for misconception.

The reasons behind this misconception are very complicated, one of which stems from the different understandings over the scope of Hong Kong's high degree of autonomy. The first view is that the

Region only enjoys executive, legislative and independent judicial power, including that of final adjudication. This view appears to come from Article 2 of the Basic Law, but it is a misinterpretation of the provision in that it is a very narrow one without regard to the other provisions of the Basic Law. The second view is that, except for defence and foreign affairs, which are the responsibilities of the Central Authorities, all other matters shall be administered by the Region on its own free from any interference of the Central Authorities. This view has led some people to perceive that any measures taken by the Central Authorities for Hong Kong, regardless of whether they are beneficial to Hong Kong or even to the country as a whole, will be regarded as interference. This view may have come from an unreasonably narrow interpretation of Articles 13 and 14 of the Basic Law, which is in turn a misinterpretation of the entire Basic Law and a complete distortion of the original intent and purpose of “one country, two systems”. The third view is that the Central Authorities authorize the HKSAR 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 which means that a high degree of autonomy is the autonomy within the framework of the Basic Law under “one country, two systems”. This view is a more proper and reasonable interpretation based on Article 2 of the Basic Law, which is closer in line with the original intent and purpose of “one country, two systems”, and is the most widely recognized view held by members of the public. However, the HKSAR courts have not yet decided on this issue. Nor has the Standing Committee of the National People’s Congress (“NPCSC”) made an interpretation in this regard. A more authoritative interpretation is required. That said, I trust that the drafting materials of the Basic Law may shed us some important light.

The second misconception lies in the disagreement over the NPCSC’s power of interpretation of the Basic Law, some even consider that it would undermine the independent judicial power of the Hong Kong CFA. This is a complete lack of understanding towards the nature of the Basic Law. Enacted by the NPC in accordance with

Article 31 of the PRC Constitution, the Basic Law is a national law applicable to the entire country. In such case, how can one say that the NPCSC does not have the power of interpretation? Moreover, it is beyond question that under the PRC Constitution and the Mainland's civil law system, the NPCSC does have such power of interpretation. This power of interpretation is also clearly provided for in Article 158(1) of the Basic Law. In fact, the power of the Hong Kong courts to interpret the Basic Law (save for certain provisions) in adjudicating cases originates from the authorization of the NPCSC, which is also stipulated in Article 158(2), (3) and (4) of the Basic Law.

There is a more solid justification for the NPCSC to have the power of interpretation of the Basic Law. While Hong Kong is a special administrative region of the PRC, the Basic Law confers on the Hong Kong courts independent judicial power, including that of final adjudication, in adjudicating cases, whether in civil proceedings and criminal prosecutions, so long as the Basic Law is not engaged. Therefore, there is no judicial connection between the Central Government and the HKSAR under the Basic Law. However, being not merely a Hong Kong law but also a national law, the Basic Law thus becomes the only legal connection between the two places and the two systems, hence the necessity for the NPCSC to have the power of final interpretation of the Basic Law. In a number of federal countries around the world, the central federal courts also have final jurisdiction over federal or state cases involving the countries' constitutions and important national legal issues. Comparing with these federal countries, the arrangement under which the power of final interpretation of the Basic Law is vested in the NPCSC achieves similar effect. Bearing this in mind, it is plainly logical for the NPCSC to have such power. This is also unequivocally clear after one peruses the Basic Law drafting materials and the relevant CFA judgments (such as *Lau Kong Yung & others v Director of Immigration* (1999) 2 HKCFAR 300).

Controversies arise frequently as to which materials should be referred to when interpreting the provisions of the Basic Law.

Hong Kong practises a common law system. Under the common law, while the legislature is empowered to enact and amend the laws, it does not have the power to interpret the laws. Only the courts may interpret and enforce the laws in adjudicating cases. When interpreting a legal provision, the court has a duty to ascertain the legislative intent as expressed in the language of the provision. It is therefore necessary to take into consideration the purpose and context of the law including the provision requiring interpretation. If need be, reference has to be made even to all the provisions of the law and the relevant legislative materials, such being confined to those which came into existence before and at the time of legislation. Moreover, the duty of the court is to merely explain the meaning and effect of the relevant provision, but not to amend or rewrite the provision in question. This approach to the interpretation of laws under the common law differs, in terms of the procedures and rules, from those adopted under the civil law system in the Mainland. In a civil law system, the power of final interpretation is usually vested in the legislature or the highest authority to be exercised in the form of legislative interpretation, which means that they can clarify, amend or supplement the laws in order to bring them in line with the legislative purposes and intended effects. Therefore, reference may be made to all the relevant legislative and drafting materials. Since this approach differs from that of the Hong Kong courts, the final interpretation and results may also be different, thus giving rise to controversies, as in the case of *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. These are the differences between the two systems and time is required for their reconciliation.

Often there are criticisms that since Hong Kong's return to China, the freedoms and rights of Hong Kong are on the wane, and freedoms such as freedom of speech, freedom of association and freedom of demonstration have been undermined. These criticisms are groundless. In a civilized society, all freedoms and rights are not absolute, the exercise of which must be subject to the law as well as the freedoms and rights of others. The freedoms and rights of Hong Kong residents, safeguarded by the Basic Law and the Hong Kong Bill of Rights, take reference from a number of international human rights

treaties, including the International Covenant on Civil and Political Rights, which also stipulates that such freedoms and rights are subject to public interest, public safety, social order, national security, public health or morals, as well as the rights and freedoms of others.

Since Hong Kong's return to China, the courts have adjudicated on numerous cases involving the freedoms and rights of individuals and the community, many of which have been appealed to the CFA. Judgments handed down by the CFA with detailed analysis after thorough consideration have struck a balance between individual interests and overall societal interests, clearly delineating the appropriate boundary. Not only is the court's interpretation applicable to the situation of the Hong Kong community, it also conforms to the international human rights standards. [See *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372; *QT v Director of Immigration* (2018) 21 HKCFAR 324.] Over the past 24 years, more than 140 cases involving the Basic Law and human rights law have been decided by the CFA. These judgments are greatly conducive to a deeper understanding of the "one country, two systems" policy. They are also highly instrumental to the understanding, observance and implementation of the Basic Law, as well as to the safeguarding of the freedoms and rights protected thereunder.

It is commendable that the Department of Justice has devoted enormous resources and efforts to the collation and publication of the drafting materials and cases with regard to the implementation of the Basic Law. These valuable materials, which help clear doubts and dispel misconceptions, are indispensable to the understanding and study of the Basic Law.

The Hon Mr Justice Patrick Chan Siu-oi, GBM,  
Non-permanent Judge of the Court of Final Appeal of  
the Hong Kong Special Administrative Region

December 2021

## Abbreviations Table

<b>Basic Law</b>	The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
<b>BL</b>	Individual articles of the Basic Law
<b>BoR</b>	Hong Kong Bill of Rights
<b>CA</b>	Court of Appeal
<b>CE</b>	Chief Executive
<b>CE in C</b>	Chief Executive in Council
<b>CFA</b>	Court of Final Appeal
<b>CFI</b>	Court of First Instance
<b>CJ</b>	Chief Justice
<b>Constitution</b>	Constitution of the People's Republic of China
<b>CPG</b>	Central People's Government
<b>Consultative Committee</b>	Consultative Committee for the Basic Law
<b>Drafting Committee</b>	Drafting Committee for the Basic Law
<b>ExCo</b>	Executive Council
<b>HKSAR</b>	Hong Kong Special Administrative Region
<b>HKSARG</b>	Government of the HKSAR
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>LegCo</b>	Legislative Council
<b>NPC</b>	National People's Congress
<b>NPCSC</b>	Standing Committee of the National People's Congress
<b>PRC</b>	People's Republic of China
<b>Joint Declaration</b>	Sino-British Joint Declaration
<b>Annex I to the Joint Declaration</b>	Elaboration by the Government of the PRC of its basic policies regarding Hong Kong



## Introduction

The *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* is a national law that applies throughout the People's Republic of China, including the Hong Kong Special Administrative Region. It was adopted on 4 April 1990 at the Third Session of the Seventh National People's Congress of the People's Republic of China,<sup>1</sup> and was promulgated by decree of the President of the People's Republic of China on the same day. It came into effect on 1 July 1997.

### Background and Purpose of the Basic Law

The Preamble to the Basic Law is the forefront of the Basic Law's framework,<sup>2</sup> which describes the development and changes of Hong Kong's political history and introduces the formation of the HKSAR

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1 Other relevant documents adopted at that session include:

- Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
- Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region
- Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region
- Decision of the National People's Congress Approving the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress (Appendix: Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress)

2 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in Dr. Simon Lee Hoey, *Overview of the Drafting Process of the Basic Law of Hong Kong* (published by the Joint Publishing (Hong Kong) Company Limited, 2012) ("*Overview of the Drafting Process*"), Vol.3, p.1281.

and the source of its powers.<sup>3</sup> It reads as follows:

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

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

In accordance with the Constitution of the People’s Republic of China, the National People’s Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People’s Republic of China regarding Hong Kong.”

On 28 March 1990, Ji Pengfei, Chairman of the Drafting Committee, briefly explained at the NPC that the Basic Law was based on the Constitution, with “one country, two systems” as the guiding principle, setting out the PRC’s principles and policies regarding Hong

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3 Consultative Committee, *Summary of the Second Batch of Seminars*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1278.

Kong in the form of a basic law:<sup>4</sup>

### **“I. On the Guiding Principle of Drafting the Hong Kong Basic Law**

‘One country, two systems’ is the fundamental policy of the Chinese Government for bringing about the country’s reunification. In line with this policy, the Chinese Government has formulated a series of principles and policies regarding Hong Kong. The main point is to establish a special administrative region directly under the Central People’s Government when China resumes its sovereignty over Hong Kong. Except for national defence and foreign affairs, which are to be administered by the Central Government, the Hong Kong Special Administrative Region will exercise a high degree of autonomy; no socialist system or policies will be practiced in the Region, the original capitalist society, economic system and way of life will remain unchanged and the laws previously in force in Hong Kong will remain basically the same; Hong Kong’s status as an international financial centre and free port will be maintained; and the economic interests of Britain and other countries in Hong Kong will be taken into consideration. The Chinese Government has written the above principles and policies into the Sino-British Joint Declaration on the Question of Hong Kong and proclaimed that all the principles and policies regarding Hong Kong will remain unchanged for 50 years, which is to be codified in the Basic Law. 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.

Article 31 of China’s Constitution stipulates that ‘the state may establish special administrative regions when necessary. The systems

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4 According to the PRC’s hierarchy of laws, a basic law is immediately below the Constitution.

to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.' China is a socialist country and socialism is China's basic system. To realize China's reunification, however, another kind of social system, namely, the capitalist system, may be practiced in individual regions of the country. It is on the basis of China's Constitution and with 'one country, two systems' as the guiding principle that all the state principles and policies regarding Hong Kong have been established in the draft Hong Kong Basic Law, which has been submitted to the present session of the National People's Congress for examination."<sup>5</sup>

### **Conception and Implementation of “one country, two systems” from a Historical Perspective**

The “one country, two systems” principle was written into the Basic Law of the HKSAR in 1990. On 28 March 1990, Ji Pengfei, the Chairman of the Drafting Committee, pointed out in the Explanations on “The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft) and Its Related Documents” at the NPC that “‘one country, two systems’ is the fundamental policy of the Chinese Government for bringing about the country's reunification.” But discussions relating to the concept “one country, two systems” began in the late 1970s:

On 8 October 1978, Chinese leader Deng Xiaoping pointed out in a meeting with Jyun Etou, a Japanese literary critic, “In the event that Taiwan returns to China, China's policies towards Taiwan will be made according to the realities in Taiwan. For example, the United States has a lot of investment in Taiwan, so does Japan, this is the reality, and we will face up to this reality.”<sup>6</sup>

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<sup>5</sup> *Explanations on “The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China” and its Related Documents* (Addressing the Third Session of the Seventh National People's Congress, 28 March 1990).

<sup>6</sup> See *Deng Xiaoping Chronology (1975-1997)*, Vol.1, Central Party Literature Press, p.396.

At a meeting with President Ne Win of Myanmar at Yangon Airport on 14 November 1978, Deng Xiaoping said “We will respect the realities in Taiwan when the Taiwan issue is to be solved. For instance, some systems in Taiwan don’t have to change, the same is true of United States and Japanese investments in Taiwan and the way of life there. But there must be reunification.”<sup>7</sup>

On 22 December 1978, the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China issued and adopted a Communiqué, which stated “The Plenary Session believes that with the normalization of China-US relations, the prospect of Taiwan, China’s sacred territory, returning to the embrace of the Motherland, the imminent realization of the great cause of China’s reunification now lies ahead of us. The compatriots in Taiwan, Hong Kong and Macao, as well as overseas Chinese, are welcomed to continue to make positive contributions to the cause of national reunification and development in the spirit of patriotism and one family.”<sup>8</sup>

“Message to Compatriots in Taiwan” issued by the NPCSC on 1 January 1979 pointed out, “our state leaders have expressed determination to complete the great cause of national reunification with due regard to realistic circumstances. When the issue of reunification is being solved, the current situations of Taiwan and the opinions of people from all sectors in Taiwan will be respected, and reasonable policies and measures will be adopted, so that the people in Taiwan will not suffer any loss.”<sup>9</sup>

Deng Xiaoping said on 24 January 1979, at a meeting with the editor-in-chief of Time Inc. and the Hong Kong office chief of Times magazine: “Our policies and principles are reasonable. We respect Taiwan’s reality. The Taiwan authorities, as a local government, have

7 Ibid, pp.429-430.

8 See the *Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*.

9 See *Selection of Important Documents of One Country, Two Systems*, Literature Research Office of the CPC Central Committee, pp.1-5.

its own powers. In other words, it may maintain its own army of a certain size, continue its trade and commercial relations with foreign countries, and continue non-governmental exchanges. Its current policies and way of life may remain unchanged, but only under the condition of one-China. This problem can be solved in the long run. China's main body, the Mainland, will also change and develop. The general requirement is one-China, not 'two Chinas'. All patriots come together like one family."<sup>10</sup>

At noon on 30 January 1979, at a talk with members of the United States Senate and House of Representatives, Deng Xiaoping said: "We no longer use the term 'liberate Taiwan'. As long as Taiwan returns to the Motherland, we will respect the reality and the current system there. We will respect the reality in Taiwan while making sure that it returns to the embrace of the Motherland."<sup>11</sup>

Deng Xiaoping said at a reception hosted jointly by the Council on Foreign Relations, the National Gallery of Art, the National Committee on United States-China Relations, the Committee on Scholarly Communication with China, the Asia Society and the China Council in the evening of the same day: "Reunification of the Motherland is the long-cherished wish of all the Chinese people. I believe that the American people, who suffered the pain of national division more than 100 years ago, will understand the Chinese people's national desire to reunify the Motherland. How to resolve the question of Taiwan's return to the Motherland falls within the scope of China's internal affairs. According to our wishes, we fully hope to solve this problem by peaceful means, because this will be better for both the country and, the people of all ethnic groups. This point has been clearly stated in the Message to Compatriots in Taiwan by the NPCSC."<sup>12</sup>

On 6 December 1979, at a meeting with Japanese Prime Minister

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10 Ibid, footnote 6, pp.473-474.

11 Ibid, footnote 6, p.478.

12 Ibid, footnote 6, pp.478-479.

Masayoshi Ohira, Deng Xiaoping said: “We have set the goal of Taiwan’s return to the Motherland for reunification. To achieve this goal, we must proceed from the actual situation. Our condition for Taiwan is very simple, that is, Taiwan’s system and way of life will remain unchanged, and so will Taiwan’s non-governmental relations with other countries, including foreign investment and non-governmental exchanges in Taiwan. That means foreign investment in Taiwan can continue as usual. Even after Taiwan is reunified with the Motherland, foreign investment will not be affected in any way and we respect the interests of investors. Taiwan, as a local government, may have its own military forces for self-defence, but only on one condition that it remains an inalienable part of China. As a local government in China, it has full autonomy.”<sup>13</sup>

On 30 September 1981, at a meeting with Xinhua News Agency reporters, Ye Jianying, then Chairman of the NPCSC, outlined a nine-point policy on the return of Taiwan to the Motherland and the realization of peaceful reunification, including: “... (3) After the country is reunified, Taiwan may become a special administrative region, enjoying a high degree of autonomy and retaining its military. The Central Government will not interfere in Taiwan’s local affairs. (4) The current social and economic systems, the way of life in Taiwan, its economic and cultural relations with foreign countries will all remain unchanged. Private properties, houses, land, ownership of enterprises, legitimate rights of inheritance and foreign investments there are inviolable. ...”<sup>14</sup>

On 11 January 1982, at a meeting with Li Yaozi, the Chairman of the Chinese Association, Deng Xiaoping pointed out the following while the discussion touched on Ye Jianying’s remarks: “The nine principles for Taiwan are put forward in the name of Vice Chairman Ye Jianying, which is in fact ‘one country, two systems’. Two systems can be allowed. They do not undermine the Mainland system, while

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13 Ibid, footnote 6, pp.582-583.

14 Ibid, footnote 9, pp.5-7.

we do not destroy theirs. National unity is the desire of the whole Chinese nation. This is not only beneficial to future generations, but also a major event in the 5,000 years of Chinese history. We think and approach the problem from this perspective. We do not engage in so-called ‘united front tactics’. We talk about fundamental policies. Without such magnanimity, we cannot achieve the goal.”<sup>15</sup>

In March 1982, Liao Chengzhi, the former director of the Hong Kong and Macao Affairs Office of the State Council, submitted to the Central Authorities a *Report on the Preliminary Plan for Solving the Question of Hong Kong’s Status and Progress of Recent Work*, and proposed the “12 Principles”: (1) Hong Kong will return to China on 1 July 1997. (2) After its return, Hong Kong, as a special autonomous region, will be directly under the authority of the CPG and will enjoy a high degree of autonomy. (3) Hong Kong will retain its status as a free port and financial centre. (4) A local inhabitant may become the CE after duly appointed by the CPG. (5) The current social and economic systems, the way of life and welfare system in Hong Kong will all remain unchanged. (6) Private property, houses, land, ownership of enterprises and legitimate rights of inheritance will be protected. (7) Foreign industry, commerce and investment will not be violated. (8) Mutually beneficial economic relations with the United Kingdom will be formed. (9) The Hong Kong dollar remains unchanged. (10) The laws, decrees and ordinances previously in force in Hong Kong shall remain basically unchanged. (11) The Hong Kong special autonomous region will be responsible for the maintenance of public order in the region. (12) All Chinese and foreign staff of various government agencies in Hong Kong may remain in their original posts with the same salaries. The special autonomous region government may also employ foreigners as advisers when necessary.<sup>16</sup>

In December 1982, Article 31 of the amended Constitution clearly

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15 See *Deng Xiaoping Chronology (1975-1997)*, Vol.2, Central Party Literature Press, p.797.

16 See *The End of a Century of Humiliation: The Beginning and End of the Hong Kong Question*, Central Party Literature Press, p.69.



stated that “The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of specific conditions”.

Deng Xiaoping said when attending the enlarged meeting of the Political Bureau of the CPC Central Committee on 22 April 1983: “These 12 Principles are the basic guidelines for our negotiations with the United Kingdom, which will begin next month... There is a provision in these 12 Principles: ‘will remain unchanged for 50 years’. This provision can reassure Hong Kong people and ease their minds. It will help to make people appreciate more the continuity and reliability of our policies, which will be conducive to the negotiation between us and the United Kingdom, will be beneficial to the smooth recovery of Hong Kong and the maintenance of Hong Kong’s prosperity. Therefore, ‘will remain unchanged for 50 years’ is a big issue. The future government of the special administrative region will be formed with Hong Kong patriots as the main body. There is only one standard for being patriots, that is support China’s recovery of Hong Kong and national unity.”<sup>17</sup>

On 22 February 1984, when meeting with a delegation from the Center for Strategic and International Studies of the United States, Deng Xiaoping said: “The way we propose to achieve the reunification of the Mainland and Taiwan is reasonable. After reunification, Taiwan will continue to practise capitalism, while the Mainland will practise socialism, but it is one unified China. One China, two systems. The same applies to Hong Kong. One China, two systems.”<sup>18</sup>

On 26 September 1984, the Government of the PRC and the Government of the United Kingdom of Great Britain and Northern Ireland initialled in Beijing the *Joint Declaration on the Question of Hong Kong*<sup>19</sup>, in which the PRC Government stated in Article 3 its

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17 Ibid, footnote 15, pp.901-902.

18 Ibid, footnote 15, pp.961-962.

19 The *Sino-British Joint Declaration* for short. It was subsequently signed in the West Hall of the Great Hall of the People in Beijing on 19 December 1984.

basic policies regarding Hong Kong: “(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People’s Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong; ... (12) The above-stated basic policies of the People’s Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, by the National People’s Congress of the People’s Republic of China, and they will remain unchanged for 50 years.” On 10 April 1985, the Third Session of the Sixth NPC approved the *Sino-British Joint Declaration*, which included three annexes and formally established “one country, two systems” as a fundamental policy of the PRC.<sup>20</sup> The session also adopted the Decision on Establishing a Drafting Committee for the Basic Law of the HKSAR of the PRC, which will be responsible for drafting the Basic Law of the HKSAR.

### **Sino-British Negotiation to the Drafting of Basic Law – Deng Xiaoping’s Interpretation of “One Country, Two Systems”**

The speeches and talks made by Chinese leader Deng Xiaoping on the question of Hong Kong in the 1980s, details set out below, are important materials enhancing our understanding of the context and purpose of China’s implementation of the “one country, two systems” policy in Hong Kong, and the Basic Law.

Excerpt from Deng Xiaoping’s conversation with Mrs Thatcher from the United Kingdom on 24 September 1982:<sup>21</sup>

“Our basic position on the question of Hong Kong is clear. There

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20 The *Sino-British Joint Declaration* entered into effect on 27 May 1985 when the Governments of the two countries exchanged their instruments of ratification and registered them with the United Nations Secretariat.

21 “Our Basic Position on the Question of Hong Kong”, *Selected Works of Deng Xiaoping*, Vol.III, p.12.

are three major issues involved. One is sovereignty. Another is the way in which China will administer Hong Kong so as to maintain its prosperity after 1997. And still another is the need for the Chinese and British governments to hold appropriate discussions on ways to avoid major disturbances in Hong Kong during the 15 years between now and 1997.

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. If China failed to recover Hong Kong in 1997, when the People's Republic will have been established for 48 years, no Chinese leaders or government would be able to justify themselves for that failure before the Chinese people or before the people of the world. It would mean that the present Chinese Government was just like the government of the late Qing Dynasty and that the present Chinese leaders were just like Li Hongzhang! We have waited for 33 years, and if we add another 15 years, that will make 48. We are able to wait for such a long time because we enjoy the full confidence of the people. But if we failed to recover Hong Kong in 15 years, the people would no longer have reason to trust us, and any Chinese Government would have no alternative but to step down and voluntarily leave the political stage. Therefore, at this time -- I don't mean today, of course, but in no more than one or two years -- China will officially announce its decision to recover Hong Kong. We can wait another year or two, but definitely not longer. ...

We hope to have Britain's cooperation in maintaining prosperity in Hong Kong, but this does not mean that continued prosperity can only be ensured under British administration. It depends fundamentally on applying policies suitable to Hong Kong, under Chinese administration after the recovery. Hong Kong's current

political and economic systems and even most of its laws can remain in force. Of course, some of them will be modified. Hong Kong will continue under capitalism, and many systems currently in use that are suitable will be maintained. Before formulating the principles and policies for the next 15 years and beyond, we shall have an extensive exchange of views with Hong Kong people from all walks of life. These principles and policies should be acceptable not only to the people of Hong Kong but also to foreign investors, and first of all to Britain, because they will benefit them too. We hope that the Chinese and British governments will engage in friendly consultations on this question, and we shall be glad to listen to suggestions put forward by the British government. All this will take time. Why must we wait one or two years before announcing our decision to recover Hong Kong? Because during that period we hope to consult with all sorts of people. ...

We suggest that an agreement be reached that the two sides will begin consultations on the question of Hong Kong through diplomatic channels. The prerequisite is the understanding that China will recover Hong Kong in 1997. On this basis we should discuss how to carry out the transition successfully in the next 15 years and what to do in Hong Kong after the end of that period.”

Major points of Deng Xiaoping’s speech to a delegation of Hong Kong’s industrial and commercial sectors visiting Beijing, and well-known Hong Kong figures including Chung Sze-yuen, on 22 and 23 June 1984: <sup>22</sup>

“The Chinese Government is firm in its position, principles and policies on Hong Kong. We have stated on many occasions that after China resumes the exercise of its sovereignty over Hong Kong in 1997, Hong Kong’s current social and economic systems will remain unchanged, its legal system will remain basically unchanged, its way of life and its status as a free port and an international trade and financial centre will remain unchanged and it can continue to maintain or establish economic relations with other countries and regions. We

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22 “One Country, Two Systems”, *Selected Works of Deng Xiaoping*, Vol.III, p.58.

have also stated repeatedly that apart from stationing troops there, Beijing will not assign officials to the government of the Hong Kong Special Administrative Region. This policy too will remain unchanged. We shall station troops there to safeguard our national security, not to interfere in Hong Kong's internal affairs. Our policies with regard to Hong Kong will remain unchanged for 50 years, and we mean this.

We are pursuing a policy of 'one country, two systems'. More specifically, this means 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.

We have discussed the policy of 'one country, two systems' more than once. It has been adopted by the National People's Congress. Some people are worried that it might change. I say it will not. The crux of the matter, the decisive factor, is whether the policy is correct. If it is not, it will change; otherwise it won't. Besides, is there anyone who can change China's current policy of opening to the outside world and invigorating the domestic economy? If it were changed, the living standard of 80 per cent of the Chinese population would decline, and we would lose the people's support. If we are on the right track and enjoy the people's support, the policy will not change...

The concept of 'one country, two systems' has been formulated according to China's realities, and it has attracted international attention. China has not only the Hong Kong problem to tackle but also the Taiwan problem. What is the solution to these problems? As for the second, is it for socialism to swallow up Taiwan, or for the 'Three People's Principles' preached by Taiwan to swallow up the Mainland? The answer is neither. If the problem cannot be solved by peaceful means, then it must be solved by force. Neither side would benefit from that. Reunification of the Motherland is the aspiration of the whole nation. If it cannot be accomplished in 100 years, it will be in 1,000 years. As I see it, the only solution lies in practising two systems in one country. The world faces the choice between peaceful and non-peaceful means of solving disputes. One way or the other, they must be solved. New problems must be solved by new

means. The successful settlement of the Hong Kong question may provide useful clues for the solution of international questions. Has any government in the history of the world ever pursued a policy as generous as China's? Is there anything recorded in the history of capitalism about any Western country doing something similar? When we adopt the policy of 'one country, two systems' to resolve the Hong Kong question, we are not acting on impulse or playing tricks but are proceeding from reality and taking into full account the past and present circumstances of Hong Kong.

We should have faith in the Chinese of Hong Kong, who are quite capable of administering their own affairs... We are convinced that the people of Hong Kong are capable of running the affairs of Hong Kong well, and we want to see an end to foreign rule. The people of Hong Kong themselves will agree to nothing less.

Some requirements or qualifications should be established with regard to the administration of Hong Kong affairs by the people of Hong Kong. It must be required that patriots form the main body of administrators, that is, of the future government of the Hong Kong special region. Of course it should include other Chinese, too, as well as foreigners invited to serve as advisers. What is a patriot? A patriot is one who respects the Chinese nation, sincerely supports the Motherland's resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong's prosperity and stability. Those who meet these requirements are patriots, whether they believe in capitalism or feudalism or even slavery. We don't demand that they be in favour of China's socialist system. We only ask them to love the Motherland and Hong Kong.

There are 13 years left until 1997. We should start working now to gradually bring about a smooth transition. First, major fluctuations or setbacks must be avoided, and the prosperity and stability of Hong Kong must be maintained. Second, conditions must be created for a smooth take-over of the government by Hong Kong residents. I hope that people of all walks of life in Hong Kong will work towards this end."

Excerpt from Deng Xiaoping's speech when meeting with compatriots from Hong Kong and Macao attending the National Day ceremony in Beijing on 3 October 1984.<sup>23</sup>

“In the agreement we stated that no change would be made for 50 years, and we mean it. There will be no changes in my generation or in the next. And I doubt that 50 years after 1997, when the Mainland is developed, people will handle matters like this in a narrow-minded way. So don't worry, there won't be any changes. Besides, not all changes are bad. Some of them are good, and the question is what should be changed... If some people say there will be no changes whatever, don't believe them. We cannot say that every aspect of the capitalist system in Hong Kong is perfect. Even when we compare the developed capitalist countries, we find that each has both strengths and weaknesses. If we make Hong Kong develop on a sounder basis – wouldn't that be a change? People in Hong Kong will welcome this change and indeed demand it. There is no doubt about that.

Other people are afraid of intervention. Again, we should not fear all interventions; intervention in some cases may be necessary. The question is whether it is good or bad for the interests of the people of Hong Kong and for prosperity and stability there. Now it seems that there will be good order in Hong Kong for the 13 years from 1984 to 1997 and for another 50 years after that. I am confident of this. But we should not think there are no potentially disruptive forces. These forces may come from any direction. If there are disturbances in Hong Kong, the Central Government will intervene. If intervention puts an end to disturbances and brings about order, should we welcome or reject it? We should welcome it. ... During the last six or seven years of the transition period, a group of young and capable people from different trades and professions should be selected to participate in the Hong Kong government to administer affairs, including financial affairs. Things cannot go well unless they participate, because if they don't, they will not become familiar with affairs in Hong Kong. In the course

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23 “Maintain Prosperity and Stability in Hong Kong”, *Selected Works of Deng Xiaoping*, Vol.III, p.72.

of their work we shall have the opportunity to identify professionally competent people to use for the administration of Hong Kong after 1997. There is only one requirement for participants: they must be patriots, that is, people who love the Motherland and Hong Kong. After 1997 the administrators will adhere to the capitalist system, but they must not do anything that is detrimental to the interests of the Motherland or of the compatriots in Hong Kong. So we cannot indiscriminately oppose all types of participation and intervention. Hong Kong will be administered by people in Hong Kong – that will not change. The administrators will be selected by the people there and then appointed by the Central Government; they will not be sent by the Central Government. Of course, some of them should be on the Left, but as few as possible; some should be on the Right; and preferably a larger number should be middle-of-the-roaders. ...

I said that China has the right to station troops in Hong Kong. I asked what else could demonstrate that China exercises sovereignty over the territory. The Chinese troops in Hong Kong would have another role also – to prevent disturbances. Knowing that there are Chinese troops present, people who intend to incite disturbances would have to think twice about it. And even if there are disturbances, they could be quelled immediately. ...

After 1997 Taiwan's institutions in Hong Kong will be allowed to remain. They will be allowed to disseminate their 'Three People's Principles' and to criticize the Communist Party – that won't bother us, because the Communist Party cannot be toppled by criticism. However, they should take care not to create disturbances in Hong Kong nor to create 'two Chinas'. We believe that, being Chinese, they will stand on the side of our nation and help safeguard its general interests and dignity. Under the conditions that will prevail there after 1997, they can be allowed to carry out their activities and conduct propaganda, so long as they conform to these requirements".

The following is an excerpt from Deng Xiaoping's conversation with Mrs Thatcher, the then Prime Minister of the UK, on 19 December



1984<sup>24,25</sup>.

“In reaching an agreement on the question of Hong Kong, the leaders of our two countries have done something highly significant for our countries and peoples. This problem has lasted for a century and a half. As long as it remains unsolved, it casts a shadow over the relations between us. Now that the shadow has been lifted, a bright prospect has opened up for cooperation between our two countries and friendly contact between our two peoples.

If the concept of ‘one country, two systems’ has international significance, that should be attributed to Marxist dialectical materialism and historical materialism or, in the words of Chairman Mao Zedong, to the principle of seeking truth from facts. This concept was formulated on the basis of China’s realities. The practical problem confronting China is how to settle the questions of Hong Kong and Taiwan. There are only two possible ways: one is peaceful, the other non-peaceful. To settle the Hong Kong question peacefully, we have to take into consideration the actual conditions in Hong Kong, in China and in Great Britain. In other words, the way in which we settle the question has to be acceptable to all three parties. If we had wanted to achieve reunification by imposing socialism on Hong Kong, not all three parties would have accepted it. And reluctant acquiescence by some parties would only have led to turmoil. Even if there were no armed conflict, Hong Kong would have become a bleak city with a host of problems, and that is not something we would have wanted. So the only solution to the Hong Kong question that would be acceptable to all three parties is the ‘one country, two systems’ arrangement, under which Hong Kong would be allowed to retain its capitalist system and its status as a free port and a financial centre. There is no alternative. The idea of ‘one country, two systems’ has first been suggested not in connection with Hong Kong but in connection with Taiwan. The nine principles concerning the Taiwan question, as proposed by

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24 The *Sino-British Joint Declaration* was executed in Beijing.

25 “China Will Always Keep Its Promises”, *Selected Works of Deng Xiaoping*, Vol.III, p.101.

Ye Jianying, Chairman of the Standing Committee of the National People's Congress, on the eve of National Day in 1981, were not summed up in the formula 'one country, two systems', but that is in fact what they meant. And when the Hong Kong question was put on the table two years ago, we presented the idea in those terms.

When this idea was put forward, it was considered a new formulation, one that had never been offered by our predecessors. Some people doubted whether it would work. They will have to be convinced by the facts. It seems to have worked so far. The Chinese, at least, think it works, because the negotiations of the past two years have proved that it does. This concept of 'one country, two systems' has played a very important, if not decisive, role in the settlement of the Hong Kong question. It has been accepted by all three parties. Its viability will be further demonstrated 13 years from now and 50 years after that. Some people are worried whether China will abide by the agreement once it has been signed. Your Excellency and the other British friends present here and people all over the world may be sure that China will always keep its promises.

A Japanese friend once asked me: Why do you specify a further period of 50 years? Why do you need to keep Hong Kong's current capitalist system unchanged for 50 years after 1997? What is the basis for this proposal? Do you have any particular reason in mind? I answered that we had, that this proposal too was based on China's realities. China has set itself the ambitious goal of quadrupling its GNP in two decades — that is, by the end of this century — and of reaching a level of comparative prosperity. But even then, China will still not be a wealthy or developed country. So that is only our first ambitious goal. It will take another 30 to 50 years after that for China to become a truly developed country, to approach — not surpass — the developed countries. If we need to follow the policy of opening China to the rest of the world until the end of this century, then 50 years later, when we are approaching the level of the developed countries, we shall have even more reason to follow it. If we departed from it, we could not accomplish anything. It is in China's vital interest to keep Hong

Kong prosperous and stable. When we gave the figure of 50 years, we were not speaking casually or on impulse but in consideration of the realities in China and of our need for development...

If people understand our fundamental viewpoint and the basis on which we have put forward this concept and established this policy, they will be convinced that we are not going to change it. I also explained to the Japanese friend that if the open policy remains unchanged in the first half of the next century, it will be even less likely to change in the 50 years after that, because then China will have more economic exchanges with other countries, and all countries will be more interdependent and inseparable.

I should also like to ask the Prime Minister to make it clear to the people of Hong Kong and to the rest of the world that the concept of 'one country, two systems' includes not only capitalism but also socialism, which will be firmly maintained on the Mainland of China, where one billion people live. ...”

On 16 April 1987, Deng Xiaoping met with members of the Drafting Committee for the Basic Law, which had been working for one year and eight months. The following is an excerpt of Deng Xiaoping's speech:<sup>26</sup>

“The committee has been working for a year and eight months. Thanks to your perseverance and wisdom, your work has been making good progress, and you have been cooperating with each other very well. This will facilitate a smooth transition for Hong Kong. The success of our 'one country, two systems' formula should be guaranteed by the Basic Law of the Hong Kong Special Administrative Region. This law will serve as a model for Macao and Taiwan. It is therefore very important. It is something new, without precedent in world history. You still have three years in which to draft the best possible document.

Today I should like to talk about some things that will not change. Our policy on Hong Kong will not change for 50 years after

26 *Selected Works of Deng Xiaoping*, Vol.III, p.215.

it is reunited with the Motherland in 1997. That policy, along with the Basic Law you are now drafting, will remain in force for at least 50 years. And I want to add that there will be even less need to change them after the 50-year period. Hong Kong's status will not change, nor will our policy towards Hong Kong. ...

So, both the political situation and the policy should remain stable. Making no change means stability. If the policy is successful, yielding the desired results in the 50-year period after 1997, we shall have little reason to change it then. That is why I say that after the Motherland is reunified under the 'one country, two systems' formula, our policy towards Hong Kong, Macao and Taiwan will not change for 50 years and that it will remain unchanged even beyond that period. Of course, I won't be around at the time, but I am convinced that our successors will understand this reasoning. ...

We decided long ago to uphold the socialist system and the Four Cardinal Principles, and that decision has been written into the Constitution. It was also on the understanding that the main body of the country would adhere to the Four Cardinal Principles that we formulated our policy towards Hong Kong, Macao and Taiwan. ...

There are also two aspects to the policy of 'one country, two systems'. One is that the socialist country allows certain special regions to retain the capitalist system — not for just a short period of time, but for decades or even a century. The other is that the main part of the country continues under the socialist system. Otherwise, how could we say there are 'two systems'? It would only be 'one system'. ...

Now I should like to say something more about the drafting of the Basic Law. I have said the law should not be weighed down with too much detail. Furthermore, Hong Kong's system of government should not be completely Westernized; no Western system can be copied in total. For a century and a half Hong Kong has been operating under a system different from those of Great Britain and the United States. I am afraid it would not be appropriate for its system to be a total copy of theirs with, for example, the separation of the three powers and a

British or American parliamentary system. Nor would it be appropriate for people to judge whether Hong Kong's system is democratic on the basis of whether it has those features. I hope you will sit down together to study this question. ... Would it be good for Hong Kong to hold general elections? I don't think so. For example, as I have said before, Hong Kong's affairs will naturally be administered by Hong Kong people, but will it do for the administrators to be elected by a general ballot? We say that Hong Kong's administrators should be people of Hong Kong who love the Motherland and Hong Kong, but will a general election necessarily bring out people like that? Not long ago the Governor of Hong Kong, Sir David Wilson, said that things should be done gradually, a view that I think is realistic. Even if a general election were to be held, there would have to be a transition period — it would have to be a gradual process. ... The truth is, not everything that can be done in one country can be done in another. We must be realistic and determine our system and our methods of administration in light of our own specific conditions.

There is another point that I should make clear. Don't ever think that everything would be all right if Hong Kong's affairs are administered solely by Hong Kong people while the Central Government has nothing to do with the matter. That simply wouldn't work — it's not a realistic idea. The Central Government certainly will not intervene in the day-to-day affairs of the special administrative region, nor is that necessary. But isn't it possible that something could happen in the region that might jeopardize the fundamental interests of the country? Couldn't such a situation arise? If that happened, should Beijing intervene or not? Isn't it possible that something could happen there that would jeopardize the fundamental interests of Hong Kong itself? Can anyone imagine that there are in Hong Kong no forces that might engage in obstruction or sabotage? I see no grounds for taking comfort in that notion. If the Central Government were to abandon all its power, there might be turmoil that would damage Hong Kong's interests. Therefore, it is to Hong Kong's advantage, not its disadvantage, for the Central Government to retain some power there. ... It is the policy of the Central Government that the interests of

Hong Kong should not be harmed, and we also hope that nothing will happen in Hong Kong itself that will harm its interests or the interests of the country as a whole. But what if something did happen? I should like to ask you to think this over and take it into consideration when drafting the Basic Law. You should also consider a few other things. For example, after 1997 we shall still allow people in Hong Kong to attack the Chinese Communist Party and China verbally, but what if they should turn their words into action, trying to convert Hong Kong into a base of opposition to the Mainland under the pretext of ‘democracy’? Then we would have no choice but to intervene. First the administrative bodies in Hong Kong should intervene; Mainland troops stationed there would not necessarily be used. They would be used only if there were disturbances, serious disturbances. Anyway, intervention of some sort would be necessary.

In short, the concept of ‘one country, two systems’ is something new. In applying it we may run into many things we don’t anticipate. The Basic Law will be an important document, which you should draft very carefully, proceeding from realities. I hope it will be a good law that truly embodies the concept of ‘one country, two systems’ and makes it practicable and successful.”

### **Relationship between the Constitution and the Basic Law**

From the beginning of the drafting process of the Basic Law, the relationship between the Constitution and the Basic Law, especially whether the socialist Constitution has legal effect and how to apply it in a special administrative region that practises capitalism, were issues which triggered much heated discussion among the members of the Drafting Committee. The Committee’s Special Group Concerned with the Relationship between the Central Authorities and the HKSAR had also studied this issue. Chapter IX, “Legal Status, Interpretation and Amendment of the Basic Law of the Hong Kong Special Administrative Region” of the *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)*, adopted by the Drafting Committee on 22 April 1986, was

originally divided into three sections. The first section was “Legal Status of the Basic Law and Its Relationship with the Constitution”. A member proposed to add a provision to this section: “The Basic Law is enacted in accordance with Article 31 of the Constitution. The responsibility to make the supreme interpretation of Article 31 of the Constitution, and to decide which provisions of the Constitution shall apply to Hong Kong and which provisions can be exempted rests with the National People’s Congress.” It was proposed to specify in the Basic Law which provisions of the Constitution applied to Hong Kong and which did not. Some people expressed the view that the Basic Law was a sub-law while the Constitution was the mother law. It would be inappropriate in both legal theory and legal procedure for the Basic Law to stipulate which provisions of the Constitution were applicable to Hong Kong. Such an approach was unprecedented in the constitutional history of the world and presented technical difficulties. It was also proposed to add that “The Basic Law is the basis for the enactment of Hong Kong’s laws, and the laws enacted by the legislature shall be valid only if they comply with the Basic Law and statutory procedures”, and that “the Basic Law will not conflict with the Constitution, nor will the Constitution undermine the legal system and theories of the Special Administrative Region”.<sup>27</sup>

On 11 November 1986, after a round of discussion and study, Drafting Committee’s Special Group Concerned with the Relationship between the Central Authorities and the HKSAR pointed out in its progress report: “After half a year’s work, this Group has provisionally formulated provisions on most of the items under Chapters II, VII and IX of the *Structure of the Basic Law (Draft)*. Generally speaking, members of the Committee are in unanimous agreement with the provisions, but there are some particular provisions or parts of the provisions over which some members still have different views.” In the “explanatory note” to Article 1 of Chapter IX, the report pointed out: “Members consider that China’s Constitution as a whole is in

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<sup>27</sup> *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee*.

force in the Hong Kong Special Administrative Region. Since the state applies the policy of ‘one country, two systems’ to Hong Kong, certain specific provisions of the Constitution would not apply to Hong Kong, primarily the provisions concerning the socialist system and policies.”<sup>28</sup>

In August 1987, after many rounds of discussion, Drafting Committee’s Special Group Concerned with the Relationship between the Central Authorities and the HKSAR decided to move BL 1 of Chapter IX to Chapter I, General Principles, as BL 10, since that provision which dealt with the relationship between the Constitution and the Basic Law had the quality of general principles.<sup>29</sup> The title of Chapter IX was changed to “Interpretation and Amendment of the Basic Law of the Hong Kong Special Administrative Region”.<sup>30</sup>

The Basic Law provides in BL 11 of Chapter I, General Principles: “In accordance with Article 31 of the Constitution of the People’s Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.” It is also stated in the Preamble to the Basic Law that “In accordance with the Constitution of the People’s Republic of China, the National People’s Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies

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28 Published in *Collection of Documents of the Third Plenary Session of the Drafting Committee*.

29 BL 11 of the current Basic Law.

30 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*.



of the People’s Republic of China regarding Hong Kong.” The NPC enacted the Basic Law in accordance with the Constitution, which together form the constitutional basis of the HKSAR.

After the Basic Law was adopted at the Third Session of the Seventh NPC on 4 April 1990, the *Decision of the National People’s Congress on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* was adopted on the same day.<sup>31</sup> The decision stated:

“Article 31 of the Constitution of the People’s Republic of China provides: ‘The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions.’ The Basic Law of the Hong Kong Special Administrative Region is constitutional as it is enacted in accordance with the Constitution of the People’s Republic of China and in the light of the specific conditions of Hong Kong. The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region.”

### **Drafting Process of the Basic Law**

In his speech to the NPC on 28 March 1990, Ji Pengfei, Chairman of the Drafting Committee, described the drafting process as follows:

“Through four years and eight months of effort, the Drafting Committee for The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China has completed the work of drafting the Basic Law. ...

In accordance with ‘The Decision of the Third Session of the Sixth National People’s Congress on the Establishment of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China,’ at its

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<sup>31</sup> Included in Appendix I.

11th session the Standing Committee of the Sixth National People's Congress appointed the members of the Hong Kong Basic Law Drafting Committee.<sup>32</sup> On 1 July 1985, the Drafting Committee was officially established and began its work. After mapping out its work plans and deciding upon the structure of the Basic Law, the Drafting Committee set up five special groups consisting of committee members from both the Mainland and Hong Kong. The five groups, namely, the Special Group Concerned with the Relationship between the Central Authorities and the Hong Kong Special Administrative Region; the Special Group Concerned with Fundamental Rights and Duties of Residents; the Special Group Concerned with the Political Structure; the Special Group Concerned with the Economy; and the Special Group Concerned with Education, Science, Technology, Culture, Sports and Religion, were responsible for the drafting work<sup>33</sup>. After these special groups worked out their first draft of provisions of the Basic Law, the General Working Group was set up to make overall adjustment and revision of the draft provisions. In April 1988, the seventh plenary session of the Hong Kong Basic Law Drafting Committee issued 'The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China for Solicitation of Opinions.' In the next five months, the Committee widely collected opinions from Hong Kong and the provinces, autonomous regions, municipalities directly under the Central Government and relevant departments on the Mainland and, based on the collected opinions, the Committee made more than 100 revisions in the draft version. In January 1989, at its eighth plenary session, the Drafting Committee voted by secret ballot on the draft Hong Kong Basic Law and its annexes and related documents to

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32 See Appendix II for the list of members of the Drafting Committee.

33 The five special groups of the Drafting Committee for the Basic Law are also known as Subgroup on the Relationship between the Central Authorities and the HKSAR; Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants; Subgroup on Political Structure; Subgroup on Economy, and Subgroup on Education, Science, Technology, Culture, Sports and Religion, in various English translated reports / documents prepared by the Secretariat of the Consultative Committee for the Basic Law.

be submitted to the Standing Committee of the National People's Congress, article by article and document by document. Except for Article 19 in the draft Basic Law, all other provisions, annexes and related documents were adopted by a two-thirds majority. At its sixth session held in February 1989, the Standing Committee of the Seventh National People's Congress decided to promulgate the Hong Kong Basic Law (Draft), its annexes and other related documents to widely solicit opinions from Hong Kong; from the provinces, autonomous regions and municipalities directly under the Central Government on the Mainland; and from central government departments, democratic parties, mass organizations and experts as well as from the general departments of the People's Liberation Army. After an eight-month opinion-soliciting period followed by a careful study of the opinions collected from all circles, the special groups jointly put forward 24 amendment bills, including the one regarding Article 19 in the Hong Kong Basic Law (Draft). At the ninth plenary session of the Drafting Committee in February this year, those amendment bills were voted upon by secret ballot one by one and all of them were passed by an over two-thirds majority. Then, all relevant provisions in the original draft were replaced by provisions recommended by the amendment bills. With this, the work of drawing up the Hong Kong Basic Law (Draft), its annexes and other related documents was complete. ...

Over this period of more than four years, the Drafting Committee has held nine plenary sessions, 25 meetings of the Chairman and Vice-Chairmen and two enlarged meetings of the Chairman and Vice Chairmen; the General Working Group held three meetings; the Special Groups met 73 times; and even the Committee for Selecting Designs for the Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region held five meetings.

In reviewing the work done over this period of more than four years, we must say that drafting of this legal document was conducted in a very democratic and open manner. During the process of drafting the Basic Law, members of the Drafting Committee worked together with one heart and pooled their wisdom and efforts; and each and

every article of the document was worked out after investigation, study and full discussion in which views of the majority were followed and those of the minority respected. After every meeting, reporters covering the event were briefed and the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region was immediately informed of its proceedings. The work of drafting the Basic Law was completed with the close attention and broad participation of the entire nation, especially the compatriots and people from all circles in Hong Kong. What is especially noteworthy here is that the Hong Kong Basic Law Consultative Committee, formed by people from all walks of life in Hong Kong,<sup>34</sup> collected a great amount of opinions and suggestions in Hong Kong on the Basic Law and promptly referred them to the Drafting Committee and has rendered active and effective assistance to the work of drafting the Basic Law from the very beginning. The work of the Consultative Committee has been praised by the drafters.”

### **Structure of the Basic Law**

At the beginning of the drafting process, the Consultative Committee held group discussions on matters such as the framework structure and content of the Basic Law. According to the remarks made by the participants, the structure of the Basic Law can be roughly divided into twelve parts: Preamble;<sup>35</sup> General Concepts;<sup>36</sup> Relationship between the Central Authorities and the Hong Kong Special Administrative Region; Rights, Freedom and Duties of the Residents; Political Structure; Economic and Financial Affairs;

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34 The Consultative Committee was formally established on 18 December 1985. Its functions included: soliciting opinions and suggestions on the Basic Law from different sectors in Hong Kong; accepting consultation from the Drafting Committee; collecting and analyzing opinions and suggestions. See Appendix III for the list of members of the Consultative Committee.

35 Ibid, footnotes 2 and 3.

36 Later renamed General Principles, including the spirit and the broad principles. Consultative Committee, *Summary of the Fourth Batch of Discussions*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1278.

Education, Science and Technology, Culture; Religion; External Affairs; Public Security and Defence; Regional Flag and Regional Emblem; Interpretation and Amendment of the Basic Law; Supplementary Provisions.<sup>37</sup>

During the discussion, some members opined that there was too much discussion on the parts relating to economy and too little on political structure in the Joint Declaration, so the Basic Law should focus more on political structure. However, if there were too many details, there would be little room for revision; if it was too brief, the main focal points might not be perfectly clear. Some members suggested that only the broad principles of the political structure should be set out in the Basic Law, while the specific details may be elaborated in the form of an annex.<sup>38</sup> On the part relating to political structure, some members proposed separation of the executive, legislative and judicial powers, and the formation and operation of such structure spelled out.<sup>39</sup> Another view was that the Basic Law should be modelled on Annex I of the Joint Declaration, with its fourteen points as the outline of the Basic Law. There was also a supplementary view that the Basic Law would be the major law of Hong Kong after 1997, while the Joint Declaration was only designed for the twelve-year transitional period. As a result some parts of the Joint Declaration could be used as a reference, but there were parts that were not applicable, and deficiencies which needed to be supplemented.<sup>40</sup>

Reference materials for the second meeting of the Drafting Committee in April 1986 included the *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law*

37 Consultative Committee, *Summary of the First Batch of Seminars*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1277.

38 Consultative Committee, *Summary of the Fourth Batch of Discussions*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1279.

39 Consultative Committee, *Summary of the Fifth Batch of Seminars*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1279.

40 Consultative Committee, *Summary of the Sixth Batch of Seminars*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1279.

*and Other Issues*.<sup>41</sup> One view was that it was better to write the Basic Law following the structure of a mini-constitution, with a preamble and general concepts, which would be easier to implement. Matters of principle such as the preservation of capitalism and the protection of private property should be included. There was also a view which considered that writing the Basic Law in the form of a constitution would run into many conflicts and difficulties, and that it would be better to write it in the form of a company law.<sup>42</sup>

On 22 April 1986, the *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)* was adopted by the Drafting Committee, which included:

**“Preamble**

Chapter I	General Principles
Chapter II	Relationship between the Central Authorities and the Hong Kong Special Administrative Region
Chapter III	Fundamental Rights and Duties of the Residents of Hong Kong
Chapter IV	Political Structure
	Section 1 The Chief Executive
	Section 2 The Executive Authorities
	Section 3 The Legislature
	Section 4 The Judiciary
	Section 5 District Organizations
	Section 6 Public Servants
Chapter V	Economy of the Hong Kong Special Administrative Region

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41 *Overview of the Drafting Process*, Vol.3, p.1280.

42 *Ibid*, p.1282.

- Chapter VI Education, Science, Technology, Culture, Sports and Religion of the Hong Kong Special Administrative Region
- Chapter VII External Affairs of the Hong Kong Special Administrative Region
- Chapter VIII Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region
- Chapter IX Legal Status, Interpretation and Amendment of the Basic Law of the Hong Kong Special Administrative Region
- Chapter X Supplementary Provisions<sup>43</sup>

Since then, important changes took place in the structure of the Basic Law when *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* was published by the Secretariat of the Drafting Committee for the Basic Law in April 1988: the addition of Annexes I, II and III. In February 1989, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* was changed from ten chapters to nine, deleting the chapter on “Regional Flag and Regional Emblem”.

The Basic Law adopted by the NPC on 4 April 1990 contained 160 articles and 3 annexes. The framework is as follows:

### “Preamble

- Chapter I General Principles (11 articles)
- Chapter II Relationship between the Central Authorities and the Hong Kong Special Administrative Region (12 articles)

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<sup>43</sup> Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1279. See Appendix IV for the full text of *Structure of the Basic Law (Draft)*.

- Chapter III Fundamental Rights and Duties of the Residents (19 articles)
- Chapter IV Political Structure (62 articles)
- Section 1 The Chief Executive
  - Section 2 The Executive Authorities
  - Section 3 The Legislature
  - Section 4 The Judiciary
  - Section 5 District Organizations
  - Section 6 Public Servants
- Chapter V Economy (31 articles)
- Section 1 Public Finance, Monetary Affairs, Trade, Industry and Commerce
  - Section 2 Land Leases
  - Section 3 Shipping
  - Section 4 Civil Aviation
- Chapter VI Education, Science, Culture, Sports, Religion, Labour and Social Services (14 articles)
- Chapter VII External Affairs (8 articles)
- Chapter VIII Interpretation and Amendment of the Basic Law (2 articles)
- Chapter IX Supplementary Provisions (1 article)
- Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region
- Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures
- Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region”



## **Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region**

The *Decision on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*<sup>44</sup> was based on a draft prepared by the Drafting Committee on behalf of the NPC after the issue was studied and discussed by the Special Group Concerned with the Political Structure of the Consultative Committee, and was adopted at the Third Session of the Seventh NPC on 4 April 1990. The *Explanations on “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” and its Related Documents* delivered by Ji Pengfei, Chairman of the Drafting Committee, on 28 March 1990 described the arrangement as follows:

### **“IV. On the Political Structure**

(5) The method for the formation of the first Government and the first Legislative Council of the Hong Kong Special Administrative Region. In line with the principles of state sovereignty and for the benefit of smooth transition, the establishment of the Special Administrative Region will be presided over by a Preparatory Committee set up by the National People’s Congress. Since preparations must be made before the establishment of the first Government and the first Legislative Council and since the Basic Law will not go into effect until 1 July 1997, the Drafting Committee has suggested that the National People’s Congress make a special decision on the method for the formation of the first Government and Legislative Council and that the decision be made public together with the Basic Law. The Drafting Committee has therefore worked out a draft of the decision on behalf of the National People’s Congress. According to this decision, the candidate for the first Chief Executive of the Hong Kong Special Administrative Region will be recommended by a selection committee composed entirely of Hong

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44 See Appendix V.

Kong residents and then referred to the Central People's Government for appointment. If the composition of the last Hong Kong Legislative Council before the establishment of the Special Administrative Region is in conformity with the provisions of the decision made by the National People's Congress on the method for the formation of the first Government and the first Legislative Council, those of its members who uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region and who meet the requirements set forth in the Basic Law may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region. This arrangement is designed to ensure stability throughout the transition period and make the two governments dovetail without a hitch."

### **About this Book**

The purpose of this book is to inform readers of the process through which the Basic Law was drafted, and the views and opinions the drafters had taken into account, by reviewing and combing through the drafting history and evolution process of the 160 articles of the Basic Law and its annexes, together with relevant reference and discussion materials, so as to enable a more comprehensive and correct understanding of the legislative background and the intent of what is considered to be the constitutional law of the HKSAR.

In addition to the notes on selected drafting materials of the articles, this book also contains summaries of court cases in the HKSAR. The disputes in these cases all involve or touch on provisions of the Basic Law. The court cases provide guidance or set down important legal principles regarding the application and understanding of relevant provisions in the Basic Law.

**Report on the Submission of The Draft Basic Law of  
the Hong Kong Special Administrative Region of the  
People's Republic of China and Related Documents  
to the Standing Committee of the National People's  
Congress for Examination**

(Addressing the Sixth Session of the Standing Committee of the  
Seventh National People's Congress on 15 February 1989)

Ji Pengfei

Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

After three and a half years of effort, the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China adopted "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)" (and three annexes) at its eighth plenary meeting on 14 January this year, as well as "The Decision of the National People's Congress of the People's Republic of China on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (Draft)", which has been worked out by the Drafting Committee on behalf of the National People's Congress, and "The Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress". The above drafts and proposal are now submitted to the Standing Committee of the National People's Congress for examination.

In accordance with "The Decision taken at the Third Session of the Sixth National People's Congress on the Establishment of the

Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" and the appointment made at the eleventh session of the Standing Committee of the Sixth National People's Congress, the Hong Kong Basic Law Drafting Committee was officially established and commenced its work on 1 July 1985. After mapping out its work plans and deciding upon the structure of the Basic Law, the Drafting Committee set up five special groups consisting of committee members from both the Mainland and Hong Kong. The five groups, namely, the Special Group Concerned with the Relationship between the Central Authorities and the Hong Kong Special Administrative Region; the Special Group Concerned with Fundamental Rights and Duties of Residents; the Special Group Concerned with the Political Structure; the Special Group Concerned with the Economy; and the Special Group Concerned with Education, Science, Technology, Culture, Sports and Religion, studied specific issues in the Basic Law and were responsible for drafting relevant provisions. After these special groups worked out their first draft of provisions of the Basic Law, the General Working Group, led by Vice Chairmen Bao Yugang and Hu Sheng, was set up, to make overall adjustment and revision of the draft provisions. In April 1988, the seventh plenary session of the Hong Kong Basic Law Drafting Committee issued "The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China for Solicitation of Opinions". Over the next five months, the Committee collected opinions from the public in Hong Kong, other regions and relevant departments of the country. At the end of the consultation period, the Drafting Committee held meetings of the special groups and enlarged meetings of the Chairmen and Vice Chairmen and revised and adjusted the provisions of the Draft Basic Law (for solicitation of opinions). Last month, at its eighth plenary session, the Drafting Committee voted by secret ballot on the individual articles and documents of the draft Hong Kong Basic Law and its related documents one by one. Except for Article 19, all other provisions, annexes, and related documents were adopted by a two-thirds majority.

The Drafting Committee also solicited designs for the regional flag and regional emblem of the Hong Kong Special Administrative Region and collected 7,147 contributed designs. After the first and second rounds of selection conducted by the Committee for Selecting Designs for the Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region and the examination by the Basic Law Drafting Committee, no single set of designs for the regional flag and regional emblem has been decided upon to be submitted to the National People's Congress for examination.

The Basic Law (Draft) was completed with the joint efforts of all members of the Drafting Committee, as well as the active participation and strong collaboration of all sectors of Hong Kong and all relevant parties in the Mainland. What is especially noteworthy is that the Hong Kong Basic Law Consultative Committee has been actively and effectively assisting the drafting work. They carried out publicity and promotion of the Basic Law in various forms in Hong Kong and collected numerous opinions and suggestions. Over the past three years, seven groups made up of more than 100 Consultative Committee members have visited Beijing to have discussions and exchange views with the drafters from the Mainland. The work of the Consultative Committee has been rated positively by members of the Drafting Committee.

Chairman, Vice Chairmen, and all Committee members, "one country, two systems" serves as the fundamental policy for solving the Hong Kong issue. According to this fundamental policy, the Chinese Government has set forth a series of specific principles and policies in the "Sino-British Joint Declaration on the Question of Hong Kong". The Basic Law of the Hong Kong Special Administrative Region is formulated to stipulate the fundamental policy of "one country, two systems" and the series of specific principles and policies in the form of laws.

Now, I would like to make the following remarks on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)" and relevant documents submitted

to the Standing Committee of the National People's Congress for examination.

## **I. General Structure of the Basic Law (Draft)**

The current Basic Law (Draft) consists of a Preamble, 159 articles in 9 chapters, and 3 annexes. In addition to the Preamble, the headings of the chapters and annexes are:

Chapter I	General Principles
Chapter II	Relationship between the Central Authorities and the Hong Kong Special Administrative Region
Chapter III	Fundamental Rights and Duties of the Residents
Chapter IV	Political Structure
Chapter V	Economy
Chapter VI	Education, Science, Culture, Sports, Religion, Labour and Social Services
Chapter VII	External Affairs
Chapter VIII	Interpretation and Amendment of the Basic Law
Chapter IX	Supplementary Provisions
Annex I	Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region
Annex II	Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region
Annex III	National Laws to be Applied in the Hong Kong Special Administrative Region

## **II. On the Relationship between the Central Authorities and the Hong Kong Special Administrative Region**

The Hong Kong Special Administrative Region, which will be established on 1 July 1997, is an inalienable part of the People's

Republic of China and enjoys a high degree of autonomy. The Government of the Hong Kong Special Administrative Region shall be composed of the local people, that is, the permanent residents of the Region. The socialist system and policies will not be applied in the Hong Kong Special Administrative Region, and the capitalist society, economic system and way of life will remain unchanged for 50 years. The first, second, seventh, and ninth chapters of the Basic Law (Draft) clearly stipulate the legal status of the Hong Kong Special Administrative Region, the relationship between the Constitution of the People's Republic of China and the Basic Law of the Hong Kong Special Administrative Region, the scope of the functions and powers of the Region, and its relationship with the Central Authorities.

(I) On the legal status of the Hong Kong Special Administrative Region, Article 12 of the Basic Law (Draft) stipulates, "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government." The relationship between the Hong Kong Special Administrative Region and the Central Authorities and its limits of power are based on this provision.

(II) On the relationship between the Constitution and the Basic Law, Article 11 of the Basic Law (Draft) stipulates, "In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law." Article 31 of the Constitution stipulates, "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." As the fundamental law of the country, the Constitution has supreme legal force. The Basic Law is enacted under the Constitution; in turn, the Constitution allows special administrative regions to practice

systems and policies that are different from those of the rest of the country. Therefore, the systems and policies to be implemented in the Hong Kong Special Administrative Region will be based on the provisions of the Basic Law.

(III) With respect to the limits of power of the Hong Kong Special Administrative Region and its relationship with the Central Authorities, it is stipulated in the Basic Law (Draft) that the defence and foreign affairs of the Region shall be managed by the Central People's Government; the Chief Executive and principal government officials of the Hong Kong Special Administrative Region shall be reported to the Central People's Government for appointment; the power of amendment and interpretation of the Basic Law shall be vested in the National People's Congress and its Standing Committee; the budgets and final accounts of the Hong Kong Special Administrative Region and the laws enacted by the Legislative Council must be reported to the Standing Committee of the National People's Congress for the record. These provisions are necessary to maintain state sovereignty and serve the interests of the whole Chinese people, including Hong Kong compatriots. The draft also stipulates that the Hong Kong Special Administrative Region shall enjoy executive, legislative and independent judicial power, including that of final adjudication; the Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of local public order. It also provides that the Hong Kong Special Administrative Region, as authorized by the Central People's Government, shall conduct relevant external affairs on its own in accordance with this Law. These provisions are also necessary for the Hong Kong Special Administrative Region to exercise a high degree of autonomy and maintain stability and prosperity.

Some important issues in the relationship between the Central Authorities and the Hong Kong Special Administrative Region which concern people of Hong Kong from all walks of life are:

1. The power of interpretation of the Basic Law: Article 157 of the Basic Law (Draft) stipulates that the power of interpretation



of the Basic Law shall be vested in the Standing Committee of the National People's Congress. At the same time, the article also includes corresponding provisions on the exercise of the power of interpretation. According to the Constitution, the interpretation of laws is one of the functions and powers of the Standing Committee of the National People's Congress. Therefore, indubitably, the power of interpretation of the Basic Law belongs to the Standing Committee of the National People's Congress. On the other hand, Article 157 of the Basic Law (Draft) provides that "The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region." In view of the special circumstances of the Hong Kong Special Administrative Region, as a local administrative region exercising a high degree of autonomy, it is also necessary to authorize the courts of the Region to interpret on their own the provisions within the scope of its autonomy.

2. Matters relating to the power of interpretation of the Basic Law: Article 17 of the Basic Law (Draft) stipulates that if any law enacted by the Legislative Council is not in conformity with the provisions of this Law with respect to affairs within the responsibility of the Central Authorities or with respect to the relationship between the Central Authorities and the Region, the Standing Committee of the National People's Congress may return the law in question. Any law returned shall immediately be invalidated. This provision is in line with the previously mentioned power of the Standing Committee of the National People's Congress to interpret the Basic Law.

3. Matters relating to the application of few national laws in Hong Kong: as the systems, policies, and legal system of the Hong Kong Special Administrative Region are different from those of the Mainland, national laws are generally not applicable in the Region. However, as a local administrative region of China, there will be inevitably a small number of national laws on national defence, foreign affairs, and affairs that are not within the scope of autonomy

of the Special Administrative Region applicable to the Region. In this respect, Article 18 and Annex III of the Basic Law (Draft) specify the categories and the number of national laws applicable to the Hong Kong Special Administrative Region, and facilitate necessary additions and deletions in the future.

4. Matters relating to the jurisdiction of the courts of the Hong Kong Special Administrative Region: Article 19 of the Basic Law (Draft) stipulates that the Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. It is also stipulated that the courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The Drafting Committee has no objection to the principle that the courts of the Hong Kong Special Administrative Region will retain their original jurisdiction after 1997. However, there are different opinions on the formulation of this provision. This provision therefore could not obtain the consent of a two-thirds majority of the Committee and is subject to further study and modification.

5. While drafting the Basic Law, the members considered it necessary to suggest that the Standing Committee of the National People's Congress set up a working body to study the problems arising from the implementation of Articles 17, 18, 157, and 158 of the Basic Law and to advise the Standing Committee. To this end, we drafted the "Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress", for the Standing Committee's deliberation.

### **III. On the Political Structure of the Hong Kong Special Administrative Region**

In accordance with the general principle of "one country, two

systems”, the design of the political structure of the Hong Kong Special Administrative Region can be neither a copy of the Mainland’s structure nor of any other country’s but must be in line with Hong Kong’s legal status and its actual conditions. The political structure should be conducive to Hong Kong’s stability and prosperity, promote capitalist economy, take the interests of all social strata into account, and be accepted by the majority of people. We should maintain what has worked in Hong Kong’s current political structure and develop a democratic system, step by step, that suits Hong Kong’s reality. The relationship between the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region should be one in which the executive authorities and the legislature regulate each other as well as co-ordinate their activities, while the judiciary and the prosecution department work independently without any interference. To maintain Hong Kong’s administrative efficiency, the Chief Executive must have real power and, at the same time, should be subject to supervision.

In accordance with the above principles, Chapter IV of the Basic Law (Draft) stipulates the functions and powers of the Chief Executive, the executive authorities, the legislature and the judiciary, as well as the relationship between the executive authorities and the legislature. At the same time, the same chapter and Annexes I and II provide for the selection of the Chief Executive and the formation of the Legislative Council.

(I) Relationship between the Chief Executive, the Government and the Legislative Council: the Basic Law (Draft) provides for the Chief Executive to be the head and representative of the Hong Kong Special Administrative Region and be accountable to the Central People’s Government and the Hong Kong Special Administrative Region. He or she is to lead the Government of the Region, sign bills and budgets and promulgate laws. If the Chief Executive considers a bill passed by the Legislative Council to be not compatible with the overall interests of the Region, he or she may return it to the Legislative Council for reconsideration. If the Chief Executive refuses to sign a bill passed the second time by the Legislative Council, or the

Legislative Council refuses to pass a budget or any other important bill introduced by the Government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council. On the other hand, the Basic Law (Draft) provides that the Government of the Region must abide by the law and be accountable to the Legislative Council. It must implement laws passed by the Legislative Council and already in force, present regular policy addresses to the Council, answer relevant questions and obtain approval from the Council for taxation and public expenditure. If the Chief Executive is found to have committed a serious breach of law or dereliction of duty, the Legislative Council may pass a motion of impeachment through certain procedures and refer it to the Central People's Government for decision. It also stipulates the circumstances under which the Chief Executive must resign.

(II) The method for selecting the Chief Executive and forming the Legislative Council: Article 45 and Article 67 of the Basic Law (Draft) provide the principles for the method for selecting the Chief Executive and forming the Legislative Council respectively, and the specific methods are respectively set out in Annexes I and II. The two methods share the principle of developing democracy in a gradual and orderly manner that is suitable for the actual conditions of Hong Kong on the premise of Hong Kong's stability and prosperity. Even after the Drafting Committee adopted the above provisions and annexes, there are still different views from different sectors of society in Hong Kong. It is necessary to further listen to and coordinate the views of all sectors of society before making necessary revisions and adjustments to the relevant provisions.

(III) The method for the formation of the first Government and the first Legislative Council of the Hong Kong Special Administrative Region: In line with the principles of maintaining state sovereignty and for the benefit of smooth transition, the establishment of the Hong Kong Special Administrative Region shall be presided over by a Preparatory Committee set up by the National People's Congress. The candidate for the first Chief Executive of the Hong Kong Special

Administrative Region will be recommended by a selection committee composed entirely of Hong Kong residents, and then referred to the Central People's Government for appointment. Members of the last Hong Kong Legislative Council before the establishment of the Special Administrative Region who meet the requirements set forth in the Basic Law, uphold the Basic Law, and pledge allegiance to the Hong Kong Special Administrative Region may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region. Since the abovementioned preparations must be made before the establishment of the first Government and the first Legislative Council and since the Basic Law will not come into effect until 1 July 1997, the Drafting Committee has suggested that the National People's Congress make a special decision on the method for the formation of the first Government and Legislative Council and that the decision be made public concurrently with the Basic Law.

In addition, the Basic Law (Draft) stipulates that the Chief Executive, principal government officials, members of the Executive Council, the President of the Legislative Council, the chief justice of the Court of Final Appeal, and the chief judges of the High Court must be Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region. This is necessary for maintaining state sovereignty.

#### **IV. Fundamental Rights and Duties of Residents**

Chapter III of the Basic Law (Draft) stipulates the definition of residents of the Hong Kong Special Administrative Region and the freedoms and rights enjoyed by its residents and others. It also stipulates that the relevant provisions of the "International Covenant on Civil and Political Rights", "International Covenant on Economic, Social and Cultural Rights", and international labour conventions applicable to Hong Kong shall remain in force and be implemented through the laws of the Hong Kong Special Administrative Region. The Draft also stipulates that the system of protecting the fundamental rights and freedoms of the residents shall be based on the provisions

of the Basic Law, so as to provide full protection for the freedoms and rights of the residents and other people.

## **V. Economy, and Education, Science, Culture, Sports, Religion, Labor and Social Services**

Chapters V and VI of the Basic Law (Draft) provide for the above two aspects respectively. Some people in Hong Kong and the Mainland believe that there are too many articles concerning policies in the two chapters and suggest that they be deleted from the Basic Law or included separately in an annex. However, having considered the fact that the Chinese Government has undertaken, in the Sino-British Joint Declaration, to write into the Basic Law its basic policies regarding Hong Kong and its elaboration of the abovementioned basic policies as given in Annex I of the Joint Declaration, and that an annex to the Basic Law has the same legal effect as the Basic Law, it has been decided to retain these provisions in the Basic Law after repeated study by the Drafting Committee. However, major amendments to the two controversial articles, which are on the maintenance of a basic fiscal balance and continuation of the implementation of the low tax policy, have been made to make them more flexible.

Chairman, Vice Chairmen, and all Committee members, although the Drafting Committee has submitted “The Basic Law of the Hong Kong Special Administrative Region (Draft)”, there are still a few issues in the Draft that remain to be resolved, such as the provision of Article 19 on the jurisdiction of the courts of the Hong Kong Special Administrative Region, and the method for selecting the Chief Executive and forming the Legislative Council. These need to be modified and improved further after the Draft is published for comments, and the selection of designs of the regional flag and regional emblem also needs to be studied and resolved. All these require the Drafting Committee to continue with its work.

This is my report on “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” and related documents for your examination.

## **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 National People’s Congress on 28 March 1990)

Ji Pengfei

Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China  
Fellow Deputies,

Through four years and eight months of effort, the Drafting Committee for The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China has completed the work of drafting the Basic Law. The Standing Committee of the National People’s Congress has submitted to the current session of the National People’s Congress for examination “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” and three annexes; the draft designs of the regional flag and regional emblem for the Hong Kong Special Administrative Region: “The Decision of the National People’s Congress of the People’s Republic of China on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (Draft),” which has been worked out by the Drafting Committee on behalf of the National People’s Congress; and “The Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People’s Congress.” I have been entrusted by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region to make the following explanations concerning this legal document.

In accordance with “The Decision of the Third Session of the Sixth National People’s Congress on the Establishment of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China,” at its 11th session the Standing Committee of the Sixth National People’s Congress appointed the members of the Hong Kong Basic Law Drafting Committee. On 1 July 1985, the Drafting Committee was officially established and began its work. After mapping out its work plans and deciding upon the structure of the Basic Law, the Drafting Committee set up five special groups consisting of committee members from both the Mainland and Hong Kong. The five groups, namely, the Special Group Concerned with the Relationship between the Central Authorities and the Hong Kong Special Administrative Region; the Special Group Concerned with Fundamental Rights and Duties of Residents; the Special Group Concerned with the Political Structure; the Special Group Concerned with the Economy; and the Special Group Concerned with Education, Science, Technology Culture, Sports and Religion, were responsible for the drafting work. After these special groups worked out their first draft of provisions of the Basic Law, the General Working Group was set up to make overall adjustment and revision of the draft provisions. In April 1988, the seventh plenary session of the Hong Kong Basic Law Drafting Committee issued “The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China for Solicitation of Opinions.” In the next five months, the Committee widely collected opinions from Hong Kong and the provinces, autonomous regions, municipalities directly under the Central Government and relevant departments on the Mainland and, based on the collected opinions, the Committee made more than 100 revisions in the draft version. In January 1989, at its eighth plenary session, the Drafting Committee voted by secret ballot on the draft Hong Kong Basic Law and its annexes and related documents to be submitted to the Standing Committee of the National People’s Congress, article by article and document by document. Except for Article 19 in the draft Basic Law, all other provisions, annexes and



related documents were adopted by a two-thirds majority. At its sixth session held in February 1989, the Standing Committee of the Seventh National People's Congress decided to promulgate the Hong Kong Basic Law (Draft), its annexes and other related documents to widely solicit opinions from Hong Kong; from the provinces, autonomous regions and municipalities directly under the Central Government on the Mainland; and from central government departments, democratic parties, mass organizations and experts as well as from the general departments of the People's Liberation Army. After an eight-month opinion-soliciting period followed by a careful study of the opinions collected from all circles, the special groups jointly put forward 24 amendment bills, including the one regarding Article 19 in the Hong Kong Basic Law (Draft). At the ninth plenary session of the Drafting Committee in February this year, those amendment bills were voted upon by secret ballot one by one and all of them were passed by an over two-thirds majority. Then, all relevant provisions in the original draft were replaced by provisions recommended by the amendment bills. With this, the work of drawing up the Hong Kong Basic Law (Draft), its annexes and other related documents was complete.

The collection and selection of designs for the regional flag and regional emblem of the Hong Kong Special Administrative Region was the responsibility of the Committee for Selecting Designs for the Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region, consisting of five drafters of the Basic Law and six experts from both Hong Kong and the Mainland. After the selecting committee conducted the first and second rounds of selection from the 7,147 contributed designs, the Basic Law Drafting Committee examined and appraised the candidates recommended by the selecting committee. Since the Drafting Committee failed to decide upon a single set of designs for the regional flag and regional emblem to be submitted to the National People's Congress for examination, the selecting committee again worked out three sets of candidate designs of the regional flag and regional emblem for the Hong Kong Special Administrative Region through collective modification of certain contributed designs. The draft designs of the regional flag and

regional emblem to be submitted to the National People's Congress for examination were finally selected at the ninth plenary session of the Basic Law Drafting Committee through a secret ballot. Also at the session, the second and third paragraphs under Article 10 of the draft Basic Law regarding the regional flag and regional emblem of the Special Administrative Region were passed.

Over this period of more than four years, the Drafting Committee has held nine plenary sessions, 25 meetings of the Chairman and Vice-Chairmen and two enlarged meetings of the Chairman and Vice-Chairmen; the General Working Group held three meetings; the Special Groups met 73 times; and even the Committee for Selecting Designs for the Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region held five meetings.

In reviewing the work done over this period of more than four years, we must say that drafting of this legal document was conducted in a very democratic and open manner. During the process of drafting the Basic Law, members of the Drafting Committee worked together with one heart and pooled their wisdom and efforts; and each and every article of the document was worked out after investigation, study and full discussion in which views of the majority were followed and those of the minority respected. After every meeting, reporters covering the event were briefed and the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region was immediately informed of its proceedings. The work of drafting the Basic Law was completed with the close attention and broad participation of the entire nation, especially the compatriots and people from all circles in Hong Kong. What is especially noteworthy here is that the Hong Kong Basic Law Consultative Committee, formed by people from all walks of life in Hong Kong, collected a great amount of opinions and suggestions in Hong Kong on the Basic Law and promptly referred them to the Drafting Committee and has rendered active and effective assistance to the work of drafting the Basic Law from the very beginning. The work of the Consultative Committee has been praised by the drafters.

Fellow Deputies,

The draft Basic Law that has been submitted to the current session of the National People's Congress for examination includes a Preamble and 160 articles in nine chapters. The nine chapters are: Chapter I, General Principles; Chapter II, Relationship Between the Central Authorities and the Hong Kong Special Administrative Region; Chapter III, Fundamental Rights and Duties of the Residents; Chapter IV, Political Structure; Chapter V, Economy; Chapter VI, Education, Science, Culture, Sports, Religion, Labour and Social Services; Chapter VII, External Affairs; Chapter VIII, Interpretation and Amendment of the Basic Law; and Chapter IX, Supplementary Provisions. There are also three annexes, namely, Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region; Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures; and Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region.

### **I. On the Guiding Principle of Drafting the Hong Kong Basic Law**

“One country, two systems” is the fundamental policy of the Chinese Government for bringing about the country's reunification. In line with this policy, the Chinese Government has formulated a series of principles and policies regarding Hong Kong. The main point is to establish a special administrative region directly under the Central People's Government when China resumes its sovereignty over Hong Kong. Except for national defence and foreign affairs, which are to be administered by the Central Government, the Hong Kong Special Administrative Region will exercise a high degree of autonomy; no socialist system or policies will be practiced in the Region, the original capitalist society, economic system and way of life will remain unchanged and the laws previously in force in Hong Kong will remain basically the same; Hong Kong's status as an international financial centre and free port will be maintained; and the economic interests of Britain and other countries in Hong Kong will be taken

into consideration. The Chinese Government has written the above principles and policies into the Sino-British Joint Declaration on the Question of Hong Kong and proclaimed that all the principles and policies regarding Hong Kong will remain unchanged for 50 years, which is to be codified in the Basic Law. 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.

Article 31 of China’s Constitution stipulates that “the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions.” China is a socialist country and socialism is China’s basic system. To realize China’s reunification, however, another kind of social system, namely, the capitalist system, may be practiced in individual regions of the country. It is on the basis of China’s Constitution and with “one country, two systems” as the guiding principle that all the state principles and policies regarding Hong Kong have been established in the draft Hong Kong Basic Law, which has been submitted to the present session of the National People’s Congress for examination.

## **II. On the relationship between the Central Authorities and the Hong Kong Special Administrative Region**

The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

Article 12 of the draft stipulates, “The Hong Kong Special Administrative Region shall be a local administrative region of the People’s Republic of China, which shall enjoy a high degree of

autonomy and come directly under the Central People's Government." This stipulation defines the legal status of the Hong Kong Special Administrative Region and constitutes the basis for specifying the Region's limits of power and its relationship with the Central Authorities. The Hong Kong Special Administrative Region, as an inalienable part of the People's Republic of China, will be a local administrative region directly under the Central People's Government and at the same time, it will be a special administrative region enjoying a high degree of autonomy and practicing a system and executing policies different from those of the Mainland. Therefore, the draft Basic Law contains both provisions embodying the unity and sovereignty of the country and provisions empowering the Special Administrative Region with a high degree of autonomy in the light of Hong Kong's special circumstances.

The power to be exercised by, or the affairs which are the responsibility of the Standing Committee of the National People's Congress or the Central People's Government, as prescribed in the draft law, is indispensable to maintaining the state sovereignty. For example, the Central People's Government will be responsible for the Special Administrative Region's defence and foreign affairs and the Chief Executive and other principal officials of the Special Administrative Region will be appointed by the Central People's Government; a small number of national laws relating to defence and foreign affairs as well as other matters beyond the limits of the autonomy of the Special Administrative Region will be applied locally by way of promulgation or legislation by the Special Administrative Region; and in the event that the National People's Congress Standing Committee decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the Special Administrative Region Government, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in Hong Kong. The draft law also stipulates that the Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition,

or subversion against the Central People's Government, or theft of state secret, 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. These stipulations are entirely necessary for maintaining the state sovereignty, unity and territorial integrity as well as for preserving Hong Kong's long-term stability and prosperity.

The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People's Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region's autonomy in areas such as finance, economy, industry and commerce, trade, transport and communications, development and management of land and natural resources, education, science and technology, culture, sports, public order and control of entry and exit activities. For instance, the draft law stipulates that the Special Administrative Region shall have independent finances, its revenues shall not be handed over to the Central Government, and the Central Government shall not levy taxes in the Region; and the Special Administrative Region may, on its own, formulate monetary and financial policies, the Hong Kong dollar shall be the legal tender in the Region, and the authority to issue Hong Kong currency shall be vested in the Special Administrative Region Government. Also, the draft stipulates that representatives of the Special Administrative Region Government may act as members of delegations of the Chinese Government to participate in negotiations at the diplomatic level affecting Hong

Kong; the Special Administrative Region may on its own, using the name “Hong Kong, China,” maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in economic, trade, financial and monetary, shipping, communications, tourism, cultural, sports and other appropriate fields.

Regarding the legislative power, the draft stipulates that laws enacted by the Hong Kong Special Administrative Region legislature shall take effect upon the signature and promulgation by the Chief Executive. The laws shall be reported to the National People’s Congress Standing Committee for the record, but they will go into force without being affected by this reporting. The draft also stipulates that only when it considers that any law enacted by the Special Administrative Region legislature is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, shall the National People’s Congress Standing Committee return the law in question; the Standing Committee shall not amend it. Any law returned by the National People’s Congress Standing Committee shall immediately be invalidated. These stipulations not only conform with the “one country, two systems” principle and are in line with provisions of the Constitution, but also take into full consideration the need for Hong Kong to enjoy a high degree of autonomy.

According to the Constitution, interpretation of laws is among the powers and functions of the National People’s Congress Standing Committee. To take into account Hong Kong’s special circumstances, the draft Basic Law, while stipulating that the power of interpretation of the Basic Law shall be vested in the National People’s Congress Standing Committee, provides that the National People’s Congress Standing Committee shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the Region. This stipulation will guarantee the



power of the National People's Congress Standing Committee and also facilitate the Hong Kong Special Administrative Region in exercising its autonomy. According to the draft, the Hong Kong Special Administrative Region courts may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government, or the relationship between the Central Authorities and the Region, and if such interpretation will affect their final judgments on the cases, the courts shall seek an interpretation of the relevant provisions from the National People's Congress Standing Committee through the Court of Final Appeal of the Region. The courts, in applying those provisions, shall follow the interpretation of the National People's Congress Standing Committee. This stipulation will provide the basis for the Region's courts, in adjudicating cases, to comprehend the provisions of the Basic Law concerning affairs which are the responsibility of the Central Government or the relationship between the Central Authorities and the Hong Kong Special Administrative Region, and prevent the courts from making erroneous judgments due to inaccurate understanding.

The draft vests the courts of the Special Administrative Region with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practise social and legal systems different from the Mainland's, this provision is necessary. Under the current judicial system and principles, the Hong Kong authorities have never exercised jurisdiction over acts of state such as defence and foreign affairs. While preserving the above principle, the draft stipulates that the courts of the Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs wherever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. However, before issuing such a certificate, the Chief Executive shall obtain a certifying



document from the Central People's Government. This stipulation not only appropriately solves the question of jurisdiction over acts of state, but also guarantees that the courts of the Region can conduct their functions in a normal way.

In addition, in order to enable the National People's Congress Standing Committee to heed fully the opinions of the people from all walks of life in Hong Kong when it makes decisions on whether a law enacted by the Special Administrative Region legislature conforms to the provisions concerning affairs within the responsibility of the Central Authorities or to the provisions concerning the relationship between the Central Authorities and the Special Administrative Region, decisions on adding to or deleting from the list of national laws which are applicable in the Hong Kong Special Administrative Region in Annex III and decisions on the interpretation of and amendment to the Basic Law, the drafters have recommended that when the Basic Law comes into force, a working committee be set up under the National People's Congress Standing Committee to submit its views regarding the above questions to the National People's Congress Standing Committee. The working committee shall be composed of people from the Mainland and Hong Kong. To this end, the Hong Kong Basic Law Drafting Committee has drafted the "Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress."

### **III. On the Fundamental Rights and Duties of Hong Kong Residents**

The extensive rights and freedoms enjoyed by the residents of the Hong Kong Special Administrative Region and other people residing in the Region as prescribed in Chapter III of the draft Basic Law include political, economic, cultural, social and family rights and freedoms and the freedom of person. The special features in the provisions concerning Hong Kong residents' rights and freedoms in the draft Basic Law boil down to the following two basic points:

(1) The draft provides multi-level protection for Hong Kong residents' rights and freedoms. In accordance with the characteristics of the composition of Hong Kong residents, the draft stipulates not only the general rights and freedoms enjoyed by Hong Kong residents, but also the rights of the permanent residents and Chinese citizens living among them. It also stipulates that people other than Hong Kong residents also enjoy the rights and freedoms of Hong Kong residents in accordance with the law. In addition, while stipulating in explicit terms the fundamental rights and freedoms of Hong Kong residents, the draft also stipulates that Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the Hong Kong Special Administrative Region. In view of the application in Hong Kong of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions, the draft stipulates that those provisions shall remain in force and be implemented through the laws of the Special Administrative Region. In addition to a chapter specially devoted to Hong Kong residents' rights and freedoms, there are also provisions concerning the issue in other relevant chapters and articles. Thus, extensive, comprehensive and multi-level protection is provided for safeguarding Hong Kong residents' rights and freedoms.

(2) The rights, freedoms and duties of Hong Kong residents are prescribed in the draft in accordance with the principle of "one country, two systems" and in the light of Hong Kong's actual situation. They include such specific provisions as protection of private ownership of property, the freedom of movement and freedom to enter or leave the Region, the right to raise a family freely and protection of private persons' and legal entities' property. The draft also provides that the systems to safeguard the fundamental rights and freedoms of Hong Kong residents shall all be based on the Basic Law.

#### **IV. On the Political Structure**

Chapter IV of the draft Basic Law mainly defines the formation and powers of and inter-relationship among the executive, legislature

and judiciary, as well as the qualifications, powers and functions of and relevant policies regarding the Chief Executive, principal officials, members of the executive and legislative councils, judges of the courts at all levels and other members of the judiciary, and public servants of the Hong Kong Special Administrative Region. It also provides that district organizations which are not organs of political power may be established in the Region.

The political structure of the Hong Kong Special Administrative Region should accord with the principle of “one country, two systems” and aim to maintain stability and prosperity in Hong Kong in line with its legal status and actual situation. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong’s reality should gradually be introduced. In accordance with this principle, Chapter IV and Annexes I and II of the Basic Law contain the following major provisions concerning the political structure of the Hong Kong Special Administrative Region:

(1) The relationship between the executive authorities and the legislature. The executive authorities and the legislature should regulate each other as well as co-ordinate their activities. To maintain Hong Kong’s stability and administrative efficiency, the Chief Executive must have real power which, at the same time, should be subject to some restrictions. The draft provides for the Chief Executive to be the head of the Hong Kong Special Administrative Region and accountable to the Central People’s Government and the Hong Kong Special Administrative Region. He or she is to lead the government of the Region, sign bills and budgets and promulgate laws. If the Chief Executive considers a bill passed by the Legislative Council to be not compatible with the overall interests of the Region, he or she may return it to the Legislative Council for reconsideration. If the Chief Executive refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass

a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council. On the other hand, the Basic Law provides that the government of the Region must abide by the law and be accountable to the Legislative Council. It must implement laws passed by the Legislative Council and already in force, present regular policy addresses to the Council, answer questions raised by members of the Council and obtain approval from the Council for taxation and public expenditure. The Chief Executive must consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, enacting subordinate legislation, or dissolving the Legislative Council. The Basic Law also stipulates that if the bill returned by the Chief Executive is passed again by the Legislative Council with at least a two-thirds majority, the Chief Executive must sign and promulgate it within one month, unless he or she dissolves the Legislative Council. If the newly elected Legislative Council, after the old one has been dissolved, again passes by a two-thirds majority the original bill in dispute, or it still refuses to pass the original budget or any other important bill introduced by the government, the Chief Executive must resign. If the Chief Executive is found to have committed a serious breach of law or dereliction of duty and if he or she still refuses to resign, the Legislative Council may pass a motion of impeachment through the specified procedures and refer it to the Central People's Government for decision. The provisions mentioned above embody the relationship of regulation and co-ordination between the executive authorities and the legislature.

(2) The method for the selection of the Chief Executive. The draft stipulates that the Chief Executive shall be selected by election or through consultations and be appointed by the Central People's Government. The method for selecting the Chief Executive shall be worked out in the light of the actual situation in Hong Kong and applied in a gradual and orderly way. The ultimate goal is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance

with democratic procedures. Based on these provisions, Annex I provides specific rules on selecting the Chief Executive. In the ten years between 1997 and 2007, the Chief Executive will be elected by a broadly representative election committee. If there is need to amend this method of election after that period, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they must be submitted to the Standing Committee of the National People's Congress for approval. The method for selecting the Chief Executive is provided in an annex to make it more amenable to revision when necessary.

(3) The method for forming the Legislative Council and its procedures for voting on bills and motions. According to the draft Basic Law, the Legislative Council will be constituted by election. The method for forming the Legislative Council will be worked out in the light of the actual situation in Hong Kong and applied in a gradual and orderly way. The ultimate goal is the election of all the members of the Legislative Council by universal suffrage. In accordance with these provisions, Annex II provides specific rules on formation of the Legislative Council. The first and second Legislative Council will be formed by members elected by functional constituencies, by the Election Committee or by geographical constituencies through direct elections. During the first 10 years after the Special Administrative Region is established, the number of seats in the Legislative Council for members elected by geographical constituencies through direct elections will be increased with each passing council, and the number of seats elected by the Election Committee will be gradually reduced. When the third Legislative Council is formed, members elected by functional constituencies and geographical constituencies through direct elections will each share half the seats of the Legislative Council. These rules accord with the principle of developing the election system in a gradual and orderly way. Annex II also stipulates that different voting procedures shall be adopted by the Legislative Council in handling bills introduced by the government and motions and bills introduced by individual members of the Legislative Council.

The passage of bills introduced by the government requires a simple majority vote of the members of the Legislative Council present. The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council requires at least a simple majority vote by each of the two groups of members present, i.e., members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee. Such provisions take into consideration the interests of all social strata and will prevent endless debates over government bills, thus helping the government work with efficiency. Ten years after the establishment of the Special Administrative Region, if there is a need to improve the method for forming the Legislative Council and its procedures for voting on bills and motions, such improvements shall be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they must be reported to the Standing Committee of the National People's Congress for the record. The method for forming the Legislative Council and the Council's procedures for voting on bills and motions are provided in an annex because it is more amenable to revision when necessary.

(4) Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong. Based on the same considerations, relevant articles stipulate that the Region's Legislative Council must be composed of Chinese citizens who are permanent residents of the Region with no right of abode

in any foreign country. However, in view of Hong Kong's specific conditions, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region, provided that the proportion of such members does not exceed 20 per cent of the total membership of the Council.

(5) The method for the formation of the first Government and the first Legislative Council of the Hong Kong Special Administrative Region. In line with the principles of state sovereignty and for the benefit of smooth transition, the establishment of the Special Administrative Region will be presided over by a Preparatory Committee set up by the National People's Congress. Since preparations must be made before the establishment of the first Government and the first Legislative Council and since the Basic Law will not go into effect until 1 July 1997, the Drafting Committee has suggested that the National People's Congress make a special decision on the method for the formation of the first Government and Legislative Council and that the decision be made public together with the Basic Law. The Drafting Committee has therefore worked out a draft of the decision on behalf of the National People's Congress. According to this decision, the candidate for the first Chief Executive of the Hong Kong Special Administrative Region will be recommended by a selection committee composed entirely of Hong Kong residents and then referred to the Central People's Government for appointment. If the composition of the last Hong Kong Legislative Council before the establishment of the Special Administrative Region is in conformity with the provisions of the decision made by the National People's Congress on the method for the formation of the first Government and the first Legislative Council, those of its members who uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region and who meet the requirements set forth in the Basic Law may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region. This arrangement is designed to ensure stability throughout the transition period and make the two governments dovetail without a hitch.



According to the decision, when assuming office, the Chief Executive, principal officials, members of the Executive Council and the Legislative Council, judges of the courts at all levels and other members of the judiciary must swear to uphold the Basic Law and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China.

## **V. On Economy, Education, Science, Culture, Sports, Religion, Labour and Social Services**

Chapter V of the Basic Law contains stipulations on the economic system and policies of the Hong Kong Special Administrative Region, divided into eight fields of endeavour: public finance, monetary affairs, trade, industry, commerce, land leases, shipping and civil aviation. These stipulations are indispensable to ensuring the normal operation of Hong Kong's capitalist economic mechanism and maintaining its status as an international financial centre and free port. Concerning monetary affairs, for instance, the draft Basic Law stipulates that no foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region and that markets for foreign exchange, gold, securities, futures and the like shall continue. The free flow of capital within, into and out of Region as well as the free operation of financial businesses and financial markets are safeguarded. It also stipulates that the Hong Kong dollar is the legal tender in the Region and shall be freely convertible and that the authority for its issuance shall be vested in the Government of the Hong Kong Special Administrative Region. As for foreign trade, the draft Basic Law stipulates that all investments from outside the Region shall be protected by law, and the free movement of goods, intangible assets and capital shall be safeguarded. Unless otherwise prescribed by law, no tariff shall be imposed. As a separate customs territory, the Region may, using the name "Hong Kong, China," participate in relevant international organizations and trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and



other similar arrangements obtained or made by the Hong Kong Special Administrative Region shall be enjoyed exclusively by the Region. The draft Basic Law also stipulates that the Hong Kong Special Administrative Region shall strive to achieve a fiscal balance and avoid deficits in drawing up its budget. The Region may also enact laws on its own concerning the taxation system, using the previously pursued low tax policy as reference. The draft Basic Law also carries detailed stipulations concerning the major trades, land leases, shipping, civil aviation and the like.

Chapter VI of the draft Basic Law carries stipulations on the maintenance and development of Hong Kong's current systems and policies concerning education, science, culture, sports, religion, labour and social services. These stipulations involve the interests of Hong Kong residents in many aspects of public life and are important for social stability and development.

There are quite a number of articles concerning policies in Chapter V and VI of the draft Basic Law. The Chinese Government has undertaken, in the Sino-British Joint Declaration, to write its basic principles and policies on Hong Kong and their detailed explanations as given in Annex I of the Joint Declaration into Basic Law, and Hong Kong residents from all walks of life have a strong desire for the Basic Law to reflect and protect their interests. Therefore, it was decided in the end that these articles concerning policies should remain in the draft Basic Law, despite the differing opinions expressed over the brevity of articles during the drafting of the law.

Finally, I should like to explain a few points about the draft designs of the regional flag and regional emblem of the Hong Kong Special Administrative Region. The regional flag carries a design of five bauhinia petals, each with a star in the middle, on a red background. The red flag represents the motherland and the bauhinia represents Hong Kong. The design implies that Hong Kong is an inalienable part of China and prospers in the embrace of the motherland. The five stars on the flower symbolize the fact that all Hong Kong compatriots love their motherland, while the red and white

colours embody the principle of “one country, two systems.” The regional emblem is round and bears a design similar to the one on the flag, with five red stars on a white bauhinia against a red background, which also symbolizes the principle of “one country, two systems” by the use of red and white. The outer ring of the emblem carries the words “Hong Kong Special Administrative Region of the People’s Republic of China” in Chinese, and “HONG KONG” in English.

Fellow Deputies,

I hereby present my explanations concerning “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft),” its annexes and other relevant documents and concerning the draft designs of the regional flag and regional emblem of the Special Administrative Region, to the National People’s Congress for examination.

# Chapter I General Principles

## Article 1

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

BL 1 is the first of the eleven articles of Chapter I – General Principles. Drafting materials in *Overview of the Drafting Process* show that<sup>1</sup> during the drafting process, the wording of BL 1 remained unchanged through eight different temporary drafts and the final version, despite suggestions from different parties to amend it.<sup>2</sup>

Materials in the *Overview of the Drafting Process* show that BL 1 was designed to clarify in writing the exercise of sovereignty of the PRC over Hong Kong.<sup>3</sup>

BL 1 reflects Articles 1, 2 and 3(1) of the Joint Declaration. These provisions provide that the PRC will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, and that the HKSAR will be established in accordance with Article 31 of the Constitution. Articles 1, 2 and 3(1) of the Joint Declaration are as follows:

“1. The Government of the People’s Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong

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1 *Overview of the Drafting Process*, Vol.1, pp.26-28.

2 None of these proposals questioned the principle that the HKSAR is an inalienable part of the PRC.

3 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988, p.19 in *Overview of the Drafting Process*, Vol.1, p.27: “This is an expression of sovereignty. All territories are inalienable ...”

with effect from 1 July 1997.

2. The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.

3. The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows:

(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution, a HKSAR upon resuming the exercise of sovereignty over Hong Kong.”

BL 1 also echoes the first sentence of the Preamble to Basic Law, which points out that Hong Kong has been part of the territory of China since ancient times; it was occupied by Britain after the Opium War in 1840. BL 1 reflects history and reality, and clearly states that the HKSAR is an inalienable part of the country.

## **Article 2**

“The National People's Congress<sup>4</sup> authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”

Drafting materials in *Overview of the Drafting Process* show that the first few drafts of BL 2 in Chapter I - General Principles of the Basic Law were confined to “the National People's Congress authorizes the Hong Kong Special Administrative Region to exercise

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<sup>4</sup> According to Articles 57 and 62(14) of the Constitution, the NPC is the highest organ of state power. The functions and powers exercised by the NPC include deciding on the establishment of special administrative regions and their systems.

a high degree of autonomy in accordance with the provisions of this Law.”<sup>5</sup> Due to opinion that the expression “a high degree of autonomy” was not detailed enough, the expression “enjoy executive, legislative and independent judicial power, including that of final adjudication” was added since the fourth draft,<sup>6</sup> which was identical to the final version.

Opinions varied on the interpretation of “a high degree of autonomy” at the later phase of the drafting process. *Overview of the Drafting Process* shows that “one country, two systems” and “a high degree of autonomy” had been widely discussed before the seventh draft was finalized. Some people opined that “a high degree of autonomy” should be defined in accordance with Article 3(2) of the Joint Declaration. The power of the CPG over the HKSAR was reserved only in defence and foreign affairs, and all other powers should be vested in the HKSARG. Some people opined that in terms of the power distribution between the CPG and the HKSAR, the national defence and foreign affairs powers reflected sovereignty and should be vested in the CPG; all other powers should be vested in the HKSARG. This design, as the simplest and clearest way to distribute power, was easy to implement and would ensure a high degree of autonomy for the HKSAR. Some people opined that as local government, HKSARG would not enjoy sovereignty. The NPC is responsible for the enactment and promulgation of the Basic Law, the amendment and interpretation of which are the responsibilities for NPC and its Standing Committee. In other words, no matter how high the autonomous power enjoyed by the HKSARG, it will only be a subsidiary regime with a special status: special, but not independent or sovereign. The “high degree of autonomy” of the HKSAR is a high degree of autonomy within the limits prescribed by the Basic Law. The

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5 *Overview of the Drafting Process*, Vol.1, pp.29-33. This article progressed through nine drafts.

6 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.29.

relevant provisions of the Joint Declaration only state that national defence and foreign affairs are the responsibilities of the CPG, and the HKSARG has no such responsibility at all. The criteria for a “high degree of autonomy” should be defined in accordance with the Basic Law. The definition of “a high degree of autonomy” can only mean that Hong Kong is neither “independent” nor with power of “self-determination”.<sup>7</sup>

*Overview of the Drafting Process* also shows that before the eighth draft was finalized, there were still proposals to amend Article 2: to replace “exercise a high degree of autonomy” with “exercise self-government” or “exercise full autonomy”. There were also suggestions to delete this article and quote the second sentence of Article 3(2) and Article 3(3) from the Joint Declaration. These proposals were ultimately rejected.<sup>8</sup>

Article 3(2) and (3) of Joint Declaration reads as follows:

“3. The Government of the People’s Republic of China declares that the basic policies of the People’s Republic of China regarding Hong Kong are as follows:

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People’s Government.

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including

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7 Published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.2 – Special Reports*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.31.

8 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.33.

that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.”

It should be noted that the first sentence of Article 3(2) of the Joint Declaration provides that “The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China.” Article 3(4) states that “The Chief Executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the Chief Executive of the Hong Kong Special Administrative Region for appointment by the Central People’s Government.” Annex I to the Joint Declaration also provides that laws enacted by the legislature of the HKSAR must be reported to the NPCSC for the record; appointment and removal of principal judges shall be submitted to the NPCSC for the record; budget of the HKSAR shall be submitted to the CPG for the record. Thus it can be seen that the Joint Declaration does not limit the power of the CPG of the PRC to foreign affairs and defence in the administration of the HKSAR.<sup>9</sup>

In his “speech at a meeting with the Drafting Committee of the Hong Kong Special Administrative Region of the People’s Republic of China” on 16 April 1987, Deng Xiaoping made the following explanation:

“There is another point that I should make clear. Don’t ever think that everything would be all right if Hong Kong’s affairs were administered solely by Hong Kong people while the Central Government had nothing to do with the matter. That simply wouldn’t work — it’s not a realistic idea. The Central Government certainly will not intervene in the day-to-day affairs of the special administrative region, nor is that necessary. But isn’t it possible that something could happen in the region that might jeopardize the fundamental interests of the country? Couldn’t such a situation arise? If that happened, should Beijing intervene or not? Isn’t it possible that something could

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9 Annex I to the Joint Declaration, paragraphs 55-56, 66 and 80.

happen there that would jeopardize the fundamental interests of Hong Kong itself? Can anyone imagine that there are in Hong Kong no forces that might engage in obstruction or sabotage? I see no grounds for taking comfort in that notion. If the Central Government were to abandon all its power, there might be turmoil that would damage Hong Kong's interests. Therefore, it is to Hong Kong's advantage, not its disadvantage, for the Central Government to retain some power there. ... It is the policy of the Central Government that the interests of Hong Kong should not be harmed, and we also hope that nothing will happen in Hong Kong itself that will harm its interests or the interests of the country as a whole. But what if something does happen? I should like to ask you to think this over and take it into consideration when drafting the Basic Law. You should also consider a few other things. For example, after 1997 we shall still allow people in Hong Kong to attack the Chinese Communist Party and China verbally, but what if they should turn their words into action, trying to convert Hong Kong into a base of opposition to the Mainland under the pretext of 'democracy'? Then we would have no choice but to intervene. First the administrative bodies in Hong Kong should intervene; Mainland troops stationed there would not necessarily be used. They would be used only if there were disturbances, serious disturbances. Anyway, intervention of some sort would be necessary."<sup>10</sup>

### Article 3

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

According to drafting materials in *Overview of the Drafting Process*, the contents and wording of BL 3 in nine drafts remained roughly the same. The greatest difference is that “local people” had

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10 *Selected Works of Deng Xiaoping*, Vol.3, People's Publishing House, 1993, p.221.



once appeared before “permanent residents of Hong Kong” in the first draft and gone later in subsequent drafts.<sup>11</sup>

The article causes little controversy during its drafting, with the main concern being that it only refers to the executive and legislative organs, not the judiciary. It was suggested that the judiciary should be added, which was not accepted.<sup>12</sup>

The Government of the PRC declares in Article 3(4) of the Joint Declaration that the basic policies of the PRC regarding Hong Kong include “The Hong Kong Special Administrative Region will be composed of local inhabitants.” Section I of Annex I to the Joint Declaration specifies this basic policy: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants.” BL 3 is consistent with these statements of basic policies.

## Article 4

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

Drafting materials in *Overview of the Drafting Process* show that the wording of BL 4 was consistent from the first to the eighth (final) version.<sup>13</sup>

It is one of the basic policies of the PRC regarding Hong Kong in the Joint Declaration that the HKSAR shall safeguard the rights and freedoms of the residents of the HKSAR and other persons in

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11 *Overview of the Drafting Process*, Vol.1, pp.34-35.

12 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.35.

13 *Overview of the Drafting Process*, Vol.1, pp.36-38.

the Region in accordance with law. As shown in *Overview of the Drafting Process*, the drafters considered the protection of the rights and freedoms of residents to be a fundamental principle that should be included in the General Principles of the Basic Law, thus this article was added to Chapter I - General Principles of the Basic Law.<sup>14</sup>

According to *Overview of the Drafting Process*, much attention was drawn to the meaning of “other persons”. However, the use of the expression is completely the same as the relevant provisions in Annex I to the Joint Declaration.<sup>15</sup> The term “other persons” also appears in BL 41: “persons in the Hong Kong Special Administrative Region other than Hong Kong residents”, and BL 42: “Hong Kong residents and other persons in Hong Kong”.

## Article 5

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

According to drafting materials in *Overview of the Drafting Process*, BL 5 had gone through nine drafts. The expression “shall remain unchanged for 50 years” did not show up until the fourth draft and BL 5 remained unchanged in both content and wording from then on.<sup>16</sup>

BL 5 has its genesis in Article 3(12) of the Joint Declaration:

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14 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.36.

BL 25 to 41 in Chapter III of the Basic Law are specific provisions to protect the fundamental rights and freedoms of the residents.

15 Section XIII of Annex I to the Joint Declaration reads: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law.”

16 *Overview of the Drafting Process*, Vol.1, pp.39-44.

“The above-stated basic policies of the People’s Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, by the National People’s Congress of the People’s Republic of China, and they will remain unchanged for 50 years.”

According to *Overview of the Drafting Process*, during the drafting stage of BL 5, many opinions collected by the Consultative Committee advocated that the HKSAR shall not implement the socialist system and policies, and the capitalist system and way of life shall remain unchanged for 50 years, but the expression “remain unchanged for 50 years” should not be interpreted as prohibiting changes or development, nor should it be understood as “frozen” or stagnation. There were also suggestions to delete “remain unchanged for 50 years”, to amend it to “remain unchanged for 50 years or more”, to add “minimum” before it, or to state clearly that the Basic Law will remain in force until 2047. None of these proposals were accepted.<sup>17</sup>

In his speech to the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China on 16 April 1987, Deng Xiaoping said:

“Today I should like to talk about some things that will not change. Our policy on Hong Kong will not change for 50 years after it is reunited with the Motherland in 1997. That policy, along with the Basic Law you are now drafting, will remain in force for at least 50 years. And I want to add that there will be even less need to change them after the 50-year period ...

So, both the political situation and the policy should remain stable – two stabilities. Making no change means stability. If the policy

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17 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October, 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.41-43.

is successful, yielding the desired results in the 50-year period after 1997, we shall have little reason to change it then.”<sup>18</sup>

## Article 6

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

Drafting materials in *Overview of the Drafting Process* show that<sup>19</sup> the text of BL 6, in the early stages of drafting, almost exclusively quoted the relevant parts of Section VI of Annex I to the Joint Declaration:

“Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.”

According to *Overview of the Drafting Process*, since the fourth draft, the drafters took into consideration that the provisions in “General Principles” should set out overarching principles, so the original longer text of the article was revised as “laws of the Hong Kong Special Administrative Region protect property ownership”. It was considered that other contents could be moved to Chapter III – Fundamental Rights and Duties of the Residents of the Basic Law.<sup>20</sup>

As to the text of BL 6, namely, “the laws of the Hong Kong Special Administrative Region protect property ownership”, it was subject to much deliberation. Some suggested that “property

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18 *Selected Works of Deng Xiaoping*, Vol.3, People’s Publishing House, 1993, p.215.

19 *Overview of the Drafting Process*, Vol.1, pp.45-48. This article progressed through nine drafts.

20 *Report by Vice Chairman Hu Sheng on the Work of the General Working Group* (26 April 1988), published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.1, p.46.

Other content was finally moved to BL 105 in Chapter V of the Basic Law.

ownership” should be changed to “private property ownership” so as to distinguish it from ownership of state-owned property. BL 6 was amended in the seventh draft to “the Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law”, which remained unchanged thereafter.<sup>21</sup>

## Article 7

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

Drafting materials in *Overview of the Drafting Process* show that this provision originally stipulated that the HKSAR shall be responsible for “management, use and lease or grant [of land] in the name of the State to individuals, legal persons or organizations for use” and did not include the expression “development”. The expression “or in the name of the State” was deleted in the second draft. “Development” was added to the fourth draft, which remained unchanged thereafter.<sup>22</sup>

The land within the HKSAR is the territory of the PRC. *Overview of the Drafting Process* shows that during the consultation period of BL 7, views received by the Consultative Committee indicated that the expression “shall be State property” reflected the spirit of what a

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21 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.47.

22 *Overview of the Drafting Process*, Vol.1, pp.49-51.

sovereign State should be.<sup>23</sup> Later, there were suggestions to amend BL 7 to “The land and resources of the Hong Kong Special Administrative Region shall be owned by the Hong Kong Special Administrative Region, which shall not be interfered or questioned by the Chinese Government”. The suggestion was rejected. A proposal to turn over land revenue to the CPG was also rejected.<sup>24</sup> Another proposal to limit leases of land and natural resources to not beyond 2047 was also rejected.<sup>25</sup>

## Article 8

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

Drafting materials in *Overview of the Drafting Process* show that the content and wording of BL 8 remained basically unchanged during

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23 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.50.

The Preamble of the Basic Law says that “Hong Kong has been part of the territory of China since ancient times” and that “upholding national unity and territorial integrity”. BL 1 makes clear the purpose from the very beginning that “The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China”. BL 12 provides that “The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.”

24 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.51.

25 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.49.

the drafting process.<sup>26</sup>

The maintenance of the laws previously in force in Hong Kong is one of China's basic policies regarding Hong Kong, which is specified in Section II of Annex I to the Joint Declaration:

“After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.”

“The original laws remained basically unchanged” is an integral part of Chapter I – General Principles of *Structure of the Basic Law (Draft)*.<sup>27</sup> During the drafting process, concern was raised as to who would review and decide whether existing laws were in conflict with the Basic Law. During the consultation period on the sixth draft of the provision in August 1988, the Drafting Committee received views from various sectors of Hong Kong suggesting that it should state clearly who would review and decide whether the previous law had contravened the Basic Law.<sup>28</sup> Some views from the Mainland suggested that the expression “confirmed by the Standing Committee of the National People's Congress” should be added at the beginning of the article, and some people said “comparing the content of this provision and BL 172, there were repetitions. ‘The expression declared by the Standing Committee of the National People's Congress’ should be added after ‘except for’, and BL 172 should be amended or

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26 This article progressed through nine drafts. *Overview of the Drafting Process*, Vol.1, pp.52-55.

27 *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)*, 22 April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee*. For its full text, see Appendix IV.

28 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.1, p.53.

omitted.”<sup>29</sup>

According to *Overview of the Drafting Process*, it was suggested at the later phase of the drafting process that this article be amended as: “The laws previously in force in Hong Kong, namely, common law, equity, ordinances, subsidiary legislation, existing precedents and customary law, shall be retained except for those that conflict with this Law or are amended by the legislature of the Hong Kong Special Administrative Region or submitted to the Hong Kong Court of Final Appeal for final adjudication.”<sup>30</sup>

It was also suggested that “and Hong Kong’s international legal obligations” should be added after “this Law”.<sup>31</sup>

The above suggestions were ultimately not accepted.

## Article 9

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

Drafting materials in *Overview of the Drafting Process* show that the text of this article on “speech and written language” of the HKSAR was roughly the same from the first to the sixth draft which read as: “In addition to the Chinese language, English may also be used by the executive authorities, legislature and judiciary of the Hong

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29 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.1, pp.53-54.

BL 172 was renumbered as BL 160 .

30 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.1, p.54.

31 Ibid.



Kong Special Administrative Region.”<sup>32</sup> Since the seventh draft, the expression “as an official language” was added to the sentence. This version was later adopted as BL 9.<sup>33</sup>

Section I of Annex I to the Joint Declaration states: “In addition to Chinese, English may also be used in organs of government and in courts in the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process* show that during the drafting process, this article was opposed by many people. Some of the views received by the Consultative Committee opined that the Basic Law should specify the Chinese language as the primary language and English the secondary. There were also views that in order to maintain Hong Kong’s status quo and status as an international city, and in view of the need to use English in the economic, legal, including the common law, as well as the judicial and administrative spheres of the HKSAR, both Chinese and English should enjoy equal official status. It was also proposed that the local dialect of Hong Kong, namely Cantonese, should be specified as the official language; instead of using simplified Chinese characters, the traditional Chinese characters commonly used in Hong Kong shall be adopted as the legal written language. However, others held that simplified Chinese characters, as the national standard, should be used, and that Putonghua should be gradually promoted as the official language.<sup>34</sup>

The inclusion of the expression “English ... as an official language” in BL 9 means that both Chinese and English are official

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32 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, February 1989.

33 This article progressed through nine drafts. *Overview of the Drafting Process*, Vol.1, pp.56-60.

34 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.58-59.

languages. Chinese and English have equal official status and are both official languages of the HKSAR.

## Article 10

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

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

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

According to drafting materials in *Overview of the Drafting Process*,<sup>35</sup> this article on “displaying and using the national flag, national emblem of the People’s Republic of China, regional flag and regional emblem of the Hong Kong Special Administrative Region” remained almost unchanged from the first to the fourth draft, then without any descriptions of the regional flag and regional emblem: “the regional flag of the Hong Kong Special Administrative Region (to be drafted)” and “the regional emblem of the Hong Kong Special Administrative Region (to be drafted)”.<sup>36</sup> Since the fifth draft, descriptions on regional flag and emblem were respectively added as “a red flag with a bauhinia highlighted by five star-tipped stamens” and “a bauhinia in the centre highlighted by five star-tipped stamens and encircled by the words ‘Hong Kong Special Administrative Region of the People’s Republic of China’ in Chinese and ‘HONG KONG’ in

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35 *Overview of the Drafting Process*, Vol.1, pp.61-63.

36 *Overview of the Drafting Process*, Vol.1, pp.61-62.

English.”<sup>37</sup> This version was later adopted as BL 10.<sup>38</sup>

Section I of Annex I to the Joint Declaration states: “Apart from displaying the national flag and national emblem of the People’s Republic of China, the Hong Kong Special Administrative Region may use a regional flag and emblem of its own.”

*Overview of the Drafting Process* shows that, during the drafting process, opinions varied as to the designs of the regional flag and regional emblem. Some people thought that the main design of the regional flag and regional emblem should emphasize the sovereignty of CPG over Hong Kong, and highlight the distinctive image of “Hong Kong, China”, so as to fully demonstrate the political relationship between China and Hong Kong. There were also views that the relevant design should show Hong Kong’s regional characteristics rather than Chinese characteristics, so as to emphasize the autonomy and freedom of Hong Kong. In addition, some suggested that the HKSAR should have a regional song representing the Region.<sup>39</sup>

Chairman Ji Pengfei further deliberated on the spirit of the design of the regional flag and emblem at the NPC: “The regional flag carries a design of five bauhinia petals, each with a star in the middle, on a red background. The red flag represents the motherland and the bauhinia represents Hong Kong. The design implies that Hong Kong is an inalienable part of China and prospers in the embrace of the motherland. The five stars on the flower symbolize the fact that all Hong Kong compatriots love their motherland, while the red and white colours embody the principle of ‘one country, two systems.’ The regional emblem is round and bears a design similar to the one on the flag, with five red stars on a white bauhinia against a red background,

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37 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 16 February 1990.

38 *Overview of the Drafting Process*, Vol.1, pp.62-63.

39 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.62.

which also symbolizes the principle of ‘one country, two systems’ by the use of red and white. The outer ring of the emblem carries the words ‘Hong Kong Special Administrative Region of the People’s Republic of China’ in Chinese, and ‘HONG KONG’ in English.”<sup>40</sup>

The suggestion on regional song was not adopted.

## Article 11

“In accordance with Article 31 of the Constitution of the People’s Republic of China,<sup>41</sup> the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

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

This article is the last one in Chapter I – General Principles of the Basic Law, the first draft of which was BL 10 in Chapter I of *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR* dated 22 August 1987.<sup>42</sup> According to drafting materials in *Overview of the Drafting Process*,<sup>43</sup> its wording had been revised twice in the drafting of the eight drafts. The first revision: the expression “its residents” in Paragraph 1 “safeguarding the fundamental rights and freedoms of its residents” was first included

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40 *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 National People’s Congress, 28 March 1990).

41 The state may, when necessary, establish special administrative regions. The systems to be practiced in the special administrative regions shall be prescribed by law adopted by the NPC in the light of the specific circumstances.

42 Published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*.

43 *Overview of the Drafting Process*, Vol.1, pp.64-68.

in the third draft. The second revision: the expression “and the relevant policies” in Paragraph 1 was included in the sixth draft.

According to *Overview of the Drafting Process*, much attention was drawn to the article during the discussion before finalizing the sixth draft. Some suggested that this article be deleted, or the words “according to Article 31 of the Constitution of the People’s Republic of China” in Paragraph 1 be deleted, or Paragraph 2 be deleted. Reasons included the following: the Basic Law was in conflict with the Constitution; though this article stated that the constitutional basis of the Basic Law was Article 31 of the Constitution, it failed to clarify whether or not, or under what circumstances, other provisions in the Constitution would apply to Hong Kong and this might lead to legal disputes or might affect the integrity of the Basic Law. There was also concern that this provision would to some extent violate the promise made by the Joint Declaration to give the HKSAR freedom to make its policy. There were suggestions to amend the last sentence of Paragraph 1 to read as: “Even if it conflicts with other provisions of the Constitution, the provisions of this Law shall still be the ultimate basis”, and that Paragraph 2 shall be deleted.<sup>44</sup>

In addition, some believed that this article should be interpreted to mean Article 31 of the Constitution allows the HKSAR to enjoy full autonomy. At the same time, some suggested that the NPC, when promulgating the Basic Law, shall issue a decree declaring that the Basic Law does not contravene the national Constitution.<sup>45</sup>

In the discussion before finalizing the seventh draft, in addition

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44 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.66.

45 Ibid.

On 4 April 1990, the Third Session of the Seventh National People’s Congress adopted the *Decision on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* which provides: “The Basic Law of the HKSAR is constitutional as it is enacted in accordance with the Constitution and in the light of the specific conditions of Hong Kong ...”

to deleting “in accordance with Article 31 of the Constitution” or the entire article, there were also suggestions to amend Paragraph 1 to read as: “Other provisions of the Constitution shall not apply to the Hong Kong Special Administrative Region”, or “Hong Kong Special Administrative Region may enact laws independently and need not follow or comply with the Basic Law”. It was also proposed to add “and the bilateral and international legal obligations undertaken or assumed by the Hong Kong Special Administrative Region, including the obligations of the Region itself” after “the provisions of this Law” in Paragraph 1.<sup>46</sup>

The eighth draft of this article was adopted as BL 11, the content and wording of which was identical with the sixth draft.

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46 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.67.

## **Chapter II Relationship between the Central Authorities and the Hong Kong Special Administrative Region**

### **Article 12**

“The Hong Kong Special Administrative Region shall be a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy<sup>1</sup> and come directly under the Central People’s Government.”<sup>2</sup>

Article 3(2) of the Joint Declaration states:

“3. The Government of the People’s Republic of China declares that the basic policies of the People’s Republic of China regarding Hong Kong are as follows:

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China. The Hong Kong Special Administrative

1 According to Article 30 of the Constitution, the administrative division of the PRC is as follows:

“(1) The country is divided into provinces, autonomous regions and municipalities directly under the Central Government;

(2) Provinces and autonomous regions are divided into autonomous prefectures, counties, autonomous counties, and cities;

(3) Counties and autonomous counties are divided into townships, nationality townships, and towns.

Municipalities directly under the Central Government and larger cities are divided into districts and counties. Autonomous prefectures are divided into counties, autonomous counties and cities.

All autonomous regions, autonomous prefectures and autonomous counties are national autonomous areas.”

2 According to Articles 85 and 89 of the Constitution, the CPG, namely the State Council, is the highest organ of state administration. It exercises the functions and powers granted by the Constitution and the NPC and its Standing Committee, including unified leadership over the work of the local organs of state administration at various levels throughout the country.

Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.”

According to drafting materials in *Overview of the Drafting Process*, although BL 12 had progressed through ten drafts, its content and text did not change much.<sup>3</sup> The first draft read: “The Hong Kong Special Administrative Region is a local administrative region of the People's Republic of China. The Hong Kong Special Administrative Region is directly under the Central People's Government.” The second and third drafts also consisted of two sentences: “The Hong Kong Special Administrative Region is a local administrative region of the People's Republic of China that enjoys a high degree of autonomy.” and “The government of the Hong Kong Special Administrative Region is directly under the Central People's Government.” Beginning from the fourth draft, “the Hong Kong Special Administrative Region” in the latter sentence was omitted and the two sentences were joined as one sentence: “The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.”

*Overview of the Drafting Process* also shows that in the early stage of drafting the Basic Law, the Consultative Committee and the Drafting Committee were fully aware that the relationship between the Central Authorities and the HKSAR must be clearly dealt with in the Basic Law. In the Consultative Committee's *Summary of the Discussion on the Structure of the Basic Law of the First Group of the Consultative Committee* of February 1986, main opinions of the participants were summarized, among which the relationship between the Central Authorities and the HKSAR was stated: “As local government, the Hong Kong Special Administrative Region should come under the Central Government, but enjoy a high degree of autonomy. It is essential to define the Central Government's

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3 *Overview of the Drafting Process*, Vol.1, pp.69-75



limits of authority and the scope of the high degree of autonomy. Meanwhile, the relationship between the political organs of the Central Government stationed in Hong Kong and the government of the Hong Kong Special Administrative Region should also be stipulated.”<sup>4</sup>

*Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues* of April 1986 shows that there were views indicating that “the future government of the Hong Kong Special Administrative Region will be a local government under the leadership of the Central Government, any opposition to ‘intervention’ should not be turned into opposition to ‘leadership’... There should be a complete idea of what is to constitute the Central Authorities’ appropriate intervention when formulating the Basic Law.”<sup>5</sup>

Before finalizing the eighth draft of BL 12 in 1989, there were views expressed disagreeing with the term “come directly under” and proposals to delete “come directly under the Central People’s Government”. The reason was that “this means that the Hong Kong Special Administrative Region is subject to the Central People’s Government”, and “There is a conflict between ‘come directly under the Central People’s Government’ and ‘a high degree of autonomy’, and this will turn the ‘Special Administrative Region’ into just another autonomous region of China.”<sup>6</sup>

The situation continued before the issuance of the ninth draft of the Basic Law on 16 February 1990. *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.3 – General Report on the Articles*, published by the Consultative Committee in

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4 *Overview of the Drafting Process*, Vol.1, p.69.

5 *Overview of the Drafting Process*, Vol.1, p.71 shows this as reference material for the *Second Session of the Drafting Committee*.

6 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.74.

November 1989, included the suggestion of deleting “come directly under the Central People’s Government” from this article. It was also proposed to amend this article to read: “Hong Kong is a local administrative region of the People’s Republic of China enjoying a high degree of autonomy. Except for foreign and defence affairs, Hong Kong does not come under the Central People’s Government.”<sup>7</sup> None of these proposals were accepted.

### Article 13

“The Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.”<sup>8</sup>

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.”

According to drafting materials in *Overview of the Drafting Process*, this article had progressed through ten drafts.<sup>9</sup> The first paragraph had never been modified. The second paragraph as currently seen was Paragraph 3 since the first draft, but changed places with the then Paragraph 2 in the eighth draft. BL 13(3) was listed as BL 13(2) in the first draft, which then read: “The Government of the Hong Kong Special Administrative Region shall, on its own, conduct external affairs as authorized by the Central People’s Government in accordance with the relevant provisions of Chapter VII and other

<sup>7</sup> *Overview of the Drafting Process*, Vol.1, p.75.

<sup>8</sup> See *Interpretation by the Standing Committee of the National People’s Congress Regarding the First Paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (Adopted at the Twenty Second Session of the Standing Committee of the Eleventh National People’s Congress on 26 August 2011) included in this book.

<sup>9</sup> *Overview of the Drafting Process*, Vol.1, pp.76-81.

provisions of this Law.” In the third draft, it was amended to read: “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.”

In Article 3(2) of the Joint Declaration, the Government of the PRC declares the basic policies of the PRC regarding Hong Kong which stipulates that foreign affairs are the responsibilities of the CPG. Section I of Annex I to the Joint Declaration specifies that “The Central People’s Government shall authorize the Hong Kong Special Administrative Region to conduct on its own those external affairs specified in Section XI of this Annex.” Paragraphs 1 and 3 of BL 13 are in line with the policies stipulated in the Joint Declaration and Annex I.

According to *Overview of the Drafting Process*, there was suggestion to delete the second paragraph, that is, “The Ministry of Foreign Affairs of the People’s Republic of China shall establish an office in Hong Kong to deal with foreign affairs” at the later phase of the drafting process. It had also been suggested that the third paragraph be amended to read “The Hong Kong Special Administrative Region shall conduct relevant external affairs on its own in accordance with this Law.”<sup>10</sup> The proposals were not accepted.

## Article 14

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

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

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10 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.3 – General Report on the Articles, November 1989* in *Overview of the Drafting Process*, Vol.1, p.81.

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

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

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

According to drafting materials in *Overview of the Drafting Process*, BL 14 had progressed through ten drafts. There were only four paragraphs in the first draft. The first, third and fifth paragraphs had not been amended from beginning to end. Paragraph 2 which read "The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region." first appeared in the eighth draft. Paragraph 4 of the article had been amended twice.<sup>11</sup>

BL 14(4):

First draft: "Members of the garrison should abide by the laws of the Hong Kong Special Administrative Region outside their barracks."

Second draft: "In addition to abiding by national laws, members of the garrison should abide by the laws of the Hong Kong Special Administrative Region."

Third to seventh drafts: Same as the second draft.

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

Ninth to tenth drafts: Same as the eighth draft.

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<sup>11</sup> *Overview of the Drafting Process*, Vol.1, pp.82-103.

In Article 3(2) of the Joint Declaration, the Government of the PRC declares the basic policies of the PRC regarding Hong Kong as follows: “The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China ... and defence affairs which are the responsibilities of the Central People’s Government”. The same wording appears in Section I of Annex I to the Joint Declaration. Article 3(11) of the Joint Declaration stipulates that the maintenance of public order in the HKSAR will be the responsibility of the HKSARG. Section XII of Annex I to the Joint Declaration is on “Defence”, which states: “The maintenance of public order in the Hong Kong Special Administrative Region shall be the responsibility of the Hong Kong Special Administrative Region Government. Military forces sent by the Central People’s Government to be stationed in the Hong Kong Special Administrative Region for the purpose of defence shall not interfere in the internal affairs of the Hong Kong Special Administrative Region. Expenditure for these military forces shall be borne by the Central People’s Government.”<sup>12</sup>

*Overview of the Drafting Process* shows the discussions prior to the finalization of the eighth draft of this article. Some people opined that the article was incomplete, since it did not spell out that the HKSARG was responsible for maintenance of public order, which was stipulated in the Joint Declaration.<sup>13</sup> The issue was addressed by adding the second paragraph in the eighth draft: “The Government of

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12 On 3 October 1984, one week after the initialing of the Joint Declaration, Deng Xiaoping spoke to the National Day audience of compatriots from Hong Kong and Macao and said, “I said China has the right to have a military presence in Hong Kong. I said, apart from stationing troops in Hong Kong, what else can China do to demonstrate its sovereignty over Hong Kong? A military presence in Hong Kong would also serve a purpose of preventing unrest. Those trouble makers have to think twice before going about it when aware of Chinese troops in Hong Kong. Even if there is unrest, it can be resolved in time.”

13 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.93.

the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region”, thus completing its meaning.

Views were also expressed that the expression “members of the garrison should abide by the laws of ...” in Paragraph 4 of the article should be amended to read “shall abide by”, since the meaning of the provision was firm, and it would be more accurate to replace “should” with “shall”.<sup>14</sup> It was also proposed to amend the paragraph because, in accordance with Hong Kong’s legal terminology, the word “should” did not denote duty, while “shall” did.<sup>15</sup> “Should” was changed to “shall” in the eighth draft in response to that suggestion.

Prior to finalizing the ninth draft of BL 14,<sup>16</sup> it was proposed that the second sentence of Paragraph 3 be amended to read: “The Government of the Hong Kong Special Administrative Region may, when necessary, by vote of the Executive and Legislative Councils, request the Central People’s Government for assistance from the garrison in the maintenance of public order.”<sup>17</sup> The proposal was not accepted.

*Overview of the Drafting Process* shows that during the drafting process of BL 14, there were concerns expressed about the People’s Liberation Army (“PLA”) garrisoning in Hong Kong. There were also many questions raised concerning the jurisdiction over the garrison

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14 Secretariat of Consultative Committee, *Report on the Preliminary Response to the Draft Basic Law (for solicitation of opinions)*, May 1988 in *Overview of the Drafting Process*, Vol.1, p.92.

15 Ibid, footnote 13.

16 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, February 1990.

17 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.100-101.

in Hong Kong,<sup>18</sup> especially before the formulation of *The Draft Basic Law* in February 1990. A view expressed during discussion opined that “PLA’s garrisoning in Hong Kong after 1997 is stipulated in the Joint Declaration, which is an agreement reached after many rounds of discussion between China and the UK, and is not to be changed lightly.”

“Relationship between the garrison and the local community” was also a focus of discussion. Some people expressed the view that members of the garrison should not interfere with Hong Kong’s community. For example, when not performing their duties or when being outside the barracks, the PLA soldiers should neither carry weapons nor wear military uniform in urban areas when they were not performing duties. However, the garrison may participate in social services. Hong Kong’s defence forces at that time were also involved in community services, for example the Royal Navy provided maritime training for Hong Kong Sea School and provided services to charitable organizations; the Royal Air Force also helped to implement a number of social service programs, such as picking up teenagers to camp sites in the New Territories to attend government sponsored activities and offering the Hong Kong Air Scouts and Hong Kong Air Cadet Corps with flying opportunities. These services, which made full use of the expertise and equipment of different military units, were very popular with the Hong Kong people and should be continued.<sup>19</sup>

Deng Xiaoping talked about the garrison in two interviews with Hong Kong people in June and October 1984:

“... We have also stated repeatedly that apart from stationing

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18 In December 1996, the NPCSC passed the *Law of the People’s Republic of China on Garrisoning the Hong Kong Special Administrative Region*, which became one of the national laws listed in Annex III to the Basic Law and was promulgated and applied to the HKSAR on 1 July 1997.

19 *The Stationing of Military Forces in the Hong Kong Special Administrative Region*, published in *Consultative Committee, The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.2 - Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.99-100.

troops there, Beijing will not assign officials to the government of the Hong Kong Special Administrative Region. This policy too will remain unchanged. We shall station troops there to safeguard national security, not to interfere in Hong Kong's internal affairs. Our policies with regard to Hong Kong will remain unchanged for 50 years, and we mean this."<sup>20</sup>

"I said that China has the right to station troops in Hong Kong. I asked what else could demonstrate that China exercises sovereignty over the territory. The Chinese troops in Hong Kong would have another role also — to prevent disturbances. Knowing that there are Chinese troops present, people who intend to incite disturbances would have to think twice about it. And even if there are disturbances, they could be quelled immediately. ..."<sup>21</sup>

## Article 15

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

According to drafting materials in *Overview of the Drafting Process*,<sup>22</sup> the initial draft of BL 15 was: "The Chief Executive and the principal officials of the executive authorities of the Hong Kong Special Administrative Region shall be appointed by the Central People's Government." The second draft was amended by adding "in

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20 Major points of Deng Xiaoping's speech to a Hong Kong industrial and commercial sectors delegation, and well-known Hong Kong figures including Chung Shi-yuen on 22 and 23 June 1984. "One country, Two Systems", *Selected Works of Deng Xiaoping*, Vol.3, p.58.

21 Deng Xiaoping's speech when meeting with compatriots from Hong Kong and Macao who attended the National Day ceremony on 3 October 1984. "Maintaining Prosperity and Stability in Hong Kong", *Selected Works of Deng Xiaoping*, Vol.3, p.72.

22 *Overview of the Drafting Process*, Vol.1, pp.104-107. The drafting of this article progressed through ten drafts.



accordance with the provisions of Chapter IV of this Law”,<sup>23</sup> which remained unchanged thereafter and was later adopted by the NPC, now known as BL 15.

In Article 3(4) of the Joint Declaration, the Government of the PRC declares the basic policies of the PRC regarding Hong Kong as follows: “The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People’s Government.” In addition, Section I of Annex I to the Joint Declaration stipulates: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.”

At the initial stage of the drafting process of the Basic Law, there were views that the power of the Central Authorities in relation to the selection and removal of the CE should be substantive and the Central Authorities could veto a CE selected by the HKSAR. However, there were also views that the appointment of the CE by the Central Authorities can be a formality only without veto power.<sup>24</sup>

At the final stage of the drafting process of the Basic Law, there were still opinions from members of the Consultative Committee that the CPG must not interfere with the appointment of the officials of the executive authorities and government, that the CPG may not veto the

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23 Chapter IV on Political Structure of the Basic Law consists of 62 articles under six sections: Section 1 The Chief Executive; Section 2 The Executive Authorities; Section 3 The Legislature; Section 4 The Judiciary; Section 5 District Organizations; Section 6 Public Servants.

24 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.1, p.105.

CE selected by the HKSAR, and that this article should be deleted.<sup>25</sup>

## Article 16

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

Drafting materials in *Overview of the Drafting Process* show that<sup>26</sup> the theme of BL 16, namely “The Hong Kong Special Administrative Region shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of the Basic Law”, had remained unchanged throughout the drafting process. However, its contents, which listed a host of administrative affairs in the early stage of the drafting process, was amended by deleting the list from the eighth draft onwards, as a result of proposals to simplify the article to avoid it from being too cumbersome, with excessive details.<sup>27</sup> It was also considered that the 29 categories of administrative matters had been set out in other chapters and there was no need to repeat them. Views had also been expressed that the list of relevant administrative matters might not be exhaustive and some powers of the HKSAR might have been left out. Also the listing of administrative matters

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25 *Overview of the Drafting Process*, Vol.1, p.107.

26 *Overview of the Drafting Process*, Vol.1, pp.108-112. The drafting process of this article progressed through ten drafts.

27 Seventh draft: Monetary and financial systems, economy, commerce and industry, trade, taxation, postal services, civil aviation, shipping, transportation, fishery, agriculture, human resources, municipal affairs, labour, education, health care and hygiene, social welfare, cultural recreation, municipal facilities, urban planning, housing, real estate, public order, immigration control, meteorology, communication, science and technology, sports and other aspects of administrative affairs. *Overview of the Drafting Process*, Vol.1, pp.110-111.

might be seen as a means to limit the HKSAR’s executive power.<sup>28</sup>

Article 3(3) of the Joint Declaration states that the Government of the PRC declares that the basic policies of the PRC regarding Hong Kong include “the Hong Kong Special Administrative Region will be vested with executive power”. Section I of Annex I to the Joint Declaration specifies that “[t]he HKSAR shall be directly under the authority of the Central People’s Government of the People’s Republic of China and shall enjoy a high degree of autonomy. Except for foreign and defence affairs which are the responsibilities of the Central People’s Government, the Hong Kong Special Administrative Region shall be vested with executive ... power ...”.

During the drafting process of this provision, there had been proposals to delete the phrase “in accordance with the relevant provisions of this Law”, and to amend the provision to read: “The Government of the Hong Kong Special Administrative Region enjoys full executive power over the Hong Kong Special Administrative Region in accordance with this Law except for foreign and defence affairs”, in order to make the Basic Law more in conformity with the Joint Declaration.<sup>29</sup>

In the end, such proposals were not accepted.

## Article 17

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

Laws enacted by the legislature of the Hong Kong Special

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28 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.111-112.

29 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.112.

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.”

Drafting materials in *Overview of the Drafting Process* show that<sup>30</sup> the first draft of this provision finalized in November 1986 was shorter and briefer than the tenth draft adopted by the NPC in April 1990. The first draft read:

“The Hong Kong Special Administrative Region shall be vested with legislative power. The legislature of the Hong Kong Special Administrative Region shall enact laws in accordance with this Law and statutory procedures, and must report to the Standing Committee of the National People's Congress for the record.

All laws enacted by the legislature of the Hong Kong Special Administrative Region that are in conformity with this Law and statutory procedures are valid. If the Standing Committee of the National People's Congress considers that any law of the Hong Kong Special Administrative Region is not in conformity with this Law or statutory procedures, the Standing Committee may return the law in question for re-deliberation or repeal, but shall not amend it. Any law returned by the Standing Committee of the National People's Congress

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30 *Overview of the Drafting Process*, Vol.1, pp.113-135. The drafting process of this article progressed through ten drafts.

for re-deliberation or repeal shall immediately be invalidated. This invalidation shall not have retroactive effect.”<sup>31</sup>

The expression at the beginning of the article: “The Hong Kong Special Administrative Region shall be vested with legislative power” and “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” became BL 17(1) and BL 17(2) respectively since the second draft of the provision. The position, content and wording of the first two paragraphs of BL 17 remained the same till the adoption of the Basic Law.

Paragraph 3 of the article was amended both in the early and late stage of its drafting process. The first revision was made in the third draft drawn up in August 1987, when “after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region” was added after “the Standing Committee of the National People’s Congress”. Thus consulting the Committee for the Basic Law of the HKSAR<sup>32</sup> became a necessary procedure before the NPCSC may decide that any law enacted by the HKSAR legislature was not in conformity with the Basic Law or statutory procedures and then exercise the relevant power conferred by this article.<sup>33</sup>

Three amendments were made to Paragraph 3 when the eighth

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31 *Overview of the Drafting Process*, Vol.1, p.113.

32 On 4 April 1990, the Third Session of the Seventh NPC adopted a decision to establish the HKSAR Basic Law Committee of the NPCSC upon the implementation of the Basic Law.

Subordination: It is a working committee under the NPCSC.

Task: To study issues relating to the implementation of BL 17, 18, 158 and 159, and to provide opinions to the NPCSC.

Composition: Twelve members, six from the Mainland and six from Hong Kong, including members of the legal profession, appointed by the NPCSC for a term of five years. Hong Kong members shall be Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country. They shall be nominated jointly by the CE, the President of the LegCo and the Chief Justice of the CFA of the HKSAR and reported to the NPCSC for appointment.

33 *Overview of the Drafting Process*, Vol.1, p.115.

draft was formulated in February 1989:

Wording of the seventh draft

“Any law not in conformity with this Law or statutory procedures”

“May return the law in question for re-deliberation or repeal, but shall not amend it”

“Any law returned for re-deliberation or repeal shall immediately be invalidated. This invalidation shall not have retroactive effect”

The eighth draft after revision

“Any law 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”

“May return the law in question but shall not amend it”

“Any law returned shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region”

Article 3 of the Joint Declaration states that the Government of the PRC declares that the basic policies of the PRC regarding Hong Kong include “The Hong Kong Special Administrative Region will be vested with ... legislative power ...”. Section I of Annex I to the Joint Declaration specifies: “The Hong Kong Special Administrative Region shall be directly under the authority of the Central People’s Government of the People’s Republic of China and shall enjoy a high degree of autonomy. Except for foreign and defence affairs which are the responsibilities of the Central People’s Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication.” Section II of Annex I provides:

“The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special

Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.”

BL 17 is a provision under Chapter II on “Relationship between the Central Authorities and the Hong Kong Special Administrative Region” of the Basic Law. According to drafting materials in *Overview of the Drafting Process*, the main opinions of the Consultative Committee members on the relationship between the Central Authorities and the HKSAR at the early stage of the drafting of the Basic Law were as follows:

“As local government, the Hong Kong Special Administrative Region is subject to the Central Government, but the Special Administrative Region Government enjoys a high degree of autonomy. It is therefore vital to define the Central Government's relevant authority, and the scope of the high degree of autonomy ...”<sup>34</sup>

In November 1986, *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR* stated:

“The majority of members were of the view that the Standing Committee of the National People's Congress should be the final arbiter on whether a law enacted by the legislature of the Hong Kong Special Administrative Region conformed to the Basic Law and statutory procedures. However, a few members took the view that it should be determined by the Hong Kong courts.”<sup>35</sup>

The issue mentioned above i.e. if the NPCSC or the Hong Kong courts should be the final arbiter on whether the laws enacted by the

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34 Consultative Committee, *Summary of the Discussion on the Structure of the Basic Law of the First Group of the Consultative Committee*, February 1986 in *Overview of the Drafting Process*, Vol.1, p.114.

35 Published in *Collection of Documents of the Third Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.115.

legislature of the HKSAR conform to the Basic Law and statutory procedures, was discussed throughout the drafting process of BL 17. Those in favor of the provision were of the view that although the HKSAR had legislative power, its laws were still part of China's laws. The HKSAR should report its enacted laws to the NPC for the record as the NPC was the highest organ of state power of China. The principle of sovereignty was reflected in the requirement that the NPCSC exercised the power of review to judge whether the laws enacted by the legislature of the HKSAR conformed to the Basic Law and statutory procedures. Those who did not accept the provision argued that it deprived the HKSAR of its power of final adjudication, infringed the legislative power of the HKSAR and did not conform to the principle of "a high degree of autonomy".<sup>36</sup>

On 28 March 1990, Ji Pengfei, Chairman of the Drafting Committee, stated at the NPC session:

"Regarding the legislative power, the draft stipulates that laws enacted by the Hong Kong Special Administrative Region legislature shall take effect upon the signature and promulgation by the Chief Executive. The laws shall be reported to the Standing Committee of the National People's Congress for the record, but they will go into force without being affected by this reporting. The draft also stipulates that only when it considers that any law enacted by the Special Administrative Region legislature is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, shall the National People's Congress Standing Committee return the law in question; the Standing Committee shall not amend it. Any law returned by the National People's Congress Standing Committee shall immediately be invalidated. These stipulations not only conform with the 'one

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36 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.127.



country, two systems' principle and are in line with provisions of the Constitution, but also take into full consideration the need for Hong Kong to enjoy a high degree of autonomy."<sup>37</sup>

## Article 18

“The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

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

BL 18 is the article immediately after the preceding one on the legislative power of the HKSAR. Chapter II of the Basic Law

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<sup>37</sup> *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 National People's Congress, 28 March 1990).

stipulates the relationship between the Central Authorities and the HKSAR, one issue of which must be addressed is the applicability and effectiveness of national laws in the HKSAR.

According to drafting materials in *Overview of the Drafting Process*,<sup>38</sup> the first draft of the provision formulated in April 1987 contained two proposals, which set out the requirements and procedures for the implementation of laws enacted by the NPC and its Standing Committee in the HKSAR.<sup>39</sup> The discussions before the first draft indicated that there were views that the future laws of the HKSAR should in principle be the Basic Law, the laws enacted by the Hong Kong legislature and the laws previously in force in Hong Kong. The legal effect of Chinese laws in Hong Kong, other than the Constitution, is a matter to be carefully handled.<sup>40</sup>

The current BL 18(1) was first formulated in the second draft of the provision. Nothing much was changed during the drafting process.

The scope of national laws to be applied in the HKSAR was limited to, in the second to sixth drafts, “laws relating to national defence and foreign affairs; and other laws which reflect national unity and territorial integrity which do not fall within the scope of the high degree of autonomy of the Hong Kong Special Administrative Region in accordance with the provisions of this Law.” Before the second draft was formulated, *Final Report on Jurisdiction and the Application of National Laws in Hong Kong* prepared by the Special Group on the Relationship between the Central Authorities and the HKSAR<sup>41</sup> showed an opinion that according to the Joint Declaration, the laws to be applied in Hong Kong in the future shall be the Basic

38 *Overview of the Drafting Process*, Vol.1, pp.136-150. The drafting process of this article progressed through nine drafts.

39 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.137.

40 *Ibid.*

41 Passed by the Executive Committee on 12 June 1987 in *Overview of the Drafting Process*, Vol.1, p.138.

Law, the laws previously in force in Hong Kong and the laws enacted by the legislature of the HKSAR, and that national laws shall not be applied in Hong Kong, otherwise it would violate the spirit of the Joint Declaration. Some members of the Consultative Committee were of the view that if the NPC considered that laws relating to national defence and foreign affairs, as well as the Nationality Law and the Law on the Election of Deputies to the People's Congress were to apply to Hong Kong, this should be expressly stated in the Basic Law.

The concept of listing the national laws to be applied in Hong Kong in "Annex III" was introduced in the seventh draft of the provision. It also provided that addition to or deletion from the list of laws in Annex III might be made, provided that any law listed was limited to those relating to defence, foreign affairs and other matters which according to the Basic Law were outside the scope of the autonomy of the HKSAR. Before the finalization of the seventh draft, a report indicated the focus of the discussion on the application of national laws in Hong Kong:

"(1) ... on the issue of applying national laws in Hong Kong, some people censured it saying that it was not stipulated in the Sino-British Joint Declaration and might give rise to a concern of violating the Sino-British Joint Declaration. Some people worried that the implementation of national laws in Hong Kong might have adverse effects due to the differences of the systems. However, in addition to the Basic Law, the laws previously in force that are consistent with the Basic Law, and the laws enacted by the legislature of the Hong Kong Special Administrative Region, there are some national laws which are obviously applicable to Hong Kong, not only those concerning national defence and foreign affairs, but also those concerning state affairs, such as territorial sea regulations, laws concerning the establishment of the capital etc.

(2) There is another way of looking at this issue. In future, the legislative power of the Special Administration Region is not only subject to the Basic Law, there is another restriction in that, it cannot engage affairs outside the Special Administrative Region (i.e.

national affairs), although these affairs may have direct impact on the residents of the Region and the scope of these affairs may not just concern issues of national defence and foreign affairs alone. Only state institutions can have legislative power over these affairs. There is therefore a need to introduce some national laws to Hong Kong.

(3) So the focus of the discussion is on the procedures necessary to apply these laws.”<sup>42</sup>

There were also views from some Consultative Committee members that some national laws should be applied in the HKSAR in order to reflect national sovereignty and territorial integrity. The Joint Declaration stipulated that in future Hong Kong’s defence and foreign affairs were the responsibilities of the CPG. Therefore, some national laws relating to national defence and foreign affairs would need to apply to Hong Kong and the Central Authorities would administer these affairs through implementation of laws. Moreover, problems concerning issues such as nationality, airspace and territorial sea could not be handled by the Special Administrative Region alone, and the assistance of the CPG would be necessary. However, there remained views that this article violated the Joint Declaration and the principle of “a high degree of autonomy”.<sup>43</sup>

Regarding the procedures for applying national laws in the HKSAR, the second to sixth drafts stipulated that all national laws that had to be applied in the HKSAR were to be promulgated or implemented locally by legislation under the State Council’s directive. However, except in cases of emergency, the State Council would consult the HKSAR Basic Law Committee and the HKSARG before issuing a directive. If the HKSARG failed to comply with a

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42 Consultative Committee, *Preliminary Report - Focuses of Discussion* (29 April – 17 June), passed by the Executive Committee on 16 July 1988 in *Overview of the Drafting Process*, Vol.1, p.141.

43 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.143.

directive of the State Council, the State Council might issue a decree to apply the law in the HKSAR. The seventh and subsequent drafts provided that the laws listed in Annex III were to be applied locally by promulgation or legislation of the HKSAR. As for any addition to or deletion from the laws listed in Annex III, it was stipulated that the NPCSC was to consult its HKSAR Basic Law Committee and the HKSARG before making such addition or deletion.

BL 18(4) which provides that the CPG may issue an order applying the relevant national laws in the Region in a state of emergency did not exist until the seventh draft of the provision. *Overview of the Drafting Process* shows that after finalizing the seventh draft, members of the Special Group on the Relationship between the Central Authorities and the HKSAR were very concerned as to who should decide that the HKSAR was in a state of emergency by reason of turmoil beyond its control. Most of the members were of the view that since the HKSAR enjoyed a high degree of autonomy and executive power, the HKSAR was solely responsible for making the decision so long as its government was still functioning, this being an administrative matter of the HKSAR. If the turmoil was so serious that the HKSAR had descended into anarchy (some members suggested that there was a clear definition of anarchy in international law), it would be up to the Central Government to make a decision. Some members also suggested that this paragraph be divided into two paragraphs, while it was the job of the Central Government to declare a state of war as a result of the NPCSC's decision, the HKSAR should be left, as far as possible, to be responsible for deciding that the Region was in a state of emergency by reason of turmoil beyond its control. These should be spelled out separately, in order to avoid confusion.<sup>44</sup>

However, some relevant parties in the Mainland pointed out that:

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<sup>44</sup> *Minutes of the Third Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR*, 22 August 1989 in *Overview of the Drafting Process*, Vol.1, p.149.

“According to the Constitution, only the Central Authorities have the power to declare a state of emergency. The requirement in Paragraph 4 is appropriate. The functions of the Chief Executive and the governor are not the same. The governor may declare a state of emergency in Hong Kong, but the Chief Executive may not. What’s more, in the event of turmoil in the Special Administrative Region that endangers national security and territorial integrity beyond the control of the local government, the situation may get out of hand if the Central Authorities do not have the power to take decisive measures. (Relevant departments of the state, legal scholars, people from democratic parties)”<sup>45</sup>

### Article 19<sup>46</sup>

“The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts.

45 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 30 November 1989 in *Overview of the Drafting Process*, Vol.1, p.150.

46 See *Interpretation of the Standing Committee of the National People’s Congress Regarding the First Paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (adopted at the Twenty Second Session of the Standing Committee of the Eleventh National People’s Congress on 26 August 2011) included in this book.

Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.”

BL 19 contains three paragraphs. According to drafting materials in *Overview of the Drafting Process*,<sup>47</sup> Paragraph 1 of that article: “The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication” had never been amended from beginning to end. Its content and wording are in accordance with Article 3(3) of the Joint Declaration which states the basic policies of the PRC regarding Hong Kong and the relevant part of Section I of Annex I to the Joint Declaration.<sup>48</sup> The draft provision consisted of one sentence only, i.e. the current Paragraph 1, from its first draft to fourth draft during the drafting process. That scenario remained unchanged until the fifth draft.

Annex I to the Joint Declaration also contains a number of elaborations on policies regarding the judicial power and the power of final adjudication of the HKSAR, including the relevant parts of Section III: “After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication”; “Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. The courts shall exercise judicial power independently and free from any interference”; “The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit

47 *Overview of the Drafting Process*, Vol.1, pp.151-161. This article progressed through ten drafts.

48 Article 3(3) of the Joint Declaration reads: “The Hong Kong Special Administrative Region will be vested with ... independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged”; Section I of Annex I: “... the Hong Kong Special Administrative Region shall be vested with ... independent judicial power, including that of final adjudication. ...”

on the court of final appeal”.

During the drafting process, there were constant disputes over the courts of the HKSAR, including the jurisdiction of the court of final appeal, cases involving the interpretation of Basic Law provisions, and the relationship between the Central Authorities and the HKSAR. Such issues were examined in a discussion document, *Jurisdiction of Hong Kong Courts and Issues Concerning Major National Interests*, at an early stage of the drafting process as follows:

- Will the courts of the HKSAR have the power to hear cases that need to interpret the Basic Law and are related to major national interests at the same time?
- What is the definition of major national interests?
- If the courts of the HKSAR do not have the power to hear cases related to major national interests (apart from matters concerning national defence and foreign affairs), or if they do not have the power to interpret the provisions of the Basic Law related to major national interests in the course of a hearing, will there be any implications on the HKSAR courts’ independent judicial power, power of final adjudication, the judicial system (apart from changes arising from the power of final adjudication) and the laws previously in force in Hong Kong (apart from those which are in contravention of the Basic Law, or are amended by the legislature of the HKSAR)?
- In the event that the courts of the HKSAR may invite judges from other common law jurisdictions to sit on the court as required, would that be a reasonable cause to disallow the courts of the HKSAR from hearing cases concerning major national interests (apart from matters concerning national defence and foreign affairs), or from interpreting the provisions of the Basic Law concerning major national interests in the course of the hearing?
- Apart from the above reason, is there any other reason to support the proposition that the courts of the HKSAR may



not hear cases related to major national interests (apart from matters concerning national defence and foreign affairs), or that they should have no power to interpret the provisions of the Basic Law related to major national interests in the course of a hearing?

- Are there sufficient provisions in the Joint Declaration to protect major national interests?
- Are there sufficient provisions in the draft Basic Law which explain what matters are suitable for raising the issue of major national interests?
- Is the proposal that the HKSAR courts have no jurisdiction over cases related to major national interests beneficial to the country?<sup>49</sup>

At that time, members of the Consultative Committee had many different views over the jurisdiction of the HKSAR:

“(1) The Sino-British Joint Declaration stipulates that the defence and foreign affairs of the Hong Kong Special Administrative Region will in future be the responsibilities of the Central People’s Government. Therefore, the courts and the court of final appeal of the Hong Kong Special Administrative Region have no jurisdiction over any case involving defence and foreign affairs.

(2) The courts and the court of final appeal of the Hong Kong Special Administrative Region shall have the power to adjudicate all cases other than defence and foreign affairs and to interpret the Basic Law provisions relating to such cases.

(3) Since the Sino-British Joint Declaration stipulates that the Hong Kong Special Administrative Region has independent judicial power and the power of final adjudication, the courts and the court of final appeal in Hong Kong have the power to adjudicate all cases,

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<sup>49</sup> *Discussion Document of the Third Joint Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR and the Special Group on Law*, 8 May 1987 in *Overview of the Drafting Process*, Vol.1, p.152.

including those involving foreign affairs and defence.

(4) A Basic Law Court should be set up in Hong Kong to interpret issues relating to foreign affairs, defence and the Basic Law. The Court shall be responsible for deciding whether a case may be heard by the courts and the court of final appeal in Hong Kong. Half of the members of the Court shall be judges from Hong Kong and half may be judges from the Mainland.”<sup>50</sup>

When the fifth draft of BL 19 was finalized in March 1988,<sup>51</sup> three paragraphs were added in addition to the original Paragraph 1:

“The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases concerning defence and foreign affairs which are the responsibilities of the Central People’s Government, and administrative acts of the Central People’s Government. The courts of the Region shall consult the Chief Executive on cases concerning defence, foreign affairs and administrative acts of the Central People’s Government whenever such questions arise in the adjudication of cases. The certificate from the Chief Executive in respect of such questions shall be binding on the courts.

Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Standing Committee of the National People’s Congress or the State Council.”

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50 Special Group on the Relationship between the Central Authorities and the HKSAR, *Final Report on Jurisdiction and the Application of National Laws in Hong Kong* (passed by the Executive Committee on 12 June 1987) in *Overview of the Drafting Process*, Vol.1, p.153.

51 Secretariat of the Drafting Committee, *Manuscript of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (revised version of the Contents, Preamble, Chapters 1, 2, 3, 5, 6, 7 and 9 of the General Working Group at its Second Meeting), March 1988 in *Overview of the Drafting Process*, Vol.1, p.153.

After *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* was published by the Drafting Committee in April 1988, there was another round of discussion until the eighth draft of BL 19 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* was formulated in February 1989. One focal point of discussion then was:

“Article 18 of the *Draft Basic Law (for solicitation of opinions)* provides that the courts of the Hong Kong Special Administrative Region have no jurisdiction over cases concerning defence and foreign affairs which are the responsibilities of the Central Government, and administrative acts of the Central People's Government. In view of this provision, will the jurisdiction of the courts of Hong Kong change after 1997? At present, the courts of Hong Kong may adjudicate on the administrative acts of the British Government. However, under the current system, the final adjudication of all cases is in the United Kingdom, not in Hong Kong, so a situation whereby the constitutional order of a region and the interests of the sovereign state are inconsistent would not arise. However, after 1997, Hong Kong will have a court of final appeal, Hong Kong's judicial system will be separate from that of its sovereign country. That is the crux of the issue. Hong Kong courts are local courts within a country and enjoy the power of final adjudication. Whether or not it is appropriate for Hong Kong courts to examine the administrative acts of the Central Government is a major issue in the judicial system of the Hong Kong Special Administrative Region under ‘one country, two systems’.”<sup>52</sup>

During the discussion, many of the comments on Paragraph 3 of the fifth draft considered that the phrase “administrative acts of the Central People's Government” was too vague and broad, would be abused or misunderstood, and would undermine the judicial independence of the HKSAR. Some people proposed its deletion; some people proposed that what were “administrative acts of the

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52 *Preliminary Report – Focuses of Discussion (29 April – 17 June)*, passed by the Executive Committee on 16 July 1988 in *Overview of the Drafting Process*, Vol.1, p.154.

Central People's Government" be specified and set out in an annex; some people proposed to change it to "acts of state". Others pointed out that Hong Kong courts had no right to try and had never tried cases concerning UK's defence, foreign affairs and acts of the cabinet, and that the stipulation in the Basic Law was merely out of precaution. Another view was that according to the judicial system in Hong Kong at that time, the courts would not engage in defence, foreign affairs and the administrative acts of the CPG of a purely political nature. Therefore, since the provision that "the restrictions on the jurisdiction of the courts imposed by the legal principles previously in force in Hong Kong shall be maintained" already embraced the meaning that "the Hong Kong Special Administrative Region has no jurisdiction over cases concerning defence and foreign affairs which are the responsibilities of the Central People's Government, and administrative acts of the Central People's Government", there was no need for repetition.<sup>53</sup>

After consultation and discussion, Paragraphs 3 and 4 of the eighth draft of the article in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* dated February 1989 were amended as follows:

"The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases concerning acts of state. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning the state whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts.

Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government."

On 15 February 1989, at the sixth session of the Standing Committee of the Seventh NPC, Ji Pengfei, Chairman of the Drafting Committee, spoke about BL 19 in *Report on the Submission of The Draft Basic Law of the Hong Kong Special Administrative Region of*

53 *Overview of the Drafting Process*, Vol.1, pp.155-158.

*the People's Republic of China and Related Documents to the Standing Committee of the National People's Congress for Examination* as follows: "... Last month, the Drafting Committee voted by secret ballot on the individual articles and documents of the draft Hong Kong Basic Law and its related documents article by article and one by one. Except for Article 19, all other provisions, annexes, and related documents were adopted by a two-thirds majority. ... In relation to the jurisdiction of the courts of the Hong Kong Special Administrative Region, Article 19 of the Basic Law (Draft) stipulates that the Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The Drafting Committee has no objection to the provision that the courts of the Hong Kong Special Administrative Region will retain their original jurisdiction after 1997. However, there are different opinions on the formulation of this provision. This provision was therefore not approved by a two-thirds majority of the Committee and is subject to further study and modification ... The draft Basic Law still has a few issues that remain to be resolved, such as the provision of Article 19 on the jurisdiction of the courts of the Hong Kong Special Administrative Region ..."

The views expressed by the Consultative Committee members on BL 19 are recorded in *Minutes of the Fourth Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR* of 20 September 1989<sup>54</sup> as follows:

"1. It is suggested that Paragraphs 3 and 4 be deleted for the following reasons:

(1) Paragraph 2: 'The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the

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<sup>54</sup> *Overview of the Drafting Process*, Vol.1, p.159.

legal system and principles previously in force in Hong Kong shall be maintained.’ The scope of jurisdiction of the courts of the Hong Kong Special Administrative Region has been adequately defined.

Under Hong Kong’s previous legal system and principles, the courts have never heard cases related to defence, foreign affairs, or the political acts of the central or local government. However, if such acts infringe upon the personal liberty or property of a citizen, the court may deal with and adjudicate on the relevant ‘writ of habeas corpus’, or a citizen’s claim for compensation for property damage, etc. If it is said that the courts should not have jurisdiction over even the aforementioned cases, it would contravene the current legal system and principles and contradiction would arise.

(2) Paragraph 3 refers to the concept of ‘acts of state’, which is a common law concept. However, the Basic Law will become a part of the laws of the People’s Republic of China, and the concept of ‘acts of state’ does not exist in Chinese law. A problem will arise in future as to which law to apply in the understanding of ‘acts of state’ when such concept is involved in hearings before the courts.

(3) In addition, the first sentence of Paragraph 3: ‘The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases concerning acts of state.’ is ambiguous. It fails to state clearly whether the courts of the Special Administrative Region have no jurisdiction over the entire case involving acts of state, or only the part of the case involving acts of state.

2. It is suggested that if members of the Drafting Committee do not agree to delete Paragraphs 3 and 4 of the provision, the following compromise may be considered:

(1) Delete the first sentence of Paragraph 3 to avoid having an ambiguous phrase ‘acts of state’ in the Basic Law.

(2) Replace the first sentence of Paragraph 3 with ‘The courts of the Hong Kong Special Administrative Region have no jurisdiction over cases concerning acts of state ‘at common law’’, so as to make it clear that this article refers to ‘acts of state’ at the common law to avoid confusion.

(3) Delete ‘cases concerning’ from the first sentence of Paragraph 3 so that the sentence reads ‘The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state’, so as to state clearly that the Hong Kong Special Administrative Region courts have no jurisdiction over only the part of the case that concerns ‘acts of state’ but not the entire case.”

Among the comments on *The Draft Basic Law* received by the Secretariat of the Drafting Committee from different sectors of the Mainland in November 1989, those that concerned BL 19 were as follows:

“1. The current provisions are fine in principle, but it is difficult to understand what ‘state act’ is and what ‘state fact’ is. It is necessary to define them clearly. (Members of the legal profession)

2. Paragraphs 3 and 4 can be deleted except for ‘The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases concerning acts of state.’ (Members of the legal profession)

3. The power of final adjudication of the courts of the Hong Kong Special Administrative Region should not preclude the highest judicial supervision of the Supreme People’s Court. Otherwise, if the courts of Hong Kong were to make a wrong judgment in a case involving the interests of the entire country, there would be no remedy. It is suggested that there should be clear provision stipulating that the power of final adjudication does not exclude the power of highest judicial supervision. (Relevant state departments and members of the legal profession)

4. Paragraph 2 stipulates that ‘all cases of the Region’. Does it refer to cases occurring in the Hong Kong Special Administrative Region, or cases related to residents, organs, organizations and legal persons of the Hong Kong Special Administrative Region? This should be clarified. (Guangxi)”<sup>55</sup>

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55 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 30 November 1989 in *Overview of the Drafting Process*, Vol.1, p.159

As for the replacement of “administrative acts of the Central People’s Government” with “acts of state”, there were suggestions that it should be rewritten to make it clear that “acts of state” refers to the common law principle in Hong Kong law at that time, otherwise it might be confused to mean all administrative acts. Under the common law, the narrow concept of acts of state refers to matters outside the court’s jurisdiction, such as invading foreign territory or blockading a foreign port.<sup>56</sup>

The ninth draft of the provision, finalized in February 1990,<sup>57</sup> was the version that was finally adopted.<sup>58</sup> Paragraphs 1 and 2 remained unchanged, and Paragraphs 3 and 4 were combined into one:

“The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.”

On 28 March 1990, Ji Pengfei, Chairman of the Drafting Committee stated at the NPC:

“The draft vests the courts of the Special Administrative Region with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practise social and legal systems different from the mainland’s, this provision is necessary. Under the current judicial system and principles, the

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56 *Draft Basic Law: Recommendations of the Members of the Consultative Committee from the Industrial, Commercial and Professional Sectors*, 26 October 1989 in *Overview of the Drafting Process*, Vol.1, p.159.

57 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 16 February 1990 in *Overview of the Drafting Process*, Vol.1, p.159.

58 The wording and content of this provision are consistent with Section 4 “Jurisdiction of the Court” of the Hong Kong Court of Final Appeal Ordinance.



Hong Kong authorities have never exercised jurisdiction over acts of state such as defence and foreign affairs. While preserving the above principle, the draft stipulates that the courts of the Hong Kong Special Administrative region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs wherever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. However, before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government. This stipulation not only appropriately solves the question of jurisdiction over acts of state, but also guarantees that the courts of the Region can conduct their functions in a normal way.”<sup>59</sup>

## Article 20

“The Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress<sup>60</sup> or the Central People's Government.”

According to drafting materials in *Overview of the Drafting Process*, the drafting of this article had progressed through ten drafts.<sup>61</sup> The first draft was formulated by the Subgroup on the Relationship between the Central Authorities and the HKSAR on 11 November 1986, which stated: “The Hong Kong Special Administrative Region may enjoy other functions and powers granted by the National People's Congress or the State Council.”<sup>62</sup> In the second draft of this

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59 *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 National People's Congress, 28 March 1990).

60 According to Article 57 of the Constitution, the NPCSC is the permanent organ of the NPC.

61 *Overview of the Drafting Process*, Vol.1, pp.162-170.

62 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 11 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.162.

article, an amendment was made to replace the expression “functions and powers” with “powers”. “Standing Committee of the National People’s Congress” was added to the third draft.<sup>63</sup> When the eighth draft was finalized, “the State Council” was deleted and “the Central People’s Government” was added.<sup>64</sup> Before the drafting of provisions process began, Chapter II of *Structure of the Basic Law (Draft)* on “Relationship between the Central Authorities and the Hong Kong Special Administrative Region” specified: “(7) Other functions and powers granted to the Hong Kong Special Administrative Region by the National People’s Congress and the State Council”.<sup>65</sup> The principle and spirit of this article: “other powers shall be granted to Hong Kong by the Central Government”, remained unchanged throughout the drafting of the Basic Law.

*Overview of the Drafting Process* shows that at the early stage of the drafting process of this article, the Special Group on the Relationship between the Central Authorities and the HKSAR of the Consultative Committee had considerable discussions on the concepts of “residual power” and “undefined power”. A working group on residual power was set up at that time and *Final Report on Residual Powers* was prepared.<sup>66</sup> The consensus pointed out in the report included: the division of powers between the Central Authorities and the HKSAR should be clearly spelt out; the relationship between Hong Kong and China should be institutionalized; whatever the relationship between the two was, it should be written down in legal language so

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63 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.169.

64 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, February 1989 in *Overview of the Drafting Process*, Vol.1, pp.169-170.

65 Adopted at the Second Plenary Session of the Drafting Committee on 22 April 1986. See Appendix IV for the full text.

66 One of the documents reviewed at the Ninth Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR, 22 January 1987 in *Overview of the Drafting Process*, Vol.1, pp.169-170.

that both sides could earnestly observe the spirit of “one country, two systems”.

A view was then expressed that the second sentence of Article 3(2) of the Joint Declaration “The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People’s Government”,<sup>67</sup> and Section I of Annex I “... Except for foreign and defence affairs which are the responsibilities of the Central People’s Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication ...” were the basis for the division of powers between the Central Authorities and the HKSAR. Thus any power in relation to sovereignty and matters relating to the overall interests of the country, such as foreign affairs and defence, should belong to the Central Government; powers relating to the internal and external affairs of the HKSAR should belong to the HKSARG; apart from that all other powers, including “residual power” and “undefined power”, should all belong to the HKSARG, so as to reflect the high degree of autonomy enjoyable by the HKSARG. The view was also expressed that the autonomous government should have full authority to determine policies over matters under its autonomy, and the Central Authorities had no power to issue executive orders or directives or legislate on such matters. It would be difficult to guarantee autonomy if the HKSARG were only to enjoy a high degree of autonomy in the exercise of its administrative and management functions.<sup>68</sup>

However, some people with different views considered that since the Joint Declaration clearly stated: “The Hong Kong Special Administrative Region will be directly under the authority of the

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67 The first sentence of Article 3(2) of the Joint Declaration reads: “The Hong Kong Special Administrative Region will be directly under the authority of the Central People’s Government of the People’s Republic of China”.

68 See *Discussion Paper on Residual Powers* (Discussion Paper II of the Third Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR, 6 June 1986), by Zhang Baizhi, 27 May 1986 in *Overview of the Drafting Process*, Vol.1, pp.163-164.

Central People's Government of the People's Republic of China", all the powers of the HKSARG, including the high degree of autonomy it would enjoy, and the powers within the "grey area" that ought to fall into the scope of the HKSARG's powers, would be granted by the NPC and the Central Government. There were also commentaries which pointed out that Article 7 of Chapter II of *Structure of the Basic Law (Draft)*, "Other functions and powers granted to the Hong Kong Special Administrative Region by the National People's Congress and the State Council", was the same as saying that the HKSARG could in future enjoy other powers within the "grey area" which were not explicitly stipulated in the Basic Law, but those powers were not intrinsic and would need to be granted by the Central Government. It was also pointed out that there was no real division of powers between the Central Government and the autonomous government and there was only a division of administrative functions. The autonomous government was responsible for the administration of autonomous affairs, but it was not the sole authority to decide on such matters. The Central Government retained the power to issue instructions to the autonomous government on the autonomous affairs set out in the autonomous law (such as the Basic Law).<sup>69</sup>

*Overview of the Drafting Process* also shows that in the course of analyzing the existence of "residual power" between the Central Authorities and the HKSAR, there were also some fundamentally different views:

"This contention maintains that the delineation of 'residual power' only appears in federal states. In these countries, each state starts off as an individual sovereign state. When these states unite to form a federation, each state would hand over a part of its powers to the federal government for it to exercise such powers through the process of constitutionalism. However, the constitution would clearly stipulate that all the remaining powers of each individual state, except those that were handed over, would be separately reserved, and this

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69 Ibid.

part of the remaining powers is called ‘residual power’. It belongs to the original power owner, that is, the government of the individual state. Therefore, the concept of ‘residual power’ is premised on the fact that all the states in a federal state are sovereign entities, and all the powers owned by the federal government are granted by the states.

However, the relationship between the Central Government of China and Hong Kong is not that of a federal state. China is a unitary country. There is only one highest centre of power in the entire country, namely the Central Government. Although Hong Kong will be a highly autonomous Special Administrative Region after 1997, it does not have independent sovereignty before or after its establishment. The sovereignty of the Special Administrative Region belongs to China. It is also stated in the Joint Declaration (Chapter I) that the sovereignty over Hong Kong is not to be first returned to Hong Kong by the United Kingdom, followed by Hong Kong handing over certain selected parts to China. It is clearly stated in the Joint Declaration that the high degree of autonomy which the Special Administrative Region is to enjoy in the future is given by the Central Government. Therefore, the power of the Central Government over Hong Kong is absolute and all-embracing. Some powers are entrusted to the Special Administrative Region Government through the Basic Law, the powers not entrusted to the Special Administrative Region Government naturally remain with the Central Government.

According to this analysis, the issue of ‘residual power’ does not exist between China and Hong Kong. Since the Special Administrative Region Government itself does not have any sovereignty at all, it has no right to make any request for ‘residual power’ from the Central Government.

Similarly, it would be legally wrong to specify in the Basic Law that Hong Kong has ‘residual power’, because the Basic Law is a law through which the Central Authorities grant powers to the local authorities, not a law through which the local authorities grant powers

to the Central Authorities.”<sup>70</sup>

At the later stage of the drafting process of this article, there were still opposing views saying that the article violated the Joint Declaration and the existing formulation violated the principle of “residual power”. There were also suggestions to delete this article or amend it to read “the Hong Kong Special Administrative Region shall enjoy ‘residual power’”, “the Hong Kong Special Administrative Region Government shall have other powers not mentioned in the Basic Law”, etc. None of these proposals were accepted.<sup>71</sup>

## Article 21

“Chinese citizens who are residents of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs according to law.

In accordance with the assigned number of seats and the selection method specified by the National People’s Congress, the Chinese citizens among the residents of the Hong Kong Special Administrative Region shall locally elect deputies of the Region to the National People’s Congress to participate in the work of the highest organ of state power.”

BL 21 of Chapter II of the Basic Law – “Relationship between

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70 Working Group on Residual Powers of the Special Group on the Relationship between the Central Authorities and the HKSAR, *Discussion Paper on Residual Powers (Draft)* (Annex I of the First Working Meeting of the Working Group on Residual Powers, 1 December 1986), 26 November 1986 in *Overview of the Drafting Process*, Vol.1, pp.167-168.

71 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.170.

Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 30 November 1989 in *Overview of the Drafting Process*, Vol.1, p.170.

the Central Authorities and the Hong Kong Special Administrative Region” addresses the participation of residents of the HKSAR in the management of state affairs, especially those relating to the NPC.

According to drafting materials in *Overview of the Drafting Process*,<sup>72</sup> before finalizing the first draft of the article, *Preliminary Report of the Special Group on the Relationship between the Central Authorities and the HKSAR* pointed out: “It is not suitable for Hong Kong to have local people’s congress, because deputies to local people’s congress may result in dual power. However, Hong Kong should have deputies to the National People’s Congress to participate in national affairs.”<sup>73</sup> Later on, the Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR of the Drafting Committee also stated that:

“In our country, it is an important political right for citizens to participate in the management of state affairs. Chinese citizens of the Hong Kong Special Administrative Region, like citizens of other provinces, autonomous regions and municipalities directly under the Central Government, enjoy this right. Since it is based on citizenship, people who enjoy the right to participate in the administration of the state in the Hong Kong Special Administrative Region shall be limited to Chinese citizens. Currently Hong Kong deputies to the National People’s Congress are elected by the Guangdong Provincial People’s Congress. This is a stop-gap measure at the moment when China has not resumed exercise of sovereignty over Hong Kong. After 1997, deputies to the National People’s Congress from the Hong Kong Special Administrative Region should be elected in Hong Kong by the Chinese citizens of Hong Kong. The specific election methods shall be prescribed by the Standing Committee of the National People’s

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72 *Overview of the Drafting Process*, Vol.1, pp.171-177. The drafting process of this article progressed through ten drafts.

73 Discussion Documents of the Second Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR, 2 May 1986 in *Overview of the Drafting Process*, Vol.1, p.171.

Congress.”<sup>74</sup>

The first draft of the article was divided into two paragraphs. Paragraph 1: “Chinese citizens of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs according to law.” Paragraph 2: “In accordance with the assigned number of seats and the selection method specified by the Standing Committee of the National People’s Congress, the Hong Kong Special Administrative Region shall locally elect deputies of the Region to the National People’s Congress.” The structure of this article remained unchanged throughout the drafting process.

Which group of residents of the HKSAR are eligible to participate in the management of state affairs was a key issue throughout the drafting process of BL 21. At the beginning of the drafting progress, some Drafting Committee members suggested that the first and second paragraphs of the article be changed to “Chinese citizens with permanent resident status in the Hong Kong Special Administrative Region may participate in the administration of state affairs in accordance with law ... Chinese citizens with permanent resident status in the Hong Kong Special Administrative Region shall elect Chinese citizens with the same status as deputies to the National People’s Congress of the Region.” However, some members took the view that this law should not deprive any Chinese citizen of his or her basic civil rights.<sup>75</sup> The first paragraph of the third draft stipulated that “Chinese citizens who are residents of the Hong Kong Special Administrative Region” could participate in the management of state affairs in accordance with law. The second sentence of the second paragraph provided that “the Chinese citizens among the residents of Hong Kong

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74 11 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.172.

75 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.173.



shall locally elect deputies of the Region to the National People's Congress." Although there were still different views on this issue during the drafting process, the provisions remained unchanged except for the amendment of "among the residents of Hong Kong" to "among the residents of the Hong Kong Special Administrative Region" in the ninth draft.

When the fifth draft of the article was finalized, a phrase was added to the end of the second paragraph: "to participate in the work of the highest organ of state power". The first sentence of the second paragraph, "in accordance with the assigned number of seats and the selection method specified by the Standing Committee of the National People's Congress" was amended in the eighth draft to read "in accordance with ... by the National People's Congress".

## **Article 22**

"No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.

If there is a need for departments of the Central Government, or for provinces, autonomous regions, or municipalities directly under the Central Government to set up offices in the Hong Kong Special Administrative Region, they must obtain the consent of the government of the Region and the approval of the Central People's Government.

All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.

For entry into the Hong Kong Special Administrative Region,

people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.<sup>76</sup>

The Hong Kong Special Administrative Region may establish an office in Beijing.”

According to drafting materials in *Overview of the Drafting Process*,<sup>77</sup> this article which concerns the relationship between the Central Authorities and the HKSARG had progressed through ten drafts. The contents from the first to second draft were basically the same, except that in the second draft, “and other personnel” was added to the second paragraph, indicating that all “offices” and “personnel” should abide by the laws of Hong Kong. Starting from the third draft, “No department ... may interfere in the local affairs of the Hong Kong Special Administrative Region” in the first paragraph was replaced with “No department ... may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”.<sup>78</sup> From the fourth draft onwards, the original four paragraphs were revised to become five. In the new Paragraph 3, “All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices” was added to replace “the above-mentioned offices and their personnel” in the third draft. From the eighth draft onwards, “should abide by the laws of the Hong Kong Special Administrative Region” in Paragraph 3 was changed to “shall abide by the laws of the Hong Kong Special

<sup>76</sup> See *Interpretation of the National People's Congress Standing Committee Regarding Paragraph 4 of Article 22 and Paragraph 2(3) of Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, (Adopted at the Tenth session of the Standing Committee of the Ninth National People's Congress on 26 June 1999) included in this book.

<sup>77</sup> *Overview of the Drafting Process*, Vol.1, pp.178-190.

<sup>78</sup> *Overview of the Drafting Process*, Vol.1, p.184.

Administrative Region”.<sup>79</sup> In addition, from the ninth draft onwards, the following sentence was added to the end of Paragraph 4: “Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region.”<sup>80</sup> This version was later adopted as BL 22.

Section I of Annex I to the Joint Declaration states: “The Hong Kong Special Administrative Region shall be directly under the authority of the Central People’s Government of the People’s Republic of China and shall enjoy a high degree of autonomy.” Section XIV of Annex I to the Joint Declaration also states: “Entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice.”

*Overview of the Drafting Process* indicates that the purpose of this provision was to help define the scope of powers and relationship between the Central Authorities and the HKSARG, and to provide concrete provisions for the high degree of autonomy set out in the Joint Declaration.<sup>81</sup> In this regard, Paragraph 1 made explicit provisions to prevent departments of the Central Authorities from interfering in Hong Kong’s internal affairs, so as to safeguard the high degree of autonomy of the HKSAR. And the provisions of Paragraphs 2 and 3 aimed at preventing departments of the Central Authorities from indiscriminately setting up offices in Hong Kong, and those personnel sent to Hong Kong from not abiding by the laws of the HKSAR.<sup>82</sup>

This article attracted many different opinions during the drafting

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79 *Overview of the Drafting Process*, Vol.1, pp.185-186.

80 *Overview of the Drafting Process*, Vol.1, pp.187-188.

81 Consultative Committee, *Summary of the Second Batch of Seminars*, February 1986 in *Overview of the Drafting Process*, Vol.1, p.179.

82 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 11 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.180.

process. At the beginning of the drafting progress, it had been suggested that the State Council may set up a HKSAR office (or Hong Kong and Macao Special Administrative Regions Office). A commissioner's office might also be set up in Hong Kong as a liaison body for handling Hong Kong related affairs, which was to serve as an exclusive medium between Hong Kong and all provinces and cities in China.<sup>83</sup> As far as the first paragraph was concerned, many people considered that "no department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own" did not expressly rule out interference from the CPG. During the consultation of *Draft Basic Law (for solicitation of opinions)*, it was suggested that the first sentence of the first paragraph be changed to "the Central People's Government and its subordinate departments ..." to clearly stipulate that the CPG should not interfere in the internal affairs of Hong Kong, so as to ensure the principle of "one country, two systems", "Hong Kong people administering Hong Kong" and "a high degree of autonomy".<sup>84</sup> There were comments that BL 22 did not clarify whether or not the Central Committee of the Communist Party of China, its departments and leaders of the Chinese Communist Party may interfere in Hong Kong's affairs. If the CPG had the right to interfere in the autonomous affairs managed by the HKSAR, it would violate the "principle of a high degree of autonomy".<sup>85</sup> In addition, a view was expressed that the provision implied that governments below

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83 *Preliminary Report of the Special Group on the Relationship between the Central Authorities and the HKSAR*, (Discussion Documents of the Second Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR, 2 May 1986) in *Overview of the Drafting Process*, Vol.1, p.180.

84 *Collection of Views of the Special Group on the Relationship between the Central Authorities and the HKSAR of the Consultative Committee for the Basic Law regarding Chapters One, Two, Seven and Nine of the Draft Basic Law for Solicitation of Opinions* in *Overview of the Drafting Process*, Vol.1, p.186.

85 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.188.

municipalities may interfere in the affairs of Hong Kong.<sup>86</sup> In the end, the above suggestions were rejected. The first paragraph only targeted departments of the CPG, and provinces, autonomous regions and municipalities directly under the Central Government.

In addition, some members of the Drafting Committee proposed to replace “local affairs” in the first paragraph with “affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”, since Hong Kong will in future manage not only local affairs, but also some external affairs authorized by the Central Authorities.<sup>87</sup> There were also views that the first paragraph was only a matter of principle and the words “in accordance with this Law” were retained to prevent relevant Mainland institutions from interfering in Hong Kong’s “affairs which ‘it’ administers on its own in accordance with this Law”. This flexible provision was made in view of the fact that various departments of the Central Authorities, such as the Ministry of National Defence and the Ministry of Foreign Affairs, had responsibilities over Hong Kong-related affairs.<sup>88</sup>

As far as Paragraph 3 was concerned, the content was not contentious since quite a number of views considered that it was necessary to stipulate that Mainland institutions and their personnel stationed in Hong Kong should equally comply with the laws of Hong Kong. However, in relation to the choice of words, it was pointed out that the word “should” in “should abide by the laws of the Hong Kong Special Administrative Region” in the seventh draft did not have any binding effect. As a result, “should” was replaced by “shall” in the eighth draft, which required Mainland institutions and their personnel

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86 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.186.

87 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.184.

88 *Ibid*, footnote 86.

stationed in Hong Kong to abide by Hong Kong laws.<sup>89</sup>

Paragraph 4 concerning the entry of mainlanders into Hong Kong was also controversial. Some commentators were of the view that it failed to make clear which department and what procedures for approval should be adopted for entry of persons from other parts of China into the HKSAR.<sup>90</sup> There were also views that according to the Joint Declaration, the entry of mainlanders into Hong Kong in the future should be controlled mainly by the Central Authorities in accordance with the current practice. The HKSAR would not be able to control the entry of mainlanders into the Region if the power of approval was completely transferred to the Region.<sup>91</sup> There were also views that the number of persons holding one-way permits moving from the Mainland to Hong Kong for the purpose of settlement should be discussed, agreed and approved by the Central Authorities together with the HKSARG, so as to avoid a large number of mainlanders migrating to Hong Kong, thus increasing the burden of housing, healthcare and transportation etc. on the HKSARG after the reunification.<sup>92</sup> Some people even worried that if the number of Mainland residents coming to settle in Hong Kong increased sharply, the “Hong Kong people” referred to in the principle “Hong Kong people administering Hong Kong” would become mainlanders instead.<sup>93</sup> However, some people had reservation over this proposal. They pointed out that the Joint Declaration provides that the present practice regarding entry and exit shall continue. According to the regulations at the time, Mainland residents might enter Hong Kong

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89 Ibid, footnote 86, p. 187.

90 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p.185.

91 Ibid.

92 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.189.

93 Ibid.

with the permit issued by the Mainland public security bureau alone and approval of the British Hong Kong government was not required.<sup>94</sup> In the end, the above proposal was not adopted. However, at the end of the fourth paragraph, it was added: “Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People’s Government after consulting the government of the Region.”

### Article 23<sup>95</sup>

“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.”

Drafting materials in *Overview of the Drafting Process* show that<sup>96</sup> BL 23 of Chapter II of the Basic Law was originally BL 12, the content and wording of the article evolved gradually as follows:

First draft: “The Hong Kong Special Administrative Region shall enact laws to prohibit any act of secession or subversion against the

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94 Ibid, footnote 90.

95 On 28 May 2020, the Third Session of the Thirteenth NPC adopted *Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security* (“the 5.28 Decision”), see Appendix XI. Based on the Constitution, the Basic Law and the authorization of the 5.28 Decision, the Twentieth Session of the Standing Committee of the Thirteenth NPC adopted the *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (“HKNSL”) on 30 June 2020, making provisions for four kinds of acts and activities which endanger national security, and decided to include the HKNSL in Annex III to the Basic Law. The CE of the HKSAR promulgated it on the same day.

96 *Overview of the Drafting Process*, Vol.1, pp.191-196.

Central People's Government."<sup>97</sup>

Second draft: "The Hong Kong Special Administrative Region shall enact laws to prohibit any act that undermines national unity or subverts the Central People's Government."<sup>98</sup>

The third to sixth drafts were the same as the second draft.

Seventh draft: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, or theft of state secrets."<sup>99</sup>

Eighth draft: "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>100</sup>

Ninth draft: Same as the eighth draft.

*Overview of the Drafting Process* shows the discussions that took place before the first draft was formulated:

"Chapter II - Relationship between the Central Authorities and the Hong Kong Special Administrative Region

#### Article 12

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97 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee*.

98 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*.

99 *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)*, February 1989.

According to *Overview of the Drafting Process*, the seventh draft of this article received 35 votes in the vote of the Drafting Committee, two votes short of a two-thirds majority. *Overview of the Drafting Process*, Vol.1, p.192.

100 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 16 February 1990.



Explanatory note: Members took the view that the existing provisions of the Crimes Ordinance in Hong Kong, which prohibit endangering the British royal family and betraying the United Kingdom, could not be adopted after 1997. When the time comes, they should be replaced by corresponding laws since the Hong Kong Special Administrative Region, being a part of the People's Republic of China, has the obligation to safeguard the unity and security of the country. It is therefore considered necessary to make provisions in principle on this issue.”<sup>101</sup>

Before the seventh draft of this article was finalized, there were proposals to delete this article due to different reasons. Some people thought that Hong Kong already had similar laws and there was no need to restate them in the Basic Law. Others thought that the provision was vague, posing a threat to the citizens of Hong Kong. There were also views that the provision violated the Joint Declaration and deprived Hong Kong people of their rights and freedoms.<sup>102</sup>

The minutes of the Third and Fourth Meetings of the Special Group on the Relationship between the Central Authorities and the HKSAR show the discussions prior to the finalization of the eighth draft:

Minutes of the Third Meeting:

“2. Some members were of the view that this article stipulated that ‘The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, or theft of state secrets.’ It is understood that the activities the Special Administrative Region may handle on its own should be those that are within the scope of its autonomy. However, acts such as ‘treason and secession’ can also be understood by the Central Authorities as affairs

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101 *Overview of the Drafting Process*, Vol.1, p.191.

102 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.192-193.

for which it is responsible. If, after 1997, the Central Authorities consider that the laws enacted by the Special Administrative Region are insufficient to prohibit treason and other acts, thus causing damage to the interests of the Central Authorities and undermining national unity, the following scenarios may happen:

→ On the basis of Article 17 of the Basic Law, the Central Authorities consider that ‘any law enacted by the legislature of the Hong Kong Special Administrative 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 Hong Kong Special Administrative Region’, and the law in question is returned for reconsideration.

→ On the basis of Article 18 of the Basic Law, the Central Authorities consider that acts such as treason are ‘those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Hong Kong Special Administrative Region as specified by this Law’, and relevant national laws are added to Annex III for implementation in the Special Administrative Region.

→ Members found the above scenarios worrying and the following recommendations were made:

i. If the Central Authorities are to add to or delete from the laws in Annex III of this Law, it should not only ‘consult’ the Basic Law Committee of the Standing Committee of the National People’s Congress and the Government of the HKSAR, as is now formulated in Article 18, but must obtain the consent of both.

ii. If the Central Authorities are to add to or delete from the laws included in Annex III, it should be treated as an amendment of the Basic Law, in other words, it must be done in accordance with the provisions of Article 158.”<sup>103</sup>

Minutes of the Fourth Meeting:

“1. Some members pointed out that the Mainland’s understanding

103 22 August 1989, in *Overview of the Drafting Process*, Vol.1, pp.194-195.

of what constitute crimes such as treason and secession, and its treatment of such offences are very different from that of Hong Kong. There is concern that the interpretation of the relevant wordings between the two parties would in future give rise to contradictions. Even though this article clearly stipulates that the Special Administrative Region ‘shall enact laws on its own to prohibit’ the relevant activities, the Mainland may in future impose its own standards on Hong Kong if it does not agree with the Special Administrative Region Government’s approach, rendering this article’s protection an empty shell.

2. There was an opposing view on the above. A member opined that the laws enacted by the Special Administrative Region Government in accordance with Article 23 would be submitted to the Standing Committee of the National People’s Congress for the record in accordance with Article 17. If the Central Government disagrees with the Special Administrative Region’s approach, the law would be returned for re-deliberation. Therefore, laws prohibiting treason and secession to be implemented in Hong Kong are bound to be agreeable to both Hong Kong and the Mainland.

3. Thus, some members were of the view that if a Hong Kong resident has committed treason and other related offences in Hong Kong, the person should be tried and convicted in accordance with the laws of Hong Kong rather than the laws of the Mainland. If the person committed the relevant crime within the territory of China, the person should be dealt with in accordance with Chinese law [Editor’s Note: the territory of China here should refer to the Mainland.] Members generally agreed with this approach, but suggested that it be clearly stated in the Basic Law to reassure Hong Kong people.”<sup>104</sup>

*Overview of the Drafting Process* shows that there remained suggestions to delete this article before the eighth draft was finalized. There was also a suggestion to change the word “shall” to “must”, because the word “shall” might be taken to mean there was a choice

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104 20 September 1989, in *Overview of the Drafting Process*, Vol.1, p.194.

whether to do the act or not, while the meaning of “must” was clearer. These proposals were not accepted in the end.<sup>105</sup>

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105 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.195-196. Paragraph 3 of the 5.28 Decision clearly provides, “It is the HKSAR’s constitutional responsibilities to safeguard national sovereignty, unity and territorial integrity. The HKSAR must complete the national security legislation stipulated in the Basic Law of the HKSAR at an earlier date.” Article 7 of the HKNSL similarly provides, “The Hong Kong Special Administrative Region shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law of the Hong Kong Special Administrative Region and shall refine relevant laws.” It is plain and obvious that the word “shall” in BL 23 bears the meaning of “is obliged to”.

## Chapter III Fundamental Rights and Duties of the Residents

### Article 24

“Residents of the Hong Kong Special Administrative Region (‘Hong Kong residents’) shall include permanent residents and non-permanent residents.

The permanent residents of the Hong Kong Special Administrative Region shall be:

(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);<sup>1</sup>

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons other than those residents listed in categories (1)

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<sup>1</sup> See *Interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (Adopted at the Tenth Session of the Standing Committee of the Ninth National People’s Congress on 26 June 1999) included in this book.

to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.”

Paragraph 1 of Section XIV of Annex I to the Joint Declaration provides:

“The following categories of persons shall have the right of abode in the Hong Kong Special Administrative Region, and, in accordance with the law of the Hong Kong Special Administrative Region, be qualified to obtain permanent identity cards issued by the Hong Kong Special Administrative Region Government, which state their right of abode:

- all Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals;
- all other persons who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region, and persons under 21 years of age who were born of such persons in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

- any other persons who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region.”

According to drafting materials in *Overview of the Drafting Process*, this article had progressed through eleven drafts.<sup>2</sup> The first draft read as follows:<sup>3</sup>

“Residents of the Hong Kong Special Administrative Region (‘Hong Kong residents’) shall include permanent residents and temporary residents.

The permanent residents of the Hong Kong Special Administrative Region shall be:

(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

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2 *Overview of the Drafting Process*, Vol.1, pp.197-217.

3 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.198.

(6) Persons not of Chinese nationality who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The temporary residents of the Hong Kong Special Administrative Region shall be persons who have resided in Hong Kong for a period of not less than one year but not more than seven years before or after the establishment of the HKSAR.”

The second draft of the article was revised as follows:<sup>4</sup>

“Residents of the Hong Kong Special Administrative Region (‘Hong Kong residents’) shall include permanent residents and temporary residents.

Hong Kong permanent residents are those who enjoy the right of permanent residence:

[Categories (1) to (5) of the second draft are the same as those of the first draft]

(6) Persons who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The temporary residents of the Hong Kong Special Administrative Region shall be persons who have the right of abode in accordance with the law of the Hong Kong Special Administrative Region but are not permanent residents.”

In the third draft of this article, the beginning of Paragraph 2 was amended to read: “The permanent residents of the Hong Kong Special Administrative Region shall be: any of the following residents who has the right of abode in the Hong Kong Special Administrative Region and is provided with permanent identity cards in accordance with

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<sup>4</sup> *Chapter III – Fundamental Rights and Duties of the Residents of the Hong Kong Special Administrative Region (Discussion Draft)*, 2 March 1987 (Discussion Document for the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others, 9 March 1987) in *Overview of the Drafting Process*, Vol.1, p.201.



law. ...” Paragraph 3 was revised to read “The temporary residents of the Hong Kong Special Administrative Region shall be persons who are provided with Hong Kong identity cards in accordance with the law of the Region but are not permanent residents of Hong Kong.”<sup>5</sup>

Subsequently, in the fourth draft, “temporary residents” was replaced by “non-permanent residents” and there were two formulas for amending Paragraphs 2 and 3:

“Residents of the Hong Kong Special Administrative Region (‘Hong Kong residents’) shall include permanent residents and non-permanent residents.

[There are two formulas for amending Paragraphs 2 and 3]

First formula:

The permanent residents of the Hong Kong Special Administrative Region shall be:

(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those

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*5 Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region, 13 April 1987, published in Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process, Vol.1, p.204.*

residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the law of the Region, permanent identity cards which state their right of abode.

Non-permanent residents of Hong Kong shall be persons other than the above six categories; they may reside in the Hong Kong Special Administrative Region but are not qualified to obtain permanent identity cards in accordance with the law of the Region.

Second formula:

The permanent residents of Hong Kong shall be: those who have the right of abode in the Hong Kong Special Administrative Region and are qualified to obtain permanent identity cards in accordance with the law of the Region:

[Categories (1) to (6) in Paragraph 2, the same as those in the first formula]

Hong Kong non-permanent residents shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the law of the Hong Kong Special Administrative Region but have no right of abode.”<sup>6</sup>

Paragraphs 2 and 3 of the fifth draft combined the two formulas of the fourth draft. For the definition of “permanent residents”, the one used in the first formula of the fourth draft was generally adopted, while for the definition of “non-permanent residents”, the one used in

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6 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, pp.205 - 206.

the second formula was adopted.

In the sixth draft, Paragraph 1 was revised to read “Residents of the Hong Kong Special Administrative Region (‘Hong Kong residents’) shall include permanent residents and non-permanent residents.”<sup>7</sup> After that, the seventh, eighth and ninth drafts remained more or less the same as the sixth draft.

In the tenth draft, an addition was made to Paragraph 2(4), for persons not of Chinese nationality to become permanent residents of Hong Kong, there is a requirement for entry into Hong Kong with valid travel documents, which is the same as the current BL 24 (the eleventh draft):<sup>8</sup>

“... (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region; ...”

The discussion and evolution of some of the main concepts of this article will be briefly described below. First of all, with regard to the definition of “Hong Kong residents” in Paragraph 1 of this article, many members of the Consultative Committee were of the view that Paragraph 1 of Section XIV of Annex I to the Joint Declaration already made clear provision for that, which might serve as a basis or starting point for discussion. There were views that according to the Joint Declaration, people residing in Hong Kong can be divided into: 1. permanent residents, i.e. holders of permanent identity cards of the HKSAR; 2. other lawful residents, i.e. non-permanent residents, who could be further categorized, according to special circumstances, into indigenous inhabitants of the New Territories and non-Chinese

7 Secretariat of the Drafting Committee, *Manuscript of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (revised version of the Contents, Preamble, Chapters 1, 2, 3, 5, 6, 7 and 9 of the General Working Group at its Second Meeting), March 1988 in *Overview of the Drafting Process*, Vol.1, p.209.

8 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 16 February 1990 in *Overview of the Drafting Process*, Vol.1, p.213.

residents.<sup>9</sup> In addition, there were mainlanders who came to Hong Kong on duty, for short-term trips and immigration.<sup>10</sup>

Apart from that, some members of the Consultative Committee suggested that in discussing the definition of residents, the fundamental rights and duties applicable to all persons should be discussed first, followed by prescribing conditions for each specific right (such as the right to vote and the right to be elected) and duty, to be regulated by legislation, prescribing a particular right or duty to a particular category of persons only. Those rights or duties might be enjoyed or performed by anyone who met the conditions prescribed. When the conditions for some rights and duties were set out, the definition of the various categories of residents would naturally fall into place.<sup>11</sup>

In the end, members of the Consultative Committee agreed to divide Hong Kong residents into three categories on the basis of Section XIV of Annex I to the Joint Declaration. The first category consisted of residents with the right of permanent abode in Hong Kong, who were entitled to obtain permanent identity cards in accordance with Section XIV of Annex I to the Joint Declaration. They enjoyed the right to vote and the right to stand for election. However, non-Chinese citizens cannot be elected as CE or members of the legislature,<sup>12</sup> or serve as principal officials. The second category referred to persons from overseas living in Hong Kong, and the third

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9 *Summary of the Second Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others (Group I)*, 22 April 1986 in *Overview of the Drafting Process*, Vol.1, p.199.

10 *Discussion Paper for the First Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others*, 4 April 1986 in *Overview of the Drafting Process*, Vol.1, p.199.

11 *Ibid*, footnote 9.

12 The current BL 67 provides that:

“The Legislative Council of the Hong Kong Special Administrative Region shall be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. However, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region, provided that the proportion of such members does not exceed 20 percent of the total membership of the Council.”

temporary residents, including transit passengers and those who have resided in Hong Kong for less than seven years. The latter two categories do not have the right to vote nor the right to stand for election.<sup>13</sup> The majority of the Consultative Committee members considered “residents” to include everyone who entered Hong Kong through legal channels and lived here.<sup>14</sup> On the other hand, when responding to questions at a later phase of the drafting process, members of the Drafting Committee from the Mainland pointed out that “persons other than Hong Kong residents” in BL 41 and 42<sup>15</sup> included those who were in transit for a day or two, who might basically also enjoy the rights and freedoms of Hong Kong residents.<sup>16</sup>

As for the definition of “permanent resident” and “right of abode” in Paragraph 2, there were no such legal terms in the laws of Hong Kong at the time when the Basic Law was being drafted. Instead, it was only stipulated which group of persons had the right to enter, exit, and remain in Hong Kong without restriction.<sup>17</sup> Although the term “right of abode” did not exist in the law, there was public opinion saying that it could be defined as Hong Kong’s indigenous people, because only the three million or so local people had the

13 Ibid, footnote 9.

14 *Minutes of the Fifth Meeting on the Rights, Freedom, Welfare and Duties of Residents and Others (Group II)*, 24 June 1986 in *Overview of the Drafting Process*, Vol.1, p.201.

15 The contents of the current BL 41 and BL 42 are as follows: “Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.”

“Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the Hong Kong Special Administrative Region.”

16 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.1, p.211.

17 Working Group on the Definition of Residents under the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986 in *Overview of the Drafting Process*, Vol.1, pp.201-202.

right not to be deported. These people were permanent residents who had the right of abode in Hong Kong. At that time, the seven-year residence requirement did not apply to non-ethnic-Chinese other than British nationals, as they were required to live in Hong Kong for nine consecutive years before they could enter Hong Kong visa-free.<sup>18</sup>

In order to maintain Hong Kong's open policies as an international financial, industrial, commercial and trade center, Consultative Committee members of the resident-definition group agreed unanimously that the immigration and residence regulations after 1997 should remain the same as they were. That is to say, persons who have entered Hong Kong by lawful means and have been lawfully residing in Hong Kong for a continuous period of not less than seven years, and those non-Chinese nationals who have taken Hong Kong as their permanent place of residence, should enjoy the right to enter and leave Hong Kong, to work freely and to stay in Hong Kong without restriction, so as to encourage more people with different backgrounds to live and work in Hong Kong and make Hong Kong their home. Later on, in response to some questions, members of the Drafting Committee from the Mainland explained that the difference between permanent residents and non-permanent residents depended on whether the individuals concerned had the right of abode. Those people who had the right of abode could not be deported.<sup>19</sup>

In relation to the concepts of "citizen" and "resident" in Paragraph 2 (1) and 2 (2) of this article, members of the Consultative Committee considered that there was a difference between the two: citizen was relative to the state and involved the issue of sovereignty. Since Hong Kong is not a country but only a part of China, it has no citizens of its own. Members of the Consultative Committee were generally of the view that since the definition of citizen related to national sovereignty, there was not to be any Hong Kong citizens, but only Hong Kong residents and Chinese citizens. A few people thought that if a citizen

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18 Secretariat of the Drafting Committee, *Extract of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.1, p.203.

19 Ibid, footnote 16.

of a country can be issued a passport of that country, then the holder of the HKSAR travel document is a Hong Kong citizen.<sup>20</sup>

During the drafting process of this article, it was also necessary to deal with the meaning of the terms found in categories (1) to (3) of Paragraph 2, such as “Chinese citizens ... in Hong Kong” and “persons of Chinese nationality”. The two terms in this article, “Chinese citizens” and “persons of Chinese nationality” are mainly based on the wording of the Joint Declaration.<sup>21</sup> At the time of the drafting of the Basic law, there were roughly over two million British Dependent Territory Citizens (BDTCs) in Hong Kong. According to the Nationality Law of China, all Chinese compatriots in Hong Kong, regardless of their BDTC passport, are all Chinese citizens. This is the concept of *jus sanguinis*. In the early phase of the drafting process, members of the Consultative Committee reached the understanding that Chinese nationality was based on lineage. Holders of foreign passports cannot obtain HKSAR passports because China does not recognize dual nationality. From the perspective of China, British National (Overseas) passport is just a travel document.<sup>22 23</sup>

In response to questions relating to this article, members of the Drafting Committee from the Mainland said at the later phase of the drafting process that the Chinese Government’s position regarding the old Sino-British treaties was that it did not accept Hong Kong’s territorial sovereignty belonged to the United Kingdom. The BDTC<sup>24</sup>

20 Ibid, footnote 9.

21 Ibid, footnote 16.

22 *Minutes of the Fourth Meeting on Rights, Freedoms, Welfare and Duties of Residents and Others (Group I)*, 18 June 1986 in *Overview of the Drafting Process*, Vol.1, p.200.

23 In relation to the meaning of the terms “Chinese citizens” and “Chinese nationality”, reference can be made to the relevant interpretation by the NPCSC after the adoption of the Basic Law which is included in Appendix VII to this book: *Interpretation of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region* (Adopted at the 19th Meeting of the Standing Committee of the Eighth National People’s Congress on 15 May 1996).

24 The law of British nationality distinguishes between different classes of British nationals. Residents of the colonies are “Dependent Territories Citizens”.

status given to local Chinese, based on British law, was not acceptable to China. The main purpose of the Chinese memorandum of the Joint Declaration was to solve the problem of BDTCs in Hong Kong. After 1997, all BDTCs with or without a British passport would be Chinese citizens. At the same time, China will allow Hong Kong residents who hold BDTC passports formerly issued to use that passport as travel documents to leave Hong Kong, China for another country. BDTC holders may seek assistance from the British consulate in any other country outside Hong Kong and China will not pay attention to it. However they may not self-claim as British citizens in Hong Kong or in the Mainland. Apart from BDTC, China does not recognize dual nationality, that is, Chinese nationals who hold foreign nationality will automatically lose Chinese nationality. Such foreign nationality holders cannot be regarded as Chinese citizens.<sup>25</sup>

With regard to Paragraph 2(3) of this article, members of the Drafting Committee opined that children of Chinese nationality born outside Hong Kong of permanent residents, including children born in the Mainland of Hong Kong permanent residents, were permanent residents of Hong Kong, if the child did not have foreign nationality, even if he or she had not lived in Hong Kong for more than seven years and was not born in Hong Kong. However when such permanent residents give birth to the next generation outside Hong Kong, their children would not be recognized as Hong Kong permanent residents since this right could not be passed on to the next generation. However, when the draft of the Basic Law was published for public opinions at the later phase of the drafting process, it was suggested that children born in the Mainland of Hong Kong residents should also apply for entry to Hong Kong through Mainland channels, and should reside in Hong Kong for at least seven years before they could obtain permanent identity cards. It was also suggested that the wives of Hong Kong residents who were from other countries or other parts of China should be able to apply for residence in Hong Kong on the ground that

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<sup>25</sup> Ibid, footnote 16, p.212.



they should have the basic right to family reunion.<sup>26</sup>

Another issue is whether spouses of Hong Kong residents, who are Mainland Chinese citizens, are eligible for Hong Kong permanent resident status. Members of the Drafting Committee from the Mainland indicated that this problem was quite complicated, because the population of Hong Kong would increase drastically if Hong Kong permanent residents could marry someone they met in the Mainland and bring him/her back to Hong Kong to become permanent residents. At that time, members of the Drafting Committee from the Mainland took the view that the circumstances of Mainland spouse were different from the treatment of Paragraph 2(1) and 2(2) concerning children of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, because children needed to be nurtured, so they should be treated as permanent residents of Hong Kong.<sup>27</sup>

The next issue is the provision in Paragraph 2(4) concerning persons not of Chinese nationality under which the concept of “have taken Hong Kong as their place of permanent residence” needed clarification. Summarizing the views expressed by the members of the Consultative Committee during the formulation of the first draft, some people held the view that when defining “have taken Hong Kong as their place of permanent residence”, a broader standard should be adopted, such as allowing foreign passport holders to have permanent resident status, so that more people could serve and contribute in Hong Kong. It was also suggested that if a person wished to take Hong Kong as his or her place of permanent residence, he or she might express his or her intention by taking an oath. A view had also been expressed that a person’s continuous residence in Hong Kong for seven years was sufficient to prove that he or she had taken Hong Kong as his or her place of permanent residence. On the other hand, some members of

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26 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.214-215.

27 Ibid, footnote 16, p.212.

the Consultative Committee were of the view that if a person left Hong Kong after completing seven years of continuous residence but wished to “take Hong Kong as his or her place of permanent residence”, that person must maintain substantial connection with Hong Kong.<sup>28</sup>

In subsequent recommendations, there was a proposal to stipulate that non-Chinese nationals must stay in Hong Kong for a continuous period within a certain period of time, for example a continuous period of three months’ residence in Hong Kong within three years, or a continuous period of one year’s residence in Hong Kong within five years. The second option was to provide that such persons automatically lost their permanent resident status after they had been away from Hong Kong for more than one year. This was the same as the administrative measures taken by the Hong Kong government when dealing with non-Chinese nationals without Chinese or British nationality at the time. The third option was to require such persons to maintain substantial connection with Hong Kong if they left Hong Kong after seven years of continuous residence and wished to take Hong Kong as their place of permanent residence. Substantive connections may include, real estate property or relatives.<sup>29</sup> The fourth suggested approach was that such persons should only be required to stay in Hong Kong for at least a certain number of days within a seven-year period without any requirement for continuous residence. The fifth approach was to look at how cases concerning permanent residence were handled in the United Kingdom or other countries where common law was practiced and to deal with individual cases according to the actual circumstances of the parties concerned.<sup>30</sup>

The next issue is Paragraph 2(5) regarding children of non-Chinese permanent residents, there was some concern as to whether people who belonged to the fifth category would lose their right of

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28 Ibid, footnote 22, pp.200-201.

29 Ibid, footnote 17.

30 *Minutes of the Seventh Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others*, 8 December 1986 in *Overview of the Drafting Process*, Vol.1, p.203.

permanent residence after they reached the age of 21.<sup>31</sup> Members of the Drafting Committee from the Mainland explained that since children needed to be nurtured, they might be treated as Hong Kong permanent residents, but after they reached the age of 21 and became adults, they should have the right to choose other nationalities.<sup>32</sup> In the comments on the *Draft Basic Law (for solicitation of opinions)* collected by the Consultative Committee, there were suggestions that categories (3) and (5) of Paragraph 2 of this article should clearly state that children born of “father or mother” or “father and mother” are eligible to become permanent residents.<sup>33</sup>

With regard to Paragraph 2(6) which provides that those who had the right of abode in Hong Kong only before the establishment of the HKSAR are eligible to become permanent residents of Hong Kong, those people in Hong Kong who held Indian passports or Indian holders of BDTC passports were concerned that their right of abode in Hong Kong was not clearly provided for in the Basic Law.<sup>34</sup>

Finally, with regard to the term “non-permanent residents” in Paragraph 3 of this article, “temporary residents of Hong Kong” was defined as “persons who have resided in Hong Kong for a period of not less than one year but not more than seven years before or after the establishment of the HKSAR” in the first draft. When the third draft was being formulated, members of the Drafting Committee realized that under Hong Kong law at the time, the delineation between temporary residents and others depended not on whether they had stayed for a full year, but on whether they had a Hong Kong identity card. Anyone who was a Hong Kong identity card holder was recognized as a Hong Kong

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31 *Focus of Exchange with Mainland Drafters: Special Group of the Rights, Freedoms, Welfare and Duties of Residents and Others*, published in *Bulletin 73 of the Secretariat of the Consultative Committee for the Basic Law*, 3 June 1988 in *Overview of the Drafting Process*, Vol.1, p.211.

32 *Ibid*, footnote 16, p.212.

33 *Ibid*, footnote 26, p.215.

34 *Ibid*, p.214.

resident.<sup>35</sup> Accordingly, Paragraph 3 of the third draft was amended to read: “Hong Kong temporary residents shall be persons who, in accordance with the law, obtain Hong Kong identity cards but are not permanent residents of Hong Kong”. In the fourth draft, members of the Drafting Committee proposed to divide Hong Kong residents into “permanent residents” and “non-permanent residents” because many foreigners had lived in Hong Kong for many years without the right of abode, it would be more appropriate to call them “non-permanent residents” than “temporary residents”.<sup>36</sup> Before formulating the fifth draft, some members of the Drafting Committee opined that the concept of “non-permanent residents”, a concept which was not used in the laws of Hong Kong at the time, should not be used. However, some members were of the view that the concept of “non-permanent residents” could not be done away with. They were different from permanent residents, for they were eligible for an identity card but did not enjoy the right of abode in Hong Kong. At that time, there were actually two types of such residents in Hong Kong: one with identity card with a black stamp, the other with identity card with a green stamp. On the other hand, non-permanent residents were also different from persons in Hong Kong other than Hong Kong residents.<sup>37</sup>

Apart from the definition of different categories of Hong Kong residents, the views on this article from different sectors were quite diverse at the later stage of the drafting process after the *Draft Basic*

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35 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.205.

36 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.206.

37 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p. 208.

*Law (for solicitation of opinions)* was published. There were many views which aspired to see professionals who had acquired or were in the process of acquiring foreign nationality being treated favorably, and a transitional period given to them to consider whether to acquire Chinese nationality or not.<sup>38</sup> In order to maintain its status as an international city, foreign passport holders should be encouraged to continue working in Hong Kong and nationality should not be treated as a race issue. Similarly, there were views which hoped to see the issue of nationality averted as far as possible when making provision for the right of abode. There was also concern whether Hong Kong residents who held British National (Overseas) passports could enjoy the rights of permanent residents of the HKSAR after 1997. Some people also raised the question as to whether or not permanent residents of the HKSAR would lose their right of abode after obtaining nationality of a foreign country. For those who have given up the right of abode in Hong Kong, if they return to Hong Kong, whether or not they would only regain their right of abode after no less than seven years of continuous residence in Hong Kong, and going through an application process.<sup>39</sup>

In view of what was happening at that time, some people hoped that the Basic Law would make provisions for ways to deal with the problem of Vietnamese refugees.<sup>40</sup> For example, there was concern as to whether or not Vietnamese refugees were “persons who have obtained Hong Kong identity cards but do not have the right of abode”.<sup>41</sup> There were also views which stated that imported workers did not have the right of abode in Hong Kong.<sup>42</sup>

As for people in the Mainland, there were concerns as to whether

38 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.1, p.211.

39 Ibid, footnote 26, p.215.

40 Ibid.

41 Ibid, p.216.

42 Ibid, p.215.

a large number of people from the Mainland would enter the HKSAR after 1997, and whether approval to enter Hong Kong should be first given by the Chinese Government or the HKSARG.<sup>43</sup> With regard to mainlanders who came to Hong Kong on business or were stationed in Hong Kong, it had been proposed earlier that persons sent by the Mainland to Hong Kong on business should not automatically be granted a Hong Kong passport, no matter how long they had stayed in Hong Kong.<sup>44</sup> During the formulation of the ninth draft, there was a suggestion to add to the article “the period of stationing in Hong Kong by the armed forces stationed by the Central People’s Government in the Hong Kong Special Administrative Region for defence purposes shall not be counted as eligibility for a Hong Kong permanent identity card”.<sup>45</sup> However, the above suggestion was not adopted.

Subsequently, on 10 August 1996, the Fourth Plenary Session of the Preparatory Committee of the HKSAR of the NPC passed the *Opinions on the Implementation of Article 24 (2) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, which was prepared for the HKSAR to refer to and act on when it came to formulate detailed regulations for the implementation of BL 24 (2).<sup>46</sup>

The *Opinion* pointed out that Chinese citizens born in Hong Kong provided for in Paragraph 2(1) of BL 24 referred to children whose parents or either parent was legally settled in Hong Kong at the time of their birth, and excluded children born in Hong Kong to persons who had entered Hong Kong illegally, had overstayed or was temporarily staying in Hong Kong. In the case of a child of Chinese nationality

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43 Ibid, p.215.

44 *Minutes of the Fourth Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others (Group II)*, 18 June 1986 in *Overview of the Drafting Process*, Vol.1, p.201.

45 *Opinion from Members of the Consultative Committee from the Industrial, Commercial and Professional Sectors on Chapter III - Fundamental Rights and Duties of the Residents of the Draft Basic Law for Solicitation of Opinions* in *Overview of the Drafting Process*, Vol.1, pp.210-211.

46 See Appendix VIII of this book.

born outside Hong Kong as provided for in Paragraph 2(3) of BL 24, both or either of the parents must be a person who has already acquired Hong Kong permanent resident status under Paragraph 2(1) or 2(2) of that article at the time of the birth of the child.

In addition, the specific requirement of Paragraph 2(4) of BL 24 for a person not of Chinese nationality to take Hong Kong as his or her permanent residence is that, when applying to become a permanent resident of the HKSAR, the applicant must sign a declaration in accordance with the law that he or she is willing to take Hong Kong as his or her permanent residence, and at the same time, the applicant must report the following personal information for the HKSARG's reference when examining and approving his or her application for permanent resident status: 1. Is there a place of residence in Hong Kong; 2. Whether the core members of the family ordinarily live in Hong Kong; 3. Whether there is decent employment or stable source of income in Hong Kong; 4. Whether taxes are paid in accordance with law in Hong Kong. Except for special reasons, a non-Chinese person who has acquired Hong Kong permanent resident status may fail to satisfy the condition of taking Hong Kong as his or her permanent residence if he or she does not reside in Hong Kong continuously within the time limit prescribed by the HKSAR, his or her permanent resident identity card may be cancelled according to law and he or she would no longer enjoy the right of abode in Hong Kong. However, the person may enter Hong Kong in accordance with law and live and work in Hong Kong without conditions or restrictions. As for children under the age of 21 born in Hong Kong of a non-Chinese person, provided for in Paragraph 2(5) of BL 24, both or either of his or her parents must have, at the time of his or her birth or after, acquired the status of permanent resident in Hong Kong in accordance with Paragraph 2(4) of BL 24. The above-mentioned children with Hong Kong permanent resident status can enjoy Hong Kong permanent resident status when they reach the age of 21 and meet the other relevant requirements of BL 24(2).



## Article 25

“All Hong Kong residents shall be equal before the law.”

According to drafting materials in *Overview of the Drafting Process*, the drafting of this article had progressed through eleven drafts.<sup>47</sup> The content of this article was not mentioned in *Structure of the Basic Law (Draft)*. However, it was stated in a progress report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee that: “In the laws of most countries in the world, there are generally provisions that citizens are safeguarded by the law and are equal before the law. In soliciting the views of people from all walks of life in Hong Kong, quite a few people have suggested that such a principled provision should be included in the Basic Law.”<sup>48</sup>

The first to third drafts of this article read as: “All Hong Kong residents, regardless of nationality, race, ethnicity, gender, occupation, religious belief, level of education or property status, shall be equal before the law.” When the fourth draft was finalized, “religious belief” was replaced by “religion, belief”. In the fifth draft, “language” was added before “gender”, “religion, belief” was restored to “religious belief” and “political opinion” was added after “religious belief”. There was no change in the sixth to eighth drafts.

As *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)* pointed out, the draft for solicitation of opinions read as: “All Hong Kong residents, regardless of nationality, race, ethnicity, language, gender, occupation, religious belief, political opinion, level of education or property status, shall be equal before the law.” There were some opinions that it was difficult to list exhaustively categories

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47 *Overview of the Drafting Process*, Vol.1, pp.217-225.

48 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, the explanatory note to the first draft of the article. Published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.217.



covered by the expression “regardless of nationality ...”. Therefore, it was proposed to delete “regardless of nationality ...” and revise the article to read as: “All Hong Kong residents shall be equal before the law.” In this way, both conciseness and comprehensiveness were achieved.<sup>49</sup> When the ninth draft was finalized, the provision was amended accordingly to read as: “All Hong Kong residents shall be equal before the law”, which was adopted as BL 25 in April 1990.

In relation to the issue of whether the rights and duties of different categories of Hong Kong residents should be different, there were already discussions in the initial phase of the drafting of the article. *Summary of the Second Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others (Group I)* of 22 April 1986 summarizes as follows: “... the opinions of the members are quite consistent. As pointed out in Section XIII of Annex I to the Joint Declaration: ‘The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law.’ Therefore, as far as the general residents of Hong Kong are concerned, there should be no difference in some basic or personal rights and freedoms. On the other hand, difference indeed exists in some respects such as Section I, Annex I to the Joint Declaration, which states that ‘the government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants’; Section IV which provides that ‘the Hong Kong Special Administrative Region Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the Hong Kong Special Administrative Region to serve as public servants at all levels, except as heads of major government departments and as deputy heads of some of those departments.’ It can be seen that difference obviously exists.”<sup>50</sup>

49 *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)*, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.223.

50 *Overview of the Drafting Process*, Vol.1, p.217.

There was the following explanatory note when the third draft was finalized: “In order to emphasize that all Hong Kong residents shall be equal before the law, it is still appropriate to retain the expression ‘regardless of nationality, race, ethnicity, gender, occupation, religious belief, level of education or property status’. The expression ‘regardless of nationality’ is acceptable because the context here is equality before the law which does not prevent the law from making other special provisions. However, some members of the Drafting Committee and some members of the Consultative Committee consider it inappropriate to retain the above expression.”<sup>51</sup>

Before finalizing the fourth draft, some members of the Drafting Committee proposed to add the expression “all adult Hong Kong permanent residents shall have the right to vote and the right to stand for election in accordance with law” to this article. In addition, some members of the Drafting Committee proposed to rewrite the provision as “All Hong Kong residents, regardless of race, color, gender, language, religion, political or other opinion, national origin, social class, property, birth or other status, shall be equal before the law.”<sup>52</sup> None of the suggestions were adopted.

The explanatory note to the fourth draft pointed out: “‘Religious belief’ in the original article has been rewritten as ‘religion, belief’, in which ‘belief’ includes ‘political belief’.”<sup>53</sup>

Before finalizing the fifth draft, some members of the Drafting

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51 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.218.

52 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.218.

53 *Progress Report of the Subgroup on Fundamental Rights and Duties of Residents of the Hong Kong Special Administrative Region*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.219.

Committee proposed that this article should, by referring to the wording of the United Nations Convention (the “Convention”), be changed to “All Hong Kong residents shall, regardless of race, color, sex, language, religion, political or other opinion, national origin or social class, property, birth or other status, be equal before the law.” The reason was that the Convention was applicable to Hong Kong and it would be easier for the courts to have precedents to follow when trying relevant cases. Some members of the Drafting Committee thought that it was unnecessary to copy the Convention but some contents of the Convention such as the word “language” could be absorbed; and that it was necessary to write into this article contents not included in the Convention such as the word “nationality”. As for the word “color” in the Convention, it meant the same as the word “race” in this article.<sup>54</sup>

In addition, regarding the expression “religion, belief” in the article, some members of the Drafting Committee believed that religion and belief were two different things, and that not all people who engaged in religious activities had religions, so the members of the Drafting Committee agreed to list religion and belief separately. Some members thought belief and religion were not in juxtaposition. In foreign constitutions, the expression “religious belief” was always a unity. Many members pointed out that political opinions were not beliefs and the expression “political belief” in the explanatory note to this article was not scientific.<sup>55</sup>

*Opinions on Draft Provisions of Chapter III of the Basic Law (August 1987)* of the Special Group Concerned with Fundamental Rights and Duties of Hong Kong Residents, which was passed by the Executive Committee on 4 November 1987, shows that “Some members consider that it is necessary to add the item ‘language’ to this

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54 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p. 219.

55 *Ibid.*

article to protect the rights of any person before the law from being discriminated against due to his language.”<sup>56</sup>

Before finalizing the ninth draft, there was a view from Hong Kong that it was incorrect for all Hong Kong residents to be equal before the law “regardless of nationality”, because the Basic Law already stipulated that certain rights (such as political rights) could not be enjoyed by non-Chinese citizens.<sup>57</sup> After the ninth draft, the content of the article remained unchanged.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” at a session of the NPC pointed out that:<sup>58</sup>

“The extensive rights and freedoms enjoyed by the residents of the Hong Kong Special Administrative Region and other people residing in the Region as prescribed in Chapter III of the draft Basic Law include political, economic, cultural, social and family rights and freedoms and the freedom of person. The special features in the provisions concerning Hong Kong residents’ rights and freedoms in the draft Basic Law boil down to the following two basic points:

(1) The draft provides multi-level protection for Hong Kong residents’ rights and freedoms. In accordance with the characteristics of the composition of Hong Kong residents, the draft stipulates not only the general rights and freedoms enjoyed by Hong Kong residents, but also the rights of the permanent residents and Chinese citizens living among them. It also stipulates that people other than Hong Kong residents also enjoy the rights and freedoms of Hong Kong residents in accordance with the law. In addition, while stipulating in explicit terms the fundamental rights and freedoms of Hong Kong

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<sup>56</sup> *Overview of the Drafting Process*, Vol.1, p.219.

<sup>57</sup> Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, August 1988 in *Overview of the Drafting Process*, Vol.1, pp.220-221.

<sup>58</sup> *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 National People’s Congress, 28 March 1990).

residents, the draft also stipulates that Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the Hong Kong Special Administrative Region. In view of the application in Hong Kong of the International Covenant on Civil and Political rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions, the draft stipulates that those provisions shall remain in force and be implemented through the laws of the Special Administrative Region. In addition to a chapter specially devoted to Hong Kong residents' rights and freedoms, there are also provisions concerning the issue in other relevant chapters and articles. Thus, extensive, comprehensive and multi-level protection is provided for safeguarding Hong Kong residents' rights and freedoms.

(2) The rights, freedoms and duties of Hong Kong residents are prescribed in the draft in accordance with the principle of 'one country, two systems' and in the light of Hong Kong's actual situation. They include such specific provisions as protection of private ownership of property, the freedom of movement and freedom to enter or leave the Region, the right to raise a family freely and protection of private persons' and legal entities' property. The draft also provides that the systems to safeguard the fundamental rights and freedoms of Hong Kong residents shall all be based on the Basic Law."

## **Article 26**

"Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law."

According to drafting materials in *Overview of the Drafting Process*, this article had progressed through eleven drafts.<sup>59</sup> The first draft of this provision was formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986. The text then read: "All

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<sup>59</sup> *Overview of the Drafting Process*, Vol.1, pp.226-236.

permanent residents of Hong Kong who have reached the age of 21 shall have the right to vote and the right to stand for election in accordance with the provisions of law.”<sup>60</sup> There was no substantial change in the second to fourth drafts of the article. When the fifth draft of the article was finalized, “permanent residents of Hong Kong” was changed to “permanent residents of the Hong Kong Special Administrative Region”. Subsequently, there was no substantial change in the sixth draft to eighth draft (for solicitation of opinions).

Prior to the finalization of the ninth draft of the article, there were dissenting views on the age requirement. *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)* pointed out that, in the draft for solicitation of opinions, the article originally read “All permanent residents of the Hong Kong Special Administrative Region who have reached the age of 21 shall have the right to vote and the right to stand for election in accordance with law.” In the draft for solicitation of opinions, there were three different opinions: “The first category of opinion considers that it is appropriate to keep the age of 21. The second category of opinion suggests changing the age of 21 to the age of 18. The third category of opinion proposes not to stipulate the age for election in the Basic Law and to stipulate it by law by the legislature of the HKSAR. We have adopted the third category of opinion and revised the article to read: ‘Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.’, which is more flexible.”<sup>61</sup> Based on such suggestion, the ninth draft was revised as “Permanent residents of the Hong Kong Special Administrative

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60 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.226.

61 *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)*, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.235.

Region shall have the right to vote and the right to stand for election in accordance with law”, which was adopted as BL 26 in April 1990.

This article also reflects Section XIII of Annex I to the Joint Declaration: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong. ...”

During the drafting process, different views were expressed on the provision, particularly on the issue of nationality. *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)* dated April 1986 shows there was an opinion that this article and articles up to BL 33 could be combined into one provision, i.e. “The government shall not infringe the fundamental rights and freedoms, including the various rights and freedoms listed in Annex I to the Joint Declaration and other rights and freedoms safeguarded by the common law.”<sup>62</sup>

Relevant part of the discussion summary as shown in *Summary of the Second Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others (Group I)* of 22 April 1986 is as follows: “(4) In terms of difference in political rights, in addition to judging the qualification by the permanent identity card of the Hong Kong Special Administrative Region and residence period in Hong Kong (seven years commonly), some members also suggested that passport or nationality be used to decide whether a person has the right to vote and the right to stand for election ... However, this method may also cause some difficulties in terms of technicalities, for example, some people may have no passport while some may have dual nationalities. Therefore, this issue remains to be discussed. In addition, some members suggested the use of the criterion ‘Chinese’, which is very

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62 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.226.



controversial, for it's difficult to judge whether a person is Chinese or not on objective criteria. So, members generally believed that objective criteria should be adopted instead of subjective criteria. Some members also proposed that since the Joint Declaration stipulates that the laws to be implemented in the Hong Kong Special Administrative Region in the future are the Basic Law and the laws previously in force in Hong Kong, the statements on the right to vote and the right to stand for election in the current laws of Hong Kong should be valid if they are not in conflict with the Basic Law, and these can at least serve as a reference indicator.”<sup>63</sup>

The relevant part of the discussion summary shown in *Summary of the Second Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others (Group II)* of 22 April 1986 is as follows: “Some members suggested that in recent years, some Hong Kong people, especially professionals, affected by the 1997 issue, have been naturalized in other countries to stay on the safe side. But in fact, their roots are in Hong Kong. Should we grant them the same rights as other Hong Kong residents’, including the right to vote and the right to stand for election? This positive approach can keep them to continue to contribute to the future of Hong Kong. Otherwise, there may be a massive brain drain, which is very detrimental to the stability and prosperity of Hong Kong. But the problem is that these people are foreign citizens with official foreign passports and have political rights in the corresponding countries. If we also acknowledge them as residents so that they have the right to vote and the right to stand for election in Hong Kong, it will lead to a rare situation, for few countries allow their citizens to exercise and enjoy certain rights in two countries at the same time, and China does not allow the existence of dual nationalities. Therefore, this issue must be handled with care.”<sup>64</sup>

When the first draft of the provision was formulated, there was an

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63 *Overview of the Drafting Process*, Vol.1, p.226.

64 *Overview of the Drafting Process*, Vol.1, pp.226-227.



explanatory note as follows: “According to investigation materials, it is more in line with the actual situation of Hong Kong to stipulate the age of voters at 21.”<sup>65</sup>

*Definition of Residents: Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* of 11 November 1986 by the Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, which was a discussion paper of the seventh meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee held on 8 December 1986, illustrates the situation of the political rights related to the right to vote and the right to stand for election at that time:

“3.3.1 The right to vote and the right to stand for election of Hong Kong people are additionally provided by the electoral law ... The original electoral law of Hong Kong was originally made for the election of the Urban Council. To accommodate the 1985 District Council and Urban Council elections, such law was amended in 1984.<sup>66</sup> At present, the electoral law for the Legislative Council was passed in April 1985.<sup>67</sup> It mainly defines the election group and functional constituencies for electing representatives to the Legislative Council, and specifies the qualifications of candidates among which the provisions on the periods of residence of voters and candidates cite the electoral law of 1984 without any separate set of definition. The requirement of this electoral law for voters to reside in Hong Kong is that, except for local people, other people should have ‘ordinarily resided in Hong Kong’ for seven years before they are registered as voters. It should be noted that this ‘seven years’ has a different meaning from the ‘seven years’ stipulated in the Immigration

65 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.227.

66 *Electoral Provisions Ordinance* (Cap. 367).

67 *Legislative Council (Electoral Provisions) Ordinance* (Cap. 381).

Ordinance. Apart from local people, the former refers to a seven-year period of ordinary residence in Hong Kong before the registration date while the latter refers to having ordinarily resident in Hong Kong for seven years at any time in the past.

3.3.2 In relation to the stipulations for candidates, according to the electoral law of 1984, a candidate must have ordinarily resided in Hong Kong within the 10 years before the date of nomination in order to run for various public offices.<sup>68</sup>

3.3.3 In addition, although there is no restriction on nationality in the election ordinance, there was an unwritten provision in the composition of the Legislative Council in the past that those appointed to the Legislative Council must hold British nationality. However, this practice has not been implemented in recent years. At present, there are also non-British nationals in the Legislative Council and the Executive Council.”<sup>69</sup>

*Final Report on Definition of Residents: Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election (draft)* of 13 January 1987 by the Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others<sup>70</sup>, which was a discussion paper of the eleventh meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee held on 20 January 1987, shows the views on the voting of the legislature and the nationality of candidates:

#### “5.2.2 Relevant provisions in the Joint Declaration

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68 At that time, the Hong Kong government had completed the review for local administration and proposed to revise the qualifications of voters and candidates, including revising the provisions on the length of residence in Hong Kong as follows: (1) voters must have accumulated seven years of residence in Hong Kong within the 10 years before registration; (2) candidates must have accumulated 10 years of residence in Hong Kong within the 15 years prior to nomination.

69 *Overview of the Drafting Process*, Vol.1, p.227.

70 The report was passed by the Executive Committee on 14 February 1987. *Overview of the Drafting Process*, Vol.1, p.228.

The Sino-British Joint Declaration does not specify the voting of the legislature or the qualification and nationality of candidates of the legislature ...

5.2.5 ... permanent residents, including people who are not of Chinese nationality, should have the right to vote and the right to stand for election, that is, people who are not of Chinese nationality can also participate in the legislature. Opinions on this issue are divided in principle as follows:

5.2.5.1 The views that the right to participate in the legislature (to elect members of the legislature and to become candidates) should be limited to permanent residents of Chinese nationality are as follows: people with foreign nationalities lack a sense of belonging to Hong Kong, and the issue of dual allegiance may arise when dealing with some public affairs related to foreign countries. On some problems related to national security in the HKSAR, embarrassment may also be caused due to their foreign nationalities. Therefore, they should not be allowed to participate in the legislature of the special administrative region in the future unless they renounce their foreign citizenship and are granted Chinese citizenship.

5.2.5.2 The opinions that the right to vote and the right to stand for election are restricted by different nationalities are as follows: permanent residents of non-Chinese nationality can only have the right to vote but not the right to stand for election, because if people of foreign nationalities become members of the legislature, it will involve the issue of sovereignty. Moreover, if people of Chinese nationality and people of non-Chinese nationality enjoy the same political rights, it is political discrimination against people of Chinese nationality.

5.2.5.3 The opinions that both people of Chinese nationality and people of non-Chinese nationality can participate in the legislature are as follows:

5.2.5.3.1 As an international commercial port, Hong Kong should, as far as possible, allow people with different backgrounds to take an active part in its governance. Moreover, many people who

have acquired foreign citizenship still regard Hong Kong as their home. Therefore, they should be given the right to vote and stand for election in the Legislative Council election to enhance their sense of belonging.

5.2.5.3.2 Permanent residents of non-Chinese nationality can become members of the legislature because the legislature is just like ‘China’s district council’, which only manages local affairs. Therefore, having people of foreign nationalities elected into the legislature will not affect China’s sovereignty in Hong Kong.”<sup>71</sup>

Before finalizing the third draft of the article, some members of the Consultative Committee of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others suggested that the expression “age of 21” be changed to “legal age”, so as to increase the flexibility of the article and avoid the need of amending the article due to any change of the age of voting and the age for standing for election.<sup>72</sup>

The third draft of the article was formulated with the following explanatory note: “It is appropriate to stipulate the age of voters in the Basic Law. Moreover, stipulating the age of voters as 21 is more consistent with the actual situation in Hong Kong and is consistent with the provisions of the Joint Declaration. Therefore, it is still appropriate to retain the age stipulation of 21 ...”<sup>73</sup>

Before the fourth draft of the article was finalized, some members of the Drafting Committee thought that the relation between the legal age and the age of voters should be considered. At that time, the British Hong Kong government was going to change the legal age

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71 *Overview of the Drafting Process*, Vol.1, p.228.

72 *Minutes of the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others (Revised)*, 9 March 1987 in *Overview of the Drafting Process*, Vol.1, p.229.

73 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.229.

to 18, which might have an impact on the age requirement of voters. In addition, some members of the Drafting Committee proposed to revise this article to “Permanent residents of Hong Kong shall have the right to vote and the right to stand for election in accordance with the provisions of the electoral law.”, instead of fixing the age of voters. There was also a suggestion that the age of voters be stipulated as 18, which can be linked with the Constitution and the age of voters who can be elected as deputies to the NPC in Hong Kong.<sup>74</sup>

In addition, some members of the Drafting Committee asked that the expression “in accordance with the provisions of law” in this article be deleted for the following reasons: (1) The Basic Law is constitutional law. If a general law is used to restrict the Basic Law, it is tantamount to placing the general law over the Basic Law; (2) The fundamental rights of residents are not restricted by the expression “in accordance with the provisions of law” in other articles. Therefore, “in accordance with the provisions of law” in this article and BL 4 should be deleted. However, some members of the Drafting Committee considered that it was not appropriate to delete “in accordance with the provisions of law” in this article.<sup>75</sup>

Also, some members of the Drafting Committee indicated that they did not agree with this article in principle, for the right to vote was a political right and only citizens could enjoy political rights, so it was impossible to ignore the issue of nationality. Many Hong Kong people were talking about democracy. However, if people of non-Chinese nationality were allowed to have the right to vote and the right to stand for election, it was not democracy but infiltration.<sup>76</sup>

When the fourth draft of the article was formulated, there was the following explanatory note: “1. After further study, it is better to set

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*74 Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law, 22 May 1987 in Overview of the Drafting Process, Vol.1, p.229.*

*75 Ibid.*

*76 Ibid.*

the age of electors at 21. 2. This article makes general provisions on the electors' right to vote and the right to stand for election. However, this does not exclude special provisions in the law. For example, the legal age for being elected as the Chief Executive and the legal length of residence for the right to stand for election shall be specified in accordance with the law. Therefore, it is appropriate to retain the expression 'in accordance with the provisions of law' in this article ... 4. Some members said that permanent residents of Hong Kong without Chinese nationality cannot enjoy the right to vote and the right to stand for election. After further study, this article is consistent with the provision in the Joint Declaration that 'The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants.'"<sup>77</sup>

During the consultation period before finalizing the ninth draft of the article, many different opinions on the age requirement were still collected. Some of such opinions were that the age for election should not be specified in the Basic Law because this way of expression lacked flexibility.<sup>78</sup>

For example, it was suggested that the article be amended as: "Chinese citizens who reside in Hong Kong in accordance with law, regardless of the length of residence, enjoy equivalent political rights, and enjoy the right to vote and the right to stand for election." The reason was: "According to the Constitution of China, all Chinese citizens who have reached the voting age have the right to vote. Therefore, Chinese citizens in Hong Kong should not have different political rights due to length of residence. If permanent residents

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<sup>77</sup> *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.231.

<sup>78</sup> Consultative Committee, *Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.233.

(those who have resided for seven years or more), including persons of non-Chinese nationality, have the right to vote and the right to stand for election, while non-permanent residents (those who have resided for less than seven years) cannot enjoy such rights even if they are Chinese citizens, it will be a disgrace to the Chinese people.”<sup>79</sup> The proposal was not accepted.

During the second consultation period after formulating the ninth draft, *Minutes of the Meeting of the Special Group on Residents on Chapter III of the Basic Law (Draft)*, the annex to the minutes of the fourth meeting of the second consultation period of the Special Group on Residents of 5 October 1989, shows that some members of the Consultative Committee proposed to add a note “(except as otherwise provided in this Law)” at the end of this article, for “there are other provisions in *The Draft Basic Law* which stipulate that the taking office of the Chief Executive and the President of the Legislative Council is subject to nationality restriction. The expression ‘In accordance with law’ in this article should refer to the laws of the Hong Kong Special Administrative Region, but the Basic Law should be superior to other laws. Therefore, it is necessary to specify in this article that there are other provisions in the Basic Law on the qualifications for the right to vote and the right to stand for election.”<sup>80</sup>

On 28 March 1990, Chairman Ji Pengfei’s “Explanations”<sup>81</sup> made at a session of the NPC contained a paragraph entitled “On the Fundamental Rights and Duties of Hong Kong Residents”, the content of which is included in the Note of BL 25 in this book.

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79 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.233-234.

80 *Overview of the Drafting Process*, Vol.1, p.235.

81 *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 National People’s Congress, 28 March 1990).

## Article 27

“Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”

This article reflects the relevant part of Article 3(5)<sup>82</sup> of and Section XIII of Annex I to the Joint Declaration: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom ... of speech, of the press, of assembly, of association, to form and join trade unions, ... of strike, of demonstration ...”

Drafting materials in *Overview of the Drafting Process*<sup>83</sup> show that this article had progressed through eleven drafts. The first draft of this article formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee on 12 November 1986 read as follows:

“Hong Kong residents shall, subject to the provisions of law, have:

(I) freedom of speech, of the press and of publication;

(II) freedom of association, to form and join trade unions, and to strike;

(III) freedom of assembly and of procession.”<sup>84</sup>

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82 Rights and freedoms, including those ... of speech, of the press, of assembly, of association, ... of strike ... will be protected by law in the Hong Kong Special Administrative Region.

83 *Overview of the Drafting Process*, Vol.1, pp.237-252.

84 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.237.



When the second draft of the article was finalized, the expression “subject to the provisions of law, have” was revised as “in accordance with law, have”. Nothing was changed in the third and fourth drafts. When the fourth draft of the article was formulated, there was the following explanatory note:

“In the subgroup’s discussion, the following two proposals were put forward for the amendment of this article:

Proposal one: change the expression ‘Hong Kong residents shall, in accordance with law, have’ to ‘Hong Kong residents shall have’;

Proposal two: rewrite ‘Hong Kong residents shall, in accordance with law, have’ as ‘The Special Administrative Region of Hong Kong shall ensure in accordance with law that Hong Kong residents have’”<sup>85</sup>

Proposal one was adopted when the fifth draft of the article was finalized and “Hong Kong residents shall, in accordance with law, have” was changed to “Hong Kong residents shall have”. Compared with the fifth draft, there was no substantial change in the contents and wording of the sixth to eighth drafts of the article.

Before finalizing the ninth draft of the article, the Subgroup on Fundamental Rights and Duties of Hong Kong Residents pointed out that the draft for solicitation of opinions originally read “Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, to form and join trade unions, and to strike; and freedom of assembly and of procession.” According to the opinions put forward, the following amendments were made: “(1) Freedom of assembly and of procession was moved to the position after ‘association’, and freedom of demonstration was added. (2) Add the word ‘right’ to freedom to form and join trade unions, and to strike. In this way, the revised provision reads: ‘Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and

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<sup>85</sup> *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.243.

the right and freedom to form and join trade unions, and to strike.”<sup>86</sup> When the ninth draft was finalized, the article was amended in accordance with this proposal and was adopted as BL 27 in April 1990.

During the drafting process, different people expressed different opinions on the article. *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, dated April 1986 shows there was an opinion that BL 26 to 33 could be combined as one, that was, “The government shall not infringe the fundamental rights and freedoms, including the various rights and freedoms listed in Annex I to the Joint Declaration and other rights and freedoms safeguarded by the common law.”<sup>87</sup>

When the first draft of the article was finalized, the explanatory note reads: “Chapter III (3) of *Structure of the Basic Law (Draft)* sets out the content of this article. By reference to the opinions collected by survey, freedom of the press was added, and it was divided into three categories according to the nature of the content. As the current laws of Hong Kong provides for all these freedoms, only provisions of principle are made here.”<sup>88</sup>

Before finalizing the second draft of the article, the Working Group on Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee reached a consensus and the members of the Consultative Committee unanimously agreed that for all types of residents of the HKSAR,

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86 *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)*, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.247.

87 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.237.

88 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.237.

whether their residency was temporary or permanent, and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of the person, of speech, of publication, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by the law.<sup>89</sup>

*Preliminary Report on Freedom of the Press* of the Working Group on Freedom of the Press of the Special Group on Culture, Education, Technology and Religion and the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of 27 February 1987 (hereinafter referred to as “*Preliminary Report on Freedom of the Press*”), included in the discussion documents of the joint meeting of the two said special groups on 5 March 1987, expounds the then situation of the press industry<sup>90</sup> and the limitations imposed by the law on the press and publishing industry at that time and the reasons for such limitations.<sup>91</sup>

*Preliminary Report on Freedom of the Press* points out that there was still debate on whether the Basic Law should only state the general principles or list the components of freedom of the press in detail

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89 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.238.

90 The report was passed by the Executive Committee on 14 March 1987. *Overview of the Drafting Process*, Vol.1, p.241.

91 Including *Printed Documents (Control) Regulations and Newspapers Registration and Distribution Regulations (Cap. 268)*; *Television Ordinance and Television (Standards of Programmes) Regulations (Cap. 52)*; *Control of Obscene and Indecent Articles Ordinance (Cap. 150)* in *Overview of the Drafting Process*, Vol.1, pp.238-239.

point by point: many persons engaged in the press industry thought that the Basic Law was a local constitutional document and it was impossible for the Basic Law to be too specific. Listing what freedom of the press was point by point would, on the contrary, restrict the freedom of the press, for the press industry of Hong Kong would lose those rights not listed. Therefore, they were in favor of only stating the general principles and strongly opposed to the establishment of a press law. Some people thought that freedom of the press was very important and therefore the Basic Law should follow the relevant practice of the United States Constitution, which would state that the legislature of the HKSAR was not allowed to pass any legislation restricting freedom of the press. In this way, freedom of the press can be guaranteed to the greatest extent. Also, some people held the view that the above-mentioned concepts needed to be amended moderately when put into practice, for example, the United States also directly guaranteed press freedom in the constitution, but on the other hand, press freedom was restricted appropriately in law when safeguarding citizens' interests. Therefore, they believed that the Basic Law should possess the following two features: (a) freedom of the press should be explicitly guaranteed in the Basic Law; and (b) allowing the legislature to impose reasonable and legal restrictions on freedom of the press when necessary under certain conditions. Some people held the view that since the Joint Declaration guaranteed that Hong Kong's current system would remain unchanged for 50 years after 1997, the Basic Law should specify that Hong Kong would preserve the currently enjoyed freedom of the press and treat all press industries equally. Some persons engaged in the press industry thought that although it might not be possible for the Basic Law itself to state in great detail, stating principles only was so abstract that it may facilitate those who intend to suppress freedom of the press.<sup>92</sup>

According to *Extract of Comments on the Basic Law in the Hong Kong Press* of the Secretariat of the Drafting Committee of February 1987, some members of the press believed that since there were laws

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92 Ibid, footnote 90, pp.240-241.

providing for freedom of the press in Hong Kong at that time, in the future attention should be paid to distinguishing the two types of measures, that is, administrative measures and legal procedures. They pointed out that in the future whether the media of Hong Kong was in violation of law should be judged by the court, rather than letting the executive authorities or the CE have the final say.<sup>93</sup>

Before finalizing the third draft of the article, there was a suggestion of referring to the stipulation in Section XIII of Annex I to the Joint Declaration and rewriting the article as “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of the inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong before the establishment of the Hong Kong Special Administrative Region shall continue to be implemented in the Hong Kong Special Administrative Region. In order to implement the two abovementioned Covenants, the Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, to strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.”

<sup>94</sup> The proposal was not adopted.

Before the fourth draft was finalized, some members of the Drafting Committee proposed to add “freedom of communication” and “the right to form and join local political parties or organizations”

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<sup>93</sup> *Overview of the Drafting Process*, Vol.1, p.241.

<sup>94</sup> *Minutes of the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others (Revised)*, 9 March 1987 in *Overview of the Drafting Process*, Vol.1, p.241.

to the article.<sup>95</sup>

Before finalizing the fifth draft of the article, some members of the Drafting Committee suggested that the four words “in accordance with law” in the article be deleted, for the fourth draft of BL 38(2)<sup>96</sup> at that time had already imposed necessary restrictions on rights and freedoms. Some members believed that the expression “in accordance with law, have” might become a basis for the relevant authorities to suppress freedoms such as freedom of speech, of the press and of publication by way of legislation. However, some members held the view that the expression “in accordance with law” must be retained, for no freedom could be absolute and freedoms such as freedom to strike and of procession needed specific legal provisions. Some members of the Drafting Committee pointed out that the term “in accordance with law” in this article should be linked with the abovementioned BL 38(2). Restrictions imposed in accordance with law should be limited by the stipulation of that article and there was a suggestion that the said BL 38(2) should be listed separately as an article.<sup>97</sup>

During the consultation period before finalizing the ninth draft, some members of the Consultative Committee of the Special Group on the Fundamental Rights and Duties of Inhabitants suggested that “freedom to strike” be changed to “right and freedom to strike” and that “... freedom of assembly and of procession” be changed

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95 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.242.

96 “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. But such restrictions shall be limited by the necessity of safeguarding national security, social order, public security, public health, public ethics and others’ rights and freedoms.”

97 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p.243.

to “freedom of assembly, of petition, of demonstration and of procession”.<sup>98</sup> When the ninth draft of the article was finalized, freedom of demonstration was added, and the word “right” was added to freedom to form and join trade unions, and to strike. In addition, some members of the Consultative Committee suggested adding the words “freedom of collective bargaining”.<sup>99</sup>

The Consultative Committee also received a number of proposals for rewriting the article, including rewriting it as “Hong Kong residents’ freedom of speech, of the press and of publication; freedom of association, to form and join trade unions, and to strike; freedom of assembly and of procession shall not be restricted by law, administrative measures or in any form.” The reason was “This expression does not lead to abuse of freedom. According to the experience of the United States, the Congress has still passed many laws to restrict people’s freedom, and the court will not rule them unconstitutional.” There was also a suggestion that the word “freedom” be changed to “right” and the reasons included fear of the word “freedom” being abused.<sup>100</sup> The said proposals were not adopted.

Before finalizing the tenth draft, it was discussed whether the right to collective bargaining should be included in the Basic Law. *Discussion Paper (2) for the Final Round of Consultations - Collective Bargaining* of 18 May 1989 shows that:

“There are different views on whether the right to collective bargaining should be included in the Basic Law. The supporting and

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98 Consultative Committee, *Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.245.

99 Ibid.

100 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.246-247.

opposing views and reservations are summarized as follows:

Supporters made the following changes to the relevant provisions of *The Draft Basic Law*:

#### Article 27

‘Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, to collective bargaining, and to strike.’

...

#### Reasons for Support:

- The rights to form and join trade unions, to strike and to collective bargaining are three fundamental rights recognized internationally. The first two rights have been enshrined in Article 27 of *The Draft Basic Law*, but not collective bargaining.

- The right to collective bargaining should not be specified in great detail in the Basic Law. Specific provisions such as the dates of implementation of collective bargaining and the level and content of negotiations should be dealt with by the Government of the Hong Kong Special Administrative Region by legislation.

- Including the right to collective bargaining in the Basic Law may induce the Hong Kong Government to consider enacting the relevant legislation before 1997.

#### Reasons for Opposing:

- Hong Kong does not need such a drastic change as introducing institutionalized collective bargaining.

- If Hong Kong people want to use the opportunity of enacting the Basic Law to consolidate their own interests or the interests of their classes or groups, this will not only lead to conflicts of interests, but also go against the principle of maintaining the status quo.

#### Reservations:



- Stating in the Basic Law that Hong Kong residents have the right to collective bargaining may not enable them to enjoy institutionalized collective bargaining. On the contrary, the absence of any provision does not mean that Hong Kong residents cannot enjoy this right.”<sup>101</sup>

During the consultation period, the Drafting Committee received opinions from the Mainland that “freedom of association” should be restricted and the establishment of societies aimed at overthrowing the Communist Party and the socialist system could not be allowed (opinion from Heilongjiang); and that a new paragraph which read: “In exercising the abovementioned rights and freedoms, Hong Kong residents shall not split the country, attack or subvert the Central People’s Government.” should be added (opinion from Liaoning).<sup>102</sup>

The Consultative Committee also received the following comments: “In terms of guaranteeing the freedom of expression, the provisions of this article are inferior to those of Article 19 of the International Covenant on Civil and Political Rights. If the provisions of Article 39 of this chapter enables the said Covenant to be effectively implemented in the Hong Kong Special Administrative Region, it’s unnecessary to amend this article.”; “According to this article, Hong Kong residents can criticize the Communist Party or any other political party, even including foreign political parties, but they can never have the freedom to subvert the Central Government.”; “Freedom of the press is of paramount importance to the prosperity and stability of Hong Kong. People from the business sector and political leaders of Hong Kong rely on freedom of communication to make sound economic and political decisions. The media provides a forum for people to complain, which helps to stop abuse of power and to test the public’s opinions on major events. Freedom of speech and freedom

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101 *Overview of the Drafting Process*, Vol.1, pp.249-250.

102 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)*, 30 November 1989 in *Overview of the Drafting Process*, Vol.1, p.250.

of the press encourage a responsible government to protect individual freedom, form inspiring public opinion, explore new knowledge and promote the well-being of the public.”<sup>103</sup>

The Consultative Committee also received a number of proposals to amend the article, including: to delete “the right and freedom to form and join trade unions, and to strike”, for it had already been included by “freedom of association, of assembly, of procession and of demonstration” provided for by this article; to add “freedom to seek, receive and transmit all kinds of information and ideas in accordance with law”, for “the abovementioned provisions refer to Article 29 (2) of the International Covenant on Civil and Political Rights. The expression ‘in accordance with law’ was added to avoid question”; to add “the legislature shall not enact any law to deprive freedom of the press and the executive authorities also shall not commit any act to affect freedom of the press”, for “if a society depends on individual considerations of law enforcement agents and the judiciary to decide whether it can enjoy freedom of the press and whether freedom of the press can become the fourth kind of social checks and balances (the fourth estate) beyond the executive, legislative and judicial powers, it will be the rule of man but not the rule of law. Although under the rule of man the society has long-term freedom of the press because of the enlightened rule of man, such freedom of the press has no legal basis and is unstable. Therefore, freedom of the press must be based on the legal system.”<sup>104</sup> None of the aforementioned suggestions were adopted.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC<sup>105</sup> contained a paragraph entitled “On the

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103 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles, November 1989 in Overview of the Drafting Process*, Vol.1, pp.250-251.

104 Ibid, p.251.

105 *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 National People’s Congress, 28 March 1990).

Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

## Article 28

“The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.”

This article reflects the relevant part of Article 3(5)<sup>106</sup> of and Section XIII of Annex I to the Joint Declaration: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person ...”

Drafting materials in *Overview of the Drafting Process*<sup>107</sup> show that this article had progressed through eleven drafts.<sup>108</sup> The first draft was formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986, the text of which read:

“The freedom of the person of Hong Kong residents shall be inviolable.

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106 Rights and freedoms, including those of the person ... will be protected by law in the Hong Kong Special Administrative Region.

107 *Overview of the Drafting Process*, Vol.1, pp.253-261.

108 The fourth item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 is “the freedom of the person”.

No resident shall be subjected to unlawful arrest, detention or imprisonment. Unlawful deprivation or restriction of the freedom of the person in any way shall be prohibited, and unlawful search of the body of any resident shall be prohibited.”<sup>109</sup>

When the second draft of the article was finalized, the expression “No resident” in the second paragraph was changed to “No Hong Kong resident”. In the third to eighth drafts, the content and wording of the article were not changed substantially. Before finalizing the ninth draft, *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)* pointed out that in the draft for solicitation of opinions the second paragraph of this article was originally: “No Hong Kong resident shall be subjected to unlawful arrest, detention or imprisonment. Unlawful deprivation or restriction of the freedom of the person in any way shall be prohibited. Unlawful search of the body of any resident shall be prohibited.” In the draft for solicitation of opinions, (1) there were opinions that the concept of “arbitrary” in common law was more consistent with the actual situation and needs of Hong Kong, and it was suggested that the word be added to the article; (2) it was also suggested that the prohibition of torture of any resident or arbitrary or unlawful deprivation of the life of any resident should be added. In accordance with the abovementioned opinions, this paragraph was amended to read: “No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.”<sup>110</sup> When the ninth draft was finalized, the

109 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.253.

110 *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)*, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, pp.259-260.

article was amended in accordance with this proposal and was adopted as BL 28 in April 1990.

During the drafting of the article, different people expressed different opinions on it. When the first draft was formulated, there was an explanatory note as follows: “There are many opinions that the freedom of the person of Hong Kong residents should be clearly stipulated in principle. The above provisions have been made by having reference to these opinions. There are also opinions that some specific provisions should be made, for example, there should be investigation within 24 hours after arrest. The Subgroup held, after study, that these contents can be stipulated by laws enacted by the legislature of the Hong Kong Special Administrative Region.”<sup>111</sup>

Before finalizing the second draft of the article, the Working Group on Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents of the Consultative Committee reached a consensus and the members of the Consultative Committee unanimously agreed that for all types of residents of the HKSAR, whether their residency was temporary or permanent, and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of the person, of speech, of publication, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by law.<sup>112</sup>

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111 Ibid, footnote 109.

112 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election*. In *Overview of the Drafting Process*, Vol.1, p.254.

When the third draft of the article was finalized, the explanatory note to the article read: “The expression ‘No resident’ in the second paragraph of the ‘discussion draft’ has been changed to ‘No Hong Kong resident’ to chime with the style of the first paragraph.”<sup>113</sup>

Before formulating the fifth draft, some members of the Consultative Committee suggested that the word “unlawful” be changed to “arbitrary”, for “arbitrary” not only meant “unlawful”, but also meant “dogmatic”. Some members were of the view that the rights of the residents after legal arrest, such as the right to know the charges and the right to be heard as soon as possible, should be guaranteed in this chapter.<sup>114</sup>

Some members of the Drafting Committee proposed to refer to the wording of the ICCPR and add the expression “unreasonable or” before the word “unlawful” in this article. Many members were of the view that in practice it was very difficult to judge whether the relevant act was reasonable, and that this article should not provide for double standard, but should take legality as the only standard.<sup>115</sup>

The explanatory note to the fifth draft of the article shows that the Drafting Committee considered it inappropriate to add the expression “unreasonable or” before “unlawful” in this article, and did not agree to change “unlawful” to “arbitrary”.<sup>116</sup>

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113 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.254.

114 Special Group Concerned with Fundamental Rights and Duties of Hong Kong Residents, *Opinions on Draft Provisions of Chapter III of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987. *Overview of the Drafting Process*, Vol.1, p.256.

115 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p.256.

116 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.1, p.256.

During the consultation period after publishing the eighth draft of the article, *i.e. The Draft Basic Law (for solicitation of opinions)*, many comments and suggestions for amendment were made on the word “unlawful” and the addition of rights after legal arrest and prohibition of torture, etc.<sup>117</sup>

As indicated above, the ninth draft of the article was revised both in wording and content. The revised version was not further revised although there were still a number of comments during the second consultation period.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC<sup>118</sup> contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

## Article 29

“The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises shall be prohibited.”

According to drafting materials in *Overview of the Drafting Process*,<sup>119</sup> this article had progressed through eleven drafts. The fifth item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 is “homes shall be inviolable ...”<sup>120</sup> The first draft of

117 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.258-259.

118 *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 National People’s Congress, 28 March 1990).

119 *Overview of the Drafting Process*, Vol.1, pp.262-267.

120 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.262. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.



the article was formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986. The text at that time was: “The homes of Hong Kong residents shall be inviolable. Unlawful search of or unlawful intrusion into a resident’s home shall be prohibited.”<sup>121</sup> In the second draft, the expression “and other premises” was added after the word “home(s)”. There were no substantial changes in the third to eighth drafts of the article. *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)* pointed out that the draft for solicitation of opinions was originally: “The homes and other premises of Hong Kong residents shall be inviolable. Unlawful search of or unlawful intrusion into a resident’s home or other premises shall be prohibited.” The word “arbitrary” was added according to the comments made. The amended article read as “The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises shall be prohibited.”<sup>122</sup> When the ninth draft was formulated, the article was amended in accordance with this proposal and remained unchanged thereafter. Subsequently, the eleventh draft was adopted as BL 29 in April 1990.

This article also reflects the relevant part of Annex I to the Joint Declaration: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong ...”

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121 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.262.

122 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.266.



Before finalizing the second draft of the article, the Working Group on Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents of the Consultative Committee reached a consensus and the members of the Consultative Committee unanimously agreed that for all types of residents of the HKSAR, whether their residency was temporary or permanent, and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by law.<sup>123</sup>

During the drafting period, there were two controversies over this article: the contents covered by the word “inviolable”; and whether the word “unlawful” should be amended. When the third draft of the article was formulated, there was the following explanatory note: “The expression ‘other premises’ has been added after home(s), so that offices and private factories, etc. can be included. The constitutions of most countries stipulate that ‘homes shall be inviolable’. The constitutions of some countries stipulate that ‘homes or other premises shall be inviolable’. Some members believed that the expression ‘premises and real estate with right of use’ should be added after the word ‘home(s)’, for premises cannot include land, farmland, etc. However, some members said that the General Principles have clearly stipulated the protection of private property and there is no need to stipulate ‘premises and real estate’ here.”<sup>124</sup>

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123 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, pp.262-263.

124 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.263.

Subsequently, *Opinions on Draft Provisions of Chapter III of the Basic Law (August 1987)* of the Special Group Concerned with Fundamental Rights and Duties of Hong Kong Residents of the Consultative Committee, which was passed by the Executive Committee on 4 November 1987, shows that some members of the Consultative Committee proposed to amend “other premises” to “property” because the word “property” covered a wider range.<sup>125</sup>

As for the word “unlawful”, there were different opinions and suggestions for its amendment during the drafting period, such as changing the expression “unlawful search ... shall be prohibited” to “arbitrary search ... shall be prohibited”.<sup>126</sup> There were also views that “arbitrary” in the above suggestion was general and could be interpreted casually while the word “unlawful” in the original text had rules to follow.<sup>127</sup>

In addition, some members of the Drafting Committee proposed to refer to the wording of the United Nations Convention and add the expression “unreasonable or” before the word “unlawful” in this article. Many members were of the view that in practice it was very difficult to judge whether the relevant act was reasonable, and that this article should not provide for double standard, but should take legality as the only standard.<sup>128</sup>

The explanatory note to the fifth draft of the article showed that

125 *Overview of the Drafting Process*, Vol.1, p.264.

126 *Opinions on the Draft of Chapter III of the Basic Law (Draft of 30 April 1987)* (Discussion Paper of the Fourth Resumed Session of the Eighteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of 22 June 1987), 19 June 1987 in *Overview of the Drafting Process*, Vol.1, p.264.

127 Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others, *Final Report on the Fundamental Rights and Duties of Hong Kong Residents, Vol.II*, passed by the Executive Committee on 8 August 1987. *Overview of the Drafting Process*, Vol.1, p.264.

128 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p.264.

members of the Drafting Committee thought it was not appropriate to add “unreasonable or” before “unlawful” in this article, and did not agree to change “unlawful” to “arbitrary”.<sup>129</sup>

During the consultation period at the later phase of the drafting of the article, the Consultative Committee received objections against the word “unlawful” for, *inter alia*, the following reasons: it provided a constitutional basis for oppressive laws; it authorized the legislature to make laws to deprive the residents of their rights; it created legal loopholes to allow powerful people to infringe upon the freedoms of residents; “unlawful” things were already prohibited by law; what were “lawful” were not necessarily “reasonable”; if the fundamental rights of residents were infringed by the law, it was also “unreasonable”.<sup>130</sup>

The Consultative Committee also received different suggestions for rewriting the article, including changing the word “unlawful” to “arbitrary” on the following grounds: it contained the principles of illegality, irrationality and injustice; it was a concept recognized by common law and in terms of interpretation, there were many cases to follow, there were legal basis and legal procedures to follow, and it could also provide an objective evaluation criterion and avoid inappropriate or inaccurate interpretation; international conventions generally adopt the word “arbitrary”; to ensure that the freedom of the person of residents was fully protected; to give full play to the function of the constitution of restricting the legislature; to let the court have discretion; to maintain the practice of common law and prevent government administrators from abusing the discretionary power that might be conferred by administrative laws and regulations resulting in nominal compliance with law but violation of human rights in practice; if power was oppressive and vague in scope, even if it was lawful, it might still be “arbitrary”. As mentioned above, the text was amended

129 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.1, p.264.

130 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.265-266.

by adding the word “arbitrary” when the ninth draft of the article was formulated.<sup>131</sup>

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC<sup>132</sup> contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

### Article 30

“The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.”

According to drafting materials in *Overview of the Drafting Process*,<sup>133</sup> this article had progressed through eleven drafts. It reflects the relevant part of Article 3(5)<sup>134</sup> of and Section XIII of Annex I to the Joint Declaration: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom ... of correspondence ...”

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131 Ibid, p.266.

132 *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 National People’s Congress, 28 March 1990).

133 *Overview of the Drafting Process*, Vol.1, pp.268-275.

134 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the Hong Kong Special Administrative Region.

The first draft of the article formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986 read as follows: “The freedom of communication and privacy of correspondence of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom of communication and privacy of correspondence of residents except that the relevant authorities may inspect correspondence in accordance with procedures stipulated by law to meet the needs of public security or of investigation into criminal offences.”<sup>135</sup> When the second draft of the article was finalized, the expression “procedures stipulated by law” was revised as “legal procedures”. The explanatory note to the fourth draft of the article read: “The scope has been enlarged by changing the word ‘correspondence’ to ‘communication’.”<sup>136</sup> The fifth to eleventh drafts remained unchanged and the article was adopted as BL 30 in April 1990.

When the first draft of the article was formulated, there was the following explanatory note on its content: “Chapter III (5) of *Structure of the Basic Law (Draft)* lists ‘inviolability of the home and freedom of communication’. Considering that the nature of these two kinds of freedoms is not exactly the same, they have been divided into Articles 6 and 7 for stipulation.”<sup>137</sup>

Before finalizing the second draft of the article, the Working Group on Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents of the Consultative Committee reached a consensus and the members of the Consultative Committee

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135 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.268.

136 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.271.

137 *Ibid*, footnote 135.

unanimously agreed that for all types of residents of the HKSAR, whether their residency was temporary or permanent, and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of correspondence, should all be protected by law.<sup>138</sup>

Before finalizing the third draft, the communication between the members of the Consultative Committee who attended the meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee and a member of the Drafting Committee, Li Fook-sean, was summarized as follows: “Some members think that if the expression ‘no department’ should refer to any government department, it is necessary to add the word ‘group’ after ‘no department or individual’ in order to protect the freedom of communication and privacy of correspondence of residents from any governmental or private infringement. Li pointed out that the expression ‘no department’ already includes all government and private departments.”<sup>139</sup>

When the third draft of the article was finalized, there was an explanatory note which read as follows: “According to general understanding, ‘communication’ has a wider scope than ‘correspondence’ and includes not only correspondence but also telephone, telegram, etc. According to the laws in force in Hong Kong, correspondence is free and there is no need to make any application. But not all communication methods are like this. For example, a

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138 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.269.

139 *Minutes of the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others (Revised)*, 9 March 1987 in *Overview of the Drafting Process*, Vol.1, p.269.

radio station cannot be set up privately. Advance application and approval are needed for setting up a radio station. Therefore, ‘freedom of communication’ should still be stipulated. It is not appropriate to change the expression ‘relevant authorities’ to ‘statutory authorities’ and such a change is also a semantic repetition of the expression ‘in accordance with legal procedures’ that follows.”<sup>140</sup>

Before the fourth draft of the article was formulated, the members of the Drafting Committee had the following views: “Freedom of communication” and “privacy of correspondence” were the same and the latter could be deleted; “investigation into criminal offences” should be changed to “handling of cases by the court”; this article could stipulate private and public communication separately; it was proposed to keep only the sentence “The freedom of communication and privacy of correspondence of Hong Kong residents shall be protected by law” and the rest should be deleted, for there were no stipulations of restrictions on rights in other articles; the stipulation of “relevant authorities” in this article was too general but actually not all authorities had the power to inspect correspondence.<sup>141</sup>

*The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee of December 1987 shows that the explanatory note to the fifth draft of the article was as follows: “Some members proposed to delete the sentence ‘No department or individual ... may inspect communication to meet the needs of public security or of investigation into criminal offences.’ This sentence has been retained as a result of the group’s study.”<sup>142</sup>

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140 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.269.

141 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.270.

142 *Overview of the Drafting Process*, Vol.1, p.271.



*Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions* shows: “Some members believe that it is not enough for this article to only provide ‘except ... to meet the needs of public security or of investigation into criminal offences’ and propose to explain the degree of seriousness of these reasons that has to be attained to constitute such needs, or the freedom of Hong Kong residents in this respect cannot be adequately protected.” Some members held the view that the expression “relevant authorities” in the article should be specified as “procuratorial organ” or “public security organ”, for at that time it was the police to carry out investigation. Some members believed that the right to privacy should be an absolute freedom. Hence it was not necessary to specify that the right was “protected by law”, and the right should not be controlled by the judiciary.<sup>143</sup>

Before formulating the ninth draft, the Consultative Committee also received opinions that in relation to the sentence “No department or individual may ... or of investigation into criminal offences”, even if such a need existed, it should not be rigidly stipulated in a constitutional document. In addition, it was suggested that the expression “public security” be deleted on the grounds that the scope of “public security” was quite broad and much would depend on the interpretation of the interpreters of the Basic Law and thus reducing the legal protection for individuals in this regard. There were also views that all situations restricting freedom and privacy of communication should be narrowly defined.<sup>144</sup>

During the second consultation period before formulating

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143 Published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1, October 1988 in *Overview of the Drafting Process*, Vol.1, p.272.

144 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – *General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.273.



the tenth draft, some members of the Consultative Committee of the Special Group on Inhabitants' and Other Persons' Rights, Freedom, Welfare and Duties proposed to change the expression "no department" to "no government department". However, some members who opposed this proposal held the view that this would cause non-government departments not to be subject to this article, whereas many non-government departments were related to activities that infringed on the freedom of communication of residents.<sup>145</sup>

*Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of the Secretariat of the Drafting Committee of 30 November 1989 shows that the relevant state departments suggested that the expression "national security" be added before "public security".<sup>146</sup>

In the later phase of the drafting of the article, the Consultative Committee received an opinion that "to meet the needs of public security or of investigation into criminal offences" should be limited to exceptional circumstances prescribed by specific legislation. In addition, there were the following suggestions: add the expression "including the Central People's Government" after "no department"; add the word "lawful" before "freedom and privacy of communication". These suggestions were not adopted.<sup>147</sup>

On 28 March 1990, Chairman Ji Pengfei's "Explanations" made at a session of the NPC<sup>148</sup> contained a paragraph entitled "On the

145 *Minutes of the Meeting of the Special Group on Residents on Chapter III of the Draft Basic Law* (Annex to the Minutes of the Fourth Meeting of the Second Consultation Period of the Special Group on Residents of 5 October 1989, passed by the Executive Committee on 7 October 1989). *Overview of the Drafting Process*, Vol.1, p.274.

146 *Overview of the Drafting Process*, Vol.1, p.274.

147 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.274.

148 *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 National People's Congress, 28 March 1990).

Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

### Article 31

“Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.”

According to drafting materials in *Overview of the Drafting Process*,<sup>149</sup> this article had gone through eleven drafts. This article reflects the relevant part of Article 3(5)<sup>150</sup> of and Section XIII of Annex I to the Joint Declaration which reads as “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom ... of travel, of movement ...”. It also reflects the relevant part of Section XIV which reads as “Unless restrained by law, holders of valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorization.”

The first draft of this article was formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986, which read as follows: “Hong Kong residents shall have freedom of movement of places of residence within Hong Kong, freedom of emigration to other countries and

149 *Overview of the Drafting Process*, Vol.1, pp.276-284.

150 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the Hong Kong Special Administrative Region.

regions and freedom to travel and to enter or leave Hong Kong. The Government of the Hong Kong Special Administrative Region shall, in accordance with law, issue travel documents to ensure the residents' realization of such freedoms."<sup>151</sup> The explanatory note to the article when its first draft was finalized read as follows: "Chapter III (6) of *Structure of the Basic Law (Draft)* lists 'freedom of movement and to enter or leave the country'. Freedom to travel is added as it is listed in Section XIII of Annex I to the Joint Declaration. 'Enter or leave the country' is replaced with 'enter or leave Hong Kong' so that the meaning is broader since entering or leaving Hong Kong is included other than entering or leaving the country."<sup>152</sup> When the second draft of the article was finalized, the expression "within Hong Kong" was replaced with "within the Hong Kong Special Administrative Region", and the second sentence of the article "The Government of the Hong Kong Special Administrative Region shall, in accordance with law, issue travel documents to ensure the residents' realization of such freedoms" was deleted.

The third draft of the article read as: "Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. Hong Kong residents holding valid travel documents shall have freedom to travel and to enter or leave the Region." There was the following explanatory note when the third draft was formulated:<sup>153</sup> "2. ... Since there is semantic problem in the expression 'Freedom

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151 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.276.

152 *Ibid*, pp.276-277.

153 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.277.

of movement of places of residence' in the 'discussion draft',<sup>154</sup> it is replaced with 'Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region'. 3. Considering the fact that residents who have resided in Hong Kong for less than one year are free to leave Hong Kong but are free to return to Hong Kong only after obtaining valid travel documents in accordance with the law, the last sentence of this provision is rewritten as: 'Hong Kong residents holding valid travel documents shall have freedom to travel and to enter or leave the Region'. 4. The sentence 'The Government of the Hong Kong Special Administrative Region shall, in accordance with law, issue travel documents to ensure the residents' realization of such freedoms' in the 'discussion draft' is deleted because article 5 of Chapter VII of the Basic Law has already made provision for this."<sup>155</sup>

Before the finalization of the fifth draft, some members of the Drafting Committee and some members of the Consultative Committee of the Special Group Concerned with Fundamental Rights and Duties of Residents of the Consultative Committee suggested that the last sentence be amended to read "Unless restrained by law, holders of valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorization.", following the

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154 *Chapter III – Fundamental Rights and Duties of the Residents of the Hong Kong Special Administrative Region (Discussion Draft)*, 2 March 1987 (Discussion Document for the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others, 9 March 1987), that is, the second draft of this article. *Overview of the Drafting Process*, Vol.1, p.277.

155 Refers to BL 154 (1) of the present Basic Law which reads as: "The Central People's Government shall authorize the Government of the Hong Kong Special Administrative Region to issue, in accordance with law, passports of the Hong Kong Special Administrative Region of the People's Republic of China to all Chinese citizens who hold permanent identity cards of the Region, and travel documents of the Hong Kong Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Region. The above passports and documents shall be valid for all states and regions and shall record the holder's right to return to the Region."

wording of Section XIV of Annex I to the Joint Declaration.<sup>156</sup> The article was amended by reference to this suggestion when its fifth draft was formulated and the fifth draft read as: “Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. Hong Kong residents holding valid travel documents shall have freedom to travel and to enter or leave the Region and, unless restricted by law, be free to leave the Region without special authorization.”

After the publication of the eighth draft of the article, namely *The Draft Basic Law (for solicitation of opinions), Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)* pointed out that the last sentence of the draft for solicitation of opinions was originally “Hong Kong residents holding valid travel documents shall have freedom to travel and to enter or leave the Region and, unless restricted by law, be free to leave the Region without special authorization.” There were views that the expression of “Hong Kong residents holding valid travel documents shall have freedom to travel and to enter or leave the Region” was not precise enough. This was because Hong Kong residents’ freedom to travel and to enter or leave the Region was pursuant to the provisions of Hong Kong law, but not on the premise of holding valid travel documents. Accordingly, this sentence was modified to “Hong Kong residents shall have freedom to travel and to enter or leave the Region, and Hong Kong residents holding valid travel documents, unless restricted by law, shall be free to leave the Region without special authorization”.<sup>157</sup>

156 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987; Special Group Concerned with Fundamental Rights and Duties of Hong Kong Residents, *Opinions on Draft Provisions of Chapter III of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987. *Overview of the Drafting Process*, Vol.1, pp.278-279.

157 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.282.

In formulating the ninth draft of the article, the second sentence was revised in accordance with the foregoing suggestion as “Hong Kong residents shall have freedom to travel and to enter or leave the Region, and Hong Kong residents holding valid travel documents, unless restricted by law, shall be free to leave the Region without special authorization”.

When the tenth draft of the article was finalized, the expression “Hong Kong residents holding valid travel documents” was replaced with “holders of valid travel documents”, and the remaining content and wording of the article remained unchanged substantively. The eleventh draft remained unchanged and was adopted as BL 31 in April 1990.

Prior to the finalization of the second draft of the article, the Working Group on Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee reached a consensus and the members of the Consultative Committee agreed unanimously that for all types of residents of the HKSAR, whether their residency was temporary or permanent and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom ... to form and join trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by law.<sup>158</sup>

After the publication of the eighth draft of the article (draft

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158 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.277.

for solicitation of opinions), the Consultative Committee received considerable objections. There was an opinion as follows: “There is no article in the draft for solicitation of opinions mentioning anyone has the right to apply for a valid travel document, and the article only states that Hong Kong residents can only apply for permanent identity cards and does not mention applications for valid travel documents. If there are laws restricting the obtaining of travel documents, the residents’ freedom of travel and freedom of entry and exit will also be restricted. In foreign countries, citizens are automatically entitled to obtain such documents.” It was also considered that BL 162<sup>159</sup> already fully empowered the HKSARG to issue passports, and BL 8 pointed out that the laws previously in force in Hong Kong, including the common law, would be retained except those in contravention of the Basic Law and there was no article in the draft which restricted the freedom of entry and exit of residents, and therefore the current immigration laws could continue.<sup>160</sup> Some members of the Consultative Committee were of the view that so long as there is the right of abode, the residents could enjoy freedom of travel and of entry and exit.<sup>161</sup>

During the consultation at the later stage of the drafting of the article, there were a number of opinions on the expression “unless restricted by law”. The opinions on the eighth draft of the article (draft for solicitation of opinions) made by the Special Group Concerned with Fundamental Rights and Duties of Hong Kong Residents of the Consultative Committee included rewriting the expression “unless restricted by law” as “unless restricted by law for special

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159 The current BL 154.

160 Secretariat of the Consultative Committee, *Report on the Preliminary Response to the Draft Basic Law (for solicitation of opinions)*, May 1988 in *Overview of the Drafting Process*, Vol.1, p.279.

161 *Minutes of the Meeting between Members of the Drafting Committee and the Special Group on Residents of the Consultative Committee*, 8 September 1988 in *Overview of the Drafting Process*, Vol.1, p.280.



reasons”.<sup>162</sup> Prior to the finalization of the tenth draft, a member of the Consultative Committee of the Special Group on Inhabitants’ and Other Persons’ Rights, Freedom, Welfare and Duties opined that the expression “unless restricted by law ... without special authorization” was of unclear meaning, as it could refer to restrictions imposed by reason of contravention of the law, or to restrictions on freedom of entry and exit imposed by the LegCo through legislation. However, some members were of the view that “unless restricted by law” should refer to restrictions imposed as a result of a breach of criminal law rather than legal restrictions imposed by immigration procedures.<sup>163</sup>

The “Explanations”<sup>164</sup> made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

## Article 32

“Hong Kong residents shall have freedom of conscience.

Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.”

According to drafting materials in *Overview of the Drafting Process*,<sup>165</sup> this article had gone through eleven drafts. This article

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162 Consultative Committee, *Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.280.

163 *Minutes of the Third Meeting of the Second Consultation Period of the Special Group on Residents*, 25 August 1989 in *Overview of the Drafting Process*, Vol.1, p.282.

164 *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 National People’s Congress, 28 March 1990).

165 *Overview of the Drafting Process*, Vol.1, pp.285-292.



reflects the relevant part of Article 3(5) of the Joint Declaration<sup>166</sup> and of Section XIII of Annex I to the Joint Declaration which read as: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom ... of belief ...”

The seventh item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 is “freedom of religion and conscience”.<sup>167</sup> The first draft of the article formulated by the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986 read: “Hong Kong residents shall have freedom of religion and conscience”.<sup>168</sup> The second draft of the article was revised as “Hong Kong residents shall have freedom of religion and freedom to conduct and participate in religious activities. Hong Kong residents shall have freedom of other conscience.” When the third draft of the article was formulated, freedom to preach and to publicly conduct religious activities was added to the first sentence. The explanatory note to the article when the fourth draft was finalized read as: “Replace the sentence ‘Hong Kong residents shall have freedom of other conscience’ with ‘Hong

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166 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the Hong Kong Special Administrative Region.

167 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.285. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

168 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.285.

Kong residents shall have freedom of conscience' and make it the first paragraph". It also proposed to make the sentence "Hong Kong residents shall have freedom of religious belief and freedom to preach and to publicly conduct and participate in religious activities" the second paragraph, and to replace the original provision of "freedom of religion" with "religious belief".<sup>169</sup> The revised fourth draft read: "Hong Kong residents shall have freedom of conscience. Hong Kong residents shall have freedom of religious belief and freedom to preach and to publicly conduct and participate in religious activities." There was no substantial change in the content or wording in the fifth to eighth drafts of the article.

After the publication of the eighth draft of the article, namely *Draft Basic Law (for solicitation of opinions), Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)* pointed out that: "Paragraph 2 of the draft for solicitation of opinions was originally 'Hong Kong residents shall have freedom of religious belief and freedom to preach and to publicly conduct and participate in religious activities'. In accordance with the opinions raised by people from the religious community of Hong Kong, it has been revised this time as 'Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.' *The two words 'in public' have been placed before preach. [Editor's Note: The above sentence is a translation of its Chinese version which describes the change in the Chinese draft of this article. The change cannot be discerned from the two preceding sentences here owing to the differences between the two languages.]*"<sup>170</sup> The ninth draft of the article was amended in accordance with this suggestion when it was formulated and remained

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169 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.288.

170 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p. 291.

unchanged thereafter. Subsequently, the eleventh draft was adopted as BL 32 in April 1990.

There was the following explanatory note when the first draft of the article was formulated: “Chapter III (7) of *Structure of the Basic Law (Draft)* sets out the content of this article. The relevant provisions on religion in Section XIII of Annex I to the Joint Declaration should be included in the religious policies in Chapter VI (4).”<sup>171</sup>

Prior to the finalization of the second draft of the article, the Working Group on Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee reached a consensus and the members of the Consultative Committee agreed unanimously that for all types of residents of the HKSAR, whether their residency was temporary or permanent and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom ... of conscience ... should all be protected by the law .<sup>172</sup>

The Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee pointed out in the explanatory note to the third draft of this article that: “1. According to the opinions of the members of this subgroup, the expression ‘freedom to preach and to publicly conduct and participate in religious activities’ has been added to freedom of religion. 2. Some members of this subgroup

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171 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.285.

172 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.286.

proposed to add the following, ‘religious groups may accept money and property donated by members of society and run social charitable welfare,’ to the content. Some members believed that donations could be included in religious activities and that this chapter should only make in principle provision and should not be too specific. In addition, if it is only stipulated that religious groups are entitled to accept donations, there will be a question of whether it should be stipulated that other groups can also accept donations. 3. Some members of this subgroup proposed to add the expression ‘Hong Kong residents shall have the freedom to sponsor religious undertakings; freedom of conscience shall not be restricted by age; any person may also explain beliefs to persons of any age’ to the article. 4. Some members of this subgroup proposed to add, ‘religious groups may maintain and develop relations with foreign religious organizations,’ to the content. The subgroup suggested that consideration could be given to making provision in Chapter VI.”<sup>173</sup> In relation to the content of point 4 of the explanatory note, the Drafting Committee subsequently recommended that provision was to be made after the two subgroups on “residents” and “education, technology & culture” had studied the same.<sup>174</sup>

Prior to the finalization of the fourth draft of the article, some members of the Drafting Committee considered it inappropriate to stipulate “freedom of conscience” in this article, because what this article prescribed was freedom of religion. If freedom of belief referred to freedom of thought, this would be no longer an issue of religion, and they proposed to create another article. However, some members of the Drafting Committee said that “freedom of conscience” was stipulated in both the Joint Declaration and international covenants of

173 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.286.

174 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.286.

human rights. The Basic Law should make provision for it, and it was not necessary to create another article but could include the same in Paragraph 2 of this article.<sup>175</sup>

During the drafting of the article, there was much discussion about whether this article's guarantee for religious freedom was adequate. For example, an opinion shown in Annex II of the Fourth Resumed Session of the Eighteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of 22 June 1987 read as: "The universally recognized minimum standard of freedom of religion was first suggested in the Universal Declaration of Human Rights and later restated in the International Covenant on Economic, Social and Cultural Rights, and was specified in many other constitutions. Such standard is: '(Everyone has the) freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.' The rights currently provided for in BL 9 are inadequate and, in some respects, the right of teaching, practice, worship and observance is not even specified at all. In particular, the right ... to publicize religious beliefs and to teach religious beliefs should be clearly stipulated ..."<sup>176</sup> In *Final Report on the Fundamental Rights and Duties of Hong Kong Residents, Vol.II* of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee, which was passed by the Executive Committee on 8 August 1987, there was a recommendation that the article be amended as: "The residents of the Hong Kong Special Administrative Region shall have freedom of thought, belief and religion. This right shall include freedom to have or to adopt a religion or belief of one's choice, and freedom, either alone or in community

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175 Ibid.

176 *Opinions on the Draft of Chapter V of the Basic Law (Draft of 30 April 1987) for Discussion at the Meeting to be held on 16 June 1987* (Annex II of the Fourth Resumed Session of the Eighteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of 22 June 1987) (remark: the expression "Chapter V" should have been a mistake for "Chapter III"), by Lo Kit Chee, 4 June 1987 in *Overview of the Drafting Process*, Vol.1, p.287.

with others and in public or private, to manifest one's religion or belief in worship, observance, practice, and teaching.”<sup>177</sup> According to the drafting materials in *Overview of the Drafting Process*, some members of the Consultative Committee suggested more than once that this article be amended by reference to international conventions and declarations of human rights during the subsequent drafting process, and the Consultative Committee also received similar proposals.<sup>178</sup>

As stated in the explanatory note to the article when its fifth draft was formulated: “Some members suggested that a third paragraph should be added to this article: ‘No person should be discriminated against or suffer loss of his or her civil rights because of his or her religious beliefs.’”<sup>179</sup>

According to *Minutes of the Meeting between Members of the Drafting Committee and the Special Group on Residents of the Consultative Committee* of 8 September 1988, some members of the Consultative Committee asked why the article did not refer to “freedom of political belief and thought”. Some members of the Drafting Committee responded that conscience already included political belief.<sup>180</sup> On the eighth draft of the article (draft for solicitation of opinions), the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee expressed the following opinion: “Some members believed that there was no uniform definition of religion and this article might lead to the growth of evil cults. Some

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177 *Overview of the Drafting Process*, Vol.1, p.287.

178 Recorded in *Minutes of the Meeting between Members of the Drafting Committee and the Special Group on Residents of the Consultative Committee*, 8 September 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.288-292.

179 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.1, p.288.

180 *Overview of the Drafting Process*, Vol.1, p.289.

members asked to add the expression ‘freedom to preach according to law’. However, some members held the view that the sentence ‘The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.’ contained in BL 39 was already sufficient to tackle the problems of ‘preaching illegally’ and ‘evil cults’, etc.”<sup>181</sup>

The “Explanations”<sup>182</sup> made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

### Article 33

“Hong Kong residents shall have freedom of choice of occupation.”

According to drafting materials in *Overview of the Drafting Process*, this article had gone through eleven drafts.<sup>183</sup> The eighth item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 is “freedom of choice of occupation, freedom of academic research”.<sup>184</sup> This article reflects the relevant part of Article 3(5) of

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181 Consultative Committee, *Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.289.

182 *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 National People’s Congress, 28 March 1990).

183 *Overview of the Drafting Process*, Vol.1, pp.293-295.

184 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.293. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.



the Joint Declaration<sup>185</sup> and of Section XIII of Annex I to the Joint Declaration which read as “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including ... choice of occupation ...” The text of this article remained unchanged throughout the drafting process.

*Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)* of April 1986 shows that there was an opinion that BL 26 to BL 33 could be combined as one article, i.e. “The government shall not infringe the fundamental rights and freedoms, including the various rights and freedoms listed in Annex I to the Joint Declaration and other rights and freedoms safeguarded by the common law”.<sup>186</sup> This opinion was not adopted.

Prior to the finalization of the second draft of the article, the Working Group on Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee discussed more than once and reached a consensus: in the discussions of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee, members of the Consultative Committee agreed unanimously that for all types of residents of the HKSAR, whether their residency was temporary or permanent and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of the person, of speech, of publication, of assembly, of association, to form and join

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185 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the Hong Kong Special Administrative Region.

186 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.293.



trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by the law.<sup>187</sup>

At a later stage of the drafting of the article, the Drafting Committee considered a suggestion from Hong Kong on the eighth draft of the article (draft for solicitation of opinions): that the expression “provision of employment security and vocational training” should be added to the article.<sup>188</sup>

The Consultative Committee received various proposals for amending the article, including: inserting into the article provisions that the government should provide adequate employment opportunities, vocational training, etc.; adding certain occupational guarantees provided for under international conventions<sup>189</sup> such as equal pay for equal work, equal treatment, and equal employment and promotion opportunities for men and women;<sup>190</sup> and adding the expression “the right to work” to the article on the grounds that: “The right to work, as a type of human right, has the following important

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187 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.293.

188 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, August 1988 in *Overview of the Drafting Process*, Vol.1, p.295.

189 Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and International Labour Conventions.

190 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.295.

meaning. The first one is the freedom to choose job and the state cannot force people to do a certain type of job; the second one is the right to request the state to provide jobs”; and “...the constitutions of many countries stipulate that the state has a duty to create job opportunities or keep the unemployment rate low”.<sup>191</sup> None of the above proposals were adopted.

The “Explanations”<sup>192</sup> made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

### Article 34

“Hong Kong residents shall have freedom to engage in academic research, literary and artistic creation, and other cultural activities.”

According to drafting materials in *Overview of the Drafting Process*, this article had progressed through eleven drafts.<sup>193</sup> The eighth item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 is “freedom of choice of occupation, freedom of academic research”.<sup>194</sup> This article reflects the relevant

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191 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.295.

192 *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 National People’s Congress, 28 March 1990).

193 *Overview of the Drafting Process*, Vol.1, pp.296-298.

194 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.296. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

part of Article 3(5) of the Joint Declaration<sup>195</sup> and of Section XIII of Annex I to the Joint Declaration which read as “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including ... academic research ...” The text of this article remained unchanged throughout the drafting process.

*Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)* of April 1986 shows that there was an opinion that BL 26 to BL 33 could be combined as one article, i.e. “The government shall not infringe the fundamental rights and freedoms, including the various rights and freedoms listed in Annex I to the Joint Declaration and other rights and freedoms safeguarded by the common law”.<sup>196</sup> This opinion was not adopted.

The explanatory note to the article when its first draft was formulated read as: “Chapter III (8) of *Structure of the Basic Law (Draft)* lists ‘freedom of choice of occupation, freedom of academic research’. In view of the different nature of these two types of freedoms, they are divided into BL 10 and 11<sup>197</sup> for stipulation. Making reference to the opinions collected in the survey of Hong Kong, freedom of literary and artistic creation is added to BL 11.”<sup>198</sup>

195 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the Hong Kong Special Administrative Region.

196 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.296.

197 Refers to the current BL 33 and BL 34.

198 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.296.

Prior to the finalization of the second draft of the article, the Working Group on Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee discussed more than once and reached a consensus: in the discussions of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee, members of the Consultative Committee agreed unanimously that for all types of residents of the HKSAR, whether their residency was temporary or permanent and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of the person, of speech, of publication, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by the law.<sup>199</sup>

In relation to the second draft of this article (discussion draft), some members of the Consultative Committee considered that “academic research” was only one part of “academia” and suggested that freedom of “academic research” be changed to “academic” freedom.<sup>200</sup> This suggestion was not adopted.

At a later stage of the drafting of the article, the Drafting Committee considered an opinion from the Mainland on *Draft Basic Law (for solicitation of opinions)* that “academic research” should be

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199 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others of 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.296.

200 *Minutes of the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others (Revised)*, 9 March 1987 in *Overview of the Drafting Process*, Vol.1, p.297.

changed to “scientific research” due to the significance of the latter and “academic research” was already included in “cultural activities”.<sup>201</sup>

The “Explanations”<sup>202</sup> made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

## Article 35

“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

According to drafting materials in *Overview of the Drafting Process*, this article had progressed through eleven drafts.<sup>203</sup> The ninth item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 is: “The right to confidential legal advice, access to the courts, choice of lawyers for representation in the courts, and to judicial remedies. Residents shall have the right to challenge the actions of the executive authorities in the courts in accordance with the

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201 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.1, p.298.

202 *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 National People’s Congress, 28 March 1990).

203 *Overview of the Drafting Process*, Vol.1, pp.299-306.

law.”<sup>204</sup> This article reflects the relevant part of Section XIII of Annex I to the Joint Declaration which reads as “Every person shall have the right to confidential legal advice, access to the courts, representation in the courts by lawyers of his choice, and to obtain judicial remedies. Every person shall have the right to challenge the actions of the executive in the courts.”

The first draft of this article read:

“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to challenge the acts of the executive authorities and their personnel in the courts.”

When the second draft of the article was finalized, the word “challenge” in Paragraph 2 was replaced with “commence legal actions against”. There were no changes in the third and fourth drafts. When the fifth draft of the article was finalized, the expression “commence legal actions against” in Paragraph 2 was changed back to the word “challenge”. There was no substantial change in the content or wording in the sixth to eighth drafts of the article. Before the finalization of the ninth draft of the article, the Subgroup on Fundamental Rights and Duties of Hong Kong Residents raised a suggestion on the amendment of the article which read as: “Paragraph 2 of the draft for solicitation of opinions originally read as ‘Hong Kong residents shall have the right to challenge the acts of the executive authorities and their personnel in the courts.’ Following the opinions of some people from Hong Kong, it is amended this time to read ‘Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.’ The word ‘challenge’ is replaced with the expression ‘institute legal proceedings

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204 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.299. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

against’.”<sup>205</sup> The ninth draft of the article was amended accordingly by replacing the expression “challenge ... in the courts” with “institute legal proceedings in the courts” in Paragraph 2. The article remained unchanged afterwards and was adopted as BL 35 in April 1990.

*Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)* of April 1986 shows that it was proposed to replace the word “actions” in the sentence “Residents shall have the right to challenge the actions of the executive authorities in the courts in accordance with the law” in *Structure of the Basic Law (Draft)* referred to above with the expression “illegal actions” or “violations of civil rights”, and to delete the expression “in accordance with the law”. When the first draft of the article was finalized, Paragraph 2 read “Hong Kong residents shall have the right to ... in the courts.” and the expression “in accordance with the law” was not found. There was also an opinion that BL 26 to BL 33 could be combined as one article, i.e. “The government shall not infringe the fundamental rights and freedoms, including the various rights and freedoms listed in Annex I to the Joint Declaration and other rights and freedoms safeguarded by the common law”.<sup>206</sup> This opinion was not adopted.

When the first draft of the article was finalized, its explanatory note read: “Section XIII of Annex I to the Joint Declaration and Chapter III (9) of *Structure of the Basic Law (Draft)* set forth the content of this article. Besides, the expressions ‘choice of lawyers for timely protection of their lawful rights and interests’ and ‘Hong Kong residents shall have the right to challenge the acts of the executive

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<sup>205</sup> *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)*, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.305.

<sup>206</sup> *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.299.



personnel in the courts’ are inserted.’<sup>207</sup>

After the release of the second draft of the article (discussion draft), some members of the Consultative Committee recommended that the expression “executive authorities” be replaced by “executive authorities of the Government” to make the meaning clearer while some members of the Drafting Committee considered that there was only one executive authority in Hong Kong so the expression “executive authorities” of course meant the executive authority of the Government.<sup>208</sup> The explanatory note to the article when its third draft was formulated read as: “1. Some members suggested that the expression ‘Hong Kong residents’ be replaced with ‘any person’, but this suggestion was not adopted taking into account that the rights of ‘other persons’ are provided for in BL 18<sup>209</sup> of this Chapter. 2. The expression ‘commence legal actions against’ should be used when it comes to the courts so the word ‘challenge’ in Paragraph 2 of the ‘discussion draft’<sup>210</sup> has been replaced with ‘commence legal actions against’. 3. Some members held the view that the expression ‘residents shall have the right to file complaints with the executive authorities’ should be added in Paragraph 2 but this suggestion was not adopted taking into account that this article is to provide for the rights of Hong

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207 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.299.

208 *Minutes of the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others (Revised)*, 9 March 1987 in *Overview of the Drafting Process*, Vol.1, p.300.

209 Refers to the current BL 41.

210 *Chapter III – Fundamental Rights and Duties of the Residents of the Hong Kong Special Administrative Region (Discussion Draft)*, 2 March 1987 (Discussion Document for the Fourteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others, 9 March 1987), i.e. the second draft of this article. *Overview of the Drafting Process*, Vol.1, p.300.



Kong residents in court.”<sup>211</sup>

Prior to the finalization of the fourth draft of the article, some members of the Drafting Committee were of the view that whether the executive authorities and executive personnel referred to in the article were limited to local ones needed to be studied.<sup>212</sup>

The Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee pointed out in the explanatory note of the time when the fourth draft of the article was formulated that: “The question of whether Hong Kong residents shall have the right to commence legal actions in the courts of Hong Kong against the acts of central state organs and their personnel is to be decided after study with the relevant subgroups”.<sup>213</sup> Later, some members of the Drafting Committee suggested that the reference to “central state organs” in the explanatory note be changed to “central organs stationed in Hong Kong”.<sup>214</sup> When the fifth draft of the article was finalized, the explanatory note was revised to read as: “The question of whether Hong Kong residents shall have the right to commence legal actions in the courts of Hong Kong against the acts of central organs stationed in Hong Kong and their personnel, this group proposes that the relevant

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211 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.300.

212 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, pp.300-301.

213 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, pp.301-302.

214 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.1, p.302.

subgroups make provisions for it in the matter on the jurisdiction of the courts.”<sup>215</sup>

During the drafting of the article, a number of opinions were made regarding the term “executive personnel” in Paragraph 2. Prior to the finalization of the fifth draft, some members of the Drafting Committee pointed out that the expression “executive personnel” was not included in the Joint Declaration, and that its concept and meaning were unclear and it should be deleted.<sup>216</sup> At the later stage of the drafting of the article, at the meeting between members of the Drafting Committee and the Special Group on Residents of the Consultative Committee held on 8 September 1988, some members of the Consultative Committee asked whether the executive personnel represented the executive officers or some other party, and hoped that members of the Drafting Committee could specify. In response, a member of the Drafting Committee pointed out that the executive authorities and executive personnel in this article were not designated to be civil servants. This was because the concept of civil servants in Hong Kong covered a wide range of officials but members of the Drafting Committee were of the view that it was usually only the executive authorities and executive personnel would have the tendency to infringe the rights of residents, not the general civil servants.<sup>217</sup> Subsequently, some members of the Consultative Committee recommended that Paragraph 2 of the article be amended to read “Residents of the Hong Kong Special Administrative Region shall have the right to challenge the acts of the government departments and

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215 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.1, p.302.

216 Ibid, footnote 214.

217 *Minutes of the Meeting between Members of the Drafting Committee and the Special Group on Residents of the Consultative Committee*, 8 September 1988 in *Overview of the Drafting Process*, Vol.1, p.303.

public servants”.<sup>218</sup> The recommendation was not adopted.

During the drafting of the article there was a dispute as to whether the word “challenge” should be used in Paragraph 2 of the article. Before finalizing the fifth draft of the article, some members of the Drafting Committee held the view that the expression “commence legal actions against” was different from “challenge”, and that the term “challenge” was used in the Joint Declaration and should be adopted in this article.<sup>219</sup> As mentioned above, when the fifth draft of the article was finalized, the expression “commence legal actions against” was revised back to the word “challenge”. Subsequently, some members of the Consultative Committee considered that the meaning of the expression “challenge ... in the courts” was not necessarily equivalent to “institute proceedings ... in the courts” and hoped that changes could be made in accordance with the general common law practice.<sup>220</sup> When the ninth draft was finalized, the expression “challenge ... in the courts” in Paragraph 2 was replaced with “institute legal proceedings in the courts”.<sup>221</sup>

As to the term “lawful rights and interests” in Paragraph 1 of the article, the explanatory note at the time the fifth draft of the article was finalized, which is included in *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee of December 1987, read as: “Some members proposed to delete the word ‘lawful’ from the term ‘lawful rights and interests’”.<sup>222</sup> The proposal was not adopted.

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218 Consultative Committee, *Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.303.

219 Ibid, footnote 214.

220 Ibid, footnote 218.

221 See above.

222 Ibid, footnote 215.

The “Explanations”<sup>223</sup> made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

### Article 36

“Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law.”

According to drafting materials in *Overview of the Drafting Process*, this article had progressed through eleven drafts.<sup>224</sup> The tenth item in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 reads as: “The right to social welfare in accordance with law ...”.<sup>225</sup>

There is no direct reference in the Joint Declaration to social welfare policy or system, or labour rights, of the HKSAR. According to drafting materials in *Overview of the Drafting Process*, at a seminar in 1986, some representatives of the labour sector raised the need for the issue of labour welfare to be included in the Basic Law. This suggestion was accepted by the Drafting Committee and, as a result, an article was added stipulating that the welfare benefits of the labour force would be protected by law. But they all understood that this article could not be written in a too specific way and could only set

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223 *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 National People’s Congress, 28 March 1990).

224 *Overview of the Drafting Process*, Vol.1, pp.307-327.

225 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.307. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

out the principle.<sup>226</sup> *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)* of April 1986 shows that it was proposed to list separately the interests and welfare of the labour force as one section.<sup>227</sup>

The first draft of this article read as “Hong Kong residents shall have the right to social welfare. The welfare benefits of the labour force shall be protected by law.” When the second draft was finalized, the expression “welfare benefits” in the second sentence was changed to “legitimate interests”. When the third draft was finalized, the expression “legitimate interests” was changed back to “welfare benefits”. There was no substantial change in the content or wording of the fourth to eighth drafts of the article. Before the finalization of the ninth draft of the article, the Subgroup on Fundamental Rights and Duties of Hong Kong Residents had an amendment suggestion which read as: “The draft for solicitation of opinions originally read: ‘Hong Kong residents shall have the right to social welfare. The welfare benefits of the labour force shall be protected by law.’ In accordance with the opinion of some people from Hong Kong, it has been amended to read: ‘Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits of the labour force shall be protected by law.’ *The expression ‘in accordance with law’ has been inserted before ‘shall have ... social welfare’.* [Editor’s Note: *The above sentence is a translation of its Chinese version which describes the change in the Chinese draft of this article. The change cannot be discerned from the above sentence owing to the differences between the two languages.*]<sup>228</sup> Such suggestion was adopted when

226 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.1, p.323.

227 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.307.

228 *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles (9 January 1989)*, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, pp.325-326.

the ninth draft of the article was finalized and the expression “in accordance with law” was inserted after “shall have the right to social welfare”. When the eleventh draft was finalized, the expression “and retirement security” was added after the term “welfare benefits” and this draft was adopted as BL 36 in April 1990.

The explanatory note to the article when its first draft was formulated read as follows: “Chapter III (10) of *Structure of the Basic Law (Draft)* lists ‘The right to social welfare in accordance with law ...’. The sentence ‘The welfare benefits of the labour force shall be protected by law’ has been added in response to the opinions collected from the survey of Hong Kong ...”<sup>229</sup>

Prior to the finalization of the second draft of the article, in the discussion paper of the Working Group on Welfare Policy and Labour Policy of the Special Group on Residents of the Consultative Committee, there were the following representations on how the policy of social welfare was written in the Basic Law:

“In view of various reasons including the citizens’ gradual attachment of importance to social welfare, it is necessary for social welfare policy to be included in the Basic Law, and the commoners agree that it should not be written with too much detail because social welfare policy is formulated based on the special needs of the political, social, economic and other environments at that time, and it needs to be continuously improved if the requirements of the citizens are to be satisfied; also, the Basic Law is a constitutional law and cannot be changed at any time so this part should be made flexible and cannot be written too meticulously. However, it is difficult to define its exact degree of detail. The following opinions from various perspectives are conducive to the writing of welfare policy in the Basic Law:

(1) Different concepts of social welfare in socialist and capitalist

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229 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Resident of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.307.

countries:

In general in socialist countries, social welfare is the property of the people so it is a right of the people, and therefore everyone enjoys social welfare. But in capitalist society, the nature of social welfare is substantially different - it is supplementary to capitalism, so welfare becomes a part of capitalism and is not wealth and cannot be owned by anyone, and therefore it is not a human right.<sup>230</sup> In capitalist society, due to changes in economic conditions, welfare differs according to time and even decreases. The noun welfare has no fixed substance and people cannot own social welfare which cannot be defined. In Hong Kong, therefore, the enjoyment of welfare is not a right. On the other hand, Hong Kong will be a part of China but there will be no situation where the government assumes all the responsibility for welfare as in socialist countries. Thus, it must be written in the Basic Law of Hong Kong that the 'Hong Kong-style social welfare system' shall be safeguarded.

(2) Legislative guarantee:

According to the tenth section 'the right to social welfare in accordance with law' of Chapter III of *Structure of the Basic Law (Draft)*, Hong Kong should have a set of legislation on welfare policy in the future. At present, however, the social welfare of Hong Kong has no law to lean on because it depends on government policy and is not guaranteed by law. Among the more than a thousand ordinances of Hong Kong, only about 50 to 60 relate to social welfare organizations and none of them state directly the provision of welfare. Although a few ordinances deal with welfare, they focus on marriage law or administrative law. Currently, the welfare of Hong Kong is only created after the policy is formulated. The welfare policy is a

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230 Subsequently, however, the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents of the Consultative Committee received the view that "... enjoyment of social welfare services is the right of every citizen". Ng Mung Zan, *Social Welfare* (Annex IV of the Second Meeting of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents, 6 February 1987) in *Overview of the Drafting Process*, Vol.1, p.311.



five-year plan extended annually. The policy would be adopted by the Executive Council after consultation with a committee jointly composed of social welfare and social services. The Legislative Council only debates in the annual policy addresses of the governor of Hong Kong or discusses welfare policy in the Finance Committee. The Legislative Council cannot legislate on welfare because welfare policy is not legislation at all. If welfare is to be legislated, the whole procedural system and foundation for collating and stipulating the policy will need to be changed.

...

(6) Chapters and sections:

In *Structure of the Basic Law (Draft)*, social welfare policy is stated in Chapter III on 'Fundamental Rights and Duties of Hong Kong Residents'. There was, however, a view that the decision-making power of welfare policy was related to the treatment of education, science, technology, culture, sports and religion (policies made by the Government of the Hong Kong Special Administrative Region on its own), so it was suggested that the word 'welfare' should be added to the title of Chapter VI of *Structure of the Basic Law (Draft)* and that welfare policy and system should be included in the sixth section."<sup>231</sup>

Later, the Working Group on Welfare Policy and Labour Policy of the Special Group on Residents considered different suggestions for specific provisions and content regarding social welfare policy and system. Such suggestions were that the provisions and content on welfare policy and system should be stated in Chapter VI of the Basic Law. The provisions on welfare policy and system are contained in Chapter VI of the present Basic Law.

Prior to the finalization of the second draft, in addition to the welfare policy as mentioned above, the Working Group on Welfare

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231 Working Group on Welfare Policy and Labour Policy of the Special Group on Residents, *Discussion Paper on Welfare Policy and Labour Policy (Draft)*, 20 January 1987 (Discussion Paper of the First Meeting of the Working Group on Welfare Policy and Labour Policy, 23 January 1987) in *Overview of the Drafting Process*, Vol.1, p.308.



Policy and Labour Policy of the Special Group on Residents of the Consultative Committee also held more than one meeting to discuss how to describe the labour policy in the Basic Law. *Discussion Paper on Welfare Policy and Labour Policy (Draft)* of the Working Group on Welfare Policy and Labour Policy of the Special Group on Residents of 20 January 1987 (Discussion Paper of the First Meeting of the Working Group on Welfare Policy and Labour Policy of 23 January 1987) shows that: "... The term 'Labour' should be inserted in Chapter VI of *Structure of the Basic Law (Draft)* on education, science, technology, culture, sports and religion of the Hong Kong Special Administrative Region, and provisions concerning labour system and welfare should be included in this chapter."<sup>232</sup> Thereafter, the Working Group received a proposal on the content of the labour policy to be added to Chapter VI of *Structure of the Basic Law (Draft)*.<sup>233</sup> The provisions relating to labour policy are contained in Chapter VI of the present Basic Law.

*Proposals for the Basic Law on "Rights and Duties of Hong Kong Residents"* of the Basic Law Concern Group of The Hong Kong Federation of Trade Unions (Annex IV of the Third Meeting of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents of 13 February 1987) shows the view that the Basic Law should clearly set out the guiding principles of labour policy: "... the working class ... is the driving force of social production. It has contributed strength to the construction of the whole society and deserves proper care and protection. Looking around the world, the laws of a constitutional nature formulated by many countries and regions state explicitly provisions for protection of labour. In *Structure of the Basic Law (Draft)*, however, this principle is not explicitly stated, which is a shortcoming. We believe receipt of balanced care by the interests of all classes of Hong Kong is a matter

<sup>232</sup> *Overview of the Drafting Process*, Vol.1, p.309.

<sup>233</sup> *Summary of the Opinions of the Joint Conference on the Basic Law of the Labour Sector on Questions relating to Basic Labour Rights* (Annex III of the Third Meeting of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents, 13 February 1987) in *Overview of the Drafting Process*, Vol.1, p.316.

of course, and therefore, principles of labour protection policy should be listed explicitly in the Basic Law. We propose that the Basic Law can confirm the following five basic principles of labour protection: (1) labour welfare and labour conditions should be prescribed by law; (2) labour's right of solidarity and right to collective bargaining should be protected; (3) trade unions have the right to bargain collectively on behalf of workers; (4) labour can have the freedom to join trade unions and to strike;<sup>234</sup> (5) local and foreign trade unions are free to make connections;<sup>235</sup> a general trade union may be formed by trade unions of different industries ...<sup>236</sup>

There was the following discussion on the labour retirement system at that time: "At present, there is no comprehensive set of policy on labour welfare protection in Hong Kong, especially in terms of the retirement system. The pension of an employee is not a benefit that every employee can enjoy and it varies with the welfare system of each company or organization. This is because the law does not stipulate that companies must provide pension benefits to employees. As of January 1986, the government started to introduce long service payments to protect employees who have served a certain number of years in a certain organization, but these are not the same as pensions which are specific safeguards ..."<sup>237</sup>

The Working Group on Welfare Policy and Labour Policy of the Special Group on Residents also took into account Hong Kong's link with the International Labour Organization<sup>238</sup>, the international

234 The current BL 27 reads as: "Hong Kong residents shall have ... the right and freedom to form and join trade unions, and to strike."

235 The current BL 149 reads as: "Non-governmental organizations in fields such as ... labour ... as well as religious organizations in the Hong Kong Special Administrative Region may maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organizations. They may, as required, use the name 'Hong Kong, China' in the relevant activities."

236 *Overview of the Drafting Process*, Vol.1, p.317.

237 Ibid, footnote 231, p.309.

238 Ibid; and Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents, *Discussion Paper on Social Welfare Policy and Labour Policy (Draft)*, 13 February 1987 in *Overview of the Drafting Process*, Vol.1, pp.314-315.

labour covenants applicable in Hong Kong at that time<sup>239</sup> and their implementation in Hong Kong.<sup>240</sup> Also, there was a view which read as: “Much of the existing labour legislation of Hong Kong is based on international labour conventions. Therefore, international labour conventions have considerable influence on Hong Kong labour. To ensure that the relevant conventions can continue to be implemented in the future and that Hong Kong’s labour legislation can be amended or new law can be introduced in accordance with these conventions, we propose to state a provision in principle in the Basic Law which reads: ‘International labour conventions applicable to Hong Kong should be recognized’, so that the conventions applicable before 1997 will continue to be valid and those applicable after 1997 should also be recognized.”<sup>241</sup> The said proposal was adopted in the current BL 39 which reads: “The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region ... ”

*Discussion Paper on Labour Policy (Revised)* of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents of 14 March 1987 (Discussion Paper of the Fifteenth Meeting (Labour Policy) of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others of 27 March

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239 *Applicability of the International Labour Covenants in Hong Kong (up to 31 December 1985)* (Annex I of the Third Meeting of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents, 13 February 1987) in *Overview of the Drafting Process*, Vol.1, pp.315-316.

240 So Mok Sau Haan, *Applicability of the International Labour Covenants in Hong Kong* (Annex I of the Third Meeting of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents, 13 February 1987) in *Overview of the Drafting Process*, Vol.1, p.316.

241 The Basic Law Concern Group of The Hong Kong Federation of Trade Unions, *Proposals for the Basic Law on “Rights and Duties of Hong Kong Residents”* (Annex IV of the Third Meeting of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents, 13 February 1987) in *Overview of the Drafting Process*, Vol.1, p.317.

1987) and *Discussion Paper on Labour Policy (Revised)* of the Working Group on Social Welfare Policy and Labour Policy of the Special Group on Residents of 28 March 1987 (which was passed by the Executive Committee on 4 April 1987 as the *Final Report on Labour Policy* of the Special Group on Residents) set out the laws of Hong Kong relating to labour at that time.<sup>242</sup>

The explanatory note to the article at the time its third draft was formulated read as: “1. Some members suggested that the ‘welfare benefits’ of the labour force in this article be changed to ‘legitimate interests’. It was not changed considering that this article stipulates the rights of residents in respect of social welfare. 2. Social welfare and labour policy have already been included in Chapter VI ...”<sup>243</sup>

Before the finalization of the fourth draft of the article, some members of the Drafting Committee considered that the expression “the welfare benefits of the labour force shall be protected by law” could be deleted because the welfare of others was also protected by law but this was not stipulated. Another view was that the provision in this article that “Hong Kong residents shall have the right to social welfare” would turn Hong Kong into a welfare society; and that a feature of Hong Kong was the government did not bear the responsibility for social welfare, and if the said provision was made whereas residents did not enjoy any welfare, they could sue the government. It was suggested to write only that social welfare would be provided for by Hong Kong legislation, or to rewrite it as “the

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242 Including: *Employment Ordinance* (Cap. 57); *Employees’ Compensation Ordinance* (Cap. 282); *Trade Unions Ordinance* (Cap. 332); *Labour Tribunal Ordinance* (Cap. 25); *Factories and Industrial Undertakings Ordinance* (Cap. 59); and *Labour Relations Ordinance* (Cap. 55), etc. in *Overview of the Drafting Process*, Vol.1, pp.320-322.

243 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.322.

lawful welfare of Hong Kong residents shall be protected by law”.<sup>244</sup> None of the foregoing suggestions were adopted.

After the publication of the eighth draft of the article (draft for solicitation of opinions), the Drafting Committee considered a number of opinions from Hong Kong on this draft, including: “Social welfare is not the right of residents. It is suggested that the article on social welfare be written as ‘enjoy the existing social welfare and services’ and put into another chapter.”<sup>245</sup> None of these opinions were adopted.

In addition, some members of the Consultative Committee questioned whether the first sentence of this article, “Hong Kong residents shall have the right to social welfare”, should be included in Chapter III. This was because all those mentioned in Chapter III were human rights while the first sentence of this article referred to the right to use social resources and there was a difference in the nature of the article. Same as the opinion stated above, some members of the Consultative Committee also pointed out that the social welfare services enjoyed by Hong Kong residents at that time were not a kind of right, but rather policies and measures formulated by the government according to the objective environment, economy and social developments, and therefore, if this article was listed among residents’ rights, it would: (1) be necessary to make more relevant legislation for the future social welfare system to guarantee that residents could truly enjoy this right in order to ensure that the exercise of this right had a legal basis; (2) result in contradiction with BL 153<sup>246</sup> since the system at that time did not treat social welfare as a right of residents, and it would be contrary to the spirit of BL 153 if it was pointed out in this article that there was such a right and

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244 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.1, p.322.

245 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, August 1988 in *Overview of the Drafting Process*, Vol.1, p.323.

246 The current BL 145.

such a right was to be guaranteed by legislation. In addition, some members of the Consultative Committee considered that social welfare should include a retirement system and therefore a retirement security scheme should be included in this item. Also, some members of the Consultative Committee opined that the expression “labour welfare ...” was too vague and seemed not to be specific enough about how to protect labour and their welfare, and suggested that employment of labour, retirement and other protection be specified.<sup>247</sup>

Before the finalization of the tenth draft of this article, some members of the Consultative Committee of the Special Group Concerned with Fundamental Rights and Duties of Residents considered that the expression “in accordance with law” conferred on the legislature a power that was too broad for determining the substantive meaning of this article. However, some members of the Consultative Committee held the view that the inclusion of the expression “in accordance with law” was unproblematic and that this expression had a positive guiding significance for the government by requesting the government to legislate to guarantee this right. The Consultative Committee also had the following suggestions for amending the article: the first sentence of this article should be revised to read “Hong Kong residents shall have the right to social welfare and retirement security in accordance with law” so as to avoid non-salaried labour being unable to enjoy retirement security; the expression “security for retirement life” should be added to this article on the grounds that it was clearer than “retirement security”; and the expression “old age pension” should be added to this article

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247 Consultative Committee, *Collection of Views of the Special Group on the Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1, October 1988 in *Overview of the Drafting Process*, Vol.1, p.324.

for safeguarding the retirement life of non-salaried labour.<sup>248</sup> These suggestions were not adopted.

The Consultative Committee received views against the inclusion of a provision on “retirement security” in the Basic Law on grounds that the inclusion would increase the burden of the government and taxpayers if the HKSARG were to bear the expenses in this regard. It was suggested, however, to replace the last sentence of the text of the article with the following: “The welfare benefits and right of retirement security of the labour force shall be protected by law.”<sup>249</sup> As stated above, when the eleventh draft of the article was finalized, the expression “and retirement security” was added after the term “welfare benefits”.

The “Explanations”<sup>250</sup> made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 contained the following, “... no socialist system or policies will be practiced in the Region, the original capitalist society, economic system and way of life will remain unchanged ...”; and a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, the content of which is included in the Note of BL 25 in this book.

## Article 37

“The freedom of marriage of Hong Kong residents and their right

248 *Collection of Views of the Special Group of the Consultative Committee on Fundamental Rights and Duties of Inhabitants regarding Chapter Three of the Draft Basic Law*, 12 September 1989 (Annex I to the Minutes of the Exchange Meeting between the Special Group on Residents and Hong Kong Members of the Drafting Committee’s Counterpart Group held on 21 September 1989) in *Overview of the Drafting Process*, Vol.1, p.326.

249 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.326-327.

250 *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 National People’s Congress, 28 March 1990).



to raise a family freely shall be protected by law.”

This article reflects Article 3(5) of the Joint Declaration<sup>251</sup>, and the relevant part of Section XIII of Annex I to the Joint Declaration which states that “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including ... the freedom to marry and the right to raise a family freely.”<sup>252</sup>

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eleven drafts.<sup>253</sup> The wording of this article remained unchanged throughout the whole drafting process, except for the deletion of the word “the” from the expression “protected by the law” when finalizing the seventh draft.

The explanatory note by the Special Group on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee when finalizing the first draft of the article read: “Section XIII of Annex I to the *Sino-British Joint Declaration* and Chapter III (11) of *Structure of the Basic Law (Draft)* contain the content of this article”.<sup>254</sup>

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251 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the HKSAR.

252 Item 11 under Chapter III, “Fundamental Rights and Duties of Hong Kong Residents”, of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)*, 22 April 1986, reads: “the freedom to marry and the right to raise a family freely shall be guaranteed”. Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.328. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

253 *Overview of the Drafting Process*, Vol.1, pp.328-331.

254 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.328.



Prior to the finalization of the second draft of the article, the Working Group on the Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee discussed more than once and reached a consensus: in the discussions of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee, members of the Consultative Committee agreed unanimously that for all types of residents of the HKSAR, whether their residency was temporary or permanent and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of the person, of speech, of publication, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the right to raise a family freely, should all be protected by the law.<sup>255</sup>

The explanatory note when finalizing the third draft of the article read: “the word ‘freely’ in the expression ‘raise a family freely’ should still be retained”.<sup>256</sup>

After the publication of the eighth draft of the article (for solicitation of opinions), some members of the Consultative Committee were of the view that it should be expressly stated in the

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255 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Departure, Residence, Deportation, Right to Vote and Right to Stand for Election* (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others, 8 December 1986), 11 November 1986. The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as the *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election. Overview of the Drafting Process*, Vol.1, p.328.

256 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.329.

Basic Law that residents of the HKSAR shall not be forced to engage in family planning or abortion.<sup>257</sup> There were views supporting the “right to raise a family freely” to be included in this article, on the ground that strict family planning program would not be introduced after 1997.<sup>258</sup>

The Consultative Committee also received suggestions to amend the article to read: “Hong Kong residents shall have the freedom of marriage and the right to raise a family freely”, on the ground that the freedom of marriage and the right to raise a family freely were both principle-based rights which were protected by the constitution, so it was not necessary to include an express provision on “protected by law”. There were other suggestions to add the expression “the right to abortion is protected by law” in the article.<sup>259</sup> These suggestions were not adopted.

The “Explanations”<sup>260</sup> made by Chairman Ji Pengfei at the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, which is included in the Note of BL 25 in this book.

## Article 38

“Hong Kong residents shall enjoy the other rights and freedoms

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257 Consultative Committee, *Collection of Views of the Special Group on Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.330.

258 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.330.

259 Ibid, pp.330-331.

260 *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 National People's Congress, 28 March 1990).

safeguarded by the laws of the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process* show that the drafting process of this article had progressed through eleven drafts.<sup>261</sup> Item 13 under Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law (Draft)* of 22 April 1986 reads: “enjoy other rights and freedoms safeguarded by the common law”.<sup>262</sup> This article reflects Article 3(5) of the Joint Declaration<sup>263</sup>, and the relevant part of Section XIII of Annex I to the Joint Declaration which states that “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong ...”

The first draft of this article was finalized by the Special Group on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee in November 1986. Its wording at that time read:

“Hong Kong residents shall enjoy the other rights and freedoms prescribed by the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.”

When finalizing the second draft of the article, the word “prescribed” in the first paragraph was changed to “safeguarded”.

261 *Overview of the Drafting Process*, Vol.1, pp.332-336.

262 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.1, p.332. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

263 Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be protected by law in the HKSAR.

When finalizing the fourth draft of the article, the expression “however, such restriction shall be limited to the extent necessary for the maintenance of national security, public order, public security, public health, public morality and the protection of the rights and freedoms of others” was added at the end of the second paragraph. The second paragraph was deleted when finalizing the fifth draft of the article. Thereafter the article remained unchanged and was adopted as BL 38 in April 1990.

The explanatory note when finalizing the first draft of the article read: “Chapter III (13) of *Structure of the Basic Law (Draft)* contained the expression ‘enjoy other rights and freedoms safeguarded by the common law’. Since the scope of ‘common law’ is a bit narrow, the expression ‘common law’ is changed to ‘the laws of the Hong Kong Special Administrative Region’. Furthermore, in order to avoid including the expression ‘prescribed by the laws’ in each of the above articles, the provision of the second paragraph of this article is added.”<sup>264</sup>

The explanatory note when finalizing the third draft of the article read: “1. The Group agreed to replace the expression ‘prescribed by the laws’ in the first paragraph of the Discussion Paper<sup>265</sup> with ‘safeguarded by the laws’. 2. The provision of Paragraph 2 serves as a supplementary provision considering that the preceding provision still cannot generalize the respective rights and freedoms comprehensively, so it should not be deleted. 3. The scope of the expression ‘laws of the Hong Kong Special Administrative Region’ in this article is quite broad, including the Basic Law, laws previously in force in Hong Kong (including common law, law of equity, etc.) and laws enacted by

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264 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.332.

265 Namely the second draft of this article.

the legislature of the Hong Kong Special Administrative Region.”<sup>266</sup>

Prior to the finalization of the fourth draft of the article, the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee received suggestions to amend the article as: “This Law shall not restrict the Hong Kong Special Administrative Region from adopting other rights and freedoms.” There was another suggestion to amend the article as:

“All residents of the Hong Kong Special Administrative Region shall enjoy the rights and freedoms prescribed in this Chapter and other rights and freedoms safeguarded by the laws of the Region.

The rights and freedoms enjoyed by the residents of the Hong Kong Special Administrative Region shall not be restricted, except as prescribed by legislation for the purpose of safeguarding national security, maintaining public order, safeguarding public security, public health or morality, or the rights and freedoms of others. Any legal restriction must be that required by a free, open and democratic society. If any laws of the Hong Kong Special Administrative Region violate the aforementioned principles to constitute unreasonable and unnecessary restrictions on the rights and freedoms of Hong Kong residents, they shall all be null and void ... (Explanation: to ensure that the rights and freedoms provided for in this chapter will not be deprived of because of the principle of ‘prescribed by law’.)”<sup>267</sup>

There were views that the expression “free, open and democratic society” in the second suggestion of the preceding paragraph was difficult to be defined. There were views that the third sentence of that suggestion should be amended to read: “Any legal restriction must

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266 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, pp.332-333.

267 *Opinions on the Draft of Chapter III of the Basic Law (Draft of 30 April 1987)* (Discussion Paper of the Fourth Resumed Session of the Eighteenth Meeting of the Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others of 22 June 1987), 19 June 1987 in *Overview of the Drafting Process*, Vol.1, p.334.

follow the principle of non-interference with fundamental human rights.” There were also views that the wording of that suggestion was very vague, as the definitions of the terms “national security, public order, public health, morality and rights and freedoms of others” were unclear. If such wording was to be followed, this would affect the spirit of the rule of law in Hong Kong and prejudice Hong Kong’s stability.<sup>268</sup>

The explanatory note when finalizing the fourth draft of the article read: “1. On the basis of the opinions made, the expression ‘however, such restriction shall be limited to the extent necessary for the maintenance of national security, public order, public security, public health, public morality and the protection of the rights and freedoms of others.’ is added to the second paragraph. 2. During group discussion, some members suggested that the four words ‘in accordance with law’ be deleted from BL 4,<sup>269</sup> and the second paragraph of this article be amended as ‘Hong Kong residents, in the exercise of freedoms and rights, shall not infringe upon national security, public order, public health and the freedoms and rights of others’.”<sup>270</sup>

Prior to the finalization of the fifth draft of the article, some members of the Consultative Committee suggested the second paragraph be singled out as a separate article and be moved after the first paragraph, so as to limit the interpretation of the term “in accordance with law”.<sup>271</sup> The said suggestion that “the second paragraph be singled out as a separate article” was adopted: as

268 Special Group on the Rights, Freedoms, Welfare and Duties of Residents and Others, *Final Report on the Fundamental Rights and Duties of Hong Kong Residents, Vol.II* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.1, p.334.

269 The current BL 27.

270 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.334.

271 Special Group Concerned with Fundamental Rights and Duties of Hong Kong Residents, *Opinions on Draft Provisions of Chapter III of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.1, pp.334-335.

mentioned above, the second paragraph of the article was deleted when finalizing the fifth draft (that is *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* by the Secretariat of the Drafting Committee for the Basic Law of December 1987) and became BL 39 of the Compilation.<sup>272</sup>

During the consultation period at the late drafting stage of the article, the Consultative Committee received opinions that the implied meaning of the article was that “certain rights and freedoms cannot be enjoyed if they are not legally safeguarded”. The Consultative Committee also received the following suggestions: this article should be incorporated in BL 4 of the present Basic Law; the rights defined by law should not be separated from those defined by the constitution and the rights being enjoyed by Hong Kong residents at present should be included in this Law; and the expression “other rights and freedoms” should be listed in detail.<sup>273</sup> These suggestions were not adopted.

The “Explanations”<sup>274</sup> made by Chairman Ji Pengfei at the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, which is included in the Note of BL 25 in this book.

## Article 39

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented

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272 However the expression “necessary for” was changed to “required for”.

273 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.335.

274 *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 National People’s Congress, 28 March 1990).



through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

The relevant part of Paragraph 4 in Section XIII of Annex I to the Joint Declaration states that: “The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.” There are 16 items in total in Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* adopted at the Second Plenary Session of the Drafting Committee on 22 April 1986, of which Item (12) reads: “The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force”.<sup>275</sup>

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eleven drafts.<sup>276</sup> The text of the first to fourth drafts read: “The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall be implemented in accordance with the laws of the Hong Kong Special Administrative Region.” It was changed into two articles in the fifth draft: “Article 38: The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall be implemented through the laws of the Hong Kong Special Administrative Region. Article 39: The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed

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275 The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

276 *Overview of the Drafting Process*, Vol.1, pp.337-361.



by law. However, such restrictions shall be limited to the extent necessarily required for the maintenance of national security, public order, public security, public health, public morality and the protection of the rights and freedoms of others.” The text of the sixth to eighth drafts was no different from that of the fifth draft, except for the article number. The ninth draft combined the two articles into one single article which was divided into two paragraphs. The expression “international labour conventions as applied to Hong Kong shall remain in force” was added to the first paragraph. In the second paragraph, the six grounds for restriction of rights and freedoms in the fifth to eighth drafts were deleted, and the expression “such restrictions shall not contravene the provisions of the preceding paragraph of this Article” was added at the end of the sentence. Thereafter the text of the tenth and eleventh drafts was the same as that of the ninth draft, and was consistent with the current BL 39.

### **Application of the Two International Conventions in the HKSAR<sup>277</sup>**

The applicability of the ICCPR and the ICESCR (the “two International Conventions”) in Hong Kong prior to 1997 was entirely due to the fact that the United Kingdom was a state party to the two International Conventions and Hong Kong was then regarded as a dependent territory of the United Kingdom. As China would resume exercise of sovereignty over Hong Kong in 1997 but it was not a state party to the two International Conventions at that time, commentators expressed concerns as to whether the two International Conventions could continue to be valid in the HKSAR after 1997.<sup>278</sup> In the process of drafting the third draft, there were views that the Conventions as

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277 Refer to the notification by the Permanent Representative of China to the United Nations to the Secretary-General on 20 June 1997 on China’s position regarding the application of international treaties to Hong Kong and list of the international treaties applicable to the HKSAR as of 1 July 1997. The content of this notification is included in Appendix X of this book.

278 *Report on the Fundamental Rights and Duties of Hong Kong Residents (First Draft)*, 14 April 1987 (Discussion Paper for the Seventeenth Meeting of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, 23 April 1987) in *Overview of the Drafting Process*, Vol.1, p.344.

applied to Hong Kong at that time were limited to the effect that they were binding at the level of international law only, and that the British government was obliged under international law to submit reports to relevant international organizations regarding the implementation of the Conventions in the United Kingdom and its territories. If someone alleged that the United Kingdom was in breach of the Conventions, other state parties to the Conventions could complain to the Human Rights Commission. If China had not become a signatory when the United Kingdom withdrew from Hong Kong in 1997, the two International Conventions would not apply to Hong Kong according to international law.<sup>279</sup>

When drafting the first draft of this article, some members of the Consultative Committee were of the view that China should consider becoming a signatory to the two International Conventions, since doing so could safeguard the rights of both Chinese citizens and Hong Kong people. There were views that since China would practise “one country, two systems” in Hong Kong, it might not be impracticable for China to accede to the two International Conventions simply to safeguard the rights of Hong Kong people. But other members of the Consultative Committee opined that it would be putting the cart before the horse to ask China to accede to the two International Conventions only for the implementation of certain provisions in Hong Kong. They were of the view that it would be impossible for China, after acceding to some conventions, not to implement the same in other places in China. Therefore, Hong Kong could not be a reason for asking China to accede to the two International Conventions.<sup>280</sup>

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279 *Discussion Paper on the Fundamental Rights and Duties of Hong Kong Residents*, 19 March 1987 (Discussion Paper for the Sixteenth Meeting of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, 10 April 1987) in *Overview of the Drafting Process*, Vol.1, p.341.

280 *Minutes of the Sixth Meeting on Rights, Freedoms, Welfare and Duties of Residents and Others (Group II)*, 22 July 1986 in *Overview of the Drafting Process*, Vol.1, p.338.

## Reservations in the Two International Conventions

As to the reservations of the two International Conventions as applied to Hong Kong, the definition of “reservation” is set out in the relevant treaty law in *Vienna Convention on the Law of Treaties* (23 May 1969). “Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Reservations usually limit the obligations to be fulfilled under international treaties, but there are exceptions: where a reservation only states a change in the provisions, or attempts to assume responsibilities beyond those provided for in the provisions. In the case of a treaty between two parties, “reservation” is only a suggestion to amend the provisions. The legality of reservation is a separate legal issue for multilateral treaties.<sup>281</sup>

Regarding the reservations in the two International Conventions as applied to Hong Kong, certain views in the newspapers pointed out that according to the declarations made by the United Kingdom when signing the two International Conventions, the United Kingdom made reservations on certain provisions in their application to the United Kingdom or its dependent territories. For example, Article 25(B) of the ICCPR concerning voting rights was not applicable to Hong Kong. Also, for example, Article 8(1)(b) of the ICESCR provides that trade unions have the right to form national federations or confederations, while according to the law relating to trade unions applicable in Hong Kong at that time, trade unions which involved different industries had no right to establish federations of trade unions.<sup>282</sup> In addition, the United Kingdom also made reservation in relation to the right of equal

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281 Ibid, footnote 279, p.340.

282 Secretariat of the Drafting Committee, *Extract of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.1, p.339.

pay for men and women for equal work under that Convention.<sup>283</sup>

Some members of the Consultative Committee raised a timing issue of the continuous validity of the provisions of the two International Conventions as applied to Hong Kong. They asked whether the provisions referred to those as applied to Hong Kong at the time of signing the Joint Declaration, or those as applied to Hong Kong in 1997. Some members of the Consultative Committee were of the view that the law was not fixed and could continue to develop in the next ten years or more. The wording used in the Joint Declaration only stated that at least those provisions which then applied to Hong Kong would continue to be valid in the future, but if the reservations became applicable to Hong Kong in the next ten years or more, there would be no restriction prohibiting such application. Therefore, the aforementioned provisions should be referring to all provisions as applied to Hong Kong in 1997. Also, some members foresaw that these reservations might not necessarily become applicable to Hong Kong only until 1997, but might possibly be applicable at that time or in the near future. To that end, provisions which were considered applicable should have been promoted to become part of the law since that time. This could also ensure consistency in the implementation of the two Conventions beyond 1997. Some members of the Consultative Committee were of the view that the best way was to study these reservations. If they were considered applicable, efforts should be made to include them in the Basic Law when drafting the Basic Law.<sup>284</sup>

Members of the Drafting Committee and the Consultative Committee also discussed the different reservations in the two International Conventions. When drafting the first draft, some

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283 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.350.

284 *Minutes of the Sixth Meeting on Rights, Freedoms, Welfare and Duties of Residents and Others (Group I)*, 22 July 1986 in *Overview of the Drafting Process*, Vol.1, pp.337-338.

members of the Consultative Committee were of the view that, with the development of society, reservations made by the United Kingdom in the past might no longer be applicable now, such as those provisions concerning voting rights.<sup>285</sup> Also, some members of the Consultative Committee were of the view that if there were direct election and also functional constituency election in future elections, reservation on Article 25(B) of the ICCPR would need to be maintained since functional constituency election could not be treated as universal and equal election by secret ballots. Also, there were views that the reservation of this provision should be reviewed after the draft of the Basic Law was published.<sup>286</sup>

### **Provisions of the Two International Conventions Applicable to Hong Kong**

Prior to the finalization of the second draft of the article, there were views that the provision in Section XIII of Annex I to the Joint Declaration concerning the two International Conventions “as applied to Hong Kong shall remain in force” could have at least three different interpretations:

“1. The Conventions apply to Hong Kong, except for the provisions reserved by the United Kingdom.

2. Except for the provisions reserved by the United Kingdom, only parts concerning rights and freedoms in the two Conventions apply to Hong Kong. This is the most likely interpretation.

3. The provisions concerning rights and freedoms do not apply to Hong Kong in their entirety. For example, the right to privacy referred to in Article 18 and the right to information referred to in Article 19 of the ICCPR are not recognized under the current judicial system in Hong Kong. Therefore, the provisions of this part in the Convention do not apply to Hong Kong.”<sup>287</sup>

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285 Ibid.

286 Ibid, footnote 280. See the Note of BL 68 in this book.

287 Ibid, footnote 282.

At the later phase of drafting the article, some members of the Drafting Committee objected to the inclusion of all provisions of the two International Conventions in the Basic Law, because the two International Conventions applied to Hong Kong through the laws of Hong Kong at that time, but not that the two Conventions directly applied to Hong Kong. Also, the United Kingdom still had reservations on the application of the two Conventions to Hong Kong. At that time, only about ten provisions were applicable to Hong Kong. If detailed provisions were made, there could not be further development. In fact, the two International Conventions were lengthy and their contents had already been included in the chapter on fundamental rights of residents. Therefore, it might not be necessary to include the provisions of the two Conventions in the Basic Law.<sup>288</sup>

### **International Labour Conventions**

At the later phase of finalizing the ninth draft of this article, there were views that, in addition to the two International Conventions, International Labour Conventions were also important and should be included in Chapter III of the Basic Law as the two International Conventions were also included in Chapter III. On the other hand, some members of the Drafting Committee from the Mainland were of the view that although International Labour Conventions were very important, there were quite a few international conventions in Hong Kong so it would be problematic to include them all. As regards the inclusion of the two International Conventions in the Basic Law, it was because the Joint Declaration had provided so, but International Labour Conventions had not been included.<sup>289</sup> When drafting the tenth draft, there were views pointing out that International Labour Conventions would be revised continuously and their actual content

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288 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.1, p.349.

289 Ibid.

was uncertain. There were concerns that whether it would be problematic to treat the International Labour Conventions on the same basis as the two International Conventions.<sup>290</sup>

### **Enforcement of the Two International Conventions**

There were views that except for the reservations, all provisions of the two International Conventions should apply to Hong Kong theoretically. However, the so-called application did not mean that the provisions of the Conventions were part of Hong Kong laws and could be enforced by the courts of Hong Kong in individual cases. This was because in accordance with the legal system in the United Kingdom and Hong Kong, international treaties were not part of the law. The official sources of Hong Kong laws at that time included statutory law enacted by the legislatures of the United Kingdom and Hong Kong, and case law established by the courts of the United Kingdom or Hong Kong, but did not include international treaties concluded by the British Government with other countries. These international treaties were not part of Hong Kong laws so the Hong Kong courts could not directly enforce them. Therefore, strictly speaking, these two International Conventions had no direct legal effect in Hong Kong at that time, which meant they could not be enforced by the courts. In summary, at the time when the Basic Law was drafted, regarding the applicability of the two International Conventions in Hong Kong, they only had binding effect on the British Government or the government established by the United Kingdom in Hong Kong at the level of

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290 *Collection of Views of the Special Group of the Consultative Committee on Fundamental Rights and Duties of Inhabitants regarding Chapter Three of the Draft Basic Law*, 12 September 1989 (Annex I to the Minutes of the Exchange Meeting between the Special Group on Residents and Hong Kong Members of the Drafting Committee's Counterpart Group held on 21 September 1989) in *Overview of the Drafting Process*, Vol.1, p.357.

international law, but not at the level of Hong Kong's municipal law.<sup>291</sup>

As to how to supervise the enforcement of the two International Conventions in the HKSAR, some members of the Consultative Committee were of the view that when the two International Conventions became part of the Basic Law, the task of supervision should be carried out by the courts. Some members of the Consultative Committee suggested the establishment of a supervisory commission. If the legislature passed legislation which violated the two International Conventions, the supervisory commission could report it to the courts. As to the content of the ICESCR, part of it fell within the scope of social policies and actual living conditions of residents, such content could not be expressed in the form of law. Such provisions had to be

291 Ibid, footnote 282.

According to the understanding at the time of the drafting of the third draft of this article, the ICCPR could be implemented at the international level by the following three methods:

(1) The States Parties must submit periodic reports to the Human Rights Commission to report what measures have been taken by the State Parties to give effect to the rights provided for in the Convention. Members of the Human Rights Commission are jointly elected by the States Parties.

(2) If a State Party agrees to accept such implementation method, another State Party might lodge a complaint with the Human Rights Commission against a violation of the Convention by that State Party. After receiving a complaint, the Human Rights Commission might proceed with mediation or conciliation to find a solution to the problem. However, the Human Rights Commission is not an international tribunal and cannot conduct judicial adjudication against the State Party in violation of the Convention. If it is to apply this method of implementation of the ICCPR in Hong Kong then, that would mean that if the British Government has committed an act in Hong Kong in violation of the Convention, other States Parties to the Convention might complain to the Human Rights Commission.

(3) Any individual affected by the breach might file a complaint directly with the Human Rights Committee. However, this way is only applicable to States that have signed the Optional Protocol thereto. The United Kingdom has not signed the document, so this implementation method did not apply to the United Kingdom and Hong Kong at the time. (Same as footnote 279.)

With regard to the implementation of the ICESCR, that Convention requires the States Parties to submit periodic reports to the United Nations Economic and Social Council to report what measures have been taken by the State Parties to give effect to the rights provided for in the Convention. The Economic and Social Council, after reviewing the reports and related information, may submit report and recommendations to the United Nations General Assembly. (Same as footnote 279.)



implemented gradually on the basis of the economic situation or socio-cultural environment of the region. As such the implementation would rely on the supervision of the legislature.

Some members of the Consultative Committee opined that, the two International Conventions only had moral force but did not have actual legal effect. Therefore, a Bill of Rights should be passed at that time to make the two International Conventions part of Hong Kong law. Since the law to be implemented in the HKSAR in the future would include those previously in force in Hong Kong, this would enable the two International Conventions to safeguard the rights of Hong Kong residents after 1997.<sup>292</sup>

At that time, there were views on the newspapers explaining the way under which many countries dealt with the two International Conventions. It was to treat rights listed in the ICCPR as fundamental rights. The rights listed in the ICESCR, on the other hand, were to be summarized as some guiding principles to guide the operation of the government, but these provisions could not be directly enforced. There were views suggesting that when deciding which rights should be listed in the Basic Law, consideration should also be given at the same time as to whether these rights could be safeguarded through the judiciary when they were violated.<sup>293</sup> As to whether the existing laws in Hong Kong could enforce the content of the ICCPR, there were views pointing out that part of the content in the ICCPR had already been safeguarded by Hong Kong law, but the Consultative Committee listed out in a discussion paper of March 1987 the law which safeguarded these fundamental rights and exceptions permitted by the law at that time. For example, there were relatively severe restrictions to the freedom of expression in the official secrecy legislation. Such views pointed out that many pieces of legislation in Hong Kong at that time were still quite strict, and, as a result of those strict pieces

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292 Ibid, footnote 284.

293 Secretariat of the Drafting Committee, *Extracts of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.1, pp.338-339.

of legislation, the freedoms enjoyable by Hong Kong people had not been rigorously enforced.<sup>294</sup>

When soliciting opinions on *The Draft Basic Law*, there were views that the HKSAR should be responsible for interpreting the provisions of the Conventions but not the NPCSC. This article involved the issue of power of interpretation of the Basic Law. If the NPCSC used such power frequently and on the basis of concepts of the Mainland, this would affect the human rights and freedoms of Hong Kong people. There were views that since the NPCSC had the final power of interpretation of the Basic Law, even if the courts of the HKSAR had the power to rule whether the restriction in this article was necessary, their function would substantially be reduced and the courts could only follow the interpretation of the NPCSC.<sup>295</sup>

### **Proposals to Make the Two International Conventions Part of Hong Kong Law<sup>296</sup>**

Regarding how to make the two International Conventions part of Hong Kong laws at the municipal level, some members of the Consultative Committee when drafting the first draft were of the view that there would be certain difficulty to strive for passage of the Bill of Rights by the then government, and this was the job of the LegCo, being unrelated to the drafting of the Basic Law. However, some members of the Consultative Committee were of the view that although it was the job of the LegCo to pass bills, members of the

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294 Johannes Chan Man Mun, *Comments on Special Report on the Fundamental Rights and Duties of Hong Kong Residents*, 31 May 1987 (Annex IV to the Minutes of the Fourth Resumed Meeting of the Eighteenth Meeting of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, 22 June 1987) in *Overview of the Drafting Process*, Vol.1, p.345.

295 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.353-354.

296 Refer to the Hong Kong Bill of Rights Ordinance in 1991, Cap. 383, which states: “An Ordinance to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong ...”

Consultative Committee could express their views to the LegCo in the capacity as residents. Moreover, cases handled by the courts from then to 1997 after the Bill took effect could also become case law for the Bill of Rights in the future.<sup>297</sup>

In addition to local legislation, some members of the Consultative Committee suggested that it should be clearly stated in the Basic Law, for example, by adopting the wording of the Joint Declaration and incorporating the provisions of the two International Conventions in the Basic Law in the form of annex, so this could ensure their legal effect in the HKSAR in the future. After discussion, members of the Consultative Committee basically agreed that both approaches should be used simultaneously, so the enforcement of the two International Conventions could have double protection.<sup>298</sup>

In the process of finalizing the fourth draft, there were seven proposals on how to enable the two International Conventions to have binding effect at the level of Hong Kong laws.<sup>299</sup>

(1) Existing laws have already reflected parts of the two International Conventions. The Basic Law could list out the respective rights and freedoms, and supplement parts of those existing laws which have not fully complied with the two International Conventions, without making further provisions for the two International Conventions themselves;

(2) To list out the provisions of the two International Conventions applicable to Hong Kong in the form of annex to the Basic Law, and grant this annex the highest legal effect which was equivalent to the other parts of the Basic Law, and to authorize the courts of the HKSAR to enforce them;

(3) To make a principled provision in the Basic Law for the provisions of the two International Conventions applicable to Hong Kong, stating that such provisions are to be implemented in the

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297 Ibid, footnote 284.

298 Ibid.

299 Ibid, footnote 278.

HKSAR;

(4) To make the provisions of the two International Conventions part of the Basic Law by, for example, listing out the article numbers of the provisions applicable to Hong Kong without specifying the contents, and to authorize the courts of the HKSAR to invoke these provisions in specific cases as the legal basis for examining the administrative and legislative acts of the HKSAR;

(5) To specifically provide for the rights and freedoms of residents as set out in the Joint Declaration and *Structure of the Basic Law (Draft)*, so as to reflect the major contents of the two International Conventions as applied to Hong Kong. Also, by reference to the current situation and methods of implementation of the two International Conventions in Hong Kong, another principled provision could be made to explain that the relevant provisions of the two International Conventions as applied to Hong Kong shall be implemented in accordance with and through Hong Kong laws, and specifying the relationship between the two International Conventions and the laws of the HKSAR;

(6) To include the Bill of Rights in the Basic Law;

(7) To ask China to become a signatory to the two International Conventions.

### **Restrictions on Rights and Freedoms**

In the fifth and sixth drafts of this article, the restrictions on rights and freedoms in the then BL 39 were as follows: “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. However, such restrictions shall be limited to the extent necessarily required for the maintenance of national security, public order, public security, public health, public morality and the protection of the rights and freedoms of others.” In the seventh and eighth drafts, the expression “such restrictions shall be” was amended to read “such restrictions should be”.

When soliciting opinions on the draft of this article, some opinions received raised the issue whether the words “necessarily

required” in the eight draft was a matter to be decided by the court or by the NPC. Also, there were consultation opinions pointing out that residents enjoyed the inherent rights and freedoms. As such, restrictions to these rights and freedoms should be limited to the extent necessary to maintain a democratic and free society. However, this article imposed too many restrictions on the residents’ enjoyment and exercise of rights and freedoms. It was hoped that such restrictions on rights would be deleted or the first sentence “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law” should be retained. Also, there were views that the provision of BL 39 in the eighth draft would make it easy for the government to legislate to restrict press freedom in future.<sup>300</sup>

In response, members of the Drafting Committee from the Mainland expressed the view that the rights and freedoms were very broad originally but were restricted after adding the words “as prescribed by law”. However, such restrictions were to be understood by reading BL 38 and 39 of the eighth draft together. BL 39 provided that the restrictions were limited to the extent necessarily required for national security, public health, public morality and the protection of the rights and freedoms of others, which followed the provisions in the two International Conventions. Therefore, if restrictions were to be imposed, they could only be “limited to the extent necessarily required” for the aforementioned purposes.<sup>301</sup>

Some members of the Consultative Committee were of the view that the wording of “limited to the extent necessarily required for the maintenance of national security, public order, public security, public health, public morality and the protection of the rights and freedoms of others” in the fifth to eighth drafts was too general, and reference should be made to the drafting of other countries. Some members of

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300 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.1, p.349.

301 *Ibid*, footnote 288.

the Consultative Committee were of the view that the power to restrict human rights as provided in BL 39 of the eighth draft was general but threatening, while the provision on the power to restrict rights and freedoms on the grounds of “public health and public morality” was vague.<sup>302</sup>

Some members of the Consultative Committee suggested that BL 39 of the eighth draft should be omitted altogether. This was because the content concerning restrictions on rights and freedoms to be as prescribed by law in the first paragraph had already been reflected in the legal system and specification was not necessary. Some members of the Consultative Committee were of the view that the second paragraph, “such restrictions shall be limited to the extent necessarily required for the maintenance of national security ... the protection of the rights and freedoms of others”, made the meaning of the first paragraph confusing. This was because the second paragraph specified the conditions for restrictions of freedoms, but actually any freedom would be subject to the law. Some members were of the view that the sentence “such restrictions shall be limited to the extent necessarily required for the maintenance of national security ... the protection of the rights and freedoms of others” was unclear. On the one hand, the sentence did not state which party would define the restrictions and, on the other hand, it did not state the criteria for these restrictions.<sup>303</sup>

In addition, some members of the Consultative Committee pointed out that the restrictions on rights and freedoms in BL 39 already went beyond those provided in the two International Conventions. There were views that in accordance with the provision in Article 4 of the ICCPR, only when the authority had formally declared a state of public emergency which threatened the life of the

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302 Consultative Committee, *Collection of Views of the Special Group on Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1 in *Overview of the Drafting Process*, Vol.1, p.350.

303 Ibid.

nation, could rights and freedoms be restricted but such restrictions could not give rise to discrimination on the ground of race or religion. Also, the relatively fundamental rights set out in Articles 6, 7, 8, 15, 16 and 18 of the Covenant, such as the right to live, the right not to be subjected to cruel, inhuman or degrading treatment, freedom of thought and religion, etc., could not be restricted.<sup>304</sup>

There were views that any restriction on rights and freedoms should be those necessary for a democratic and free society, and advocating that political interpretation should not be adopted for the meaning of “democratic”. As such, the article could be flexibly applied to impose different restrictions on different rights. This wording was very similar to the restriction provisions in the ICCPR and the European Convention on Human Rights, enabling international precedents to be used as reference for interpretation. To ensure that the rights granted to and restrictions imposed on Hong Kong residents would not change after 1997, there were also views that the courts should be allowed to make reference to the precedents of international courts and other countries and to set a standard in line with that of the international community, so as to strengthen the influence and binding effect of international precedents and to avoid creating new interpretations by abandoning the rich international precedents.<sup>305</sup>

There were also views that this article only provided standards for laws to be enacted by the legislature in the future, but did not seem to have much supervisory effect on the laws implemented at that time.<sup>306</sup> When soliciting opinions on *The Draft Basic Law* in the process of drafting the tenth draft, there were views that unless laws that could restrict rights and freedoms would be subjected to certain restrictions, the HKSAR could undermine the rights and freedoms safeguarded by this chapter through the laws in the past and under this situation,

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304 Ibid.

305 Ibid, footnote 283, p.355.

306 Ibid, p.354.

human rights could not be effectively safeguarded.<sup>307</sup>

After discussion, in the ninth draft and subsequent versions of this article, BL 38 and 39 were merged into one single article divided in two paragraphs, the reference to the maintenance of national security, public order, public security, public health, public morals and the protection of the rights and freedoms of others in the second paragraph of the original BL 39 was deleted, and the expression “Such restrictions shall not contravene the provisions of the preceding paragraph of this Article” was added at the end of the sentence. According to *Report of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents regarding the Amendments to the Articles* at that time, such amendments would enable the restrictions on the rights and freedoms of Hong Kong residents as prescribed by law to be closely integrated, thus promoting the protection of the rights and freedoms of Hong Kong residents by the HKSAR according to law.<sup>308</sup>

On 28 March 1990, Chairman Ji Pengfei’s “Explanations”<sup>309</sup> made at a session of the NPC contained a paragraph entitled “On the Fundamental Rights and Duties of Hong Kong Residents”, the content of which is included in the Note of BL 25 in this book.

## Article 40

“The lawful traditional rights and interests of the indigenous inhabitants of the ‘New Territories’ shall be protected by the Hong

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307 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.359.

308 9 January 1989. Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.1, p.356.

309 *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 National People’s Congress, 28 March 1990).



Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eleven drafts.<sup>310</sup> Item 15 under Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 reads: “The lawful rights and interests of the indigenous inhabitants of the New Territories shall be protected”.<sup>311</sup> The Joint Declaration does not directly mention about the rights and interests of the indigenous inhabitants of the New Territories.<sup>312</sup>

The first to third drafts of the article read: “The lawful rights and interests of the indigenous inhabitants of the New Territories shall be protected by the Hong Kong Special Administrative Region.” The fourth draft of the article read: “The lawful traditional rights and interests of the indigenous inhabitants of the ‘New Territories’ shall be protected by the Hong Kong Special Administrative Region.” The explanatory note when finalizing the fourth draft of the article read: “1. According to the Joint Declaration, the term ‘New Territories’ should be used in quotation marks. 2. To change the expression ‘lawful rights and interests’ to ‘lawful traditional rights and interests’.”<sup>313</sup> Thereafter,

310 *Overview of the Drafting Process*, Vol.1, pp.362-371.

311 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.362. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

312 Refer to the agreement between the Government of the United Kingdom and the Government of the PRC on the treatment of land leases in Hong Kong in Section 2 of Annex III on “Land Leases” to the Joint Declaration: “... In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, the property is granted to, a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the rent shall remain unchanged so long as the property is held by that person or by one of his lawful successors in the male line. Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the Hong Kong Special Administrative Region.”

313 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.367.

the fifth to eleventh drafts of the article remained unchanged and it was adopted as BL 40 in April 1990.

Prior to the finalization of the first draft of the article, some members of the Drafting Committee expressed views on *Structure of the Basic Law (Draft)*. Their views were that the rights and traditional morality and customs enjoyed by the indigenous inhabitants of the New Territories could be omitted as they were all Hong Kong people and should not be differentiated separately.<sup>314</sup> The Special Group of the Consultative Committee on Rights, Freedoms, Welfare and Duties of Residents and Others discussed the issue of indigenous inhabitants of the New Territories: “Some members consider that the significance of indigenous inhabitants of the New Territories only exists when Hong Kong is under the British sovereignty. Once the British rule is over, all inhabitants will be integrated into one group and there will be no need to distinguish the so-called indigenous inhabitants. That notwithstanding, some members consider that the idea of the indigenous inhabitants is actually a problem left over from history. Since we accept the concept of ‘one country, two systems’, that means we are willing to proceed under the principle of respecting the history. Therefore, we should, on the one hand, view the problem from the perspective of unity as a whole, and, on the other hand, take into account special circumstances from the perspective of historical developments and carefully handle them, so that the current rights enjoyed by the indigenous inhabitants of the New Territories would be properly addressed in the transition of sovereignty.”<sup>315</sup>

The explanatory note when finalizing the first draft of the article read as follows: “Based on the special circumstances of the New Territories, the existing laws of Hong Kong provide that the

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314 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.362.

315 *Summary of the Second Meeting on Rights, Freedoms, Welfare and Duties of Residents and Others (Group II)*, 22 April 1986 in *Overview of the Drafting Process*, Vol.1, p.362.

indigenous inhabitants of the New Territories enjoy some special legal rights and interests. Chapter III (15) of *Structure of the Basic Law (Draft)* states that ‘The lawful rights and interests of the indigenous inhabitants of the New Territories shall be protected’.”<sup>316</sup>

Annex I to the tenth Meeting (Indigenous Inhabitants of the New Territories) of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others held on 16 January 1987, i.e. *Seminar on the Rights and Interests of the Indigenous Inhabitants of the New Territories - Original Legal Rights and Interests and Traditional Customs of the Indigenous Inhabitants of the New Territories* dated 20 December 1986 (hereinafter referred to as “*Seminar Report on the Rights and Interests of the Indigenous Inhabitants of the New Territories*”), sets forth the rights and interests which were considered to be those of the indigenous inhabitants of the New Territories at that time, including: the status of Heung Yee Kuk and its members; male indigenous inhabitants of the New Territories were all entitled to build a small house with an area not exceeding 700 square feet and a height not exceeding 25 feet once during their lifetime; village lots in the New Territories could be exempted from rates; preferential compensation should be available when the villages of the indigenous inhabitants were relocated; the land leases of the indigenous inhabitants of the New Territories and all rights related to the land; the right to burial of the indigenous inhabitants of the New Territories; protection of customs and cultural relics; and the rights to estate and inheritance of the indigenous inhabitants of the New Territories.<sup>317</sup> The Report also sets out Hong Kong legislation relating to the aforementioned rights.<sup>318</sup>

316 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.362.

317 *Overview of the Drafting Process*, Vol.1, pp.363-364.

318 Including Heung Yee Kuk Ordinance (Cap.1097); District Boards Ordinance (Cap.366); Regional Council Ordinance (Cap.385); Rating Ordinance (Cap.116); Public Health and Municipal Services Ordinance (Cap.132); New Territories Ordinance (Cap.97) in *Overview of the Drafting Process*, Vol.1, pp.363-364.

As to the issue of the indigenous inhabitants of the New Territories living overseas, there were views in the *Seminar Report on the Rights and Interests of the Indigenous Inhabitants of the New Territories* that their right of residence, right to inheritance and political rights in the HKSAR were to be clearly stated in the Basic Law.<sup>319</sup> The Special Group on Rights, Freedoms and Duties of Residents and Others of the Consultative Committee considered that the indigenous inhabitants of the New Territories who went abroad for a living and held a HKSAR permanent resident identity card should enjoy the right to vote and the right to stand for election regardless of which country's passport they held, and that the "indigenous inhabitants" with foreign citizenship should be specially dealt with, but this problem should be handled according to the Nationality Law or by other groups.<sup>320</sup>

The Special Group on Rights, Freedoms, and Duties of Residents and Others of the Consultative Committee met more than once to discuss whether the rights and interests of the indigenous inhabitants of the New Territories should be stated in the Basic Law. In the end, a consensus was reached on the drafting of the rights and interests of the indigenous inhabitants of the New Territories in the Basic Law: the lawful rights and interests of the indigenous inhabitants of the New Territories should be respected, and future drafting could be amended to respond to social changes, while the power of amendment was to be vested in the HKSARG in the future. While some members of the Consultative Committee were of the view that this consensus should be stated in the Basic Law, others opined that it should not be stated in

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319 *Overview of the Drafting Process*, Vol.1, p.365.

320 Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, *Final Report on the Rights and Interests of Indigenous Inhabitants in the New Territories* (passed by the Executive Committee on 14 March 1987) in *Overview of the Drafting Process*, Vol.1, p.367.

the Basic Law.<sup>321</sup>

That Special Group also discussed more than once on whether the term “indigenous inhabitants” should be used: “From the perspective of law drafting, privileges should not be stated. They also should not be highlighted. If there is a term ‘indigenous inhabitants’, this could cause someone to claim different kinds of privileges in the name of ‘indigenous inhabitants’ thereafter. Therefore, there were suggestions that the term ‘indigenous inhabitants’ should be changed to ‘a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong’, and that to list its related issues in the column of ‘land lease’, so as to prevent someone from making use of the term ‘indigenous inhabitants’ to claim privileges.”<sup>322</sup> According to *Final Report on the Rights and Interests of the Indigenous Inhabitants in the New Territories* by the Task Force on Rights, Freedoms and Duties of Residents and Other Persons adopted by the Executive Committee on 14 March 1987, the meaning of “indigenous inhabitant” was “a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong”.<sup>323</sup>

The explanatory note when finalizing the third draft of the article read as follows: “1. Some members suggested the term ‘lawful rights and interests’ be changed to ‘lawful traditional rights and interests’, as the traditional rights and interests of the indigenous inhabitants of the New Territories, i.e. traditional rights and interests of peasants, are

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321 *Minutes of the Tenth Meeting of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others (Indigenous Inhabitants of the New Territories)*, 16 January 1987; Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, *Discussion Paper on the Rights and Interests of the Indigenous Inhabitants of the New Territories (Draft)*, 4 March 1987 (Discussion Paper for the Fourteenth Resumed Meeting of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others held on 13 March 1987); Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, *Final Report on the Rights and Interests of Indigenous Inhabitants in the New Territories* (passed by the Executive Committee on 14 March 1987) in *Overview of the Drafting Process*, Vol.1, pp.365-367.

322 Ibid.

323 *Overview of the Drafting Process*, Vol.1, p.367.

matters of fact formed in hundreds of years of history. Some of them are not regulated by law, such as inheritance of Tso/Tong property, etc., so stating ‘lawful rights and interests’ only will be incomplete. 2. As regards the provision of ‘protected by the Special Administrative Region’, some members suggested it be changed to ‘protected by the laws of the Special Administrative Region’, but this overlaps with the meaning of ‘lawful rights and interests’ at the front. Some members suggested changing it to ‘protected by the government of the Special Administrative Region’, but this is not comprehensive enough because in addition to being protected by the government, they are protected by the legislature and the judiciary. Therefore, the reference of ‘protected by the Special Administrative Region’ still remains.”<sup>324</sup> As stated above, the expression “lawful rights and interests” was replaced with “lawful traditional rights and interests” when finalizing the fourth draft of the article.

Throughout the whole drafting process of the article, there were many opinions on the term “New Territories”. For example, before the finalization of the fifth draft of the article, some members of the Drafting Committee raised the issue whether the reference to “New Territories” in this article could be avoided and wished it to be further studied. Some members of the Drafting Committee suggested that, in order to avoid using the term “New Territories”, the term “indigenous inhabitants of the ‘New Territories’” could be changed to “inhabitants

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324 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.367.

in the north of Kowloon”.<sup>325</sup>

Before the finalization of the fifth draft of the article, there were the following objections: “Some members considered that the rights and interests of the indigenous inhabitants of the ‘New Territories’ under BL 17 were not fundamental rights and interests of residents so they should not be listed in Chapter III or even in the Basic Law. Some members were of the view that at the same time of protecting the rights and interests of indigenous inhabitants of the New Territories, the rights and interests of other persons should also be equally protected. That was to say, equality before the law was a basic principle when solving problems. If indigenous inhabitants of the New Territories enjoy privileges over non-indigenous people in the New Territories in disputes over property or related issues, it would be unfair to the latter ...”<sup>326</sup>

Prior to the finalization of the ninth draft of the article, some members of the Consultative Committee suggested this article be removed because, as stated in the article, the interests of people in the New Territories were too privileged and the lawful traditional rights and interests of indigenous inhabitants of the New Territories after 1997 protected by the article were strongly discriminatory against women. Other members of the Consultative Committee were of the

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325 Included in: *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987; Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)(I)*, August 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988; Consultative Committee, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft), Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, pp.367-368 and 370-371.

326 *Discussion Report on “Principles and Specific Issues in Safeguarding the Fundamental Rights and Freedoms of the Residents”* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.1, p.368.



view that the meaning of the word “traditional” was vague, and some members of the Consultative Committee suggested the term “lawful traditional rights and interests” be replaced by “lawful and traditional customs, rights and interests”.<sup>327</sup> However, some members of the Drafting Committee from the Mainland expressed the view that during the Sino-British negotiations, a clause related to the protection of the rights of indigenous inhabitants of the New Territories was included in respect to land issue, including, *inter alia*, not to increase rent in the future, the right to build small houses, etc., so the provisions of the Joint Declaration had to be followed after 1997. Furthermore, the Basic Law was to maintain as much as possible the existing system after 1997, so the rights of indigenous inhabitants were not to be changed too since the existing laws in Hong Kong also included their rights. From the legal perspective, it was not contradictory to include both the general and minority interests. The interests of ethnic minorities would also be accommodated in the Mainland to enable them to obtain autonomy. This was conducive to the unity of ethnic minorities and the people. While the problem of indigenous inhabitants of the New Territories was a problem left over from history, protecting their rights would be conducive to the unity of Hong Kong residents.<sup>328</sup>

Before the finalization of the tenth draft of the article, the Consultative Committee still received many objections to this article and amendment proposals on the article.<sup>329</sup> However, as stated above,

327 Consultative Committee, *Collection of Views of the Special Group on Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.369.

328 Reference Materials (1) of the Secretariat of the Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of the Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.1, p.368.

329 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.371.



the article remained unchanged since the fifth draft.

The “Explanations”<sup>330</sup> made by Chairman Ji Pengfei at the NPC on 28 March 1990 mentioned “... in the Region ... the original ... way of life will remain unchanged and the laws ... will remain basically the same ...” and contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, which is now included in the Note of BL 25 in this book.

## Article 41

“Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.”

This article reflects the relevant part of Section XIII of Annex I to the Joint Declaration, which states that “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law ...”. Item 14 under Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law (Draft)* of 22 April 1986 reads: “The lawful rights and interests of other persons living in Hong Kong shall be protected”.<sup>331</sup>

Drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eleven drafts.<sup>332</sup> The first draft of this article read: “The lawful rights and interests of persons in Hong Kong other than Hong Kong residents shall be

330 *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 National People’s Congress, 28 March 1990).

331 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.372. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

332 *Overview of the Drafting Process*, Vol.1, pp.372-377.

protected by the Hong Kong Special Administrative Region.” When finalizing the second draft of the article, the expression “in Hong Kong” was changed to “in the Hong Kong Special Administrative Region” and the expression “The lawful rights and interests of ... shall be protected by the Hong Kong Special Administrative Region” was changed to “shall enjoy the rights and freedoms of Hong Kong residents provided in this Chapter in accordance with law”. There was no substantial change in the content and wording in the third to eleventh drafts of the article. The article was subsequently adopted as BL 41 in April 1990.

The explanatory note when finalizing the first draft of the article read as follows: “Section XIII of Annex I to the *Sino-British Joint Declaration* and Chapter III (14) of *Structure of the Basic Law (Draft)* set forth the content of this article.”<sup>333</sup>

Prior to the finalization of the second draft of the article, the Working Group on Definition of Residents of the Special Group on Rights, Freedoms and Duties of Residents of the Consultative Committee discussed more than once and reached a consensus: in the discussions of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others of the Consultative Committee, members of the Consultative Committee agreed unanimously that for all types of residents of the HKSAR, whether their residency was temporary or permanent and regardless of their nationality, their individual fundamental rights and freedoms as provided for by the laws previously in force, including freedom of the person, of speech, of publication, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of procession, of choice of occupation, of academic research and of conscience, inviolability of the home, the freedom of marriage and the

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333 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.372.

right to raise a family freely, should all be protected by the law.<sup>334</sup>

The explanatory note when finalizing the third draft of the article read as follows: “Based on the opinions received, a further provision is made to safeguard the rights of other persons, by changing to ‘enjoy the rights and freedoms of Hong Kong residents provided in this Chapter in accordance with law’. After a clause-by-clause study by the group, other persons shall also enjoy the rights and freedoms of Hong Kong residents provided in this Chapter subject to certain exceptions. The adding of the expression ‘in accordance with law’ is because there are certain rights, such as the right to vote and the right to stand for election, to which other persons are not entitled.”<sup>335</sup>

The explanatory note when finalizing the fourth draft of the article read as follows: “Some suggested changing the provision of this article to ‘persons other than Hong Kong residents shall enjoy the rights and freedoms of Hong Kong residents provided in this Chapter (except for the right to vote and the right to stand for election) in accordance with law’. After study by the group, since other persons cannot enjoy the right to vote and the right to stand for election and are also not entitled to certain rights such as freedom to enter Hong Kong, the change was not made.”<sup>336</sup>

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334 Working Group on the Definition of Residents of the Special Group on the Rights, Freedoms and Duties of Residents, *Definition of Residents: Discussion Paper on Entry and Exit, Residence, Deportation, Right to Vote and Right to Stand for Election*, 11 November 1986 (Discussion Paper of the Seventh Meeting on the Rights, Freedoms, Welfare and Duties of Residents and Others, 8 December 1986). The contents of the discussion paper were passed by the Executive Committee on 14 February 1987 as *Final Report on Definition of Residents, Right of Entry and Departure, Right of Abode, Immunity from Deportation, Right to Vote and Right to Stand for Election in Overview of the Drafting Process*, Vol.1, pp.372-373.

335 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.373.

336 *Progress Report of the Subgroup on Fundamental Rights and Duties of HKSAR Inhabitants*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.374.

Before the finalization of the ninth draft of the article, some members of the Drafting Committee from the Mainland considered that in the context of the definition of residents and nationality, Chapter III of the Basic Law mainly referred to Hong Kong residents. The term “persons other than ...” in this article and BL 42, on the other hand, did not refer to people from the Mainland but others who were in transit for one to two days might also be regarded as other persons. These people, though vaguely defined, were basically entitled to the rights and freedoms of Hong Kong residents.<sup>337</sup>

Some members of the Consultative Committee suggested the expression “enjoy the rights and freedoms of Hong Kong residents provided in this Chapter in accordance with law” be amended to “enjoy the rights and freedoms conferred upon them by the laws enacted by the Hong Kong Special Administrative Region” for two reasons: (1) to prevent Vietnamese boat people who were stranded in Hong Kong after 1997 from enjoying the same rights and freedoms as Hong Kong residents. This amendment could allow the Hong Kong Government to maintain its existing power to deal with refugees after 1997; (2) if the words “in accordance with law” referred to “in accordance with the Basic Law”, the rights and freedoms enjoyed by “persons other than ...” referred to in the article, such as tourists, would be greater than those currently provided for in Hong Kong. Therefore, it had to be rewritten that the rights and freedoms they (other persons) could enjoy in Hong Kong were given to them in accordance with the laws of the HKSAR. However, some members of the Consultative Committee were of the view that the words “in accordance with law” were not inappropriate, because according to the then Immigration Ordinance, there were already provisions that refugees stranded in Hong Kong could not enjoy the same rights and freedoms as Hong Kong residents, so Vietnamese boat people were no exception. Therefore, there was no

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337 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of the Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.1, p.375.

need to amend this article.<sup>338</sup>

The Consultative Committee received a view that this article was a special supplement to BL 24,<sup>339</sup> which was necessary in view of the special status of such other persons. The Consultative Committee also received suggestions to delete this article for reasons including: if “persons other than ...” referred to people other than Hong Kong residents, they should not be entitled to the rights and freedoms of Hong Kong residents provided in Chapter III in accordance with the law indeed; this article overlapped with the content of BL 5 of Chapter I that “The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law”;<sup>340</sup> and except for appropriate provisions for protecting the political rights of permanent residents, the provisions set out in Chapter III should apply to all persons within the jurisdiction of the HKSAR but not only to the residents thereof.<sup>341</sup>

The “Explanations”<sup>342</sup> made by Chairman Ji Pengfei at the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, which is included in the Note of BL 25 in this book. The relevant part thereof specifies that “... In accordance with the characteristics of the composition of Hong Kong

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338 Consultative Committee, *Collection of Views of the Special Group on Fundamental Rights and Duties of Inhabitants of the Consultative Committee for the Basic Law regarding Chapter Three of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.375.

339 The current BL 25.

340 The current BL 4.

341 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, pp.375-376.

342 *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 National People's Congress, 28 March 1990).

residents, the draft stipulates not only the general rights and freedoms enjoyed by Hong Kong residents, but also the rights of the permanent residents and Chinese citizens living among them. It also stipulates that people other than Hong Kong residents also enjoy the rights and freedoms of Hong Kong residents in accordance with the law ...”

## Article 42

“Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the Hong Kong Special Administrative Region.”

The Joint Declaration makes no reference to the obligations of Hong Kong residents and other persons in Hong Kong. The following proposals and suggestions on the structure of the Basic Law were contained in *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues* dated April 1986, which was one of the reference materials for the second meeting of the Drafting Committee: “... The obligations of citizens, such as compliance with the legislation, should also be listed in detail.”<sup>343</sup> Drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eleven drafts.<sup>344</sup> Item 16 under Chapter III on “Fundamental Rights and Duties of Hong Kong Residents” of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986, reads: “Hong Kong residents shall have the obligation to abide by the Basic Law and all laws in force in the Hong Kong Special Administrative Region”.<sup>345</sup> Some members of the Drafting Committee expressed the view that the Basic Law should not provide for the obligations of residents.<sup>346</sup>

343 *Overview of the Drafting Process*, Vol.1, p.378.

344 *Overview of the Drafting Process*, Vol.1, pp.378-384.

345 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.378. The full text of *Structure of the Basic Law (Draft)* is included in Appendix IV.

346 *Opinions from Some Drafters on the Basic Law Structure (Draft) (Memo)*, April

The first draft of this article read: “Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws of the Hong Kong Special Administrative Region.” When finalizing the second draft of the article, the expression “in Hong Kong” was changed to “in the Hong Kong Special Administrative Region”, and was changed back to “in Hong Kong” when finalizing the third draft of the article subsequently. There was no change in the content and wording in the fourth to eighth drafts of the article. When finalizing the ninth draft of the article, the expression “laws of the Hong Kong Special Administrative Region” was changed to “laws in force in the Hong Kong Special Administrative Region”. The tenth and eleventh drafts of the article remained unchanged and the article was adopted as BL 42 in April 1990.

The explanatory note when finalizing the first draft of the article read as follows: “It is stipulated in Chapter III (16) of *Structure of the Basic Law (Draft)* that Hong Kong residents shall have the obligation to abide by the laws of the Hong Kong Special Administrative Region. In addition, with reference to the opinions solicited by survey in Hong Kong, it is added that other persons in Hong Kong shall also fulfill this obligation.”<sup>347</sup>

Before finalizing the third draft of the article, some members of the Consultative Committee suggested this article be moved to after BL 2<sup>348</sup> to show its importance.<sup>349</sup> The explanatory note when finalizing the third draft of the article read as follows: “Some members asked whether all persons in Hong Kong, including the Garrison, shall abide

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1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.378.

347 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 12 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.378.

348 The current BL 25.

349 *Minutes of the Fourteenth Meeting of the Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others (Revised)*, 9 March 1987 in *Overview of the Drafting Process*, Vol.1, p.379.



by the laws of Hong Kong. After study, this article is a principled provision for the observation of laws by Hong Kong residents and other persons. It does not affect the making of special provision regarding the issue of observation of laws by the Garrison in the Basic Law.”<sup>350</sup>

Prior to the finalization of the fourth draft of the article, some members of the Consultative Committee suggested that the words “other persons” be deleted and that the article be amended to “Residents of the Hong Kong Special Administrative Region shall have the obligation to abide by the laws of the Hong Kong Special Administrative Region while they are in the Region.”<sup>351</sup> These suggestions were not adopted.

Before the finalization of the ninth draft of the article, some members of the Drafting Committee from the Mainland considered that in the context of the definition of residents and nationality, Chapter III of the Basic Law mainly referred to Hong Kong residents. The term “persons other than ...” in BL 41 and this article, on the other hand, did not refer to people from the Mainland but others who were in transit for one to two days might also be regarded as other persons. These people, though vaguely defined, were basically entitled to the rights and freedoms of Hong Kong residents.<sup>352</sup>

During the consultation period for solicitation of opinions, there was a number of views that other obligations should be added to this

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350 *Progress Report of the Subgroup on Fundamental Rights and Duties of Hong Kong Residents of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.1, p.379.

351 Special Group on Rights, Freedoms, Welfare and Duties of Residents and Others, *Final Report on the Fundamental Rights and Duties of Hong Kong Residents*, Vol.2 (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.1, p.381.

352 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of the Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.1, pp.381-382.



article. For example, there were views from the Mainland that the expression “Hong Kong residents shall have the obligation to uphold the state’s honor, interests and security and to promote the prosperity and stability of the Motherland.” should be added to this article.<sup>353</sup> The Consultative Committee also received suggestions to rewrite the article as: “Hong Kong residents and other persons in Hong Kong shall have the obligation to maintain national unity, support the Central People’s Government and abide by the laws of the Hong Kong Special Administrative Region”; “Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region have the obligation to pledge allegiance to the state and its people, and to maintain national unity; other persons residing in Hong Kong have the obligation to abide by the laws of the Hong Kong Special Administrative Region”.<sup>354</sup> None of these opinions were adopted.

The Consultative Committee received views that it was unclear what purpose could be served by stating obligations which ordinary people would accept. However, there were views that this chapter should further specify the obligations which residents should fulfill, and should not assume that residents would automatically abide by the law.<sup>355</sup> Also, some members of the Special Group on Residents were of the view that “Since this chapter is about the rights and obligations of residents but all provisions in this chapter are about rights except this article, the existence of this article is necessary”.<sup>356</sup>

On the issue of whether Hong Kong residents shall have

353 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.1, p.382.

354 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.1, p.382.

355 Ibid.

356 *Minutes of the Meeting of the Special Group on Residents on Chapter III of the Basic Law (Draft)* (Annex to the *Minutes of the Fourth Meeting of the Second Consultation Period of the Special Group on Residents*, 5 October 1989, passed by the Executive Committee on 7 October 1989) in *Overview of the Drafting Process*, Vol.1, p.383.

the obligation to perform military service, some members of the Drafting Committee from the Mainland were of the view that the rights and freedoms of Hong Kong residents were based on the Basic Law according to BL 10,<sup>357</sup> and this article also provided that Hong Kong residents only had the obligation to abide by the law without mentioning performance of military service, so Hong Kong residents did not have the obligation to perform military service.<sup>358</sup> Subsequently, prior to the finalization of the tenth draft of the article, the Consultative Committee received suggestions to add the expression “Chinese citizens in Hong Kong shall fulfill the obligation of performing military service” to the article, for reasons including that there should be no difference between the obligations of Chinese citizens in Hong Kong and those of Chinese citizens in the Mainland. However, there were other suggestions to add the expression “Hong Kong residents shall not be obligated to perform military service”, in order to implement the policy of the state leaders regarding the HKSAR.<sup>359</sup> None of these proposed amendments were adopted.

The “Explanations”<sup>360</sup> made by Chairman Ji Pengfei at the NPC on 28 March 1990 contained a paragraph entitled “On the Fundamental Rights and Duties of the Residents”, which is included in the Note of BL 25 in this book.

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357 The current BL 11.

358 Ibid, footnote 352. *Overview of the Drafting Process*, Vol.1, p.381.

359 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.1, p.383.

360 *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 National People's Congress, 28 March 1990).

## Chapter IV Political Structure

### Section 1 The Chief Executive

#### Article 43

“The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent the Region.

The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to<sup>1</sup> the Central People’s Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.”

BL 43 is the initial article in Section 1 “The Chief Executive” of Chapter IV on Political Structure of the Basic Law.<sup>2</sup> At the initial stage of the drafting of the Basic Law, some members of the Consultative Committee held the view that “there was too much discussion on the parts relating to economy and too little on political structure in the Joint Declaration, so the Basic Law should focus more on political structure. However, if there were too many details, there would be little room for revision; if it was too brief, the main focal point might not be perfectly clear. Some members suggested that only the broad principles of the political structure should be set out in the Basic Law, while the specific details may be elaborated in the form of an annex ... This would not only be precise and concise, it would also be easy for Hong Kong people to amend the annex on the political structure and it

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1 The expression “be accountable to ...” or “be responsible to ...” [*Editor’s note: both expressions are translated from the same Chinese expression “對……負責”*] is found not only in BL 43, but also in BL 57, 58, 64, 99 and 101.

2 There are 62 articles in Chapter IV of the Basic Law, from BL 43 till BL 104, which are divided into six sections: 1. The Chief Executive; 2. The Executive Authorities; 3. The Legislature; 4. The Judiciary; 5. District Organizations; and 6. Public Servants.

might not be necessary to submit the same to the Central Authorities for approval.”<sup>3</sup>

According to drafting materials in *Overview of the Drafting Process*, the first to fourth drafts of the article were briefer than the version adopted by the NPC. The said drafts simply stated: “The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall be accountable to the Central People’s Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.” Amendments were made when the fifth draft was finalized and the expression “and shall represent the Region” was added to the first part of the article. The revised text was later adopted as BL 43.<sup>4</sup>

Article 3(4) of the Joint Declaration states that the Government of the PRC declares that the basic policies of the PRC regarding Hong Kong include: “The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally.” The elaboration in Section I of Annex I to the Joint Declaration states: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.”

The discussion before the formulation of the fifth draft of this article recorded the views of the members of the Drafting Committee on the draft article, which can serve as a reference on why this article was amended and the expression “and shall represent the Region” was added:

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3 Consultative Committee, *Summary of the Fourth Batch of Discussions*, February 1986 in *Overview of the Drafting Process*, Vol.2, p.387.

4 *Overview of the Drafting Process*, Vol.2, pp.387-393. The drafting of this article progressed through nine drafts.

“Some members believed that the content of Article 47(1) and (2) should be moved to this article and this article should be amended to read: ‘The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region, represent the Region and lead the Government of the Region, and be accountable to the Central People’s Government and the Region in accordance with the provisions of this Law.’ This can reflect clearly the status of the Chief Executive.<sup>5</sup> Some members suggested revising the article to read: ‘The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and is accountable to the Central People’s Government and the Region in accordance with the provisions of this Law on behalf of the Region.’ Some members believed that the second half of this article should be replaced by ‘and shall be accountable to the Central People’s Government and lead the Government of the Hong Kong Special Administrative Region in accordance with the provisions of this Law.’ Some members were of the view that it would be better to retain the original article.

Some members held the view that this article was about the status and functions of the Chief Executive, but this was not stated clearly and needed further deliberation, for example: what did the expression ‘the Chief Executive shall be the head of the Region’ mean? The Region was not an organization ...”<sup>6</sup>

During the drafting of the article, there was quite a lot of discussion on the provision of the CE of the HKSAR being “accountable to the Central People’s Government and the Hong Kong Special

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5 At the initial stage of the drafting process of the Basic Law, Article 47, namely, BL 48 of the current Basic Law, listed the functions and powers to be exercised by the CE, and of which Paragraph 1 read as: “to represent the Hong Kong Special Administrative Region” and Paragraph 2 read as: “to lead the Government of the Hong Kong Special Administrative Region.”

6 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.389.

Administrative Region”. Some members of the Drafting Committee were concerned about the meaning of the CE being “accountable” to the HKSAR and whether it was appropriate to use this expression simultaneously with the expression of being “accountable” to the CPG.<sup>7</sup> Another view was that the article should be amended so that the CE of the HKSAR would be accountable to the residents of the HKSAR. There were also views that since Annex I to the Joint Declaration provides that “the executive authorities shall abide by the law and shall be accountable to the legislature” and the CE is the head of the executive authorities, the article should be amended to stipulate that the CE is accountable to the legislature. It was also suggested that the expression “the Central People’s Government and” be deleted.<sup>8</sup>

### Article 44

“The Chief Executive of the Hong Kong Special Administrative Region shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.”

According to drafting materials in *Overview of the Drafting Process*, the content of BL 44 on the qualifications for the CE, including age limit, length of residence in Hong Kong and nationality, remained basically unchanged during the drafting process. The only amendment was adding the expression “with no right of abode in any foreign country” to the eighth draft at the later stage of the drafting process.<sup>9</sup> The stipulation on the length of residence in Hong Kong was literally changed from “ordinarily and continuously resided in Hong

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7 Ibid.

8 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol. 3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.392.

9 *Overview of the Drafting Process*, Vol.2, pp.394-399. The drafting process of this article progressed through nine drafts.

Kong for a period of not less than 20 years”, which was the initial version, to “ordinarily resided in Hong Kong for a continuous period of not less than 20 years” in the fifth draft.

During the consultation process, a view was expressed that it was only necessary for the CE to be a Hong Kong permanent resident rather than a Chinese citizen. Another view was that the terms “Chinese citizen” and “permanent resident” should be replaced by “Chinese born in Hong Kong”. It was also suggested to add a requirement of “without non-Chinese nationality” to prevent dual allegiance and political privileges. Another suggestion was adding the expression “prior to assuming office” before “ordinarily resided in Hong Kong for a continuous period of not less than 20 years” to avoid the case where someone has “ordinarily resided in Hong Kong for a continuous period of not less than 20 years” but left Hong Kong for so long “prior to assuming office” that he or she is not familiar with the affairs of Hong Kong at that time.<sup>10</sup>

Chairman Ji Pengfei’s report of 15 February 1989, submitted to the NPCSC before the publication of the eight draft of the article, points out:

“(3) ... In addition, the draft Basic Law stipulates that the Chief Executive, principal government officials, members of the Executive Council, the President of the Legislative Council, the chief justice of the Court of Final Appeal, and the chief judges of the High Court must be Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region. This is necessary for maintaining state sovereignty.”<sup>11</sup>

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10 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.397-398.

11 *Report on the Submission of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and Related Documents to the Standing Committee of the National People’s Congress for Examination*, by Ji Pengfei, 15 February 1989 in *Overview of the Drafting Process*, Vol.2, p.398.

On 19 February 1990, Chairman Ji Pengfei pointed out in *Report on the Amendments to The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents*:

“3. The restriction of ‘with no right of abode in any foreign country’ was added to the provisions concerning the stipulations on the qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, President of the Legislative Council, principal government officials, Chief Justice of the Court of Final Appeal, Chief Judge of the High Court, and Hong Kong members of the Basic Law Committee.”<sup>12</sup>

Chairman Ji Pengfei stated at a session of the NPC on 28 March 1990:

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong. Based on the same considerations, relevant articles stipulate that the Region’s Legislative Council must be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.”<sup>13</sup>

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12 *Overview of the Drafting Process*, Vol.2, p.399.

13 *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 National People’s Congress, 28 March 1990).



On 4 April 1990, the NPC adopted the ninth draft of this article as BL 44 the text of which was the same as the eighth draft.

Deng Xiaoping talked about “the scope and criteria for Hong Kong people administering Hong Kong” during his meetings with a delegation of the industrial and commercial sectors of Hong Kong visiting Beijing, and a group of well-known figures of Hong Kong, including Chung Sze-yuen, on 22 and 23 June 1984 respectively:<sup>14</sup>

“We should have faith in the Chinese of Hong Kong, who are quite capable of administering their own affairs ... We are convinced that the people of Hong Kong are capable of running the affairs of Hong Kong well, and we want to see an end to foreign rule. The people of Hong Kong themselves will agree to nothing less.

Some requirements or qualifications should be established with regard to the administration of Hong Kong affairs by the people of Hong Kong. It must be required that patriots form the main body of administrators, that is, of the future government of the Hong Kong special region. Of course it should include other Chinese, too, as well as foreigners invited to serve as advisers. What is a patriot? A patriot is one who respects the Chinese nation, sincerely supports the Motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are patriots, whether they believe in capitalism or feudalism or even slavery. We don’t demand that they be in favour of China’s socialist system. We only ask them to love the Motherland and Hong Kong.”

## Article 45

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.

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14 “*One Country, Two Systems*”, *Selected Works of Deng Xiaoping*, Vol.3, p.72.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

The specific method for selecting the Chief Executive is prescribed in Annex I ‘Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region’.<sup>15</sup>

Article 3(4) of the Joint Declaration states that the Government of the PRC declares that the basic policies of the PRC regarding Hong Kong include “The chief executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally.” Section I of Annex I to the Joint Declaration also provides: “The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.”

On 22 April 1986, the second plenary session of the Drafting Committee adopted *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)*, in which Chapter IV was titled: *Political Structure of the Hong Kong Special Administrative Region*. Section 1 (1): CE - Selection, Appointment and Removal of the CE. Drafting materials in *Overview of the Drafting Process* show that the drafting process of this article had progressed through nine drafts.<sup>16</sup> Before and after the adoption

15 Adopted at the Third Session of the Seventh NPC on 4 April 1990; amended, as approved at the Sixteenth Session of the Standing Committee of the Eleventh NPC on 28 August 2010; *Decision of the National People’s Congress On Improving the Electoral System of the Hong Kong Special Administrative Region* adopted at the Fourth Session of the Thirteenth NPC on 11 March 2021, see Appendix XII; and amended at the Twenty-Seventh Session of the Standing Committee of the Thirteenth NPC on 30 March 2021, see Appendix XIII.

16 *Overview of the Drafting Process*, Vol.2, pp.400-470.

of *Structure of the Basic Law (Draft)* and at the beginning of the drafting process of the provisions, the Subgroup on Political Structure of the Drafting Committee had held many discussions on this subject, including group discussions, and had received many different opinions from members and organizations of the community. Meanwhile, the words “selection of the Chief Executive of the Hong Kong Special Administrative Region (to be formulated)” were seen in the first to third drafts of this article.

Deng Xiaoping made the following remarks at a meeting with members of the Drafting Committee on 16 April 1987:

“Would it be good for Hong Kong to hold general elections? I don’t think so. For example, as I have said before, Hong Kong’s affairs will naturally be administered by Hong Kong people, but will it do for the administrators to be elected by a general ballot? We say that Hong Kong’s administrators should be people of Hong Kong who love the Motherland and Hong Kong, but will a general election necessarily bring out people like that? Not long ago the Governor of Hong Kong, Sir David Wilson, said that things should be done gradually, a view that I think is realistic. Even if a general election were to be held, there would have to be a transition period — it would have to be a gradual process. ...”<sup>17</sup>

*The Draft Basic Law of Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee, December 1987, includes the fourth draft of the article:<sup>18</sup>

“(Paragraph 1) The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.

(Paragraph 2) Four methods for selecting the Chief Executive:

1. Elected by a broadly representative electoral college.

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17 *Selected Works of Deng Xiaoping*, Vol.3, p.220.

18 *Overview of the Drafting Process*, Vol.2, p.429.

2. Nominated by members of the legislature (e.g., one-tenth) and directly elected by one-person-one-vote in the territory.

3. Elected by functional constituencies.

4. The first three terms of the Chief Executive shall be selected by an advisory panel through local consultations and reported to the Central Authorities for appointment. After that, an advisory panel shall nominate three candidates for election by an election committee after approval of nominees from the Central Authorities.

(Paragraph 3) The method for selecting the Chief Executive prescribed in the preceding paragraphs may be changed in the light of the actual situation of the Hong Kong Special Administrative Region. Such change must be passed by a two-thirds majority of all the members of the legislature of the Hong Kong Special Administrative Region and agreed by the Chief Executive, and submitted to the Standing Committee of the National People's Congress for approval.”

At the same time, some members of the Drafting Committee suggested that the method for selecting the CE should be provided in an annex or a separate piece of law, which should be drafted by the Drafting Committee and promulgated at the same time as the Basic Law.<sup>19</sup>

*The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of the Secretariat of the Drafting Committee, April 1988, shows the fifth draft of this article which was divided into three paragraphs:

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The specific method for selecting the Chief Executive is prescribed

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<sup>19</sup> *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.435.

in Annex I *Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region*.

The method for selecting the Chief Executive prescribed in the preceding paragraphs may be changed in the light of the actual situation of the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. Such change must be passed by a two-thirds majority of all the members of the Legislative Council of the Hong Kong Special Administrative Region and agreed by the Chief Executive, and submitted to the Standing Committee of the National People's Congress for approval.”

In addition, Annex I detailed five options, excerpts of which are as follows:<sup>20</sup>

- Option 1: The CE of the HKSAR will be elected locally by a broadly representative electoral college consisting of about 600 representatives from all sectors in Hong Kong: members of the legislature, representatives of district organizations, representatives of statutory bodies and permanent non-statutory bodies, representatives of various functional constituencies (industrial and commercial, financial, professional, education, labour, religion, social service and civil servants, etc.). The electoral college will elect amongst themselves 20 members to form a nominating committee. The nominating committee is responsible for nominating three CE candidates. Based on those nominations, the electoral college will cast votes and the choice of the CE elected by the electoral college shall be submitted to the CPG for appointment.
- Option 2: The CE of the HKSAR will be nominated by not less than one-tenth of members of the legislature and elected directly through territory-wide election.

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20 Secretariat of the Drafting Committee, *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, April 1988 in *Overview of the Drafting Process*, Vol.2, pp.435-436.

- Option 3: The CE of the HKSAR will be elected by a functional electoral college on a one-person-one-vote basis. The college shall be composed of no more than 600 members. Permanent residents of the HKSAR who are members of the industrial and commercial, financial, professional, labour and other organizations, with influence on government operation and social service, will choose representatives amongst themselves through elections. Any person who meets the qualifications set out in the Basic Law and is nominated by 50 Hong Kong permanent residents may become a candidate for the CE.
- Option 4: The first few terms (about two to three terms) of CE will be selected by an advisory panel through consultations. The advisory panel will consist of 50-100 advisers nominated by various sectors in Hong Kong, selected by the ExCo and appointed by the CE upon submission to the Central Authorities. Subsequent terms will be elected by an electoral college consisting of retired members of previous terms of the LegCo, ExCo, CE and former principal officials appointed by the Central Authorities. The minimum number of members of the electoral college to be 250. The number of members will increase each term with 500 being the maximum. The advisory panel will by consultation nominate three persons as CE candidates and, with the consent of the Central Authorities, pass to the electoral college for election.
- Option 5: The CE will be elected by universal suffrage on a one-person-one-vote basis, after three persons are nominated by the “Chief Executive nominating committee” through consultations or voting after consultation. The “Chief Executive nominating committee” will be composed of permanent residents of Hong Kong and must be broadly representative, the composition of which should be: 25% from industrial, commercial and financial bodies; 25% representatives of professional bodies; 25% representatives of labour, grassroots, and religious bodies; 12% members of

the legislature; 8% members of district organizations; 5% NPC deputies and members of the Chinese People's Political Consultative Committee.

BL 45 and Annex I of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* of the Drafting Committee, April 1988, which was the sixth draft of the provision, remained the same as the fifth one. There was immediately a period of consultation after the sixth draft was finalized.<sup>21</sup>

During the period of consultation, at a meeting of the Special Group on the Political Structure of the SAR of the Consultative Committee and members of the Drafting Committee from the Mainland, there was a suggestion that “the Chief Executive should not be selected through consultations”. However, many members considered it as being contrary to the Joint Declaration and selecting the CE through “consultations” should not be abolished.<sup>22</sup>

In response to the opinion that “since this article provides for appointment, it should correspondingly provide for removal by the Central People's Government”,<sup>23</sup> the delegation of Mainland members of the Drafting Committee visiting Hong Kong stated: “The Central People's Government has the power to appoint and remove the Chief Executive. The power to appoint is always matched with the power to remove, which is a matter of practicality but not formality. Therefore Article 72 prescribes that the legislature has the power to impeach the Chief Executive, but the final decision is to be made by the Central Authorities. The Central People's Government is the

21 The seventh draft of this article can be found in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, February 1989.

22 *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (II) and Members of the Drafting Committee from the Mainland*, 6 June 1988 in *Overview of the Drafting Process*, Vol.2, p.437.

23 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.2, p.437.

Central Authorities. According to the Sino-British Joint Declaration, the Hong Kong Special Administrative Region is directly under the jurisdiction of the Central People's Government, and the Central People's Government is the State Council. Therefore, the appointment and removal of the Chief Executive are also conducted in accordance with the laws of the State Council."<sup>24</sup>

There were views that it should be stipulated that the direction of "gradual and orderly progress" would develop towards the goal of one-person-one-vote, and Paragraph 3 should be revised as: "The method for selecting the Chief Executive set out in Annex I aims at promoting universal participation of residents, and may be changed in the light of the actual conditions of the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress ...". There were also views that a change in the method for selecting the CE should not be subject to the "consent of the Chief Executive".<sup>25</sup> There were also opinions that the amendment of Annex I should not be submitted to the NPCSC for "approval", but only for "notification", "because this is merely an administrative matter of the Hong Kong Special Administrative Region".<sup>26</sup>

Many comments were collected regarding the five options listed in Annex I during the consultation period.<sup>27</sup> For Option 1, those in favour considered that it can maintain the status quo, stabilize the government, ensure a smooth transition and a gradual and orderly

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24 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.2, pp.437-438.

25 Ibid, footnote 23.

26 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.439.

27 For details, see Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.440-450.



progress. Those who opposed argued that it only protected the interests of a certain social class, was vulnerable to manipulation by a small group of people, lacked representativeness and was unequal.

Those in favour of Option 2 argued that it conformed to the principle of democracy and fairness, guaranteed the participation and voting rights of Hong Kong people, and ensured that the CE enjoyed a certain degree of support and trust in the LegCo. It would also strengthen collaboration between the two and reduce the possibility of the LegCo opposing the implementation of the CE's executive orders in the future. Otherwise, a weak relationship between the two would harm the stability and efficiency of the government. Besides, all the other options were unacceptable. Those who opposed Option 2 argued that it would result in subjecting the CE to the members of the LegCo and the power of the LegCo becoming excessively inflated, and the checks and balances between the executive and the legislature would be lost which might lead to legislative dictatorship, with the supervisor becoming an indirect power holder, contrary to the meaning of the executive being responsible to the legislature. There were also views arguing that universal suffrage by one-person-one-vote might not necessarily ensure the "legitimacy" of the CE. Hong Kong was never and will not in future become a sovereign state, so the selection of the CE cannot be independent of the functioning of the Central Authorities. Any CE selected through Option 2 may not be able to maintain a proper cooperative relationship and communication with the CPG.

Those in favour of Option 3 considered that it could avoid a partisan political structure of "Hong Kong party ruling Hong Kong". It could build an efficient government, and when the conditions for direct election were not there yet, a gradual and orderly approach must be adopted. Reasons for opposing this option included: excessive favouritism to the business sector; disadvantages of functional elections (e.g., members of functional constituencies may have excellent achievements in their respective business or professions, but their experience for and competence in leading the whole HKSAR could not be guaranteed; the CE elected by an electoral college could

not be guaranteed to be free from manipulation, even if the voters had been elected in a more democratic way; a membership of 600 people was vulnerable to monopolization); disregard for democracy and human rights (e.g., disregard for ordinary Hong Kong people's will and right to participate, lack of representativeness); with little public participation and influence, the CE so elected would not be democratic and would lack representativeness; vulnerability to interference and control by the CPG.

Those in favour of Option 4 believed that the selection of the CE through consultations would prevent people with ulterior motives from using public opinion to oppose the Central Authorities, and that a CE selected through consultations was representative. The reasons for opposing this option included the drawbacks of advisory panel consultations (e.g., the number of members of an advisory panel was too small and at the same time membership was restricted to people of certain backgrounds, so representativeness was lacking and people's confidence was not easy to be built up; the advisory panel would bring about political operation within a small circle which would be detrimental to the building up of citizens' recognition of the government and senses of belonging, and have negative impact on the authority of the CE; and it was vulnerable to be controlled by a small number of groups with interests); vulnerability to intervention and control by the CPG; and violation of the principles of democracy and fairness.

As to Option 5, those who were in favour of it considered that it was in line with the principle of democracy and that the elected CE was representative and authoritative, for it allowed nomination of CE candidates by a broadly representative body and the people of Hong Kong to participate in the final selection. Those who opposed it opined that it involved consultations and was extremely undemocratic; it ignored the equal political rights of residents; the election by one-person-one-vote was just an ornament of democracy; it was vulnerable to intervention and control by the CPG; the composition ratio of the nominating committee was disproportionate; the nomination method

excluded the opportunity of people representing different political views, social classes and backgrounds for standing for election, and the candidates nominated would only be persons who leant towards some partial interests or were controlled by a small group, in which case the entire system would completely lose its legitimacy, representativeness and authority. Apart from the above, there were many proposals for amendments to the option which mainly focused on the nomination procedure of the CE and the composition ratio of the nominating committee.

During that consultation period before the seventh draft was finalized in February 1989, there were many suggestions for amendments to the options proposed by different organizations, groups and individuals in the community. After a meeting of the Drafting Committee's Subgroup on Political Structure in late 1988, the "Mainstream Proposal" was adopted. There were many comments afterwards. A relevant excerpt from the Consultative Committee's *Comparison between the Mainstream Proposal and other Proposals for the Political Structure* is as follows:<sup>28</sup>

#### "1. Introduction

1.1 Recently, the Subgroup on Political Structure of the Drafting Committee held a meeting in Guangzhou, during which Louis Cha, one of the group conveners, proposed a coordinated proposal for political structure. Since the people of Hong Kong had failed to reach a unified proposal, the meeting did not study the options one by one. Instead, each term of government of the Hong Kong Special Administrative Region after 1997 was taken as the basis for discussion. The result of the discussion was close to the proposal put forward by Louis Cha and, the meeting called it the 'Mainstream Proposal'.

1.2 Before the Guangzhou meeting, in order to promote dialogue

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28 *Comparison between the Mainstream Proposal and other Proposals for the Political Structure*, 4 January 1989, published in *The Drafting of the Basic Law and the Mainstream Proposal for the Political Structure in Overview of the Drafting Process*, Vol.2, pp.457-459.

among all sectors, the working group of the Special Group on the Political Structure of the SAR of the Consultative Committee made efforts and put forward three principles for proposal on 14 October:

(1) The Chief Executive would initially be elected by a broadly representative body, which would include members elected by universal suffrage from the Legislative Council, two Regional Councils and District Councils.

(2) Subsequently, through a gradual process (e.g., after a certain number of years or a flexible mechanism of trigger point) the Chief Executive would be elected by all the Hong Kong people by universal direct election by one-person-one-vote.

(3) The Legislative Council would initially be elected by hybrid mode elections, and gradually develop towards an election model with more elements of universal suffrage.

1.3 Although the working group intended to provide a common starting point for people in favour of different options to facilitate discussion by suggesting the three principles for proposal, they failed to come to a coordinated proposal that was acceptable to all parties.

1.4 In view of the increasingly urgent need for coordination, the working group invited representatives of the initiating bodies of the different options to hold a meeting on 12 November (also known as '*Wulin conference*'). Although no proposal acceptable to all nor consensus on the issue of specific proposal for the political structure could be achieved at the conference, a consensus was reached on five points:

(1) A dialogue this way is highly desirable. Effort should be made to create more opportunities for discussion and exchange of views in the future. A confrontational or repellent attitude should be avoided and there should instead be coordination with each other to seek consensus.

(2) The Chief Executive designate of the HKSAR should be selected by election and reported to the Central People's Government

for appointment.

(3) The election of the Chief Executive of the Hong Kong Special Administrative Region should be conducted in a democratic way.

(4) A fully democratic nomination procedure should be adopted to nominate candidates for the Chief Executive election.

(5) The Legislative Council should initially be constituted by hybrid mode elections and develop towards a fully democratic election.

1.5 The failure of all sectors in Hong Kong to reach a coordinated proposal was largely due to the fact that the proponents of the various options could not come to terms on the following issues:

(1) What is the starting point of the Hong Kong Special Administrative Region's future political structure? Which election model should be adopted in the beginning?

(2) How should the pace of political structure development be determined? Should a decision be made by the legislature or by vote?

(3) What should the ultimate democratic political structure be like? How should the Chief Executive be selected? Should the legislature be constituted entirely by direct election?

1.6 On how to elect the Chief Executive designate, one view was that he or she should be elected by direct election of one-person-one-vote from the first term. Another view was that he or she should be elected by indirect election. Those who supported the latter view also had different opinions: some of them considered that at least 25% of the members of the body responsible for electing the Chief Executive should be elected by universal suffrage; some insisted on at least one-third of the members, while some even argued for 75%, although all parties agreed that the ultimate aim of the electoral model was one-person-one-vote universal suffrage.

1.7 It can be seen that there were disputes over the development process to achieve one-person-one-vote universal suffrage for the

selection of the Chief Executive. Some people took the view that a fixed timetable should be set (different proposals relating to time have been made, but all proponents hoped to achieve the transition from indirect election to direct election within the second to fifth terms). Another view was that some flexible mechanism (such as a trigger point, or comprehensive trigger point) should be applied.

1.8 On the method of formation of the Legislative Council, the group representatives attending the '*Wulin conference*' had different views over the proportion of direct election there ought to be to kick start a hybrid mode of election. Some views suggested that the proportion of direct election should at a minimum be not less than 25%, others suggested at a maximum of not more than 50%, still there were views in between.

1.9 After the Guangzhou conference, the Subgroup on Political Structure of the Drafting Committee approved the Mainstream Proposal, which was criticized by some as going beyond the scope of the various options, being 'more conservative than the most conservative option'. Some argued that it was a 'moderate' proposal, a coordinated proposal based on all the options.

...

## 6. Conclusion

6.1 According to the analysis of and comparison between the various options and the Mainstream Proposal, the latter one has combined the characteristics and essence of most options. All options share a common feature, that is to develop the political structure towards the direction of democracy by adopting a mode of gradual and orderly progress, and the ultimate goal is to bring to Hong Kong a truly democratic and open political structure. The Mainstream Proposal has been designed based on these two considerations.

6.2 The suggestions in the Mainstream Proposal are based on the consensus reached at the '*Wulin conference*': the Chief Executive is to be selected by election and appointed by the Central People's Government; the method for selecting the Chief Executive is democratic

with a broadly representative election committee being responsible and the people to decide whether to introduce universal suffrage from the fourth term; a Chief Executive candidate must obtain the support of not less than 100 election committee members before he or she is nominated and the nominating process is fully democratic. The Legislative Council would initially be constituted by a hybrid mode of election, with the proportion of members elected by universal suffrage gradually increase, and develop towards a fully democratic election. Finally, it is up to Hong Kong people to decide whether or not to elect all members of the Legislative Council by universal suffrage from the fifth term onwards.

6.3 Although all the options share common features and spirit, they differ in the pace it takes to move towards democracy. In this regard, the Mainstream Proposal advocates a step by step approach to move towards democracy in a steady and healthy manner.”

BL 45(1) of the *Draft Basic Law*, i.e. the seventh draft of this article finalized in February 1989, remained unchanged.<sup>29</sup> BL 45(2) read: “The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage.” BL 45(3) read: “The specific method for selecting the Chief Executive is prescribed in Annex I ‘Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region’.”<sup>30</sup>

“Annex I Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region.

1. The Chief Executive shall be elected by a broadly representative Election Committee and appointed by the Central People’s Government.

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29 “The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.”

30 *Overview of the Drafting Process*, Vol.2, p.436.

2. The Election Committee shall be composed of 800 persons from the following sectors:

Industrial, commercial and financial sectors	200
The professions	200
Labour, social services, religious and other sectors	200
Members of the Legislative Council, representatives of district organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference	200

3. The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall be prescribed by an electoral law by the Hong Kong Special Administrative Region.

Corporate bodies of various sectors shall elect members to the Election Committee in accordance with the number of seats allocated and the election method as prescribed by the electoral law.

Members of the Election Committee shall vote in their individual capacities.

4. Candidates for the office of Chief Executive may be nominated jointly by not less than 100 members of the Election Committee. Each member may nominate only one candidate.

5. The Election Committee shall, on the basis of the list of nominees, elect the Chief Executive designate by secret ballot on a one-person-one-vote basis. The specific election method shall be prescribed by the electoral law.

6. The Election Committee shall be dissolved after the appointment of the Chief Executive by the Central People's Government.

7. The first Chief Executive shall be selected in accordance with the *Decision of the National People's Congress of the People's*



*Republic of China on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region.*

The second and third Chief Executives shall be selected in accordance with the method prescribed in this annex.

During the term of office of the third Chief Executive, the Legislative Council will formulate a specific method and all voters of the Hong Kong Special Administrative Region will vote<sup>31</sup> to decide whether to elect the Chief Executive by universal suffrage after

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31 One of the reference documents before the seventh draft of this article was finalized: *The Nature and Functions of Referendums*, 3 January 1989 (*Overview of the Drafting Process*, Vol.2, pp.455-457), provided information on referendums worldwide and pointed out: "There are actually several different models of what are commonly called referendums. The main difference among them lies in the degree to which they transfer the power of making laws from the government to the ordinary voters. The transfer ranges from small to big and can be divided into four basic types.

(1) Government-controlled referendums: The government has full power to decide whether or not to hold a referendum, the subject matter and wording of the question to be voted on, the proportion of affirmative votes required to win the question, and whether the voting result is binding on the government or purely advisory.

(2) Constitutionally required referendums: The constitutions of some countries require that certain bills passed by the government be approved by voters before they enter into force. These bills are mainly constitutional amendments, but there are still others. The government has the right to decide whether to hold a referendum on each amendment and determine its wording, but a mandatory referendum determines whether it becomes part of the constitution.

(3) Referendums by popular petitions: In some countries, ordinary voters have the right to jointly sign a petition to request that a bill passed by a government be handed over to voters. If their petition contains the required number of valid signatures, a referendum must be held on the bill. If the majority of voters approve the repeal of the bill, whether the government wants to maintain it or not, the bill will lose its effectiveness.

(4) Popular initiatives: In some countries, ordinary voters have the right to jointly sign a petition to request that a bill that is not passed by the government be handed over to voters. If their petition contains the required number of valid signatures, a referendum must be held on the bill. If the majority of voters approve of the bill, no matter how opposed the government is, the bill will become law.

Most of the countries that hold referendums only adopt the first type of referendum. Governments only choose to hold referendums in very few cases. They are mainly for reasons of political convenience rather than as a response to the general theory of how laws should be formulated. The third and fourth types of referendums (commonly referred to as "direct democracy") are widely used at the federal and state levels in Switzerland, as well as in some states in the United States.

nomination by a broadly representative nomination committee in accordance with democratic procedures. The voting results shall be reported to the Standing Committee of the National People's Congress for the record.

The above-mentioned voting by all voters must be carried out with the approval of a majority of the members of the Legislative Council, the consent of the Chief Executive and the approval of the Standing Committee of the National People's Congress. There must be affirmative votes from more than 30% of the legitimate voters before the result is considered valid for implementation.

8. If the vote above decides that the Chief Executive shall be elected by universal suffrage, it shall be implemented from the fourth term onwards. If the vote decides there should be no change, a vote by all voters in accordance with the stipulations in Item 7 may be held again every ten years.

9. Except as provided in Items 7 and 8 of this annex, if there is a need to make any other amendments to the method for selecting the Chief Executive, such amendments may be made with the endorsement by a two-thirds majority of all members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record.”

Excerpt from *Report on the Submission of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents to the Standing Committee of the National People's Congress for Examination* by Chairman Ji Pengfei of 15 February 1989:<sup>32</sup>

“III. On the Political Structure of the Hong Kong Special Administrative Region

II. The method for selecting the Chief Executive and forming the Legislative Council: Article 45 and Article 67 of the Basic Law

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32 *Overview of the Drafting Process*, Vol.2, p.462.

(Draft) provide the principles for the method for selecting the Chief Executive and forming the Legislative Council respectively, and the specific methods are respectively set out in Annexes I and II. The two methods share the principle of developing democracy in a gradual and orderly manner that is suitable for the actual conditions of Hong Kong on the premise of Hong Kong's stability and prosperity. Even after the Drafting Committee adopted the above provisions and annexes, there are still different views from different sectors of society in Hong Kong. It is necessary to further listen to and coordinate the views of all sectors of society before making necessary revisions and adjustments to the relevant provisions.”

Opinions received during the consultation period which followed were still diverse. Some members of the Consultative Committee were of the view that the primary principle to bear in mind when designing a proposal for the political structure was that the political structure should develop in a steady rather than haphazard manner in order to maintain prosperity and stability. Too many or too frequent reviews or changes to the political structure would cause social unrest. The original political structure had worked well and developments should be made on that basis. After entering the era of the special administrative region, there should be a stable period of fifteen to twenty years during which the political structure shall remain unchanged, in order to allow developments to be made on the basis of the existing foundation and to foster “Hong Kong people administering Hong Kong”. There were also members who were of the view that the design of the political structure should be able to protect capitalist society and it could not be conducive to the birth of the socialist system.<sup>33</sup>

Members of the Consultative Committee in support of the seventh

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33 *Collection of Views of the Special Group on Political Structure of the Consultative Committee for the Basic Law regarding Chapter IV of and Annexes I and II and the Appendices to the Draft Basic Law*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol. I*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.464.

draft of BL 45 were of the view that the CE should be approved by the Chinese Government, and there should be mutual understanding, accommodation and respect between the CE and China, and they should complement each other. Members in favour of Paragraph 2 considered that the “gradual and orderly progress” requirement was consistent with the Joint Declaration and the policy of “Hong Kong people administering Hong Kong”. However, members of the Consultative Committee who opposed it considered that the CE should be elected rather than selected through consultations, and should not be appointed by the CPG. Some members also considered that the word “ultimate” in Paragraph 2 gave people an impression of something far, far away. The expressions “actual situation” and “gradual and orderly progress” were considered obscure and there were suggestions for their deletion. Some considered that the starting point of the proposal in the annex was not democratic and the pace of development was too slow, and it was unreasonable to deprive residents of the right to vote for fifteen years. In addition, the destination was not guaranteed and therefore it was unacceptable. There were also members of the Consultative Committee who suggested that the entire Annex I be amended to read: “(1) Not less than 100 voters of the Hong Kong Special Administrative Region may jointly nominate candidates for the Chief Executive. Each voter may nominate only one candidate. (2) From the candidates for the Chief Executive, the Chief Executive shall be elected by universal suffrage on a one-person-one-vote basis by voters of the Hong Kong Special Administrative Region. The specific election method shall be stipulated by the electoral law of the Hong Kong Special Administrative Region. (3) The first Chief Executive shall be selected in accordance with the *Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*.”<sup>34</sup>

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34 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, pp.464-469.

Relevant excerpt from *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure*, December 1989, shows,<sup>35</sup>

“I. The majority of members agreed to the following amendments:

1. In Paragraph 2 of Article 45, replace ‘The ultimate aim ... by universal suffrage’ with ‘The ultimate aim ... by universal suffrage upon nomination by the nominating committee.’

III. With regard to the method for selecting the Chief Executive, members agreed to make the following amendments after discussion:

1. After Item 3, add ‘The Election Committee elects the Chief Executive and some members of the Legislative Council in accordance with the electoral law. The term of office of the Election Committee is five years.’

2. Delete Item 6, Paragraphs 2, 3, 4 of Item 7 and Item 8.

3. Amend Item 9 to read: ‘If there is a need to amend the method for selecting the Chief Executives for the terms after 2007, such amendments shall be made with the approval of two-thirds of all the members of the Legislative Council (and where votes are counted according to groups, by a simple majority vote of each group), and shall be reported to the Standing Committee of the National People’s Congress for approval.’ Corresponding amendments to the method for counting votes according to groups shall be made after the method for forming the Legislative Council is confirmed.”

Excerpt from *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure*, 17-20 January 1990, shows:<sup>36</sup>

“1. Amendments to Chapter IV ‘Political Structure’

Members confirmed the proposed changes to some provisions of Chapter IV made at the seventeenth meeting and the following new changes were also made after discussion:

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35 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, pp.469-470.

36 Ibid, p.470.

2. At the previous meeting, it was recommended to amend Paragraph 2 of Article 45 to read: ‘The ultimate aim is ... by universal suffrage upon nomination by the nominating committee’. Amend that to read: ‘The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.’

## 2. On the method for selecting the Chief Executive of the Hong Kong Special Administrative Region

On the basis of the amendments to Annex I made at the previous meeting, after further discussion, members agreed to amend the method for selecting the Chief Executive to read:

Annex I Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region.

1. The Chief Executive shall be elected by a broadly representative Election Committee in accordance with this Law and appointed by the Central People’s Government.

2. The Election Committee shall be composed of 800 members from the following sectors:

Industrial, commercial and financial sectors	200
The professions	200
Labour, social services, religious and other sectors	200
Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference	200

The term of office of the Election Committee shall be five years.

3. The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall

be prescribed by an electoral law enacted by the Hong Kong Special Administrative Region.

Corporate bodies in various sectors shall, on their own, elect members to the Election Committee, in accordance with the seat allocation and the election method prescribed by the electoral law.

Members of the Election Committee shall vote in their individual capacities.

4. Candidates for the office of Chief Executive may be nominated jointly by not less than 100 members of the Election Committee. Each member may nominate only one candidate.

5. The Election Committee shall, on the basis of the list of nominees, elect the Chief Executive designate by secret ballot on a one-person-one-vote basis. The specific election method shall be prescribed by the electoral law.

6. The first Chief Executive shall be selected in accordance with the *Decision of the National People's Congress of the People's Republic of China on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*.

7. If there is a need to amend the method for selecting the Chief Executive for the terms subsequent to 2007, such amendments must be made with the endorsement of a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections, and by a two-thirds majority of all members of the Legislative Council, with the consent of the Chief Executive, and reported to the Standing Committee of the National People's Congress for approval.

(Some members expressed reservation about the counting of votes according to groups provided for in Item 7.)”

The eighth draft of BL 45 of the *Draft Basic Law* finalized on 16 February 1990 remained largely the same as the seventh draft,

except that the phrase “upon nomination by a broadly representative nominating committee in accordance with democratic procedures” was added after “The ultimate aim is the selection of the Chief Executive by universal suffrage” and Items 3 and 7 of Annex I were amended as follows:<sup>37</sup>

“3. The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall be prescribed by an electoral law enacted by the Hong Kong Special Administrative Region in accordance with the principles of democracy and openness.

Corporate bodies in various sectors shall, on their own, elect members to the Election Committee, in accordance with the number of seats allocated and the election method as prescribed by the electoral law.

Members of the Election Committee shall vote in their individual capacities.

7. If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for approval.”

Excerpt of Chairman Ji Pengfei’s explanation made at a session of the NPC on 28 March 1990.<sup>38</sup>

#### “IV. On the Political Structure

(2) The method for the selection of the Chief Executive. The draft stipulates that the Chief Executive shall be selected by election

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<sup>37</sup> *Overview of the Drafting Process*, Vol.2, p.470.

<sup>38</sup> *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 National People’s Congress, 28 March 1990).



or through consultations and be appointed by the Central People's Government. The method for selecting the Chief Executive shall be worked out in the light of the actual situation in Hong Kong and applied in a gradual and orderly way. The ultimate goal is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. Based on these provisions, Annex I provides specific rules on selecting the Chief Executive. In the ten years between 1997 and 2007, the Chief Executive will be elected by a broadly representative election committee. If there is need to amend this method of election after that period, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they must be submitted to the Standing Committee of the National People's Congress for approval. The method for selecting the Chief Executive is provided in an annex to make it more amenable to revision when necessary."

The text of BL 45 (the ninth draft) and Annex I adopted by the NPC in April 1990 remained the same as the eighth draft.

## Article 46

"The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms."

According to drafting materials in *Overview of the Drafting Process*, the content of BL 46 remained largely the same as the version adopted by the NPC from the first to the ninth draft. For the first sentence, the words "each session" were added before "term of office" in the fifth draft, but were deleted in the seventh draft.<sup>39</sup>

*Minutes of the Fifth Meeting of the Special Group on the Political*

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39 *Overview of the Drafting Process*, Vol.2, pp.471-475.

*Structure of the SAR (Group III)* of 8 July 1986 records one of the discussions before the first draft of BL 46 was finalized:

“Most members agreed that the term of office of the Chief Executive should be five years, and may be extended once. The time for the replacement of the Chief Executive should be different from that of members of the Legislative Council so as to ensure the stability of the entire political environment.”<sup>40</sup>

During the drafting process, members of the Drafting Committee and the Consultative Committee had many discussions over this article, including the length of the CE’s term of office, the issue of consecutive terms, and whether the term of office of the CE should be the same as that of LegCo members or slightly different to avoid simultaneous elections, and the views were varied. In the end, the provision maintained a five-year term for the CE, who may serve one consecutive term, and was adopted by the NPC.<sup>41</sup>

## Article 47

“The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties.

The Chief Executive, on assuming office, shall declare his or her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region. This declaration shall be put on record.”

BL 47 specifies two points: the character requirements of the CE and the requirement for the CE to declare his or her assets. According to drafting materials in *Overview of the Drafting Process*,<sup>42</sup> this article was made up of only one sentence at the beginning of the drafting process: “The Chief Executive of the Hong Kong Special

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40 *Overview of the Drafting Process*, Vol.2, p.471.

41 *Overview of the Drafting Process*, Vol.2, pp.472-475.

42 *Overview of the Drafting Process*, Vol.2, pp.476-480.

Administrative Region shall not use his or her position and power for personal gain.” Some members of the Drafting Committee considered it inappropriate, and a positive expression that the CE must fulfill his or her duties and abide by the law was suggested.<sup>43</sup>

From the fourth draft onwards, the article was divided into two paragraphs. The first paragraph read: “The Chief Executive of the Hong Kong Special Administrative Region must be dedicated to his or her duties.”<sup>44</sup> The second paragraph read: “Upon assuming office, the Chief Executive must declare his or her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region. This declaration shall be put on record in secret.” The content and style of the fifth draft was more or less the same as the fourth draft, but the word “must” was changed to “shall”. The sixth draft remained the same as the fifth.

The discussions held and the views collected before the seventh draft was finalized showed that there was considerable opposition to the CE’s declaration of assets being “put on record in secret”. The view was expressed that if the CE only had to declare his or her assets to the Chief Justice of the Court of Final Appeal, to be put on record in secret, then no one could monitor the integrity of his or her conduct. There was also a suggestion to delete the expression “in secret”, since the asset declaration of the CE was open to the public in many countries in order not to arouse people’s suspicion. There was also a view that the CE should declare his or her assets to the LegCo, to be put on public record.<sup>45</sup>

When the seventh draft was finalized, the words “in secret” in

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43 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, pp.476.

44 The expression “must be dedicated to his or her duties” can also be found in Paragraph 2 of BL 99: “Public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region.”

45 *Overview of the Drafting Process*, Vol.2, pp.478-479.

Paragraph 2 were deleted. The revised version became the ninth draft of this article and was adopted by the NPC on 4 April 1990.

## Article 48

“The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

(1) To lead the government of the Region;

(2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region;

(3) To sign bills passed by the Legislative Council and to promulgate laws;

To sign budgets passed by the Legislative Council and report the budgets and final accounts to the Central People’s Government for the record;

(4) To decide on government policies and to issue executive orders;

(5) To nominate and to report to the Central People’s Government for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise; and to recommend to the Central People’s Government the removal of the above-mentioned officials;

(6) To appoint or remove judges of the courts at all levels in accordance with legal procedures;

(7) To appoint or remove holders of public office in accordance with legal procedures;

(8) To implement the directives issued by the Central People’s Government in respect of the relevant matters provided for in this

Law;

(9) To conduct, on behalf of the Government of the Hong Kong Special Administrative Region, external affairs and other affairs as authorized by the Central Authorities;

(10) To approve the introduction of motions regarding revenues or expenditure to the Legislative Council;

(11) To decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees;

(12) To pardon persons convicted of criminal offences or commute their penalties; and

(13) To handle petitions and complaints.”

BL 48 lists the functions and powers of the CE, the evolution and development of which shows the considerations of the Drafting Committee on the functions and powers of the CE as head of the locality and head of the Special Administrative Region government. The following chart of the evolution of BL 48 (“the evolution chart of BL 48”) is prepared based on drafting materials in *Overview of the Drafting Process*.<sup>46</sup>

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<sup>46</sup> *Overview of the Drafting Process*, Vol.2, pp.481-503.

	First draft ( <i>Progress Report of the Subgroup on Political Structure, of the HKSAR</i> (discussion draft), August 1987)	Second draft ( <i>Chapter IV Political Structure of the HKSAR (discussion draft)</i> , September 1987)	Third draft ( <i>Chapter IV Political Structure of the HKSAR (discussion draft)</i> , October 1987)	Fourth draft (Secretariat of the Drafting Committee, <i>The Draft Basic Law of the HKSAR (compilation)</i> , December 1987)	Fifth draft (Secretariat of the Drafting Committee, <i>The Draft of The Draft Basic Law of the HKSAR of the PRC</i> , April 1988)	Sixth draft (Drafting Committee, <i>The Draft Basic Law of the HKSAR (for solicitation of opinions)</i> , April 1988)	Seventh draft ( <i>The Draft Basic Law of the HKSAR of the PRC</i> , February 1989)	Eighth draft ( <i>The Draft Basic Law of the HKSAR of the PRC</i> , February 1990)	Ninth draft (The Basic Law, April 1990)
Represent the HKSAR	✓	✓	✓	✓	×	×	×	×	×
Lead the HKSARG	✓	✓	✓	✓	✓	✓	✓	✓	✓
Implement this Law and other laws	✓	✓	✓	✓	✓	✓	✓	✓	✓
Laws passed by the legislature	To approve or disapprove laws passed by the legislature, sign and promulgate them			To sign the bills, passed and promulgate laws. If the CE considers that the bill passed by the legislature is not compatible with the overall interests, he or she may return it for reconsideration. If the bill is passed again by a two-thirds majority of the legislature, the CE must sign and promulgate it, or dissolve the legislature.	To sign bills passed by the Legislative Council and to promulgate laws; To sign budgets and final accounts passed by the Legislative Council and report them to the CPG for the record	Same as the fifth draft	Amendment: Name of the legislature in Chinese changed from “立法會議” to “立法會”. Name in English not affected	Same as the seventh draft	



Whether officials should testify before the LegCo	To approve or refuse to approve relevant persons to attend committees of the legislature to testify or give evidence	To decide, in the light of security and public interests, whether government officials should testify or give evidence before the court or the legislature	To decide, in the light of security and public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence to the Legislative Council	Same as the fifth draft	Amendment: replace "Legislative Council" with "Legislative Council or its committees"	Amendment: replace "public interests" with "vital public interests"	Same as the seventh draft	Same as the seventh draft
Dissolve the legislature	To dissolve the legislature with the Central Authorities' prior consent	To dissolve the Legislative Council under certain prescribed circumstances after consulting the ExCo	X	X	X	X	X	X
Deportation of criminal offenders	X	To approve the deportation of criminal offenders endangering the public according to law	X	X	X	X	X	X
Pardon persons convicted of criminal offences or commute their penalties	✓	✓	✓	✓	✓	✓	✓	✓
Handle petitions and complaints of residents	X	✓	✓	✓	✓	✓	✓	✓
Other powers required while performing duties	X	✓	X	X	X	X	X	X



The provisions of the Joint Declaration on the functions and powers of the CE are as follows:

- Principal officials will be nominated by the chief executive of the HKSAR for appointment by the CPG. (Article 3(4) and Section I of Annex I)
- Judges of the HKSAR courts shall be appointed by the chief executive of the HKSAR acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. (Section III of Annex I)
- A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the chief executive of the HKSAR acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. (Section III of Annex I)
- Additionally, the appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the chief executive with the endorsement of the HKSAR legislature and reported to the NPCSC for the record. (Section III of Annex I)

The Special Group on the Political Structure of the SAR of the Consultative Committee held panel discussions on 8 July 1986 to discuss the functions and powers of the CE. Members of the Consultative Committee made reference to the main functions and powers of the governor of Hong Kong<sup>47</sup> at that time and discussed

- 47 (a) Preside over Executive Council meetings  
 (b) In charge of all executive departments  
 (c) Preside over Legislative Council meetings  
 (d) Approve bills passed by the Legislative Council  
 (e) Also served as the Commander-in-Chief of Hong Kong  
 (f) Appointment of members of the Executive Council  
 (g) Appointment of some Legislative Council members  
 (h) Appointment of judges  
 (i) Appointment of public officials  
 (j) Appointment of members of statutory committees  
 (k) Make decisions contrary to the views of the majority of Executive Council members  
 (l) Dissolve the Legislative Council  
 (m) Land management  
 (n) Appoint investigation committee  
 (o) Order of Pardon  
 (p) Decide on petitions  
 (q) Execute the legislative power under primary legislation to make subsidiary legislation.

whether or not a number of functions and powers should be retained, including the function and power to preside over LegCo meetings, approving bills passed by the LegCo, making decisions contrary to the views of most ExCo members, and dissolving the LegCo.<sup>48</sup> During panel discussions, some members proposed that “under the current system, laws are initially proposed by the ExCo, approved by the LegCo, and implemented with the approval of the governor of Hong Kong. In other words, the model adopted is ‘executive-led’, and the power to initiate laws belongs to the executive authorities.” Some members proposed that the HKSAR should adopt the “executive-led” model, in which any formulation or amendment of laws should initially be proposed by the executive authorities. However, some members of the Consultative Committee disagreed at that time and argued that the legislature should have complete legislative power, including the power to initiate legislation.<sup>49</sup>

The discussion papers of the meeting of the Working Group of the Executive Authorities and the selection of the Chief Executive of the Special Group on the Political Structure of the SAR of May and June 1987 show that the functions and powers of the governor of Hong Kong at that time and the relevant clauses in the Letters Patent and the Royal Instructions were important reference materials before formulating the first draft of BL 48. A number of items listed as the CE’s “less controversial functions and powers” at the time, including the following functions and powers listed in “the evolution chart of BL 48”: lead the HKSARG, implement the Basic Law and other laws, conduct external affairs authorized by the Central Authorities on behalf of the HKSARG, pardon criminal offenders or commute criminal penalties, and handle petitions and complaints from residents, formed

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48 *Powers and Functions of the Chief Executive and Executive Authorities* (Annex I of the Fifth Meeting of the Special Group on the Political Structure of the SAR, 8 July 1986) in *Overview of the Drafting Process*, Vol.2, p.482.

49 *Minutes of the Fifth Meeting of the Special Group on the Political Structure of the SAR (Group I) of 8 July 1986*, 8 July 1986 in *Overview of the Drafting Process*, Vol.2, p.483.

a part of the functions and powers of the CE set out in BL 48.<sup>50</sup>

From the first to the fourth draft, “to represent the Region” was always at the top of the list of the CE’s functions and powers. However, some members of the Drafting Committee opined during that period that “to represent the Region” did not reflect the functions and powers of the CE, but rather it was a description of the status of the CE, and proposed to move it to another provision in the same chapter.<sup>51</sup> When the fifth draft of BL 48, namely *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* of April 1988 by the Secretariat of the Drafting Committee, was finalized, the first item “to represent the Region” was deleted and was moved to BL 43 to become its first paragraph which read: “The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent the Region.”

At the initial stage of the drafting progress of BL 48, the Subgroup on Political Structure of the Drafting Committee received an opinion which read: “Some public figures in Hong Kong opined that it appears from the content of this article that the Chief Executive of the Hong Kong Special Administrative Region is to play a dual role:

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50 Working Group on the Executive Authorities and the Selection of the Chief Executive of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Composition and the Powers and Functions of the Executive Authorities (First Draft)*, 25 May 1987 (Discussion Paper of the Fifth Meeting of the Working Group on the Executive Authorities and the Selection of the Chief Executive of the Special Group on the Political Structure of the SAR, 29 May 1987); Working Group on the Selection of the Chief Executive and the Executive Authorities of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Composition, Powers and Functions of the Executive Authorities (Second Draft)*, 2 June 1987 (Discussion Paper of the Sixth Meeting of the Working Group on the Selection of the Chief Executive and the Executive Authorities of the Special Group on the Political Structure of the SAR, 8 June 1987) in *Overview of the Drafting Process*, Vol.2, pp.484-488.

51 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, p.489.

head of the Region and head of the government of the Region. As the latter, the Chief Executive should be accountable to the legislature. Therefore, in the formulation of functions and powers, the functions and powers arising from the status as head of the Region and those arising from the status as head of the government of the Region should be differentiated.”<sup>52</sup>

The functions and powers of the CE in relation to the legislature concern the relationship between the executive authorities and the legislature. As mentioned above, the functions and powers of the Hong Kong governor which were related to the LegCo, including: preside over LegCo meetings, approve bills passed by the LegCo, and dissolve the LegCo were important issues in the discussions of the Consultative Committee during the drafting of BL 48. According to “the evolution chart of BL 48”, several items of functions and powers related to the legislature were more controversial during the drafting process of BL 48 and as a result led to more amendments.

One of the meeting discussion papers before formulating the first draft, that is, *Discussion Paper on the Composition, Powers and Functions of the Executive Authorities (Second Draft)* of 2 June 1987 (Discussion Paper of the Sixth Meeting of the Working Group on the Selection of the Chief Executive and the Executive Authorities of the Special Group on the Political Structure of the SAR of 8 June 1987),<sup>53</sup> has the following content:

“B. Controversial functions and powers are set out below:

17) Functions and powers related to the legislature

(1) To be president of the legislature:

In favour

→ With the Chief Executive being president of the legislature, the

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52 *Chapter IV - Political Structure of the Hong Kong Special Administrative Region (Discussion Draft)*, October 1987, (Working Document of the Subgroup on Political Structure) in *Overview of the Drafting Process*, Vol.2, p.491.

53 *Overview of the Drafting Process*, Vol.2, pp.487-488.

Chief Executive can play a leading role and ensure that the executive-led model will be the form of government.

→ Facilitate communication and coordination between the executive and legislative authorities.

Oppose

→ It would lead to the Chief Executive having excessive power, which would be detrimental to the society's development. It would also run counter to the principle of mutual checks and balances between the executive authorities and the legislature.

→ The Chief Executive will be too busy to act as president of the legislature.

(2) Dissolve the legislature:

In favour

→ The Chief Executive should have the power to dissolve the legislature when necessary, which can ensure that the executive-led model will be the form of government.

→ The Chief Executive's power to dissolve the legislature may be seen as a force to regulate the legislature.

Oppose

→ The Joint Declaration states that the legislature is to be constituted by elections. If the Chief Executive could dissolve the legislature, the entire political structure of Hong Kong will become very unstable.

→ Excessive power would be given to the Chief Executive if he can dissolve the legislature.

→ Under certain circumstances, this power would contravene the principle that the executive authorities should be accountable to the legislature.

(3) Veto bills passed by the legislature:

In favour

→ If the Chief Executive has the power to veto bills passed by the legislature, there can be checks and balances between the two.

→ Members of the legislature will in future be elected, and they may, in order to please voters, put forward proposals that are not in the public interest. However, it is the Chief Executive's job to take care of the interests of the whole society, so he or she should have the power to approve or veto bills passed by the legislature.

→ A bill passed by the legislature will be implemented by the Chief Executive, so he or she should have the power to approve or veto the resolution, otherwise contradictions may arise when he or she implements it.

#### Oppose

→ The Chief Executive would be given excessive power if he or she has the power to veto bills passed by the legislature.

(4) Approve bills passed by the legislature.

(5) The Chief Executive to deliver policy address to the legislature every year.

(6) Attend meetings of the legislature when necessary to answer members' questions on policies.

(7) The power to shelve a bill for a limited period of time."

When the first draft was finalized, the list of functions and powers of the CE did not include "to be president of the legislature".

From the first to the third draft of this article, the power to veto bills passed by the legislature and the power to dissolve the legislature formed a part of the list of functions and powers though there were arguments throughout. Major revision was made when the fourth draft was finalized:

Item 4 was changed to:

"(4) To sign bills passed by the legislature and to promulgate laws. If the Chief Executive considers that a bill passed by the

legislature is not compatible with the overall interests of the Region, he or she may return it to the legislature within three months for reconsideration. If the legislature passes the original bill again by not less than a two-thirds majority of all the members, the Chief Executive must sign and promulgate it within one month, or exercise the power under Item 13 of this article and dissolve the legislature.”

Item 13 was changed to:

“(13) May dissolve the legislature after consulting the Executive Council under any of the following circumstances:

1. The legislature refuses to pass a budget, appropriation bill or other important bills that the Chief Executive considers to be compatible with the interests of the Region, and consensus cannot be reached after consultations;

2. The Chief Executive considers that the contents of a bill passed by the legislature or amendments to a bill proposed by the legislature are not compatible with the interests of the Region and returns them for reconsideration. The legislature still passes the original bill by a two-thirds majority of all the members, and the Chief Executive again refuses to sign the same. The Chief Executive may dissolve the legislature only once in each term of his or her office.

If the legislature refuses to pass a budget or appropriation bill, or appropriation of funds cannot be approved because the legislature has already been dissolved, the Chief Executive may, prior to the election of the new legislature, approve provisional short-term appropriations to maintain government expenditure.”

After the fourth draft was finalized, some members of the Drafting Committee considered that listing out the functions and powers of the CE being the primary content of this article, each item should provide for one kind of power. However, the fourth draft was quite confusing. There was one item which stipulated several kinds of power. It was suggested that the content of Items 4 and 13 be split

up to form separate items.<sup>54</sup> When the fifth draft was finalized, Item 4 became Item 3 and part of the content was removed. The revised text is shown in “the evolution chart of BL 48”. The part concerning the CE’s power to return a bill was hived off and became BL 49. Item 13 of the fourth draft was removed, the contents of which split up to form BL 50 and BL 51.

On the relationship between the executive authorities and the legislature, Chairman Ji Pengfei explained at a session of the NPC on 28 March 1990:

“The relationship between the executive authorities and the legislature. The executive authorities and the legislature should regulate each other as well as co-ordinate their activities. To maintain Hong Kong’s stability and administrative efficiency, the Chief Executive must have real power which, at the same time, should be subject to some restrictions. The draft provides for the Chief Executive to be the head of the Hong Kong Special Administrative Region and accountable to the Central People’s Government and the Hong Kong Special Administrative Region. He or she is to lead the government of the Region, sign bills and budgets and promulgate laws. If the Chief Executive considers a bill passed by the Legislative Council to be not compatible with the overall interests of the Region, he or she may return it to the Legislative Council for reconsideration. If the Chief Executive refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council. On the other hand, the Basic Law provides that the government of the Region must abide by the law and be accountable to the Legislative Council. It

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54 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, pp.492-493.



must implement laws passed by the Legislative Council and already in force, present regular policy addresses to the Council, answer questions raised by members of the Council and obtain approval from the Council for taxation and public expenditure. The Chief Executive must consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, enacting subordinate legislation, or dissolving the Legislative Council. The Basic Law also stipulates that if the bill returned by the Chief Executive is passed again by the Legislative Council with at least a two-thirds majority, the Chief Executive must sign and promulgate it within one month, unless he or she dissolves the Legislative Council. If the newly elected Legislative Council, after the old one has been dissolved, again passes by a two-thirds majority the original bill in dispute, or it still refuses to pass the original budget or any other important bill introduced by the government, the Chief Executive must resign. If the Chief Executive is found to have committed a serious breach of law or dereliction of duty and if he or she still refuses to resign, the Legislative Council may pass a motion of impeachment through the specified procedures and refer it to the Central People's Government for decision. The provisions mentioned above embody the relationship of regulation and co-ordination between the executive authorities and the legislature."<sup>55</sup>

## Article 49

“If the Chief Executive of the Hong Kong Special Administrative Region considers that a bill passed by the Legislative Council is not compatible with the overall interests of the Region, he or she may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill

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<sup>55</sup> *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 National People’s Congress, 28 March 1990).

again by not less than a two-thirds majority of all the members, the Chief Executive must sign and promulgate it within one month, or act in accordance with the provisions of Article 50 of this Law.”

The first draft of BL 49 originated from Item 4 of the fourth draft BL 47 on Functions and Powers of the Chief Executive in *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* issued by the Secretariat of the Drafting Committee in December 1987.<sup>56</sup> Drafting materials in *Overview of the Drafting Process* show that<sup>57</sup> the part about the CE’s power to return bills was removed from Item 4 to form a separate provision, that is, BL 49. There was no discussion before formulating the second and third drafts of this article. Compared with the first draft, the content and wording were only revised in terms of title and technical matters: from “legislature” to “Legislative Council”; at the end of the article, the expression “or exercise the power under Item 13 of this article and dissolve the legislature” was changed to “or act in accordance with the provisions of Article 50 of this Law”.<sup>58</sup>

Discussions before finalizing the fourth draft of this article focused on the checks and balances between the powers of the CE and the LegCo and on avoiding bills being delayed. Some members of the Consultative Committee considered that the power conferred on the CE was excessive, and the LegCo was not given sufficient power to monitor and balance the CE and his or her government. However, some members of the Consultative Committee pointed out that the situation mentioned in this article and in BL 50 arising would be rare. This was because only the executive authorities had the power to introduce bills, so the CE would not return his or her own bill. Suggestions to amend this article from members of the Consultative Committee include: shorten the three-month period, replace “or act in accordance with the provisions of Article 50 of this Law” with “If the

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56 See BL 48 above: “the evolution chart of Article 48”.

57 *Overview of the Drafting Process*, Vol.2, pp.504-508.

58 BL 50: The Chief Executive may dissolve the Legislative Council.

Chief Executive still does not sign the bill, the bill will automatically take effect after one month.”<sup>59</sup>

The focus of the discussions prior to the finalization of the fourth and the fifth drafts was similar, but the content and wording of the provision remained unchanged with no amendments. In April 1990, the sixth draft of the article was adopted by the NPC as BL 49.

## Article 50

“If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office.”

BL 50 on “The Chief Executive may dissolve the Legislative Council” had progressed through six drafts. The first draft originated from Item 13 of the fourth draft of BL 47 on “Functions and Powers of the Chief Executive” in *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee of December 1987. Drafting materials in *Overview of the Drafting Process* show that Item 13 was deleted when the fifth draft was finalized, and the content divided to become two separate articles, namely BL 50 and BL 51.<sup>60</sup>

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59 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol. 5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.506-508.

60 *Overview of the Drafting Process*, Vol.2, pp.509-514.

The first draft of BL 50:

“The legislature may be dissolved after consulting the Executive Council under any of the following circumstances:

1. The legislature refuses to pass a budget, appropriation bill or other important bills that the Chief Executive considers to be compatible with the interests of the Region, and consensus cannot be reached after consultations;

2. The Chief Executive considers that the contents of a bill passed by the legislature or amendments to a bill proposed by the legislature are not compatible with the interests of the Region and returns them for reconsideration. The legislature still passes the original bill by a two-thirds majority of all the members, and the Chief Executive again refuses to sign the same. The Chief Executive may dissolve the legislature only once in each term of his or her office.

If the legislature refuses to approve a budget or appropriation bill, or appropriation of funds cannot be approved because the legislature has already been dissolved, the Chief Executive may, prior to the election of the new legislature, approve provisional short-term appropriations to maintain government expenditure.”<sup>61</sup>

Before the first draft of this article was formulated, the discussion materials show that there were sharp differences of opinion on the relationship between the executive authorities and the legislature. The main problem revolved around the political structure in the future: whether it should be executive-oriented, or there should be division of labour and checks and balances between the executive and legislature. Whether the CE had the power to dissolve the legislature was one of the specific issues.<sup>62</sup> Some members of the Drafting Committee maintained that the CE could not dissolve the legislature. If such provision was to be retained, a provision of “no-confidence vote may

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61 The part concerning “provisional short-term appropriations” in the fourth draft of BL 48(13) was separated as another single article, namely BL 51.

62 *Annex to the Minutes of the Preliminary Discussion on Drafting the Political Structure*, 14 August 1986 in *Overview of the Drafting Process*, Vol.2, p.510.

be cast on the Chief Executive or principal officials” should be added to the functions and powers of the legislature.<sup>63</sup>

BL 50 was amended to become two paragraphs in the second draft:

“If the Chief Executive refuses to sign a bill passed the second time by the Legislative Council, or if the Legislative Council refuses to pass a budget or other important bill introduced by the government, and consensus cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office.”

When the fourth draft was finalized, the Chinese text of Paragraph 2 was changed slightly but such change did not affect the English text. There was discussion before that draft was finalized. Some members of the Consultative Committee were concerned that the power of the CE was excessive and could easily be abused, the LegCo might lose its role as monitor of government operation, and there might be impact on the independent legislative power of the LegCo. In addition to the proposal to delete this article, some members of the Consultative Committee suggested that the CE should also resign when the LegCo was dissolved, for he or she would no longer be trusted by the elected LegCo, and this would also achieve checks and balances between the executive and the legislature.<sup>64</sup>

The content of the sixth draft remained the same as the previous drafts, with the wording slightly amended, and the sixth draft was

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63 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, pp.510-511.

64 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.512-513.

adopted as BL 50.<sup>65</sup>

## Article 51

“If the Legislative Council of the Hong Kong Special Administrative Region refuses to pass the budget introduced by the government, the Chief Executive may apply to the Legislative Council for provisional appropriations. If appropriation of public funds cannot be approved because the Legislative Council has already been dissolved, the Chief Executive may, prior to the election of the new Legislative Council, approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year.”

BL 51 had progressed through six drafts. The first one originated from Item 13 of the fourth draft of BL 47 on “Functions and Powers of the Chief Executive” in *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee of December 1987. Drafting materials in *Overview of the Drafting Process* show that Item 13 was deleted when the fifth draft was finalized and the content divided to become two separate articles, namely BL 50 and BL 51.<sup>66</sup>

BL 51 initially read as follows: “If the legislature refuses to pass a budget or appropriation bill, or appropriation of funds cannot be approved because the legislature has already been dissolved, the Chief Executive may, prior to the election of the new legislature, approve provisional short-term appropriations to maintain government expenditure.”

The focus of attention before the first draft of this article was finalized, i.e. the differences of views arising from the relationship between the executive and the legislature, has been mentioned in

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65 The first sentence of Paragraph 1 was revised to read: “If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign ...” in *Overview of the Drafting Process*, Vol.2, p.514.

66 *Overview of the Drafting Process*, Vol.2, pp.515-517.

the Notes on BL 48, 49 and 50 in this book, and will not be repeated here. The second and third drafts basically repeated the first draft. The difference was that the expression, “or appropriation bill”, in the first draft was deleted and the provision was amended to read “the budget introduced by the government”.

When the fourth draft was finalized, the content of the article was changed and it was divided into two parts. Part 1: If the LegCo refuses to approve the budget introduced by the government, the CE may apply to the LegCo for provisional appropriations. Part 2: If the LegCo has already been dissolved and the appropriation cannot be approved, the CE may, prior to the election of the new LegCo, approve provisional short-term appropriations according to the level of expenditure of the previous fiscal year. The fifth draft remained the same as the fourth one.

Before the fifth draft was finalized, some members of the Consultative Committee proposed to add “and considering the economic situation of the government and society at the time” after “according to the level of expenditure of the previous fiscal year”.<sup>67</sup> There was also a view to add at the end of the article: “However, the relevant appropriation must be ratified and examined by the new Legislative Council.”<sup>68</sup> These suggestions were not adopted.

BL 51 passed by the NPC in April 1990 remained the same as the fifth draft with only some refinements in the wording and style of writing.

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67 *Annex I of the Fourth Meeting of the Special Group on the Political Structure of the SAR during the Second Consultation Period*, 18 August 1989 in *Overview of the Drafting Process*, Vol.2, p.517.

68 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol. 3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.517.

## Article 52

“The Chief Executive of the Hong Kong Special Administrative Region must resign under any of the following circumstances:

(1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;

(2) When, after the Legislative Council is dissolved because he or she twice refuses to sign a bill passed by it, the new Legislative Council again passes by a two-thirds majority of all the members the original bill in dispute, but he or she still refuses to sign it; and

(3) When, after the Legislative Council is dissolved because it refuses to pass a budget or any other important bill, the new Legislative Council still refuses to pass the original bill in dispute.”

Drafting materials in *Overview of the Drafting Process* show that<sup>69</sup> the first draft of BL 52 originated from BL 49 of *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee of December 1987.<sup>70</sup> It progressed through six drafts, the last one of which was passed by the NPC in April 1990. The content and language of the six drafts largely remained the same, with two major amendments.

First, the words “loses the ability to discharge his or her duties over a prolonged period as a result of serious disease or other reasons” in the first item of the first draft was amended to read “loses the ability to discharge his or her duties as a result of serious illness or other reasons” in the second draft.

Second, the words in the second item “but he or she still refuses to sign it” were added in the fourth draft.

During the drafting process of this article, members of the Drafting Committee and those of the Consultative Committee held different opinions. Some were of the view that: “The legislature can force the Chief Executive to resign. This practice of the British style

69 *Overview of the Drafting Process*, Vol.2, pp.518-523.

70 *Overview of the Drafting Process*, Vol.2, p.518.



responsible cabinet is not in line with the actual situation of Hong Kong and is not conducive to the stability and development of Hong Kong.”<sup>71</sup>

There were also views calling for an increase in the situations under which the CE shall resign. Before the finalization of the first draft, some members of the Drafting Committee advocated the addition of a fourth item: “A two-thirds majority of all members of the legislature pass a vote of no-confidence against the Chief Executive”. At the same time, other members of the Drafting Committee advocated that “if this is to be written down, it must be that the Chief Executive may dissolve the legislature after the legislature has passed a no-confidence vote. The Chief Executive must resign if the re-elected legislature passes a no-confidence vote again.”<sup>72</sup>

Prior to the finalization of the fourth and fifth drafts, there was much discussion on the proposal to add a fourth item to this article. Much of that discussion revolved around the proposal to add “when the Legislative Council passes a no-confidence vote against the Chief Executive”, or similar ideas.<sup>73</sup>

In April 1990, the Basic Law including BL 52 was passed by the NPC. BL 52 stipulates three situations under which the CE must resign. The suggestion of adding a fourth item to BL 52 was not accepted.

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71 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.2, p.520.

72 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.519.

73 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol. 5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.520-521. Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol. 3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, pp.522-523.

## Article 53

“If the Chief Executive of the Hong Kong Special Administrative Region is not able to discharge his or her duties for a short period, such duties shall temporarily be assumed by the Administrative Secretary, Financial Secretary or Secretary of Justice in this order of precedence.

In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law. During the period of vacancy, his or her duties shall be assumed according to the provisions of the preceding paragraph.”<sup>74</sup>

Drafting materials in *Overview of the Drafting Process* show that the content and wording of BL 53 had changed substantially during the drafting process.<sup>75</sup>

During the drafting process, this article was made up of only one paragraph from the first to third drafts: “If the Chief Executive of the Hong Kong Special Administrative Region is not able to discharge his or her duties, such duties shall be assumed by the Secretary General (Chief Secretary).”

During the initial discussions, some members of the Drafting Committee advocated that when the CE is unable to discharge his or her duties, there must be a list in sequential order of persons acting in his or her stead. Some members opined that it was not necessary to specify the candidates as such candidates could be designated by the CE at the relevant time. Some members proposed to establish a post of deputy CE, but most members opposed.<sup>76</sup> Later, the majority of

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<sup>74</sup> See *Interpretation by the Standing Committee of the National People's Congress Regarding the Second Paragraph in Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* included in this book.

<sup>75</sup> *Overview of the Drafting Process*, Vol.2, pp.524-527. The drafting of this article progressed through nine drafts.

<sup>76</sup> *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.525.

the members held the view that a list of persons to assume the CE's duties when the CE is unable to discharge his or her duties should be stipulated, and a candidate should not be designated by the CE on an ad hoc basis. Some members suggested that the Basic Law should also stipulate how a new CE is to be selected if a CE dies during his or her term of office.<sup>77</sup>

A new paragraph was added when the fourth draft of the article was finalized. The first paragraph: "If the Chief Executive of the Hong Kong Special Administrative Region is not able to discharge his or her duties for a short period, such duties shall temporarily be assumed by the Administrative Director, Financial Director or Director of Justice in this order of precedence." The second paragraph read: "In the event that the office of the Chief Executive of the Hong Kong Special Administrative Region becomes vacant, a new Chief Executive shall be elected within six months. Before the new Chief Executive is elected, it shall be handled according to the provisions of the preceding paragraph."

There were two more amendments when the fifth draft<sup>78</sup> was finalized. In the first paragraph, the title of officials changed from "Director" to "Secretary". In the second paragraph, the expression "a new Chief Executive shall be elected within six months" was amended to read: "a new term of Chief Executive shall be selected within six months". The sixth draft of the article remained the same as the fifth one.<sup>79</sup>

The finalization of the sixth draft of the article in *The Draft*

77 *Collection of Views of the Fifth Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 8 September 1987 (Annex II of the Second Meeting of the Special Group on the Political Structure of the SAR, 22 September 1987) in *Overview of the Drafting Process*, Vol.2, p.525.

78 Secretariat of the Drafting Committee, *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, April 1988.

79 Drafting materials in *Overview of the Drafting Process* show that there was no relevant discussion record before the finalization of the fourth, fifth and six drafts of BL 53.

*Basic Law (for solicitation of opinions)* was followed by a period of consultation. The discussions during that period showed that in relation to the expression “a new term of” in the sixth draft, some members of the Special Group on the Political Structure of the SAR of the Consultative Committee asked whether it meant starting a new term or the continuation of the unfinished term of office. Members of the Drafting Committee replied that “it means the new Chief Executive will serve for another five years, which has nothing to do with the previous term.”<sup>80</sup>

The wording in the first paragraph of the seventh draft of the article was amended when it was finalized: the expression “in this order of precedence” was changed to “in the above-mentioned order of precedence”. The amendments to the second paragraph were more significant. First of all, the expression “in accordance with the provisions of Article 45 of this Law” was added to “shall be selected within six months” to become “shall be selected within six months in accordance with the provisions of Article 45 of this Law”. Also, the phrase “a new term of Chief Executive” in the sixth draft was changed to “a new Chief Executive”.

When the eight draft of the article was finalized, the expression “in the above-mentioned order of precedence” in the first paragraph was changed to “in this order of precedence” and the rest remained unchanged. The revised draft article was later adopted by the NPC as BL 53.

## Article 54

“The Executive Council of the Hong Kong Special Administrative Region shall be an organ for assisting the Chief Executive in policymaking.”

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<sup>80</sup> *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (III) and Members of the Drafting Committee*, 6 June 1988 in *Overview of the Drafting Process*, Vol.2, p.526.

Drafting materials in *Overview of the Drafting Process* show that<sup>81</sup> the content and wording of this article basically remained unchanged during the entire drafting process except that the term “Executive Council” was referred to as a “provisional name” at the initial stage. Such reference was later deleted.<sup>82</sup>

BL 54 is one of the articles in Section 1 on “The Chief Executive” of Chapter IV on Political Structure of the Basic Law. At the early stage of the drafting process, some members of the Drafting Committee were of the view that it failed to state clearly the nature and responsibilities of the ExCo and its relationship with the executive authorities and the legislature. With regard to the nature of ExCo, some members opined that ExCo of Hong Kong at that time was nominally an advisory body to the governor, however the orders issued by the governor were issued by the governor in council. Whether ExCo was to be an advisory body or a decision-making body in the future should be made clear.<sup>83</sup>

Discussion papers before the first to fifth drafts of the article show that during that drafting period, some members of the Drafting Committee did not agree to the setting up of ExCo and some suggested that the provisions relating to ExCo should be set out in another section, namely, the section on “The Executive Authorities”.<sup>84</sup>

After the sixth draft of the article, which was set out in *The*

81 *Overview of the Drafting Process*, Vol.2, pp.528-531.

82 Secretariat of the Drafting Committee, *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, April 1988 includes the fifth draft of the article, in which the term “provisional name” was already deleted. *Overview of the Drafting Process*, Vol.2, p.529.

83 Discussion before the second draft was finalized: *Collection of Views of the Fifth Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 8 September 1987 (Annex II of the Second Meeting of the Special Group on the Political Structure of the SAR, 22 September 1987) in *Overview of the Drafting Process*, Vol.2, p.529.

84 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.529.

*Draft Basic Law (for solicitation of opinions)*, was finalized,<sup>85</sup> a consultation period followed, during which the Special Group on the Political Structure of the SAR (III) of the Consultative Committee had an exchange with members of the Drafting Committee. The relevant minutes of the meeting show that on the question: “Is the Executive Council part of the executive authorities?”, members of the Drafting Committee replied, “The Executive Council is not part of the executive authorities. It is just an organ to assist the Chief Executive in policymaking.”<sup>86</sup>

Discussions at the later stage of the drafting of this article, namely, before the finalization of the seventh draft of February 1989, and the eighth draft of the article in the *Draft Basic Law* of February 1990, showed that there were still views that ExCo should not or need not be set up, there were suggestions to delete BL 54, 55 and 56 and to cancel the setting up of ExCo. The reasons included: there was no mention of this in the Joint Declaration, the setting up of ExCo was the policy of the colonial government, and ExCo should not be constituted by a group of non-elected people. The basis for some proposals of this type was that since ExCo was only an advisory body without real power, similar to CE’s think tank, it was not necessary to include it in the Basic Law. There was also a suggestion that BL 54 should be placed under Section 2 on “The Executive Authorities”. There was also a proposal to amend this article by adding “and be accountable to the Legislative Council” to this article.<sup>87</sup>

The ninth draft of the article was adopted by the NPC in April 1990 as BL 54. The content, style and wording of the ninth draft were

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85 Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, April 1988.

86 6 June 1988. *Overview of the Drafting Process*, Vol.2, p.530.

87 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, pp.530-531.

the same as those in the previous drafts without any modification.

## Article 55

“Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. Their appointment or removal shall be decided by the Chief Executive. The term of office of members of the Executive Council shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them.

Members of the Executive Council of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

The Chief Executive may, as he or she deems necessary, invite other persons concerned to sit in on meetings of the Council.”

Drafting materials in *Overview of the Drafting Process* show that<sup>88</sup> this article had progressed through nine drafts. The first to third draft of the article was originally divided into two provisions, namely: “Members of the Executive Council of the Hong Kong Special Administrative Region shall be nominated by the Chief Executive from among principal officials, members of the legislature and public figures and submitted to the Central People’s Government for appointment”; and “The term of office of members of the Executive Council of the Hong Kong Special Administrative Region shall not exceed five years.”

When the first draft of the article was formulated, the explanatory note of the two provisions set out in *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*, showed that members of the Drafting Committee had different

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88 *Overview of the Drafting Process*, Vol.2, pp.532-539.

opinions on these two provisions:

“Some members advocated that the members of the legislature participating in the Executive Council must be elected by members of the legislature from among themselves; whereas the appointment of public figures must be endorsed by more than half of the members of the legislature. Some members claimed that if there was no election among themselves, members of the legislature need not participate in the Executive Council. With regard to issues such as the size of membership of the Executive Council, and whether membership should be allocated between different sectors on a proportional basis, members agreed not to make any provision pending further study. Other members suggested that membership of the Executive Council need not be reported to the Central People’s Government for appointment. Some members considered that members of the Executive Council could be removed by the Chief Executive for reasons such as serious criminal offence, serious misconduct, serious dereliction of duty or inability to perform their duties.

Some members advocated that the term of office should not be prescribed, to be determined by the Chief Executive at the relevant time. Some members were of the view that the term of office of members of the Executive Council should not extend beyond the expiry of the term of office of the Chief Executive who appoints them.”<sup>89</sup>

Before formulating the second draft, members of the Drafting Committee also had different opinions on “report to the Central People’s Government for appointment”. Some members considered that this provision implied control by the Central Authorities. Other members suggested that it be changed to “appointed by the Chief Executive of the Hong Kong Special Administrative Region and reported to the Central People’s Government for the record”. However, some members considered the provision did not give rise to the issue

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89 *Overview of the Drafting Process*, Vol.2, p.533.



of control by the Central Authorities.<sup>90</sup>

In the fourth draft, the provisions were consolidated to form a single article with three paragraphs:

“Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. Their term of office or removal before the expiration of his or her term of office shall be decided by the Chief Executive. The term of office of members of the Executive Council shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them.

Members of the Executive Council of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region and shall swear allegiance to the Region.

The Chief Executive may, as he or she deems necessary, invite other persons concerned to sit in on meetings of the Council.”

The structure of the article made up of three paragraphs remained unchanged. Content and wording of the last paragraph remained unchanged till the ninth draft.

The first paragraph was controversial, including the opinions set out above, the size of membership of ExCo, and whether membership should be allocated on a proportional basis among different sectors as mentioned above.<sup>91</sup> For fear that people with political background but not returned by election or selected from the civil service structure might become members of ExCo and exercise influence over the CE, some members of the Consultative Committee proposed to

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90 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, p.533.

91 Secretariat of Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.534.

delete “public figures”. However, some members of the Consultative Committee insisted on the retention of the term. This is because at that time many ExCo members were non-official public figures who were not part of the legislature. In most cases, such members occupied key positions and could provide valuable advice to the CE.<sup>92</sup>

The first paragraph of the article was amended in the seventh draft. “Their term of office or removal before the expiration of his or her term of office shall be decided by the Chief Executive” was changed to “Their appointment or removal shall be decided by the Chief Executive.” The revised first paragraph remained unchanged since then.

Members of the Drafting Committee had different opinions on the phrase “shall swear allegiance to the Region” in the second paragraph of the article in its fourth draft. Some members pointed out that the requirement for the British-Hong Kong government officials to swear allegiance to the British-Hong Kong government was a product of colonial rule. After 1997, Hong Kong permanent residents and Chinese citizens knew their responsibilities and needed not swear allegiance. They suggested that this provision be deleted. However, some members considered it necessary to retain this provision. Other members opined that the provision of swearing allegiance to the HKSAR rather than the PRC was too loose.<sup>93</sup> This provision was deleted in the fifth draft.<sup>94</sup>

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92 *Minutes of the Fifth Meeting of the Second Consultation Period of the Special Group on the Political Structure of the SAR*, 1 September 1989 in *Overview of the Drafting Process*, Vol.2, p.538.

93 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987, published in *Collection of Documents of the Sixth Plenary Session of the Drafting Committee*, Vol.2, p.534.

94 See BL 104: “When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”

With regard to the stipulation on the nationality of ExCo members in the second paragraph, during the consultation period of the *Draft Basic Law*, the Consultative Committee received comments that ExCo members should only be permanent residents of Hong Kong and needed not be Chinese citizens, otherwise it would be different from the current system whereby foreigners were allowed to participate in ExCo, moreover, relaxing such restriction would allow foreigners, who were permanent residents, with outstanding experience and status to participate in ExCo.<sup>95</sup> It was also suggested that this article be deleted in its entirety because ExCo was only an advisory body without real power, or a body similar to CE's think tank, which needed not be included in the Basic Law.<sup>96</sup>

On 15 February 1989, Chairman Ji Pengfei pointed out in *Report on the Submission of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents to the Standing Committee of the National People's Congress for Deliberation* that the provision in the Basic Law, whereby ExCo members must be Chinese citizens among the permanent residents of the HKSAR is necessary to reflect national sovereignty.<sup>97</sup>

When the eighth draft was finalized on 16 February 1990, the restriction "with no right of abode in any foreign country" was added to the second paragraph. On 19 February 1990, Chairman Ji Pengfei pointed out in *Report on the Amendments to The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Its Relevant Documents*:<sup>98</sup>

“III. The restriction of ‘with no right of abode in any foreign

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95 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.536.

96 Ibid.

97 *Overview of the Drafting Process*, Vol.2, p.537.

98 *Overview of the Drafting Process*, Vol.2, p.539.

country’ was added to the provisions on the qualifications of the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the Chief Justice of the Court of Final Appeal, the Chief Judge of the High Court, and Hong Kong members of the Basic Law Committee.”

In April 1990, this provision was adopted by the NPC as BL 55.

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC:<sup>99</sup>

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong.”<sup>100</sup>

## Article 56

“The Executive Council of the Hong Kong Special Administrative Region shall be presided over by the Chief Executive.

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99 *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 National People’s Congress, 28 March 1990).

100 Deng Xiaoping’s speech to a Hong Kong industrial and commercial sectors delegation visiting Beijing, and a group of well-known Hong Kong figures, including Chung Sze-yuen, on 22 and 23 June 1984, “The scope and criteria for Hong Kong people administering Hong Kong”. See Introduction and the Note on BL 44 in this book.

Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.

If the Chief Executive does not accept a majority opinion of the Executive Council, he or she shall put the specific reasons on record.”

Drafting materials in *Overview of the Drafting Process* show<sup>101</sup> there had been changes over the conduct of meetings and the advisory role of the ExCo. The first draft stipulated: “The Executive Council of the Hong Kong Special Administrative Region shall be presided over by the Chief Executive. If the Chief Executive does not accept a majority opinion of the Executive Council, he or she shall put the specific reasons on record and report to the Central People’s Government for the record.”<sup>102</sup>

Subsequently, it was suggested that “this article basically follows the current practice of the Hong Kong Governor and the Executive Council. However, after 1997, the Chief Executive will be selected by election or through consultations held locally, he or she should be fully aware of the social situation and be trusted by society, the situation will be very different from the current one whereby Britain designates British officials to serve as Governors of Hong Kong. Therefore, a stipulation that ‘report to the Central People’s Government for the record’ is unnecessary.”<sup>103</sup> The stipulation “report to the Central People’s Government for the record” was deleted when the fourth draft was finalized. In addition, the article was revised to become three paragraphs. The first paragraph read: “The Executive Council of the Hong Kong Special Administrative Region shall be presided over by the Chief Executive.”

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101 *Overview of the Drafting Process*, Vol.2, pp.540-543.

102 *Overview of the Drafting Process*, Vol.2, p.540.

103 *Chapter IV – Political Structure of the Hong Kong Special Administrative Region (Discussion Draft)*, October 1987 (Working Document for the Subgroup on the Political Structure) in *Overview of the Drafting Process*, Vol.2, p.541.

The second paragraph stipulated that in four types of cases, the CE must consult the ExCo in advance, namely: making important policy decisions, introducing bills to the LegCo, making subordinate legislation, or dissolving the LegCo. However, it also provided three “exceptions”, namely: the appointment and removal of officials, disciplining of officials, and emergencies.<sup>104</sup> The third paragraph read: “If the Chief Executive does not accept a majority opinion of the Executive Council, he or she shall put the specific reasons on record.”

“Emergencies” was revised as “the adoption of measures in emergencies” in the fifth draft which immediately followed. No revision has been made thereafter.

After the sixth draft was published for solicitation of opinions, it was pointed out in the comments received by the Consultative Committee that “‘put the specific reasons on record’ would not constitute an extra hurdle for the Chief Executive to reject a majority opinion of the Executive Council. As such, the collective decision-making function of the Executive Council would be weakened and the Executive Council become an in-house advisory organ of the Chief Executive.”<sup>105</sup>

The ninth draft of the article was adopted by the NPC as BL 56 in April 1990.

## Article 57

“A Commission Against Corruption shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive.”

Drafting materials in *Overview of the Drafting Process* show

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104 *Overview of the Drafting Process*, Vol.2, p.541.

105 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.542.

that<sup>106</sup> the first to third drafts of the article read: “Anti-corruption agency shall be maintained in the Hong Kong Special Administrative Region and independently accountable to the Chief Executive.”<sup>107</sup>

The fourth draft was revised: “be maintained” was replaced by “be established”; the second part of the sentence was changed to “It shall function independently and be accountable to the Chief Executive.”<sup>108</sup>

In the fifth draft, “Anti-corruption agency” was replaced by “Independent Commission Against Corruption”.<sup>109</sup> The revised text remained unchanged and was adopted by the NPC as BL 57.

At the later stage of the drafting of this article, some members of the Consultative Committee suggested that Chapter IV of the Basic Law set out provisions relating to the CE, and it should not include the Independent Commission Against Corruption and this article should not be included in Chapter IV. There was also a view that the Independent Commission Against Corruption was within the scope of the HKSAR’s internal administration and needed not be included in the Basic Law. Some members were of the view that the Independent Commission Against Corruption should be accountable to the CE and Hong Kong residents. Some members of the Consultative Committee also suggested that the Independent Commission Against Corruption should be accountable to the LegCo, otherwise the CE’s power would become excessive.<sup>110</sup>

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106 *Overview of the Drafting Process*, Vol.2, pp.544-548. This article progressed through nine drafts.

107 The Independent Commission Against Corruption (ICAC) specially appointed by the former governor, which was established under Independent Commission Against Corruption Ordinance, came into force on 15 February 1974. *Overview of the Drafting Process*, Vol.2, pp.544-546.

108 *Overview of the Drafting Process*, Vol.2, p.546.

109 *Overview of the Drafting Process*, Vol.2, p.546.

110 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 and Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, pp.547-548.

## Article 58

“A Commission of Audit shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive.”

BL 58 is the last article of Section 1 on “The Chief Executive” in Chapter IV of the Basic Law. The structure and wording are the same as BL 57, including the expression “be accountable to the Chief Executive”.<sup>111</sup>

Drafting materials in *Overview of the Drafting Process* show that<sup>112</sup> the content and wording of this article basically remained the same during the entire drafting process.<sup>113</sup>

Drafting materials in *Overview of the Drafting Process* also show that throughout the entire drafting process, there were views from members of the Consultative Committee and views collected by the Consultative Committee that the Commission of Audit should not be responsible to the CE, but to the Legislative Council, for the CE, being a member of the executive authorities, was to be responsible to the legislature. There were also views that it was inappropriate to require the Commission of Audit to be accountable to the CE because its work should be open to the public, also the Commission of Audit was actually accountable to the governor in his capacity as President of the Legislative Council at that time, therefore, it should in future still be

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111 “Be accountable to...” appears not only in BL 58, but also in BL 43, 57 and 64. In BL 99 and 101, though the words in Chinese are the same, the translation in English is “be responsible to”.

112 *Overview of the Drafting Process*, Vol.2, pp.549-553.

113 The term “Authority for Audit” in the first draft was changed to “Commission of Audit” in the second draft, and the expression “be accountable towards the Chief Executive” in the first draft had been changed to “be accountable to the Chief Executive” since the second draft.



accountable to the Legislative Council.<sup>114</sup>

## Section 2 The Executive Authorities

### Article 59

“The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region.”

BL 59 is the first of the seven articles in Section 2 on “The Executive Authorities” of Chapter IV on Political Structure of the Basic Law.

Drafting materials in *Overview of the Drafting Process* show that<sup>115</sup> there were only two versions of this article during the drafting process. From the first to the fourth draft of this article, the name of the executive authorities was left blank in the text which read: “XX (name to be determined) of the Hong Kong Special Administrative Region shall be the executive authorities of the Region. The head of the executive authorities of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region.”<sup>116</sup> In *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* formulated by the Secretariat

114 See *Proposals Made by Members of the Consultative Committee to Members of the Drafting Committee at the Exchange Meeting between the Special Group on the Political Structure of the SAR and the Subgroup on Political Structure (10 November)* (Annex I of the Seventh Meeting of the Special Group on the Political Structure of the SAR, 17 November 1987); Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 and *Annex I of the Fourth Meeting of the Special Group on the Political Structure of the SAR during the Second Consultative Period*, 18 August 1989 in *Overview of the Drafting Process*, Vol.2, pp.549-551.

115 *Overview of the Drafting Process*, Vol.2, pp.553-561. The drafting process of this article progressed through nine drafts.

116 *Overview of the Drafting Process*, Vol.2, pp.553-557.

of the Drafting Committee in April 1988, the fifth draft of the article was amended to read “The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region.”<sup>117</sup>

Article 3(4) of the Joint Declaration stipulates that “The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants ... Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People’s Government.” In Annex I to the Joint Declaration, there are many expressions of “executive authorities” and “government”, such as the relevant part in Section I which reads: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People’s Government. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature”; the relevant part in Section XII reads: “The maintenance of public order in the Hong Kong Special Administrative Region shall be the responsibility of the Hong Kong Special Administrative Region Government”; the relevant part in Section XIII reads: “The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law.”

At the initial stage of the drafting of this article, the discussion on executive authorities centered on the nature and operation of the then ExCo as well as the allocation of powers among the executive, legislature and judiciary and the relationship among the three in the

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117 *Overview of the Drafting Process*, Vol.2, p.558.

future.<sup>118</sup> The focus was on the definition and scope of the executive authorities, especially whether the executive authorities include the CE and ExCo. Some members of the Consultative Committee considered that the executive authorities should include the CE, ExCo, principal officials and civil servants in general. However, some members considered that ExCo already includes the CE and the executive authorities.<sup>119</sup>

Some members of the Drafting Committee held the view that since the CE of the HKSAR was both the head of the HKSAR and the executive authorities of the HKSAR, he or she should be part of the executive authorities. Some members suggested that the word “government” could be used to refer to the executive authorities of the HKSAR, and the Mainland used the term in the same way. Some members were of the view that the word “government” was generally understood to mean the concept of big government in Hong Kong. The Subgroup on Political Structure agreed that at that time the article was drafted only temporarily according to the concept of big government and the article was yet to be consolidated after further study. Some members considered that determination of the name of the executive authorities of the HKSAR required consideration of the names of a series of executive organs, executive officials and the legislature of the HKSAR together.<sup>120</sup>

Before the Secretariat of the Drafting Committee formulated *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* in April 1988, i.e. before the

118 *Summary of the Third Meeting of the Special Group on the Political Structure of the SAR (Group IV)*, 13 May 1986 in *Overview of the Drafting Process*, Vol.2, p.554.

119 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.2, p.556.

120 *Collection of Views of the Fifth Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 8 September 1987 (Annex II of the Second Meeting of the Special Group on the Political Structure of the SAR, 22 September 1987) in *Overview of the Drafting Process*, Vol.2, p.557.

fifth draft of this article, some members of the Drafting Committee proposed that a uniform name should be used for the executive authorities and some suggested the name “the Government” whilst another group of members considered the name “the Administration Department” better.<sup>121</sup> The *Report by Vice Chairman Hu Sheng on the Work of the General Working Group (26 April 1988)* had the following explanation: “Originally, the executive authorities was ‘tentatively named’ as ‘the Administration Department’. After discussion and research, the General Working Group is of the view that it is better to call the executive authorities ‘the Government’ than ‘the Administration Department’ or another name, which is consistent with the relevant provisions in the Sino-British Joint Declaration.”<sup>122</sup>

After the text of this article was revised to read “The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region”, Xiao Weiyun said in reference materials of the Secretariat of the Consultative Committee, 19 August 1988, *Reference (8) - Concepts Underlying the Design of the Future Political Structure of Hong Kong*, “What are the executive authorities? What is their status? This is clearly stipulated in the *Draft Basic Law*. The executive authorities are the Government of the Hong Kong Special Administrative Region which administer various administrative affairs which should be administered by them as prescribed by the Basic Law. In this way, their nature and legal status are clear. They are also accountable to the legislature.”<sup>123</sup> During the consultation period of the article, there were opposing opinions that the scopes of “government” and “executive authorities” were different, and “government” generally included the executive and the legislature

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121 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.558.

122 Published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.2, p.558.

123 *Overview of the Drafting Process*, Vol.2, p.558.

and could not be equated with the executive authorities.<sup>124</sup> There were also views that the HKSARG is not only the executive authorities, but also the legislature and the judiciary, and this article should be deleted.<sup>125</sup>

The above-mentioned text was adopted by the NPC as BL 59 in April 1990.

## Article 60

“The head of the Government of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region.

A Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions shall be established in the Government of the Hong Kong Special Administrative Region.”

BL 60 deals with the organizational structure of the executive authorities and the selection, appointment and removal of individuals composing it.<sup>126</sup>

Article 3(4) of the Joint Declaration provides that “The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the

124 *Collection of Views of the Special Group on Political Structure of the Consultative Committee for the Basic Law regarding Chapter IV of the Draft Basic Law (for solicitation of opinions)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1, October 1988 in *Overview of the Drafting Process*, Vol.2, p.559.

125 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – *General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.559.

126 *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 22 April 1986, published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.562.

Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government." Section I of Annex I to the Joint Declaration provides: "The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government."

Drafting materials in *Overview of the Drafting Process* show that<sup>127</sup> this article had progressed through nine drafts. From the first to fourth draft, the present first paragraph "The head of the Government of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region" and the expression "XX (name to be determined) of the Hong Kong Special Administrative Region shall be the executive authorities of the Region" formed one provision. The fourth draft of Article 58 stipulated:

"The composition of the executive authorities of the Hong Kong Special Administrative Region is as follows:

The Chief Executive, directors of various offices and other officials equivalent to Secretaries.<sup>128</sup>

The organization of the executive authorities of the Hong Kong Special Administrative Region shall be prescribed by law."

The terms "office" and "director of office" were criticized before the finalization of the fourth draft. Some members of the Special Group on the Political Structure of the SAR thought that they were

127 *Overview of the Drafting Process*, Vol.2, pp.561-572.

128 Article 56 of the fourth draft. *Overview of the Drafting Process*, Vol.2, p.568. It is the current BL 59.

similar to terms used in the Mainland and Hong Kong people might be concerned that it was a kind of link with the Mainland or might even become “one country, one system”.<sup>129</sup> These terms were deleted in the fifth draft.

Some members of the Drafting Committee considered the scope of “equivalent to Secretaries” in the fourth draft too wide and suggested that it be deleted.<sup>130</sup>

In the fifth draft, Article 58 was revised as:

“The head of the Government of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region.

A Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions shall be established in the Government of the Hong Kong Special Administrative Region.

The organization of the executive authorities of the Hong Kong Special Administrative Region shall be prescribed by law.”<sup>131</sup>

After further refinement, the above text became the sixth draft, and BL 60 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)* issued by the Drafting Committee in April 1988.

In the reference materials of the Secretariat of the Consultative Committee, *Reference (8) - Concepts Underlying the Design of the Future Political Structure of Hong Kong*, Xiao Weiyun had the

129 Special Group on the Political Structure of the SAR, *Opinions on the Draft (November 1987) of the Articles in Chapter IV of the Basic Law (I)*, passed by the Executive Committee on 23 November 1987 in *Overview of the Drafting Process*, Vol.2, p.568.

130 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p. 569.

131 BL 61 of the fifth draft. *Overview of the Drafting Process*, Vol.2, p.569.

following comments on the status, composition and powers of the executive authorities:<sup>132</sup>

“How should the government of the Hong Kong Special Administrative Region be constituted? What institutions should be established? This is also stipulated in the *Draft Basic Law* for solicitation of opinions. Article 60 stipulates that the Chief Executive is the head of the government of the Hong Kong Special Administrative Region. The government consists of a Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions. Such is the composition of the government of the Hong Kong Special Administrative Region. For the sake of Hong Kong’s prosperity, stability and stable transition, we should maintain as much as possible a system of executive authorities similar to the current system in Hong Kong headed by the Chief Secretary. What is different is that the Chief Executive will also be head of the government, and the Chief Secretary will be renamed Administrative Secretary, for the Chief Secretary was the title of an office in the Qing Dynasty which had not been used after the revolution of 1911. ‘Department’ is retained for the three major departments. In order to preserve the heads of the three major departments as ‘Secretaries’, and distinguish the status of the three major departments from the other existing ‘departments’, ‘bureaux’ is used in Article 60 the status of which is the same as that of the existing ‘department’ and the ‘Secretaries’ referred to in the Joint Declaration. In view of the actual circumstances of Hong Kong, the *Draft Basic Law* for solicitation of opinions also stipulates that ‘the original system of establishing advisory organizations by executive authorities shall be retained’.”

BL 60(3) “The organization of the executive authorities of the Hong Kong Special Administrative Region shall be prescribed by law” had always been controversial. The opinions collected by the Consultative Committee during the consultation period of the sixth draft were that the executive organization structure of the special

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132 *Overview of the Drafting Process*, Vol.2, p.570.



administrative region should retain certain flexibility and should not stipulate rigid regulations.<sup>133</sup> Before finalizing the seventh draft on 9 January 1989, deletion of BL 60(3) was proposed in *Report of the Subgroup on Political Structure regarding the Amendments to the Articles*, as there may be frequent changes in the organization of the government, it was not appropriate to impose too strict legal provisions.<sup>134</sup> That paragraph was deleted in the seventh draft.

That version was adopted by the NPC in April 1990 as BL 60.

## Article 61

“The principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country and have ordinarily resided in Hong Kong for a continuous period of not less than 15 years.”

Section I of Annex I to the Joint Declaration stipulates that: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants ... Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People’s Government.”

Drafting materials in *Overview of the Drafting Process* show that this article originally had two paragraphs when the first draft was finalized. The first paragraph read: “The principal officials of various departments of the executive authorities of the Hong Kong Special Administrative Region shall be nominated by the chief executive of the Region and reported to the Central People’s Government for

133 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.570.

134 *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.2, p.571.

appointment.” The second paragraph read: “The principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of Hong Kong and have ordinarily and continuously resided in Hong Kong for not less than 15 years.” The first paragraph was deleted when the fifth draft was finalized and the original second paragraph was left as an individual article.<sup>135</sup> The expression “have ordinarily and continuously resided” in the original second paragraph of the article was revised to read “have continuously resided” when the third draft was finalized, but was reinstated in the fourth draft, and was finally amended to read “have ordinarily resided ... for a continuous period” when the fifth draft was finalized. As for the condition “with no right of abode in any foreign country”, it was added when the eighth draft, namely, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* of 16 February 1990, was finalized.

Drafting materials in *Overview of the Drafting Process*<sup>136</sup> show that this article had progressed through nine drafts. Many views were collected during the consultation at the initial stage of the drafting of the Basic Law. Among such views, in relation to the selection of Secretaries, some members of the Consultative Committee considered that the term “local inhabitants” mentioned in the Joint Declaration should be clearly defined. Some members agreed to use a period of residence of seven years as the standard while some members were of the view that relying on this alone as a standard was not sufficient and there should also be a restriction based on the year in which residence was taken up.<sup>137</sup> The relevant discussions also focused on the situation of the Secretaries of Hong Kong at that time and the political status of

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135 Some members of the Drafting Committee pointed that the first paragraph of this article was a repetition of other articles and should be deleted. See *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.584.

136 *Overview of the Drafting Process*, Vol.2, pp.573-587.

137 *Summary of Group III of the Special Group on the Political Structure of the SAR*, 15 April 1986 in *Overview of the Drafting Process*, Vol.2, p.574.

the Secretaries of the HKSARG. As pointed out by the Working Group on the Executive Authorities and the Selection of the Chief Executive of the Special Group on the Political Structure of the SAR of the Consultative Committee, Section I of Annex I to the Joint Declaration only referred to the nomination and appointment of Secretaries without mentioning their political status.<sup>138</sup> Before finalizing the first draft of the article in early August 1987, *Final Report on Public Servants* of the Special Group on the Political Structure of the SAR of the Consultative Committee elaborated on the views on the status of principal officials (equivalent to Secretaries) after 1997, especially the supporting and opposing views of allowing civil servants to serve as principal officials:

“Supporting:

(1) Maintain the existing system.

(2) Since civil servants are not affected by the partial interests of voters, they can take the overall interests into account better when formulating policies.

(3) Civil servants should participate in policy formulation to a certain extent because the best candidates for assessing the feasibility of policy proposals are the persons responsible for implementation of the policies, which is a different matter from policy making. Therefore, to a certain extent it is advantageous for the posts of Secretaries to be taken up by civil servants.

(4) After 1997, the Chief Executive’s appointment will be political and Secretaries will be under the orders of the Chief Executive. When Secretaries make mistakes, the Chief Executive and the executive authorities might be subject to impeachment or removal.

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138 Working Group on the Executive Authorities and the Selection of the Chief Executive of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Composition and the Powers and Functions of the Executive Authorities (First Draft)*, 25 May 1987 (Discussion Paper of the Fifth Meeting of the Working Group on the Executive Authorities and the Selection of the Chief Executive of the Special Group on the Political Structure of the SAR, 29 May 1987) in *Overview of the Drafting Process*, Vol.2, pp.576-577.

Accordingly, although Secretaries are civil servants, they would also need to bear direct or indirect responsibilities.

Opposing:

(1) After 1997, Secretaries should no longer keep the status of civil servants and be appointed politically, for according to the Sino-British Joint Declaration, principal officials shall be nominated by the Chief Executive and appointed by the Central Government. The Chief Executive is to be selected by election or through consultations held in Hong Kong, which shows that the selection process is democratic and therefore political. This means that the Chief Executive himself or herself is a politician and his or her nomination is also political. Since political factor is not a criterion for promoting civil servants, civil servants cannot serve as principal officials. When the Chief Executive wishes a civil servant to be appointed as principal official, that person should give up his or her civil servant status.

(2) Although Secretaries can influence the formulation of policies, they do not need to bear any political responsibility for their decisions, i.e. the public cannot impeach or remove Secretaries for disagreeing with the latter's views, which is really unreasonable.

(3) Civil servants should participate in policy formulation to a certain extent because the best candidates for assessing the feasibility of policy proposals are the persons responsible for implementation of the policies. Policy formulation and policy making are different things, they should be clearly differentiated, for any policy maker should be accountable to the legislature, and it is not appropriate for politically neutral civil servants to bear this responsibility.”<sup>139</sup>

When formulating the first draft, there was the following explanatory note in *Progress Report of the Subgroup on Political Structure* of the Drafting Committee of 22 August 1987:

“Members are of the view that principal officials should generally

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139 Passed by the Executive Committee on 8 August 1987 in *Overview of the Drafting Process*, Vol.2, pp.580-581.

be selected from civil servants but could also be selected from members of society other than civil servants. While members of the public are serving as principal officials, they will be treated as civil service agreement officers and will leave public office upon expiration of his or her term of office. The transfer of principal officials and the expansion of the Secretaries establishment must be approved by the Central People's Government. The scope of ranks considered as principal officials must be defined. With regard to the period for which principal officials must have ordinarily and continuously resided in Hong Kong, some members suggested 10 years, some suggested 20 years and some suggested that there should be no provision on this."<sup>140</sup>

After finalizing the first draft of the article, there was a view that the meaning of the expression "have ordinarily and continuously resided" was vague. Therefore, it was suggested to state only "have continuously resided ... for not less than", there was also suggestion to state only "have ordinarily resided". However, some members were of the view that there were already case authorities on this expression in Hong Kong. Some members also suggested that members of the Drafting Committee should define this expression as clearly as possible in law.<sup>141</sup>

During the consultation period, after the finalization of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* of April 1988 of the Drafting Committee, *Reference (8) - Concepts Underlying the Design of the Future Political Structure of Hong Kong* (by Xiao Weiyun) of the Secretariat of the Consultative Committee pointed out:

"Article 61 of *The Draft Basic Law (for solicitation of opinions)* provides that the principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent

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140 Published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.581.

141 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.2, p.582.

residents of Hong Kong and have ordinarily resided in Hong Kong for a continuous period of not less than 15 years. This fully reflects the spirit of ‘Hong Kong people administering Hong Kong’; excludes Chinese citizens of central state organs and provinces, autonomous regions and municipalities directly under the Central Government in the Mainland from participating in the work of the executive authorities (and also the legislature and judiciary) of the Hong Kong Special Administrative Region; implements China’s basic policies regarding Hong Kong in the Joint Declaration; and reflects the high degree of autonomy that the Hong Kong Special Administrative Region enjoys.”<sup>142</sup>

Many different opinions were collected during the consultation period of *The Draft Basic Law (for solicitation of opinions)* on the issues of period of residence in Hong Kong and nationality of principal officials. There were some views that the principal officials of executive authorities should only have Chinese nationality. However, some considered the provision that principal officials can only be Chinese citizens too rigid and although the number of posts of principal officials directly affected (about a dozen) would be small, a number of mid-level civil servants would be indirectly affected, for if they were unwilling to give up their foreign nationality, they would not have any opportunity to serve as principal officials. There were also views that for the time being it should not be provided rigidly that principal officials must not have dual nationality, so that the elite who had emigrated to foreign countries could be attracted to return to Hong Kong, and the confidence of Hong Kong people during the transition period could be consolidated.<sup>143</sup>

Chairman Ji Pengfei’s *Report on the Submission of “The Draft Basic Law of the Hong Kong Special Administrative Region of the*

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142 19 August 1988. *Overview of the Drafting Process*, Vol.2, p.585.

143 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.585-586.

*People's Republic of China” and Related Documents to the Standing Committee of the National People's Congress for Examination* of 15 February 1989 points out:

“In addition, the *Basic Law (Draft)* stipulates that the Chief Executive, principal government officials, members of the Executive Council, President of the Legislative Council, the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court must be Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region. This is necessary for maintaining state sovereignty.”<sup>144</sup>

The finalization of the seventh draft of the article, which was included in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of February 1989, was followed by another consultation period, during which there were still views that not allowing Chinese with foreign passports to participate in the ExCo or serve as senior civil servants was short-sighted and amendment was necessary. There were also suggestions to delete this article or the expression “Chinese citizen”, or to modify the length of residence in Hong Kong, etc.<sup>145</sup>

When BL 61 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of 16 February 1990 was finalized, the expression “with no right of abode in any foreign country” was added. Chairman Ji Pengfei's *Report on the Amendments to The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents* of 19 February points out:

“The restriction ‘with no right of abode in any foreign country’ has been added to the provisions on the qualifications of the Chief Executive of the Hong Kong Special Administrative Region, members

144 *Overview of the Drafting Process*, Vol.2, p.586.

145 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, pp.586-587.



of the Executive Council, the President of the Legislative Council, principal government officials, the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court, and Hong Kong members of the Basic Law Committee. At the same time, the Director of Immigration and the Commissioner of Customs and Excise are also listed as principal officials, whose qualifications are also subject to the above restriction.”<sup>146</sup>

Chairman Ji Pengfei explained at a session of the NPC on 28 March 1990:

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong. Based on the same considerations, relevant articles stipulate that the Region’s Legislative Council must be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.”<sup>147</sup>

Deng Xiaoping talked about “the scope and criteria for Hong Kong people administering Hong Kong” during his meetings with a Hong Kong industrial and commercial sectors delegation visiting Beijing, and a group of well-known Hong Kong figures including

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146 *Overview of the Drafting Process*, Vol.2, p.587.

147 *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 National People’s Congress, 28 March 1990).



Chung Sze-yuen, on 22 and 23 June 1984 respectively:<sup>148</sup>

“We should have faith in the Chinese of Hong Kong, who are quite capable of administering their own affairs ... We are convinced that the people of Hong Kong are capable of running the affairs of Hong Kong well, and we want to see an end to foreign rule. The people of Hong Kong themselves will agree to nothing less.

Some requirements or qualifications should be established with regard to the administration of Hong Kong affairs by the people of Hong Kong. It must be required that patriots form the main body of administrators, that is, of the future government of the Hong Kong special region. Of course it should include other Chinese, too, as well as foreigners invited to serve as advisers. What is a patriot? A patriot is one who respects the Chinese nation, sincerely supports the Motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are patriots, whether they believe in capitalism or feudalism or even slavery. We don’t demand that they be in favour of China’s socialist system. We only ask them to love the Motherland and Hong Kong.”

## Article 62

“The Government of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To formulate and implement policies;
- (2) To conduct administrative affairs;
- (3) To conduct external affairs as authorized by the Central People’s Government under this Law;
- (4) To draw up and introduce budgets and final accounts;
- (5) To draft and introduce bills, motions and subordinate legislation;

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148 See Introduction in this book.

and

(6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.”

Drafting materials in *Overview of the Drafting Process*<sup>149</sup> show that at the initial stage of drafting process, some members of the Consultative Committee thought that “there was too much discussion on economy, too little on political structure in the Joint Declaration, so the Basic Law should focus on political structure ...”<sup>150</sup> *In Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)*, 22 April 1986<sup>151</sup> “Powers and functions of the executive authorities” was listed as the third article in Section II “The Executive Authorities” of Chapter IV on “Politics of the Hong Kong Special Administrative Region”.

Discussion before the first draft of this article was about the functions and powers of the ExCo at that time. The minutes of the group discussion of the Special Group on the Political Structure of the SAR showed that:

“4. Discussion about executive authorities:

4.1 Some members considered that it was necessary to establish executive authorities similar to the nature of the current Executive Council. However, members still did not reach a conclusion of this issue.

4.2 Most members agreed that the functions and powers of the executive authorities should include not only proposing and consulting on policies, but also appointing independent investigation committees to study the affairs of government departments and public utilities, and dealing with issues of great importance to the public interest. Some members suggested that consent of the legislature to such committees

149 *Overview of the Drafting Process*, Vol.2, pp.588-597.

150 Consultative Committee, *Summary of the Fourth Batch of Discussions*, February 1986 in *Overview of the Drafting Process*, Vol.2, pp.588-589.

151 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee for the Basic Law* in *Overview of the Drafting Process*, Vol.2, p.589.

should be obtained.

4.4 The provisions of the Basic Law should provide that the executive authorities may use emergency powers in emergency situations. However, the use of emergency powers should be confined to a specific period of time, any extension must be approved by the legislature.”<sup>152</sup>

The first draft originated from *Progress Report of the Subgroup on Political Structure*, 22 August 1987:

“Chapter IV Section II

‘Article 3 The executive authorities of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To make policy proposals to the Chief Executive;
- (2) To formulate and implement executive policies and conduct administrative affairs in accordance with the provisions of this Law;
- (3) To draw up and introduce budgets and final accounts; and
- (4) To draft and introduce bills and motions.”<sup>153</sup>

The said *Progress Report* contained an explanatory note on Article 3 as follows:

“Some members suggested that if the executive authorities should only include an implementation organ, their powers and functions in Item (2) in this article would have to be written as: ‘Implement executive policies approved by the Chief Executive and conduct administrative affairs in accordance with the provisions of this Law.’ Most members considered that ‘bills’ referred to in Item (4) should

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152 *Minutes of the Fifth Meeting of the Special Group on the Political Structure of the SAR (Group I) of 8 July 1986*, 8 July 1986 in *Overview of the Drafting Process*, Vol.2, p.590.

153 Published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.2, p.588.

include ‘subordinate legislation’”.<sup>154</sup>

Significant changes took place in the fourth draft of this article: four items were expanded into six items. Item (1) was amended to become: “To formulate and implement government policies”; a new item was added: “To conduct external affairs as authorized by the Central People’s Government as stipulated in Chapter VII of this Law”; “subordinate legislation” was added to “To draft and introduce bills and motions”; another new item was added (as Item 6): “Other necessary and reasonable powers when performing duties in accordance with the provisions of this Law”.

The newly added Item (6) was deleted in the fifth draft of this article. The content of the sixth draft of this article, i.e. BL 62 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, April 1988, when it was finalized, was the same as the fifth draft.

Subsequently, in reference materials of the Secretariat of the Consultative Committee, 19 August 1988, *Reference (8) - Concepts Underlying the Design of the Future Political Structure of Hong Kong*, Xiao Weiyun pointed out that:

“Article 62 stipulates five functions and powers of the government of the Hong Kong Special Administrative Region namely: formulation and implementation of policies; conduct of administrative affairs; conduct of foreign affairs authorized by the Central People’s Government; drawing up and introduction of budgets and final accounts; drafting and introduction of bills, motions and subordinate legislation. It outlined the functions and powers of the government that are conducive to achieving a high degree of autonomy and enhancing the efficiency of administrative work.”<sup>155</sup>

During the consultation period of *The Draft Basic Law (for solicitation of opinions)*, some members of the Consultative

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154 Ibid, p.592.

155 *Overview of the Drafting Process*, Vol.2, pp.594-595.

Committee considered that the HKSARG could exercise its power to formulate and introduce bills, motions and subordinate legislation. However, after the bill was drafted, there were no clear provisions as to how the legislature could introduce the bill. Some members of the Consultative Committee considered that according to the current wording, the “ministerial system” should be adopted in the operation of the executive and legislative organs, that is to say, members of the legislature should submit proposals, participate in debates and vote on behalf of the government. However, if “ministerial system” were to be established too soon, it would be difficult to predict its impact on Hong Kong.<sup>156</sup> Meanwhile, it was pointed out in a special report by the Consultative Committee that “Members of the executive authorities or principal officials should not serve as members of the Legislative Council at the same time. However, they may sit in on the meeting of the Legislative Council to implement the provision in Article 64. This can avoid confusing the relationship between the executive authorities and the legislature and can also enable the executive authorities to implement the provision of Article 64.”<sup>157</sup> Subsequently, the Drafting Committee suggested in the *Report of the Subgroup on Political Structure regarding the Amendments to the Articles*, 9 January 1989 that: “The new Item (6) be added after Item (5): ‘To designate officials to sit in on the meetings of the Legislative Council’, so that officials can submit bills and motions and answer questions in the Legislative Council.”<sup>158</sup>

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156 *Collection of Views of the Special Group on Political Structure of the Consultative Committee for the Basic Law regarding Chapter IV of the Draft Basic Law (for solicitation of opinions)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1, October 1988 in *Overview of the Drafting Process*, Vol.2, p.595.

157 *Some General Issues Concerning the Political Structure of the Hong Kong Special Administrative Region*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.3 – *Special Reports*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.595.

158 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.2, p.595.

BL 62 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, February 1989, which was the seventh draft of this article, included the above Item 6, the content of which was subsequently revised twice by the Subgroup on Political Structure of the SAR of the Drafting Committee. *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure*, 13-16 December 1989 revealed that most members agreed that BL 62(6) should be amended to “appoint officials to attend the Legislative Council to speak on behalf of the government”.<sup>159</sup> Later, *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure*, 17-20 January 1990 show that apart from confirming the above proposed amendment, members also suggested that BL 62(6) should be changed to “appoint officials to attend the Legislative Council and to speak on behalf of the government”.<sup>160</sup>

In formulating the eighth draft, Item (6) was amended as “appoint officials to attend the Legislative Council and speak on behalf of the government”. The content of the other five items basically remained unchanged.

During the consultation period of the *Draft Basic Law* in November 1989, some comments received by the Consultative Committee suggested that Item (5) be amended to read: “drafting and introducing bills and motions, private bills proposed by individual members of the Legislative Council not affected”; “If the executive authorities intend to propose a motion, it shall be submitted to the legislature for the latter to propose.”<sup>161</sup> These suggestions were rejected.

BL 62 was adopted by the NPC in April 1990, the text was the same as the eighth draft.

159 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, p.597.

160 Ibid.

161 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.596.

## Article 63

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”

Article 3 of the Joint Declaration stipulates that “ ... The laws currently in force in Hong Kong will remain basically unchanged.” The relevant part of Section III of Annex I to the Joint Declaration reads: “A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.”

Drafting materials in *Overview of the Drafting Process*<sup>162</sup> show that before formulating the first draft of the article in August 1987, the Special Group on Law and the Special Group on the Political Structure of the SAR of the Consultative Committee held more than one joint meeting. *Final Report on Some Aspects of Final Adjudication and the Judicial System of the SAR, and the Role of an Independent Prosecuting Authority* of 3 June 1987 of the Special Group on Law and the Special Group on the Political Structure of the SAR pointed out:<sup>163</sup>

“(D) Duties of an Independent Prosecuting Authority

### 26. Current status

The current status of the Attorney General in Hong Kong is detailed in Annex I to this Report. Although some of the duties of the Attorney General are the same as those of the Minister of Justice, their duties are not exactly the same and their roles are essentially different. In addition to the duties of Attorney General, Minister of Justice (the Attorney General may be an official under his or her authority) is also responsible for affairs relating to immigration, law and order, court administration, prison, or the police, etc.

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162 *Overview of the Drafting Process*, Vol.2, pp.598-603.

163 *Overview of the Drafting Process*, Vol.2, pp.599-600.

## 27. Future status

Section III of Annex I to the Joint Declaration points out that “A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.” Under the current system, the Attorney General can give general instructions to the Crown Prosecutor. However, according to the law, the Attorney General is in charge of prosecution work and uses his or her powers and performs his or her duties to keep prosecution work from any interference. Some people suggested that the existing system should be maintained. Others suggested that in future the Attorney General may be politically appointed, so an independent prosecuting authority should be established and its head should be statutory and completely independent of the Attorney General, free from any interference.

The person holding the said post may decide whether to prosecute a criminal case according to:

- i. a case with prima facie evidence;
- ii. a reasonable possibility of conviction;
- iii. the above two points should be applied to all persons with equal standard;
- iv. The prosecuting authority may decide not to prosecute a case if it considers beneficial to the public not to do so.
- v. The powers of the prosecuting authority and its decision on any case should not be questioned by any person or authority.

## 28. Content of the Basic Law

There should be provisions in the Basic Law stipulating that the Special Administrative Region will have an independent prosecuting authority which controls criminal prosecutions, free from any interference.

### (E) Duties of the Attorney General in Future

29. The duties and responsibilities of the Attorney General should be mapped out by the local laws of the Special Administrative Region



in future.

30. Our group has discussed the question of whether the post of Minister of Justice should be established. The result of the discussion is that in view of the circumstances of Hong Kong, it would not be beneficial to merge the posts currently held by various officials at the Secretary level. Moreover, if the Minister of Justice is to enjoy more powers, there might be confusion or duplication with the current powers of the Attorney General. There are concerns that the Minister of Justice might have excessive power. Members consider that an official should not have judicial, legal and public order powers at the same time. If both the posts of Minister of Justice and Attorney General are to be established in the Special Administrative Region in future, the responsibilities of the two should be clearly delineated, especially the responsibilities of the Attorney General. Therefore, the powers and functions of the Attorney General should not be extended to cover those of the Minister of Justice.

Annex I : *The Role of the Attorney General in Hong Kong* (translated version).”

The first draft of the article read: “The prosecution department of the executive authorities of the Hong Kong Special Administrative Region shall handle criminal prosecutions independently, free from any interference.” The content of the second to sixth draft of the article, namely, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)* of April 1988 of the Drafting Committee, remained unchanged, but there were some amendments to the wording of the article. When the fourth draft was finalized, in the Chinese version, the term “工作” which means “work” was added after “criminal prosecutions” but the change did not affect the English translation. When the fifth draft was finalized, a Chinese character in the expression “刑事檢控工作”, which means “criminal prosecutions”, was changed but it did not affect the English translation.

In the course of the drafting process, some members of the

Drafting Committee opined that the prosecution department should also be accountable to the CE. However, most members of Group II considered that such department is not necessarily accountable to the executive authorities. The prosecution department should have a certain degree of independence, the CE cannot make any administrative intervention.<sup>164</sup>

After finalizing *The Draft Basic Law (for solicitation of opinions)* of April 1988, the Mainland delegation visiting Hong Kong responded to some related questions:

#### “4. Political Structure

##### 4.7 Prosecution Department

4.7.1 For the current prosecution work of Hong Kong, proceedings are initiated by the Attorney General, who also at present acts as the legal adviser to and drafts legal documents for the government which are not prosecution work in the strict sense. Prosecution work is mainly to initiate public prosecutions, which will be the same in future and will not be subject to interference by the executive authorities.

4.7.2 This idea is included in the section on the executive authorities because currently the Financial Secretary and the Chief Secretary are both executive departments under the governor of Hong Kong.”<sup>165</sup>

The text of the seventh draft of the article remained the same as the sixth draft. However, during the consultation afterwards, some people suggested that the term “prosecution department” of this article be changed to “Department of Justice”. Some members of the

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164 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.601.

165 Reference Materials (1) of the Secretariat of Consultative Committee, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)*, 3 August 1988 in *Overview of the Drafting Process*, Vol.2, p.601.

Consultative Committee rejected the suggestion, for the Secretary of Justice, as a principal official appointed by the Central Authorities, with political functions, should be different from the functions of the prosecution department and should not replace it.<sup>166</sup> There was also a suggestion that “the department to which the Director of Public Prosecutions of the Hong Kong government currently belongs should break away from the Attorney General and become an independent department”. The reason was that a Director of Public Prosecutions under the command of the Attorney General would result in public criticism of prosecution work being interfered by the executive authorities. If the prosecuting authority decides whether to act or not under political influence or on the basis of personal relations, the public will not trust that the rule of law can be implemented. Another view pointed out that the Basic Law stressed the independence of the “prosecuting authority”, but none of the articles on the courts of the HKSAR contained the expression “independent” or “independent trial”, which seemed to imply that the “prosecuting authority” had a more special status than other executive, legislative and judicial organs of the HKSAR. Also, some people asked: Did the expression “handle ... independently” in the article mean “independence” from the HKSARG?<sup>167</sup>

In two meetings which followed, the Subgroup on Political Structure of the Drafting Committee first agreed by a majority to amend the article to read: “The prosecution department of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference”,<sup>168</sup> and subsequently

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166 *Minutes of the Fifth Meeting of the Second Consultation Period of the Special Group on the Political Structure of the SAR*, 1 September 1989 in *Overview of the Drafting Process*, Vol.2, p.602.

167 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.602.

168 *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure*, 13 - 16 December 1989, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, pp.602-603.

amended it to read “The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”<sup>169</sup> The revised version was finalized as the eighth draft of the article and was adopted by the NPC in April 1990 as BL 63.

## Article 64

“The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.”

Drafting materials in *Overview of the Drafting Process* show that<sup>170</sup> the content, wording and punctuation of BL 64 remained the same throughout the entire drafting process except the appellations. The term “Government of the Hong Kong Special Administrative Region” was referred to as “executive authorities of the Hong Kong Special Administrative Region” and the term “Legislative Council of the Region” was referred to as “legislature of the Region” originally in the early and mid-term drafting process. They were changed when the seventh draft, namely, the *Draft Basic Law*, was finalized.

The relevant part of Section I of Annex I to the Joint Declaration reads: “The executive authorities shall abide by the law and shall be accountable to the legislature.”

A record of discussion of the initial stage of the drafting of the

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169 *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure*, 17 - 20 January 1990, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, p.603.

170 *Overview of the Drafting Process*, Vol.2, pp.604-619. The drafting process of this article progressed through nine drafts.

article, i.e. prior to the finalization of the first draft, shows an opinion which reads: “There are checks and balances between the executive, legislative and judicial powers, with the legislature as the supreme authority. The principle that the executive authorities are accountable to the legislature must be established. Being accountable is not just reporting and consultation. Under certain circumstances, the legislature should be able to sanction the Chief Executive or officials with dereliction of duties in government affairs.” However, another opinion reads: “In order to maintain stability, the operation of the political structure should be executive-led. The Chief Executive and the executive authorities are the centers of power. The legislature cannot have the power to overthrow the government. ‘Being accountable’ is to report to the legislature.”<sup>171</sup>

In mid-1986, a delegation for the purpose of exchanging views had discussions in groups with Mainland members of the Drafting Committee. The first group consisted of Shao Tianren, Li Hou, Xu Chongde, etc. Opinions on fundamental issues relating to political structure were expressed by Li Hou and Shao Tianren, which were recorded in *Bulletin 17 of the Secretariat of the Consultative Committee for the Basic Law*. The relevant opinions are excerpted as follows:

“As for the issue of the executive authorities being accountable to the legislature in the Sino-British Joint Declaration, actually there was common understanding amongst all during the Sino-British negotiations, that is: the executive authorities should present regular policy addresses to the legislature, the executive authorities should answer questions raised by the Legislative Council; the legislature had the power to examine and decide budgets; when the principal officials of the executive authorities (including the Chief Executive) commit criminal acts, the legislature may impeach them and report to

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171 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.2, p.605.

the Central Authorities for handling. The status of the legislature and executive authorities is equal and they regulate each other.”<sup>172</sup>

*Annex to the Minutes of the Preliminary Discussion on Drafting the Political Structure* of 14 August 1986 reads: “On the issue of the relationship between the executive authorities and the legislature, opinions differ widely. The focus is on whether the future political structure should centre around the legislature or the executive, or there is to be division of labour between the executive and the legislature with checks and balances between them. The specific issue is: how will the future executive authorities be accountable to the legislature, explain, and answer questions raised by the legislature?”<sup>173</sup>

*Discussion Paper on the Relationship between the Executive Authorities and the Legislature* of 10 June 1987 of the Working Group on the Relationship between the Executive Authorities and the Legislature of the Special Group on the Political Structure of the SAR analyzed the problem caused by the Joint Declaration:<sup>174</sup>

“Since the Sino-British Joint Declaration only explains the relationship between the executive authorities and the legislature as follows: ‘The executive authorities ... shall be accountable to the legislature’, without explaining the term ‘accountable’, much debate has been triggered.

#### 2.4.1 Interpretation of the term ‘accountable’

There are three different kinds of opinions:

2.4.1.1 According to China’s Constitution, or in layman’s terms, ‘accountable’ refers to the relationship between a subordinate and a superior, who has the power to monitor the operations of the subordinate and to select and dismiss the subordinate head.

2.4.1.2 The relationship between the two is similar to the one

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172 *Overview of the Drafting Process*, Vol.2, p.606.

173 *Overview of the Drafting Process*, Vol.2, p.608.

174 Discussion Paper of the Second Resumed Meeting of the Thirteenth Meeting of the Special Group on the Political Structure of the SAR, 27 July 1987 in *Overview of the Drafting Process*, Vol.2, pp.609-610.

currently between the Executive Council and the Legislative Council of Hong Kong. ‘Accountable’ does not imply a superior-subordinate relationship. The relationship between the two is:

(1) The executive authorities present regular policy addresses to the legislature;

(2) The executive authorities must answer questions raised by the legislature;

(3) The legislature has the power to pass budgets and examine final accounts;

(4) If any principal official of the legislature, including the Chief Executive, commits a crime, the legislature may impeach him or her and report to the Central Authorities for handling.

2.4.1.3 The Oxford English Dictionary defines ‘accountable’ and ‘responsible’ as:

(1) accountable - bound to give account; responsible.

(2) responsible - liable to be called to account, answerable, not autocratic, morally accountable for actions capable of rational conduct, of good credit or repute, respectable, apparently trustworthy.

The relationship has been clearly defined by the term ‘accountable’ as it does not imply subordination (superior and subordinate). In terms of the relationship between the legislature and the executive authorities, it means mutual obligation.

2.4.3 Since the legislature and the executive authorities have their respective scopes of functions and powers, it is not helpful to solve the problem of the relationship between the two if the term ‘accountable’ is only given an isolated and literal interpretation. This paper will explore the relationship between the legislature and the executive authorities in terms of their substantive functions.”

A year later, i.e. August 1988, a document compiled the responses of the visiting group of members of the Drafting Committee from the Mainland to a number of issues. The material on “political structure”

below shows the discussion before the seventh draft was finalized:<sup>175</sup>

#### “4.5 Definition of ‘accountable’

4.5.1 The term ‘accountable’ appears many times in the Basic Law in different contexts and there may be confusion. Therefore, on the relationship between the executive authorities and the legislature, Article 64 of the Basic Law expressly sets out the substance of ‘accountable’. Although there are only four points, the functions and responsibilities of the two authorities are very clear already.

4.5.2 The reason for not stating ‘the executive authorities shall be subject to the supervision of the legislature’ is that the word ‘supervision’ without definition may become a hollow concept without any substance in the relationship between the two authorities. In that case, the two will only compete for power without coordination and the effect of real regulation cannot be achieved. Therefore, the effect of stating only ‘abide by the law’ and ‘answer questions raised’, etc. would be the same as being subject to supervision and regulations, there is no need for extra provision.

#### 4.6 The executive authorities, legislature and judiciary

4.6.2 As for the executive authorities being accountable to the legislature, the meaning of ‘accountable’ has already been settled by the using of a colon. This is written based on understanding of members who attended the discussions during the Sino-British negotiations, and relevant materials provided by them. This is also a kind of regulation.”<sup>176</sup>

During the drafting of the article, some members considered that the article was unclear; or that the scope of the executive authorities’

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175 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.2, p.614.

176 In addition to BL 64, the expression “be accountable to ...” can also be found in BL 43, 57, 58, 99 and 101.



accountability to the legislature too narrow, which was contrary to the Joint Declaration, since “being accountable” should have no limit or restraint. There was a suggestion that this article be rewritten into two paragraphs, with one paragraph before the colon and one after the colon, expressing two layers of meaning. There was also a suggestion to change the colon to a semicolon (;) or full stop (.). Another suggestion was to include more items for which the executive will be “accountable”. However, some members of the Drafting Committee did not agree to remove the colon because the expression before the colon was stipulated by the Joint Declaration and the one after was the specific scope of “be accountable to”.<sup>177</sup>

Chairman Ji Pengfei explained at a session of the NPC on 28 March 1990 that:

“The relationship between the executive authorities and the legislature. The executive authorities and the legislature should regulate each other as well as co-ordinate their activities. To maintain Hong Kong’s stability and administrative efficiency, the Chief Executive must have real power which, at the same time, should be subject to some restrictions. The draft provides for the Chief Executive to be the head of the Hong Kong Special Administrative Region and accountable to the Central People’s Government and the Hong Kong Special Administrative Region. He or she is to lead the government of the Region, sign bills and budgets and promulgate laws. If the Chief Executive considers a bill passed by the Legislative Council to be not compatible with the overall interests of the Region, he or she may return it to the Legislative Council for reconsideration. If the Chief Executive refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council. On the other hand, the Basic Law provides that the government of the Region must

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177 *Overview of the Drafting Process*, Vol.2, pp.611-619.

abide by the law and be accountable to the Legislative Council. It must implement laws passed by the Legislative Council and already in force, present regular policy addresses to the Council, answer questions raised by members of the Council and obtain approval from the Council for taxation and public expenditure. The Chief Executive must consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, enacting subordinate legislation, or dissolving the Legislative Council. The Basic Law also stipulates that if the bill returned by the Chief Executive is passed again by the Legislative Council with at least a two-thirds majority, the Chief Executive must sign and promulgate it within one month, unless he or she dissolves the Legislative Council. If the newly elected Legislative Council, after the old one has been dissolved, again passes by a two-thirds majority the original bill in dispute, or it still refuses to pass the original budget or any other important bill introduced by the government, the Chief Executive must resign. If the Chief Executive is found to have committed a serious breach of law or dereliction of duty and if he or she still refuses to resign, the Legislative Council may pass a motion of impeachment through the specified procedures and refer it to the Central People's Government for decision. The provisions mentioned above embody the relationship of regulation and co-ordination between the executive authorities and the legislature."<sup>178</sup>

## Article 65

“The previous system of establishing advisory bodies by the executive authorities shall be maintained.”

Drafting materials in *Overview of the Drafting Process*<sup>179</sup> show that at the early stage of the drafting of the Basic Law, some members

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178 *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 National People’s Congress, 28 March 1990).

179 *Overview of the Drafting Process*, Vol.2, pp.620-623.

of the Consultative Committee held the view that there was much discussion on the parts relating to economy and too little on political structure in the Joint Declaration, so the Basic Law should focus more on political structure.<sup>180</sup>

Before finalizing the first draft of BL 65, there was suggestion to maintain the existing advisory system to enhance coordination between the executive and the legislature. The relevant part of the suggestion was as follows:<sup>181</sup>

“5. Mutual relationship between the executive authorities and the legislature

5.4 In order to enhance coordination between the executive and the legislature, it is proposed to basically maintain the current advisory system, i.e. set up advisory committees according to affairs of concern under major policy bureaux, such as Transport Advisory Committee, Education Commission, Labour Advisory Board, etc. and establish advisory committees on other matters. One-third of the members of the advisory boards to be appointed by the Chief Executive, one-third by the legislature, and the other one-third are representatives of organizations or individuals with the relevant expertise jointly invited by the Chief Executive and the legislature. The main functions of these committees are to provide comments on policies to be proposed by principal officials at an early stage of deliberation, and to provide an opportunity for the executive authorities, the legislature and members of society (groups and individuals related to the policies) to get in contact for exchange of information and coordination so that the policies formulated in the future can fully reflect the views of all parties. Since members of the legislature have the opportunity to participate and express their views before the executive authorities

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180 Consultative Committee, *Summary of the Fourth Batch of Discussions*, February 1986 in *Overview of the Drafting Process*, Vol.2, p.620.

181 *Proposal for the Plan for the Political Structure of the Hong Kong Special Administrative Region* jointly signed by 190 people, published in Secretariat of Drafting Committee, *References, Issue 28*, 10 November 1986 in *Overview of the Drafting Process*, Vol.2, p.620.

formulate policies, it is believed that policies of the executive authorities can gain support of the legislature more easily.”

Since its first draft, “the system of establishing advisory bodies by the executive authorities shall be maintained” had been the substantive part of the article. In the fourth and fifth drafts, the expression “Chief Executive and the” was added before “executive authorities”. When the sixth draft was finalized, the said words were deleted and the word “previous” was added to the beginning of the sentence. During the period for solicitation of opinions on the article, some views were expressed that this article should be deleted or amended to read “the executive authorities shall establish advisory organs” to avoid the reference to “previous”.<sup>182</sup>

At that time, there was also a special report entitled *Some General Issues Concerning the Political Structure of the Hong Kong Special Administrative Region*, which discussed the “advantages and characteristics of the existing structure” and was published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.3 – Special Reports* of October 1988. The relevant parts are excerpted as follows:<sup>183</sup>

“I Principles of designing political structure

3. Maintaining the strengths of the existing structure and further enhancement

3.2 Advantages and characteristics of the existing structure

3.2.3 Views are expressed that the current system of setting up advisory bodies by the executive authorities should be retained. The strengths of this system are that, in terms of result, it helps to improve the efficiency of administrative management and strengthen professional guidance in the policy making process; in terms of

182 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, August 1988 in *Overview of the Drafting Process*, Vol.2, p.621.

183 *Overview of the Drafting Process*, Vol.2, pp.621-622.

the form of organization, there are both statutory and non-statutory groups that advise on territory-wide specialized issues. Through the Executive Council, the Legislative Council, the Urban Council, the District Boards and more than 400 advisory committees attached to the executive authorities, the Government forms a network through which it can gain further understanding of various social affairs. These advisory bodies serve the purpose of transmitting and communicating between the government and the public, and mediating conflicts. In addition, the system of consultation by the executive is currently a successful experience of attracting the elite to participate in politics in Hong Kong. This has a democratic component and is the result of social progress and growing calls for democracy, which is conducive to the development of a democratic political structure in Hong Kong. There are views that the retention of the system of consultation by the executive is conducive to the continuation of Hong Kong's prosperity and stability and would ease the immigration wave.”

Before finalizing BL 65 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of February 1989, namely, the seventh draft of the article, Secretariat of the Consultative Committee, *Reference (8) – Concepts Underlying the Design of the Future Political Structure of Hong Kong (by Xiao Weiyun)* mentioned that “In view of the reality of Hong Kong, *The Draft Basic Law (for solicitation of opinions)* also stipulates that ‘the previous system of establishing advisory bodies by the executive authorities shall be maintained’.”<sup>184</sup>

The seventh and eighth drafts of the article remained the same as the sixth one. During the consultation period of the *Draft Basic Law* in September 1989, namely before finalizing the eighth draft, some members of the Consultative Committee considered that the emphasis on “maintain” in this article would hinder the formation of new advisory bodies. Some members were of the view that this article was aimed at the system rather than individual bodies, and

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184 19 August 1988. *Overview of the Drafting Process*, Vol.2, p.621.

if there was no substantial change in the existing structure by 1997, no major problems would arise. Some members considered that the word “previous” should be interpreted as the moment when the Basic Law came into force. Also, some members were of the view that when interpreting this article, one should focus flexibly on the general principles rather than dwelling on the details, and only in this way can relevant questions be resolved.<sup>185</sup>

The ninth draft of the article was adopted by the NPC in April 1990 as BL 65.

### Section 3 The Legislature

#### Article 66

“The Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region.”

BL 66 is the first of fourteen articles in Section 3 on “The Legislature”, Chapter IV on Political Structure of the Basic Law.

Section II of Annex I to the Joint Declaration provides that “The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process*<sup>186</sup> show that the name of the legislature was the only difference among the nine drafts of the article. The first to the fourth draft began with the expression “XX (name to be determined)”. In the fifth draft, the name “立法會議”[legislative conference] was used in the Chinese version

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185 *Minutes of the Fifth Meeting of the Second Consultation Period of the Special Group on the Political Structure of the SAR*, 1 September 1989 in *Overview of the Drafting Process*, Vol.2, p.623.

186 *Overview of the Drafting Process*, Vol.2, pp.624-627.

and its English translation was “Legislative Council”<sup>187</sup>. Finally, when *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* of February 1989 was finalized, “立法會議”[legislative conference] was amended to read “立法會”[Legislative Council] in the Chinese version and its English translation remained the same.<sup>188</sup>

## Article 67

“The Legislative Council of the Hong Kong Special Administrative Region shall be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. However, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region, provided that the proportion of such members does not exceed 20 percent of the total membership of the Council.”

Section I of Annex I to the Joint Declaration stipulates: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants.”

Drafting materials in *Overview of the Drafting Process*<sup>189</sup> show that this article had progressed through five drafts. The first three drafts provided “Composition and the method for formation of the legislature of the Hong Kong Special Administrative Region (to be formulated).” When *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 16 February 1990 was finalized, the fourth draft of this article was elaborated and became a separate article which addressed solely the composition of

187 Secretariat of the Drafting Committee, *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, April 1988: Members agreed that the English translation of “立法會議” [legislative conference] was still “LEGISLATIVE COUNCIL”. *Overview of the Drafting Process*, Vol.2, p.626.

188 *Overview of the Drafting Process*, Vol.2, p.626.

189 *Overview of the Drafting Process*, Vol.2, pp.628-634.

LegCo, namely, the current BL 67. Its content and wording were the same as the fifth draft passed by the NPC in April 1990.

At an early stage of the drafting process, the Working Group on the Legislature and the Formation of the Legislature of the Special Group on the Political Structure of the SAR repeatedly discussed the issue of nationality of members of the legislature. Subsequently, it was pointed out in *Discussion Paper on the Legislature (Sixth Draft)* of the Working Group as follows:<sup>190</sup>

“8. Others

8.1 The issue of nationality of members of the legislature:

Members of the Legislative Council have not been required to take an oath of allegiance to the Queen since April 1985, which indirectly meant that there was no requirement that members must be of British nationality. Whilst there were no other specific requirements of nationality, the issue of nationality of members of the legislature in future will be very controversial.

8.1.1 Apart from providing that the Government of the Hong Kong Special Administrative Region shall be composed of local inhabitants, the Sino-British Joint Declaration provides no specific provisions on the legislature’s ballot, qualifications of candidates and their nationality.

8.1.2 Apart from Chinese residents, permanent residents include people of other nationalities (see the report on the definition of resident). If permanent residents were equivalent to “local inhabitants” and the future government of the Region were to be composed of “local inhabitants”, then permanent residents, including persons other than Chinese nationals, would have the right to vote and the right to stand for election. In other words, persons of other nationalities than Chinese nationality might also participate in the legislature. On the basis of the 1987 Nationality Law (with regard to the question of whether or not

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190 Discussion Paper of the Twelfth Meeting of the Special Group on the Political Structure of the SAR, 9 June 1987 in *Overview of the Drafting Process*, Vol.2, p.631.



the Nationality Law should apply to Hong Kong, there were different opinions), there were principled differences of opinions as follows:

8.1.3 Those who opined that the right to participate in the legislature (to elect members of the legislature and to become candidates) should be limited to permanent residents of Chinese nationality had the following views: persons of foreign nationality lack a sense of belonging to Hong Kong, and the issue of dual allegiance might arise when dealing with certain public affairs relating to foreign countries. In addition, foreigners may not be able to connect the fate of the Special Administrative Region with their own interests when making decisions on major affairs in the Region. Moreover, there is the problem of by-elections once foreigners move out of Hong Kong. Specifically, will members of the post-1997 legislature need to swear allegiance to China? If the answer is 'yes', it would pose a problem to non-Chinese members of the legislature, as some countries do not allow their residents to pledge allegiance to another country. Besides, an embarrassing situation might arise due to their foreign nationality on matters relating to national security issues in Hong Kong. Therefore, foreigners should not be allowed to participate in the future legislature of the Region unless they renounce their foreign nationality and their application for naturalization as a Chinese national has been approved.

8.1.4 Some opined that the right to vote and the right to stand for election should be subject to different restrictions based on nationality: permanent residents other than Chinese nationals should be entitled only to the right to vote, but not to the right to stand for election, because the issue of sovereignty might arise if foreigners are to become members of the legislature. Besides, if Chinese nationals and non-Chinese nationals enjoy the same political rights, it would constitute political discrimination against Chinese nationals.

8.1.5 Some opined that both Chinese and non-Chinese nationals may participate in the legislature:

8.1.5.1 As an international commercial port, Hong Kong should allow as far as possible people of different backgrounds to play an active

role in the administration of local affairs. Moreover, many people who have acquired non-Chinese nationality still regard Hong Kong as their home, and therefore should be given the right to vote and the right to stand for election in the election of the Legislature, so as to enhance their sense of belonging. (There are people who consider their political rights curtailed in the absence of a right to participate in politics.)

8.1.5.2 Permanent residents, who are not Chinese nationals, may become members of the legislature because the legislature is a “Local Legislature of China” dealing only with local affairs. Therefore, the election of non-Chinese nationals as members of the legislature should not affect China’s sovereignty over Hong Kong.

#### 8.1.6 Other opinions:

8.1.6.1 Persons with right of abode in foreign countries should have no right to vote or stand for election in Hong Kong.

8.1.6.2 Chinese citizens, who have right of abode in foreign countries but regard Hong Kong as their home, should have the right to vote and the right to stand for election.

8.1.6.3 Persons who have the right to vote should have the right to stand for election.

8.1.6.4 If the legislature is purely an advisory body rather than the highest organ of power, its formation should not be limited by nationality, provided that it cannot have any political status or power equivalent to that of the local people’s congress. However, if the legislature is to be regarded as the highest organ of power, its formation must be limited by nationality as it is in effect a local people’s congress. Besides, political rights, being a form of civil rights, is related to nationality, allegiance and obligations to the state, and therefore different from the general rights of residents or citizens. Moreover, due to the pride of the nation, Chinese nationals and non-Chinese nationals should not enjoy the same political rights.

8.1.6.5 If due regard of the interests of people of other nationalities is required, a constituency or an election committee may be carved out so that representatives can be elected for representing

such interests in the legislature.”

Apart from the issue of nationality, the Consultative Committee also received comments on the qualifications of members of the legislature, stipulation of the length of residence in Hong Kong, and no criminal conviction, etc.<sup>191</sup>

Before formulating the fourth draft, the Subgroup on Political Structure of the Drafting Committee held a meeting to discuss the restrictions on qualification of members of the legislature and the relevant provisions. *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure*, 13 – 16 December 1989 shows that the members did not reach any unanimous decision on the proposed amendment, and decided to leave it to the next meeting. Comments made in the discussion on these provisions were as follows:

“4. With regard to the issue of qualification restrictions on qualification of Legislative Council members, some members suggested that there should be appropriate restrictions on qualification. It should be stipulated that members to be returned by universal suffrage must be Chinese citizens, and those returned by functional constituencies may be foreign nationals. Some members considered that granting permanent residents of the Hong Kong Special Administrative Region of foreign nationality a right to vote was a special arrangement due to historical reasons. If foreign nationals abused such right, the National People’s Congress should have the right to revoke such right generally or individually. Some members considered that it was unnecessary to impose nationality restrictions on members of the Legislative Council.”<sup>192</sup>

Relevant records of *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure*, 17 – 20 January 1990 read as follows:

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191 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.633.

192 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, pp.633-634.

“I. Regarding amendment to articles in Chapter IV ‘Political Structure’

8. Add a new article after Article 66: ‘The Legislative Council of the Hong Kong Special Administrative Region shall be composed of Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region with no right of abode in any foreign country.

Permanent residents of the Hong Kong Special Administrative Region who are not of Chinese nationality and permanent residents of the Hong Kong Special Administrative Region who have a right of abode in foreign countries may also be elected members of the Legislative Council of the Hong Kong Special Administrative Region, provided that the proportion of such members should not exceed 15 percent of the total membership of the Legislative Council.’

Some members argued that ‘15 percent’ should be changed to ‘25 percent’.”<sup>193</sup>

The fourth draft formulated on 16 February 1990, namely, BL 67 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* contained the following:

“The Legislative Council of the Hong Kong Special Administrative Region shall be composed of Chinese citizens who are permanent residents of the Hong Kong Special Administrative Region with no right of abode in any foreign country. However, permanent residents of the Hong Kong Special Administrative Region who are not of Chinese nationality and permanent residents of the Hong Kong Special Administrative Region who have a right of abode in foreign countries may also be elected members of the Legislative Council of the Hong Kong Special Administrative Region, provided that the proportion of such members does not exceed 20 percent of the total membership of the Legislative Council.”

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193 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, p.634.

On 19 February 1990, Chairman Ji Pengfei pointed out in *Report on the Amendments to The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents* that:

“IV. Permanent residents of the Hong Kong Special Administrative Region who are not of Chinese nationality and permanent residents of the Hong Kong Special Administrative Region who have a right of abode in foreign countries may also be elected members of the Legislative Council of the Hong Kong Special Administrative Region, provided that the proportion of such members does not exceed 20 percent of the total membership of the Legislative Council.”<sup>194</sup>

On 28 March 1990, Chairman Ji Pengfei stated in the “Explanations” made at the Third Session of the Seventh NPC that:

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong. Based on the same considerations, relevant articles stipulate that the Region’s Legislative Council must be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. However, in view of Hong Kong’s specific conditions, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region,

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194 *Overview of the Drafting Process*, Vol.2, p.634.

provided that the proportion of such members does not exceed 20 per cent of the total membership of the Council.”<sup>195</sup>

Deng Xiaoping talked about “the scope and criteria for Hong Kong people administering Hong Kong” during his meetings with a Hong Kong industrial and commercial sectors delegation visiting Beijing, and a group of well-known Hong Kong figures including Chung Sze-yuen, on 22 and 23 June 1984.<sup>196</sup>

“We should have faith in the Chinese of Hong Kong, who are quite capable of administering their own affairs ... We are convinced that the people of Hong Kong are capable of running the affairs of Hong Kong well, and we want to see an end to foreign rule. The people of Hong Kong themselves will agree to nothing less.

Some requirements or qualifications should be established with regard to the administration of Hong Kong affairs by the people of Hong Kong. It must be required that patriots form the main body of administrators, that is, of the future government of the Hong Kong special region. Of course it should include other Chinese, too, as well as foreigners invited to serve as advisers. What is a patriot? A patriot is one who respects the Chinese nation, sincerely supports the Motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are patriots, whether they believe in capitalism or feudalism or even slavery. We don’t demand that they be in favour of China’s socialist system. We only ask them to love the Motherland and Hong Kong.”

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195 *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 National People’s Congress, 28 March 1990).

196 See Introduction in this book.

## Article 68

“The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: “Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures.”<sup>197</sup>

According to Annex I to the Joint Declaration: “The ... legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections.”<sup>198</sup>

### Evolution of the article

“Composition and Formation Method of the Legislature” is the first item of Section 3 “The Legislature” of Chapter IV on Political Structure of Hong Kong Special Administrative Region of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)*<sup>199</sup> adopted by the Drafting Committee on 22 April 1986. Drafting materials in *Overview of the*

197 Adopted at the Third Session of the Seventh NPC on 4 April 1990; amended, as approved at the Sixteenth Session of the Standing Committee of the Eleventh NPC on 28 August 2010; *Decision of the National People’s Congress On Improving the Electoral System of the Hong Kong Special Administrative Region* adopted at the Fourth Session of the Thirteenth NPC on 11 March 2021, see Appendix XII, and amended at the Twenty-Seventh Session of the Standing Committee of the Thirteenth NPC on 30 March 2021, see Appendix XIV.

198 Section XIII of Annex I to the Joint Declaration is the relevant provision: “The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force.”

199 See Annex IV.

*Drafting Process*<sup>200</sup> show that this article had progressed through nine drafts. At the initial stage of the drafting of the Basic Law, from early 1986 to the end of 1987 before the third draft was finalized, the Drafting Committee and the Consultative Committee discussed this subject and collected a lot of opinions. Most of the members of the Drafting Committee described this article as more than just an issue of mode of election, and the views of Hong Kong people were very diverse. Adopting a temporary measure of copying the words “the legislature shall be constituted by elections” was not desirable, a draft provision should be made after further study by the Subgroup on Political Structure.<sup>201</sup> The first to third drafts of the article were: “Composition and formation method of the legislature of the Hong Kong Special Administrative Region (to be drafted)”.

In *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Compilation)* of the Secretariat of the Drafting Committee in December 1987, Article 64, i.e. the fourth draft of this article was divided into three paragraphs:

“(Paragraph 1) The legislature of the Hong Kong Special Administrative Region shall be constituted by election.

(Paragraph 2) Three options for the method of forming the legislature:

1. 50% of members to be returned by functional constituencies elections, 25% returned by geographical constituencies through direct elections, and 25% returned by general electoral college elections.

2. Not less than 50% of members to be returned by universal and direct elections, not more than 25% to be returned by functional constituencies elections and not more than 25% by district-based

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200 *Overview of the Drafting Process*, Vol.2, pp.635-713.

201 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, p.667.



councils such as District Councils, Urban Council and Regional Council elections.

3. 30% of the members to be non-advisors elected by the advisory panel amongst whom at least one-third should be principal officials, and the rest members of the Executive Council and other members of the community, 40% of the members to be returned by functional constituencies elections and 30% of members returned by geographical direct elections.

(Paragraph 3) The election methods prescribed in the preceding paragraph may be changed in the light of the actual situation of the Hong Kong Special Administrative Region, which must be passed by a two-thirds majority of all members of the legislature of the Region, consented by the Chief Executive and reported to the Standing Committee of the National People's Congress for approval."

BL 68 of *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of the Secretariat of the Drafting Committee in April 1988 was the fifth draft of this provision:

"The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by hybrid mode elections.

The election method and composition of the Legislative Council shall be prescribed in Annex II 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region'.

The election method and composition of the Legislative Council as stipulated in Annex II may be changed in the light of the actual situation of the Hong Kong Special Administrative Region and the principle of gradual and orderly progress. Such change must be approved by a two-thirds majority of all the members of the Legislative Council of the Hong Kong Special Administrative Region, consented by the Chief Executive, and reported to the Standing Committee of the National People's Congress for approval."

The content of the fifth draft and Annex II were basically included

in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* by the Drafting Committee in April 1988, which became the sixth draft of this article. Only Paragraph 2 was changed from: "The election method and composition of the Legislative Council shall be prescribed in Annex II 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region'" to "The specific method for forming the Legislative Council is prescribed in Annex II: 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region'". This article and Annex II were briefly introduced in the *Draft Basic Law (for solicitation of opinions)* as follows:

"27. Section III of this chapter stipulates that the Legislative Council shall exercise the legislative power of the Hong Kong Special Administrative Region ... According to the Sino-British Joint Declaration, the legislature of the Hong Kong Special Administrative Region shall be constituted by election. Due to the large number of proposals on the method for the return of members of the Legislative Council, no consensus was reached in the drafting process. The relevant annex 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region' to the *Draft Basic Law (for solicitation of opinions)* lists four options, a decision will be made after taking into account the views and suggestions of the people of Hong Kong.

28. Option 1 advocates that among the members of the Legislative Council, 50% will be returned by functional constituencies elections, 25% will be returned by geographical constituencies through direct elections and 25% will be returned by electoral college elections. This option was proposed to coordinate with option 1 of the method for selecting the Chief Executive, designed specifically to ensure diversification and balance of representation in the Legislative Council.

29. Option 2 advocates that among the members of the Legislative Council, not less than 50% to be elected by universal and direct

elections, not more than 25% by functional constituencies elections, and not more than 25% by District Council, Urban Council and Regional Council elections. This option was proposed to coordinate with option 2 of the method for selecting the Chief Executive. It is designed to ensure that the Legislative Council may take care of the interests of all the people of Hong Kong and strengthen the link between the Legislative Council and the district councils.

30. Option 3 advocates that among the members of the Legislative Council, 30% to be non-advisors elected by the advisory panel, amongst whom one-third shall be principal officials; 40% returned by functional constituencies elections and 30% returned by geographical constituencies through direct elections. This option was proposed to coordinate with option 4 of the method for selecting the Chief Executive. It is designed to maintain connection between the principal members of the executive authorities and the Legislative Council.

31. Option 4 advocates that among the members of the Legislative Council, 30% are to be elected by industrial and commercial sectors, 25% elected by professionals, 20% elected by grass-roots organizations and 25% by universal suffrage at geographical level. This option was proposed to coordinate with option 5 of the method for selecting the Chief Executive. Its characteristics are: from the perspective of functional constituencies and universal suffrage at geographical level, the former accounts for 75% and the latter for 25%; from the perspective of economic interests, the middle and upper classes account for 55% and the grass-roots account for 45%; from the perspective of direct and indirect elections, direct election accounts for 50%.

32. The adoption of hybrid mode elections to return members of the Legislative Council is the common feature of the four options on the method of selecting the members of the Legislative Council, and that gradual and orderly progress should be made in future. These are matters over which there is no dispute. The difference lies in what modes should be used, and the proportion of members to be returned

by the various modes.”<sup>202</sup>

After a round of consultation, Article 67 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, the seventh draft of this provision, was formulated in February 1989. The contents were as follows:

“The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council is prescribed in Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region.”

Annex II at that time read as follows:

“Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region.

1. The composition of the first to fourth terms of the Legislative Council of the Hong Kong Special Administrative Region shall be as follows:

First term Legislative Council members in total	55
(1) Geographical representatives	15
(2) Industrial, commercial and financial sectors	16
(3) The Professions	12
(4) Labour, social services, religion and other sectors	12
Second term Legislative Council members in total	65

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202 Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, April 1988 in *Overview of the Drafting Process*, Vol.2, p.676.

(1) Geographical representatives returned by direct elections	25
(2) Industrial, commercial and financial sectors	16
(3) The Professions	12
(4) Labour, social services, religion and other sectors	12
Third and fourth terms Legislative Council members in total	80
(1) Geographical representatives returned by direct elections	40
(2) Industrial, commercial and financial sectors	16
(3) The Professions	12
(4) Labour, social services, religion and other sectors	12

2. The division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods etc., shall be specified by an electoral law of the Hong Kong Special Administrative Region.

Each voter can only have one vote.

3. The first term Legislative Council shall be formed in accordance with the *Decision of the National People's Congress on the Method for the Formation of the First Government and the Legislative Council of the Hong Kong Special Administrative Region*.

The first to fourth terms Legislative Council shall be constituted in accordance with this annex. During the term of office of the Legislative Council in its fourth term, the Legislative Council will formulate a specific method to pass a vote by all voters of the Hong Kong Special Administrative Region to decide whether or not all members of the Legislative Council should be returned by direct elections. The voting results shall be reported to the Standing Committee of the National People's Congress for the record.

The above-mentioned voting by all voters must be carried out with the approval of a majority of the members of the Legislative Council, the consent of the Chief Executive and the approval of

the Standing Committee of the National People's Congress. After voting is closed, there must be affirmative votes from more than 30% of the legitimate voters before the result is considered valid for implementation.

4. If the vote above decides that all members of the Legislative Council shall be elected by direct elections, it shall be implemented from the fifth term onwards; If the vote decides there should be no change, a vote by all voters in accordance with the stipulations in Item 3 may be held again every ten years.

5. Except as provided in Items 3 and 4 of this annex, other changes shall be made with the endorsement by a two-thirds majority of all members of the Legislative Council and the consent of the Chief Executive, and shall be reported to the Standing Committee of the National People's Congress for the record."<sup>203</sup>

The publication of the seventh draft was followed by another consultation exercise. The eighth draft of this article was finalized on 16 February 1990, in which the first and second paragraphs remained the same as that of the seventh draft. Paragraph 3 was amended to read: "The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures."

Annex II to the eighth draft was discussed at two meetings of the Subgroup on Political Structure of the Drafting Committee in December 1989 and January 1990, and a show of hands was held on two separate issues: the composition of the LegCo, and the voting procedures for bills and motions.<sup>204</sup> The text finalized on 16 February

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203 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, February 1989 in *Overview of the Drafting Process*, Vol.2, pp.699-700.

204 *Minutes of the Seventeenth and Eighteenth Meetings of the Subgroup on Political Structure*, 13 December 1989 and January 1990. Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, pp.710-711.

1990 read as follows:

“Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures

### I. Method for the Formation of the Legislative Council

(1) The Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term. In the first term, the Legislative Council shall be formed in accordance with the *Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*. The composition of the Legislative Council in the second and third terms are as follows:

#### Second term

Members returned by functional constituencies	30
Members returned by the Election Committee	6
Members returned by geographical constituencies through direct elections	24

#### Third term

Members returned by functional constituencies	30
Members returned by geographical constituencies through direct elections	30

(2) Except in the case of the first Legislative Council, the above-mentioned Election Committee refers to the one provided for in Annex I of this Law. The division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods; and the method for electing members of the Legislative Council by the Election Committee shall be specified by an electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council.

## II. Voting procedures of the Legislative Council on bills and motions

Unless otherwise provided for in this law, the Legislative Council of the Hong Kong Special Administrative Region shall adopt the following procedures for voting on bills and motions:

The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present.

Motions, bills and amendments to Government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies; and geographical constituencies through direct elections and members returned by the Election Committee.

## III. Method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007

With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record.”<sup>205</sup>

No further revisions were made to the ninth draft and Annex II, they were adopted by the NPC as BL 68 and Annex II of the Basic Law in April 1990.

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<sup>205</sup> *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 16 February 1990 in *Overview of the Drafting Process*, Vol.2, pp.711-712.



## Drafting process of the article

At the initial stage of the drafting process, the *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986, shows that<sup>206</sup> there were many opinions over the election of the legislature. Those who advocated direct elections supported the method of one-person-one-vote; those who advocated indirect elections supported functional constituencies; those who advocated hybrid mode elections were of the view that the legislature could be constituted by appointment, indirect and direct elections. Direct elections may take the form of geographical constituencies or referendum, while indirect elections may be divided into functional constituencies and social constituencies. Opinions on the composition of the legislature were also diversified. The idea of a bicameral system for the legislature was also suggested, with the first chamber constituted by direct elections and the second chamber acting as checks and balances.

During that period, the Special Group on the Political Structure of the SAR of the Consultative Committee not only met in groups to discuss, but also took into account many different views from the society, including the *Twelve Ideas on Political Structure*. The views expressed included:

“The needs of the majority of society may be satisfied if the entire legislature is returned by indirect elections and all district-based councils are returned by direct elections, for welfare is the only concern for the society’s majority. As to policies of the Central Authorities, external policies such as tariff and trade agreements, Hong Kong’s trade and industrial policies, customs, taxation and other issues, are not the concern of the ordinary grass-roots population, nor do they know much about these things, instead, they trust that experts would deal with those matters and their direct participation in such policy matters is not required. So what is needed is a group of experts

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206 One of the reference materials for the Second Session of the Drafting Committee for the Basic Law in *Overview of the Drafting Process*, Vol.2, pp.636-637.

returned by functional constituencies to deal with government policies. That is why indirect elections may suffice.

If in future the entire legislature is to be constituted by direct elections, political parties may be established in Hong Kong. The Chinese Nationalist Party is a political party, can it operate openly? Surely, the Communist Party of China may also conduct public activities. If the Communist Party of China participates in the election, is it possible for other political parties to compete with it?<sup>207</sup>

At that time, some members of the Special Group on the Political Structure of the SAR considered that the general civic awareness and education level of Hong Kong people (the proportion of university students) were quite low, it would be unsafe to constitute the legislature by direct elections alone. Some members considered that there must be a transitional period before the time was ripe for direct elections.<sup>208</sup>

It was also pointed out that Sections I and XIII of Annex I to the Joint Declaration mentioned three points: “composed of local inhabitants”, “constituted by elections” and “The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force.” When people looked up the part about the formation of the legislature in the Joint Declaration, their focus was usually only on the first and second points and neglected the third. According to that view, “since China is not a party to the above-mentioned covenant, but in order to enable Hong Kong people to enjoy no less rights than those stipulated in the current Covenant, a commitment was made. The purpose of making such commitment is certainly to reassure Hong Kong people. As for the provisions not applied to Hong Kong, China has full discretion to decide whether or not to implement them. When we discussed the formation of the legislature, we should fully estimate the impact of the third point.”

207 *Twelve Ideas on Political Structure* in *Overview of the Drafting Process*, Vol.2, pp.639-640.

208 *Minutes of the Fourth Meeting of the Special Group on the Political Structure of the SAR (Group IV)*, 10 June 1986 in *Overview of the Drafting Process*, Vol.2, p.641.

That view continued: “there is a provision in the International Covenant on Civil and Political Rights that does not apply to Hong Kong which relates to the formation of the legislature. When ratifying the Covenant, the British government declared that ‘the United Kingdom reserves the right not to invoke Article 25 (b) on establishing an elected Executive Council or Legislative Council in Hong Kong ...’ The so-called civil rights in Article 25 (b) are: ‘To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.’ In short, the British government reserved the right not to elect the Legislative Council and Executive Council of Hong Kong by universal and equal elections. While ensuring that the provisions of the Covenant as applied to Hong Kong would continue to remain in force, China also reserved the right not to constitute the Legislative Council by universal suffrage. Therefore, should the Hong Kong government deliberately create a fait accompli that some members of the Legislative Council are returned by universal suffrage and forced the Chinese side to accept it, this is strictly speaking a violation of China’s rights.”<sup>209</sup>

*Final Report on the Formation of the Legislature* by the Special Group on the Political Structure of the SAR, 25 May 1987, was prepared after many rounds of discussion in meetings, and revisions. It elaborated on the method to return the 56 seats of LegCo at that time, and pointed out the crux of the problem:<sup>210</sup>

209 Xin Weisi, *On Method of Election of the Legislature*, published in Secretariat of the Drafting Committee, *References, Issue 28*, 10 November 1986 in *Overview of the Drafting Process*, Vol.2, p.649.

210 Namely, ex officio members; appointment; functional constituencies elections (according to the 1985 Legislative Council (Electoral Provisions) Ordinance); regarding electoral college - see Working Group on the Legislature and Working Group on the Chief Executive and Executive Authorities of the Special Group on the Political Structure of the SAR, *Discussion Paper on Election Methods - Direct, Indirect, Functional Constituencies, Big Electoral Group (Draft)*, 3 December 1986 (Discussion Paper of the First Joint Conference of the Working Group on the Composition of the Executive Authorities and on the Chief Executive and the Working Group on the Composition and Formation of the Legislature of the Special Group on the Political Structure of the SAR, 3 December 1986) in *Overview of the Drafting Process*, Vol.2, p.651.

“For the Legislative Council of Hong Kong in 1985, some members were returned by direct elections, but those were not elections by universal suffrage, they were direct elections within certain functional constituencies. In the 1985 Legislative Council elections, there were members returned by universal suffrage. Moreover, the electorate in Hong Kong elected members of the Legislative Council on the basis of two different universal elections. However, these elections were conducted indirectly and involved participation by appointed members, the choice of members returned to the Legislative Council in the end was not purely a decision left to the representatives of the electorate. Therefore, the question currently under discussion is: “should the future legislature of the Region apply different election methods to elect members of the legislature? If so, what should the composition be and the timing for implementation?”<sup>211</sup>

In October 1987, amongst the working papers of the Drafting Committee on the formulation of the third draft, i.e. the discussion draft of the political structure, there was the following record:

“Among the opinions from different sectors in Hong Kong, there is an overwhelming support for both functional constituencies elections and universal direct elections in the Basic Law, but opinions differed on the proportion. Members of the Consultative Committee of the industrial and commercial sectors advocated that 50% of the members should be elected by functional constituencies, 25% elected by an electoral college, and 25% elected by geographical direct elections. Even the most ardent supporters of direct elections did not rule out functional constituencies elections.”<sup>212</sup>

When the fourth draft was finalized in December 1987, three options were put forward for the formation of the legislature.<sup>213</sup> During

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211 Special Group on the Political Structure of the SAR, *Final Report on the Formation of the Legislature*, 25 May 1987 in *Overview of the Drafting Process*, Vol.2, p.667.

212 *Chapter IV - Political Structure of the Hong Kong Special Administrative Region (Discussion Draft)*, October 1987 (Working Document of the Subgroup on Political Structure) in *Overview of the Drafting Process*, Vol.2, p.668.

213 See above.

that period, the Special Group on the Political Structure of the SAR of the Consultative Committee still received a lot of different opinions and proposals on the composition and formation method of the legislature, including a proposal to establish a broadly representative electoral college to elect 25% of the seats of the legislature.<sup>214</sup>

There was an explanatory note on Paragraph 2 when the fourth draft was finalized:

“Most members advocated hybrid mode elections, among whom more members were in favor of the first option, some members supported the second one, while some agreed with the third option. Members who proposed the first and third options claimed that the various methods for the return of members of the legislature in their options were a ‘package’, that is, whether or not there would be geographical direct elections was conditional on whether the other two election methods would be accepted at the same time.

Apart from that, some members suggested that all members of the legislature of the Hong Kong Special Administrative Region be returned by functional constituencies.

Some members suggested that all members of the legislature of the Hong Kong Special Administrative Region be returned by geographical, one-person-one-vote universal elections.”<sup>215</sup>

After *The Draft Basic Law (for solicitation of opinions)* was published, the Consultative Committee’s document, *Some General Issues Concerning the Political Structure of the Hong Kong Special Administrative Region*, analyzed universal and direct elections, electoral college election, functional constituencies elections and general electoral college election, and summarized as follows:

214 Members of the Consultative Committee from the Industrial, Commercial and Professional Sectors, *Proposals on the Big Electoral Group*, published in Secretariat of the Drafting Committee, *References, Issue 35*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.673.

215 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.674.

“Each of the election methods listed in this report has its own merit. Universal direct election is considered the most democratic or the one and only election method. The merit of electoral college election is that the general public already have some experience in it. The merit of functional constituencies election is that it can reflect the interests of various sectors. The merit of general electoral college election is development in a steady and healthy manner. No matter what kind of election method or combination will be applied, it should suit the actual situation and the needs of Hong Kong, and at the same time accommodate and balance the interests of all parties.”<sup>216</sup>

After *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)* was released, Xiao Weiyun discussed the four options listed in Annex II in his writing *Concepts Underlying the Design of the Future Political Structure of Hong Kong*:

“... The majority of members of both the Drafting Committee and the Consultative Committee advocated constituting the legislature by hybrid mode election combining direct and indirect elections. This has been stipulated in Article 67 (1) of *The Draft Basic Law (for solicitation of opinions)*. However, there has been long-standing differences among different sectors in Hong Kong over the specific method for forming the legislature ... It appears to be an appropriate thing for the Drafting Committee to publish these four options, to seek opinions widely and to make a decision through consultations, in order to find a workable method acceptable to the majority.

To resolve these differences, the Subgroup on Political Structure proposed to add a paragraph to the article on the formation of the legislature: “The method for the formation of the Legislative Council specified in Annex II may be changed in the light of the actual situation

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216 *Some General Issues Concerning the Political Structure of the Hong Kong Special Administrative Region*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.3 – Special Reports, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.680-683.

of the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. Such change shall be approved by a two-thirds majority of all members of the Legislative Council of the Region, with the consent of the Chief Executive, and reported to the Standing Committee of the National People's Congress for approval (a paragraph with the same content had also been added to the method for selecting the Chief Executive)."<sup>217</sup>

The seventh draft of the article was finalized in February 1989. Amongst the reference materials of the Secretariat of the Consultative Committee, February 1989,<sup>218</sup> was Xiao Weiyun's writing *Discussion on the Design of the Political Structure and its Development*, with the following relevant material:

"8. ... According to the consultation report, the amendments to the political structure proposed by the different sectors basically had two points in common: first, a democratic political structure is treated as the ultimate goal of development; second, the pace of developing the political structure is one of gradual and orderly progress. These proposals can be summarized into three types of coordinated schemes:

(1) There is no established procedure for development, only gradual developments will be made towards a democratic political structure based on the objective environment;

(2) There is established procedure, the voter turnout rate is used to measure the political maturity of the residents and as the triggering point for the introduction of one-person-one-vote direct elections;

(3) There is established procedure, the pace of development forward will be based on the term of the council. A firm timetable for development is to be set out in the Basic Law.

9. In view of the above situation, Louis Cha, the convener of the Subgroup on Political Structure of Drafting Committee (Hong Kong),

217 Secretariat of the Consultative Committee, *Reference (8) – Concepts Underlying the Design of the Future Political Structure of Hong Kong (by Xiao Weiyun)*, 19 August 1988 in *Overview of the Drafting Process*, Vol.2, p.679.

218 See above.



put forward a coordinated mainstream proposal at the meeting of the Subgroup. The biggest difference between the mainstream proposal and the options in *The Draft Basic Law (for solicitation of opinions)* was that the former is a concept for the political structure with room for development, while the latter (apart from option 4) had no such room.

### (3) Formation of the first term of government and legislature

The relevant elements of the mainstream proposal were largely the same as those in Annex III of *The Draft Basic Law (for solicitation of opinions)*, and more specific provisions were made on individual aspects, for example, it was stipulated that the selection committee shall be composed of 400 members; the first Legislative Council shall be composed of 50 members, of whom 27% shall be returned by universal suffrage at geographical level, the rest returned by functional constituencies elections: 29% from the industrial, commercial and financial sectors, 22% from the professions, and 22% from labour, social services and religious sectors.

10. The mainstream proposal has incorporated the characteristics and spirit of most other options. All options shared a feature in common that is to gradually develop the political structure towards democracy in an orderly manner, the ultimate aim is to bring a truly democratic and open political structure to Hong Kong. The mainstream proposal was based on these two considerations. The Chief Executive to be selected by election and appointed by the Central People's Government; the method for selecting the Chief Executive is democratic, a broadly representative election committee being responsible and the people to decide whether to introduce universal suffrage from the fourth term; a Chief Executive candidate must obtain the support of not less than 100 election committee members before he or she is nominated, the nominating process is fully democratic; the Legislative Council would initially be constituted by hybrid mode elections. The proportion of members elected by universal suffrage would gradually increase and develop towards a fully democratic election mode. Finally, it is up to the people of Hong



Kong to decide whether or not to elect all members of the Legislative Council by universal suffrage from the fifth term onwards. Although all the options shared common features and spirit, they differed in the pace and speed it takes to move towards democracy. In this regard, the mainstream proposal advocates a step by step approach to move towards democracy in a steady and healthy manner.”<sup>219</sup>

*Report on the Submission of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and Related Documents to the Standing Committee of the National People’s Congress for Examination* by Chairman Ji Pengfei on 15 February 1989 pointed out:

“II. The method for selecting the Chief Executive and forming the Legislative Council. Article 45 and Article 67 of the Basic Law (Draft) provide the principles for the method for selecting the Chief Executive and forming the Legislative Council respectively and the specific methods are respectively set out in Annexes I and II. The two methods share the principle of developing democracy in a gradual and orderly manner that complements the actual conditions of Hong Kong on the premise of Hong Kong’s stability and prosperity. Even after the Drafting Committee adopted the above provisions and annexes, there are still different views from different sectors of society in Hong Kong. It is necessary to listen to and coordinate the views of all sectors of society before making necessary revisions and adjustments to the relevant provisions.”<sup>220</sup>

Opinions received during the consultation period which followed were still diverse. In December 1989 and January 1990, the Subgroup on Political Structure of the Drafting Committee held its seventeenth

219 *Discussion on the Design of the Political Structure and its Development*, published in Secretariat of the Consultative Committee, *Reference Papers for the Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, February 1989 in *Overview of the Drafting Process*, Vol.3, pp.1271-1272.

220 Ji Pengfei, *Report on the Submission of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and Related Documents to the Standing Committee of the National People’s Congress for Examination*, 15 February 1989 in *Overview of the Drafting Process*, Vol.2, p.699.

and eighteenth meetings. Relevant extract minutes of the seventeenth meeting is as follows:

“With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region, three members proposed three amendments at the Subgroup meeting. Members also referred to the eight proposals in the consultation report, discussed the principles for designing the political structure, and confirmed the principles put forward at the fourth Subgroup meeting as being correct. The political structure should ensure the long-term stability and prosperity of Hong Kong. In order to achieve this goal, development of the political structure should progress in a gradual and orderly manner, rather stable and not in chaos. The political structure should ensure a balanced participation by all sectors of society. The political structure should be based on ‘one country, two systems’, it should not give rise to a legislature that confronts the Central Authorities. Adopting these principles, members considered that:

1. Members returned by functional constituencies, geographical constituencies through direct elections and the Chief Executive election (nominating) committee may become members of the Legislative Council. As to whether there should be an element of district organizations election, members still had different views. Some members believed that an element of district organizations election in the Legislative Council may help to unite more people; some thought that with universal suffrage, there would be no need to adopt district-based indirect elections that were usually used as a substitute for universal suffrage; some members opined that district organizations were not organs of political power, and their members were involved in district administration so it would be inappropriate for them to elect amongst themselves legislators to administrate affairs of the whole territory. This issue would be further discussed at the next meeting.

2. In principle, members agreed that votes of different constituencies should be counted separately. As to how to count votes separately, it would be studied and decided at the next meeting.

3. The first term of the Legislative Council of the Hong Kong

Special Administrative Region would be composed of 60 members, of whom 30% (18 members) would be directly returned by geographical constituencies. As to the proportion of other components of the Legislative Council, it would be studied and decided at the next meeting.

4. After the establishment of the Hong Kong Special Administrative Region, its political structure should remain stable for at least 10 years. Members opined that the transfer of political power in 1997 was a significant change and that political stability must be maintained for a period of time. Some members were of the view that the composition of the Legislative Council should not change during the ten-year stability period; some believed that a little change can be made during the period to reflect gradual and orderly progress; some members considered that so long as a ten-year stability period and the composition ratio of the first term was set, the composition ratio of the second and third terms could be left to the government of the Region to decide on its own. Members agreed that whether the composition of the second and third terms of the Legislative Region should be developed on the basis of the first term should be discussed and decided at the next meeting.

5. After the ten-year stability period, if the composition of the Legislative Council needs to be amended, it shall be passed by two-thirds of the Legislative Council (by a simple majority vote of each group under the split voting system), with the consent of the Chief Executive and reported to the Standing Committee of the National People's Congress for the record."<sup>221</sup>

Subsequent developments have been described above. With regard to the amendments of this article, the report of Chairman Ji Pengfei on 19 February 1990 was as follows:

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221 *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure*, 13 - 16 December 1989, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, pp.710-711.

“V. The following amendments have been made to the method for the formation and voting procedures of the Legislative Council of the Hong Kong Special Administrative Region:

1. The Legislative Council shall be composed of members elected by functional constituencies, by the election committee and by geographical constituencies. The seats directly elected by geographical constituencies shall account for 33.3% of the total seats (60 seats) of the first Legislative Council, or 20 seats; the second term for 40%, or 24 seats; the third term for a half, or 30 seats.

2. The voting method of the Legislative Council on bills or motions: The passage of bills, motions and amendments to government bills proposed by individual members shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the election committee. The passage of bills proposed by the government shall require a simple majority vote of all the members present.

VI. The procedure for amending the method for the selection of the Chief Executive and the formation of the Legislative Council of the Hong Kong Special Administrative Region stipulated in Annexes I and II of the original draft was as follows: to decide whether to elect the Chief Executive and all members of the Legislative Council by universal suffrage during the term of office of the third Chief Executive and the fourth term of the Legislative Council. Voting by all voters must be carried out with the approval of a majority of the Legislative Council, the consent of the Chief Executive and the approval of the Standing Committee of the National People’s Congress. The voting results must be approved by more than 30% of the eligible voters before they can be implemented. After repeatedly studying the views of people from all walks of life in Hong Kong, the Plenary Session revised the above procedures as follows: if there is a need to change the method for the selection of the Chief Executive and the formation of the Legislative Council of the Hong Kong Special Administrative Region and the voting procedures of the Legislative Council after

2007, such change must be made with the approval of a two-thirds majority of all members of the Legislative Council and the consent of the Chief Executive, and reported to the Standing Committee of the National People's Congress.”<sup>222</sup>

Excerpt of Chairman Ji Pengfei's explanation made at a session of the NPC on 28 March 1990 as follows:<sup>223</sup>

“The method for forming the Legislative Council and its procedures for voting on bills and motions. According to the draft Basic Law, the Legislative Council will be constituted by election. The method for forming the Legislative Council will be worked out in the light of the actual situation in Hong Kong and applied in a gradual and orderly way. The ultimate goal is the election of all the members of the Legislative Council by universal suffrage. In accordance with these provisions, Annex II provides specific rules on formation of the Legislative Council. The first and second Legislative Council will be formed by members elected by functional constituencies, by the Election Committee or by geographical constituencies through direct elections. During the first 10 years after the Special Administrative Region is established, the number of seats in the Legislative Council for members elected by geographical constituencies through direct elections will be increased with each passing council, and the number of seats elected by the Election Committee will be gradually reduced. When the third Legislative Council is formed, members elected by functional constituencies and geographical constituencies through direct elections will each share half the seats of the Legislative Council. These rules accord with the principle of developing the election system in a gradual and orderly way. Annex II also stipulates that different voting procedures shall be adopted by the Legislative

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222 Chairman Ji Pengfei, *Report on the Amendments to The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents*, 19 February 1990 in *Overview of the Drafting Process*, Vol.2, p.712.

223 *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 National People's Congress, 28 March 1990).

Council in handling bills introduced by the government and motions and bills introduced by individual members of the Legislative Council. The passage of bills introduced by the government requires a simple majority vote of the members of the Legislative Council present. The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council requires at least a simple majority vote by each of the two groups of members present, i.e., members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee. Such provisions take into consideration the interests of all social strata and will prevent endless debates over government bills, thus helping the government work with efficiency. Ten years after the establishment of the Special Administrative Region, if there is a need to improve the method for forming the Legislative Council and its procedures for voting on bills and motions, such improvement shall be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they must be reported to the Standing Committee of the National People's Congress for the record. The method for forming the Legislative Council and the Council's procedures for voting on bills and motions are provided in an annex because it is more amenable to revision when necessary."

## Article 69

"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."

Drafting materials in *Overview of the Drafting Process*<sup>224</sup> show that the second paragraph of Section 3 "The Legislature" of Chapter IV on Political Structure of the Hong Kong Special Administrative Region of *Structure of the Basic Law of the Hong Kong Special Administrative*

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224 *Overview of the Drafting Process*, Vol.2, pp.713-718.

*Region of the People's Republic of China (Draft)*, 22 April 1986 was: "The term of office of the Legislature".<sup>225</sup> Subsequently, the Special Group on the Political Structure of the HKSAR held several rounds of panel discussions on issues such as the term of office of members of the legislature, rotation or full replacement, and whether or not they can be re-elected, etc.<sup>226</sup>

When the first draft of this article was finalized on 22 August 1987, there was only one line: "The term of office of the members of the legislature of the Hong Kong Special Administrative Region shall be four years", which remained unchanged through the fourth draft. Meanwhile, some members of the Drafting Committee suggested that it be revised as "the term of office of the legislature shall be four years".<sup>227</sup> Some members of the Drafting Committee raised a question that "Given the term of office of the Chief Executive shall be five years, whereas the term of office of the members of the legislature shall be four years, whether or not such terms shall be unified?"<sup>228</sup>

*The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Secretariat of the Drafting Committee of April 1988 revealed that when the fifth draft of this article was finalized, it was revised as "Each term of office of the Legislative Council of the Hong Kong Special Administrative Region shall be four years."

*In The Draft Basic Law of the Hong Kong Special Administrative*

225 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.714.

226 *Overview of the Drafting Process*, Vol.2, pp.714-715.

227 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, p.716.

228 *Collection of Views of the Fifth Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 8 September 1987 (Annex II of the Second Meeting of the Special Group on the Political Structure of the SAR on 22 September 1987), in *Overview of the Drafting Process*, Vol.2, p.716.



*Region of the People's Republic of China* formulated in February 1989, the seventh draft of this article was revised again as "Each 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." It was passed by the NPC in April 1990 as BL 69.

## Article 70

"If the Legislative Council of the Hong Kong Special Administrative Region is dissolved by the Chief Executive in accordance with the provisions of this Law, it must, within three months, be reconstituted by election in accordance with Article 68 of this Law."

Drafting materials in *Overview of the Drafting Process*<sup>229</sup> show that the first draft of BL 70 was formulated by the Secretariat of the Drafting Committee as Article 66 of *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, specifying that "if the legislature of the Hong Kong Special Administrative Region is dissolved by the Chief Executive in accordance with the provisions of this Law, it must, within six months, be reconstituted by election in accordance with Article 64 of this Law."

After the first draft of this article was formulated, some members of the Drafting Committee proposed to stipulate the term of members of the newly elected legislature following the dissolution of the old one. And some members suggested shortening the six-month period for the formation of a new legislature after the dissolution of the former legislature, which in their view was too long. However, some members considered the six-month period stipulated in this article was appropriate.<sup>230</sup>

229 *Overview of the Drafting Process*, Vol.2, pp.719-721.

230 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.720.



During the formulation of the second draft of this article, the period of “six months” was amended to “three months”. Since then, this article had not been modified though there were still suggestions such as changing “three months” to “two months”,<sup>231</sup> deleting the entire article, and shortening the period for the reorganization of the legislature after the dissolution of the old one to four to six weeks.<sup>232</sup> The sixth draft was adopted by the NPC in April 1990 as BL 70.

## Article 71

“The President of the Legislative Council of the Hong Kong Special Administrative Region shall be elected by and from among the members of the Legislative Council.

The President of the Legislative Council of the Hong Kong Special Administrative Region shall be a Chinese citizen of not less than 40 years of age, who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.”

Drafting materials in *Overview of the Drafting Process*<sup>233</sup> show that the drafting of this article had progressed through nine drafts and was derived from two consecutive articles which respectively specified the selection and qualifications of the President of the LegCo of the HKSAR. In preparation of the first, second and third drafts, both articles were tagged with the phrase “(to be drafted)”. In the fourth draft, the former article presented two different options for the selection of the President of the LegCo: namely, election by and

231 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.2, p.720.

232 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.720-721.

233 *Overview of the Drafting Process*, Vol.2, pp.722-731.

from among the members of the LegCo; or the CE shall also be the President. The latter specified that the President of the LegCo shall be a Chinese citizen of not less than 40 years of age, who is a permanent resident of the Region and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.

In the fifth draft, the two articles were consolidated into one, of which the content remained almost the same with some changes in the presentation. Option I specified that the President of the LegCo shall be elected by and from among the members of the LegCo and also prescribed the qualifications of the President. Option II only mentioned that the President shall be the CE. The sixth draft, namely, Article 70 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* in April 1988, was not different from the fifth draft. Option II was deleted in the seventh draft. The revised article stipulated that the President of the LegCo of the HKSAR shall be elected by and from among the members of the LegCo. The provision on the qualifications of the President of the LegCo in Paragraph 2 of the article was the same as the previous draft. In the eighth draft, Paragraph 2 was amended by adding “with no right of abode in any foreign country” beside “a continuous period of not less than 20 years”.

During the preliminary drafting stage, the Special Group on the Political Structure of the SAR of the Consultative Committee and its Working Group on the Legislature and Formation of the Legislature had discussions on the selection of the President of the LegCo for many times and collected many opinions. Given the prevailing arrangement at that time referred to in *Chapter IV - Political Structure of the Hong Kong Special Administrative Region (Discussion Draft)* by the Special Group on the Political Structure of the SAR in October 1987, which was for the Governor of Hong Kong to be the President of LegCo in accordance with the provision of the Letters Patent, there were three suggestions for future development: election by and from among the members of the LegCo; the CE as the President (maintaining the status quo); and the Deputy CE as the President. The report also

analyzed the pros and cons of the above suggestions and pointed out that “the legislature of the Hong Kong Special Administrative Region shall be constituted by elections’ according to the Joint Declaration. If the President should also be a member of the legislature, whereas the Chief Executive or the Deputy Chief Executive might not be returned by election, it might not be appropriate for the latter to be the President.”<sup>234</sup>

The discussion on the selection of the President of LegCo continued. When the Secretariat of the Drafting Committee formulated *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* in December 1987, two options on the fourth draft of the article were proposed. The explanatory note on the draft stated that “more members were in favor of Option I, and some members preferred Option II.”<sup>235</sup>

During the consultation period after *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)* was formulated by the Drafting Committee in April 1988, the Consultative Committee received many different opinions on the two options of the sixth draft of this article.<sup>236</sup> The *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)* of the Secretariat of the Drafting Committee released in September 1988 stated that “Option I should be adopted as the adoption of Option II would undermine the legislature’s role to regulate the executive authorities.”<sup>237</sup> On 9 January 1989, shortly before the finalization of the seventh draft of this article, the *Report of the Subgroup on Political Structure regarding the Amendments to the*

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234 *Overview of the Drafting Process*, Vol.2, pp.726-727.

235 *Overview of the Drafting Process*, Vol.2, p.727.

236 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.729-730.

237 *Overview of the Drafting Process*, Vol.2, p.729.

*Articles* of the Drafting Committee recorded that “Option II of Article 70 was deleted.”<sup>238</sup>

During the two consultation periods in the later drafting stage of the Basic Law, the Consultative Committee received many opinions on the qualifications of the President of the LegCo. Some proposed to amend or delete the phrase “not less than 40 years of age”; some suggested omitting the words “having ordinarily resided in Hong Kong for a continuous period of not less than 20 years”; and some proposed to remove the phrase “a Chinese citizen”.<sup>239</sup>

Drafting materials in *Overview of the Drafting Process* show that the Subgroup on Political Structure of the Drafting Committee once discussed the proposal to appoint a Vice President in December 1989, but no consensus was reached.<sup>240</sup>

Shortly before the finalization of the eighth draft of this article, *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure* from 17 to 20 January 1990 included a record on the second paragraph of this article: adding the requirement “with no right of abode in any foreign country” in addition to “a continuous period of not less than 20 years”.<sup>241</sup>

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC that:<sup>242</sup>

238 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol. 2, p.730.

239 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988; Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, pp.729-731.

240 *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure*, 13 – 16 December 1989, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, p.731.

241 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.2, p.731.

242 *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 National People's Congress, 28 March 1990).

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the Chief Justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong.”<sup>243</sup>

## **Article 72**

“The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To preside over meetings;
- (2) To decide on the agenda, giving priority to government bills for inclusion in the agenda;
- (3) To decide on the time of meetings;
- (4) To call special sessions during the recess;
- (5) To call emergency sessions on the request of the Chief Executive; and
- (6) To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council.”

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243 Deng Xiaoping’s talks during his meetings with a Hong Kong industrial and commercial sectors delegation visiting Beijing, and a group of well-known Hong Kong figures including Chung Sze-yuen, on 22-23 June 1984, “The scope and criteria for Hong Kong people administrating Hong Kong”. See Introduction and the Note on BL 44 in this book.

Drafting materials in *Overview of the Drafting Process*<sup>244</sup> show that in September 1987 some members of the Drafting Committee suggested setting up a separate article to prescribe the powers and functions of the President of the LegCo.<sup>245</sup> Subsequently, the Secretariat of the Drafting Committee formulated Article 69 of *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* in December 1987, namely the first draft of this article. The sixth draft of this article was passed by the NPC as BL 72 in April 1990.

This article lists the powers and functions of the President of the LegCo. The number of items was five in the first four drafts, and increased to six in the fifth draft. In terms of content, except deletion of certain wording, the following five items remained basically unchanged:<sup>246</sup> to preside over meetings; to decide on the agenda; to decide on the time of meetings; to call special sessions during the recess; and to exercise other powers and functions as prescribed in the rules of procedure. The fourth draft had a major change: adding the phrase of “giving priority to government bills for inclusion in the agenda” after “to decide on the agenda”; and the fifth draft had another major change: adding a new item “to call emergency sessions on the request of the Chief Executive” as the fifth item.

On 10 June 1986, some members of the Drafting Committee pointed out that “... it is necessary to note that the President of the Legislative Council is different from the Speaker of the Westminster model. In addition to arranging the agenda, implementing rules of procedure and ensuring fair debates, he or she is also the representative of the Central Government. On the one hand, he or she should fully

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244 *Overview of the Drafting Process*, Vol.2, pp.732-738.

245 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, p.735.

246 The words deleted included: “control” and “master” in the second item; and “suspension” and “recess” in the third item.

safeguard democracy in the legislative process; on the other hand, he or she should ensure on behalf of the Central Government that the laws of Hong Kong do not go beyond the scope prescribed in the Joint Declaration ...”<sup>247</sup>

In the first half of 1987, Working Group on the Legislature and the Formation of the Legislature of the Special Group on the Political Structure of the SAR met many times to discuss the powers and functions of the President of the Legislature and also the status quo at that time,<sup>248</sup> and suggested that the status quo should remain unchanged in future.<sup>249</sup>

*After The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*

247 *Twelve Ideas on Political Structure* (Annex II of the Fourth Meeting of the Special Group on the Political Structure of the SAR, 10 June 1986) in *Overview of the Drafting Process*, Vol.2, p.733.

248 (1) To preside over meetings of the Legislative Council;

(2) To decide on the suspension, recess and time of meetings;

(3) To call special sessions during the recess;

(4) To maintain order while presiding over meetings;

(5) To make final decisions on issues relating to the procedures of meetings;

(6) To cast a decisive vote in case of an equality of votes in addition to the original vote;

(7) To decide on the number of members of special committees and appoint chairpersons and members for them;

(8) The President of the Legislative Council or the chairperson of a committee has the power to decide whether to put a resolution to the vote;

(9) To order outsiders (members of the public and the press who enter the chamber to observe the proceedings of meetings) to leave;

(10) To decide on the processing methods and procedures for any matter not provided for in the standing orders, and use the methods and procedures of the House of Commons as guidance (if the President considers appropriate).

(11) To determine whether a proposal involves public expenditure. (Any proposal involving public expenditure shall gain the approval of the Governor of Hong Kong first).

*Overview of the Drafting Process*, Vol.2, p.734.

249 Working Group on the Legislature and the Formation of the Legislature of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Legislature (Draft)*, 28 February 1987 (Discussion Paper of the First Meeting of the Working Group on the Legislature and the Formation of the Legislature of the Special Group on the Political Structure of the SAR, 4 March 1987) in *Overview of the Drafting Process*, Vol.2, p.734.



was formulated by the Drafting Committee in April 1988, the Consultative Committee received opinions on the third draft of this article which stated that it should be the job of the President of the LegCo to enable the LegCo to play its role efficiently, and his powers should be exercised only to ensure the smooth progress of meetings, so there was no need to grant him or her too much power. This article gave too much power to the President. It should be within the powers of all members of the LegCo instead of only the President of the LegCo to decide on the agenda, time, frequency and rules of procedure of meetings. The suggestions of revising this article included changing “President of the Legislative Council” into “Speaker of the Legislative Council”; and the whole article should be amended to read: “the President of the Legislative Council of the Hong Kong Special Administrative Region shall call and preside over meetings in accordance with the standing orders of the Council and exercise the powers and functions specified in the standing orders; the adoption and amendment of the standing orders of the Council shall be approved by a majority of its members.”<sup>250</sup>

Such opinions continued after the formulation of the fourth draft of this article. According to *Minutes of the Fifth Meeting of the Second Consultation Period of the Special Group on the Political Structure of the SAR* of 1 September 1989:

“14. Article 71

14.1 Some members were of the view that the President of the Legislative Council should not monopolize the power to decide on the agenda and should add an item into the agenda at the request of a certain percentage of members.

14.2 Some members were of the view that the President of the Legislative Council should call meetings at the request of a certain percentage of members.

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250 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.736.



14.3 Some members were of the view that there was no need to worry too much about the excessive power of the President of the Legislative Council as the Council itself should have a set of standing orders to control the operation of its meetings.

14.4 Some members were of the view that the fifth item of this article should be moved up, and the first sentence of this article should be amended to read: ‘The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions according to the standing orders of the Council’. In this way, the power of the President could be limited.”

The Consultative Committee also received suggestions to add the following items to the article: “to review the accounts of the Government of the Hong Kong Special Administrative Region and relevant reports submitted by the Director of Audit”; and “to appoint members and chairpersons of the working committees of the Legislative Council”.<sup>251</sup> These suggestions were not adopted.

The sixth draft of this article was adopted by the NPC as BL 72 in April 1990, listing six items of powers and functions of the President of the LegCo.

### Article 73

“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

(1) To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures;

(2) To examine and approve budgets introduced by the government;

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251 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.738.

- (3) To approve taxation and public expenditure;
- (4) To receive and debate the policy addresses of the Chief Executive;
- (5) To raise questions on the work of the government;
- (6) To debate any issue concerning public interests;
- (7) To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
- (8) To receive and handle complaints from Hong Kong residents;
- (9) If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision; and
- (10) To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence.”

Drafting materials in *Overview of the Drafting Process*<sup>252</sup> show that the drafting process of this article regarding the powers and functions of the LegCo and its impeachment procedure against the CE had progressed through nine drafts, with the number of its items increased from seven to ten. At the initial drafting stage of the Basic Law when there was discussion and consultation on its structure, some people from different sectors of Hong Kong were of the view that: “The legislature, being the highest organ of power in Hong Kong, have many powers: power to initiate legislation, legislative power, fiscal

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252 *Overview of the Drafting Process*, Vol.2, pp.739-777.

power, impeachment power, supervisory power, power to appoint and remove the chief executive and power to nominate principal officials. The legislature takes leadership over the executive authorities, and the latter is subordinate to the former and should implement the policies formulated by the former.” At the same time, there were views that: “The powers and functions of the legislature are basically the same as those of the current Legislative Council, i.e. exercising legislative and supervisory powers (including power to raise questions and conduct investigations), forming different committees for different public affairs for the purpose of supervising the work of relevant government departments.”; “In order to maintain stability, executive authorities should take the lead in the operation of political power. The chief executive and the executive authorities should be the centre of power. The legislature should not have the power to overthrow the government, and ‘be accountable to’ means to submit reports to the legislature”; and “In future, the executive should continue to play a dominant role and power should not be transferred to the Legislative Council.”<sup>253</sup>

After *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* was passed on 22 April 1986,<sup>254</sup> the Special Group on the Political Structure of the SAR had multiple panel discussions on the powers and functions of the legislature, relationship between the executive authorities and the legislature, etc. On 6 August of the same year, a discussion paper titled *The Legislature and Formation of the Legislature* pointed out:

“1. Powers and functions of the legislature

1.1 Factors to be considered in the discussion on powers and functions of the legislature

1.1.1 The issue of powers and functions involves the relationship

<sup>253</sup> *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.2, p.741.

<sup>254</sup> The full text is included in Annex IV.

between the executive authorities and the legislature: whether it should be executive-led, or legislative-led, or separation of the three powers.

1.1.2 According to the Sino-British Joint Declaration, the executive authorities shall 'be accountable to' the legislature. The meaning of the words 'be accountable to' may be discerned from the meaning of the words 'be responsible to' in China's Constitution whereby people's congresses at all levels, the Central Military Commission and the State Council shall be responsible to the National People's Congress — the relationship of 'be accountable to' should be one between higher and lower organs. The powers and functions of a higher organ include the power to select and remove the head of a lower organ; at the same time the lower organ is subject to the supervision of the higher organ.

1.1.3 As Hong Kong adopts a system that is different from that of the Mainland, the legislature of the Hong Kong Special Administrative Region should not be its highest organ of power.

1.1.4 The centre of power of the Region should be transferred from the current executive authorities to the legislature. Over the years, the executive authorities have taken up a leading role in Hong Kong, a decrease in the work efficiency of its government might ensue if the legislature is to take up that role. Thus, there must be co-ordination between the executive authorities and the legislature.

1.1.5 It is necessary to take into account the two difficulties for the legislature to perform its functions and duties while discussing its powers and functions, namely, the system must ensure the policies made by the legislature are in line with popular opinion, and can be efficiently implemented by the executive authorities.

1.1.6 Referring to the political structures of other countries, the executive, legislative and judicial authorities are independent in many countries, clearly indicating that each of them have their own importance and no one is subordinate to the other. Even if the executive authorities are selected by the legislature, it would be difficult to maintain a superior-subordinate relationship between

them. If the executive authorities are to be subject to the orders of the legislature, all that is required would be a legislative cum executive authority.

1.1.7 Hong Kong is a special administrative region of China under the principle of 'one country, two systems'. The study of Hong Kong's political structure should take into account how Hong Kong's political structure can correlate with the future political structure of China.

1.1.8 The powers and functions of the legislature of the Region should be developed, increased or decreased on the basis of those of the current Legislative Council. Since the current executive-led political system has made Hong Kong stable and prosperous, no major change should be made after 1997 and the legislature should play its original advisory role.

1.1.9 The scope of work of the executive authorities and the legislature are totally different, their powers cannot be measured and compared. They should regulate each other instead of holding each other back.

1.1.10 Different countries adopt different political systems. It is difficult to define which authority should play a leading role. The Basic Law should set out in detail the functions and powers of an ideal legislature.

1.1.11 Terms such as legislation, law and ordinance are often used interchangeably in publications of Hong Kong and caused confusion. It is proposed to adopt a unified list of vocabularies in the Basic Law.

1.1.12 If too much power is given to the legislature, the legislature and the executive authorities will become unbalanced. If it is intended that a balanced and stable relationship is to be maintained between the two, the legislature should not take up a leading role, administratively or politically, over the executive authorities.<sup>255</sup>

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255 *The Legislature and Formation of the Legislature* (Discussion Paper II of the Seminars on the Political Structure in Batches (Batch III), 6 August 1986) in *Overview of the Drafting Process*, Vol.2, pp.746-747.

In August 1988, reference materials prepared by the Secretariat of the Consultative Committee included Xiao Weiyun's *Concepts Underlying the Design of the Future Political Structure of Hong Kong*, in which he grouped the nine items of powers and functions of the LegCo set out in the sixth draft of Article 72 of the *Draft Basic Law (for solicitation of opinions)* into five categories: power to legislate; power to examine budgets and public expenditure; power to receive policy address, conduct debates and raise questions; appointment and removal power; and impeachment power. He pointed out: "The powers and functions of the Legislative Council are stipulated on the basis of its nature and status, its relationship with the executive authorities and having regard to the current situation of Hong Kong. The Legislative Council is a legislature, this determines that it should enjoy the power to legislate. Meanwhile, the legislature and the executive authorities should regulate each other and the latter should be accountable to the former. The legislature should therefore have the powers to examine budgets, taxation and public expenditure proposed by the executive authorities, receive policy addresses of the Chief Executive, conduct debates and raise questions, and impeach the Chief Executive. Besides, the Legislative Council may also exert pressure on the Chief Executive to resign in accordance with law. Hence, the legislature would be able to regulate the executive authorities. Its powers and functions are relatively appropriate."<sup>256</sup>

The following is a review on the evolution and development of each item of the article according to its current order.

#### Item (1)

"To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures" – The provision "to enact laws in accordance with the provisions of this Law and legal procedures" in this item has remained unchanged from beginning to end. The legislature's power "to enact or amend laws" in the earlier drafts was changed to the power "to enact, repeal or amend laws" in

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256 Reference Materials (8) of the Secretariat of Consultative Committee, 19 August 1988 in *Overview of the Drafting Process*, Vol.2, p.768.

the fourth draft, which was revised by putting “amend” before “repeal” in the seventh draft. That became the final version passed by the NPC.

Before the formulation of the first draft of this article, according to the *Progress Report of the Subgroup on Political Structure* of the Drafting Committee on 8 November 1986, one of the functions and powers of the legislature over which the Subgroup almost reached consensus was the power “to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures.”<sup>257</sup>

In the course of discussions held during the drafting process, the Special Group on the Political Structure of the SAR of the Consultative Committee suggested that the legislative power of the legislature should include introducing bills and passing and amending laws (excluding the introduction of bills related to taxation or financial expenditure), because “a legislature constituted by election should have complete legislative power, including the power to initiate legislation”.<sup>258</sup>

When the first draft of the article was finalized, the explanatory note stated: “Some members proposed to add the words ‘to introduce bills’, but other members disagreed, arguing that clear restrictions should be made in accordance with existing measures if the Basic Law authorizes members of the legislature to introduce bills.”<sup>259</sup>

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257 Published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.749

258 Special Group on the Political Structure of the SAR, *Final Report on the Relationship between the Executive Authorities and the Legislature*, passed by the Executive Committee on 8 August 1987 in *Overview of the Drafting Process*, Vol.2, p.760. See Section I of Annex I to the Joint Declaration: “The legislature of the Hong Kong Special Administrative Region shall be constituted by elections.” And Section II of Annex I: “The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People’s Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.”

259 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.761.

Similar opinions were also recorded in the formulation of the second draft: “Some members suggested that members of the legislature may introduce motions, but it must be subject to certain restrictions, such as no financial or policy-related motions may be introduced. Some members considered that the term ‘in accordance with legal procedures’ already offered a solution to the aforementioned problem as relevant specific provisions may be prescribed in the standing orders.”<sup>260</sup>

In December 1987, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* prepared by the Secretariat of the Drafting Committee included the fourth draft of this article as Article 70. Article 71 was the first draft of a separate article authorizing members of the LegCo to introduce bills in accordance with law, which was subsequently passed by the NPC as BL 74.

#### Item (2)

“To examine and approve budgets introduced by the government” – This item read “to examine and approve budgets and accounts introduced by the executive authorities” from the first to the sixth drafts. In the seventh draft, except for the phrase “executive authorities” which was changed to “government”, and the deletion of the word “accounts”, the item remained unchanged.

Before the formulation of the first draft of this article, the Subgroup on Political Structure of the Drafting Committee almost reached consensus that the legislature should enjoy the power “to examine and approve budgets and approve taxation and public expenditure introduced by the executive authorities.”<sup>261</sup> Section V of Annex I to the Joint Declaration provides: “The systems by which taxation and public expenditure must be approved by the legislature,

<sup>260</sup> *Collection of Views of the Fifth Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 8 September 1987 (Annex II of the Second Meeting of the Special Group on the Political Structure of the SAR, 22 September 1987) in *Overview of the Drafting Process*, Vol.2, p.762.

<sup>261</sup> *Ibid*, footnote 257.



and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained.” According to the discussion paper of the Working Group on the Relationship between the Executive Authorities and the Legislature of the Special Group on the Political Structure of the SAR, the then Legislative Council’s power to examine budgets was as follows: “Financial budgets introduced by the government of Hong Kong can only be passed by the Legislative Council after three readings have been given. During the second reading, the Finance Committee is responsible for examining the budgets to prevent misuse of public funds by the government, it is therefore subject to the following limitations: a. No increase to the expenditure set out by the government of Hong Kong may be proposed. It may only accept, reject or propose to reduce them; b. It may only discuss expenditures, no motion to change the taxation of Hong Kong may be taken out.”<sup>262</sup>

#### Item (3)

“To approve taxation and public expenditure” – This item remained unchanged from the first to the ninth draft.

#### Item (4)

“To receive and debate the policy addresses of the Chief Executive” – This item originally read “to receive the policy addresses of the executive authorities” from the first to the third draft. The words “and debate” were added when the fourth draft was finalized. When the fifth draft was finalized, “the executive authorities” were changed to “the Chief Executive”. No other changes were made since then.

This is one of the items regarding the powers and functions of the legislature over which the Subgroup on Political Structure of the Drafting Committee almost reached a consensus from the initial

<sup>262</sup> Working Group on the Relationship between the Executive Authorities and the Legislature of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Relationship between the Executive Authorities and the Legislature*, 10 June 1987 (Discussion Paper of the Second Resumed Meeting of the Thirteenth Meeting of the Special Group on the Political Structure of the SAR, 27 July 1987) in *Overview of the Drafting Process*, Vol.2, p.757.

stage of the drafting process.<sup>263</sup> *The Legislature and Its Formation*, a discussion paper of the Subgroup's panel discussion in August 1986 pointed out: The legislature has the power to supervise the work of the executive authorities, including "debating and criticizing policy addresses delivered annually or from time to time by the executive authorities or the Chief Executive, so as to enable the Chief Executive to make adjustments, and the executive authorities and the legislature may coordinate with each other."<sup>264</sup>

The discussion paper also pointed out that the legislature should have a consultative function, but the CE should have the power to make decisions in case of emergency or when time did not permit prior consultation with the legislature, in which case a posterior explanation was to be made to the legislature and its endorsement sought for the decision-making power already exercised.<sup>265</sup> However, the *Final Report on Relationship between the Executive Authorities and the Legislature* prepared by the Special Group on the Political Structure of the SAR a year later pointed out that, according to the relevant legal procedures for the enactment of laws at that time, the government of Hong Kong (a specific department thereof) had no legal duty to consult the Legislative Council first. Therefore, it was not a necessary procedure for the government to consult the Council on bills and new policies. There were different views on the proposal to retain that system.<sup>266</sup>

#### Item (5)

"To raise questions on the work of the government" – This item read "to raise questions on the work of the executive authorities" from the first to the sixth drafts. The term "executive authorities" was changed to "government" when the seventh draft was finalized, the rest remained unchanged.

263 Ibid, footnote 257.

264 Ibid, footnote 255, p.747.

265 Ibid.

266 Passed by the Executive Committee, 8 August 1987 in *Overview of the Drafting Process*, Vol.2, pp.760-761.

This item is also one of the items regarding the powers and functions of the legislature over which the Subgroup on Political Structure of the Drafting Committee almost came to a consensus from the initial stage of the drafting process.<sup>267</sup> *The Legislature and Its Formation*, the discussion paper mentioned above, pointed out: “The legislature should enjoy the power to supervise the operation of the executive authorities ... and the executive authorities should regularly submit progress reports to the legislature or receive questions from it”.<sup>268</sup>

The explanatory note on this item in the first and the fourth drafts of this article recorded that “some members suggested that it be changed to ‘to examine and raise questions on the work of the executive authorities’”.<sup>269</sup> In the formulation of the second draft, some members of the Drafting Committee “disagreed with the proposal in the explanatory note whereby the legislature may examine the work of the executive authorities”.<sup>270</sup> At the later stage of the drafting process, that is, during the second consultation period on the *Draft Basic Law* before the formulation of the eighth draft, the Consultative Committee still received the same proposal to amend this item,<sup>271</sup> which was not accepted.

#### Item (6)

“To debate any issue concerning public interests” – This item remained unchanged after it was added to the article when the fourth

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267 Ibid, footnote 257.

268 Ibid, footnote 255, p.747.

269 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.2, p.761. Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.765.

270 Ibid, footnote 260.

271 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.776.

draft was finalized.

Item (7)

“To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court” – This item was also added when the fourth draft of the article was finalized, it remained unchanged.

An opinion received by the Consultative Committee in October 1988 pointed out that this was an existing non-legislative power, possessed by the Legislative Council at that time and legislatures of other countries.<sup>272</sup>

Item (8)

“To receive and handle complaints from Hong Kong residents” – This was originally the sixth item, it was changed to become the eighth item when the fourth draft was finalized, with the addition of the words “and handle”. Since then, no other changes have been made.

“To receive complaints from Hong Kong residents” is a power and function of the legislature over which the Subgroup on Political Structure of the Drafting Committee almost reached consensus during the initial drafting stage of the Basic Law.<sup>273</sup> Before the formulation of the fifth draft of the article, some members of the Drafting Committee were of the view that it was unclear whether the “complaints” mentioned in this item were judicial or administrative; some believed it was an accepted practice for residents to complain to the legislature which need not be stipulated in law, and suggested that this item be deleted. On the other hand, some members of the Drafting Committee were of the view that it was necessary to legalize the existing practice

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272 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.769-770.

273 Ibid, footnote 257.

and the item should not be removed.<sup>274</sup>

### Item (9)

“If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People’s Government for decision” - A lot of changes had been made to this item during the drafting process. From the first to the third drafts, it was listed as the seventh item with the same content: “If there is serious breach of law or dereliction of duty by the Chief Executive, the legislature may initiate a motion by one-third of all its members and may pass a motion of impeachment by a three-quarters majority of all its members and report it to the Central People’s Government for decision.”

The idea that the legislature “has the power of impeachment” was proposed during the early stage of the drafting process of the Basic Law when its structure was discussed.<sup>275</sup> Later, at the panel discussion of the Special Group on the Political Structure of the SAR of the Consultative Committee, some members argued that the legislature should have the power to impeach and remove the CE as a “check and balance” of his or her power. Some members were of the view that the legislature should only have the power to remove heads of departments, not the CE, as only the CPG had the power to remove

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*274 Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law, December 1987 in Overview of the Drafting Process, Vol.2, p.765.*

*275 Ibid, footnote 253.*

the CE.<sup>276</sup> After a round of discussions, the Subgroup on Political Structure of the Drafting Committee almost reached a consensus on the following power and function of the legislature on 8 November 1986: “If there is serious breach of law or dereliction of duty by the Chief Executive, the legislature may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People’s Government for decision.”<sup>277</sup>

On 28 February 1987, the Working Group on the Legislature and its Formation of the Special Group on Political Structure of the SAR started to conduct meetings and discussed the *Draft Discussion Paper of the Legislature*, which included the legislature’s power to impeach the CE in future. After several rounds of discussion, the discussion paper was passed by the executive committee of the Special Group as the *Final Report on the Legislature* on 12 June 1987.<sup>278</sup>

When the first draft of this article was finalized on 22 August 1987, the progress report of the Subgroup on Political Structure of the Drafting Committee pointed out in the explanatory note: “Some members advocated that a motion should be initiated by one-fourth of all the members, and passed by two-thirds. Some members suggested that the legislature may be authorized to impeach principal officials by a majority of its members. Some members proposed to authorize the legislature to cast a vote of no confidence against the Chief Executive and principal officials by a two-thirds majority of all its members, most members disagreed.”<sup>279</sup>

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276 *Minutes of the Fourth Meeting of the Special Group on the Political Structure of the SAR (Group II)*, 10 June 1986 in *Overview of the Drafting Process*, Vol.2, p.743. See Note of BL 45 in this book: “... the delegation of Mainland members of the Drafting Committee visiting Hong Kong stated: ‘The Central People’s Government has the power to appoint and remove the Chief Executive. The power to appoint is always matched with the power to remove, which is a matter of practicality but not formality. Therefore Article 72 prescribes that the legislature has the power to impeach the Chief Executive, but the final decision is to be made by the Central Authorities.’”

277 *Ibid*, footnote 257.

278 *Overview of the Drafting Process*, Vol.2, pp.750-759.

279 *Ibid*, footnote 259.

This item was amended and listed as Item (9) when the fourth draft was finalized. The target and conduct subject to impeachment remained the same, but the threshold for initiating a motion of impeachment and passing it was lowered, while the procedural steps were enhanced: "... After a motion is initiated jointly by one-fourth of all the members of the legislature, an independent investigation committee may be established according to law with the Chief Justice of the Court of Final Appeal being its Chairman to carry out the investigation and report its findings to the legislature. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision." Meanwhile, the "exploratory note" on the article provides that: "Some members suggested that the legislature may, with a motion initiated jointly by one-fourth of all its members and approved by a two-thirds majority, pass a motion of no confidence against the Chief Executive or principal officials, and report it to the Central People's Government for removal of the Chief Executive or the relevant principal officials. However, this suggestion was rejected by a majority of the members."<sup>280</sup>

When the fifth draft was finalized, the provision regarding impeachment was further revised: "If there is serious breach of law or dereliction of duty by the Chief Executive, a motion having been initiated jointly by one-fourth of all the members of the Legislative Council and passed by the council, an independent investigation committee may be established, with the Chief Justice of the Court of Final Appeal being its Chairman, to carry out an investigation and report its findings to the council. If the committee considers the evidence sufficient to substantiate such charges, the council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision." This

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280 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.765.

draft became the sixth draft for solicitation of opinions. From the release of the draft for solicitation of opinions in April 1988 to the formulation of the seventh draft in February 1999, a lot of opinions and suggestions were received. For example, there was a view that the power prescribed in Item (9) was not sufficient for the legislature to supervise the CE, because: (1) the legislature may only initiate a motion when there is conduct of serious breach of law or dereliction of duty by the CE; (2) the motion required joint initiation by one-fourth of all its members; (3) the motion required a two-thirds majority of all its members to be passed; (4) the legislature may only raise a motion of impeachment and the decision was left to the CPG, and there was no power to cast a vote of no confidence.<sup>281</sup>

In August that year, Xiao Weiyun pointed out in *Concepts Underlying the Design of the Future Political Structure of Hong Kong*, which had been included in reference materials prepared by the Secretariat of Consultative Committee, that since the CE enjoyed an important political status and had certain powers, his or her conduct had great impact on the Region. Thus, the legislature should be given the power of impeachment to supervise and regulate the CE. However, Hong Kong had no such system at that time. As for principal officials, Xiao pointed out that the draft for solicitation of opinions did not prescribe that they could be impeached because they were nominated by the CE and should be accountable to the CE. As public servants, they would be supervised by the authority against corruption, and their illegal deeds and dereliction of duty would be dealt with in accordance with general legal procedures.<sup>282</sup>

Before the formulation of the seventh draft, the Subgroup on Political Structure of the Drafting Committee proposed in the report

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281 *Some General Issues Concerning the Political Structure of the Hong Kong Special Administrative Region*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.3 – Special Reports*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.769.

282 *Ibid*, footnote 256.



regarding the amendments to the articles: “The first three lines of Item (9) should be changed to ‘if a motion initiated jointly by one-fourth of all the members of the Legislative Council charging the Chief Executive with serious breach of law or dereliction of duty or failure to fulfill duties and if he or she refuses to resign, the Council may, after passing a motion for investigation, form an independent investigation committee’ so as to clarify the legal procedures, while the rest of the item remained unchanged.”<sup>283</sup> When the seventh draft was finalized, the suggestion of adding “failing to fulfil duties” as a reason for impeachment was rejected. However, the first part of Item (9) was changed to: “If a motion initiated jointly by one-fourth of all the members of the Legislative Council charging the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee...” Although there were still proposals to amend this item during the second consultation period, the eighth draft remained the same as the seventh draft. This version was adopted by the NPC as BL 73 (9) of the Basic Law in April 1990.

#### Item (10)

“To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence.” – This item first appeared in Article 72 of the *Draft Basic Law*, i.e. the seventh draft of this article. Before that, there was an item (10) in the fourth draft of this article, prescribing: “Other powers required for performing duties in accordance with this Law.” However, that item only appeared in the fourth draft and was removed when the fifth draft

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283 *Report of the Subgroup on Political Structure regarding the Amendments to the Articles* (9 January 1989), published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.2, p.773.

was finalized.<sup>284</sup>

During the consultation period of the *Draft Basic Law (for solicitation of opinions)*, before the formulation of the seventh draft of this article, the Consultative Committee received opinions which argued that the CE should, on the ground of security and public interests, have the power to determine whether government officials may testify or provide evidence to the LegCo.<sup>285</sup> According to the relevant powers and privileges legislation at that time,<sup>286</sup> the Legislative Council had the power to summon persons to give evidence. However, the draft for solicitation of opinions had no similar provision on this power of the legislature.<sup>287</sup> There was an opinion which stated that the Basic Law made no provision for heads of departments to provide relevant information to LegCo's committees and provide appropriate answers to all reasonable questions.<sup>288</sup>

Subsequently, the Subgroup on Political Structure of the Drafting Committee proposed to "add" the current Item (10) "in view of the fact that it is a function and power of the Legislative Council."<sup>289</sup>

## Article 74

"Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate

284 *Overview of the Drafting Process*, Vol.2, pp.764-765

285 The sixth draft of BL 48(11) of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, April 1988 in *Overview of the Drafting Process*, Vol.2, p.495; *Some General Issues Concerning the Political Structure of the Hong Kong Special Administrative Region*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.3 – Special Report*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.769.

286 *Legislative Council (Powers and Privileges) Ordinance* (Cap.382).

287 *Ibid*, footnote 283.

288 *Ibid*, footnote 281.

289 *Ibid*, footnote 283.

to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.”

Drafting materials in *Overview of the Drafting Process*<sup>290</sup> show that this article had progressed through six drafts, its first draft was included by the Secretariat of the Drafting Committee in December 1987 in *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* as Article 71. This draft consisted of two alternatives. “Alternative I: Members of the legislature of the Hong Kong Special Administrative Region may individually or jointly introduce bills in accordance with the provisions of this Law and legal procedures, but should obtain the written consent of the Chief Executive before introducing bills regarding: (I) taxation and government expenditure; (II) government policies; (III) the structure, management and operation of executive authorities. Alternative II: Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills, formulate and amend laws in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or public policies may be introduced individually or jointly by members of the legislature.” The explanatory note on this article pointed out: “Some members argued that bills concerning public expenditure or policies must be jointly introduced by at least one-tenth members of the legislature with no need to obtain the written consent of the Chief Executive.”<sup>291</sup>

The two alternatives coexisted until the third draft. In the formulation of the second draft, there were three changes: “taxation and government expenditure” of Item (I) in Alternative I was changed to “fiscal revenue or expenditure”; “executive authorities” of Item (III) was changed to “government”; and “formulate and amend laws” in

290 *Overview of the Drafting Process*, Vol.2, pp.778-787.

291 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.2, p.781.

Alternative II was deleted.<sup>292</sup>

The *Report of the Subgroup on the Political Structure of the SAR regarding the Amendments to the Articles* released on 9 January 1989 suggested: “deleting Alternatives I and II and amend this article to read: ‘Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure and the structure, management and operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.’”<sup>293</sup> The fourth draft was changed accordingly. In the formulation of the fifth draft, the second sentence of the article was changed from “bills which do not relate to public expenditure and the structure, management and operation of the government” to “bills which do not relate to public expenditure or political structure or the operation of the government”. No more changes have been made since then.

At the initial stage of the drafting process of the Basic Law, there were opinions on “the legislature’s power to introduce bills” stating that:

“In terms of the powers and functions of the legislature, the current Legislative Council serves as a consultative and supervisory body on the executive structure. It has certain legislative power. Such power, however, is not complete as it cannot introduce bills on its own, bills must be introduced by the governor of Hong Kong, then to be amended and passed (or rejected) by the Legislative Council. Since the Sino-British Joint Declaration stipulates that the future legislature

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292 Secretariat of the Drafting Committee, *The Draft of the Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, April 1988 in *Overview of the Drafting Process*, Vol.2, p.781.

293 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee*, January 1989 in *Overview of the Drafting Process*, Vol.2, p.785.

is to have the power to legislate,<sup>294</sup> the power to introduce bills should be brought into the scope of its powers and functions.

Meanwhile, the current Legislative Council cannot introduce bills to increase taxation on its own, and in relation to the budget, it may only be decreased but not increased. This restriction should be retained because a legislature constituted by election will be confronted with greater pressure when it comes to expense-related issues than it is now. Thus, it is not appropriate to give the power to increase taxation and expenditure to an authority subject to electoral pressure.”<sup>295</sup>

The Working Group on the Legislature and the Formation of the Legislature under the Special Group on Political Structure met many times to discuss the power to introduce bills. It was suggested, after analyzing the situation at that time and Section II of Annex I to the Joint Declaration, in a discussion paper of a meeting in the middle of 1987 that:<sup>296</sup>

“i) The legislative power of the legislature includes introduction of bills (excluding those related to taxation or financial expenditure), passing and amending bills etc. (excluding those relating to taxation or financial expenditure). The executive authorities should also have the power to introduce bills (including those involving the budget) to the legislature. A bill passed by the legislature may only formally become law after it is countersigned by the Chief Executive.

Supporting reasons: An independent legislature should have complete legislative power, which includes the power of initiation.

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294 Section II of the Annex I to the Joint Declaration: “The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People’s Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.”

295 *Twelve Ideas on Political Structure* (Annex II of the Fourth Meeting of the Special Group on the Political Structure of the SAR, 10 June 1986) in *Overview of the Drafting Process*, Vol.2, p.779.

296 *Ibid*, footnote 294.

A legislature should not have the power to introduce bills relating to taxation and fiscal budget, because a legislature constituted by election will be confronted with great pressure when it comes to expense-related issues. Thus, it is not appropriate to give the power to increase taxation and expenditure to an authority subject to electoral pressure.

Oposing reasons: If the legislature also had the power to introduce bills, it may lead to chaos in policies, and loss of executive efficiency.

ii) The power to introduce bills should only be vested in the executive authorities, not the legislature, whose legislative power should be limited to amending, passing and rejecting bills.

Supporting reasons: This proposal is consistent with the current structure, under which the government operates in a highly efficient manner. Separating the power to introduce bills from the power to examine bills is a way to achieve checks and balances.

Oposing reasons: The legislature should have the power to introduce bills on its own which may or may not concern financial issues, under the guidance of the electorate.<sup>297</sup>

After the release of the third draft of this article which was included in the *Draft Basic Law (for solicitation of opinions)*, members of the Special Group on the Political Structure of the SAR of the Consultative Committee raised different opinions on it. Some members were of the view that this article violated the Joint Declaration, which stated that the legislative power shall be vested in the legislature, as the legislature had no power to introduce most of the bills according to this article. However, some members considered that according to the usual procedure, a bill would be introduced, debated, voted and passed by a majority of the members of the legislature. Thus, the legislative power still belonged to the legislature and this

297 Working Group on the Relationship between the Executive Authorities and the Legislature of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Relationship between the Executive Authorities and the Legislature*, 10 June 1987 (Discussion Paper of the Second Resumed Meeting of the Thirteenth Meeting of the Special Group on the Political Structure of the SAR, 27 July 1987) in *Overview of the Drafting Process*, Vol.2, pp.780-781.

article did not contravene the Joint Declaration.<sup>298</sup>

Opinions collected by the Consultative Committee were also quite different. People in favor of Alternative I considered Item (I) as a must. The legislature as the elected representative of the electorate should have no power to introduce bills relating to government's revenue and expenditure. When the executive authorities introduce bills of that nature, the LegCo may only initiate a motion to reduce or approve but may not propose to increase them, otherwise, Hong Kong would become a welfare city. Items (II) and (III) mainly involved the day-to-day jurisdiction of the executive authorities. In order to ensure administrative efficiency, the executive authorities should be given autonomy and the LegCo should act as a supervisor. In addition, the LegCo should in general have the power to introduce any bills, though some of which required the prior consent of the CE. The conditions listed in this article were reasonable and would not disturb or impact on the administration or operation of the government. People in favor of Alternative II believed that this would ensure that the fiscal planning and government policies would not be changed frequently due to opinions of members of the LegCo; it was the current practice, which was easier to implement; it allowed Council members to exercise their power of controls and bills may be introduced without any interference. People against Alternative I thought that there were a lot of restrictions; Items (I) to (III) almost included everything, which would place the LegCo in a totally passive position. It therefore lacked the power to introduce bills relating to government policies, and its role of balancing and regulating the executive authorities would be lost. The provision that members of the LegCo should "obtain the written consent of the Chief Executive" before introducing a bill obviously restricted their power to introduce bills. People

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298 *Collection of Views of the Special Group on Political Structure of the Consultative Committee for the Basic Law regarding Chapter IV of the Draft Basic Law (for solicitation of opinions)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1, October 1988 in *Overview of the Drafting Process*, Vol.2, p.783.

against Alternative II were of the view that this totally eliminated the opportunity for members of the LegCo to individually introduce bills relating to public expenditure or policies. There were also proposals to amend this article so that bills relating to public expenditure or policies should be introduced jointly by a certain percentage of members of the legislature.<sup>299</sup>

Changes made in the formulation of the fourth draft are discussed above. During the consultation period which followed, there were opinions that the restrictions on the power to introduce bills were unreasonable and should be amended.<sup>300</sup> However, except for the textual changes discussed above, the rest of the fifth draft remained unchanged. The sixth draft of this article was passed by the NPC in April 1990 as BL 74.

## Article 75

“The quorum for the meeting of the Legislative Council of the Hong Kong Special Administrative Region shall be not less than one half of all its members.

The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.”

Drafting materials in *Overview of the Drafting Process*<sup>301</sup> show that the drafting of this article had progressed through nine drafts. From the first to the seventh draft, there were originally three paragraphs, among which the second paragraph regarding the

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299 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.783-784.

300 Annex I of the Fourth Meeting of the Second Consultation Period of the Special Group on the Political Structure of the SAR, 18 August 1989 in *Overview of the Drafting Process*, Vol.2, pp.785-786.

301 *Overview of the Drafting Process*, Vol.2, pp.788-792.



procedure for voting on bills and motions in the LegCo was removed when the eighth draft in the *Draft Basic Law*, 16 February 1990 was finalized. In April 1990, there were only two paragraphs in BL 75 adopted by the NPC.<sup>302</sup>

Drafting materials in *Overview of the Drafting Process* show that this article is related to section 3(4) of Chapter IV of the *Structure of the Basic Law (Draft)*: “Convening of Meetings and Legislative Procedures”.<sup>303</sup> According to the Minutes of the Panel discussion of the Special Group on the Political Structure of the SAR on 26 June 1986 in respect of “Convening of Meetings and Legislative Procedures”, attending members considered that all issues relating to the convening of meetings and legislative procedures should be handled “in accordance with the existing regulations.”<sup>304</sup>

The first paragraph of this article relating to the quorum for the meeting of the LegCo has always been not less than one half of all its members. The first three drafts of the third paragraph provided that: “The working procedures of the legislature shall be prescribed by law”, which was later amended to the current version in the fourth draft.

When the first draft of this article was finalized, the explanatory note in the *Progress Report of the Subgroup on Political Structure* stated: “Some members propose that the quorum for the meeting of the legislature can be less than one half of all its members because

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302 Except for the change of the Chinese name of the legislature, the second paragraph of this article in the first to the seventh draft read: “Unless otherwise provided in this Law, the passage of bills and motions through the legislature of the Hong Kong Special Administrative Region shall require at least a simple majority vote of the members present.” When the *Draft Basic Law* of 16 February 1990 was formulated, Article 68 (3) was amended at the same time by adding “and the voting procedures for bills and motions”, and the heading of Annex II was also amended to read “Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures”.

303 *Overview of the Drafting Process*, Vol.2, pp.788-789.

304 *Minutes of the Fourth Meeting (Resumed) of the Special Group on the Political Structure of the SAR (Group IV)*. *Overview of the Drafting Process*, Vol.2, p.789.

it would not be easy to convene a meeting if the quorum is too high.”<sup>305</sup> Some members were of the view: “If a quorum is required for convening meetings of the legislature, the legislature may not be able to function. So long as a certain number of members who are against or not interested in a motion or bill stay away from the meeting, the legislature would be unable to move or pass the relevant motion or bill. Thus, that member had reservation about the requirement of a quorum, and considered that this requirement would only benefit those irresponsible members of the legislature.”<sup>306</sup>

Opinions similar to the above explanatory note continued to be raised during the drafting process. However, the Drafting Committee also noted that “a majority of members of the first group agreed with the text of this article, and suggested deleting the explanatory note”.<sup>307</sup> At the later stage of the drafting process of the Basic Law, there were opinions that the quorum for the meeting of the LegCo should remain to be one half of all its members.<sup>308</sup> There were also views: “A quorum is a major consideration in determining the legality of a meeting. Generally speaking, except for some important meetings which require attendance of more than two-thirds of the members, a quorum for a general meeting should be not less than one half of all its member. Meanwhile, upon the moving of a motion, as long as over half of the members are present in the meeting, that motion will be deemed to be passed. At present, this arrangement is adopted in many meetings.

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305 Published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*, 22 August 1987 in *Overview of the Drafting Process*, Vol.2, p.789.

306 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.2, p.790.

307 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.2, pp.790-791.

308 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.791.

However, members still agreed to request the Drafting Committee to study this issue.”<sup>309</sup>

In addition, proposals to amend the first paragraph were also collected. Some thought that “if the quorum is set too high, it would not be easy to convene a meeting”, while others considered “a quorum of one half of its members for the meetings of the LegCo too low because it is the highest legislature of the Hong Kong Special Administrative Region.” Some also suggested that “it should be clarified whether the quorum requirement should apply at the beginning of a meeting or throughout the entire meeting.”<sup>310</sup>

## Article 76

“A bill passed by the Legislative Council of the Hong Kong Special Administrative Region may take effect only after it is signed and promulgated by the Chief Executive.”

Drafting materials in *Overview of the Drafting Process*<sup>311</sup> show that in the nine drafts of this article, apart from an amendment to the name of the legislature, another amendment was made to the phrase “a bill passed” in the current article, which was “a law passed” in the first three drafts.

In relation to the discussion on the political structure of the SAR and the relationship between the executive authorities and the legislature at the initial stage of the drafting process of the Basic Law, there were opinions: “A bill passed by the legislature will become law only after it is countersigned by the Chief Executive. If the Chief Executive refuses to countersign it, the legislature may pass it again by

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309 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.792.

310 Ibid, footnotes 308 and 309.

311 *Overview of the Drafting Process*, Vol.2, pp.793-797.

a two-thirds majority of all its members.”<sup>312</sup> There were other views: “... Although the Chief Executive cannot participate in the legislative process, all legislation must be ‘countersigned’ by the Chief Executive before formally becoming laws. The Chief Executive may postpone ‘countersigning’ a bill to conduct further study if he or she considers that a law may contravene the Basic Law.”<sup>313</sup>

According to the discussion paper of the Working Group on the Relationship between the Executive Authorities and the Legislature of the Special Group on the Political Structure of the SAR before the formulation of the first draft of this article, the power to introduce bills and the power to veto motions both related to the relationship between the executive authorities and the legislature. The paper pointed out, according to the situation at that time, “a bill is introduced by the ex officio members of the Legislative Council after obtaining the consent of both the Governor and the Executive Council of Hong Kong. Since the ex officio members of the Legislative Council, the unofficial members who are also members of the Executive Council, and the appointed members account for more than half of the seats in the Legislative Council, it is very rare that motions submitted by the Executive Council cannot be passed by the Legislative Council. In addition, the President of the Legislative Council is the Governor of Hong Kong who has the power to veto motions passed by the Legislative Council under the Letters Patent, but it rarely happens.” The paper further pointed out that the Joint Declaration did not make any provision on this, and suggested that “a bill passed by the legislature can become law only after it is countersigned by the Chief Executive. If the Chief Executive refuses to countersign it within a certain period of time, the bill will be returned to the legislature immediately for reconsideration. If the legislature passes the bill again by a two-thirds majority of all its members, the relevant bill will

312 *Various Ideas on Political Structure*, 4 August 1986 (Discussion Paper I of the Sixth Meeting of the Special Group on the Political Structure of the SAR, 12 August 1986) in *Overview of the Drafting Process*, Vol.2, p.794.

313 Secretariat of Drafting Committee, *Extracts of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.2, p.794.

become law.” The arguments in support were: “The legislature should have the power to override the veto power because if a bill is passed by a two-thirds majority of all its members or more, that bill must have received considerable support, and the Chief Executive should respect the decision of the legislature. On the other hand, giving the Chief Executive the power to veto bills passed by the legislature is a means to counterbalance the power of the legislature.”<sup>314</sup>

On 22 August 1987, when the first draft of the article was finalized, the *Progress Report of the Subgroup on Political Structure* provided in its explanatory note: “Some members suggested that the Chief Executive may return the bills, which have been passed by the legislature but not compatible with the public interests of Hong Kong, to the legislature for reconsideration. Some members proposed that the Chief Executive should either sign the bills within one year or return them for reconsideration within six months, failing which the bills would not take effect. Other members proposed that the bills not signed within the time limit should take effect automatically.”<sup>315</sup>

Later, some members of the Drafting Committee suggested that this article was not in line with one of the items relating to the powers and functions of the CE because “to approve” was missing there.<sup>316</sup> Some members considered that the article relating to the powers and functions of the CE concerns approval of laws whereas this article concerns the commencement of laws. The two have different focus.<sup>317</sup>

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314 Working Group on the Relationship between the Executive Authorities and the Legislature of the Special Group on the Political Structure of the SAR, *Discussion Paper on the Relationship between the Executive Authorities and the Legislature*, 10 June 1987 (Discussion Paper of the Second Resumed Meeting of the Thirteenth Meeting of the Special Group on the Political Structure of the SAR, 27 July 1987) in *Overview of the Drafting Process*, Vol.2, p.794.

315 Published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.2, p.794.

316 The relevant wording of this item at that time was “to approve or disapprove laws passed by the legislature, sign and promulgate them”.

317 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.2, p.795.

On 28 March 1990, Chairman Ji Pengfei pointed out in the “Explanations” at a session of the NPC that:

“II. On the Relationship between the Central Authorities and the Hong Kong Special Administrative Region

... Regarding the legislative power, the draft stipulates that laws enacted by the Hong Kong Special Administrative Region legislature shall take effect upon the signature and promulgation by the Chief Executive. The laws shall be reported to the Standing Committee of the National People’s Congress for the record, but they will go into force without being affected by this reporting. ...”<sup>318</sup>

## Article 77

“Members of the Legislative Council of the Hong Kong Special Administrative Region shall be immune from legal action in respect of their statements at meetings of the Council.”

Drafting materials in *Overview of the Drafting Process*<sup>319</sup> show that the drafting of this article had progressed through nine drafts during which the content and text remained basically the same except for some changes of names.

Paragraph 5 of Section III “The Legislature” of Chapter IV on Political Structure of the Hong Kong Special Administrative Region of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* read: “Duties and Powers of Members of the Legislature”.<sup>320</sup> Before the formulation of the first draft of this article, the discussion on “the powers of members

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318 *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 National People’s Congress, 28 March 1990) in *Overview of the Drafting Process*, Vol.2, p.797.

319 *Overview of the Drafting Process*, Vol.2, pp.798-800.

320 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee*, 22 April 1986 in *Overview of the Drafting Process*, Vol.2, p.798.

of the legislature” in the *Minutes of the Fourth Meeting of the Special Group on the Political Structure of the SAR (Group IV)* on 26 June 1986 read as follows:

“(5) Powers of members of the legislature

Attending members were of the view that after 1997, members of the legislature should enjoy the same powers possessed by their counterparts in 1986, and should not be subject to any criminal or civil interference in the performance of their public functions during their term of office.”<sup>321</sup>

Later, *The Legislature and Formation of the Legislature*, a discussion paper for discussion (in batches) on political structure, on 6 August 1986, had the following relevant material:

“4. Duties and powers of members of the legislature

4.1 There is no need to elaborate on this item in the Basic Law to avoid creating restrictions.

4.2 The duties of members should be prescribed in the standing orders of the legislature.

4.3 The duties of members have two levels. On a personal level, members should perform the functions of the legislature, actively participate in law making, suggest or consider bills in accordance with the procedures and spirit of the constitution for the stability and prosperity of Hong Kong. On a political level, they should be accountable to the government of the Region and the Central Government.

4.4 If there is a conflict between personal interests and the interests of the entirety, the latter should come first.

4.5 During their term of office, members of the legislature shall not be subject to criminal threats, legal interference or individual criticism when performing their official duties.

4.6 The arrest of a member of the legislature within the buildings

321 *Overview of the Drafting Process*, Vol.2, p.799.

of the legislature is not allowed whatever the circumstances are. The approval of the President must be obtained before a member of the legislature is arrested.

4.7 The privileges of members of the legislature must not be less than those granted to the members by standing orders of the Legislative Council in 1986.”<sup>322</sup>

During the consultation period at the later stage of the drafting process, the views collected by the Consultative Committee indicated that this article originated from the powers and privileges ordinance at that time,<sup>323</sup> and it was unnecessary to highlight this article since the Basic Law had prescribed that the law previously in force shall be maintained, otherwise unnecessary concerns might arise.<sup>324</sup>

In April 1990, the NPC adopted this article as BL 77.

## Article 78

“Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be subjected to arrest when attending or on their way to a meeting of the Council.”

Drafting materials in *Overview of the Drafting Process*<sup>325</sup> show that the drafting of this article had progressed through nine drafts. Except for changes in names, this article was only amended in its third draft by adding “on their way” before “to a meeting”. Other than that, no substantive changes has been made.

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322 Discussion Paper II of the Seminars on the Political Structure in Batches (Batch III), 6 August 1986 in *Overview of the Drafting Process*, Vol.2, p.799.

323 *Legislative Council (Powers and Privileges) Ordinance*, Cap.382, 1985. See Note on BL 78 of this book.

324 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.2, p.799.

325 *Overview of the Drafting Process*, Vol.2, pp.801-804.



Paragraph 5 of Section III “The Legislature” of Chapter IV on Political Structure of the Hong Kong Special Administrative Region of *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* read: “Duties and Powers of Members of the Legislature”.<sup>326</sup> Before the formulation of the first draft of this article, the discussion on “the powers of members of the legislature” in the *Minutes of the Fourth Meeting (Resumed) of the Special Group on the Political Structure of the SAR (Group IV)* on 26 June 1986 read as follows:

“(5) Powers of members of the legislature

Attending members were of the view that after 1997, members of the legislature should enjoy the same powers possessed by their counterparts in 1986, and should not be subject to any criminal or civil interference in the performance of their public functions during their term of office.”<sup>327</sup>

Later, *The Legislature and Formation of the Legislature*, a discussion paper for discussion (in batches) on political structure, 6 August 1986, had the following relevant content:

“4. Duties and powers of members of the legislature

4.1 There is no need to elaborate on this item in the Basic Law to avoid restrictions.

4.2 The duties of members should be prescribed in the standing orders of the legislature.

4.3 The duties of members have two levels. On a personal level, members should perform the functions of the legislature, actively participate in law making, suggest or consider bills in accordance with the procedures and spirit of the constitution for the stability and prosperity of Hong Kong. On a political level, they should be accountable to the government of the Region and the Central Government.

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326 Published in *Collection of Documents of the Second Plenary Session of the Drafting Committee*, 22 April 1986 in *Overview of the Drafting Process*, Vol.2, p.802.

327 *Overview of the Drafting Process*, Vol.2, p.802.

4.4 If there is a conflict between personal interests and the interests of the entirety, the latter should come first.

4.5 During their term of office, members of the legislature shall not be subject to criminal threats, legal interference or individual criticism when performing their official duties.

4.6 The arrest of a member of the legislature within the buildings of the legislature is not allowed whatever the circumstances are. The approval of the President must be obtained before arresting a member of the legislature is arrested.

4.7 The privileges of members of the legislature must not be less than those granted to the members by standing orders of the Legislative Council in 1986.”<sup>328</sup>

The working document of the Subgroup on Political Structure of the Drafting Committee in October 1987 set out the information on this article:<sup>329</sup>

“Information: The current *Legislative Council (Powers and Privileges) Ordinance*

Section 3 There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council.

Section 4 No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, bill, resolution, motion or otherwise.

Section 5 No member shall be liable to arrest-

(a) for any civil debt (except a debt the contraction of which

328 Discussion Paper II of the Seminars on the Political Structure in Batches (Batch III), 6 August 1986 in *Overview of the Drafting Process*, Vol.2, p.802.

329 *Chapter IV - Political Structure of Hong Kong Special Administrative Region (Discussion Draft)*, October 1987 (Working Document of the Subgroup on Political Structure) in *Overview of the Drafting Process*, Vol.2, pp.802-803.

constitutes a criminal offence) whilst going to, attending at or returning from a sitting of the Council or a committee;

(b) for any criminal offence whilst attending at a sitting of the Council or a committee.

Section 6 (1) No process issued by any court in Hong Kong or elsewhere in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Chamber while the Council is sitting, nor shall any such process be served or executed through the President or any officer of the Council unless it relates to a person employed within the precincts of the Chamber.

(2) Except by leave of the Council obtained in accordance with the Rules of Procedure, a member shall not be required to attend as a witness in any civil proceedings on a day when the Council is sitting.

(3) A member shall be exempted from service as a juror in accordance with section 5 of the Jury Ordinance.<sup>330</sup>

At the final stage of the drafting process of this article, some members of the Special Group on the Political Structure of the SAR were not aware of the reasons why no member of the LegCo shall be liable to arrest whilst attending at or going to a sitting of the Council. In this regard, some members of the Drafting Committee explained that this served to prevent people from arresting members to stop them from voting or expressing their views.<sup>331</sup> Some members of the Consultative Committee considered that the reasons why members of the LegCo should not be subjected to arrest whilst attending at or going to a sitting of the Council should be defined.<sup>332</sup>

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330 *Legislative Council (Powers and Privileges) Ordinance*, Cap. 382, 1985.

331 *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (II) and Members of the Drafting Committee from the Mainland*, 6 June 1988 in *Overview of the Drafting Process*, Vol.2, p.803.

332 Consultative Committee, *Collection of Views of the Special Group on Political Structure of the Consultative Committee for the Basic Law regarding Chapter IV of the Draft Basic Law (for solicitation of opinions)*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.2, p.803.

In addition, the Consultative Committee also received proposals to add “shall not be subjected to arrest when a meeting of the Council is over”, “on the way out after a meeting of the Council”, etc.<sup>333</sup> None of these proposals were accepted.

## Article 79

“The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:

(1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;

(2) When he or she, with no valid reason, is absent from meetings for three consecutive months without the consent of the President of the Legislative Council;

(3) When he or she loses or renounces his or her status as a permanent resident of the Region;

(4) When he or she accepts a government appointment and becomes a public servant;

(5) When he or she is bankrupt or fails to comply with a court order to repay debts;

(6) When he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Region and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present; and

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*333 Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (I) and Members of the Drafting Committee from the Mainland, 6 June 1988; Consultative Committee, The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles, October 1988 in Overview of the Drafting Process, Vol.2, p.803.*

(7) When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present.”

Drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through six drafts.<sup>334</sup> The first draft, included in *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee in December 1987 prescribed seven scenarios under which a member of the Council was no longer qualified for the office, and separated “misbehaviour” and “breach of oath” into two items.<sup>335</sup> In the second draft, the two items were consolidated into one, namely, item (7) of the current article.

The first draft of item (1) originally read: “When he or she loses the ability to discharge his or her duties as a result of serious diseases or other reasons for a long time”. In the second draft, the word “diseases” was amended to “illness” and the phrase “for a long time” was deleted.

As for item (2), its first to third draft all prescribed that absence from meetings for three consecutive months without the consent of the President of the LegCo was one of the grounds of disqualification. Before the formulation of the fourth draft, there were opinions that this article was too harsh because a member might be absent from meetings for important reasons.<sup>336</sup> Thus, in the fourth draft, the phrase “with no valid reasons” was added.

In addition, item (4) of the current article which read “when he or she accepts a government appointment and becomes a public servant” was added into this article in the fourth draft. As to the other three

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334 *Overview of the Drafting Process*, Vol.2, pp.805-811.

335 *Overview of the Drafting Process*, Vol.2, pp.805-806.

336 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.2, pp.809-810.

items, namely items (3), (5) and (6), the text remained more or less the same from the beginning to end.

During the period for solicitation of opinions on the fourth draft, the Consultative Committee received many views on this article. There were opinions that this article was risky, and might trigger the emergence of an authoritarian government, because the “majority” in the legislature could suppress or expel the “minority” or members with opposite views, from the Council. There were views that since the “breach of oath” and “misbehaviour” were very vague terms, it was necessary to define them. There were also suggestions to adopt the investigation procedure of impeachment in BL 73(9). If the investigation committee considers the evidence sufficient to substantiate such charges, the LegCo may pass a motion of censure by a two-thirds majority of all its members. There were also proposals to add: “a member of the legislature who accepts an appointment as a member of the Executive Council or a principal official of the executive authorities should resign and vice versa.” As to item (3) of the current article which read “when he or she loses or renounces his or her status as a permanent resident of the Region”, questions such as what constituted losing or renouncing the status as a permanent resident of the Region, and what the statutory procedures were had been raised. Those were outstanding issues requiring further clarification then.<sup>337</sup>

During the subsequent consultation period, the Consultative Committee received comments again on the draft article, there was suggestion to amend the first paragraph: “A member shall resign from his or her office at the request of the President of the Legislative Council and if he or she refuses to resign, he or she will be no longer be qualified for the office if a motion is passed by three-quarters of the members of the Council for that purpose”. There were also proposals to delete or amend items (5) and (6). None of these proposals were

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337 Ibid.

accepted.<sup>338</sup>

## Section 4 The Judiciary

### Article 80

“The courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.”

According to drafting materials in *Overview of the Drafting Process*,<sup>339</sup> this article, which reflects Section III of Annex I to the Joint Declaration, i.e. “Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region”, had progressed through eight drafts without much debate, and there were no significant changes to the text all along.<sup>340</sup> There was a suggestion to amend this article to read: “The courts of the Hong Kong Special Administrative Region at all levels shall be the judicial organization of the Region, exercising the judicial power, the power of judicial interpretation and the power of constitutional review of the Region.” The suggestion was not adopted though.<sup>341</sup>

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338 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.2, p.810.

339 *Overview of the Drafting Process*, Vol.3, pp.816-818.

340 In the second draft, the word “judiciary” was replaced by “judicial organ”, in *Overview of the Drafting Process*, Vol.3, p.817.

341 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, November 1988 in *Overview of the Drafting Process*, Vol.3, p.817.

## Article 81

“The Court of Final Appeal, the High Court, district courts, magistrates’ courts and other special courts shall be established in the Hong Kong Special Administrative Region. The High Court shall comprise the Court of Appeal and the Court of First Instance.

The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process*<sup>342</sup> show that this article had progressed through eight drafts, of which both content and wording remained unchanged all along.

Section III of Annex I to the Joint Declaration reads: “After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication.”

At a later stage in the drafting process of this article, some members of the Consultative Committee suggested that “and the Constitutional Tribunal” be added to the end of the second sentence as an intermediate body between the judicial system of China and that of the HKSAR. It was also suggested that a constitutional court be set up in the HKSAR. The suggestions were not adopted.<sup>343</sup>

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342 *Overview of the Drafting Process*, Vol.3, pp.819-821.

343 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.821.



## Article 82

“The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.”

Drafting materials in *Overview of the Drafting Process*<sup>344</sup> show that this article had progressed through eight drafts and is in line with the relevant part of Section III of Annex I to the Joint Declaration. Both content and wording of this article remained unchanged all along during the drafting process.

The relevant part of Section III of Annex I to the Joint Declaration reads:

“The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal.”

Drafting materials in *Overview of the Drafting Process* show that during discussion in the drafting process, there were views that the promotion and maintenance of a solid local judicial framework of permanent judges were very important, and the number of judges invited from other common law jurisdictions should remain unchanged so as to enhance the confidence of different sectors of society in the legal system of Hong Kong; and the term “different sectors” here included not only Hong Kong residents but should also include international investors and trading countries. Therefore, there was a need to determine the minimum ratio of external judges to be permanent judges in the CFA.<sup>345</sup>

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344 *Overview of the Drafting Process*, Vol.3, pp.822-826.

345 Working Group on the Final Adjudication and the Judicial System of the SAR, *Discussion Paper on the Final Adjudication and the Judicial System of the SAR (Second Draft)*, 20 May 1987 (Discussion Paper of the Resumed Session of the Second Joint Conference of the Special Group on Law and the Special Group on the Political Structure of the SAR, 30 May 1987) in *Overview of the Drafting Process*, Vol.3, p.823.

Some members of the Consultative Committee, however, believed that a judge of the CFA must be a Hong Kong resident of Chinese nationality. They also proposed to amend this article to specify that the Chief Justice and judges of the CFA must be Chinese citizens who were permanent residents of the HKSAR, and that the CFA might invite judges from other common law jurisdictions to sit on the CFA as required, but only as consultants or advisors without the power of final adjudication.<sup>346</sup>

Apart from the debate on the nationality of the judges, there was also a view that leave must be obtained before the cases could be appealed to the CFA. Leave must be sought from either the CA or directly from the CFA. The application for leave to appeal to the CFA should be considered by not less than two judges. Cases where application for leave to appeal to the CFA would be granted must be those involving either matters of great importance to the ordinary people or the public at large, or a point of law of great and general importance. There were different opinions on the question of whether or not leave to appeal to the CFA should automatically be granted in cases involving a minimum amount of money. The practice of setting a minimum amount of money as the triggering point for granting leave to appeal to the CFA automatically should be preserved, subject to constant review.<sup>347</sup>

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC that:

“The draft vests the courts of the Special Administrative Region with independent judicial power, including that of final

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346 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.825.

347 Working Group on the Final Adjudication and the Judicial System of the SAR, *Discussion Paper on the Final Adjudication and the Judicial System of the SAR (Draft)*, 9 April 1987 (Discussion Paper of the First Joint Conference of the Special Group on Law and the Special Group on the Political Structure of the SAR, 13 April 1987) in *Overview of the Drafting Process*, Vol.3, p.823.

adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practise social and legal systems different from the Mainland's, this provision is necessary."<sup>348</sup>

### Article 83

“The structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law.”

The first to fourth drafts of this provision read: “The division of functions and powers of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by the laws of the Region.” Starting from the fifth draft, it was revised as: “The structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law.”<sup>349</sup> No notable issues were raised during the drafting process of BL 83.<sup>350</sup>

### Article 84

“The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.”

Drafting materials in *Overview of the Drafting Process*<sup>351</sup> show that this article reflects Section III of Annex I to the Joint Declaration:

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348 *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 National People’s Congress, 28 March 1990).

349 *Overview of the Drafting Process*, Vol.3, p.828.

350 *Overview of the Drafting Process*, Vol.3, pp.827-828.

351 *Overview of the Drafting Process*, Vol.3, pp.829-831.

“The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions”.<sup>352</sup>

This article progressed through nine drafts. The first to third drafts of this provision read: “The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws of the Region and may refer to precedents of other common law jurisdictions.” In its fourth to sixth drafts, it was changed to: “The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 17 of this Law and may refer to precedents of other common law jurisdictions.” In the seventh to ninth drafts, the words “Article 17” were changed to “Article 18”. The entire article became: “The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.”

In the discussions at the initial stage of the drafting process of this article, some members of the Drafting Committee considered that if the words “refer to” in the sentence “may refer to precedents of other common law jurisdictions” meant that those precedents had no binding force, then this article could be deleted. Some other members believed that this article was drafted in accordance with the provisions of the Joint Declaration and should not be deleted.<sup>353</sup> The Consultative Committee also received comments that the meaning of the foregoing sentence was ambiguous, and that the provision should set out clearly which judicial precedents coming from common law practising countries shall have legal force in the courts of the Region, and

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352 *Overview of the Drafting Process*, Vol.3, p.829.

353 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.829.

which can only be used for reference with no legal force. It had also been suggested that the sentence be replaced with “and may refer to precedents of other common law jurisdictions that conform to Chinese custom”.<sup>354</sup>

In addition, a view was expressed that there was no need to refer to BL 18 in this article. There were also views that apart from cases concerning defence and foreign affairs, the courts of the HKSAR should have jurisdiction over all cases that fall within the scope of the Region’s high degree of autonomy, including those involving administrative acts of the CPG relating to the Region, and cases involving the Central Authorities and their personnel which touched upon the jurisdiction of the Region.<sup>355</sup>

It had also been suggested that an additional paragraph be added to this article: “The Basic Law should be interpreted in a fair, reasonable and broad manner in accordance with the true original intent and spirit of the making of the law, without being restrained by the limitations of its wording”. The reason being: “To ensure that the courts of the Region at all levels focus on the spirit behind the articles when interpreting them, in particular, they should take heed of the fact that there are articles of a policy and principle nature, in addition to those of a legal nature, in the Basic Law.”<sup>356</sup>

## Article 85

“The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference.

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354 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.830.

355 Ibid.

356 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.830.

Members of the judiciary shall be immune from legal action in the performance of their judicial functions.”

Drafting materials in *Overview of the Drafting Process*<sup>357</sup> show that this article reflects the relevant part of Section III of Annex I to the Joint Declaration which reads as “The courts shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions.”<sup>358</sup>

The content and wording of this article did not change at all from its first to ninth drafts.

In the discussions during the drafting of this article, it was suggested to add the following, “but shall be subject to supervision by the Standing Committee of the National People’s Congress over the issue of whether the jurisdiction prescribed in this Law has been exceeded”, after the expression “free from any interference”.<sup>359</sup> It was also proposed to replace the expression “the courts ... shall exercise judicial power independently” in the article with “the judges ... shall exercise judicial power independently”. These suggestions were not adopted.

## Article 86

“The principle of trial by jury previously practised in Hong Kong shall be maintained.”

Drafting materials in *Overview of the Drafting Process*<sup>360</sup> show that this article reflects Section II of Annex I to the Joint Declaration:

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357 *Overview of the Drafting Process*, Vol.3, pp.832-834.

358 *Overview of the Drafting Process*, Vol.3, p.832.

359 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.833.

360 *Overview of the Drafting Process*, Vol.3, pp.835-836.

“After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature”.<sup>361</sup>

The content and wording of this article remained unchanged throughout the entire drafting process.

According to drafting materials in *Overview of the Drafting Process*, there was a view coming from members of the Drafting Committee during the drafting process suggesting that this article be written in a positive way, that is, the system of trial by jury would be practised in the HKSAR. Another view coming from members of the Drafting Committee remarked that trial by jury was one of the principles of criminal and civil litigation, and this article might not be necessary in view of BL 87.<sup>362</sup> There were also views that the word “previously” should be revised, while others pointed out that the word “principle” could be deleted, besides, there was no need to go into details in the Basic Law since this was a matter of system.<sup>363</sup>

## Article 87

“In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.

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361 *Overview of the Drafting Process*, Vol.3, p.835.

362 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.836.

363 *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (III) and Members of the Drafting Committee*, 6 June 1988 in *Overview of the Drafting Process*, Vol.3, p.836.

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.”

Drafting materials in *Overview of the Drafting Process*<sup>364</sup> show that no changes were made to the first paragraph of this article throughout the drafting process. The second paragraph was added when the seventh draft was finalized and remained unchanged until the ninth draft.

When the first draft of this article was published, some members of the Drafting Committee provided briefing on the principles applicable to criminal proceedings and the rights enjoyed by defendants in Hong Kong at that time, including:

“1. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3. Any judgment shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

4. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

5. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(1) To be informed promptly and in detail in a language which he

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364 *Overview of the Drafting Process*, Vol.3, pp.837-840.



understands of the nature and cause of the charge against him;

(2) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(3) To be tried without undue delay;

(4) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this type of right;

(5) To have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(6) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(7) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(8) Not to be compelled to testify against himself or to confess guilt.

6. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

7. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher court according to law.

8. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

9. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law.”<sup>365</sup>

Later, some members of the Drafting Committee considered that the international conventions on the rights of residents should be incorporated into the Basic Law, and that, in order to avoid the Basic Law becoming overly lengthy, the provisions of these conventions could be listed as an annex.<sup>366</sup> Some members of the Drafting Committee proposed to include the principles and rights mentioned in the first paragraph of this article in Chapter III of the Basic Law.<sup>367</sup> Some suggested that the above-mentioned principles and rights be included in an annex to the Basic Law.<sup>368</sup> The Consultative Committee also received a view that, “In order to determine clearly what rights and principles fall within the above abstract sentence and to make this part more specific and explicit, they should be stated in this Law. It does not matter whether it is stated in the main body or in an annex.”<sup>369</sup>

Prior to the finalization of the seventh draft, the Consultative Committee received proposals for amendments of the article, including the addition of the sentences which read “Anyone who is lawfully arrested shall have the right to a fair trial by the open,

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365 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*, Vol.3, pp.837-838.

366 *Opinions of the Special Group on Law on the Draft Articles in Section 4 on “The Judiciary” of Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.838.

367 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.838.

368 *Collection of Opinions and Proposals of Some Members of Various Subgroups on the Articles Drafted by this Subgroup*, published in Secretariat of Drafting Committee, *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, April 1988 in *Overview of the Drafting Process*, Vol.3, p.839.

369 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.839.

fair and independent judicial organs without delay. Anyone shall be presumed innocent until convicted by the fair and independent judicial organs.” after the original sentence. It was also proposed to delete this article and add the following after BL 42 in Chapter III: “In criminal proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights of parties to proceedings shall be maintained. Anyone who is lawfully arrested shall have the right to a fair trial by a fair and independent judicial organ without delay. Anyone shall be presumed innocent until convicted by a fair and independent judicial organ.” The reason was that although the first paragraph of the article “maintains, in criminal and civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings, it is still insufficient to safeguard Hong Kong residents’ rights under the International Covenant on Civil and Political Rights in this regard ... Preventing retaliation for personal grudges through performance of public duties and abuse of power, and safeguarding the real enjoyment of rights of the residents.”<sup>370</sup>

The second paragraph was added when the seventh draft was finalized. According to *Report of the Subgroup on Political Structure regarding the Amendments to the Articles of 9 January 1989*, “amending in such a way was to take into account the fact that the above are two principles of the common law in Hong Kong”.<sup>371</sup>

After the finalization of the seventh draft, the Consultative Committee still received proposals to amend the second paragraph of the article. There was a suggestion to add the expression “fair and independent” before “judicial organs” on the grounds of “safeguarding the rights of residents after being lawfully arrested”. There was also

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370 Ibid.

371 *Report of the Subgroup on Political Structure regarding the Amendments to the Articles*, 9 January 1989, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, p.840.

a suggestion to replace the word “fair” in the phrase “right to a fair trial” with the word “public” on the grounds that “the condition of ‘fair’ is clear even without stipulation, but the trial must be stipulated explicitly to be a public trial”.<sup>372</sup> These suggestions were not adopted.

As indicated above, the second paragraph of this article remained unchanged till the ninth draft after its inclusion in the finalized version of the seventh draft. The text of the second paragraph of the article, together with that of the first paragraph, was adopted by the NPC as BL 87 in April 1990.

### Article 88

“Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.”

This article reflects the relevant part of Section III of Annex I to the Joint Declaration which reads as “Judges of the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.”<sup>373</sup>

Drafting materials in *Overview of the Drafting Process*<sup>374</sup> show that the drafting process of this article had progressed through nine drafts. Its first four drafts read “Judges of the courts of the Hong Kong Special Administrative Region shall be conferred appointment

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372 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.840.

373 *Overview of the Drafting Process*, Vol.3, p.841.

374 *Overview of the Drafting Process*, Vol.3, pp.841-845.

by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.” From the fifth draft onwards, the expression “conferred appointment” was replaced with “shall be appointed” and the article remained unchanged thereafter.

*Discussion Paper on the Final Adjudication and the Judicial System of the SAR (Draft)* of the Working Group on the Final Adjudication and the Judicial System of the SAR of 9 April 1987 shows that prior to the finalization of the first draft of this article, discussions were centred on the then Judicial Service Commission, whose function was to advise the governor of Hong Kong on the filling of judicial vacancies. Such vacancies included positions ranging from judges of the CA to magistrates. A view was expressed that the Judicial Service Commission Ordinance as it was then<sup>375</sup> should be retained after 1997 and that the then Judicial Service Commission could remain essentially unchanged.<sup>376</sup>

*Progress Report of the Subgroup on Political Structure* of 22 August 1987 explains that “judges of the courts of the Hong Kong Special Administrative Region refer to those at the level of the District Court and above, and other judicial officers refer to adjudicating officers of the magistrates’ courts and specialized courts ...”<sup>377</sup>

Prior to the finalization of the seventh draft, the Consultative Committee received an opinion that the appointment of judges by the CE must be approved by the legislature, for the reason which read: “no manipulation by the Chief Executive and to ensure the independence of the judiciary”. There was also a view that the appointment and

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375 Cap. 92. Currently known as the Judicial Officers Recommendation Commission Ordinance.

376 Discussion Paper of the First Joint Conference of the Special Group on Law and the Special Group on the Political Structure of the SAR, 13 April 1987 in *Overview of the Drafting Process*, Vol.3, pp.841-842.

377 Published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee* in *Overview of the Drafting Process*, Vol.3, p.842.

removal of judges should be reported by the legislature rather than the CE to the NPCSC for recognition afterwards, for the reason that: “This can make the executive authorities accountable to the legislature and the legislature accountable to the Central Authorities.”<sup>378</sup>

Before the eighth draft of the article was finalized, the Consultative Committee received a suggestion to delete the expression “eminent persons from other sectors”.<sup>379</sup>

In addition, drafting materials in *Overview of the Drafting Process* show that in the discussions during the drafting of the article, some members of the Drafting Committee opined that matters including membership and powers of the independent commission mentioned in the article were not regulated and suggested that such matters be detailed in the form of an annex.<sup>380</sup> There were also a number of views on the details of the independent commission, such as its structure, number of members, functions and whether the recommended candidates require the approval of all members. These views were not adopted as part of the article though.

## Article 89

“A judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the

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378 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.844.

379 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.844.

380 *Opinions of the Special Group on Law on the Draft Articles in Section 4 on “The Judiciary” of Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.842.

Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.”

This article reflects Section III of Annex I to the Joint Declaration which reads as “A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. Additionally, the appointment or removal of principal judges (i.e. those of highest rank) shall be made by the chief executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People’s Congress for the record. The system of appointment and removal of judicial officers other than judges shall be maintained.”<sup>381</sup>

Drafting materials in *Overview of the Drafting Process*<sup>382</sup> show that the drafting of this article had progressed through nine drafts and there was only one paragraph in the first three drafts which read as: “A judge of a court of the Hong Kong Special Administrative Region may be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.”

In the discussions during the drafting of this article, some

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381 *Overview of the Drafting Process*, Vol.3, p.846.

382 *Overview of the Drafting Process*, Vol.3, pp.846-849.

members of the Drafting Committee considered that the removal of judges should be treated with great caution, and that the three judges comprising the tribunal should be senior ones and suggested the addition of the word “senior”.<sup>383</sup> There was also a view that the term “misbehaviour” must be defined, but some members of the Drafting Committee felt that this kind of term was difficult to be defined clearly, moreover, the Letters Patent at that time already adopted this term.<sup>384</sup>

The second paragraph was added when the fourth draft of the article was finalized and the second paragraph then read: “The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.” Starting from the fifth draft, the expression “for inability to discharge his or her duties, or for misbehaviour” in the first and second paragraphs of the article was replaced by “if he or she is unable to discharge his or her duties, or misbehaves”.

Prior to the finalization of the seventh draft, the Consultative Committee received an opinion that the expressions “unable to discharge his or her duties” and “misbehaves” were not good enough and clearer reasons should be put forward.<sup>385</sup>

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383 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.847.

384 *Opinions of the Special Group on Law on the Draft Articles in Section 4 on “The Judiciary” of Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.847.

385 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.849.



Before the eighth draft was finalized, the Consultative Committee received a proposal to delete the term “Chief Justice of the Court of Final Appeal” and add the following two paragraphs:

“Under the principle of impartiality, this tribunal shall determine its own rules and procedures.

The Chief Justice should be able to appoint any magistrate and remove any magistrate from office with good cause.”<sup>386</sup>

There was also a proposal to amend the article to read: “The appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be decided by a two-thirds majority of the Legislative Council of the Region, and the decision shall be forwarded to the Chief Executive for announcement by the Chief Member of the Legislative Council and shall be reported to the Standing Committee of the National People’s Congress for the record without affecting the result decided by the Legislative Council.”<sup>387</sup> This proposal was not adopted.

Drafting materials in *Overview of the Drafting Process* show that starting from the eighth draft of this article, the expression “may be removed if he or she is unable to discharge his or her duties, or misbehaves, by the Chief Executive ...” in the first paragraph was replaced by “may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive ...”, and the expression “may be investigated if he or she is unable to discharge his or her duties, or misbehaves, by a tribunal appointed by the Chief Executive ...” in the second paragraph was replaced by “may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive ...”. The revised version was adopted by the NPC as BL 89 in April 1990.

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386 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.849.

387 Ibid.

## Article 90

“The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

In the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall, in addition to following the procedures prescribed in Articles 88 and 89 of this Law, obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People’s Congress for the record.”

This article reflects Section III of Annex I to the Joint Declaration: “Additionally, the appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the chief executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People’s Congress for the record.”

Drafting materials in *Overview of the Drafting Process*<sup>388</sup> show that this article had progressed through nine drafts. There was only one paragraph in the first three drafts: “In the case of the appointment and removal of chief judges of the Court of Final Appeal and the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall, in addition to following the procedures prescribed in Articles 7 and 8 of this Section, obtain the endorsement of the legislature of the Hong Kong Special Administrative Region and report such appointment and removal to the Standing Committee of the National People’s Congress for the record.” In the fourth draft, “Articles 7 and 8 of this Section” were replaced with “Articles 84 and 85 of this Law” and the first sentence was revised as: “In the case of the appointment and removal of judges of the Court of Final Appeal

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388 *Overview of the Drafting Process*, Vol.3, pp.850-853.

and the Chief Judge of the High Court ...” The words “appointment and removal” were replaced with “appointment or removal” in the fifth draft.

The Subgroup on Political Structure of the Drafting Committee focused its discussion on the establishment and composition of the CFA before the finalization of the first draft. Some members advocated that the judges of the CFA should be divided into two categories - local judges and overseas judges from other common law jurisdictions, whose appointment should be made by the CE having obtained the endorsement of the legislature and should be reported to the NPCSC for the record. The CFA should be made up of three overseas judges and two local judges. Another view put forward proposed that the CFA should be composed of local judges, though judges from other common law jurisdictions could be invited to sit and adjudicate in a case when required and the ratio of local judges to overseas judges needed not be specified. Some members argued that the procedures of appointment by the CE, etc. needed not apply to judges invited from overseas.<sup>389</sup>

After the first draft was finalized, a member of the Consultative Committee of the Special Group on Law asked whether “chief judges of the Court of Final Appeal and the High Court” included judges invited from abroad to Hong Kong on a temporary basis. The member considered that the Drafting Committee and the Consultative Committee seemed to understand this article differently and called for a clear explanation.<sup>390</sup>

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389 *Progress Report of the Subgroup on Political Structure of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region*, 8 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.850.

390 *Opinions of the Special Group on Law on the Draft Articles in Section 4 on “The Judiciary” of Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.851. As indicated above, this article was amended in its fourth draft by replacing “chief judges of the Court of Final Appeal and the High Court” with “judges of the Court of Final Appeal and the Chief Judge of the High Court”.

Amongst the comments and opinions collected by the Consultative Committee prior to the finalization of the seventh draft, there was a view which argued that on the premise of maintaining Hong Kong's judicial independence, the appointment or removal of the judges of the CFA and the Chief Judge of the High Court needed not be made with the "endorsement of the Legislative Council" or reported to the NPCSC for the record. There was a proposal to amend the article to read: "Subject to the procedures prescribed in Articles 87 and 88 of this law, judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall enjoy life tenure, and in the case of their appointment or removal, the Chief Executive shall obtain the endorsement of the Legislative Council of the Hong Kong Special Administrative Region and report such appointment or removal to the Standing Committee of the National People's Congress for the record." Another suggestion was to add at the end of the article: "Reporting for the record would not affect the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court." There was also a suggestion to prescribe that judges of the CFA and the Chief Judge of the High Court, being the most senior members of the judiciary, must be Chinese citizens.<sup>391</sup>

A new paragraph was inserted when the seventh draft was finalized: "The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region." As indicated in the *Report of the Subgroup on Political Structure regarding the Amendments to the Articles* of the Drafting Committee, "The same should be true for these two positions, considering that they are not inferior to the principal officials, who must be Chinese citizens and are permanent residents of the

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391 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.852.

Region.”<sup>392</sup>

Before the eighth draft was finalized, the Consultative Committee received some views on the nationality of the Chief Justice of the CFA and the Chief Judge of the High Court, including “The question whether or not, in 1997, the chief judge could be a permanent resident of the Region and a Chinese citizen has attracted much attention in recent years. The situation would be even more difficult if there are to be two different chief judge positions in the Region. According to Article 61 of the Draft Basic Law, the principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region and have ordinarily resided in Hong Kong for a continuous period of not less than 15 years. Though this is acceptable, qualifications of members of the judiciary of the Region should be given greater flexibility in view of the current special circumstances. The Basic Law should make different provisions regarding nationality restrictions for different members of the judiciary for the several years immediately after 1997, though the positions concerned would eventually be filled by Chinese citizens who are permanent residents of the Region. Alternatively, the Basic Law may provide for the appointment of qualified candidates to those positions if they are willing to renounce their foreign nationality.” There were suggestions to delete “Chinese citizens who are” in the first paragraph, on the ground that “Hong Kong’s judiciary is independent, besides, the work of chief judges do not involve any administrative and policy tasks of the government. Accordingly, non-Chinese citizens may also be appointed to the highest levels of the judiciary.” It was also suggested to amend Paragraph 1 to read: “The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese or non-Chinese citizens who are permanent residents of the Region.”, the

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392 *Report of the Subgroup on Political Structure regarding the Amendments to the Articles*, 9 January 1989, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, p.852.

reason being: “to maintain Hong Kong’s international status.” There were views that the inclusion of this provision in the section on “The Judiciary” could completely reflect the spirit of the Joint Declaration. With this provision for the chief judges, foreigners may more readily be employed to serve as judges of other levels of the judiciary.<sup>393</sup>

When the eighth draft was finalized, the article was revised again by adding “with no right of abode in any foreign country” after the words “permanent residents of the Region” in the first paragraph.<sup>394</sup>

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC stated that:<sup>395</sup>

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong Kong. Based on the same considerations, relevant articles stipulate that the Region’s Legislative Council must be composed of Chinese citizens who are permanent residents of the Region with no right of abode in

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393 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, pp.852-853.

394 *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure*, 17 - 20 January 1990, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.853.

395 *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 National People’s Congress, 28 March 1990).

any foreign country.”<sup>396</sup>

## Article 91

“The Hong Kong Special Administrative Region shall maintain the previous system of appointment and removal of members of the judiciary other than judges.”

This article reflects Section III of Annex I to the Joint Declaration: “The system of appointment and removal of judicial officers other than judges shall be maintained.”

Drafting materials in *Overview of the Drafting Process*<sup>397</sup> show that this article had progressed through nine drafts and no changes were made to its wording or content throughout the entire drafting process.

At the initial stage of the drafting process, some members of the Drafting Committee opined that the term “the previous system of appointment and removal” was ambiguous because the point of time at which the system was considered to be “the previous” one was not clear. Some members suggested to replace it with “the system before the establishment of the Hong Kong Special Administrative Region”, but a member expressed reservations about it, saying that the word “previous” or “current” used in the Basic Law sometimes referred to the period before 1997 and at other times to 1984 when the Joint Declaration was signed. Apart from the above, some members suggested that the system of appointment and removal of members of the judiciary at that time be clearly spelt out and this article could then

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396 Deng Xiaoping’s talked about “the scope and criteria for Hong Kong people administering Hong Kong” during his meetings with a Hong Kong industrial and commercial sectors delegation visiting Beijing and a group of well-known figures of Hong Kong, including Chung Sze-yuen, on 22 and 23 June 1984, see Introduction of this book.

397 *Overview of the Drafting Process*, Vol.3, pp.854-855.

provide for its continuation after 1997.<sup>398</sup>

At the later stage of the drafting process, the Consultative Committee received an opinion stating that “The Hong Kong Special Administrative Region would not be established until midnight on 1 July 1997. Prior to that, the Hong Kong Government would still be under the administration of the United Kingdom. Accordingly, the previous system of appointment and removal definitely does not belong to the Hong Kong Special Administrative Region.”<sup>399</sup>

## Article 92

“Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.”

This article reflects Section III of Annex I to the Joint Declaration: “Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions.”

Drafting materials in *Overview of the Drafting Process*<sup>400</sup> show that this article had progressed through nine drafts and was amended only in its seventh draft by inserting “their” before the words “judicial and professional qualities”.<sup>401</sup>

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398 *Opinions of the Special Group on Law on the Draft Articles in Section 4 on “The Judiciary” of Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.854.

399 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.855.

400 *Overview of the Drafting Process*, Vol.3, pp.856-857.

401 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.857.



At a later stage of the drafting process, it was pointed out in the comments received by the Consultative Committee that this article should be amended to read: “Courts and other members of the judiciary of the Hong Kong Special Administrative Region should be chosen on the basis of their judicial and professional qualities. Judges with power of adjudication must be Chinese citizens who are permanent residents of Hong Kong and members of the judiciary with an advisory role could be recruited from other common law jurisdictions.” It was also suggested that “should” be changed to “must” to avoid ambiguity.<sup>402</sup> However, these suggestions were not adopted.

### **Article 93**

“Judges and other members of the judiciary serving in Hong Kong before the establishment of the Hong Kong Special Administrative Region may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

The Government of the Hong Kong Special Administrative Region shall pay to judges and other members of the judiciary who retire or leave the service in compliance with regulations, including those who have retired or left the service before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place of residence.”

This article reflects Section IV of Annex I to the Joint Declaration: “After the establishment of the Hong Kong Special Administrative Region, public servants previously serving in Hong Kong in all government departments, including the police department, and members of the judiciary may all remain in employment and continue their service with pay, allowances, benefits and conditions

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<sup>402</sup> Ibid.

of service no less favourable than before. The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.”

Drafting materials in *Overview of the Drafting Process*<sup>403</sup> show that this article had progressed through nine drafts. Since the first draft, both content and wording were almost the same as that of the version passed by the NPC in April 1990 except for a consolidation of two articles into one as from the seventh draft.

During the drafting process, some members of the Drafting Committee considered that “the expression ‘terms no less favourable than before’ is ambiguous, and given that the present civil servant system keeps changing and the situation is deteriorating, what if such system eventually develops into a very unreasonable system in 1997, should such system still be regarded as the previous standard in determining whether ‘terms are no less favourable than before’?” Some members considered that such ambiguous wording should be avoided in the Basic Law. Other members suggested that the Basic Law should clearly specify in which articles the terms “previous” and “current”, etc. mean the period before 1997 and in which articles such terms mean the period before 1984. Some members argued that all such terms, when used in the Basic Law, should refer to the period before 1997 rather than 1984 when the Joint Declaration was signed.<sup>404</sup>

At a later stage of the drafting process during the consultation period, the Consultative Committee received suggestions to delete the words “including those who have retired or left the service before the establishment of the Hong Kong Special Administrative Region” in the second paragraph so as not to burden the future HKSARG

403 *Overview of the Drafting Process*, Vol.3, pp.858-860.

404 *Opinions of the Special Group on Law on the Draft Articles in Section 4 on “The Judiciary” of Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.859.

with the payment to such persons. It was also proposed to add “except privileged treatment accorded to foreigners” after “retain their seniority” in the first paragraph; “except removal of privileged treatment accorded to foreigners” after “irrespective of their nationality or place of residence” in the second paragraph; and “provided that those who have retired or left the service in violation of regulations or before reaching the retirement age before the establishment of the Hong Kong Special Administrative Region shall not be entitled to this treatment” to the end of the second paragraph.<sup>405</sup> These suggestions were not adopted.

## Article 94

“On the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region.”

According to *Report of the Subgroup on Political Structure regarding the Amendments to the Articles* of 9 January 1989,<sup>406</sup> this article was lately added as there was such a provision in the Joint Declaration. Section III of Annex I to the Joint Declaration reads: “On the basis of the system previously operating in Hong Kong, the Hong Kong Special Administrative Region Government shall on its own make provision for local lawyers and lawyers from outside the Hong Kong Special Administrative Region to work and practise in the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process*<sup>407</sup> show

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405 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.860.

406 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, p.861.

407 *Overview of the Drafting Process*, Vol.3, p.861.

that this article had progressed through three drafts and no changes were made to its wording and content throughout the drafting process.

At a later stage of the drafting process of the article, the Consultative Committee received suggestions to delete it for lack of importance.<sup>408</sup> This advice was not adopted.

## Article 95

“The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.”

Drafting materials in *Overview of the Drafting Process*<sup>409</sup> show that this article had progressed through nine drafts. The first two drafts read: “The Hong Kong Special Administrative Region may, through consultations, maintain juridical relations with the judicial organs of other parts of the country, and they may render collaboration to each other in accordance with the law.”

In developing the first draft, some members of the Drafting Committee suggested that “render ... in accordance with the law” be deleted.<sup>410</sup> However, some members suggested that “render” be retained and “in accordance with the law” be deleted. Some members considered that “render ... in accordance with the law” in this context meant that both parties should render collaboration to each other in accordance with their respective laws, and therefore “render...in accordance with the law” should be retained in view of the fact that the

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408 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.861.

409 *Overview of the Drafting Process*, Vol.3, pp.862-864.

410 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.862.

respective laws of the Mainland and Hong Kong were very different.<sup>411</sup>

Some members of the Drafting Committee suggested that this article be revised to “The Hong Kong Special Administrative Region may, in accordance with the relevant laws of the Hong Kong Special Administrative Region and other parts of the country, maintain juridical relations with and render assistance to the judicial organs of other parts of the country”. Some members considered that such expression could not solve the problem given that the legal system of the Mainland was different from that of Hong Kong, and consultations would be necessary to achieve results. Some members considered that judicial assistance should include, among others, serving of legal documents, the obtaining of evidence and execution of judgments, and as criminal matters could not be clarified in a few words, the original expression should suffice.<sup>412</sup>

In the third draft, “render collaboration ... in accordance with the law” was changed to “render assistance ... in accordance with the law”. In the fourth draft, “through consultations, maintain juridical relations ... and ... render assistance ... in accordance with the law” was changed to “through consultations and in accordance with the law, maintain juridical relations ... and ... render assistance”.

According to *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law* of December 1987, some members of the Drafting Committee raised issues with the words “in accordance with the law” again. Some members commented that the words “in accordance with the law” in this article were ambiguous. Some members considered that “in

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411 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, pp.862-863.

412 *Ibid*, p.863.

accordance with the law” might cause Hong Kong people to have concerns on whether the judicial relations between the two places would be handled in accordance with Mainland laws.<sup>413</sup>

In the fifth draft, the expression “to each other” was added after “render assistance”.<sup>414</sup> Since then, no further changes were made.

During the consultation period at a later stage of the drafting process, there were views that as far as civil and criminal disputes were concerned, the Mainland and Hong Kong should assist each other, including serving of legal documents, execution of judgments and recognition of the legal effect of notarization. The Basic Law should provide for the principle of mutual assistance apart from providing for the making of arrangements for mutual assistance through consultations between Hong Kong and other parts of the country. There were also views that the Basic Law should also make provisions for interregional conflict of laws.<sup>415</sup>

## Article 96

“With the assistance or authorization of the Central People’s Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance.”

This article reflects Section III of Annex I to the Joint Declaration which reads “The Central People’s Government shall assist or authorize the Hong Kong Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.”

413 *Overview of the Drafting Process*, Vol.3, p.863.

414 *Summary of the Amendments to the Articles Made by the General Working Group*, April 1988, published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.863.

415 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.3, p.864.

Drafting materials in *Overview of the Drafting Process*<sup>416</sup> show that this article had progressed through nine drafts. The content and wording remained unchanged throughout the drafting process.

In the discussions during the drafting process of the article, some members of the Drafting Committee suggested that “reciprocal juridical assistance” be replaced by “juridical assistance”. Some considered that Hong Kong had made arrangements for reciprocal juridical assistance with certain states at the time and that it should be made clear that such arrangements would continue to be effective.<sup>417</sup>

The Consultative Committee received a view that, given the high degree of autonomy and independent judicial power enjoyed by the HKSAR, the HKSARG could conduct discussions and consultations with foreign states on reciprocal juridical assistance without seeking the views of the CPG. There were suggestions to amend the first sentence of the article to read: “With the consent and assistance of the Central People’s Government, the Hong Kong Special Administrative Region may, if necessary, ...” and to replace “the Central People’s Government” with “the National People’s Congress”.<sup>418</sup>

In the consultation at a later stage of the drafting process, the Consultative Committee received some suggestions to delete the words “With the assistance or authorization of the Central People’s Government” and to amend the article to read: “The Government of the Hong Kong Special Administrative Region shall have the right to make arrangements with foreign states for reciprocal juridical assistance.”<sup>419</sup> None of these suggestions were accepted.

416 *Overview of the Drafting Process*, Vol.3, pp.865-866.

417 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.3, p.866.

418 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.866.

419 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.866.

## Section 5 District Organizations

### Article 97

“District organizations which are not organs of political power may be established in the Hong Kong Special Administrative Region, to be consulted by the government of the Region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation.”

In Chapter IV “Political Structure” of the Basic Law, there are only two articles, namely BL 97 and BL 98, under Section 5 “District Organizations”.

Drafting materials in *Overview of the Drafting Process*<sup>420</sup> show that the drafting of BL 97 had progressed through nine drafts. The first draft read: “District organizations which are not organs of local political power may be established in the Hong Kong Special Administrative Region, to be consulted by the government of the Region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation.” It remained basically the same from the second to sixth drafts. In the finalization of the seventh draft, the word “local” was deleted from the first sentence and after the amendment the expression became “District organizations which are not organs of political power”. Since then, no further changes were made.

Prior to the finalization of the first draft, the Working Group on District Organizations of the Special Group on the Political Structure of the SAR of the Consultative Committee had held several discussions on district organizations and related matters, including the current and future structure of district organizations, the functions and powers of district organizations, the relationship among district

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420 *Overview of the Drafting Process*, Vol.3, pp.867-877.



organizations, legislature and advisory committees, the relationship between district organizations and government departments, and the proposals on the provisions on district organizations in the Basic Law, etc.<sup>421</sup>

*Discussion Paper of the Working Group on District Organizations* of 11 April 1987 states that the Working Group on District Organizations of the Special Group on the Political Structure of the SAR gathered comments that the scope of “district organizations” included the then Urban Councils, Regional Councils and District Councils of each district. Another view was that “district organizations” included not only the aforementioned organizations, but also Heung Yee Kuk and other regional advisory organizations, such as Kaifong associations and rural committees, etc. The discussion paper points out that this article reflects Article 3(3) of the Joint Declaration which reads “The Hong Kong Special Administrative Region will be vested with executive power...”. There is, however, no reference made to local administrative or district organizations in the Joint Declaration. *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)* of 22 April 1986 mentioned the functions and powers and formation of district organizations in Section 5 of Chapter IV and such district organizations were similar to the local administrative organizations at that time.<sup>422</sup>

The Special Group on the Political Structure of the SAR also compiled views collected from different proposals on the idea of

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421 Working Group on District Organizations of the Special Group on the Political Structure of the SAR, *Report on the Seminar on District Organizations of the Hong Kong Special Administrative Region*, 12 March 1987 (Discussion Result of the Seminar on District Organizations of the Hong Kong Special Administrative Region, 14 February 1987) in *Overview of the Drafting Process*, Vol.3, pp.867-873.

422 Working Group on District Organizations of the Special Group on the Political Structure of the SAR, *Discussion Paper of the Working Group on District Organizations*, 11 April 1987 (Discussion Paper of the Twelfth Meeting of the Special Group on the Political Structure of the SAR, 9 June 1987) in *Overview of the Drafting Process*, Vol.3, p.871.

district organizations of the HKSAR. Some agreed that there was no need for specific provisions on district organizations in the Basic Law, on the grounds that “(1) The Basic Law which would be promulgated in 1990 is impossible to specify in detail the specific content of district organizations after 1997. In order to facilitate the smooth development of district organizations in future, the Basic Law should be given a certain degree of flexibility and only states certain principles. (2) According to the Joint Declaration, the laws in force in Hong Kong include the Basic Law, the laws previously in force in Hong Kong (except for those in conflict with the Basic Law) and those enacted by the legislature of the HKSAR. Currently, there are laws regulating the structures of various local organizations and such laws should continue to be in force if they do not conflict with the Basic Law, and the functions and powers and formation of these organizations can be varied by the Government of the Hong Kong Special Administrative Region as and when appropriate. Therefore, there was no need for the Basic Law to provide too much details on the district organizations ...”<sup>423</sup>

When finalizing the first draft, the explanatory note of the *Progress Report of the Subgroup on Political Structure* of the Drafting Committee read “Members considered that if the current three-tier structure is to be retained, the District Councils should remain as regional advisory organizations.”<sup>424</sup>

Prior to the finalization of the second draft, some members of the Drafting Committee mentioned that the district organizations of Hong Kong of that time were advisory organizations with certain policy decision-making functions and powers, and suggested that the term “responsible for providing” be changed to “responsible for managing”. Some other members of the Drafting Committee argued that “providing” included the meaning of “managing”. Members suggested

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423 Ibid, p.873.

424 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.873.

the Subgroup to further deliberate on the matter.<sup>425</sup>

In the sixth draft of the article, that is, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)* of the Drafting Committee in April 1988, the following brief introduction was made: "As provided in Section 5 of this Chapter, district organizations which are not organs of local political power may be established in the Hong Kong Special Administrative Region, to be responsible for consultations on district administration and provision of services in the fields of culture, recreation and environmental sanitation. Under this provision, the existing district organizations of Hong Kong, including Urban Councils, Regional Councils and District Councils, will either remain or be subject to the discretion of the Government of the Hong Kong Special Administrative Region on whether changes should be made."<sup>426</sup>

During the consultation period before the finalization of the seventh draft, the term "not organs of local political power" attracted many opinions. Some views from Hong Kong were that: "1. It was hoped that the current three-tier structure of district organizations could be maintained and that there would be explicit provision that 'the existing structure and service scope should be maintained'. 2. Specific provisions should be made in relation to functions and powers. 3. The term 'not organs of local political power' should be clearly defined ..."<sup>427</sup>

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425 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.874.

426 Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, April 1988 in *Overview of the Drafting Process*, Vol.3, p.874.

427 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.875.

Apart from that, some Mainland members of the Drafting Committee said that the cities, districts and counties of the Mainland as well as Hong Kong in its entirety were organs of political power which could administer any affairs,<sup>428</sup> but the Urban Councils of Hong Kong were not organs of political power at the local level and its powers and functions were limited to some extent as set out in this article.<sup>429</sup> Some members of the Consultative Committee were of the view that the meaning of the phrase “district organizations which are not organs of local political power” was unclear, since Regional Councils at that time also possessed political power to a certain extent.<sup>430</sup>

In *Reference (8) – Concepts Underlying the Design of the Future Political Structure of Hong Kong* of Secretariat of the Consultative Committee of 19 August 1988, Xiao Weiyun, a Mainland member of the Drafting Committee, said, “The Subgroup on Political Structure discussed district organizations repeatedly over the past two years. Members agree that the current Urban Councils, Regional Councils and District Councils are district organizations which are not organs of local political power, which should be affirmed in the Basic Law. As to the need to merge or adjust the two-tier structure of the two Councils and the nineteen District Councils, different sectors of Hong Kong have different views, the Subgroup on Political Structure considers that this issue should be resolved by the Hong Kong Special Administrative Region itself in the future, and at present it is better

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428 See Section 5 “Local People’s Congresses at All Levels and Local People’s Governments at All Levels”, Chapter III of the Constitution.

429 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.875.

430 *Collection of Views from the Special Group on Political Structure of the Consultative Committee for the Basic Law regarding Chapter IV of the Draft Basic Law (for solicitation of opinions)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.875.

to maintain and acknowledge the status quo. Therefore, Article 96 is drafted in relatively general and flexible terms, which includes both the two-tier structure and its functions, without specifying whether one tier or two tiers would be better, leaving room for the future government and residents of the Hong Kong Special Administrative Region to decide the issue by themselves.”<sup>431</sup>

During the consultations, it was suggested to amend the word “or” in the expression “or to be responsible for providing ...” to “and”.<sup>432</sup> There were also suggestions to amend the article to read: “District organizations may be established in the Hong Kong Special Administrative Region, to be consulted by the government of the Region in accordance with law, and to provide services in the fields of culture, recreation, environmental sanitation, district administration and others in accordance with law” and so forth. None of these proposals were accepted.

In the finalization of the seventh draft, the word “local” was deleted from “District organizations which are not organs of local political power”. Other proposals were not accepted.

## Article 98

“The powers and functions of the district organizations and the method for their formation shall be prescribed by law.”

Drafting materials in *Overview of the Drafting Process*<sup>433</sup> show that this article had progressed through nine drafts. The first four drafts read: “The specific powers and functions of the district organizations and the method for their formation shall be prescribed by law.” Beginning from the fifth draft, it was changed to: “The

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431 *Overview of the Drafting Process*, Vol.3, p.875.

432 *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (I) and Members of the Drafting Committee*, 6 June 1988. See footnote 431.

433 *Overview of the Drafting Process*, Vol.3, pp.878-879.

powers and functions of the district organizations and the method for their formation shall be prescribed by law.” The text of this provision remained unchanged until April 1990 when it was passed by the NPC as BL 98.

During the consultation period at the later stage of the drafting process of the Basic Law, the Consultative Committee received an opinion stating that the matters provided for in this article needed not be prescribed by law.<sup>434</sup> It was also suggested that a clause be added, stipulating that the formation of district organizations should be through elections. A view was also expressed that the type of law referred to in this article should be set out in detail.<sup>435</sup>

## Section 6 Public Servants

### Article 99

“Public servants serving in all government departments of the Hong Kong Special Administrative Region must be permanent residents of the Region, except where otherwise provided for in Article 101 of this Law regarding public servants of foreign nationalities and except for those below a certain rank as prescribed by law.

Public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region.”

Section 6 on “Public Servants” of Chapter IV on Political

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434 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.879.

435 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.879.

Structure of the Basic Law contains six articles, namely, BL 99 to BL 104.

This article reflects the relevant part of Article 3(4) of the Joint Declaration and Section I of Annex I to the Joint Declaration which provide: “The government ... of the Hong Kong Special Administrative Region shall be composed of local inhabitants.”

Drafting materials in *Overview of the Drafting Process*<sup>436</sup> show that the drafting of this article had progressed through nine drafts and no substantive changes were made to its content or wording throughout the drafting process.<sup>437</sup>

When the first draft was finalized, an explanatory note in a progress report of the Subgroup on Political Structure of the Drafting Committee read: “As to the definition of the term ‘public servants’, this Subgroup has not reached any appropriate conclusion after repeated discussions.”<sup>438</sup> Prior to the finalization of the second draft, some members of the Drafting Committee suggested that the difficulty in defining “public servants” lay in the fact that the Chinese version of the Joint Declaration means “Civil Service” while the English version uses the term “Public Service”.<sup>439</sup>

Some members of the Drafting Committee considered that the expression in the second sentence of the first paragraph of this

436 *Overview of the Drafting Process*, Vol.3, pp.880-883.

437 The second sentence of the first paragraph in the first three drafts read as: “except where otherwise provided for in Article 4 of this Section and except for those below a certain pay point as prescribed by law.” When the seventh draft was finalized, it was amended to read: “except where otherwise provided for in Article 100 of this Law regarding public servants of foreign nationalities and except for those below a certain rank as prescribed by law”.

438 *Progress Report of the Subgroup on Political Structure*, 22 August 1987 (published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee*) in *Overview of the Drafting Process*, Vol.3, p.881.

439 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.881.

article actually divided Hong Kong residents into two classes, i.e. permanent residents could serve as senior civil servants while non-permanent residents could only serve as junior civil servants, which was discriminatory, and a different way of expression should be used. Some members suggested to replace the second paragraph of the article with the expression “Public servants must be loyal to the Hong Kong Special Administrative Region”.<sup>440</sup>

Also, some members considered that in relation to the stipulation that public servants must be permanent residents of the HKSAR, only those provided for in BL 101 should be exempted from it; and that the expression “and except for those below a certain pay point as prescribed by law” should be deleted, as it would allow the largest employer of Hong Kong to bring in cheap labour from outside Hong Kong, and setting such a precedent would be risky, prejudicing the interests of the local low-wage workers of the HKSAR.<sup>441</sup>

Views were expressed that the second paragraph of this article was not necessary as its content was already contained in BL 103 and 104 and that there was no need to particularly specify in the Basic Law that public servants must be dedicated to their duties and be responsible to the HKSARG, as anyone employed by anybody in any capacity should do so.<sup>442</sup> None of these views were accepted.

## Article 100

“Public servants serving in all Hong Kong government departments, including the police department, before the establishment

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440 Ibid.

441 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.881.

442 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.883.



of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.”

This article reflects the relevant provisions in Article 3(4) and Section IV of Annex I to the Joint Declaration: “After the establishment of the Hong Kong Special Administrative Region, public servants previously serving in Hong Kong in all government departments, including the police department, and members of the judiciary may all remain in employment and continue their service with pay, allowances, benefits and conditions of service no less favourable than before.”

Drafting materials in *Overview of the Drafting Process*<sup>443</sup> show that this article had progressed through nine drafts. No substantive changes had been made to its content or wording throughout the entire drafting process.

Prior to the finalization of the second draft, a member of the Special Group on the Political Structure of the SAR of the Consultative Committee considered that the phrase “no less favourable than before” was not appropriate for the Basic Law, though it may be used in the Joint Declaration, since this phrase was too vague and would become meaningless in a few years. That member, therefore, recommended that it be deleted. However, others considered the expression to be a minimum guarantee for public servants, the deletion of which would mean even less protection. Some members of the Consultative Committee opined that this was a problem pertaining to the English version. The Chinese version meant before the establishment of the HKSAR, that is, drawing the line at 1997, rather than 1984 when the Joint Declaration was signed.<sup>444</sup>

Before the formulation of the seventh draft, some members of

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443 *Overview of the Drafting Process*, Vol.3, pp.884-887.

444 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.885.

the Consultative Committee considered that remuneration, etc. were conditions for future employment so this article was of a policy nature which should not be included in this law, and that it could be summarized as “employment policy to be formulated by the future Hong Kong Special Administrative Region Government”.<sup>445</sup>

The Consultative Committee received a comment saying that the article stressed only the guarantee of civil service pay and benefits prior to the establishment of the HKSAR, but made no express provision for such protection afterwards. Another view was expressed that the then remuneration and conditions of service of public servants should basically be retained, while the unreasonable gap between local and foreign national public servants should be eliminated.<sup>446</sup>

It was also suggested that the article be amended to read: “Public servants of all Hong Kong government departments before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.” The reason being that it was pointless to refer specifically to public servants serving in the police department. A proposal was also received to change “may all remain in employment” to “shall all be retained” to indicate that everyone would be retained. There was also an opinion which said that the article should provide at the same time that the various items therein would be adjusted as appropriate according to the progress of living standards.<sup>447</sup>

## Article 101

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445 *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (III) and Members of the Drafting Committee*, 6 June 1988 in *Overview of the Drafting Process*, Vol.3, p.886.

446 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – *General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.886.

447 *Ibid*, pp.886-887.

“The Government of the Hong Kong Special Administrative Region may employ British and other foreign nationals previously serving in the public service in Hong Kong, or those holding permanent identity cards of the Region, to serve as public servants in government departments at all levels, but only Chinese citizens among permanent residents of the Region with no right of abode in any foreign country may fill the following posts: the Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise.

The Government of the Hong Kong Special Administrative Region may also employ British and other foreign nationals as advisers to government departments and, when required, may recruit qualified candidates from outside the Region to fill professional and technical posts in government departments. These foreign nationals shall be employed only in their individual capacities and shall be responsible to the government of the Region.”

This article reflects Article 3(4) of the Joint Declaration and the relevant part of Section I of Annex I to the Joint Declaration which read as: “The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants.” It also reflects the relevant part of Section IV which reads as: “The Hong Kong Special Administrative Region Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the Hong Kong Special Administrative Region to serve as public servants at all levels, except as heads of major government departments (corresponding to branches or departments at Secretary level) including the police department, and as deputy heads of some of those departments. The Hong Kong Special Administrative Region Government may also employ British and other foreign nationals as advisers to government departments and, when there is a need, may recruit qualified candidates from

outside the Hong Kong Special Administrative Region to professional and technical posts in government departments. The above shall be employed only in their individual capacities and, like other public servants, shall be responsible to the Hong Kong Special Administrative Region Government.”

Drafting materials in *Overview of the Drafting Process*<sup>448</sup> show that the drafting of this article had progressed through nine drafts. The first two drafts of this article were largely the same as Section IV of Annex I to the Joint Declaration, except that the expression “must be dedicated to their duties and” was added before “shall be responsible to the Hong Kong Special Administrative Region Government” at the end of the sentence. When the first draft was formulated, the explanatory note to the article read: “Members considered that the scope of heads of major government departments and deputy heads of some of those departments needed to be clearly stipulated.”<sup>449</sup>

Before finalizing the second draft, some members of the Drafting Committee proposed to delete the particular reference to “British nationals” in this article because “foreign nationals” already included “British nationals”. Some members objected, holding the view that the majority of foreign nationals in Hong Kong at that time were British who had certain experience and made certain contributions, and it was necessary to mention them in particular. Some members pointed out that the particular reference to “British nationals” reflected the spirit of the Joint Declaration, namely accommodating Britain’s interests in Hong Kong.<sup>450</sup>

Some members of the Drafting Committee considered that the use

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448 *Overview of the Drafting Process*, Vol.3, pp.888-897.

449 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.890.

450 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.891.

of expression in BL 100 and this article needed to be reviewed, such as the expression “may all remain in employment” in BL 100 and the use of “may employ” in this article, and there must be consistency.<sup>451</sup>

It was suggested by some members of the Consultative Committee that the posts which could not be filled by British and other foreign nationals should be listed one by one so as to enable British and other foreign nationals to have better understanding of their situation and to ensure that the posts which could not be held by them would not further expand. Also, some members were concerned that rewriting the article would result in difference from the wording of the Joint Declaration and would arouse unnecessary anxiety.<sup>452</sup>

When the third draft was finalized, the expression “some of those departments” was changed to “some major departments of the government” and there was no substantive change to the remaining content and wording. When finalizing the fourth draft, the expression “except as heads of major government departments (corresponding to branches or departments at Secretary level) including the police department, and as deputy heads of some major departments of the government” in the first paragraph was replaced with “except for the following posts: the Heads and Deputy Heads of Offices, Secretaries of Departments and Deputy Secretaries of the Security Department, Personnel Department and Administration Department, Commissioner Against Corruption, Director of Audit, Director and Deputy Director of the Police Department, Director and Deputy Director of the Bureau of Foreign Affairs, Director of Immigration and Commissioner of Customs and Excise”. In the second paragraph of the Chinese version of the article, the expression “專業和技術職務” which means “professional and technical posts” was replaced with “專門和技術職務” which means “specialized and technical posts”, but the English version continued to adopt the expression “professional and technical

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451 Ibid.

452 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.891.

posts”; also, the expression “and, like other public servants, must be dedicated to their duties” was deleted.

When finalizing the fifth draft, the titles of the posts listed in this article were adjusted to read “the Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner against Corruption, Director of Audit, Deputy Directors of the Security Bureau and Civil Service Bureau, Commissioner and Deputy Commissioner of Police, Director and Deputy Director of Foreign Affairs, Director of Immigration and Commissioner of Customs and Excise”.<sup>453</sup>

There were the following suggestions from Hong Kong before finalizing the seventh draft: the post “Director of Education” should be added to show the importance attached to education; the expression “may recruit qualified candidates from the Mainland to fill professional and technical posts in government departments” should be added in the second paragraph; and the expression “with a good knowledge of Cantonese and English” should be added after “permanent residents of the Region”.<sup>454</sup> None of these suggestions were adopted though.

The Consultative Committee received two proposals with regard to relaxation of the nationality restriction for principal officials: (1) foreign nationals should be allowed to serve as principal officials; and (2) China should recognize dual nationality in Hong Kong and allow Hong Kong people who had foreign nationality to retain their Chinese citizenship so they could serve as principal officials. The Consultative Committee received mixed views on whether to allow foreign nationals to serve as principal officials. The supporting views mainly included: (1) the arrangement would severely undermine the morale of civil servants at that time, particularly local civil servants who held foreign

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453 *Summary of the Amendments to the Articles Made by the General Working Group*, April 1988, published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.892.

454 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.893.

nationality and at the rank of administrative officer, as their promotion opportunities would be hampered over the next decade, thereby leading to the issue of brain drain; (2) the majority of people with foreign nationality, including those of Chinese origin, were talented and had contributed greatly to the maintenance of the prosperity and stability of Hong Kong, and the arrangement would limit the government's recruitment of talents and thus lower the standard of the administrators of the government; (3) since principal officials at all levels were to be nominated and reported by the CE to the CPG for appointment, there was no need to impose nationality restriction in the Basic Law; (4) non-Chinese nationals working in the government should enjoy the same treatment as Chinese nationals so that non-Chinese nationals could contribute to Hong Kong's prosperity; and (5) Hong Kong is not a sovereign territory, but merely a local special administrative region of China which comes directly under the CPG, and China was committed to maintaining Hong Kong's prosperity, stability and status as an international financial center. In such circumstances, allowing permanent residents of Hong Kong of Chinese descent [*Editor's note: 'Chinese descent' should have been 'non-Chinese descent'*] to hold important posts of the HKSARG would not necessarily undermine the system of the state, but could be of great benefit to Hong Kong as a demonstration of China's determination to maintain Hong Kong as an international financial center. The objections were as follows: (1) restricting the rank of government posts that could be held by foreign nationals was a necessary step to change the colonial political structure of Hong Kong, and was conducive to the discovery and cultivation of talents among Chinese citizens in Hong Kong; (2) the Basic Law should specify that Hong Kong residents who have acquired foreign nationality cannot hold senior posts because of the concern that the stability of the HKSAR would be affected seriously after such people's departure from the HKSAR in future; and (3) it was acceptable for foreign nationals to hold government posts in future in the HKSAR and they could hold technical and advisory posts, and could be at the middle level rather than the decision-making level. Such arrangement could allow foreign nationals who intended to contribute their talents



to Hong Kong to stay and serve Hong Kong.<sup>455</sup>

The discussions and consultation during the drafting of this article showed that there were many different views on the issue of which posts should only be filled by Chinese citizens. For example, the Consultative Committee received views that such posts should be limited to the Chief Secretary, the Financial Secretary and the Security Secretary, and in theory and in practice, other posts should be open to officials of British nationality and officials of Chinese nationality for reasons including that “this article imposes more restrictions on the positions which non-Chinese citizens can occupy than the Sino-British Joint Declaration”.<sup>456</sup>

In addition, the Consultative Committee received views that the definition of “Chinese citizen” should be clearly stated or listed in an annex.<sup>457</sup>

According to *Report of the Subgroup on Political Structure regarding the Amendments to the Articles* of 9 January 1989, this article provided that “among the posts which must be filled by Chinese citizens among permanent residents of the Hong Kong Special Administrative Region, seven posts have been deleted: Deputy Director of the Security Bureau, Deputy Director of the Civil Service Bureau, Deputy Commissioner of Police, Director and Deputy Director of Foreign Affairs, Director of Immigration and General Administration of Customs [*Editor’s note: ‘General Administration of Customs’ should have been ‘Commissioner of Customs and Excise’*]. Such deletions have been made because during the consultation period, some persons and organizations expressed different views on

455 *The Basic Law and Nationality*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.4 – Special Reports*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.893-894.

456 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.894.

457 *Ibid*, p.895.



the qualifications for ‘the heads and some deputy heads of the major departments of the government’.<sup>458</sup>

Before the eighth draft was formulated, some views from the Mainland suggested that the posts “Director of Immigration” and “Commissioner of Customs and Excise” be added to this article.<sup>459</sup> Also, the Consultative Committee received views that: “According to Article 100 of the *Draft Basic Law*, the appointment of offices of principal officials is subject to nationality restriction, namely such offices can only be taken up by Chinese nationals. Currently, a number of senior officials serving in the government are foreign nationals. If they continue to stay in office in the Hong Kong Special Administrative Region Government after 1997, their careers will be affected because of the issue of nationality, and this has already hurt the morale of these civil servants. Moreover, the Chinese civil servants with foreign nationality still do not have a clear understanding of their own Chinese nationality, so the same problem occurs among them. However, this issue related to nationality must be studied together with the question of how the Nationality Law of China is to be applied in Hong Kong.” Some considered that “appropriate amendments should be made to the Nationality Law of China when it is applied in Hong Kong so that Chinese nationals residing in Hong Kong could enjoy dual nationality, i.e. they do not need to renounce their foreign nationality and could still retain their Chinese nationality.” However, there were views that “allowing only Chinese nationals to serve as principal officials is a practice to define sovereignty, and there will be no issue of double allegiance that will affect the interests of the Hong

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458 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, pp.895-896.

459 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 30 November 1989 in *Overview of the Drafting Process*, Vol.3, p.896.

Kong Special Administrative Region Government.”<sup>460</sup>

In *Minutes of the Eighteenth Meeting of the Subgroup on Political Structure* of 17 to 20 January 1990, the following amendments to the article were recorded: “The expression ‘with no right of abode in any foreign country’ should be inserted after ‘but only Chinese citizens among permanent residents of the Region’; the Chinese wording of ‘Director of Audit, Commissioner of Police’ was slightly adjusted and the posts ‘Director of Immigration and Commissioner of Customs and Excise’ were inserted thereafter. Some members suggested that ‘Deputy Directors’ be included while some members suggested that ‘Director of Immigration’ and ‘Commissioner of Customs and Excise’ should not be included.”<sup>461</sup>

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC that:<sup>462</sup>

“Qualifications for the Chief Executive of the Hong Kong Special Administrative Region, members of the Executive Council, the President of the Legislative Council, principal government officials, the chief justice of the Court of Final Appeal and the chief judges of the High Court, as well as Hong Kong members of the Basic Law Committee. Relevant provisions in the draft Basic Law stipulate that these posts must be held by Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. This helps define state sovereignty and reflects the principle of managing Hong Kong by the Hong Kong people. Only in this way can those maintaining the posts mentioned above hold themselves responsible to the State, the Region and the residents of Hong

460 *Civil Servants and Politics*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.2 – Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.896.

461 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.897.

462 *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 National People's Congress, 28 March 1990).

Kong.”<sup>463</sup>

## Article 102

“The Government of the Hong Kong Special Administrative Region shall pay to public servants who retire or who leave the service in compliance with regulations, including those who have retired or who have left the service in compliance with regulations before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place of residence.”

This article reflects the relevant part in Section IV of Annex I to the Joint Declaration which reads “... The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.”

Drafting materials in *Overview of the Drafting Process*<sup>464</sup> show that this article had progressed through nine drafts and no substantive changes were made to its content or wording throughout the drafting process. In the third draft, the words “(including survivors’ benefits)” were inserted after “benefits”, which were later deleted in the fifth draft to make it consistent with the wording of the Joint Declaration.<sup>465</sup>

The outline of Judge Arthur Garcia’s speech contained in *Report on the Seminar on Civil Servants and the Basic Law* of 7 June

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463 See the discussion on the scope and criteria for Hong Kong people administering Hong Kong in Introduction and the Note on BL 44 in this book.

464 *Overview of the Drafting Process*, Vol.3, pp.898-901.

465 *Summary of the Amendments to the Articles Made by the General Working Group*, April 1988, published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.900.

1986 reads: “Under Section 1 of Chapter V of the existing Pensions Ordinance, the Government has no legal obligation to distribute pensions to public servants. Although the Hong Kong Government rarely does so, the possibility remains ... Under the Government’s employment contract, pension forms part of a civil servant’s salary and is payable upon the end of his term of service. If the Government fails to pay or reduce the pension, this contractual right can be the basis of action against the Government. It is understood, however, that the Pensions Ordinance will be amended to take into account the new retirement age and pension discount component, and that Section 1 of Chapter V may be amended. The Basic Law should clearly stipulate that civil servants, whether those of the Hong Kong Special Administrative Region Government or the Hong Kong Government before 1 July 1997, should be entitled to pensions after retirement ...” Another view was that the Basic Law should explain in detail the meaning of “on terms no less favourable than before” mentioned in the Joint Declaration.<sup>466</sup> There were questions on the meaning of “on terms no less favourable than before” until the later stage of the drafting of the article. Views were expressed on how the HKSAR could ensure that pensions would be paid “on terms no less favourable than before” and how the exchange rate should be calculated if retired civil servants emigrated or overseas civil servants returned to their home country.<sup>467</sup>

### **Article 103**

“The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong’s previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special

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466 *Overview of the Drafting Process*, Vol.3, p.898.

467 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol. 5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.901.

bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals.”

This article reflects the relevant part in Section IV of Annex I to the Joint Declaration which reads “The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability. Hong Kong’s previous system of recruitment, employment, assessment, discipline, training and management for the public service (including special bodies for appointment, pay and conditions of service) shall, save for any provisions providing privileged treatment for foreign nationals, be maintained.”

Drafting materials in *Overview of the Drafting Process*<sup>468</sup> show that this article had progressed through nine drafts and no substantive changes were made to its content or wording throughout the drafting process.

According to the explanatory note of the first draft of the article, some members of the Drafting Committee advocated adding the following sentence at the end of the article: “The Government of the Hong Kong Special Administrative Region may, based on the actual situation, develop and improve the above system in accordance with law with a view to improving efficiency of work and the quality of the public servants”.<sup>469</sup>

Prior to the finalization of the second draft, a member of the Consultative Committee considered that “previous system” was inappropriate to be used in the Basic Law, regardless of its use in the Joint Declaration, on the grounds that the recruitment system had changed since the announcement of the Joint Declaration, and the word “previous” would be meaningless in a few years’ time. That member proposed that this article be written in a more positive manner,

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468 *Overview of the Drafting Process*, Vol.3, pp.902-906.

469 *Progress Report of the Subgroup on Political Structure*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.903.

specifying the established system (or procedure), otherwise the system as a whole could be changed at will and would not be certain enough. Some members also suggested that the expression “except for any provisions for privileged treatment of foreign nationals” be deleted, on the grounds that if there was a need to recruit foreign experts, there would be a basis for attracting talents with privileged treatment, and if this expression had other meanings, it should be clearly stated.<sup>470</sup>

Prior to the finalization of the seventh draft, the Consultative Committee was advised that this article may not necessarily be feasible since privileged treatment constituted a very important element in the conditions of employment of foreign public servants. BL 100 allows pay, allowances, benefits and conditions of service to be no less favourable than before. The Hong Kong Government had also given assurances that benefits will not be reduced or diminished after 1997. A view was expressed that the existing privileged treatment should be listed out as soon as possible so that they could be abolished soonest to avoid controversy. It was also suggested to replace the word “treatment” with the word “employment” on the grounds that many overseas employees still could not understand the apparent contradiction between the words “no less favourable than before” in BL 100 and “except for any provisions for privileged treatment of foreign nationals” in this article.<sup>471</sup>

## Article 104

“When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council,

470 Special Group on the Political Structure of the SAR, *Opinions on Some Draft Articles in Chapter IV of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.903.

471 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.905.

judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."<sup>472</sup>

Drafting materials in *Overview of the Drafting Process*<sup>473</sup> show that the drafting of this article had progressed through five drafts and the first draft was published in *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* by the Secretariat of the Drafting Committee in April 1988.

The first two drafts of this article read as follows: "When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and members of the judiciary in the Hong Kong Special Administrative Region must swear in accordance with law."<sup>474</sup> When the third draft was finalized, a textual amendment in relation to the name of the legislature in Chinese was made, which had no impact on the English version, and the word "other" was inserted before "members of the judiciary".

Before the finalization of the third draft, the Special Group on the Political Structure of the SAR of the Consultative Committee held an exchange meeting with members of the Drafting Committee, in which some members of the Consultative Committee considered that the members of the legislature and judges of the courts mentioned in this article were not public servants and therefore should not be included.

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472 See *Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress* (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty Fourth Session on 7 November 2016).

473 *Overview of the Drafting Process*, Vol.3, pp.907-909.

474 Oaths and Declarations Ordinance (Cap. 11) is part of the "laws previously in force in Hong Kong" under BL 8, which is to amend and consolidate the laws on oaths and declarations, and stipulate the form of oaths, etc.

Some members of the Drafting Committee responded that “Originally, the Subgroup included an oath-taking provision in the sections of the Chief Executive, the executive authorities and the legislature respectively, but later decided to include them all in the section of public servants so as not to be too repetitive and cumbersome.”<sup>475</sup>

In the consultations during the drafting process of this article, the Consultative Committee received suggestions to delete this article on the ground that it was irrelevant to the public servants because although the CE, principal officials, members of the LegCo, judges and members of the judiciary would all be public offices, they would not be part of the civil service. Therefore, to avoid confusion in the definition of public servants, matters of their oath of office should not be stipulated in Section 6 of Chapter IV. It was also worth discussing whether the details of the oath should be stipulated in the Basic Law.<sup>476</sup>

Besides, it was also proposed to revise the article by inserting “The content of the oath must include the following: to bear allegiance to the People’s Republic of China and the Hong Kong Special Administrative Region, to be a person of integrity, and to be dedicated to his or her duties” after “must, in accordance with law, swear”. Others considered that the meaning of “in accordance with law, swear” vague and the meaning and effect of “in accordance with law, swear” should be clearly stated.<sup>477</sup>

Prior to the finalization of the fourth draft, the Secretariat of the Drafting Committee received views from relevant state departments of the Mainland that the provisions of this article were not comprehensive and suggested that concise provisions should be made on the “contents

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475 *Minutes of the Exchange Meeting between the Special Group on the Political Structure of the SAR (III) and Members of the Drafting Committee*, 6 June 1988 in *Overview of the Drafting Process*, Vol.3, p.907.

476 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – *General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.908.

477 *Ibid.*



of the oath”.<sup>478</sup>

The Subgroup on Political Structure of the Drafting Committee held two meetings to discuss this article. As recorded in *Minutes of the Seventeenth Meeting of the Subgroup on Political Structure* of 13 to 16 December 1989, the meetings discussed this article but did not reach a consensus on the proposal for changes and decided to defer the resolution to the next meeting. The discussion on the article during the meetings was as follows:

“... Some members proposed to replace the phrase ‘must, in accordance with law, swear’ in this article with ‘must swear to uphold this Law and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China’. Some members were of the view that the Hong Kong Special Administrative Region was an integral part of the People’s Republic of China and that all officers holding public offices in the Special Administrative Region should swear allegiance to the country. Some members pointed out that there would be conflicts if foreign members of the Legislative Council were required to bear allegiance to the People’s Republic of China. Some members considered it reasonable to demand a foreign national holding a public office in a Special Administrative Region of a country to bear allegiance to such country. Other members proposed to amend this article to read: ‘When assuming office, the Chief Executive, principal officials, members of the Executive Council, the President and Vice-President of the Legislative Council, the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region and swear allegiance to the People’s Republic of China and the Hong Kong Special Administrative Region’. ‘Other members of the Legislative Council, judges of the courts at all levels

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478 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 30 November 1989 in *Overview of the Drafting Process*, Vol.3, p.908.

and other members of the judiciary must also swear in accordance with law when assuming office'. Some members proposed to revise this article to read: 'When assuming office, the Chief Executive, principal officials and members of the Executive Council must, in accordance with law, swear to uphold the Basic Law and swear allegiance to the People's Republic of China and the Hong Kong Special Administrative Region.' 'When assuming office, members of the Legislative Council of the Hong Kong Special Administrative Region, judges of all levels and other members of the judiciary must, in accordance with law, swear to uphold the Basic Law and swear allegiance to the Hong Kong Special Administrative Region'. Some members suggested that the Basic Law should only stipulate that the Chief Executive must uphold the Basic Law and bear allegiance to the People's Republic of China and the Hong Kong Special Administrative Region, and that this be inserted into BL 47 as Paragraph 1. The Chief Executive should be deleted from BL 103 (which is the subsequent BL 104) and the rest should remain unchanged."<sup>479</sup>

*Minutes of the Eighteenth Meeting of the Subgroup on Political Structure* of 17 to 20 January 1990 suggested that this article be amended by "... adding 'to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China' after 'in accordance with law, swear'."<sup>480</sup> When finalizing the fourth draft, the article was revised according to that suggestion, which was adopted by the NPC as BL 104 in April 1990.

On 28 March 1990, Chairman Ji Pengfei's "Explanations" at a session of the NPC pointed out that Chapter IV on Political Structure

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479 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.909.

480 Ibid.

of the Basic Law stipulates that:<sup>481</sup>

“... when assuming office, the Chief Executive, principal officials, members of the Executive Council and the Legislative Council, judges of the courts at all levels and other members of the judiciary must swear to uphold the Basic Law and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”

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481 *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 National People’s Congress, 28 March 1990).

## Chapter V Economy

### Section 1 Public Finance, Monetary Affairs, Trade, Industry and Commerce

#### Article 105

“The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.”

As the Joint Declaration provides in Article 3(5) that “The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style ... Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.” According to Section VI of Annex I to the Joint Declaration, “Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.”

Drafting materials in *Overview of the Drafting Process*<sup>1</sup> show that drafting of this article had progressed through nine drafts. The provisions of the first to second drafts were basically the same as

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1 *Overview of the Drafting Process*, Vol.3, pp.910-916.

that of the foregoing reference to Section VI of Annex I to the Joint Declaration.<sup>2</sup> The third, fourth and seventh drafts had major changes. Some members of the Drafting Committee suggested that the content in brackets in the first and second drafts be deleted, because they considered that the provisions were too detailed to be in compliance with the style of the Basic Law.<sup>3</sup> After repeated discussions, in order to help reassure investors in Hong Kong, the initial brackets were deleted in the third draft and the content therein was retained to become a part of the fourth draft of the article: “Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.”<sup>4</sup> The fourth draft was also supplemented by the following paragraph: “The investments from outside the Region will be protected by law.”

When the seventh draft was finalized, in addition to private property, it was stipulated that the HKSAR shall also protect the property of legal persons in accordance with law, and that the ownership of enterprises and the investments from outside the Region shall all be protected by law. The eighth and ninth drafts had not

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2 The provisions of the first and the second drafts provided: “Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall all be protected by law.”

3 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee*, and *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, pp.911-912.

4 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987, and Secretariat of the Drafting Committee, *Manuscript of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (revised version of the Contents, Preamble, Chapters 1, 2, 3, 5, 6, 7 and 9 of the General Working Group at its Second Meeting), March 1988 in *Overview of the Drafting Process*, Vol.3, pp.911-912.

undergone any further amendments and were consistent with the current BL 105.

The provisions on the protection of property ownership have been included in Chapter I - General Principles (in the first, second, third and sixth drafts) and Chapter III – Fundamental Rights and Duties of the Residents (in the fourth and fifth drafts). As property rights were fundamental to the important achievements of the Region’s economy,<sup>5</sup> the Subgroup on Economy finally recommended that the provisions on private ownership of property be listed as Article 1 in Chapter V, Economy, stressing that the property of legal persons shall also be protected by law, while Article 6 in Chapter I was revised as “The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.” The drafters considered that by doing so the principle of protecting the property ownership was clarified at a higher level.<sup>6</sup>

When the views were solicited from different sectors of Hong Kong on the *Draft Basic Law*, some thought that the phrase “lawful deprivation” should be followed by “by the government”,<sup>7</sup> while others suggested that the word “deprivation” should be changed to “expropriation”.<sup>8</sup> None of these views was adopted in the final text. The word “deprivation”, which was adopted in the first draft of BL 105, is still used in the present version of the provision.

During the consultation process on the *Draft Basic Law*, one

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5 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.913-915.

6 *Report of the Sub-group on Economy regarding the Amendments to Chapter V* (9 January 1989), published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, p.915.

7 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)(I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.913.

8 *Ibid*, footnote 5, p.914.

view was that it was not an ideal practice to assess the real value of the property, and that, instead, the market value of the property to be expropriated should be assessed and compensation made accordingly. There was also concern that it might cause unnecessary controversy by guaranteeing compensation equal to the real value of the property concerned.<sup>9</sup> Despite dissenting voices, the final wording consistent with Section VI of Annex I to the Joint Declaration was still adopted, namely, “the real value of the property concerned at the time”.

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC:

“The rights, freedoms and duties of Hong Kong residents are prescribed in the draft in accordance with the principle of ‘one country, two systems’ and in the light of Hong Kong’s actual situation. They include specific provisions such as protection of private ownership of property, the freedom of movement and freedom to enter or leave the Region, the right to raise a family freely and protection of private persons’ and legal entities’ property. The draft also provides that the system to safeguard the fundamental rights and freedom of Hong Kong residents shall all be based on the Basic Law.”<sup>10</sup>

## Article 106

“The Hong Kong Special Administrative Region shall have independent finances.

The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People’s Government.

The Central People’s Government shall not levy taxes in the Hong Kong Special Administrative Region.”

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<sup>9</sup> Ibid, pp.914-915.

<sup>10</sup> *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 National People’s Congress, 28 March 1990).

Drafting materials in *Overview of the Drafting Process* show that the content and language of BL 106 remains essentially unchanged throughout the drafting process.<sup>11</sup>

According to Article 3(8) of the Joint Declaration, “The Hong Kong Special Administrative Region will have independent finances. The Central People’s Government will not levy taxes on the Hong Kong Special Administrative Region.” And Section V of Annex I to the Joint Declaration also provides that “The Central People’s Government shall not levy taxes on the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes and they shall not be handed over to the Central People’s Government.”

As recorded in the *Overview of the Drafting Process*, this article attracted many different views throughout its drafting process. Among them, one view was that the financial independence, as stipulated in the Joint Declaration, reflects Hong Kong’s high degree of autonomy, and that the relevant principle should be preserved in the Basic Law. Others believed that it would be difficult for Hong Kong to fully achieve financial independence and it would be inconsistent with BL 105 in *Draft Basic Law for Solicitation of Opinions*, which stipulated “keeping the expenditure within the limits of revenues”.<sup>12</sup> There were proposals that Hong Kong, as part of the PRC, had obligation to pay taxes to the CPG.<sup>13</sup>

Eventually, the article retains the guiding principle of “financial independence” without adopting the proposal to pay taxes to the CPG.

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC: “... the Basic Law stipulates that the Special Administrative Region shall have independent finances, its revenues shall not be

11 *Overview of the Drafting Process*, Vol.3, pp.917-920.

12 Now BL 107.

13 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.919.



handed over to the Central Government, and the Central Government shall not levy taxes in the Region ...”<sup>14</sup>

## Article 107

“The Hong Kong Special Administrative Region shall follow the principle of keeping the expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.”

Drafting materials in *Overview of the Drafting Process*<sup>15</sup> show that the content of this article on the “fiscal budget” of the HKSAR was broadly the same from the first to the second drafts, emphasizing that the Region’s budget should “maintain a basic balance between revenues and expenditures” and that the growth rate of its budget revenues and expenditures should “not exceed the growth rate of GDP in principle”.<sup>16</sup> Starting from the third draft, the following was inserted into the sentence: “follow the principle of keeping the expenditure within the limits of revenues in drawing up its budget.”<sup>17</sup> And from the sixth draft, the requirement to “strive to achieve a fiscal balance, avoid deficits” was further added.<sup>18</sup> This version was later passed as BL 107.<sup>19</sup>

As recorded in the *Overview of the Drafting Process*, this article

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14 *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 National People’s Congress, 28 March 1990).

15 *Overview of the Drafting Process*, Vol.3, pp.921-930.

16 *Overview of the Drafting Process*, Vol.3, pp.921-922.

17 Secretariat of the Drafting Committee, *Manuscript of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (revised version of the Contents, Preamble, Chapters 1, 2, 3, 5, 6, 7 and 9 of the General Working Group at its Second Meeting), March 1988.

18 *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, February 1989.

19 *Overview of the Drafting Process*, Vol.3, pp.923-930.

attracted many different views throughout its drafting process. One view was that the principle of “keeping the expenditure within the limits of revenues, achieving fiscal balance and avoiding deficits” would not only prevent the government from borrowing heavily or imposing high welfare benefits, but also avoid high tax policies, thus enhancing investors’ confidence and safeguarding Hong Kong’s prosperity and stability. Some considered that the relevant principle was outdated and would hinder the rational allocation of resources and the establishment of a just society in Hong Kong, and contravene the provisions under the Basic Law that the HKSAR may manage its financial affairs on its own, thus reducing the flexibility of fiscal policies and restraining the government from managing future financial problems by issuing bonds and borrowing. There were also views that policy provisions should not be incorporated into the Basic Law which had legal status.<sup>20</sup> At the same time, some argued that the principle was fiscally sound, but if incorporated into the Basic Law, it would become legally binding, which might lead to a breach of the Basic Law in the event of a fiscal deficit.<sup>21</sup>

On 28 March 1990, Chairman Ji Pengfei explained at a session of the NPC that “Chapter V ... also stipulates that the Hong Kong Special Administrative Region shall strive to achieve a fiscal balance and avoid deficits in drawing up its budget ...”<sup>22</sup>

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20 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.921-930.

21 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.922.

22 *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 National People’s Congress, 28 March 1990).

## Article 108

“The Hong Kong Special Administrative Region shall practise an independent taxation system.

The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.”

As provided in Section V, Financial System, Annex I to the Joint Declaration,

“The Hong Kong Special Administrative Region shall deal on its own with financial matters, including disposing of its financial resources and drawing up its budgets and its final accounts. The Hong Kong Special Administrative Region shall report its budgets and final accounts to the Central People’s Government for the record.

... The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes and they shall not be handed over to the Central People’s Government. The systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained.”

Drafting materials in *Overview of the Drafting Process*<sup>23</sup> show that this article had progressed through eight drafts, among which the sixth draft had undergone most changes. At the initial stage of the drafting process, Chapter V was divided into several individual articles concerning the taxation system and policies of the HKSAR, covering independent taxation system, low tax policy, and independent formulation of taxation system with the Central Authorities not levying taxes in the Region. The sixth draft combined the independent taxation system, low tax policy and independent formulation of taxation system

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23 *Overview of the Drafting Process*, Vol.3, pp.931-939.

into one article with two paragraphs.

Throughout the drafting process, members of the Drafting Committee and the Consultative Committee and people from different sectors in Hong Kong had different views on the phrase “low tax policy” used in the Joint Declaration. Some believed that the low tax policy would attract foreign investment to Hong Kong and promote local employment and Hong Kong’s prosperity and stability, and accordingly, it would be better to maintain the low tax policy in Hong Kong.<sup>24</sup> Prior to the formulation of the second draft, some members of the Consultative Committee considered that the phrase “low tax policy”, although unclear in meaning, could be included in the article to maintain investors’ confidence and proposed that it might be replaced by “low tax system”.<sup>25</sup> The Visiting Group of Members of the Drafting Committee from the Mainland summarized three kinds of objections before making the sixth draft: (1) this article could be retained, but with substantial modifications in wording; (2) this article should be deleted because it is of policy nature, making it not suitable to be included as a legal provision in Chapter V; (3) the low tax rate was supported in principle, but it still should not be included in this article taking into account that the budget and taxation system would be subject to change and adjustment according to actual situations which might vary.<sup>26</sup> From the first to the eighth drafts, the phrase “low tax policy” was used without variation.

In formulating the sixth draft, the phrase “continue to implement

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24 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.3, p.931.

25 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)* passed by the Executive Committee on 4 November 1987 in *Overview of the Drafting Process*, Vol.3, p.933.

26 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.934.

the low tax policy” was revised to “take the low tax policy previously pursued in Hong Kong as reference”. When the third draft was being prepared, some members of the Drafting Committee had proposed that the meaning of the word “continue” was not clear enough and should be revised. There were also suggestions that the word “continue” be replaced by “as far as possible”, since the low tax was a relative concept,<sup>27</sup> which was not adopted.

Prior to the formulation of the seventh draft, it was suggested by some members of the Consultative Committee that the word “may” be inserted before “take the low tax policy previously pursued in Hong Kong as reference”, “as these are only statements of policy and intention and are not provided for in the Joint Declaration. The insertion of the word ‘may’ adds flexibility to these provisions”.<sup>28</sup> The suggestion was not adopted eventually.

Prior to the formulation of the seventh draft, members of the Consultative Committee also discussed about the binding effect of this article on policies formulated by the government. Some members considered that “The revised provisions of this article no longer require the Hong Kong Special Administrative Region Government to implement a low tax policy, as the *Draft Basic Law* only takes the concept of a low tax policy as a ‘reference’ with weaker binding effect. With this word, the Hong Kong Special Administrative Region Government can enact a high tax policy simply by stating that the original low tax policy is no longer suitable for Hong Kong’s new environment due to changes in the times and actual situations, and can also use these tax revenues because there is no longer a mandatory

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27 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.933.

28 Consultative Committee, *Collection of Views of the Special Group on Economy of Consultative Committee for the Basic Law regarding Chapter V of the Draft Basic Law*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report*, Vol.1, November 1989 in *Overview of the Drafting Process*, Vol.3, p.937.

requirement that government revenues shall not grow more than its gross domestic product.”<sup>29</sup>

## Article 109

“The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.”

“The Hong Kong Special Administrative Region shall retain the status of an international financial centre” is one of the basic policies of the PRC towards Hong Kong as provided in the text and Annex I to the Joint Declaration.<sup>30</sup>

Drafting materials in *Overview of the Drafting Process*<sup>31</sup> show that the drafting of this article had progressed through eight drafts, among which the sixth draft had major changes in its wording. Its content kept roughly the same from the first to third drafts, of which the third draft read “The Government of the Hong Kong Special Administrative Region shall provide the necessary conditions and take appropriate measures for the maintenance of the status of Hong Kong as an international financial centre.” In the fourth and fifth drafts, “necessary” and “appropriate” were deleted. From the sixth draft onwards, the phrase “provide conditions and take measures” was replaced with “provide an appropriate economic and legal environment”. The sixth to eighth drafts remained the same.

As for the changes in the first half of this article, it was considered

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29 *Constitutional Economics and the Provisions on Economy in the Basic Law (Draft)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.2 – Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.937.

30 Article 3(7) of the Joint Declaration, and paragraph 1, Section VII of Annex I to the Joint Declaration.

31 *Overview of the Drafting Process*, Vol.3, pp.940-943.

by the members of the Consultative Committee that the phrase “provide the necessary conditions and take appropriate measures” was too general to be included when the first draft was formulated.<sup>32</sup>

Also, the drafting materials in *Overview of the Drafting Process* show that there was a discussion when making the sixth draft as to whether this article should be retained in the Basic Law. Members of the Consultative Committee considered that “some economic policies have to be adapted to the changing circumstances and change accordingly”<sup>33</sup> and this article “ignores the need for contingency in the event of severe economic downturn”.<sup>34</sup> It was also considered that “the status of the ‘international financial centre’ could not be secured simply by measures taken by the HKSARG. According to the present provisions of this article, any change in the status of an ‘international financial centre’ would constitute a breach of the Basic Law”,<sup>35</sup> so this article should not be included in the Basic Law. The views in favor of retaining this article included: “It is not appropriate to delete this article as it concerns the continued prosperity and stability of Hong Kong’s economy and is also stipulated in the Joint Declaration”; “Although these provisions may affect the flexibility of the HKSARG, they should be retained, after weighing up the gains and losses, as a free and outward-looking economy is the lifeblood of Hong Kong’s survival”.<sup>36</sup> Another view was that “although this article is a policy provision rather than a legal provision, it has a stabilizing effect and

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32 Special Group on Finance, Business, and Economy, *Final Report on Finance, Taxation, Monetary System and Principles of the Economic System* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.941.

33 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.942.

34 Ibid.

35 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.3, p.942.

36 Ibid, footnote 33.

should be included in an annex”.<sup>37</sup>

After the revision of the sixth draft, members of the Consultative Committee still considered that the wording “The Government of the Hong Kong Special Administrative Region shall provide economic and legal environment” too broad and imprecise.<sup>38</sup> In spite of this, no amendment was made in this regard in the seventh or eighth drafts.

## Article 110

“The monetary and financial systems of the Hong Kong Special Administrative Region shall be prescribed by law.

The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law.”

As provided in paragraphs 1 and 2 of Section VII of Annex I to the Joint Declaration:

“The Hong Kong Special Administrative Region shall retain the status of an international financial centre. The monetary and financial systems previously practised in Hong Kong, including the systems of regulation and supervision of deposit taking institutions and financial markets, shall be maintained.

The Hong Kong Special Administrative Region Government may decide its monetary and financial policies on its own. It shall safeguard the free operation of financial business and the free flow of capital within, into and out of the Hong Kong Special Administrative Region.

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37 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.942.

38 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.943.



No exchange control policy shall be applied in the Hong Kong Special Administrative Region. Markets for foreign exchange, gold, securities and futures shall continue.”

Drafting materials in *Overview of the Drafting Process*<sup>39</sup> show that the drafting of this article had progressed through eight drafts. At the initial stage of the drafting process, the content in Chapter V on monetary and financial systems, policies, regulation and supervision were presented in several separate articles. They were merged into one single article divided into two paragraphs in the sixth draft. The content and wording of this article were also amended. When the second draft of this article was finalized, the then BL 109 stated that the HKSAR “shall, on its own, formulate monetary and financial systems”. It was changed to be “the monetary and financial systems shall be prescribed by law” in the third draft. In addition, it was stated in the first to fifth drafts of this article that the HKSAR “shall continue to pursue free and open monetary and financial policies”. This sentence was deleted in the sixth draft and replaced by the first sentence of Paragraph 2 of the article, that is, “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies”.

At an early stage of the drafting process of this article, members of the Consultative Committee agreed on the proposals in relation to the financial system. Those proposals relating to this article included “a sound banking regulatory system based on international banking principles should be established” and “the Government of the Hong Kong Special Administrative Region should maintain adequate prudential supervision over the financial sector (e.g. insurance, securities, banking, futures and other financial institutions) to ensure that Hong Kong’s position as an advanced financial centre is not adversely affected and that English is preferred as the operating language of the sector”.<sup>40</sup>

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39 *Overview of the Drafting Process*, Vol.3, pp.944-948.

40 *Progress Report of the Special Group on Finance, Business, and Economy*, 29 August 1986 (Documents of the Second Plenary Session of the Consultative Committee, 30 August 1986) in *Overview of the Drafting Process*, Vol.3, p.945.

Prior to the formulation of the second draft of this article, a member of the Drafting Committee proposed several amendments, one of which was to amend the first draft of Article 12 by replacing the sentence “The Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial systems” with “The Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies”. The reason being that the word “policies” was used in Annex I to the Joint Declaration. He also proposed to amend the first draft of Article 14 by replacing the sentence “the Government of the Hong Kong Special Administrative Region shall safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law” with “the monetary and financial systems previously practised in Hong Kong, including the systems of regulation and supervision of deposit taking institutions and financial markets, shall be maintained”. The wording of the revised draft was based on Annex I to the Joint Declaration.<sup>41</sup> Such proposals were not adopted in the second draft of the article though.

With regard to Paragraph 1 of this article which read “The monetary and financial systems of the Hong Kong Special Administrative Region shall be prescribed by law.”, members of the Consultative Committee received views that the revised provision “states that the monetary and financial systems shall be prescribed by law and this formulation is acceptable as it is more flexible and could leave room for reform of the systems”.<sup>42</sup>

The phrase “shall continue to pursue free and open monetary and financial policies” was used in the first to fifth drafts of the article.

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41 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987, in *Overview of the Drafting Process*, Vol.3, p.945.

42 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.947.

Prior to the formulation of the sixth draft of the article, there were views that there was no need to use the phrase “continue to” on the grounds that “in the fast-changing circumstances of today’s financial sector, the provision should be written more flexibly”.<sup>43</sup>

Prior to the finalization of the sixth draft of the article, members of the Drafting Committee and Consultative Committee received objections to the use of the phrase “free and open”. Members of the Consultative Committee received views that “the phrase ‘free and open financial policies’ was correct in theory, but the inclusion of the word ‘monetary’ was highly questionable. This year, the Hong Kong Government actually realized that the over-liberal regulation of the financial sector had caused social and economic fluctuations and therefore had implemented stricter supervision and regulation. Accordingly, it is hard to say whether it would still be hailed as ‘free and open financial policies’ in the future. Also, monetary and financial policies are closely related, for example, excessive growth in credit will increase the instability of the financial sector, so the coordination of the two types of policies cannot be easily achieved by being ‘free and open’. Bundling the two types of policies with different concepts and objectives can cause problems unless they are expressed in highly professional language.”<sup>44</sup>

Members of the Drafting Committee also received similar views that “the current monetary and financial policies cannot simply be described as ‘free and open’. Currency should be controlled. It is suggested that the first sentence should be replaced with ‘The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies’”.<sup>45</sup> This suggestion was adopted and reflected in the sixth draft of the article.

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43 Ibid.

44 Ibid, footnote 42.

45 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.946.

## Article 111

“The Hong Kong dollar, as the legal tender in the Hong Kong Special Administrative Region, shall continue to circulate.

The authority to issue Hong Kong currency shall be vested in the Government of the Hong Kong Special Administrative Region. The issue of Hong Kong currency must be backed by a 100 per cent reserve fund. The system regarding the issue of Hong Kong currency and the reserve fund system shall be prescribed by law.

The Government of the Hong Kong Special Administrative Region may authorize designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency will be soundly based and that the arrangements for such issue are consistent with the object of maintaining the stability of the currency.”

As stipulated in paragraph 3 of Section VII of Annex I to the Joint Declaration:

“The Hong Kong dollar, as the local legal tender, shall continue to circulate and remain freely convertible. The authority to issue Hong Kong currency shall be vested in the Hong Kong Special Administrative Region Government. The Hong Kong Special Administrative Region Government may authorize designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency will be soundly based and that the arrangements for such issue are consistent with the object of maintaining the stability of the currency. Hong Kong currency bearing references inappropriate to the status of Hong Kong as a Special Administrative Region of the People’s Republic of China shall be progressively replaced and withdrawn from circulation.”

Drafting materials in *Overview of the Drafting Process*<sup>46</sup> show that at the initial stage of the drafting process, the retention of legal

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46 *Overview of the Drafting Process*, Vol.3, pp.949-955.

tender in Hong Kong, as well as the issue of currency and the reserve system, were presented in two separate articles in Chapter V of the Structure of the Basic Law. In the sixth draft, these articles were merged into one single article divided into three paragraphs. During the drafting process, the content of this article had not been significantly modified. The fifth draft of BL 114 read as “The Hong Kong dollar, as the legal tender in the Hong Kong Special Administrative Region, shall continue to circulate and remain freely convertible”, of which the phrase “and remain freely convertible” was deleted in the sixth draft. In addition, the sentence “there must be a reserve fund of not less than 100 per cent that is freely convertible into foreign currencies” in the fifth draft of BL 115 was deleted in the sixth draft, but the sentence “the issue of Hong Kong currency must be backed by a 100 per cent reserve fund” was added in the seventh draft.

Prior to the finalization of the sixth draft of the article, members of the Consultative Committee received views saying that it was not appropriate to specify in the Basic Law that Hong Kong dollar should be freely convertible as it was not up to Hong Kong unilaterally to decide whether the Hong Kong dollar could be converted freely.<sup>47</sup> The phrase “and remain freely convertible” in the fifth draft of the article was deleted in the sixth draft. Prior to the finalization of the seventh draft, there were views that apart from maintaining the stability of Hong Kong currency, its “convertibility” should also be maintained, and therefore the phrase “and remain freely convertible” should be retained.<sup>48</sup> Such phrase, however, was not included in the sixth to eighth drafts of the article.

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47 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.952.

48 *Constitutional Economics and the Provisions on Economy in the Basic Law (Draft)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.2 – Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.954.

At an early stage of the drafting of the Basic Law, there were views that the word “adequate” in the original text published by the members of the Drafting Committee which read: “the issue of Hong Kong currency must be backed by an adequate reserve fund” was not clear enough. It was suggested that the phrase “a currency reserve fund of not less than 100 per cent” should be used instead.<sup>49</sup> Prior to the formulation of the second draft, some members of the Drafting Committee also had reservation about the use of the word “adequate” in the first draft.<sup>50</sup> This sentence was finally changed to “the issue of Hong Kong currency must be backed by a reserve fund of not less than 100 per cent of freely convertible foreign currencies” in the second draft, and remained unchanged through the fifth draft.

Prior to the finalization of the sixth draft, members of the Consultative Committee received views that the requirement of “100 per cent” reserve fund was inflexible and not compatible with the actual situation at that time as the relevant Ordinance did not require the issue of Hong Kong currency to be backed by convertible foreign currencies. There was doubt as to whether it was necessary to add a provision on reserve fund, given that the article had already stated that the issue of the Hong Kong currency should be soundly based and consistent with the object of maintaining the stability of the currency.<sup>51</sup> The provision on reserve fund was deleted in the sixth draft.

Prior to the finalization of the seventh draft of the article, some members of the Special Group on Economy of Consultative Committee suggested the retention of the provisions relating to reserve fund mainly for the following three reasons: (1) the deletion of the

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49 Special Group on Finance, Business, and Economy, *Final Report on Finance, Taxation, Monetary System and Principles of the Economic System* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.950.

50 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.950.

51 *Ibid*, footnote 47.

provision relating to reserve fund in the sixth draft was probably because this provision was seen as an unnecessary restriction and that the flexibility required to maintain the exchange value when trading in Hong Kong dollars was not taken into consideration; (2) the scale of Hong Kong's economy was not large and it was necessary to uphold the principle of holding not less than 100 per cent reserve fund. Even if it was necessary to implement measures in the future, such as excess issue and fiduciary issue, which would require changes of the existing reserve fund system, it might not be impracticable to amend the Basic Law at that time; (3) holding 100 per cent reserve fund was essential to Hong Kong's economic prosperity and reserve fund had been used in the issuance of currency in Hong Kong for many years. To this end, it was suggested that the fifth draft of BL 115 could be reinstated and the phrase "foreign currencies" could be deleted, such that foreign currencies and Hong Kong currency could coexist as reserve funds.<sup>52</sup> According to the *Minutes of the Eleventh Meeting of the Sub-group on Economy* on 18 December 1989,<sup>53</sup> members of the Drafting Committee agreed that most of the provisions of Chapter V in the *Draft Basic Law*, which were passed in the Eighth Plenary Session of the Drafting Committee, were satisfactory. Meanwhile, they made the following amendment after examining the views of people from different sectors in Hong Kong and the Mainland: in Paragraph 2 of this article, the sentence, "the issue of Hong Kong currency must be backed by a 100 per cent reserve fund," was to be inserted after the sentence, "the authority to issue Hong Kong currency shall be vested in the Government of the Hong Kong Special Administrative Region."<sup>54</sup> After the amendment, the provision relating to reserve fund in the seventh draft became "the issue of Hong Kong currency must

52 Consultative Committee, *Collection of Views of the Special Group on Economy of Consultative Committee for the Basic Law regarding Chapter V of the Draft Basic Law*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report*, Vol.1, November 1989 in *Overview of the Drafting Process*, Vol.3, p.953.

53 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.955.

54 *Overview of the Drafting Process*, Vol.3, p.955.

be backed by a 100 per cent reserve fund”. It remained unchanged in the eighth draft and was passed by the NPC and adopted as BL 111 in April 1990.

## Article 112

“No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region. The Hong Kong dollar shall be freely convertible. Markets for foreign exchange, gold, securities, futures and the like shall continue.

The Government of the Hong Kong Special Administrative Region shall safeguard the free flow of capital within, into and out of the Region.”

As stipulated in paragraph 7 of Article 3 of the Joint Declaration:

“The Hong Kong Special Administrative Region will retain the status of an international financial centre, and its markets for foreign exchange, gold, securities and futures will continue. There will be free flow of capital. The Hong Kong dollar will continue to circulate and remain freely convertible.”

Section VII of Annex I to the Joint Declaration provides that:

“The Hong Kong Special Administrative Region Government may decide its monetary and financial policies on its own. It shall safeguard the free operation of financial business and the free flow of capital within, into and out of the Hong Kong Special Administrative Region. No exchange control policy shall be applied in the Hong Kong Special Administrative Region. Markets for foreign exchange, gold, securities and futures shall continue.”

Drafting materials in *Overview of the Drafting Process*<sup>55</sup> show that although the drafting of this article had progressed through eight drafts, there was no significant changes in the content and wording of the text. In the second to fifth drafts, the content on foreign exchange

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<sup>55</sup> *Overview of the Drafting Process*, Vol.3, pp.956-961.



policy and capital flow were presented in two separate articles, and then were merged into one single article with two paragraphs in the sixth draft. In addition, the sentence “the Hong Kong dollar shall be freely convertible” was included in this article from the sixth draft onwards.

The last sentence of BL 110 of the second draft read “Markets for foreign exchange, foreign currency, gold, securities and futures shall continue”. The phrase “foreign currency” was removed from the third draft. Even before the formulation of the first draft, some members of the Drafting Committee expressed the view that there was no need to add “foreign currency” separately because it had already been covered by “foreign exchange”.<sup>56</sup> Prior to the finalization of the second draft of the article, some members of the Drafting Committee also suggested that the phrase “foreign currency” be deleted because it was inconsistent with the Joint Declaration.<sup>57</sup> During the drafting of the third draft of the article, some members of the Drafting Committee objected to the deletion of the phrase “foreign currency”, arguing that “generally speaking, foreign exchange does include foreign currency, but in the case of Hong Kong, there are differences in the practice and conceptual understanding of the two phrases. Therefore, they can be both included in the article”. Some members of the Drafting Committee also suggested that the phrase “including foreign currency” be added in brackets after “foreign exchange”.<sup>58</sup>

Drafting materials in *Overview of the Drafting Process* also show

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56 *Progress Report of the Sub-group on Economy*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.956.

57 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.957.

58 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.957.

that when members of the Drafting Committee were drafting the third draft, “many members suggested that the word ‘commodity’ be added before the word ‘futures’ in this article to clarify its meaning”.<sup>59</sup> Such suggestion was not adopted.

This article stipulates that “No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region”. Prior to the finalization of the sixth draft of the article, members of the Consultative Committee received views that this provision was impractical and would pose difficulties for the HKSARG when formulating fiscal policies. Accordingly, there were suggestions that this sentence could be deleted, or could be changed to: “The Hong Kong Special Administrative Region shall, in principle, not implement foreign exchange control policies. Markets for foreign exchange, gold, securities and futures shall continue. However, in cases of emergency, for example, if consented by three-quarters of the members of the Legislative Council and three-quarters of the members of the Executive Council and the Chief Executive, the markets for foreign exchange, gold, securities and futures can be temporarily closed.” But there were also views that this article should not be deleted. The reasons being that there was clear stipulation in the Joint Declaration, and this article could ensure continued economic prosperity in the future, the deletion might lead to decline in confidence and might even cause panic.<sup>60</sup>

After the sixth draft of this article was finalized, which was the then BL 111 of the *Draft Basic Law*, the document *Memorandum on BL 111 and 114 of the Draft Basic Law*, which contained discussion of members of the Consultative Committee, became the reference materials for members of the Drafting Committee for formulating the seventh draft of the article. Its contents are as follows:

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59 Ibid.

60 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.958-959.

“1. The problems found in BL 111 and BL 114 are common to many of the provisions of Chapter V. The crux of the problems is that the Basic Law needs to stand up to the rigorous standards of the interpretation system under common law. If the Basic Law stipulates that the Government of the Hong Kong Special Administrative Region bears certain legal responsibilities, it will constitute a corresponding right according to the concept of common law. The common law protects the legitimate interests of businessmen. Accordingly, if the Basic Law stipulates that the government shall be responsible for ensuring the free flow of capital, the businessmen have reason to believe that the government will not legislate against the free flow of capital, which would harm their interests. On the face of it, this right may be enforced by the courts by way of judicial review (for the legal provisions, see Rule 53 of the Rules of the Supreme Court).

2. Such right is, of course, not absolute, and it is limited by at least two principles.

(i) Only legitimate interests are protected. Therefore, drug dealers cannot take legal actions on the ground that the *Drug Trafficking (Recovery of Proceeds) Bill* is an *ultra vires* legislative exercise (as the Bill contravenes BL 111 and 114).

(ii) It is self-evident that private interests may be affected from time to time in the exercise of legislative power. The government's responsibility is to protect the welfare of the Hong Kong community as a whole, not to make laws only for the business community or certain members of the community. Therefore, it is also self-evident that in the Basic Law, laws passed by the legislature of the Hong Kong Special Administrative Region for the purpose of maintaining peace, order and good governance in Hong Kong as a whole may also be detrimental to certain members of the community or infringe upon their freedom.

3. The provisions of the Basic Law (such as BL 111 and 114) are designed to ‘build’ the ‘capitalist system and life-style’ as stipulated in the Joint Declaration. These ‘building materials’ distinguish

Hong Kong's system from that of the Mainland and actually reflect the concept of 'one country, two systems'. For this reason, many members of the Consultative Committee did not agree to remove these provisions. But on the other hand, would the retention of these provisions result in the following situation? After 1997, attempts by people with vested interests to obstruct the passage of new legislation could lead to entanglement between the courts and the Government of the Hong Kong Special Administrative Region in 'constitutional law' proceedings.

4. The solution to the above problems depends in part on the practice of the courts. A more decisive interpretation of the law would allow the court to declare that: 'Taking into account the principal objectives set out by the two sovereign Governments in the Sino-British Joint Declaration, namely to ensure the continued stability and prosperity of Hong Kong, the laws used to achieve these objectives must be valid on the face of it. The court cannot only focus on a particular provision of the Basic Law and lose sight of the principal objectives of this constitutional document, which are to empower the legislature to pass laws for the sake of maintaining peace, order and good governance of the community as a whole. Any appeal by a section of the community against a law passed by the legislature, especially in defence of the vested interests of certain people, must be dealt with in accordance with the above principles.'

5. If the courts adopt such approach, it could be ensured that only in a limited number of cases would applicants be able to obtain leave to commence judicial review proceedings against the government under rule 1(2) of Order 53 of the *Rules of the Supreme Court*.

6. It is believed that if the *Draft Basic Law* can be amended in the following two ways, it will be of great benefit to the implementation of Item 4 above:

(i) Include a 'principal clause' in the Basic Law: The legislature of the Hong Kong Special Administrative Region shall formulate laws for peace, order and good governance in the HKSAR (except for

matters relating to foreign affairs and defence).

(ii) Incorporate Section 19 of the *Interpretation and General Clauses Ordinance* (Cap.1) into the Basic Law: An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.”<sup>61</sup>

### Article 113

“The Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the government of the Region, primarily for regulating the exchange value of the Hong Kong dollar.”

Section VII of Annex I to the Joint Declaration provides that:

“The Exchange Fund shall be managed and controlled by the Hong Kong Special Administrative Region Government, primarily for regulating the exchange value of the Hong Kong dollar.”

Drafting materials in *Overview of the Drafting Process*<sup>62</sup> show that there were proposals from different people for amendments of BL 113 during the drafting process. Nevertheless, the text of this article remained unchanged in the eight drafts and was the same as the final version of the article.

There were views that this article only mentioned the HKSARG’s ability to manage and control the exchange fund, but did not specify its ownership. Members of the Drafting Committee from the Mainland explained that the sentence “the Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the

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61 Published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report*, Vol.1, November 1989 in *Overview of the Drafting Process*, Vol.3, p.960.

62 *Overview of the Drafting Process*, Vol.3, pp.962-964.

Region” had already implied its ownership.<sup>63</sup>

During the drafting process, some members of the Drafting Committee from the Mainland considered it necessary to make regular disclosure of the management, operation and even conditions of assets of the exchange fund to the LegCo and the public.<sup>64</sup> Members of the Consultative Committee received suggestions that the following sentences could be inserted in this article, namely “the profits, losses and balances of the exchange fund shall be announced in the Legislative Council once a year, together with the budget proposal, to facilitate public monitoring”, or “an annual report of the exchange fund, including its management development and conditions of assets, shall be submitted to the Legislative Council every year”.<sup>65</sup>

Members of the Consultative Committee also received views that this article provided that the exchange fund was mainly used to regulate the Hong Kong dollar and it was a policy provision, so it should not be included in the Basic Law. For those members of the Consultative Committee who were in favour of keeping the article, they considered that this article was consistent with the Joint Declaration and made provision for a prerequisite for maintaining the HKSAR as an international financial centre.<sup>66</sup>

Prior to the finalization of the seventh draft of the article, members of the Consultative Committee received objection to the sentence “primarily for regulating the exchange value of the Hong Kong dollar”, arguing that the primary function of the management and control of the exchange fund was to maintain the stability and

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63 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)*, in *Overview of the Drafting Process*, Vol.3, p.963.

64 Ibid.

65 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.963.

66 Ibid.

convertibility of the Hong Kong dollar, not to regulate its exchange value.<sup>67</sup>

## Article 114

“The Hong Kong Special Administrative Region shall maintain the status of a free port and shall not impose any tariff unless otherwise prescribed by law.”

As stipulated in paragraph 6 of Article 3 of the Joint Declaration:

“The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.”

According to the relevant provisions of Section VI of Annex I to the Joint Declaration,

“The Hong Kong Special Administrative Region shall maintain the capitalist economic and trade systems previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall decide its economic and trade policies on its own. ... The Hong Kong Special Administrative Region shall retain the status of a free port and continue a free trade policy, including the free movement of goods and capital. The Hong Kong Special Administrative Region may on its own maintain and develop economic and trade relations with all states and regions.

The Hong Kong Special Administrative Region shall be a separate customs territory ...”

Drafting materials in *Overview of the Drafting Process*<sup>68</sup> show that although the drafting of this article had progressed through eight drafts, there was no significant changes in the content and wording of the text. In the first to fifth drafts, this article was divided into two

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67 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.964.

68 *Overview of the Drafting Process*, Vol.3, pp.965-967.

paragraphs. In the fifth draft, the first sentence read: “The Hong Kong Special Administrative Region shall continue to be a free port”; and the second sentence read: “The Hong Kong Special Administrative Region shall not impose any tariff unless otherwise prescribed by law.” From the sixth draft onwards, the two sentences were merged into one single article and the phrase, “the Hong Kong Special Administrative Region”, in the latter sentence was deleted. In the sixth draft, there was also a change in wording, where the phrase “continue to be a free port” in the first sentence of the third to fifth drafts was changed to “maintain the status of a free port” from the sixth draft onwards.

As to some views about the reference to maintaining the status of a free port in the article, *Overview of the Drafting Process* contains *Extract of Comments on the Basic Law in the Hong Kong Press* published by the Secretariat of the Drafting Committee in February 1987, where commentary published in *Ta Kung Pao* on 20 June 1986 mentioned:

“Hong Kong’s status as a free port and the free flow of capital should be maintained beyond 1997. The government’s current policy of non-interventionism towards the business sector and low tax system should also be retained in the future. The current procedures for import and export of goods are flexible and do not need to be changed. The government’s current import controls on certain goods should also be retained if they are beneficial to the economy of Hong Kong. ...”<sup>69</sup>

In the first draft of the article, the first sentence was written as “The Hong Kong Special Administrative Region shall be a free port”. When the second draft of the article was revised, some members of the Drafting Committee suggested that the word “continue” be added to this sentence to better reflect the original intention of Annex I to the Joint Declaration.<sup>70</sup> The word “continue” was ultimately included in

69 Ibid, p.965.

70 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987, in *Overview of the Drafting Process*, Vol.3, p.965.



the third draft.

There were discussions by different people on the definition of “free port” during the drafting process. According to the *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)* published by the Secretariat of the Drafting Committee in August 1988, there were views that Hong Kong was not entirely a free port as it imposed tariff. Accordingly, it was suggested that this article could clearly state that “It shall be a free port to such an extent as it is now and that the Government of the Hong Kong Special Administrative Region shall decide which items should be subject to tariff and which should not”.<sup>71</sup> Members of the Consultative Committee also received views that “this article contradicts itself as a free port will not impose any tariff”, and there was suggestion that the definition of “free port” could be annotated.<sup>72</sup> From the sixth draft onwards, the first sentence of this article became “The Hong Kong Special Administrative Region shall maintain the status of a free port”, where the wording used was more consistent with that of the relevant provisions in the Joint Declaration.

When BL 114 was revised, members of the Consultative Committee received views that this article involved a policy issue and should not be stipulated in the Basic Law, and that the HKSARG should make decisions in light of the circumstances.<sup>73</sup> In addition, there were views that the phrase “unless otherwise prescribed by law” would enable the HKSARG to do whatever it wanted with regard to tariff. Accordingly, there was suggestion that this article could be amended as follows: “The Hong Kong Special Administrative Region shall maintain the status of a free port and shall not impose any tariff

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71 *Overview of the Drafting Process*, Vol.3, p.966.

72 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.966.

73 *Ibid.*

except as required by the legislation to carry out customs inspection.”<sup>74</sup> Those in favour of the inclusion of this article in the Basic Law believed that this article, which established Hong Kong’s status as a free port, was essential and necessary for Hong Kong’s economy and would give investors greater confidence.<sup>75</sup>

## Article 115

“The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.”

According to Section VI, Annex I to the Joint Declaration,

“The Hong Kong Special Administrative Region shall maintain the capitalist economic and trade systems previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall decide its economic and trade policies on its own. ...

The Hong Kong Special Administrative Region shall retain the status of a free port and continue a free trade policy, including the free movement of goods and capital. The Hong Kong Special Administrative Region may on its own maintain and develop economic and trade relations with all states and regions.”

Drafting materials in *Overview of the Drafting Process*<sup>76</sup> show that this article had progressed through eight drafts. At the earlier drafting stage, the structure of articles separated the concepts of free trade policy and free movement of goods and capital, and made provisions for the two concepts by two articles, or one article with two

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<sup>74</sup> *Constitutional Economics and the Provisions on Economy in the Basic Law (Draft)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.2 – Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.967.

<sup>75</sup> Ibid, footnote 72.

<sup>76</sup> *Overview of the Drafting Process*, Vol.3, pp.968-973.

paragraphs. In the sixth draft, they were merged into one article, which was passed by the NPC as BL 115 in April 1990.

As for the content and wording, before the first draft was finalized, some members of the Drafting Committee held that the term “policy of free foreign trade” used in the provisions then for discussion was too vague and not a conventional term in economics and could have different meanings, such as “free trade policy” or referring to “conduct foreign trade freely”. Similarly, some members considered that the term “intangible assets” was not a conventional term in economics and could mean “intangible trade” or “intellectual assets”, and that if the meaning of “intellectual assets” was included, this article would be contrary to the view of the working group. The member believed that intellectual assets should not be allowed to be transferred freely and the HKSARG had obligation to protect copyrights, patents and registrations in the HKSAR. Members of the Drafting Committee considered that the trade policy provisions should be redrafted<sup>77</sup> and that the HKSAR’s status as an independent economy was a principle of the Joint Declaration, such independence should be safeguarded by the Basic Law by containing more detailed provisions.<sup>78</sup>

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77 As proposed by the members of the Drafting Committee, the trade policy provisions should be redrafted as follows:

(1) The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard a “free market”, which is characterized by free enterprise, minimal government intervention, no foreign exchange control, free port, free movement of capital, etc.

(2) The Hong Kong Special Administrative Region shall safeguard intellectual assets such as copyright, patents and registration.

(3) The Government of the Hong Kong Special Administrative Region shall have the right to negotiate with foreign governments for the purpose of obtaining trading rights and interests, provided that such negotiations are not contrary to China’s sovereignty in foreign affairs.

(4) There were views that the following provision was preferred: The Hong Kong Special Administrative Region Government shall decide its economic and trade policies on its own. Special Group on Finance, Business, and Economy, *Final Report on Policy regarding Industry and Commerce, Free Trade, and Policy regarding Agriculture and Fishery* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, pp.968-969.

78 Ibid, p.968.

Prior to the finalization of the third draft, some members of the Drafting Committee proposed to add “Foreign investments shall be protected by law” to this article,<sup>79</sup> which was adopted and reflected in the text of the third draft. Before finalizing the sixth draft, however, different people proposed to deal with this provision separately. The Visiting Group of Members of the Drafting Committee from the Mainland held that “This article is not sufficient to protect foreign capital and should be dealt with separately or put in the General Principles after Article 6”.<sup>80</sup> Other Mainland people also considered that “it can be made into a separate clause to provide that investment by Hong Kong residents and foreign investment should be treated alike, i.e. the so-called ‘national treatment’”.<sup>81</sup> This sentence was ultimately removed from the sixth draft.

Before the sixth draft was made, some members of the Consultative Committee proposed to change the term “intangible assets” to simply “assets”.<sup>82</sup> However, the term “intangible assets” was used throughout the first to eighth drafts and had never been adjusted.

In addition, before the sixth draft was finalized, some members of the Consultative Committee said that the words “free and open”, which were used in many articles in Chapter V, lacked explicit explanation, and there was inherent contradiction between such wording and the

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79 *Summary of the Amendments to the Articles Made by the General Working Group*, April 1988, published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.3, pp.969-970.

80 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.970.

81 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.3, p.970.

82 *Opinion from Members of the Consultative Committee from the Industrial, Commercial and Professional Sectors on Chapter V - Economy of the Draft Basic Law for Solicitation of Opinions* in *Overview of the Drafting Process*, Vol.3, p.970.

word “policy”. They should be distinguished and clearly explained.<sup>83</sup>

Other members said that the first sentence of this article in the fifth draft, “the Hong Kong Special Administrative Region shall continue to pursue a free foreign economic and trade policy”, gave an impression that domestic trade might not be free, and therefore proposed to amend it to: “the Hong Kong Special Administrative Region shall continue to pursue the policy of free trade and of free foreign economic relations”.<sup>84</sup> At last, the first sentence of this article was amended in the sixth draft to read: “the Hong Kong Special Administrative Region shall pursue the policy of free trade”, which remained unchanged thereafter.

Some views collected by the Consultative Committee held that this article was a policy provision and it was not practical to write it into the Basic Law and to make mandatory provisions on it, and that such matter should be decided by the HKSARG in light of the actual circumstances. It was proposed to put this article in an annex. But those in favor of keeping this article argued that the policy of free trade described therein was a major factor contributing to Hong Kong’s prosperity and stability and must be maintained.<sup>85</sup>

On 28 March 1990, Chairman Ji Pengfei made the following explanation at a session of the NPC:

“... As for foreign trade, the draft Basic Law stipulates that all investments from outside the Region shall be protected by law, and the free movement of goods, intangible assets and capital shall be

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83 Consultative Committee, *Collection of Views of the Special Group on Economy of Consultative Committee for the Basic Law regarding Chapter V of the Draft Basic Law (for solicitation of opinions)*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.1, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.970-971.

84 Ibid, footnote 82.

85 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.971.

safeguarded ...”<sup>86</sup>

## Article 116

“The Hong Kong Special Administrative Region shall be a separate customs territory.

The Hong Kong Special Administrative Region may, using the name ‘Hong Kong, China’, participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.

Export quotas, tariff preferences and other similar arrangements, which are obtained or made by the Hong Kong Special Administrative Region or which were obtained or made and remain valid, shall be enjoyed exclusively by the Region.”

As stipulated in Article 3(6) of, and Section VI of Annex I to the Joint Declaration:

“(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.”

“The Hong Kong Special Administrative Region shall be a separate customs territory. It may participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Hong Kong Special Administrative Region shall be enjoyed exclusively by the Hong Kong Special Administrative Region.”

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<sup>86</sup> *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 National People’s Congress, 28 March 1990).

This article had progressed through eight drafts.<sup>87</sup> In the first and second drafts, the parts concerning export quotas and tariff preferences read: “Export quotas, tariff preferences and other similar arrangements, which are obtained or made by the Hong Kong Special Administrative Region or which were obtained or made and remain valid, in accordance with the international agreements to which it was or is a party, shall be enjoyed exclusively by the Region.” Subsequently, it was proposed in the Drafting Committee that the phrase, “in accordance with the international agreements to which it was or is a party”, be deleted,<sup>88</sup> hence that phrase did not appear in the third draft or in subsequent text.

Drafting materials in *Overview of the Drafting Process* show that there were opinions questioning whether the HKSAR could manage its own customs. They believed that if the customs authority was not an independent department, it would affect the introduction of high technology into Hong Kong after 1997.<sup>89</sup> Some members of the Drafting Committee from the Mainland stated in their explanatory note on this article that the parties to the General Agreement on Tariffs and Trade, China and Britain had already agreed that Hong Kong could be a separate customs territory and could participate in that Agreement as a member. Being a separate customs territory meant that Hong Kong was separated from the country as a whole in terms of tariff, and the future Beijing General Tariff Office would not have a superior-subordinate relationship with Hong Kong customs.<sup>90</sup>

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87 *Overview of the Drafting Process*, Vol.3, pp.974-978.

88 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.975.

89 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.976.

90 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)*, in *Overview of the Drafting Process*, Vol.3, p.976.

As to export quotas, many people were concerned about what would happen if foreign governments mixed the export quotas of Hong Kong's textiles with those of the Mainland and only gave the quotas to the PRC as one unit. Members of the Drafting Committee from the Mainland explained that China would not monopolize the quotas without considering Hong Kong's situation. It was said that if there were bilateral meetings in the future discussing quotas or dealing with other issues, China could, in light of the practice of the British delegation at that time, include representatives of Hong Kong as members of delegation and they could express their views in the name of "Hong Kong, China".<sup>91</sup>

### Article 117

"The Hong Kong Special Administrative Region may issue its own certificates of origin for products in accordance with prevailing rules of origin."

Section VI, Annex I to the Joint Declaration provides that: "The Hong Kong Special Administrative Region shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin."

Drafting materials in *Overview of the Drafting Process*<sup>92</sup> show that this article had progressed through eight drafts. In the first to fifth drafts, this article read: "The Hong Kong Special Administrative Region may issue its own certificates of origin for local products in accordance with prevailing rules of origin." The word "local" was deleted in the sixth draft and thereafter.<sup>93</sup>

During the consultation on the *Draft Basic Law* at a later stage

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91 Ibid.

92 *Overview of the Drafting Process*, Vol.3, pp.979-980.

93 Article 116 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, February 1989 in *Overview of the Drafting Process*, Vol.3, p.980.



of the drafting, some supporting views considered that allowing the HKSAR to continue to issue certificates of origin for local products would further safeguard its independent trading status. Opposing views argued that this provision was difficult to enforce and too detailed and should not be stipulated in the Basic Law.<sup>94</sup>

## Article 118

“The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries.”

Drafting materials in *Overview of the Drafting Process*<sup>95</sup> show that this article had progressed through nine drafts. The text of this article had undergone major changes in the second, third and sixth drafts. Its first draft read as: “Article 29 - The Hong Kong Special Administrative Region shall encourage industrial investments, technological progress and the establishment of new industries, in order to enhance its international competitiveness. Article 30 - The Government of the Hong Kong Special Administrative Region shall proactively create the necessary environment and condition to facilitate the development of industries.” Some members of the Drafting Committee suggested that the words “in order to enhance its international competitiveness” could be deleted from the first draft and the two articles could be combined.<sup>96</sup> Accordingly, the second

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94 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988, p.379 in *Overview of the Drafting Process*, Vol.3, p.980.

95 *Overview of the Drafting Process*, Vol.3, pp.981-984.

96 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, pp.981-982.

draft merged the two articles and read: “The Government of the Hong Kong Special Administrative Region shall provide the necessary environment and condition for encouraging industrial investments, technological progress and the establishment of new industries.”

Some members of the Drafting Committee raised the issue that the meaning of “necessary environment” in the second draft was not clearly defined. The third draft deleted the word “necessary” accordingly and read: “The Government of the Hong Kong Special Administrative Region shall provide an environment and condition for encouraging industrial investments, technological progress and the establishment of new industries.” Then, from the sixth draft, “environment and condition” were revised as “economic and legal environment”.<sup>97</sup>

As for the term “industrial investments” in the first to fifth drafts, some held the view that Hong Kong had always encouraged all kinds of investments, including the service sector, so there was no need to highlight industrial investments in the Basic Law, which would only weaken the spontaneity of Hong Kong.<sup>98</sup> Accordingly, the term, “industrial investments”, was replaced by “investments” from the sixth draft onwards. There were also views that this article was not in line with the policy of positive non-interventionism,<sup>99</sup> and that the policy matters could not be prescribed by law. They argued that the Basic Law should not encourage industrial planning, which had failed generally when implemented in a central or state-led economy, and that industrial and economic development should therefore be

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97 Article 117 of *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, February 1989 in *Overview of the Drafting Process*, Vol.3, p.982.

98 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.983.

99 *Ibid*, pp.983-984.

dominated by market forces.<sup>100</sup>

## Article 119

“The Government of the Hong Kong Special Administrative Region shall formulate appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and pay regard to the protection of the environment.”

Drafting materials in *Overview of the Drafting Process*<sup>101</sup> show that this article had progressed through eight drafts. The first draft of this article read: “The Government of the Hong Kong Special Administrative Region shall formulate appropriate policies to promote the development of various industries such as commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries.” In the second and subsequent drafts, “industries” was replaced by “trades”, to reflect the view of certain members of the Drafting Committee that it was impossible to list all industries in this provision, so a more general term was suggested to cover a wide range of trades in order to avoid omissions.<sup>102</sup> Another view mentioned that industry was the backbone of the society and economy, and the government should formulate long-term industrial policies.<sup>103</sup> In

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100 *Constitutional Economics and the Provisions on Economy in the Basic Law (Draft)*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.2 – Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.984.

101 *Overview of the Drafting Process*, Vol.3, pp.985-989.

102 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.986.

103 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.988.

the sixth and subsequent drafts, the text of this article also included manufacturing.<sup>104</sup>

In respect of fisheries, some expressed the view that it was not appropriate to refer to fisheries only as an ancillary item and suggested that the Basic Law should clarify the future relationship between the operations of local fishermen and those in the Mainland, and specify whether fishing vessels from Hong Kong and the Mainland could continue to freely travel across and fish in the waters of both sides and whether the fish catch can be freely traded in the fish markets of both sides.<sup>105</sup> Such suggestion was not reflected in the provision subsequently though.

On the other hand, those opposing the article argued that the terms “appropriate policies”, “promote” and “coordinate” were synonyms with the concept “worship of an almighty government”, which ran counter to the long-standing economic spirit of Hong Kong, and would easily give politicians an excuse to fight for vested interests and threaten the stability of Hong Kong.<sup>106</sup> Some opined that the term “coordinate” seemed to imply intervention and should be modified appropriately to eliminate that implication.<sup>107</sup> There were even suggestions that this article could be deleted on the ground that there was no need in the Basic Law to designate particular trades which required special support from the government.<sup>108</sup>

As to environmental protection, the article required the government to promote and coordinate the development of manufacturing, commerce

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104 Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, February 1989 in *Overview of the Drafting Process*, Vol.3, p.987.

105 Secretariat of the Consultative Committee, *Report on the Preliminary Response to the Draft Basic Law (for solicitation of opinions)*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.987.

106 Ibid, footnote 103.

107 Ibid, footnote 103.

108 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.989.

and other trades, however, the first to sixth drafts did not take into account the protection and promotion of natural ecosystems and the natural environment. Therefore, it was proposed to add the following at the end of the sentence: “This policy shall be formulated without infringing upon the right of residents and their children to a safe and healthy environment.”<sup>109</sup> After studying the views of different sectors in Hong Kong and the Mainland, members of Drafting Commission added the phrase, “and pay regard to the protection of the environment”, at the end of the seventh draft of this article.<sup>110</sup>

## Section 2 Land Leases

### Article 120

“All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region.”

According to Annex III (Land Leases) to the Joint Declaration, the Government of the United Kingdom and the Government of the PRC have agreed that, with effect from the entry into force of the Joint Declaration, land leases in Hong Kong and other related matters shall be dealt with in accordance with the provisions mentioned therein, in which paragraph 1 prescribes that:

“1. All leases of land granted or decided upon before the entry into force of the Joint Declaration and those granted thereafter in accordance with paragraph 2 or 3 of this annex, and which extend

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109 Ibid.

110 *Minutes of the Eleventh Meeting of the Sub-group on Economy*, 18 December 1989, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.989.

beyond 30 June 1997, and all rights in relation to such leases shall continue to be recognized and protected under the law of the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process*<sup>111</sup> show that in the initial drafting process of this article, some members of the Drafting Committee considered that the aforementioned paragraph should be retained in whole as the issue of land leases was of great significance to Hong Kong. As such, the section on “Land Leases“ in Chapter V of the *Draft Basic Law* basically adopted Annex III - Land Leases to the Joint Declaration.<sup>112</sup>

In a subsequent public consultation on the *Draft Basic Law*, there was an opinion which stated that any basic land policy should be made clear in this chapter, otherwise there might be a crisis of confidence. According to that commentator, leases to expire after 1997 without the right of renewal could be renewed “not beyond” 30 June 2047. It was argued that the above arrangement was not clear enough and that such right of renewal was not registrable under the law of land leases.<sup>113</sup> It was considered that if this article meant that land leases to expire after 1997 without the right of renewal could be renewed up to 30 June 2047, it should be clearly stated and such land policy would be consistent with the provisions in the Joint Declaration. If the intention was to end such leases on 30 June 2047 or any other year without renewal, it should also be expressly spelt out.<sup>114</sup>

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111 *Overview of the Drafting Process*, Vol.3, pp.990-992.

112 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.990.

113 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, pp.991-992.

114 *Ibid.*

## Article 121

“As regards all leases of land granted or renewed where the original leases contain no right of renewal, during the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire not later than 30 June 2047, the lessee is not required to pay an additional premium as from 1 July 1997, but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter, shall be charged.”

According to Annex III (Land Leases) to the Joint Declaration, the Government of the United Kingdom and the Government of the PRC agreed that, with effect from the entry into force of the Joint Declaration, land leases in Hong Kong and other related matters shall be dealt with in accordance with the provisions mentioned therein, in which paragraph 2 prescribes that:

“2. All leases of land granted by the British Hong Kong Government not containing a right of renewal that expire before 30 June 1997, except short-term tenancies and leases for special purposes, may be extended if the lessee so wishes for a period expiring not later than 30 June 2047 without payment of an additional premium. An annual rent shall be charged from the date of extension equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter. ...”

Drafting materials in *Overview of the Drafting Process*<sup>115</sup> show that this article had progressed through eight drafts and little change was made to the text of the article throughout the drafting process. The text of these eight drafts remained the same, except for the first draft, which read as follows:

“As regards all leases of land granted or renewed where the original leases contain no right of renewal, during the period from 27 May 1985 to 30 June 1997 which extend beyond 30 June 1997 and

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115 *Overview of the Drafting Process*, Vol.3, pp.993-995.

expire not later than 30 June 2047, the lessee is not required to pay an additional premium as from 1 July 1997, but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter, shall be charged.”

In the drafting process of the sixth draft, some expressed the view that from the perspective of land economy, pegging land rent to rates might cause great fluctuations due to the large amount of short-term capital in Hong Kong, it was therefore suggested that land rent be pegged to both land price and rates.<sup>116</sup> Others said that the provisions of the Joint Declaration should be clearly incorporated to ensure that leases to expire before 30 June 1997 could be renewed upon payment of 3 per cent of the rateable value.<sup>117</sup>

During the drafting of the seventh draft, a member of the Consultative Committee pointed out that, if there was a significant change in the criteria used to evaluate rateable value, the annual rates payable charged at 3 per cent of rateable value might also be increased. It was therefore suggested that the criteria for assessing rateable value at the time be affirmed and appropriate avenues of appeal established.<sup>118</sup> Previously when the sixth draft was being drafted, some expressed the view that appeals relating to land should still be dealt with by the Lands Tribunal and the CFA in Hong Kong.<sup>119</sup> With respect

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116 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions)*, September 1988 in *Overview of the Drafting Process*, Vol.3, p.994.

117 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.994.

118 Consultative Committee, *Collection of Views of the Special Group on Economy of Consultative Committee for the Basic Law regarding Chapter V of the Draft Basic Law*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report*, Vol.1, November 1989 in *Overview of the Drafting Process*, Vol.3, p.995.

119 Ibid, footnote 117.



to rateable value, there were suggestions to add the following sentence to this article: “The Hong Kong Special Administrative Region Government may take the policy previously pursued in Hong Kong as reference when making assessment of rateable value.”<sup>120</sup>

There was also a view that the calculation of rates should be based on the use and the area of the property, applying different percentage to properties for different use with different area, rather than on the basis of valuation, which would be fairer, and more reasonable for the sandwich class and the toiling masses.<sup>121</sup>

## Article 122

“In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, where the property is granted to, a lessee descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the previous rent shall remain unchanged so long as the property is held by that lessee or by one of his lawful successors in the male line.”

According to Annex III (Land Leases) to the Joint Declaration, the Government of the United Kingdom and the Government of the PRC agreed that, with effect from the entry into force of the Joint Declaration, land leases in Hong Kong and other related matters shall be dealt with in accordance with the provisions mentioned therein, in which paragraph 2 prescribes that:

“... In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, the property

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<sup>120</sup> Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.995.

<sup>121</sup> Ibid.

is granted to, a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the rent shall remain unchanged so long as the property is held by that person or by one of his lawful successors in the male line. ...”

Drafting materials in *Overview of the Drafting Process*<sup>122</sup> show that this article had progressed through eight drafts, during which its text remained the same. However there were views for and against it.

Those who supported it believed that the article was closely related to the indigenous inhabitants of the New Territories. A provision which safeguarded the rights and interests of indigenous inhabitants was fully compliant with the provisions in Annex III (Land Leases) to the Joint Declaration. Some, however, were of the opinion that this article was not detailed enough with regard to the land of indigenous inhabitants of the New Territories and the arrangements for the small house rights and interests.<sup>123</sup>

Those who opposed argued that this article should, together with BL 40, which protected the lawful traditional rights and interests of the indigenous inhabitants of the New Territories, be deleted.<sup>124</sup> They objected to the article as it preserved the privileges and feudal traditions enjoyed by the indigenous inhabitants of the New Territories. The rights of the indigenous inhabitants to small houses was unfair to the majority of residents who were not indigenous inhabitants. In view of the shortage of land resources in Hong Kong, the rights enjoyed by the indigenous inhabitants would further escalate the tension of land supply, with an impact on Hong Kong’s economy.<sup>125</sup> In their opinion,

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122 *Overview of the Drafting Process*, Vol.3, pp.996-998.

123 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.997.

124 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.997.

125 Ibid, footnote 123.

“indigenous inhabitants” meant people who had settled in Hong Kong before the British Government governed the territory and their descendants, it was questionable whether the concept of “indigenous inhabitants” should continue to exist after the reunification in 1997.<sup>126</sup>

Others objected on the ground that since Hong Kong residents would have the right of equality, there should not be any distinction between indigenous or non-indigenous inhabitants. Therefore, it was unreasonable to make special arrangements for the land of the indigenous inhabitants. They believed that all Hong Kong residents should be treated alike and enjoy the same rights. They also considered that the provision of rights and interests to men in the article was discriminatory against women and therefore proposed its deletion.<sup>127</sup>

On the other hand, there were suggestions that male indigenous inhabitants born on or before 30 June 1997 should still have the right to a small house, given the unrest that would result if there was immediate abolition of male indigenous inhabitants’ rights in the New Territories. However, after China’s resumption of the exercise of sovereignty over Hong Kong, all persons should be treated alike. There was also a view that the aforementioned right of indigenous inhabitants of the New Territories living overseas should be abolished immediately.<sup>128</sup> These suggestions were not adopted.

## Article 123

“Where leases of land without a right of renewal expire after the establishment of the Hong Kong Special Administrative Region, they shall be dealt with in accordance with laws and policies formulated by the Region on its own.”

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126 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.1 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.998.

127 Ibid, footnote 123.

128 Ibid, footnote 123, pp.997-998.

According to Annex III (Land Leases) to the Joint Declaration, the Government of the United Kingdom and the Government of the PRC agreed that, with effect from the entry into force of the Joint Declaration, land leases in Hong Kong and other related matters shall be dealt with in accordance with the provisions mentioned therein, in which paragraph 2 prescribes that:

“... Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process*<sup>129</sup> show that this article had progressed through eight drafts and little change was made to the text of the article throughout the drafting process.

In the earlier stage of the drafting process, some members of the Drafting Committee considered that the Basic Law should contain the following content on real estate policies: 1. The HKSARG may formulate land policies on its own, including land transaction premium, taxation and other policies, as well as the use of the revenue, i.e. free from restriction by any authority similar to the Sino-British Land Commission at that time. 2. Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the HKSAR, i.e. paragraph 2 of Annex III to the Joint Declaration.<sup>130</sup>

Later on, some expressed the view that during the consultation on the *Draft Basic Law* that this article would give the HKSARG an opportunity to levy renewal premium.<sup>131</sup>

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129 *Overview of the Drafting Process*, Vol.3, pp.999-1000.

130 Finance, Business, and Economy, *Final Report on Policy regarding Tourism and Policy regarding Real Estate (passed by the Executive Committee on 8 August 1987)* in *Overview of the Drafting Process*, Vol.3, p.999.

131 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1000.

## Section 3 Shipping

### Article 124

“The Hong Kong Special Administrative Region shall maintain Hong Kong’s previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen.

The Government of the Hong Kong Special Administrative Region shall, on its own, define its specific functions and responsibilities in respect of shipping.”

The relevant part of the first paragraph of Section VIII of Annex I to the Joint Declaration provides that:

“The Hong Kong Special Administrative Region shall maintain Hong Kong’s previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen. The specific functions and responsibilities of the Hong Kong Special Administrative Region Government in the field of shipping shall be defined by the Hong Kong Special Administrative Region Government on its own. ...”

The drafting materials in *Overview of the Drafting Process*<sup>132</sup> show that the drafting of this article had progressed through eight drafts. The first to fifth drafts read as: “The Hong Kong Special Administrative Region shall maintain Hong Kong’s previous systems of shipping management and shipping regulation. The Government of the Hong Kong Special Administrative Region shall, on its own, define the specific functions and responsibilities in respect of shipping.” The phrase “including the system for regulating conditions of seamen” was inserted later in the sixth to eighth drafts, which was consistent with the current BL 124.

When formulating the first draft, with regard to the jurisdiction

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132 *Overview of the Drafting Process*, Vol.3, pp.1001-1002.

over ships registered in Hong Kong and their crew where there would be no foreign involvement, members of the Drafting Committee considered that although the ships registered with the Hong Kong Shipping Registry would be of Chinese nationality, they would follow the practice of flying the national flag together with the regional flag when registered in the HKSAR. Therefore, the HKSAR should have autonomy in terms of management of and legislation on ships, that is, the HKSARG should exercise jurisdiction over the ships of the HKSAR and their crew. On the other hand, members agreed that China would have the right to expropriate ships registered in Hong Kong and the right of expropriation was the right of a sovereign state to take over civilian ships in time of war.<sup>133</sup>

Members of the Drafting Committee also considered that officers and other crew members of Hong Kong registered ships should not be subject to any nationality restriction but the HKSARG should encourage the hiring of crew members of the HKSAR on Hong Kong registered ships and should also encourage these crew members to work on Hong Kong registered ships.<sup>134</sup> During the drafting of the first draft, some members of the Consultative Committee suggested that persons of any nationality could serve as seamen in Hong Kong so long as they had received formal training and passed examinations.<sup>135</sup>

Views on the draft article collected by the Special Group on Finance, Business, and Economy during consultation were that the HKSAR should have the right to handle, on its own, all matters affecting the management of domestic merchant ships; an independent shipping registry should be established; and the HKSAR should regulate shipping operations and issue certificates in the name of “Hong

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133 Special Group on Finance, Business, and Economy, *Final Report on Policies regarding Shipping and Civil Aviation* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.1001.

134 Ibid.

135 *Summary of the Second Meeting of the Special Group on External Affairs*, 30 April 1986 in *Overview of the Drafting Process*, Vol.3, p.1001.

Kong, China”.<sup>136</sup>

During the consultation on this article at the later stage of the drafting of the Basic Law, there were supporting views that this article accurately reflected the spirit of the Joint Declaration. On the other hand, it was suggested in the Consultative Committee that the word “maintain” in the first paragraph should be replaced with the word “develop” on the grounds that the systems should evolve rather than remaining static at its present stage. Some also proposed that the expression “The Government of” should be inserted before “the Hong Kong Special Administrative Region” in the first sentence of the article.<sup>137</sup>

Also, some views collected during the consultation considered that while this article had pointed out that the current systems would be maintained, an additional provision should be included to specify clearly that the systems could be reformed if necessary and that the relevant organizations could continue to play a role in the consultation process after 1997, namely, those organizations should be allowed to continue to submit comments and suggestions on changes to the shipping systems and could continue to participate in various advisory committees.<sup>138</sup>

## Article 125

“The Hong Kong Special Administrative Region shall be authorized by the Central People’s Government to continue to maintain a shipping register and issue related certificates under its legislation,

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136 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.1001.

137 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1002.

138 Ibid.

using the name ‘Hong Kong, China’.”

The second paragraph of Section VIII of Annex I to the Joint Declaration provides that:

“The Hong Kong Special Administrative Region shall be authorized by the Central People’s Government to continue to maintain a shipping register and issue related certificates under its own legislation in the name of ‘Hong Kong, China’.”

The drafting materials in *Overview of the Drafting Process*<sup>139</sup> show that the drafting of this article had progressed through eight drafts. The first draft read as: “The Hong Kong Special Administrative Region shall be authorized by the Central People’s Government to continue to maintain a shipping register and issue related certificates under its legislation, using the name ‘Hong Kong, China’.” In the second to third drafts, the text was changed to read as: “The Hong Kong Special Administrative Region shall be authorized by the Central People’s Government to continue to maintain a shipping register and issue related certificates under the legislation formulated by itself, using the name ‘Hong Kong, China’.” In the fourth to fifth drafts, only slight adjustment was made to the Chinese text, with no change in substance. Subsequently, the sixth to eighth drafts remained consistent with the current BL 125.

In the drafting process of the first draft, members of the Drafting Committee believed that the Basic Law should include provisions covering the following aspects.<sup>140</sup> As regards the objects of registration, members considered that, for ships owned by companies, only companies registered in the HKSAR should be entitled to register with the Hong Kong Shipping Registry, and for ships owned by individuals, shipowners with the right of abode in Hong Kong should be so entitled. In either case, the management and control of the ships

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139 *Overview of the Drafting Process*, Vol.3, pp.1003-1005.

140 Special Group on Finance, Business, and Economy, *Final Report on Policies regarding Shipping and Civil Aviation* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.1003.



should be exercised by Hong Kong authorities. Members of the Drafting Committee were of the view that qualified shipowners should be allowed to add their ships to or remove them from the Hong Kong Shipping Register freely. On the other hand, some members of the Consultative Committee proposed that ships of other countries should also be allowed to come to Hong Kong for registration.<sup>141</sup>

Regarding the nationality and flags of ships registered in Hong Kong, some members of the Consultative Committee pointed out that at that time no country had two types of legislation on shipping registration.<sup>142</sup> Members of the Drafting Committee were of the view that ships registered in Hong Kong must fly two flags, one being the national flag of the PRC and the other being the regional flag of the HKSAR, to indicate the nationality and the status of being registered in Hong Kong. There were suggestions that since ships registered in Hong Kong would be ships of China, the law of China should guarantee that they could access all ports of China freely and could trade freely between such ports.

Regarding the HKSAR's status in international organizations and international maritime conventions, like the Joint Declaration, under the principle of the Basic Law that foreign affairs are the responsibility of the CPG, the HKSAR may on its own maintain and develop relations and conclude and implement relevant agreements with foreign states and regions and relevant international organizations. For instance, the HKSAR can retain its status in the International Maritime Organization. Regarding actions taken by other countries against ships registered in Hong Kong, it was suggested that China should provide protection and take responsibility, and provide protection for such ships at international level.<sup>143</sup>

On the other hand, members of the Drafting Committee

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141 *Summary of the Second Meeting of the Special Group on External Affairs*, 30 April 1986 in *Overview of the Drafting Process*, Vol.3, p.1003.

142 Ibid.

143 Ibid, footnote 140.

considered that taxation on ships registered in Hong Kong should be decided by the HKSAR. There were also suggestions that such detail be included in the general provisions on taxation.<sup>144</sup>

Opinions on the draft article collected by the Special Group on Finance, Business, and Economy during consultation were that private shipping businesses and shipping-related businesses and private container terminals could continue to operate freely; and that shipping enterprises owned or controlled by state bodies or similar bodies could register with the shipping registry of the HKSAR, however at all times they would have the same legal status as private shipping businesses and could not enjoy sovereign immunity, namely, these state bodies should also be capable to be sued and tried in court like individuals or private businesses, and could not escape legal liabilities because of their status.<sup>145</sup> These opinions did not affect the text of BL 125.

## Article 126

“With the exception of foreign warships, access for which requires the special permission of the Central People’s Government, ships shall enjoy access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the Region.”

The third paragraph of Section VIII of Annex I to the Joint Declaration provides:

“With the exception of foreign warships, access for which requires the permission of the Central People’s Government, ships shall enjoy access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the Hong Kong Special Administrative Region.”

144 Ibid, footnote 140.

145 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987), the revised draft proposed by Sanford Yung Yung Tao in *Overview of the Drafting Process*, Vol.3, p.1004.

The drafting materials in *Overview of the Drafting Process*<sup>146</sup> show that the drafting of this article had progressed through eight drafts. The first and second drafts read as: “All civil ships may have access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the Region. Access to the Hong Kong Special Administrative Region for foreign warships requires the special permission of the Central People’s Government.” In the drafting process of the third draft, some members of the Drafting Committee indicated that the wording of the Joint Declaration should be referred to in formulating this article. As such the text of the third to eighth drafts and the current BL 126 are in line with the wording of the Joint Declaration.

In the drafting process of the first draft, some members of the Drafting Committee expressed the views that ships registered in Hong Kong should have absolute freedom to trade elsewhere, and that profits tax should not be levied in Hong Kong on earnings made by these ships outside Hong Kong.<sup>147</sup> Members of the Drafting Committee considered that the Basic Law should provide that ports could be accessed freely, namely, ships could access ports freely except when prohibited by the legislation of Hong Kong or by the CPG for reasons of defence or diplomacy.<sup>148</sup>

Opinions on the draft article collected by the Special Group on Finance, Business, and Economy during consultation were that all merchant ships registered with the registry of the HKSAR were of Chinese nationality and should fly the national flag of the PRC together with the regional flag of the HKSAR; and that such ships should enjoy freedom of entry in various ports of the PRC and

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146 *Overview of the Drafting Process*, Vol.3, pp.1006-1007.

147 *Summary of the Second Meeting of the Special Group on External Affairs*, 30 April 1986 in *Overview of the Drafting Process*, Vol.3, p.1006.

148 Special Group on Finance, Business, and Economy, *Final Report on Policies regarding Shipping and Civil Aviation* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.1006.

freedom of trade between various ports.<sup>149</sup>

During the solicitation of opinions on this article at the later stage of the drafting of the Basic Law, there were hopes that the legislation on access of ships to the ports in Hong Kong could be lenient so as to maintain the status of an international port for ship repair. Some also suggested that the CPG should set up a military liaison office in Hong Kong for processing and approving the entry of military ships and aircrafts into Hong Kong, on the ground that this could avoid delays arising from making applications to Beijing, since most of the activities of military vessels and aircrafts in Hong Kong would be of a routine nature and should be able to be processed and approved speedily.<sup>150</sup>

## Article 127

“Private shipping businesses and shipping-related businesses and private container terminals in the Hong Kong Special Administrative Region may continue to operate freely.”

The relevant part of the first paragraph of Section VIII of Annex I to the Joint Declaration provides:

“... Private shipping businesses and shipping-related businesses and private container terminals in Hong Kong may continue to operate freely.”

The drafting materials in *Overview of the Drafting Process*<sup>151</sup> show that the drafting of this article had progressed through eight

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149 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, p.1006.

150 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1007.

151 *Overview of the Drafting Process*, Vol.3, pp.1008-1009.

drafts and there had been no significant change in the content. The first draft read as: “Private shipping businesses, shipping-related businesses and private container terminals in the Hong Kong Special Administrative Region may continue to operate freely.” In the second to fifth drafts, a minor amendment was made to the Chinese version which did not affect the meaning of the article. While drafting the second draft, some members of the Drafting Committee considered that the expression “may continue to operate freely” seemed to lack an element of development and suggested that the expression “continue to” be deleted.<sup>152</sup> The text of the sixth to eighth drafts was consistent with the current BL 127.

In drafting the first draft, some members of the Drafting Committee expressed an opinion that state-owned ships should compete fairly with private ones.<sup>153</sup> Also, some members proposed that the Basic Law should contain general provisions to ensure that private enterprises and organizations operated by the CPG would not receive different treatment, namely, Chinese publicly-owned commercial organizations in Hong Kong could not claim privileges relying on their status as state body.<sup>154</sup>

Opinions on the draft article collected by the Special Group on Finance, Business, and Economy during consultation were that the HKSAR should have jurisdiction over ships registered in Hong Kong and their crews, but where foreign countries would be involved, the CPG should provide protection at international level and assume responsibility for such ships; and that the HKSAR could become or

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152 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1008.

153 *Summary of the Second Meeting of the Special Group on External Affairs*, 30 April 1986 in *Overview of the Drafting Process*, Vol.3, p.1008.

154 Special Group on Finance, Business, and Economy, *Final Report on Policies regarding Shipping and Civil Aviation* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.1008.

continue to be a member of the International Maritime Organization in the name of the HKSAR after notification has been given to the CPG.<sup>155</sup>

During the solicitation of opinions on this article at the later stage of the drafting of the Basic Law, it was suggested that this article be amended to read: “Private shipping businesses, shipping-related businesses (including shipping agents) and private container terminals in the Hong Kong Special Administrative Region may continue to operate freely.” The view was that this would help to eliminate concerns that the HKSAR might need to require foreign shipowners and/or foreign shipping operators to exclusively employ Chinese agents in accordance with the existing practice at Chinese ports.<sup>156</sup> Views were also expressed that it should be specified that the expression “private shipping businesses and shipping-related businesses” in the article included the existing cargo ship and barge businesses and tugboat businesses at the ports.<sup>157</sup>

## Section 4 Civil Aviation

### Article 128

“The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional

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155 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987), the revised draft proposed by Sanford Yung Yung Tao in *Overview of the Drafting Process*, Vol.3, p.1008.

156 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1009.

157 Ibid.

aviation.”

The relevant part of the first paragraph of Section IX of Annex I to the Joint Declaration provides that:

“The Hong Kong Special Administrative Region shall maintain the status of Hong Kong as a centre of international and regional aviation ...”

Drafting materials in *Overview of the Drafting Process*<sup>158</sup> show that this article had progressed through eight drafts. The text of the first and second drafts read as: “The Government of the Hong Kong Special Administrative Region shall provide necessary conditions and take appropriate measures for the maintenance of its status as a centre of international and regional aviation.” In the drafting process of the third draft, some members of the Drafting Committee proposed to delete the words “necessary” and “appropriate” from the text,<sup>159</sup> which led to corresponding amendment in the third to fifth drafts. The text of the sixth to eighth drafts was consistent with the current BL 128.

At an early stage of the drafting process, the Consultative Committee received views that helicopter services should also be included in the Civil Aviation category of the Basic Law and the then existing regulations relating to helicopter services should survive 1997.<sup>160</sup>

At the consultation stage of the drafting process, the Special Group on Finance, Business, and Economy received views that the registration mark “VR”, along with the regional emblem of the HKSAR, should be displayed on the fuselage of aircraft registered in Hong Kong, and that the HKSAR shall be responsible on its own

158 *Overview of the Drafting Process*, Vol.3, pp.1010-1011.

159 Secretariat of the Drafting Committee, *Manuscript of The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (revised version of the Contents, Preamble, Chapters 1, 2, 3, 5, 6, 7 and 9 of the General Working Group at its Second Meeting), March 1988 in *Overview of the Drafting Process*, Vol.3, p.1010.

160 *Report of the Consultative Committee on “The Seminar on the Basic Law and Civil Aviation Policy”*, 26 January 1987 in *Overview of the Drafting Process*, Vol.3, p.1010.

for all operational and technical matters affecting aircraft registered in Hong Kong, as well as the routine management of civil aviation, including the management of airports, the provision of air traffic services within the flight information region of the HKSAR, and the discharge of other responsibilities allocated to it under the regional air navigation procedures of the International Civil Aviation Organization. It was also proposed that the HKSAR should have jurisdiction over aircraft registered in Hong Kong and their crews, passengers and cargo, and that in case of involvement of foreign countries, the CPG should provide protection at international level and assume responsibility for the aircraft registered in Hong Kong.<sup>161</sup>

At a later stage of the drafting process during the consultation period, it was suggested that the words “provide conditions and take measures for” be deleted on the ground that there was no such provision in the Joint Declaration. It was noted that whether the HKSAR could maintain the status as a centre of international and regional aviation would be affected by a number of factors, including the support of an airport with modern equipment, bilateral air services agreements and arrangements granting traffic rights to other routes in the HKSAR. However, there were opinions and concerns that these factors might not all be within the control of the HKSAR. For example, it was mentioned that other cities had tried to take Hong Kong’s status in this regard but failed. A number of airlines in Taiwan tried to get the right to land in the Mainland, whereas the Mainland wanted to strive for more landing rights in Hong Kong, and Macau had already announced a plan to construct an airport.<sup>162</sup> The above proposed amendments were not adopted though.

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161 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987 in *Overview of the Drafting Process*, Vol.3, p.1010.

162 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1011.



## Article 129

“The Hong Kong Special Administrative Region shall continue the previous system of civil aviation management in Hong Kong and keep its own aircraft register in accordance with provisions laid down by the Central People’s Government concerning nationality marks and registration marks of aircraft.

Access of foreign state aircraft to the Hong Kong Special Administrative Region shall require the special permission of the Central People’s Government.”

The first paragraph of Section IX of Annex I to the Joint Declaration provides that:

“... The Hong Kong Special Administrative Region shall continue the previous system of civil aviation management in Hong Kong, and keep its own aircraft register in accordance with provisions laid down by the Central People’s Government concerning nationality marks and registration marks of aircraft. ...”

Drafting materials in *Overview of the Drafting Process*<sup>163</sup> show that this article had progressed through eight drafts. The text of the first to fifth drafts included two paragraphs:

“The Hong Kong Special Administrative Region shall continue the previous system of civil aviation management in Hong Kong and keep its own aircraft register in accordance with provisions laid down by the Central People’s Government concerning nationality marks and registration marks of aircraft.

Access of foreign military aircraft to the Hong Kong Special Administrative Region shall require the special permission of the Central People’s Government.”

The term “foreign military aircraft” in the second paragraph was changed to “foreign state aircraft” when the sixth draft was formulated. The text of the sixth to eighth drafts was in line with the current BL 129.

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163 *Overview of the Drafting Process*, Vol.3, pp.1012-1014.

With regard to the format of flag and emblem, the views collected by the Consultative Committee at the time of preparing the first draft were that the Basic Law should stipulate the format of flag and emblem in the HKSAR if necessary or desirable, as this would be entirely consistent with the idea of granting autonomy to the HKSAR.<sup>164</sup> The views collected by the Special Group on Finance, Business and Economy were that registration of a mark could follow the then common practice (i.e. to follow that of the “VR” registration mark), and that the regional emblem of the HKSAR should be displayed on the tail of each and every aircraft registered in Hong Kong.<sup>165</sup> Other views made clear that the licensing criteria applied in most countries in the world should be used in the HKSAR.<sup>166</sup> At a later stage of the drafting process, there were suggestions that most aircraft nationality markings were expressed by national flags or national emblems. Such technical issue of aircraft nationality markings might not be easy to deal with as might be expected. This article would give rise to adverse impact upon airlines in Taiwan and any other countries that did not have diplomatic relations with or were hostile to China. It was also suggested that the provisions in relation to marks be changed to “The administrative region government then in office shall formulate all necessary provisions for marks in accordance with the Central People’s Government’s requirements”.<sup>167</sup>

With regard to the jurisdiction over aircraft registered in Hong Kong, views collected by the Special Group on Finance, Business and Economy were that the HKSAR should have jurisdiction over the aircraft, crew and passengers on such aircraft although they are of Chinese

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164 *Report of the Consultative Committee on “The Seminar on the Basic Law and Civil Aviation Policy”*, 26 January 1987 in *Overview of the Drafting Process*, Vol.3, p.1012.

165 Special Group on Finance, Business and Economy, *Final Report on Policies regarding Shipping and Civil Aviation (passed by the Executive Committee on 8 August 1987)* in *Overview of the Drafting Process*, Vol.3, p.1012.

166 *Ibid*, footnote 164.

167 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1014.

nationality. At the international level, should other countries take action against aircraft registered in Hong Kong, China should provide protection and assume responsibility for the aircraft registered in Hong Kong.<sup>168</sup>

In collecting views on the *Draft Basic Law*, it was suggested that research should be conducted again in order to gauge the coverage of the term “foreign military aircraft” in this article<sup>169</sup> With regard to the meaning of “foreign military aircraft”, there were subsequent suggestions to define the term as follows: (1) aircraft which always belong to the military of a foreign country; and/or (2) aircraft capable of carrying out military missions, including aircraft equipped with weapons or detection and interference equipment. With regards to the definition of detection equipment, it should include any equipment capable of detecting conditions on the ground or in the air by any measure other than those necessary for aiding in navigation. With regard to the definition of interference equipment, it should include any equipment capable of disrupting or impeding ground communications. Besides, there were views that “foreign military aircraft” should include civil aviation aircraft chartered by foreign military units.<sup>170</sup> It was also suggested that the CPG should set up a military liaison office in Hong Kong for the approval of military ships and aircraft entering Hong Kong. The rationale was to avoid any delays in applying to Beijing, since most of the activities of military vessels and aircraft in Hong Kong were of a routine nature, and therefore should be processed and approved speedily.<sup>171</sup> The term “foreign military aircraft” was changed to “foreign state aircraft” in the sixth draft.

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168 Ibid, footnote 165.

169 *Collection of Opinions and Proposals (on the Preamble and Chapters 1, 2, 3, 5, 6, 7 and 9) of Some Members of Various Subgroups on the Articles Drafted by this Subgroup*, published in Secretariat of Drafting Committee, *The Draft of The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, March 1988 in *Overview of the Drafting Process*, Vol.3, p.1013.

170 Ibid, footnote 167.

171 Ibid, footnote 167.

At a later stage of the drafting process during the consultation period, it was suggested that this article should cover such modes of operation as non-scheduled and chartered air transport. It was therefore proposed to include an additional item with regard to non-scheduled civil aviation services in this article, namely: “... continue the previous system of civil aviation management in Hong Kong, including the relevant procedures for non-scheduled civil aviation services with access to the Special Administrative Region ...”<sup>172</sup>

With regard to aviation safety, it was suggested that the phrase, “the Government of the Hong Kong Special Administrative Region shall make every effort to maintain the highest civil aviation safety standard”, be included in the text of this article. The rationale was: international aviation community and international air travelers might have concern that after 1997, international airlines in Hong Kong would not provide the highest safety standard as what they are providing at that time.<sup>173</sup>

### **Article 130**

“The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation, including the management of airports, the provision of air traffic services within the flight information region of the Hong Kong Special Administrative Region, and the discharge of other responsibilities allocated to it under the regional air navigation procedures of the International Civil Aviation Organization.”

The relevant part of the first paragraph of Section IX of Annex I to the Joint Declaration provides that:

“... The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation, including the management of airports,

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172 Ibid, footnote 167.

173 Ibid, footnote 167.

the provision of air traffic services within the flight information region of the Hong Kong Special Administrative Region, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organization.”

Drafting materials in *Overview of the Drafting Process*<sup>174</sup> show that this article had progressed through eight drafts. The text of the first and second drafts included two paragraphs:

“The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation, and for the management of airports.

The Hong Kong Special Administrative Region shall be responsible for the provision of air traffic services within the flight information region of the Special Administrative Region, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organization.”

It was subsequently proposed by some members of the Drafting Committee that the two paragraphs should be merged.<sup>175</sup> As such, the text of the third to eighth drafts was in line with the current BL 130.

With regard to flight performance, mechanical performance, aircraft registration and licensing, views collected by the Consultative Committee from the aviation industry at an early stage of the drafting process were that the HKSAR should have the autonomy to opt for a set of international flight performance standards, which could be modeled out of those applied by the United States, Germany, France, Britain or Japan. The SAR should have the right to adopt internationally recognized standards in terms of operational and mechanical performance.<sup>176</sup>

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174 *Overview of the Drafting Process*, Vol.3, pp.1015-1017.

175 *Report of the Consultative Committee on “The Seminar on the Basic Law and Civil Aviation Policy”*, 26 January 1987 in *Overview of the Drafting Process*, Vol.3, p.1015.

176 *Ibid.*

As for other aviation-related services, there were some suggestions that the facilities of Kai Tak Airport were the most important part of the entire aviation infrastructure at that time, and therefore it was necessary to continue to give special treatment when handling the lease of the airport. And it was believed that Hong Kong Aircraft Engineering Company Limited, Hong Kong Air Cargo Terminals Limited and the in-flight catering center were all indispensable, without which Kai Tak Airport could not play the role of an international airport. If the rent and price of the relevant land were to be assessed only on the basis of its general commercial value, these undertakings would be completely uneconomic, and therefore the Basic Law should acknowledge their unique status.<sup>177</sup>

It was also considered that if all business entities were to have their unique status specified in the Basic Law, the Basic Law would become nothing more than a highly complicated document. The Basic Law could only establish a system which protects existing interests by law and prevents competition but it would not be a genuine capital system. Some expressed the view that such a move would not only be incompatible with Hong Kong's economic and social traditions but it would also contravene the "stability and prosperity" stated in the Joint Declaration.<sup>178</sup>

Separately views collected by the Special Group on Finance, Business and Economy suggested that an appropriate balance should be struck between the number of flights from Mainland airlines to the HKSAR and vice versa.<sup>179</sup>

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177 Ibid, footnote 175.

178 Ibid, footnote 175.

179 Special Group on Finance, Business and Economy, *Opinions on Draft Provisions of Chapter V "The Economy of the Hong Kong Special Administrative Region" of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987 in *Overview of the Drafting Process*, Vol.3, p.1016.

## Article 131

“The Central People’s Government shall, in consultation with the Government of the Hong Kong Special Administrative Region, make arrangements providing air services between the Region and other parts of the People’s Republic of China for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and other airlines of the People’s Republic of China.”

As provided in the relevant part of the second paragraph of Section IX of Annex I to the Joint Declaration:

“The Central People’s Government shall, in consultation with the Hong Kong Special Administrative Region Government, make arrangements providing for air services between the Hong Kong Special Administrative Region and other parts of the People’s Republic of China for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and other airlines of the People’s Republic of China. ...”

Drafting materials in the *Overview of the Drafting Process*<sup>180</sup> show that this article had progressed through eight drafts. Throughout the drafting process, the text of this article remained unchanged and is the same as the current BL 131.

As for the signing of air service agreements, a member of the Consultative Committee mentioned that the Joint Declaration clearly distinguished the following three categories of air services: (1) air services between the HKSAR and other parts of the PRC; (2) air services between other parts of the PRC and other states and regions with stops at the HKSAR; (3) air services between the HKSAR and other states and regions with stops at other parts of the PRC. Regional air services in category 1 above were subject to the consent of the CPG and the HKSARG. As for category 2, the member proposed that the HKSARG should be authorized by the CPG to negotiate independently

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180 *Overview of the Drafting Process*, Vol.3, pp.1018-1019.

for the conclusion and practical implementation of agreements relating to those air services, including the authority to approve flights by airlines from other states to the HKSAR.<sup>181</sup> For the agreement of air services of category 3, he was of the view that the agreement should be left to the CPG, taking into account the specific circumstances and economic interests of the HKSAR, and allowing the HKSARG to negotiate and participate in the civil aviation negotiations.<sup>182</sup> There was also a view from the aviation industry that the Basic Law should guarantee the maintenance of the existing aviation agreements and legislation after 1997.<sup>183</sup>

Views collected by the Special Group on Finance, Business, and Economy suggested that the HKSAR may, acting under specific authorizations from the CPG, negotiate, conclude, review, modify and terminate air service agreements and provisional arrangements providing rights for over-flights, technical stops for flights to and from or through Hong Kong which do not operate to, from or through the Mainland, provided that the results shall be reported to the CPG for the record.<sup>184</sup>

In the later stage of the drafting process of the Basic Law, views collected by the Consultative Committee said that the issue of air services should not be included in the Basic Law, since it was an internal matter between the HKSAR and the Mainland. No other states

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181 Relevant part of the second paragraph of Section IX, Annex I to the Joint Declaration prescribes that “All Air Service Agreements providing for air services between other parts of the People’s Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region ... shall be concluded by the Central People’s Government.”

182 *Report of the Consultative Committee on “The Seminar on the Basic Law and Civil Aviation Policy”*, 26 January 1987 in *Overview of the Drafting Process*, Vol.3, p.1018.

183 *Ibid.*

184 Special Group on Finance, Business, and Economy, *Opinions on Draft Provisions of Chapter V “The economy of the Hong Kong Special Administrative Region” of the Basic Law (August 1987)*, passed by the Executive Committee on 4 November 1987 in *Overview of the Drafting Process*, Vol.3, p.1019. See the Note on BL 133 in this book.



had included matters relating to inland flights in their constitution.<sup>185</sup>

## Article 132

“All air service agreements providing air services between other parts of the People’s Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region and air services between the Hong Kong Special Administrative Region and other states and regions with stops at other parts of the People’s Republic of China shall be concluded by the Central People’s Government.

In concluding the air service agreements referred to in the first paragraph of this Article, the Central People’s Government shall take account of the special conditions and economic interests of the Hong Kong Special Administrative Region and consult the government of the Region.

Representatives of the Government of the Hong Kong Special Administrative Region may, as members of the delegations of the Government of the People’s Republic of China, participate in air service consultations conducted by the Central People’s Government with foreign governments concerning arrangements for such services referred to in the first paragraph of this Article.”

As provided in the relevant part of the second paragraph of Section IX, Annex I to the Joint Declaration:

“... All Air Service Agreements providing for air services between other parts of the People’s Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region and air services between the Hong Kong Special Administrative Region and other states and regions with stops at other parts of the People’s Republic of China shall be concluded by the Central People’s

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185 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.3 – General Report on the Articles, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1019.

Government. For this purpose, the Central People's Government shall take account of the special conditions and economic interests of the Hong Kong Special Administrative Region and consult the Hong Kong Special Administrative Region Government. Representatives of the Hong Kong Special Administrative Region Government may participate as members of delegations of the Government of the People's Republic of China in air service consultations with foreign governments concerning arrangements for such services."

Drafting materials in *Overview of the Drafting Process*<sup>186</sup> show that this article had progressed through eight drafts. The first draft read as follows:

"The Air Service Agreements providing for air services between other parts of the People's Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region and air services between the Hong Kong Special Administrative Region and other states and regions with stops at other parts of the People's Republic of China shall be concluded by the Central People's Government.

In concluding the international air service agreements referred to in the first paragraph of this Article, the special conditions and economic interests of the Hong Kong Special Administrative Region shall be taken into account and the government of the Region shall be consulted.

Representatives of the Government of the Hong Kong Special Administrative Region may, as members of the delegations of the Government of the People's Republic of China, participate in air service consultations conducted by the Central People's Government with foreign governments concerning arrangements for such services referred to in the first paragraph of this Article."<sup>187</sup>

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186 *Overview of the Drafting Process*, Vol.3, pp.1020-1023.

187 *Progress Report of the Sub-group on Economy*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1020.

During the formulation of the second draft, some members of the Drafting Committee considered that the second paragraph lacked a subject and suggested that “The Central People’s Government” be inserted or the second paragraph shall follow the first one.<sup>188</sup> And in the sixth draft, the word “international” was deleted. After that, the text of the article remained the same as the current BL 132.

When views were sought on the draft of this article at the later stage of the drafting process, the Consultative Committee received views that the provision was in fact stipulating that the Chinese Government would be the overall coordinator of air services, whereas representatives of Hong Kong would only be members of the delegation. It was believed that such arrangement did not conform to the “one country, two systems” principle, nor accord with the system at that time, which was for the Hong Kong Government to appoint a tribunal (usually including one judge) to hear the case before making a final ruling. This system applied to all local or international airlines. It was proposed that there should not be any difference between the provisions of the Basic Law and the said system because these air service arrangements were local affairs. However, for airlines wishing to land in other states or other parts of China, they would need to consult the relevant authorities.<sup>189</sup>

The Consultative Committee also received a proposal to delete paragraphs 2 and 3 and to replace the words “shall be concluded by the Central People’s Government” at the end of the first sentence with “shall be concluded by the Hong Kong Special Administrative Region with the governments of those regions and reported to the Central

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188 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1021.

189 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1022.

People's Government for the record".<sup>190</sup> None of these views were accepted.

### Article 133

“Acting under specific authorizations from the Central People's Government, the Government of the Hong Kong Special Administrative Region may:

(1) renew or amend air service agreements and arrangements previously in force;

(2) negotiate and conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and providing rights for over-flights and technical stops; and

(3) negotiate and conclude provisional arrangements with foreign states or regions with which no air service agreements have been concluded.

All scheduled air services to, from or through Hong Kong, which do not operate to, from or through the mainland of China shall be regulated by the air service agreements or provisional arrangements referred to in this Article.”

In Section IX, Annex I to the Joint Declaration, the third paragraph provides that:

“Acting under specific authorizations from the Central People's Government, the Hong Kong Special Administrative Region Government may: renew or amend Air Service Agreements and arrangements previously in force; in principle, all such Agreements and arrangements may be renewed or amended with the rights contained in such previous

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190 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1023.

Agreements and arrangements being as far as possible maintained; negotiate and conclude new Air Service Agreements providing routes for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and rights for overflights and technical stops; and negotiate and conclude provisional arrangements where no Air Service Agreement with a foreign state or other region is in force. All scheduled air services to, from or through the Hong Kong Special Administrative Region which do not operate to, from or through the mainland of China shall be regulated by Air Service Agreements or provisional arrangements referred to in this paragraph.”

Drafting materials in *Overview of the Drafting Process*<sup>191</sup> show that this article had progressed through eight drafts. The first draft read as follows:

“Acting under specific authorizations from the Central People’s Government, the Government of the Hong Kong Special Administrative Region may:

(1) renew or amend air service agreements and arrangements previously in force (in principle, all such agreements and arrangements may be renewed or amended with the rights contained in such previous Agreements and arrangements being as far as possible maintained);

(2) conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong Special Administrative Region and providing rights for over-flights and technical stops; and

(3) conclude provisional arrangements with foreign states or regions with which no air service agreements have been concluded.

All scheduled air services to, from or through Hong Kong Special Administrative Region, which do not operate to, from or through the mainland of China may be regulated by the air service agreements or provisional arrangements referred to in this Article.”

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191 *Overview of the Drafting Process*, Vol.3, pp.1024-1027.

When the first draft was being formulated, some members of the Drafting Committee suggested that this article be merged with the next article and rewritten as: “Acting under specific authorizations from the Central People’s Government, the Government of the Hong Kong Special Administrative Region may negotiate, amend, renew or conclude civil air service agreements, arrangements or provisional arrangement relating to the Government of the Hong Kong Special Administrative Region, and make arrangements in accordance with law and report them to the Central People’s Government for approval or for the record.”<sup>192</sup> Such suggestion was not adopted. In formulating the second draft, it was proposed by some members of the Drafting Committee that the contents in parentheses in the first draft may be deleted due to repetition. When the third draft was being formulated, some members of the Drafting Committee suggested that the word “negotiate” be inserted before the word “conclude” in paragraphs (2) and (3) of this article. After these amendments, the text of the article in the fourth to eighth drafts became the same as the current BL 133.

The Special Group on Finance, Business, and Economy expressed a view at the initial stage of the drafting process that the Basic Law should have provisions incorporating the contents of the Joint Declaration which provided that “[a]cting under specific authorizations from the Central People’s Government”, the HKSAR may negotiate, conclude, renew and amend civil air service agreements or provisional arrangements for scheduled air services to, from or through the HKSAR which do not operate to, from or through the mainland of China. It was suggested that the Basic Law should clearly state that such specific authorization was for civil aviation purposes and that the HKSAR should be able to negotiate and conclude any such agreement on its own within the scope provided for in the Joint Declaration.<sup>193</sup>

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192 *Progress Report of the Sub-group on Economy*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1025.

193 Special Group on Finance, Business, and Economy, *Final Report on Policies regarding Shipping and Civil Aviation* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, pp.1024-1025.

In order to grant the HKSAR greater autonomy in civil aviation, some members of the Drafting Committee proposed that, upon the promulgation of the Basic Law, the CPG should, for the purpose of this article, grant an one-off authorization to the HKSARG to deal with matters under this article on its own, without the HKSARG having to obtain a specific authorization on each occasion. However, other members were of the view that civil aviation issues tended to be complex, many of which involved state sovereignty, such as conclusion or renewal of civil aviation agreements and arrangements, and could not be resolved by a one-off authorization.<sup>194</sup> There were also views that the civil aviation relationship between Taiwan and Hong Kong should be clearly set out in the Basic Law.<sup>195</sup>

Among the views collected by the Consultative Committee at the later stage of the drafting process, there was a suggestion that the following be added to the article: “Reference in this article to civil air service agreements and provisional arrangements may include provisions on non-scheduled air services.”, the reason being that the phrase “scheduled air services” in the last paragraph might mislead people to think that this article applied only to the scheduled ones.<sup>196</sup>

Another view collected by the Consultative Committee said that the purposed content of this article would serve to ensure that Britain’s interests in air service agreements would not be lost as a result of the reunification. The commentator wondered why the Joint

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194 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1025.

195 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1026.

196 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1026.

Declaration had such a provision. In his view, this article would harm China's long-term interests in civil aviation, as it would prevent China from making use of the right to land in Hong Kong to negotiate better results with other states when negotiating bilateral air service agreements.<sup>197</sup>

## Article 134

“The Central People's Government shall give the Government of the Hong Kong Special Administrative Region the authority to:

(1) negotiate and conclude with other authorities all arrangements concerning the implementation of the air service agreements and provisional arrangements referred to in Article 133 of this Law;

(2) issue licences to airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong;

(3) designate such airlines under the air service agreements and provisional arrangements referred to in Article 133 of this Law; and

(4) issue permits to foreign airlines for services other than those to, from or through the mainland of China.”

The fourth paragraph in Section IX, Annex I to the Joint Declaration, the fourth paragraph provides that:

“The Central People's Government shall give the Hong Kong Special Administrative Region Government the authority to: negotiate and conclude with other authorities all arrangements concerning the implementation of the above Air Service Agreements and provisional arrangements; issue licences to airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region; designate such airlines under the above Air

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197 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1027.



Service Agreements and provisional arrangements; and issue permits to foreign airlines for services other than those to, from or through the mainland of China.”

Drafting materials in *Overview of the Drafting Process*<sup>198</sup> show that this article had progressed through eight drafts. Throughout the drafting process of this article, the content remained substantially the same as the current BL 134, except changes to the reference of the relevant Basic Law provision in paragraphs (1) and (3) above concerning civil aviation.

At the early stage of the drafting process, different views arose as to how routes should be designated. Representatives of the aviation sector argued that if Hong Kong was to have a healthy and highly efficient aviation industry, it should not maintain two or more airlines operating intercontinental routes. As such, the government’s prevailing aviation policy on route designation should be included in the Basic Law to ensure the continuation of the policy and the maintenance of a stable and reasonable aviation structure. The policy on route designation practised at that time was that if multiple airlines were competing for the designation of one route, the government would consider whether the increased competition would be beneficial to the public and whether the demand for traffic would be sufficient to sustain the business of these airlines. To ensure that local airlines are highly competitive in order to compete with foreign airlines, some opined that most governments would ensure that the local airline is the only one fully competitive on any route, and the existing airlines also would not want other local rivals to carve up existing markets and weaken their ability to compete abroad. Hence one route is usually designated to only one airline.<sup>199</sup>

The opponents argued, however, that the inclusion of the aviation policy practised by the then government in the Basic Law would cause

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198 *Overview of the Drafting Process*, Vol.3, pp.1028-1031.

199 *Report of the Consultative Committee on “The Seminar on the Basic Law and Civil Aviation Policy”*, 26 January 1987 in *Overview of the Drafting Process*, Vol.3, p.1028.

a negative impact on the autonomy of the HKSAR and unnecessarily limit its economic development in the future, and that the Basic Law should give the future HKSARG the power to determine its own aviation policy, which could be set out in aviation legislation.<sup>200</sup>

On the other hand, some in the aviation sector expressed the view that since the provisions relating to the government's aviation policy should not be included in the constitution, it would not be appropriate for the Basic Law, to be applied in the HKSAR in the future, to specify that the right of route designation should be owned by one or more airlines. And, they said that the experience of states that deregulated routes showed that competition led to better and cheaper services for consumers.<sup>201</sup> With regard to designation of route, it was considered that a policy of deregulation should be adopted, that is, multiple airlines could freely compete for designation on multiple routes. It was observed that air transport industry was gradually shifting from supply-led to market-led and that there was growing acceptance of the notion that air transport was nothing more than a trade service generally. Another trend in the development of the air transport industry was the internationalization of ownership. The ownership standards of airlines in many states had gradually been relaxed to the extent that airline groups were owned by nationals of multiple countries.<sup>202</sup>

There were also views that it would be in the best interest of the HKSAR to enable two Hong Kong-based airlines operating one same route, and that the opportunity to reach this conclusion should not be constrained by politics in the law. This was because prior to the designation of two Hong Kong-based airlines to operate on one route, there were a number of factors to be considered and such matters should be decided unanimously in the public interest by an independent expert licensing authority. Such public interest should include consideration of long-term interests, for example, the availability of consistent and reasonably stable services to protect

200 Ibid, p.1029.

201 Ibid, footnote 199.

202 Ibid, footnote 199, p.1029.

the interests of airlines and customers.<sup>203</sup> The government's aviation policy should be provided in detail as soon as possible because of the long-term planning and large investment required by the air transport industry.<sup>204</sup>

As for Mainland airlines, it was suggested that their status, rights and obligations in the HKSAR should be jointly defined by Beijing and the HKSAR by concluding an agreement, the details of which should be specified before the reunification. The Mainland airlines operating in the HKSAR should ensure that their interests were balanced with those of the local airlines without competing with each other so as to avoid undermining local airlines' interests.<sup>205</sup>

During the drafting of the second draft, some members of the Drafting Committee raised a question of whether the expression, "The Central People's Government shall give ... the authority to", could be omitted from this article, since the legal provision itself was an authorization. Some opponents argued that the freedoms of the air belonged to a sphere of the state's absolute sovereignty, so the law had to specify clearly that the authorization was given by the Central Authorities.<sup>206</sup>

## Article 135

"Airlines incorporated and having their principal place of business in Hong Kong and businesses related to civil aviation functioning there prior to the establishment of the Hong Kong Special Administrative Region may continue to operate."

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203 Ibid, footnote 199, p.1029.

204 Ibid, footnote 199, p.1029.

205 Ibid, footnote 199, p.1029.

206 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1029.

The relevant provision of the first paragraph of Section IX, Annex I to the Joint Declaration, provides that:

“... Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses may continue to operate. ...”

Drafting materials in *Overview of the Drafting Process*<sup>207</sup> show that this article had progressed through eight drafts. The text of the first and second drafts of this article remained almost identical to the relevant provisions of the Joint Declaration, and read “Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses may continue to operate.” Later in the third and fourth drafts, “incorporated ... in Hong Kong” was changed to “incorporated ... in the Hong Kong Special Administrative Region”. And “functioning there prior to the establishment of the Hong Kong Special Administrative Region” was inserted at the end of the fifth to eighth drafts, thus in line with the text of the current BL 135.<sup>208</sup>

At the early stage of the drafting process of this article, with regard to the qualifications required for airlines in the HKSAR, some representatives of the aviation sector considered that the Basic Law should have the following requirements for airlines in the HKSAR:<sup>209</sup>

(1) According to the Joint Declaration: the airlines in the HKSAR must be incorporated and having their principal place of business in Hong Kong.

(2) The majority ownership and effective control of an airline in the HKSAR must be held by permanent residents of Hong Kong.

There were opposing views that Hong Kong’s status as an international financial centre would be affected if the operation and

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207 *Overview of the Drafting Process*, Vol.3, pp.1032-1033.

208 *Ibid.*

209 *Report of the Consultative Committee on “The Seminar on the Basic Law and Civil Aviation Policy”*, 26 January 1987 in *Overview of the Drafting Process*, Vol.3, p.1032.

management of the airlines in the HKSAR would only be controlled by permanent residents of Hong Kong in future. It was also proposed that the ownership and control of the airlines in the HKSAR should be held by permanent residents of Hong Kong, but should not be restricted to only Chinese nationals.<sup>210</sup>

Some members of the Consultative Committee mentioned that if Chinese nationality should be a prerequisite for ownership of airlines in the HKSAR, it would be difficult for the HKSAR to revise or resign any existing air traffic agreements in future, especially those agreements negotiated and concluded in accordance with Section IX of Annex I to the Joint Declaration on those routes then served by Hong Kong airlines. Therefore the Basic Law should clarify the definition of “an airline in Hong Kong”.<sup>211</sup>

The Joint Declaration provides that “Airlines incorporated and having their principal place of business in Hong Kong ... may continue to operate.” In the opinion of the Special Group on Finance and Economy, any person interested in operating civil aviation services in Hong Kong, irrespective of the person’s nationality or right of abode in the HKSAR, so long as the person had established an airline in Hong Kong before 1997 and obtained an air operators certificate, the person would be protected under the Basic Law and could continue to operate after 1997. Whether the airline would be able to be designated for scheduled air services would depend on the terms of specific air service agreements between the HKSAR and other states. In other words, a Hong Kong airline could be in existence and in possession of all the necessary licenses issued by the HKSAR, but its ability to operate scheduled air services to other states in future would depend on whether those other states would accept the lack of nationality criteria for ownership and control of the airline.<sup>212</sup>

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210 Ibid.

211 Ibid, footnote 209.

212 Special Group on Finance, Business, and Economy, *Final Report on Policies regarding Shipping and Civil Aviation* (passed by the Executive Committee on 8 August 1987) in *Overview of the Drafting Process*, Vol.3, p.1032.

At the latter stage of the drafting process, the Consultative Committee collected views that the original intention of this article was that all airlines then incorporated had the right to continue to operate, but the phrase “may continue to operate” was not firm enough to give those airlines the right to operate, and would undermine their confidence in the long run, thus harming Hong Kong’s economy. It was also suggested that “functioning there prior to the establishment of the Hong Kong Special Administrative Region” be deleted on the grounds that the words were not used in the Joint Declaration and that such a provision would encourage the existing airlines to monopolize the entire market, thereby hindering healthy competition among airlines registered in Hong Kong.<sup>213</sup> This suggestion was not adopted.

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213 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1033.

## Chapter VI Education, Science, Culture, Sports, Religion, Labour and Social Services

### Article 136

“On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications.

Community organizations and individuals may, in accordance with law, run educational undertakings of various kinds in the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process*<sup>1</sup> show that this article on the “education system” of the HKSAR had progressed through eight drafts. This article was initially separated as two provisions in the first to fifth drafts, which respectively stressed that “The education system previously practised in Hong Kong shall be maintained” and that “The Government of the Hong Kong Special Administrative Region shall on its own decide policies in the field of education”. Starting from the sixth draft, the two provisions were merged into one, and the words “The Hong Kong Special Administrative Region shall maintain the educational system previously practised in Hong Kong” were replaced by “On the basis of the previous educational system”. This version was later adopted by the NPC as BL 136 in April 1990.

Section X of Annex I to the Joint Declaration provides that “The Hong Kong Special Administrative Region shall maintain

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<sup>1</sup> *Overview of the Drafting Process*, Vol.3, pp.1034-1043.

the educational system previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications.”

*Overview of the Drafting Process* shows that this article attracted many different views throughout its drafting process. Among them, some considered that to “maintain the educational system previously practised in Hong Kong” would prevent the introduction of the social system of the Mainland.<sup>2</sup> Others expressed the view that Cantonese and English should be specified as the main language of instruction. There were also views that there was an apparent contradiction between “the education system previously practised in Hong Kong shall be maintained” and “the Government of the Hong Kong Special Administrative Region shall on its own decide policies in the field of education”, as the former would limit the government’s decision-making power in education policy and made it unlikely for the education system to keep up with the rapid changes in knowledge and technology and to meet the development needs of the community. Another view also expressed was that the “language of instruction” should be a national matter and should not be left to the HKSARG to decide on its own.<sup>3</sup>

Eventually, the provision “The education system previously practised in Hong Kong shall be maintained” was deleted, and this article stipulates that “On the basis of the previous educational system, the Government of the Hong Kong Special Administrative

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2 *Preliminary Report - Focuses of Discussion (29 April - 17 June)* (passed by the Executive Committee on 16 July 1988) in *Overview of the Drafting Process*, Vol.3, p.1038.

3 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1039-1042.



Region shall, on its own, formulate policies on the development and improvement of education”, so as to enable the education policies to adapt flexibly to the needs of social and educational development.

In addition, a number of views were expressed that this article should set out education policies in greater details. For example, it should add that public education about patriotism and civic education should be strengthened, and that the mother tongue should be added as the main language of instruction to correct the influence of enslaving education policy during colonial rule. Some even suggested that the provisions should encourage the use of Mandarin and simplified Chinese in teaching to reflect the spirit of “one country”.<sup>4</sup>

These suggestions and views were not adopted.

### Article 137

“Educational institutions of all kinds may retain their autonomy and enjoy academic freedom. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Schools run by religious organizations may continue to provide religious education, including courses in religion.

Students shall enjoy freedom of choice of educational institutions and freedom to pursue their education outside the Hong Kong Special Administrative Region.”

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eight drafts. Its content and wording remained basically unchanged throughout the drafting process.<sup>5</sup>

Section X of Annex I to the Joint Declaration provides that

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4 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1042-1043.

5 *Overview of the Drafting Process*, Vol.3, pp.1044-1050.

“Institutions of all kinds, including those run by religious and community organizations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.”

The drafting materials in *Overview of the Drafting Process* show that this article attracted many different views throughout its drafting and consultation processes. Among them, some believed that the definition of “academic freedom” should be further elaborated to safeguard academic freedom in respect of speech, research, writing, creation and publication.<sup>6</sup> There were also suggestions to insert “including the right to set their own admission policies” after “Educational institutions of all kinds may retain their autonomy”.<sup>7</sup> It was also proposed that consideration may be given to include in this article a policy of non-intervention in education by the CPG and the HKSARG.<sup>8</sup>

During consultation, it was suggested that the phrase, “but on an elective basis, and religious services and other religious activities should also be freely participated in by teachers and students”, be added after the words, “courses in religion”, in order to promote religious freedom in religious schools. There were also views that including education policy in the Basic Law would operate to limit the autonomy of the HKSARG. It was also suggested that while educational institutions could recruit staff and select teaching

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6 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1048-1050.

7 *Opinion from Members of the Consultative Committee from the Industrial, Commercial and Professional Sectors on Chapter VI – Education, Science, Culture, Sports, Religion, Labour and Society of the Draft Basic Law for Solicitation of Opinions* in *Overview of the Drafting Process*, Vol.3, p.1048.

8 Secretariat of the Drafting Committee, *Extracts of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.3, p.1045.

materials from outside the HKSAR, it should be made clear that “such recruitment and selection shall only be made if they are in the interest of China and Hong Kong”.<sup>9</sup>

These suggestions were not adopted.

### Article 138

“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies to develop Western and traditional Chinese medicine and to improve medical and health services. Community organizations and individuals may provide various medical and health services in accordance with law.”

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eight drafts, in which the content and wording had changed considerably.<sup>10</sup> The first draft read as: “The Government of the Hong Kong Special Administrative Region shall develop medical and health services, promote modern and traditional Chinese medicine, and encourage and support community and individual organizations in providing various medical and health services.” The text of the second draft consisted of three parts: “The Government of the Hong Kong Special Administrative Region shall develop medical and health services”, “promote Western and traditional Chinese medicine” and “encourage community organizations and individuals to provide various medical and health services”. Starting from the third draft, the first two parts above were combined into one complete sentence, and the word “develop” was changed to “improve”, such that the two original parts read together as “improve medical and health services and the development of Western and traditional Chinese medicine”, while the remaining part, “encourage community organizations and individuals to provide various medical and health services”, remained unchanged. In the

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<sup>9</sup> Ibid, footnote 6.

<sup>10</sup> *Overview of the Drafting Process*, Vol.3, pp.1051-1055.

sixth to eighth (final) drafts, there were significant changes in wording, by changing the word “improve” into “on its own, formulate policies” on Western and traditional Chinese medicine and medical and health services. In the second sentence, the word “encourage” was deleted and the phrase “provide various medical and health services” was followed by a newly added phrase “in accordance with law”.<sup>11</sup>

*Overview of the Drafting Process* also shows that the status of traditional Chinese medicine was the biggest concern in the drafting process of this article, as Chinese medicine did not enjoy formal and legal status at the time of drafting of the Basic Law, nor was it recognized by the British Hong Kong Government.<sup>12</sup> Some members of the Consultative Committee said that it was appropriate to include the words “Western and traditional Chinese medicine” in this article and considered that “the Western and traditional Chinese medicine shall be of equal significance and deserve equal development”. Other members, however, argued that these words would “limit the flexibility and freedom of operation of the HKSARG, and would force the HKSARG to give equal importance to Western and traditional Chinese medicine in future policy formulation, thereby losing its power to determine the pace of development at its own discretion.”<sup>13</sup>

There were also objections to the use of the words Western and traditional Chinese medicine. Others pointed out that the inclusion of “traditional Chinese medicine” in this article “accorded disproportionate protection for the status of traditional Chinese medicine”. Some pointed out that since “the government has the

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11 Ibid, pp.1051-1053.

12 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1054.

13 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee for the Basic Law regarding Chapter Six of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1053.

responsibility for providing basic services”, there was no need to highlight the words “Western” and “Chinese”.<sup>14</sup> Such discussions continued throughout the drafting process of this article.

Another concern was the role and status of the HKSARG in health services and development.<sup>15</sup> Discussions prior to the second draft showed that there were views that the word “support” should be deleted from “The Government of the Hong Kong Special Administrative Region shall develop medical and health services, promote modern and traditional Chinese medicine, and encourage and support community and individual organizations in providing various medical and health services”, in order “to avoid the legal responsibility of the Government for funding”. Members also pointed out that the word “develop” would “put a lot of pressure” on the HKSARG. It was also suggested that this article should be deleted on the grounds that “this article concerns policy affairs and should not be included in the Basic Law”.<sup>16</sup>

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC pointed out:

“Chapter VI of the Draft Basic Law carries stipulations on the maintenance and development of Hong Kong’s current systems and policies concerning education, science, culture, sports, religion, labour and social services. These stipulations involve the interests of Hong Kong residents in many aspects of public life and are important for social stability and development.

There are quite a number of articles concerning policies in Chapter V and VI of the Draft Basic Law. The Chinese Government has undertaken, in the Sino-British Joint Declaration, to write its basic

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14 Ibid, footnote 12.

15 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1052.

16 Ibid, footnote 12.

principles and policies on Hong Kong and their detailed explanations as given in Annex I of the Joint Declaration into Basic Law, and Hong Kong residents from all walks of life have a strong desire for the Basic Law to reflect and protect their interests. Therefore, it was decided in the end that these articles concerning policies should remain in the Draft Basic Law, despite the different opinions expressed over the brevity of articles during the drafting of the law.”<sup>17</sup>

### **Article 139**

“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology and protect by law achievements in scientific and technological research, patents, discoveries and inventions.

The Government of the Hong Kong Special Administrative Region shall, on its own, decide on the scientific and technological standards and specifications applicable in Hong Kong.”

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eight drafts, with little change in its content and wording.<sup>18</sup> The first draft read: “The Government of the Hong Kong Special Administrative Region shall develop science and technology and reward and protect achievements in scientific and technological research, discoveries and inventions. The Government of the Hong Kong Special Administrative Region shall, on its own, decide on various scientific and technological standards and specifications.” Starting from the second draft, this article consisted of three parts, “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology”, “The laws of the Hong Kong Special Administrative Region shall protect achievements in scientific and technological

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<sup>17</sup> *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 National People’s Congress, 28 March 1990).

<sup>18</sup> *Overview of the Drafting Process*, Vol.3, pp.1056-1061.

research, patents, discoveries and inventions” and “The Government of the Hong Kong Special Administrative Region shall, on its own, decide on the scientific and technological standards and specifications applicable in Hong Kong”. In the third draft, the sentence “The laws of the Hong Kong Special Administrative Region shall protect achievements in scientific and technological research, patents, discoveries and inventions” was replaced with “The Hong Kong Special Administrative Region shall protect by law achievements in scientific and technological research, patents, discoveries and inventions”. In the sixth draft the same sentence was combined with the preceding one, with these words removed: “The Hong Kong Special Administrative Region shall”.

BL 139 reflects Section X of Annex I to the Joint Declaration, which is excerpted below: “The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of ... science and technology, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications.” Those who supported this article argued that the words “on its own” meant that the HKSAR could determine its own science and technology policies without consulting the CPG for instructions.<sup>19</sup>

*Overview of the Drafting Process* also shows that during the drafting of this article, there were different views within members of the Consultative Committee on the wording denoting the scope of this article.<sup>20</sup> Some members suggested that this article was “confused

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19 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1059.

20 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee for the Basic Law regarding Chapter Six of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1059.

about copyrights and inventions” and suggested that this article should be changed as “The Hong Kong Special Administrative Region shall protect by law registered patents, copyrights, designs and trademarks.” There were also views that terms such as “news”, “broadcasting” and “publication” should be added to this article, while opponents argued that “the business of news broadcasting in Hong Kong is not managed by the government” and such terms should not be added.

A focal point of this article during the drafting process was the role of HKSARG in formulating scientific and technological standards.<sup>21</sup> Some members opined that the HKSARG could not decide on relevant standards and specifications on its own because there are uniform international standards and specifications for the government to adopt. Some members however pointed out that the issues pertaining to the standards and specifications were complex and could better be decided by the HKSARG on its own.

### **Article 140**

“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation.”

According to the relevant provisions in Section X of Annex I to the Joint Declaration, “The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education ... including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications.”

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21 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1058.



Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eight drafts, with little change in content and wording since the second draft.<sup>22</sup> The first draft read: “The Government of the Hong Kong Special Administrative Region shall develop cultural undertakings, reward and protect the achievements, honours, and lawful rights and interests of authors in their cultural creations.” In the second draft, the words “develop cultural undertakings” were changed to “on its own, formulate policies on culture”, whereas the words “cultural creations” were changed to “literary and artistic creation”, and the words “reward and” and “honours” were removed. After the revisions, the second draft read “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect the achievements and the lawful rights and interests of authors in their literary and artistic creation.” Since the sixth draft, the words “by law” were also inserted to the second part of the sentence.

At the initial stage of the drafting process of this article, the views of various cultural sectors, including publishing, communication, film and culture and art, were considered. There was a wide range of views held by different sectors. Some thought that the Basic Law “should not only provide for the protection of cultural freedom, but it should also stipulate that the government shall encourage and subsidize cultural publishing businesses”.<sup>23</sup> Some sectors hoped that Hong Kong could maintain an independent identity and continue to participate in international cultural organizations under the name of Hong Kong, China.<sup>24</sup>

*Overview of the Drafting Process* also shows that one of the concerns in the drafting process of this article was the scope of its content. Some opined that “as it is impractical to provide for

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22 *Overview of the Drafting Process*, Vol.3, pp.1062-1069.

23 *Summary of the Forum of the Publishing Industry*, 18 June 1986 in *Overview of the Drafting Process*, Vol.3, p.1063.

24 *Summary of the Forum of the Performing Arts Industry*, 31 July 1986 in *Overview of the Drafting Process*, Vol.3, p.1065.

details” for cultural policies under the Basic Law, “it would be more appropriate to lay down a broad principle of flexibility, such as guaranteeing cultural freedom”.<sup>25</sup> Views were also expressed that “since policies shall adapt to changes over time and the needs of the community, excessive or premature policy formulation may hinder future development”, and this article should therefore be “concise and specific, with a view to maintaining long-term flexibility”.<sup>26</sup> However, some objected to this article because “there is no need to stipulate in the Basic Law that the Hong Kong Special Administrative Region Government should formulate cultural policies” and “it seems that such detailed policies or principles should not be set out in the Basic Law”.<sup>27</sup>

Another focal point of this article was the role of the HKSARG in protecting authors’ achievements in creation. The discussions before formulating the third draft showed that some members of the Drafting Committee believed that it was inappropriate for the HKSARG to protect the authors’ achievements in creation, as they should instead be protected by law. As discussed above, since the sixth draft, the words “by law” were inserted to the second part of the sentence. This revised version was adopted by the NPC as BL 140 in April 1990.

## Article 141

“The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the

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25 Secretariat of the Drafting Committee, *Extracts of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.3, p.1065.

26 Education System and Cultural Policy Unit of the Special Group on Culture, Education, Technology and Religion, *Final Report on Education System and Cultural Policy* (passed by the Executive Committee on 12 June 1987) in *Overview of the Drafting Process*, Vol.3, p.1066.

27 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1068.

internal affairs of religious organizations or restrict religious activities which do not contravene the laws of the Region.

Religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected.

Religious organizations may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.

Religious organizations and believers in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organizations and believers elsewhere.”

BL 141 reflects Section XIII of Annex I to the Joint Declaration, the relevant parts of which are excerpted below:

“Religious organizations and believers may maintain their relations with religious organizations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organizations may be continued. The relationship between religious organizations in the Hong Kong Special Administrative Region and those in other parts of the People’s Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.”

Drafting materials in *Overview of the Drafting Process*<sup>28</sup> show that this article had progressed through eight drafts. The first draft consisted of four paragraphs:

“The Government of the Hong Kong Special Administrative Region shall not interfere in or restrict religious activities and the internal affairs of religious groups. The religious activities shall not contravene the laws of the Hong Kong Special Administrative Region.

Religious groups shall, in accordance with law, enjoy the rights

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28 *Overview of the Drafting Process*, Vol.3, pp.1070-1081.

to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected.

Seminaries and other schools, hospitals, welfare institutions and other social undertakings run by religious groups may continue to exist and develop according to their previous practice.

Religious organizations and believers may maintain their original relations with religious organizations and believers elsewhere.”

In the second draft, the following changes were effected to its wording and expression. The first paragraph was changed to “The Government of the Hong Kong Special Administrative Region shall not interfere in the internal affairs of religious groups or restrict religious activities which do not contravene the laws of the Region”. The third paragraph was shortened to “Religious groups may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services”. For the fourth paragraph, the phrase “in the Hong Kong Special Administrative Region” was inserted after “Religious organizations and believers” and the phrase “maintain their original relations” were replaced with “maintain and develop their relations”. Since then, this article remained largely unchanged apart from textual modification and deletion, except that the phrase “The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief” was added at the beginning of the first sentence in the sixth draft.

At the beginning of the drafting process of this article, there were views hoping that in formulating the Basic Law, “religious provisions and policies should be avoided so as to avoid future restrictions on religious development in Hong Kong under constitutional provisions”. Some expressed the wish that the Basic Law would stipulate that religious policies in the Mainland would not apply to Hong Kong, and that “religious activities should be considered as normal as long as

they do not violate the law or affect public safety and interests”.<sup>29</sup>

*Final Report on the Religious Issues of the HKSAR* of Social Lifestyle and Religious Policy Unit of the Special Group on Culture, Education, Technology and Religion shows that, in the drafting process of this article, a number of factors were taken into account, including the basic principles of this article, the meaning of religious freedom, the specific operation for guaranteeing religious freedom and the problems arising from the connection between religious groups and foreign counterparts. Some expressed the view that “Although current religious policies implemented in China may have already been rather liberal, since Article 24 of China’s Constitution stipulates that the state should carry out education on dialectical and historical materialism, this explicit provision will certainly affect religious policy”. As such, it was considered that Hong Kong needed some formal guarantees by “stipulating in the Basic Law that the future religious policies of the Hong Kong Special Administrative Region will not be affected by the Constitution or other statutes, such that the residents of the Hong Kong Special Administrative Region shall enjoy the freedom to receive religious education and to carry out various religious activities and rituals”.<sup>30</sup>

One focal point of this article was the term “internal affairs” in the phrase “interfere in the internal affairs of religious organizations”. Some members of the Consultative Committee considered that this term was ambiguous because “external affairs” and “internal affairs” were difficult to differentiate and could be subject to arbitrary delineation and misinterpretation, which would greatly restrict religious activities in other aspects. There were also views that the provision for “not interfering” with the internal affairs of religious groups and the

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29 Secretariat of the Drafting Committee, *Extracts of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.3, p.1071.

30 Social Lifestyle and Religious Policy Unit of the Special Group on Culture, Education, Technology and Religion, *Final Report on the Religious Issues of the HKSAR* (passed by the Executive Committee on 12 June 1987) in *Overview of the Drafting Process*, Vol.3, pp.1073-1074.

provision requiring such activities must “not contravene” with the laws of the Region were both ambiguous.<sup>31</sup> However, some members of the Consultative Committee were of the view that, this formulation would not restrict religious activities but would safeguard those lawful religious activities. Some also expressed the view that, as the scope of religious affairs was too broad, stipulating expressly that there shall be no interference with “the internal affairs” would facilitate the proper functioning of religion.<sup>32</sup>

## Article 142

“The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.

Persons with professional qualifications or qualifications for professional practice obtained prior to the establishment of the Hong Kong Special Administrative Region may retain their previous qualifications in accordance with the relevant regulations and codes of practice.

The Government of the Hong Kong Special Administrative Region shall continue to recognize the professions and the professional organizations recognized prior to the establishment of the Region, and these organizations may, on their own, assess and confer professional qualifications.

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31 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1077-1078.

32 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee for the Basic Law regarding Chapter Six of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1076.

The Government of the Hong Kong Special Administrative Region may, as required by developments in society and in consultation with the parties concerned, recognize new professions and professional organizations.”

The drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eight drafts.<sup>33</sup> The first draft consisted of three paragraphs:

“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate provisions for assessing and conferring qualifications for professional practice in the various professions.

Persons with qualifications for professional practice obtained prior to the establishment of the Hong Kong Special Administrative Region may maintain their previous qualifications.

The Hong Kong Special Administrative Region shall maintain the professions and the professional organizations recognized prior to the establishment of the Region, and recognize new professions and professional organizations as required by developments in society.”

Starting from the second draft, this article was amended to contain four paragraphs:

“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate provisions for assessing and conferring the qualifications for practice in the various professions. The provisions for assessing and conferring the qualifications for practice in the various professions previously implemented in Hong Kong shall be retained and improved.

Persons with professions and professional qualifications obtained prior to the establishment of the Hong Kong Special Administrative Region may maintain their previous qualifications.

The Hong Kong Special Administrative Region shall maintain

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33 *Overview of the Drafting Process*, Vol.3, pp.1082-1097.

the professions and the professional organizations recognized prior to the establishment of the Region, and professional qualifications shall be assessed and conferred by such various professional organizations according to the previous practice.

The Government of the Hong Kong Special Administrative Region may, as required by developments in society and in consultation with the parties concerned, recognize new professions and professional organizations.”

In the third draft, the first paragraph was revised to read as: “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate provisions to assess and confer qualifications for practice in the various professions. The previous practice implemented in Hong Kong for assessing and conferring qualifications may be retained and improved”, and the second half of the third paragraph was changed from “and professional qualifications shall be assessed and conferred by such various professional organizations according to the previous practice” to read as “and these organizations may, on their own, assess and confer professional qualifications”. After that, except for a few changes in wording, the article changed little as a whole until it was revised to read the same as the current BL 142 starting from the sixth draft.

This article gives effect to Section X of Annex I to the Joint Declaration, the relevant part of which is excerpted as follows: “The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, including policies regarding ... the recognition of educational and technological qualifications.”

The issue of professional qualifications of professionals was already identified as one of the contents that should be included in the Basic Law at the initial stage of the drafting process, that is, during the period of *Structure of the Basic Law (Draft)*.<sup>34</sup> At that time, there were

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34 Consultative Committee, *Reference Materials for Seminars in Batches*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1082.



views that “professionals are generally concerned about their future qualifications, and professionals from outside Hong Kong (including those from the Mainland) should be treated as equals and should all pass certain examinations before being able to practise in Hong Kong.”<sup>35</sup>

Prior to the finalization of the third draft, some members of the Drafting Committee commented on the Explanatory Note to the first paragraph of the article that “There is no contradiction between the two sentences of the first paragraph. The former sentence explains the relationship between the local government and the Central Authorities rather than between the local government and non-governmental organizations, and indicates that the local government can make policies without the influence of the Central Authorities. The latter sentence simply suggests that the government can formulate some provisions on its own, particularly with regard to the new professions, but the existing systems and provisions need to be retained. Taken together, these two sentences more fully embody the spirit of the Joint Declaration and are conducive to reassuring the public and promoting stability and prosperity. Section X of Annex I to the Joint Declaration stipulates that ‘The Hong Kong Special Administrative Region Government shall on its own decide policies ... including policies regarding ... technological qualifications.’ However, policies are not equivalent to practice and technological qualifications are not equal to professional qualifications. Therefore, the abovementioned quotation from Section X absolutely should not be extended to mean ‘The Government of the Hong Kong Special Administrative Region shall, on its own, formulate provisions for assessing and conferring professional qualifications’, as this would deprive professional organizations of their autonomy in determining professional

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35 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.3, p.1083.

qualifications, thus causing shock among professionals.”<sup>36</sup>

After *The Draft Basic Law (for solicitation of opinions)* of April 1988 was published, the Drafting Committee received views that professional qualifications and qualifications for professional practice should not be separated and that it should be amended to read “Professional qualifications and qualifications for professional practice should be formulated independently by statutory committees on management of professions authorized and recognized by the Government of the Hong Kong Special Administrative Region. Each statutory committee on the management of the profession should be composed mainly of and chaired by the professionals of that profession.”<sup>37</sup> However, some members of the Drafting Committee from the Mainland opined that “Professional qualifications and qualifications for professional practice should be separated. Professional qualifications should be set down by the professional organizations themselves and qualifications for professional practice should be set down by the Government of the Hong Kong Special Administrative Region. Therefore, professional qualifications can cover professionals from the Mainland and other countries. Currently, all professionals, including doctors, architects, etc. of the Commonwealth countries can practise in Hong Kong, which is unreasonable. In the future, there will not be such inequality and all professionals, whether from the Mainland or other countries, will be treated equally. All professionals need to acquire professional qualifications and go through certain formalities to practise in Hong Kong, such as passing examinations stipulated by the Hong Kong Government before being

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36 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, pp.1087-1088.

37 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, pp.1089-1090.

able to practise in Hong Kong.”<sup>38</sup> As for the Consultative Committee, “some members consider that there is confusion in the first and third paragraphs of this article: on the one hand it is said that the Government of the Hong Kong Special Administrative Region shall, on its own, formulate provisions to assess and confer qualifications for practice in the various professions, but on the other hand, it is said that recognized professional organizations may, on their own, assess and confer professional qualifications. However, some members do not agree that there is any confusion. Also, some members are of the view that the allocation of power in relation to professional qualifications and qualifications for professional practice under this article is appropriate and flexible, and if there are professional organizations which have proven themselves to be capable of self-regulation and to be self-disciplined, the government can delegate the power of conferring qualifications for professional practice to the professional organizations.”<sup>39</sup> At the later stage of the drafting of the article, some members of the Consultative Committee continued to express the view that the biggest drawback of this article was that the first and third paragraphs did not link professional qualifications with qualifications for professional practice.<sup>40</sup> There were also members who were of the view that “if the two are not linked, various professions will lose their autonomy in situations where qualifications for professional

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38 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.1090.

39 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee for the Basic Law regarding Chapter Six of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1090.

40 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee regarding Chapter Six of the Draft Basic Law*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.1*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1095.

practice are conferred in the absence of professional qualifications.”<sup>41</sup> Nevertheless, the content of that part of the article eventually remained unchanged.

The drafting process of this article aroused much discussion. For example, there were views that this article did not protect and respect Chinese professionals. Some opined that the article failed to accommodate the status and interests of professionals in Hong Kong graduated in the Mainland. Some even said that the colonial method of assessing the professions at that time must be revised.

However, opinions in favour of this article were that it could allow the various professions to maintain their status and continue to develop; generally take into account the interests of the professions in various aspects; and enhance the confidence of the professionals. Some held the view that this article was able to summarize basically the main views expressed by professional organizations and individuals during the two years of drafting and therefore they agreed to this article.<sup>42</sup>

### Article 143

“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on sports. Non-governmental sports organizations may continue to exist and develop in accordance with law.”

The drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eight drafts,

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41 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1096.

42 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1091.

with little change in content and wording.<sup>43</sup> The first draft read as: “The Government of the Hong Kong Special Administrative Region shall support and develop sports undertakings. Previous non-governmental sports organizations of Hong Kong may continue to exist and develop in accordance with law.” In the second and third drafts, the first sentence was changed to read as “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies in the area of sports” and “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on sports” respectively, while the last sentence remained unchanged. The words “previous” and “of Hong Kong” in the last sentence was deleted in the sixth draft.

According to the discussion materials before the formulation of the sixth draft, some considered that this article “failed to arrange for the development of new sports organizations and only stated that previous non-governmental sports organizations may continue to exist and develop in accordance with the law”. There was a contrary view, however, that by allowing the HKSARG to formulate the relevant policies on its own, the article had been “given a certain degree of flexibility” so that new sports organizations could also be developed.<sup>44</sup> It was also proposed to delete the word “previous” from the last sentence to indicate that any “previously non-existent” organization could exist as long as it is registered in accordance with the law.<sup>45</sup>

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43 *Overview of the Drafting Process*, Vol.3, pp.1098-1100.

44 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee for the Basic Law regarding Chapter Six of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1100.

45 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, *Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1100.

## Article 144

“The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare and social work. Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.”

Drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eight drafts and there was no significant change in the wording and content.<sup>46</sup> The first draft read “The Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for organizations for education, medicine, culture, art, recreation, sports, social welfare and social work, etc. After the establishment of the Hong Kong Special Administrative Region, staff members previously serving in subvented organizations in Hong Kong may continue to be employed in accordance with the previous system”. In the third draft, the expression “After the establishment of the Hong Kong Special Administrative Region” was deleted and the expression “continue to be employed” was replaced with “remain in their employment”. In the sixth draft, the expression “and health” was added after the word “medicine”, and the expression “in respect of subventions for organizations for ... social work, etc.” was changed to read “in respect of subventions for non-governmental organizations in fields such as ... social work”.

The major focus of this article is to maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in certain fields. During the drafting process, there had always been views that this article was too restrictive, lacked flexibility, imposed unnecessary restrictions on the HKSARG and restricted HKSARG’s ability to amend its

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<sup>46</sup> *Overview of the Drafting Process*, Vol.3, pp.1101-1106.

policies. Views were also expressed that it should be stipulated that the treatment and conditions of service of employees of subvented organizations employed before the establishment of the HKSAR should be no less favourable than before.<sup>47</sup>

At the later stage of the drafting of the article, that is, before the finalization of the seventh draft, the Special Group on Culture, Education, Technology and Religion of the Consultative Committee discussed whether to add the expression “and shall develop and improve it in the light of the economic conditions and social needs” at the end of the first sentence of this article. At that time, some members of the Consultative Committee endorsed the addition of this expression. However, some members were of the view that “such a change is subject to the understanding of the phrase ‘policy previously practised’. The expression should be added if it is considered that there are no elements of improvement in the policy on subventions previously practised; but if the policy on subventions previously practised contains the meaning of improvement, it is unnecessary to add the expression.” A member objected to such addition. That member considered that “There is no need to impose statutory restrictions on the government. An effective government will certainly provide appropriate subventions in the light of the economic conditions and social needs.” There were also views that “judging from the wording, this article has ensured that the Hong Kong Special Administrative Region Government will provide subventions in different fields, and such a change should not be made unless there is evidence that the ‘policy previously practised’ referred to in this article excludes any possibility of improvement.”<sup>48</sup>

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47 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1104.

48 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee regarding Chapter Six of the Draft Basic Law*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.1*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1105.



## Article 145

“On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.”

Drafting materials in *Overview of the Drafting Process* show that the drafting of this article had progressed through eight drafts and there was no significant change in the wording and content from the first to fifth drafts.<sup>49</sup> The first draft read “The Government of the Hong Kong Special Administrative Region shall maintain the previous social welfare and shall, on its own, decide on the development and improvement of social welfare in the light of the economic conditions and social needs.” In the second draft, the term “social welfare” was changed to “social welfare system”, the expression “shall, on its own, decide on” was changed to “shall, on its own, formulate”, and the phrase “policies on” was inserted before “the development and improvement”. However, there were some changes in the wording of this article in the sixth draft.

The materials before the finalization of the sixth draft show that some members of the Consultative Committee were of the view that the word “maintain” in this article implied “unchanged” and that the HKSARG should be allowed to develop welfare services. There were also views that the article was self-contradictory.<sup>50</sup> Modifications were made when the sixth draft was finalized: the expression “shall maintain the previous social welfare system and” was deleted and replaced by “On the basis of the previous social welfare system”; the expression “in the light of the economic conditions and social needs” in the article

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49 *Overview of the Drafting Process*, Vol.3, pp.1107-1111.

50 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1109.



was not amended despite criticism; as for the expression “shall, on its own, formulate policies on the development and improvement of this system”, the phrase “laws and” was inserted before the word “policies”. Subsequently, some members of the Consultative Committee proposed to replace the expression “laws and policies” with “laws or policies” on the grounds that there were few laws on social welfare in Hong Kong and the major part of social welfare was not regulated by law, and therefore such wording might restrict the development of welfare services in Hong Kong and seemed inconsistent with the situation in Hong Kong.<sup>51</sup> When the seventh draft was finalized, the phrase “laws and” was deleted.<sup>52</sup>

## Article 146

“Voluntary organizations providing social services in the Hong Kong Special Administrative Region may, on their own, decide their forms of service, provided that the law is not contravened.”

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eight drafts, with little change in content and language.<sup>53</sup> The first draft read “Voluntary organizations providing social services in the Hong Kong Special Administrative Region may, on their own, decide their forms of service.” The words “may, on their own, decide” were changed to “may, on their own, decide in accordance with law” in the fourth draft and then to “may,

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51 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee regarding Chapter Six of the Draft Basic Law*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.1*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1110.

52 *Minutes of the Twelfth Meeting of the Subgroup on Education, Science and Culture*, 17 December 1989, published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.1111.

53 *Overview of the Drafting Process*, Vol.3, pp.1112-1114.

on their own, decide their forms of service, provided that the law is not contravened” in the sixth draft.

At an early stage of the drafting process of this article, some members of the Drafting Committee indicated that “it is inappropriate for voluntary organizations to decide their forms of service independent of the government” and suggested that the words “in accordance with law” be added after “on their own, decide”.<sup>54</sup> After the addition of the words “in accordance with law” in the fourth draft, however, some members suggested that such words be deleted on the ground that they were not clearly defined and might in the future “become the basis for depriving voluntary organizations of their freedom to determine their own forms of service”. It was also pointed out that the words “in accordance with law” implied that the government could enact and stipulate the manner in which voluntary organizations could provide services. It was also suggested that the term “in accordance with law” be replaced by “insofar as the law is not violated”.<sup>55</sup> In formulating the sixth draft, the words “in accordance with law” were amended to “provided that the law is not contravened”.

## Article 147

“The Hong Kong Special Administrative Region shall on its own formulate laws and policies relating to labour.”

Drafting materials in *Overview of the Drafting Process* show that this article had progressed through eight drafts.<sup>56</sup> The first draft read “The Hong Kong Special Administrative Region shall on its own

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54 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.1113.

55 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1114.

56 *Overview of the Drafting Process*, Vol.3, pp.1115-1123.

formulate laws and policies relating to labour, taking into account the actual situation of economic development, social needs and labour negotiations.” In the sixth draft, the article had been reduced in length and become concise in content. The conditional provision, “taking into account the actual situation of economic development, social needs and labour negotiations”, was deleted. The article read as “The Hong Kong Special Administrative Region shall on its own formulate laws and policies relating to labour”. The seventh and eighth drafts were the same as the current text of BL 147.

During the drafting process of this article, it was pointed out that the international labour spirit had not been fully incorporated in this article, and that the International Labour Conventions, like Civil Rights, should be clearly incorporated therein.<sup>57</sup> It was also suggested by some members of the Drafting Committee that “The provisions of the International Labour Conventions applicable to Hong Kong should remain in force and be increased as actual circumstances require” be added to this article. The opponents argued that great care should be taken to include international conventions in the Basic Law so as not to cause any misunderstanding that the Basic Law was enacted on the basis of international conventions.<sup>58</sup>

Besides, with regard to the condition “taking into account the actual situation of economic development, social needs and labour negotiations” in the article, it was suggested that the term “economic development” be changed to “economic situation” or the whole sentence be deleted. This was because many labour laws and policies were enacted during an economic downturn, the term “economic development” had an implication of “economic growth, booming economy”. Thus it would be difficult for the government to resolve the

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57 Secretariat of the Consultative Committee, *Report on the Preliminary Response to the Draft Basic Law (for solicitation of opinions)*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.1117.

58 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.1117.

plight of labourers during an economic downturn. In addition, the term “social needs” aroused different understandings in different sectors. The term “labour negotiations”, in the absence of any trade union bargaining power, would be detrimental to labourers, and therefore hindered the enactment of labour laws.<sup>59</sup> Accordingly this provision had been deleted since the sixth draft.

During the drafting process, there were many views that the status and representation of trade unions in negotiations should be established in the Basic Law to protect labourers’ rights, as many labour disputes could not be resolved by labour legislation or the government’s intervention alone. In addition, there were supportive opinions that the unions represented a vast number of labourers, and therefore played an important role in protecting labourers’ rights, stabilizing the society and promoting economic development. Some even considered that genuine labour negotiations could be reached only when the unions were officially recognized and given the right of collective bargaining.<sup>60</sup>

Discussions on the right of collective bargaining prior to the preparation of the seventh draft showed that some members of the Consultative Committee considered that the rights to form and join trade unions, to strike and the right of collective bargaining were considered to be internationally recognized fundamental rights, and that the former two rights were already contained in the *Draft Basic Law* while the right of collective bargaining was not, and therefore supported its inclusion in the Basic Law. It was also considered that the inclusion of such right could lead the Hong Kong government to consider the enactment of relevant legislation before the reunification.

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59 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1118.

60 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1121-1122.

Opponents argued that Hong Kong did not need to introduce such a major change as institutionalized collective bargaining and that using the opportunity of the enactment of the Basic Law to consolidate their own interests or the interests of their own classes or groups would only lead to conflict of interest and also violate the principle of maintaining the status quo.<sup>61</sup>

## Article 148

“The relationship between non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Region and their counterparts on the mainland shall be based on the principles of non-subordination, non-interference and mutual respect.”

Drafting materials in *Overview of the Drafting Process*<sup>62</sup> show that this article, at the initial stage of the drafting process, did not cover the four categories of “art”, “medicine and health”, “labour” and “social work” but otherwise the rest of this article remained more or less the same throughout the drafting process in terms of its content and wording.

Section XIII of Annex I to the Joint Declaration provides that:

“Religious organizations and believers may maintain their relations with religious organizations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organizations may be continued. The relationship between religious organizations in the Hong Kong Special Administrative Region and

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61 *Collective Bargaining*, published in Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.2 – Reports on Special Issues*, November 1989 in *Overview of the Drafting Process*, Vol.3, pp.1122-1123.

62 *Overview of the Drafting Process*, Vol.3, pp.1124-1129.

those in other parts of the People's Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.”

During the drafting process, there were opinions that “The provisions of this article go beyond the original intention of the Joint Declaration, which is to deal with the history of religion. The addition of culture, education, science and technology, etc. to this article restricts the interaction of the organizations in such fields with their counterparts in the Mainland”.<sup>63</sup>

Prior to the finalization of the third draft, some members of the Drafting Committee proposed to add “labour organizations” after “social welfare”.<sup>64</sup> There was also discussion before the sixth draft as to whether or not the provisions should include labour groups. The views collected by the Consultative Committee suggested that “labour” groups be added to each and every existing group on ground that “labour groups should enjoy independence”, “labour groups have frequent exchanges and contacts with their Mainland counterparts, and therefore should be protected by the principles of ‘non-subordination, non-interference and mutual respect’” and “to avoid labour organizations in Hong Kong being led by trade unions in the Mainland”. There were also views that the word “Mainland” in this article should be changed to “other parts of China”, “other parts of the Mainland”, but the word “Mainland” remained unchanged.<sup>65</sup>

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63 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1126.

64 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.1125.

65 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1127.

Some members of the Consultative Committee also considered that while Article 157 in the fifth draft (i.e. BL 149) did mention “labour” and “health” when referring to the relations between non-governmental and religious organizations in Hong Kong and foreign organizations, no similar mentioning was made in Article 156 in the fifth draft (i.e. BL 148) when referring to the relation with the corresponding groups in the Mainland. Therefore it was suggested to amend this article to unify the wording.<sup>66</sup> This suggestion was finally adopted: “With regard to the non-governmental organizations of the Hong Kong Special Administrative Region, in addition to the fields of education, technology, culture, sports, the professions, social welfare and religion as specified in the original provisions, the fields of art, medicine and health, social work and labour shall be added”.<sup>67</sup>

With regard to the second part of this article, which read: “shall abide by the principles of non-subordination, non-interference and mutual respect”, it was revised from the sixth draft by replacing the words “abide by” with the words “be based on”. The views collected by the Consultative Committee were that this would make the provisions “more flexible; and those groups which originally subordinated to the Mainland can also continue to maintain the original relation with those from the Mainland”.<sup>68</sup>

With regard to the “principles of non-subordination, non-

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66 *Collection of Views of the Special Group on Culture, Education, Technology and Religion of the Consultative Committee for the Basic Law regarding Chapter Six of the Draft Basic Law for Solicitation of Opinions*, published in *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.1*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1126.

67 *Report of the Subgroup on Education, Science, Culture, Sports, Religion, Labour and Social Services regarding the Amendments to the Articles*, 9 January 1989, published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, p.1128.

68 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1127.

interference and mutual respect” in this article, views were expressed throughout the drafting process that such principles should be amended or deleted. Before the revision of the second draft, some members of the Consultative Committee considered that “‘mutual respect’ should be deleted as it was not a legal concept, and therefore should not be included in the Basic Law”.<sup>69</sup> Identical views also emerged before the sixth draft was revised.<sup>70</sup> This situation continued even before the revision of the seventh draft. Some views collected by the Consultative Committee said that “The Basic Law is a constitutional document. The three principles mentioned in this article are vague terms of principle, only the principle of ‘non-subordination’ is clearer and more definite, the principles of ‘non-interference’ and ‘mutual respect’ are likely to cause disputes in future interpretation and implementation of the provisions.”<sup>71</sup> Even so, the wording for the three principles remained unchanged at different stages of the drafting process and was identical to the final text.

## Article 149

“Non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Region may maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organizations.

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69 Special Group on Culture, Education, Technology and Religion, *Opinions on the Draft Articles in Chapter VI of the Basic Law (August 1987)* in *Overview of the Drafting Process*, Vol.3, p.1125.

70 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1126.

71 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1128.



They may, as required, use the name ‘Hong Kong, China’ in the relevant activities.”

Drafting materials in *Overview of the Drafting Process*<sup>72</sup> show that this article had progressed through eight drafts, with additions and amendments to the wording and changes to the structure. At an early stage of the drafting process, this article did not specify that it applied to “non-governmental organizations”, nor did it cover the fields of “art”, “health”, “labour” and “social work”. In terms of its structure, the first and second drafts stated that the organizations “may maintain and develop relations with foreign countries and regions and with relevant international organizations in the name of ‘Hong Kong, China’”. However, since the third draft, the first part of this article switched with the second. The third draft stated that the organizations “may maintain and develop relations with foreign countries and regions and with relevant international organizations. They may, as required, use the name ‘Hong Kong, China’ in the relevant activities.”

At an early stage of the drafting process, there was consensus within the Drafting Committee on the content of Chapter VI. The consensus reached was as follows:

“7. Organizations in fields such as education, science, technology, culture, sports and the professions as well as religious organizations in the Hong Kong Special Administrative Region may, on their own and in the name and identity of the Hong Kong Special Administrative Region of the People’s Republic of China (‘Hong Kong, China’), maintain and develop relations with foreign countries and regions and with relevant international organizations, and conclude and perform the relevant agreements. The Central People’s Government shall take the necessary measures to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organizations of which the People’s Republic of China is a member and in which Hong Kong participates in one capacity or another. The Central People’s

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72 *Overview of the Drafting Process*, Vol.3, pp.1130-1137.

Government shall, as necessary, facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member (it can be omitted from this chapter if it has already been fully reflected in Chapter VII of the Basic Law - External Affairs);<sup>73</sup>

Drafting materials in *Overview of the Drafting Process* also show that members of the Drafting Committee were aware of the possibility of duplication between the provisions of this article and those under Chapter VII - External Affairs. In finalizing the second draft, members of the Drafting Committee reiterated that this article (Article 156 in the second draft, i.e. BL 149) could be deleted if its content had already been included in the relevant provisions of Chapter VII.<sup>74</sup>

During the drafting process, members of the Drafting Committee discussed whether or not non-governmental organizations should be covered in this article. Some members of the Drafting Committee considered that this article could only cover official organizations, as there was no question of non-governmental organizations developing relations with foreign countries and regions and relevant international organizations "in the name of 'Hong Kong, China'". Some members considered that the provisions of this article should be limited to participating in international organizations and conferences which are not limited to states.<sup>75</sup> The phrase "Non-governmental organizations"

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73 *Progress Report of the Subgroup on Education, Science, Technology, Culture, Sports and Religion (and Issues on Regional Flag and Regional Emblem) of the Drafting Committee*, 5 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1131.

74 Secretariat of the Drafting Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.1131.

75 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1131.

was finally added to this article starting from the sixth draft.

Prior to the formulation of the sixth draft, an issue emerged as to whether sports organizations would need to register the changes of name with different international organizations. With regard to the questions raised by different sectors on Article 157 in the fifth draft (i.e. BL 149), the Visiting Group of Members of the Drafting Committee from the Mainland had the following responses:

“Article 157 provides that sports organizations in the Hong Kong Special Administrative Region may maintain and develop relations with relevant international organizations in all parts of the world. In other words, sports groups and organizations in Hong Kong that have previously established relations with international organizations abroad would be able to maintain and even develop such relations after 1997. This is the so-called ‘maintain and develop relations’. Those organizations referred to in Article 157 are non-governmental organizations, including those in the fields of education, science, technology, culture, sports, health, the professions and labour, all of which are organizations of the civil society, which are not governmental. So if South China Football Team played in the United States and if they find it necessary, they can call themselves ‘South China Football Team of Hong Kong’ or, ‘South China Football Team of Hong Kong, China’ if they wish. As the provision states that ‘They may, as required, use the name “Hong Kong, China” in the relevant activities’, they may use, if necessary and vice versa. Whether or not such name has been used would not constitute a breach of the Basic Law, because all these international non-governmental sports activities are professional sports activities, rather than diplomatic activities.”<sup>76</sup>

At that time, some views collected by the Consultative Committee expressed disagreement with the phrase “use the name ‘Hong Kong, China’” in the article. It was suggested that “Hong Kong, China” be

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<sup>76</sup> Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.1133.

replaced by “Hong Kong”. This is because at that time, “Hong Kong” was not required to participate in relevant international activities using the name of “Hong Kong, Britain”. It was said that since Hong Kong could participate in the relevant international activities independently without first becoming part of China, the HKSAR should be able to participate in the name of “Hong Kong”. It was also suggested that “Hong Kong, China” be changed to “China and Hong Kong” as at that time, there were many organizations in Hong Kong using the name “Hong Kong” and it was considered “unnecessary to add ‘China’ to all organizations’ names”.<sup>77</sup> From the first draft to the eighth draft, the phrase “Hong Kong, China” had been used all along without revision.

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77 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1136.

## Chapter VII External Affairs

### Article 150

“Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the Government of the People’s Republic of China, participate in negotiations at the diplomatic level directly affecting the Region conducted by the Central People’s Government.”

Chapter VII - External Affairs of the Basic Law consists of eight articles, i.e. BL 150 to 157.

This article reflects the relevant provisions in Section XI of Annex I to the Joint Declaration, that “Subject to the principle that foreign affairs are the responsibility of the Central People’s Government, representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People’s Republic of China, in negotiations at the diplomatic level directly affecting the Hong Kong Special Administrative Region conducted by the Central People’s Government.”

Drafting materials in *Overview of the Drafting Process*<sup>1</sup> show that the content and wording of this article did not change throughout the drafting process, except for an insignificant wording adjustment to the Chinese version in the eighth draft.

As regards the boundary between foreign affairs and other areas, the *Final Report on Forms and Arrangements for Participation in International Organizations/Agreements*, Discussion Paper of the Ninth Meeting of the Special Group on Foreign Affairs on 28 February 1987, shows that a view was expressed that “In accordance with the provisions of the Joint Declaration that ‘foreign affairs are the responsibility of the Central People’s Government ...’, diplomacy

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<sup>1</sup> *Overview of the Drafting Process*, Vol.3, pp.1138-1140.

can be understood as involving political relations, but it is difficult to define the boundary between diplomacy and other areas (economy, trade, finance, shipping, communications, tourism, culture, sports, etc.). If China and the relevant countries concerned are in a state of war, or if the Special Administrative Region's lobbying work involved defence, the autonomy of the HKSAR in 'other areas' would of course be suspended. When the nature of a situation is not obvious and it is difficult to determine whether the matter concerned is diplomatic in nature, and the Chinese Government and the HKSAR have different views on the definition of the situation, the solution will be provided by mechanism under the 'interpretation of the Basic Law' or the 'relationship between the Central Authorities and the Hong Kong Special Administrative Region'".<sup>2</sup>

During the consultations made at the drafting stage, the Consultative Committee received views that Chapter VII of the Basic Law should specify how the HKSAR should deal with affairs relating to Taiwan and the relationship between the two sides.<sup>3</sup> None of these views were adopted though.

The consultations made at a later stage of the drafting process showed that there were suggestions to change the word "may" into "has the right" and "must automatically become". The reasons were that the representatives of the CPG may not be fully aware of all the affairs and needs of the HKSAR; the HKSARG should be responsible for the interests of the HKSAR; and a passive stance should not be taken awaiting the CPG to inform it the outcome of the diplomatic negotiations. There was also suggestion to include the phrase "The Hong Kong Special Administrative Region may, on its own, decide its

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2 Ibid, Vol.3, pp.1138-1139.

3 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1139.

policies on the matters referred to in this article.”<sup>4</sup> These views were not adopted though.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC pointed out:<sup>5</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

...

The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People’s Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region’s autonomy in areas such as finance, economy, industry and commerce, trade, ... control of entry and exit activities ... Also, the draft stipulates that representatives of the Special Administrative Region Government may act as members of delegations of the Chinese Government to participate in negotiations at the diplomatic level affecting Hong Kong; ...”

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4 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1140.

5 *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 National People’s Congress, 28 March 1990).

## Article 151

“The Hong Kong Special Administrative Region may on its own, using the name ‘Hong Kong, China’, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”

This article reflects the relevant provisions in Article 3(10) and Section XI of Annex I to the Joint Declaration which read “The Hong Kong Special Administrative Region may on its own, using the name ‘Hong Kong, China’, maintain and develop relations and conclude and implement agreements with states, regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields.”

Drafting materials in *Overview of the Drafting Process*<sup>6</sup> show that this article had progressed through ten drafts. The first to fourth drafts read “The Hong Kong Special Administrative Region may on its own maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, using the name ‘Hong Kong, China’, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”<sup>7</sup> The amendments to the fifth draft were included in the *Summary of the Amendments to the Articles Made by the General Working Group*, April 1988, which changed the order of the provisions as follows: “The Hong Kong Special Administrative Region may on its own, using the name ‘Hong Kong, China’, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping,

6 *Overview of the Drafting Process*, Vol.3, pp.1141-1145.

7 *Ibid*, pp.1141-1143.



communications, tourism, cultural and sports fields.”<sup>8</sup> This article remained unchanged in the following five drafts in terms of wording and content, and was passed as BL 151 in April 1990.

According to the *Discussion Paper on the Forms and Arrangements for Participating in International Organizations/Agreements (Draft)*, 27 January 1987, the international agreements applicable to Hong Kong at that time were as follows:<sup>9</sup>

### “2.1 International Agreements

According to the materials of the Department of Justice of the Hong Kong Government in July 1983, there were more than 300 international agreements applicable to Hong Kong. Most of these treaties were concluded in the form of treaties, conventions, agreements and protocols as well as international rules and declarations, the scope of which was wide-ranging, including economy, finance, trade and commerce, communications, transportation, law, fisheries and agriculture, culture, medicine and health, among others.

### 2.2 Form of Participation

Hong Kong participated in these agreements only through the connection with the United Kingdom in the form of the following categories:

2.2.1 Participating in these agreements in the name of “Hong Kong” alone. Its identity was actually a British Dependent Territory which needed to be authorized by the British Government to become a contracting territory. Hong Kong often contracted in trade in such identity.

### 2.2.2 Participation through the United Kingdom:

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8 Published in *Collection of Documents of the Seventh Plenary Session of the Drafting Committee*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.1144.

9 Discussion Paper of the First Working Meeting of the Working Group on the Forms and Arrangements for Participating in International Organizations/Agreements of the Special Group on External Affairs, 4 February 1987 in *Overview of the Drafting Process*, Vol.3, p.1142.

(1) Agreements to which the United Kingdom was a party usually included a ‘Territory Governed’ clause, which determined whether or not the content of the agreement was applicable to an affiliated region of the United Kingdom (such as Hong Kong). The United Kingdom could, at the time of the signing of these agreements, make a declaration under such clause so as to preserve the applicability of certain provisions in these agreements to British dependent territories. In other words, to reserve certain provisions so that they would not apply to certain dependent territories. For instance, the *International Covenant on Civil and Political Rights*, in which the provision reserved for Hong Kong was Article 25(b) in relation to the right to vote. When the United Kingdom accepted the Convention, Hong Kong’s legislature had no elected seats, and therefore the United Kingdom reserved the provision so that it was not applicable to Hong Kong.

(2) In the absence of a ‘Territory Governed’ clause in agreements, it might depend on their content and purpose so as to assess the applicability of the agreements to Hong Kong. Some agreements were clearly applicable to Hong Kong, such as a bilateral aviation treaty entered into between the United Kingdom and another country in relation to a route on which Hong Kong was located. On the other hand, some other agreements might be clearly inapplicable to Hong Kong, such as those relating to the coastline of the British mainland.”

In this regard, the following was recorded by the Special Group on External Affairs in the *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements*:<sup>10</sup>

“If it is unclear as to whether or not an agreement relates to Hong

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10 *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements* (Discussion Paper of the Ninth Meeting of the Special Group on External Affairs 28 February 1987) in *Overview of the Drafting Process*, Vol.3, p.1143.

Kong, and the United Kingdom does not state that the agreement is not applicable to Hong Kong, the agreement will be assumed to be applicable to Hong Kong by the other contracting parties.

The United Kingdom Government will consult the Hong Kong Government before signing an agreement that might be applicable to Hong Kong, and then decide whether or not to extend the agreement to Hong Kong.”

According to the discussions during the drafting process of the article, some members of the Drafting Committee suggested that issues relating to Hong Kong’s development of foreign relations in various aspects could be compiled together. It was suggested that all the relevant provisions in Chapters V and VI could be collected so as to consider and adjust in one go. Some members of the Drafting Committee proposed that the meaning of the term “in the appropriate fields” referred to in this article needed clarification. There were queries whether the term was meant to be exhaustive. It was proposed that the Subgroup concerned should further examine the term.<sup>11</sup>

Prior to the finalization of the eighth draft, the Secretariat of the Consultative Committee received suggestions to add the words “the professions”, “science and technology”, “patent and copyright”, “intellectual and industrial property rights” and “industry and invention” to the article. Views were also expressed that the areas referred to in this article were of a broad nature, and therefore suggested that they should be more specific so as to avoid confusion.<sup>12</sup> The Consultative Committee received suggestions to add “or Hong Kong” and similar words after “Hong Kong, China” on the ground that it should be appropriate and reasonable for Hong Kong to use

11 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1143.

12 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1144.

the name “Hong Kong” after 1997, since Hong Kong participated in all trade activities and negotiations as well as international sports and cultural events in the name of “Hong Kong”. It was also suggested the phrase, “The Hong Kong Special Administrative Region shall, on its own, formulate policies on the matters referred to in this article”, be added at the end of this article.<sup>13</sup> These suggestions were not adopted.

The “Explanations” made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 pointed out:<sup>14</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

...

The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People’s Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region’s autonomy in areas such as finance, economy, industry and commerce, trade, ... control of entry and exit activities ... Also, ... the Special Administrative Region may on its own, using the name ‘Hong Kong,

13 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1144-1145.

14 *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 National People’s Congress, 28 March 1990).

China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in economic, trade, financial and monetary, shipping, communications, tourism, cultural, sports and other appropriate fields."

## Article 152

"Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the People's Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central People's Government and the international organization or conference concerned, and may express their views, using the name 'Hong Kong, China'.

The Hong Kong Special Administrative Region may, using the name 'Hong Kong, China', participate in international organizations and conferences not limited to states.

The Central People's Government shall take the necessary steps to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organizations of which the People's Republic of China is a member and in which Hong Kong participates in one capacity or another.

The Central People's Government shall, where necessary, facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member."

This article reflects the relevant provisions in Article 3(10)<sup>15</sup> and Section XI of Annex I to the Joint Declaration which read “Representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People’s Republic of China, in international organizations or conferences in appropriate fields limited to states and affecting the Hong Kong Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People’s Government and the organization or conference concerned, and may express their views in the name of ‘Hong Kong, China’. The Hong Kong Special Administrative Region may, using the name ‘Hong Kong, China’, participate in international organizations and conferences not limited to states. The application to the Hong Kong Special Administrative Region of international agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People’s Government shall, as necessary, authorize or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements. The Central People’s Government shall take the necessary steps to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organizations of which the People’s Republic of China is a member and in which Hong Kong participates in one capacity or another. The Central People’s Government shall, where necessary, facilitate the

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15 The Hong Kong Special Administrative Region may on its own, using the name “Hong Kong, China”, maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organizations.

continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member.”

Drafting materials in *Overview of the Drafting Process*<sup>16</sup> show that no substantive changes had been made to the content or wording of this article throughout the drafting process.<sup>17</sup>

The *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements* made by the Special Group on External Affairs of the Consultative Committee at an early stage of the drafting process shows that Hong Kong's status in international agreements/organizations at that time was as follows: “At present, with regard to Hong Kong's attendance at international trade agreements and conferences, Hong Kong's status is probably represented by the United Kingdom as the contracting party, and in some occasions a member of the British delegation might speak on behalf of Hong Kong. Such member would usually be a Hong Kong government official. He could represent and speak on behalf of Hong Kong's interests. If any conflict of trade interests arises, Hong Kong could take up a position different from that of the United Kingdom.”<sup>18</sup>

Before the second draft was finalized, the Special Group on External Affairs of the Consultative Committee discussed the form in which the HKSAR should participate in the following international organizations, the practice of which had not been specified in the Joint Declaration: the international organizations of which China was a member but HKSAR was not, and those of which neither China nor

16 *Overview of the Drafting Process*, Vol.3, pp.1146-1152.

17 When the eighth draft was finalized, “of the Government” were added to “Representatives of the Hong Kong Special Administrative Region may ...” in the first paragraph which became “Representatives of the Government of the Hong Kong Special Administrative Region may ...”.

18 Special Group on External Affairs, *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements* (Discussion Paper of the Ninth Meeting of the Special Group on External Affairs 28 February 1987) in *Overview of the Drafting Process*, Vol.3, p.1149.

HKSAR was a member.<sup>19</sup> There were also views on the autonomy of the HKSAR or “Hong Kong, China” under various forms of participation: “As International organizations and conferences are forums for expressing views and resolving disputes, Hong Kong needs to express its own views and position in such international forums even if Hong Kong’s participation is through China. The Basic Law should protect the Hong Kong Special Administrative Region’s right to express views independently. In case there are conflict of interests between the Hong Kong Special Administrative Region and China, representatives of the Region might express views contrary to those of China.”; and “The Basic Law should protect the Hong Kong Special Administrative Region’s right to vote independently, including to cast votes contrary to China’s.” There were also views on the impact of China’s decision to withdraw from an international agreement/organization on the HKSAR’s participation in that agreement/organization: “(1) If the Hong Kong Special Administrative Region participates in the name of ‘Hong Kong, China’, it should have the right to withdraw at its own discretion. (2) If the Hong Kong Special Administrative Region participates as a member of the Chinese delegation, it must withdraw with China. The Basic Law should empower the HKSAR to request China to facilitate its continued participation in an appropriate capacity.”<sup>20</sup>

Prior to the finalization of the third draft, some members of the Drafting Committee considered that the term “appropriate fields” in the first paragraph was not clear and suggested that the words be deleted. Some other members argued, however, that the “appropriate fields” generally referred to the range of matters specified in BL 151,

19 *Discussion Paper on the Forms and Arrangements for Participating in International Organizations/Agreements (Draft)*, 27 January 1987 (Discussion Paper of the First Working Meeting of the Working Group on the Forms and Arrangements for Participating in International Organizations/Agreements of the Special Group on External Affairs, 4 February 1987); *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements* (Discussion Paper of the Ninth Meeting of the Special Group on External Affairs 28 February 1987) in *Overview of the Drafting Process*, Vol.3, pp.1147-1149.

20 *Ibid*, footnote 18.



which should not be deleted.<sup>21</sup>

Prior to the finalization of the fourth draft, it was suggested by some members the Drafting Committee that the phrase “and express their views, using the name ‘Hong Kong, China’” in the first paragraph be amended as “and can express their views, using the name ‘Hong Kong, China’”. It was believed that in this way, representatives of the HKSAR, when acting as members of the Chinese delegation, could either express views consistent with those of the state delegation in the name of the state delegation, or express views inconsistent with those of the state delegation in the name of “Hong Kong, China”. Some members of the Drafting Committee suggested that a semicolon be added after the words “Representatives of the Government of the Hong Kong Special Administrative Region may participate, as members of delegations of the People’s Republic of China, in international organizations or conferences in appropriate fields limited to states and affecting the Region”, so that both meanings could be expressed more clearly. These suggestions were not adopted.<sup>22</sup>

Prior to the finalization of the eighth draft, the Consultative Committee received suggestions to add the following sentence to the end of the article: “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate its policies on the participation of the Hong Kong Special Administrative Region in the above-mentioned international organizations or conferences.”<sup>23</sup> This advice was not adopted.

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21 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.3, p.1150.

22 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law*, 2 September 1987 in *Overview of the Drafting Process*, Vol.3, p.1150.

23 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1151.

At a later stage of the drafting process, the Consultative Committee received different suggestions, including to add “and sign regional agreements” at the end of the first paragraph; with regard to the third and fourth paragraphs, replace “appropriate capacity” with “independent capacity”; with regard to the third paragraph, to amend the expression “of which the People’s Republic of China is a member and in which Hong Kong ...” to read as “of which the People’s Republic of China is a member and in which, prior to the establishment of the Special Administrative Region, Hong Kong”; similar amendment should also be made to the fourth paragraph. The reasons for the amendments are to clarify the timeline and to specify the meaning of “appropriate” referred to in “appropriate capacity” to avoid vagueness.<sup>24</sup> These suggestions were not adopted though.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC pointed out:<sup>25</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

...

The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People’s Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

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24 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1152.

25 *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 National People’s Congress, 28 March 1990).

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, ... the draft stipulates that representatives of the Special Administrative Region Government may act as members of delegations of the Chinese Government to participate in negotiations at the diplomatic level affecting Hong Kong; the Special Administrative Region may on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in economic, trade, financial and monetary, shipping, communications, tourism, cultural, sports and other appropriate fields.”

### **Article 153**

“The application to the Hong Kong Special Administrative Region of international agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.

International agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People’s Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.”<sup>26</sup>

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26 See the diplomatic note by the Permanent Representative of the People’s Republic of China to the United Nations informing the Secretary-General on 20 June 1997 of China’s position regarding the application of international treaties to Hong Kong and a list of the international treaties applicable to the HKSAR as of 1 July 1997, in order to facilitate the smooth implementation of BL 153. The content of this diplomatic note is included in Appendix X.

This article reflects Section XI of Annex I to the Joint Declaration which reads “The application to the Hong Kong Special Administrative Region of international agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People’s Government shall, as necessary, authorize or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements.”

Drafting materials in *Overview of the Drafting Process*<sup>27</sup> show that no changes had been made to its content or wording throughout the drafting process.

The *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements* made by the Special Group on External Affairs of the Consultative Committee at an early stage of the drafting process shows how international agreements then had legal effect in Hong Kong: “Before any agreement is applied in Hong Kong (no matter in what way), firstly, it is necessary to consider whether or not such agreement complies with the laws of Hong Kong; and whether or not the Hong Kong Government has the necessary legal authority for implementing such agreement. Amendments to Hong Kong law to give effect to the agreement should be made before the entry into force of such agreement in Hong Kong. The way to ensure that Hong Kong laws can tie in with such agreement is simply to give such agreement legal force in Hong Kong as long as such agreement itself possesses the necessary qualities to be legally enforceable. Many agreements have already been applied

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27 *Overview of the Drafting Process*, Vol.3, pp.1153-1158.

to and are formally enforceable in Hong Kong in one of the following ways: existing legislation, enactment of new law for such agreements, common law or other arrangements.”<sup>28</sup>

Prior to the finalization of the third draft of this article, some members of the Drafting Committee proposed that the term “international agreements to which the People’s Republic of China is or becomes a party” in the first paragraph should be replaced by “treaties to which the People’s Republic of China is or will be a party”. The HKSAR was a part of China, and therefore international agreements should of course be applicable to Hong Kong. It was not necessary for the Central Authorities to decide whether or not international agreements should be applicable to Hong Kong. Whether or not international treaties should be applicable to the HKSAR must be stipulated in the provisions of treaties rather than to be decided thereafter, and therefore the Central Authorities should consult Hong Kong in advance as to whether or not international treaties should apply to the Special Administrative Region. However, some members of the Drafting Committee considered that “agreements” were broader in scope than “treaties”, and therefore the use of the term “international agreement” was appropriate. It was appropriate to decide, whether in advance or afterwards, as to whether a certain agreement was applicable to Hong Kong. Besides, some members proposed that it was worth considering whether or not “International agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong” referred to in the second paragraph could continue to apply. However, some members considered that this paragraph was copied from the Joint Declaration, and therefore should

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28 Special Group on External Affairs, *Final Report on the Forms and Arrangements for Participating in International Organizations/Agreements* (Discussion Paper of the Ninth Meeting of the Special Group on External Affairs 28 February 1987) in *Overview of the Drafting Process*, Vol.3, p.1155. For the international agreements then applied to Hong Kong, see the Note on BL 151 in this book. There was also a view on the impact of China’s decision to withdraw from an international agreement/organization on the HKSAR’s participation in that agreement/organization, see further details in the Note on BL 152 in this book.

not be changed.<sup>29</sup>

Prior to the finalization of the eighth draft, the Consultative Committee received different suggestions including “Government of the Hong Kong Special Administrative Region” in the first paragraph should be specified as referring to the CE, the ExCo and the LegCo, so as to ensure that the latter’s opinions would be heard and would have an opportunity to represent the mass, and with regard to the binding effect of international agreements concluded by the Central Authorities on the Special Administrative Region, it would be an acceptable arrangement for the Basic Law Committee to decide since the Committee had sufficient Hong Kong representatives to protect Hong Kong’s interests.<sup>30</sup>

Prior to the finalization of the ninth draft, the Secretariat of the Consultative Committee received views from different sectors of the Mainland including that the provision, “international agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region”, in the second paragraph was not sufficiently comprehensive because if there were provisions in such international agreements that ran counter to China’s unity and territorial integrity or the national economic interests, would such provisions still be applicable? It was suggested to specify that “such agreements or specific terms set forth therein shall be subject to modification under the principle of ‘change of circumstances’.”<sup>31</sup>

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29 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.3, p.1156.

30 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1157.

31 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of the Mainland on The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, 30 November 1989 in *Overview of the Drafting Process*, Vol.3, p.1157.

Views collected by the Consultative Committee were that the HKSARG should be consulted on matters relating to the autonomy of the HKSAR. Besides, it was also suggested that this provision be changed to “International agreements to which the People’s Republic of China is or becomes a party which are not in conformity with the spirit of the Basic Law shall not apply to the Hong Kong Special Administrative Region. With regard to international agreements to which the People’s Republic of China is or becomes a party, the Central People’s Government shall, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region and with the consent of the Government of the Hong Kong Special Administrative Region, determine whether or not such international agreements shall be applied to the Hong Kong Special Administrative Region.”<sup>32</sup>

## Article 154

“The Central People’s Government shall authorize the Government of the Hong Kong Special Administrative Region to issue, in accordance with law, passports of the Hong Kong Special Administrative Region of the People’s Republic of China to all Chinese citizens who hold permanent identity cards of the Region, and travel documents of the Hong Kong Special Administrative Region of the People’s Republic of China to all other persons lawfully residing in the Region. The above passports and documents shall be valid for all states and regions and shall record the holder’s right to return to the Region.

The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions.”

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32 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1157.

The relevant provisions of the Joint Declaration on immigration controls and visas are set out in Article 3(10)<sup>33</sup> and Section XIV of Annex I to the Joint Declaration:

“The Central People’s Government shall authorize the Hong Kong Special Administrative Region Government to issue, in accordance with the law, passports of the Hong Kong Special Administrative Region of the People’s Republic of China to all Chinese nationals who hold permanent identity cards of the Hong Kong Special Administrative Region, and travel documents of the Hong Kong Special Administrative Region of the People’s Republic of China to all other persons lawfully residing in the Hong Kong Special Administrative Region. The above passports and documents shall be valid for all states and regions and shall record the holder’s right to return to the Hong Kong Special Administrative Region.

For the purpose of travelling to and from the Hong Kong Special Administrative Region, residents of the Hong Kong Special Administrative Region may use travel documents issued by the Hong Kong Special Administrative Region Government, or by other competent authorities of the People’s Republic of China, or of other states. Holders of permanent identity cards of the Hong Kong Special Administrative Region may have this fact stated in their travel documents as evidence that the holders have the right of abode in the Hong Kong Special Administrative Region.

Entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice.

The Hong Kong Special Administrative Region Government may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions.

Unless restrained by law, holders of valid travel documents shall

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33 The Government of the Hong Kong Special Administrative Region may, on its own, issue travel documents for entry into and exit from Hong Kong.



be free to leave the Hong Kong Special Administrative Region without special authorization.

The Central People's Government shall assist or authorize the Hong Kong Special Administrative Region Government to conclude visa abolition agreements with states or regions.”

Drafting materials in *Overview of the Drafting Process*<sup>34</sup> show that no significant changes had been made in the ten drafts of this article. The first and second drafts of this article read:

“The Central People's Government shall authorize the Hong Kong Special Administrative Region Government to issue, in accordance with the provisions of law, passports of the Hong Kong Special Administrative Region of the People's Republic of China to all Chinese citizens who hold permanent identity cards of the Hong Kong Special Administrative Region, and travel documents of the Hong Kong Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Hong Kong Special Administrative Region. The above passports and documents shall be valid for all states and regions and shall record the holder's right to return to the Hong Kong Special Administrative Region.

The Hong Kong Special Administrative Region Government may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions.”

Prior to the formulation of the second draft, the Special Group on External Affairs of the Consultative Committee, together with the Special Group on the Relationship between the Central Authorities and the HKSAR jointly formed a Working Group on Entry Control and Visa Issues and held several meetings. As indicated in its *Final Report on the Issues of Immigration Controls and Visas*, the working group's discussion paper included a note on visa issues contained in the Chinese Memorandum in the Joint Declaration that “... Taking into

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34 *Overview of the Drafting Process*, Vol.3, pp.1159-1166.

account the historical background of Hong Kong and its realities, the competent authorities of the Government of the People's Republic of China will, with effect from 1 July 1997, permit Chinese citizens 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. The above Chinese citizens will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above-mentioned British travel documents."<sup>35</sup> The report also analyzed the immigration controls and visas processing in Hong Kong at that time, and discussed the issue of each and every class of people entering Hong Kong. There was an opinion on immigration of non-residents to the HKSAR that "there should be no need for coordination between the Central Authorities and the Hong Kong Special Administrative Region as the Hong Kong Special Administrative Region has the absolute power to review and approve immigration from outside the HKSAR. Some members consider that such issue does not exist as the Hong Kong Special Administrative Region may implement immigration controls on foreigners' entry into, stay in and departure from the Region. For the purpose of obtaining the right of abode, one must have ordinarily resided in Hong Kong for a continuous period of not less than seven years. This requirement is not easy to meet for people overseas."<sup>36</sup>

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35 Working Group on the Issues of Immigration Controls and Visas co-organized by the Special Group on External Affairs and the Special Group on the Relationship between the Central Authorities and the HKSAR, *Discussion Paper on the Issues of Immigration Controls and Visas*, 19 February 1987 (Discussion Paper of the Joint Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR and the Special Group on External Affairs, 26 February 1987) in *Overview of the Drafting Process*, Vol.3, pp.1159-1160.

36 Working Group on the Issues of Immigration Controls and Visas co-organized by the Special Group on External Affairs and the Special Group on the Relationship between the Central Authorities and the HKSAR, *Final Report on the Issues of Immigration Controls and Visas*, 9 March 1987 (Discussion Paper of the Resumed Session of the Second Joint Conference of the Special Group on External Affairs and the Special Group on the Relationship between the Central Authorities and the HKSAR, 11 March 1987) in *Overview of the Drafting Process*, Vol.3, p.1162.

Prior to the finalization of the third draft, some members of the Drafting Committee proposed that the words “the provisions of” might be removed from the phrase “The Central People’s Government shall authorize the Hong Kong Special Administrative Region Government to issue, in accordance with the provisions of law ...”, so as to be consistent with the wording of the Joint Declaration.<sup>37</sup> These words were deleted from the third draft. In the fifth draft, the words “the Hong Kong Special Administrative Region” in the phrase “shall record the holder’s right to return to the Hong Kong Special Administrative Region” in the first paragraph were replaced by “Hong Kong”.

During the consultation period prior to the eighth draft, the Consultative Committee was advised that “The provision that the Government of the Hong Kong Special Administrative Region shall issue passports of the Hong Kong Special Administrative Region to Chinese citizens in Hong Kong does not indicate whether or not such passports will be issued to the holders of travel documents or C.I. issued by the United Kingdom, if not, the holders of these two documents might be considered stateless while abroad and not protected by the Chinese Consulate. Therefore, this point should be confirmed in the provisions. If subsequent laws are to be relied upon so as to regulate it, Hong Kong people cannot be reassured.” Besides, it was suggested that “as required” be added after the “The Central People’s Government shall” in the first line. It was also suggested that the following sentence be added to the end of the article: “Hong Kong Chinese who live abroad and have become foreign nationals shall enjoy the rights of entry and exit.” It was also suggested that this article be moved to Chapter III of the Basic Law, since obtaining a travel document in accordance with law was as of right.<sup>38</sup> None of

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37 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.3, p.1163.

38 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1164-1165.

these suggestions were adopted.

Prior to the finalization of the ninth draft, the Consultative Committee received different amendment proposals, including replacing the words “persons from foreign states and regions” in the second paragraph with “persons from foreign states and regions, including persons of other provinces of the People’s Republic of China”; and that the concluding sentence should specify the enforcement of immigration controls in accordance with law, and therefore the sentence should be amended as “The Government of the Hong Kong Special Administrative Region may, in accordance with the current circumstances, enact law to implement immigration controls.” It was also suggested that travel documents issued by the HKSARG after 1997 should not be named as “Passport of the Hong Kong Special Administrative Region of the People’s Republic of China”, but should follow the practice of the “Hong Kong Certificate of Identity” then, that is, in the name of “Hong Kong” only. None of the above proposals were adopted.<sup>39</sup>

According to the amendment proposals contained in the *Minutes of the Fifteenth Meeting of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 11-12 December 1989, “Members considered that the wording of individual articles was not precise enough and should be amended ... The last sentence in the first paragraph should be amended by replacing ‘and shall record the holder’s right to return to Hong Kong’ with ‘and shall record the holder’s right to return to the Hong Kong Special Administrative Region’.”<sup>40</sup> When the tenth draft was finalized, the foregoing amendment was adopted and the text of this article was adopted as BL 154 in April 1990.

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39 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1165.

40 Published in the *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.1166.

The “Explanations” made by Chairman Ji Pengfei at a session of the NPC on 28 March 1990 pointed out:<sup>41</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

...

The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People’s Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region’s autonomy in areas such as finance, economy, ... control of entry and exit activities ...”

## Article 155

“The Central People’s Government shall assist or authorize the Government of the Hong Kong Special Administrative Region to conclude visa abolition agreements with foreign states or regions.”

This article reflects the relevant part of Section XIV of Annex I to the Joint Declaration which reads as: “The Central People’s Government shall assist or authorize the Hong Kong Special Administrative Region Government to conclude visa abolition

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<sup>41</sup> *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 National People’s Congress, 28 March 1990).

agreements with states or regions.”

Drafting materials in *Overview of the Drafting Process*<sup>42</sup> show that apart from a minor amendment in the Chinese text in the sixth draft, no changes were made to the content or wording of this article throughout the drafting process.

At the early stage of the drafting process, the Special Group on External Affairs, together with the Special Group on the Relationship between the Central Authorities and the HKSAR, organized the Working Group on the Issues of Immigration Controls and Visas and had meetings repeatedly to discuss immigration controls and visas of foreigners, including the institutions responsible for visas.<sup>43</sup> During the consultation at the later stage of the drafting of the article, the Consultative Committee received a view which read as: “Judging from the articles, the Hong Kong Special Administrative Region is a typical local administrative region, and it can be said that it does not have any legal personality under international law.”<sup>44</sup> There was also a suggestion to insert the expression “when necessary” after “The Central People’s Government shall”.<sup>45</sup> It was not adopted though.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC pointed out:<sup>46</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues

42 *Overview of the Drafting Process*, Vol.3, pp.1167-1169.

43 *Ibid*, pp.1167-1168.

44 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1169.

45 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1169.

46 *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 National People’s Congress, 28 March 1990).

defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

... The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People's Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region's autonomy in areas such as finance, economy, ... control of entry and exit activities ... Also, ... the Special Administrative Region may on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in economic, trade, financial and monetary, shipping, communications, tourism, cultural, sports and other appropriate fields."

### **Article 156**

"The Hong Kong Special Administrative Region may, as necessary, establish official or semi-official economic and trade missions in foreign countries and shall report the establishment of such missions to the Central People's Government for the record."

This article reflects the relevant part of Section VI of Annex I to the Joint Declaration which reads as: "The Hong Kong Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment of such missions to the Central People's Government for the record."

Drafting materials in *Overview of the Drafting Process*<sup>47</sup> show that the drafting of this article had progressed through ten drafts and no changes were made to its content or wording throughout the drafting process.

*Discussion Paper on Missions Stationed Abroad* (Discussion Paper of the Tenth Meeting of the Special Group on External Affairs of 5 March 1987) shows the functions of the missions of Hong Kong stationed abroad at that time as follows: “To develop and maintain Hong Kong’s external relations, the Hong Kong Government, the Hong Kong Trade Development Council and the Hong Kong Tourist Association all maintain offices stationed abroad. These offices basically provide Hong Kong and foreign governments and organizations with opportunities for direct contact, but each of them also has its own special functions: ...”<sup>48</sup> The overseas offices of the Hong Kong government were affiliated to the Industry Department of the government and had offices in London, Geneva, Brussels, Washington and New York at that time. They represented Hong Kong’s interests in commercial relations and provided information on international developments affecting Hong Kong.<sup>49</sup>

During the consultation at the later stage of the drafting process, the Consultative Committee received a suggestion to insert the expression “and other missions authorized by the Central Authorities under the Basic Law to conduct affairs of the Hong Kong Special Administrative Region” after “economic and trade missions”. There were also suggestions to insert the expression “the Government of” before “the Hong Kong Special Administrative Region” and to replace the term “foreign countries” with “other countries or regions” to make the meaning clearer.<sup>50</sup> Also, some suggested “adding the item ‘cultural

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47 *Overview of the Drafting Process*, Vol.3, pp.1170-1172.

48 *Overview of the Drafting Process*, p.1170.

49 Ibid.

50 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions)*, Consultation Report, Vol.5 – General Report on the Articles, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1172.



and educational missions’ to the expression ‘establish official or semi-official economic and trade missions in foreign countries’”.<sup>51</sup>

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC pointed out:<sup>52</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters ...

The high degree of autonomy to be enjoyed by the Special Administrative Region, as stipulated in the draft, embodies executive, legislative and independent judicial power, including that of final adjudication. The Special Administrative Region, authorized by the Central People’s Government, also has the power to conduct relevant external affairs on its own. This shows that the Hong Kong Special Administrative Region will enjoy extensive autonomy.

Regarding the executive power, the draft law, while stipulating that the Special Administrative Region shall, on its own, conduct the administrative affairs of Hong Kong in accordance with the Basic Law, specifically defines the Special Administrative Region’s autonomy in areas such as finance, economy, industry and commerce, trade, ... Also, ... the Special Administrative Region may on its own, using the name ‘Hong Kong, China’, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in economic, trade, financial and monetary, shipping, communications, tourism, cultural, sports and other appropriate fields.”

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51 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1172.

52 *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 National People’s Congress, 28 March 1990).

## Article 157

“The establishment of foreign consular and other official or semi-official missions in the Hong Kong Special Administrative Region shall require the approval of the Central People’s Government.

Consular and other official missions established in Hong Kong by states which have formal diplomatic relations with the People’s Republic of China may be maintained.

According to the circumstances of each case, consular and other official missions established in Hong Kong by states which have no formal diplomatic relations with the People’s Republic of China may be permitted either to remain or be changed to semi-official missions.

States not recognized by the People’s Republic of China may only establish non-governmental institutions in the Region.”

This article reflects the relevant part of Section XI of Annex I to the Joint Declaration which reads as:

“Foreign consular and other official or semi-official missions may be established in the Hong Kong Special Administrative Region with the approval of the Central People’s Government. Consular and other official missions established in Hong Kong by states which have established formal diplomatic relations with the People’s Republic of China may be maintained. According to the circumstances of each case, consular and other official missions of states having no formal diplomatic relations with the People’s Republic of China may either be maintained or changed to semi-official missions. States not recognized by the People’s Republic of China can only establish non-governmental institutions.”

Drafting materials in *Overview of the Drafting Process*<sup>53</sup> show that the first and second paragraphs of the first draft of this article were not substantially different from the final version. The third and fourth paragraphs read as:

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53 *Overview of the Drafting Process*, Vol.3, pp.1173-1177.

“According to the circumstances of each case, consular and other official missions of states which have no formal diplomatic relations with the People’s Republic of China may be permitted either to remain or be changed to semi-official missions.

States not recognized by the People’s Republic of China may only establish non-governmental institutions.”

There was no substantive change in the content or wording from the second through the fourth drafts of the article. According to *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Fifth Plenary Session on the Preamble and Draft Articles of Chapters 1, 2, 3, 4, 5, 6, 7 and 9 of the Basic Law* of 2 September 1987, some members suggested that the expression “in Hong Kong” should be inserted after the expressions “other official missions” in the third paragraph and “establish non-governmental institutions” in the fourth paragraph of this article.<sup>54</sup> When the fifth draft was finalized, the following amendments were made: the expression “other official missions of states” was replaced with “other official missions established in Hong Kong by states” and the expression “in Hong Kong” was added after “establish non-governmental institutions”. There was the following record in *Minutes of the Fifteenth Meeting of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 11-12 December 1989: “Members considered that the wording of individual articles was not precise enough and should be amended as follows: ... in the last sentence of the fourth paragraph, the expression ‘may only establish non-governmental institutions in Hong Kong’ should be replaced with ‘may only establish non-governmental institutions in the Region’”.<sup>55</sup> When the ninth draft was finalized, the foregoing suggestion was adopted and this version of the article was adopted as BL 157 in April 1990.

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54 *Overview of the Drafting Process*, Vol.3, p.1175.

55 Published in *Collection of Documents of the Ninth Plenary Session of the Drafting Committee*, February 1990 in *Overview of the Drafting Process*, Vol.3, p.1177.

According to *Discussion Paper on Missions Stationed Abroad* (Discussion Paper of the Tenth Meeting of the Special Group on External Affairs, 5 March 1987), the group discussed the proposed criteria for distinguishing official and semi-official missions and the criteria for distinguishing non-governmental institutions. Views were expressed, however, that the Basic Law did not need to provide for the definitions of official and semi-official missions, as such definitions would be solely for administrative convenience and have no impact on the principles or spirit of dealing with external affairs. There were also views that the Basic Law should provide for the procedures for establishing foreign missions in the HKSAR but such views were not adopted.<sup>56</sup>

Prior to the finalization of the third draft of the article, some members of the Drafting Committee suggested that consideration could be given to adjusting the order of the paragraphs so that consular and other official missions which could be retained would be placed first and new institutions subject to approval would be provided for in a later paragraph. Some members proposed that the expression “or be changed to semi-official missions” in the third paragraph should be deleted, since the fourth paragraph already provided that states not recognized by the PRC could only establish non-governmental institutions. Some members were of the view that the HKSAR should play some role in the future development of China’s foreign relations and there was no need to downgrade the existing official missions of states that had not established diplomatic relations with China. Some members considered that the relevant provisions of the original draft were appropriate. In the end, no changes were made to the article.<sup>57</sup>

Prior to the finalization of the ninth draft, the Consultative Committee received suggestions to amend this article which included:

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<sup>56</sup> *Overview of the Drafting Process*, Vol.3, p.1174.

<sup>57</sup> *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.3, p.1174.

replacing the first paragraph with the sentence “The establishment of foreign consular and other official or semi-official missions in the Hong Kong Special Administrative Region shall require the approval of the Government of the Hong Kong Special Administrative Region”; and revising the fourth paragraph to read “States not recognized by the People’s Republic of China may only establish non-governmental institutions or semi-official missions in Hong Kong.”<sup>58</sup>

In addition, there were views that applications from foreign countries to establish missions in the HKSAR should be handled by the HKSAR itself without any interference from the Central Authorities, and that states that had not yet established missions in Hong Kong could do so as long as approved by the HKSAR, without the need of reporting to, and free from any interference from, the Central Authorities.<sup>59</sup> None of these views were accepted.

On 28 March 1990, Chairman Ji Pengfei’s “Explanations” made at a session of the NPC pointed out:<sup>60</sup>

“The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters ...

The power to be exercised by, or the affairs which are the responsibility of the Standing Committee of the National People’s Congress or the Central People’s Government, as prescribed in the draft law, is indispensable to maintaining the state sovereignty. For example, the Central People’s Government will be responsible for the Special Administrative Region’s defence and foreign affairs ...”

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58 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1176.

59 Ibid.

60 *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 National People’s Congress, 28 March 1990).

## Chapter VIII Interpretation and Amendment of the Basic Law

### Article 158

“The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.

The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People’s Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.”

BL 158 consists of four paragraphs. Drafting materials in *Overview of the Drafting Process*<sup>1</sup> show that the first paragraph

<sup>1</sup> *Overview of the Drafting Process*, Vol.3, pp.1178-1209. This article progressed through ten drafts.

stipulates that the power of interpretation of the Basic Law shall be vested in the NPCSC.<sup>2</sup> The content and wording of this paragraph remained basically the same throughout the drafting process, while the content of the other three paragraphs underwent major changes.

The scope of the HKSAR courts' power to interpret the Basic Law was initially set out in the second paragraph:

- The first to third drafts of the second paragraph read: “The courts of the Hong Kong Special Administrative Region may interpret, in adjudicating cases, the provisions of the Basic Law that fall within the autonomy of the Region.”
- Starting from the fourth draft, the second paragraph was incorporated into the third paragraph, and the words “that fall within the autonomy of the Region” were deleted. The revised paragraph authorized “The courts of the Hong Kong Special Administrative Region may interpret, in adjudicating cases, the provisions of the Basic Law”. But it was also stipulated that “If a case involves the interpretation of the provisions of the Basic Law concerning national defence, foreign affairs and other affairs which are the responsibility of the Central Authorities, the courts of the Hong Kong Special Administrative Region shall, before making their final judgments on the case, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress.”<sup>3</sup> The relevant content and wording in the fourth to seventh drafts remained roughly the same.
- Starting from the eighth draft, the second paragraph was revised to read “The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are

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<sup>2</sup> Article 67(4) of the Constitution provides that the NPCSC shall exercise the functions and powers of “interpreting laws”.

<sup>3</sup> *Overview of the Drafting Process*, Vol.3, pp.1188-1191.

within the limits of the autonomy of the Region.”<sup>4</sup> The first sentence in the third paragraph was changed to “The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases.”<sup>5</sup> The relevant content and wording in the eighth to tenth drafts remained unchanged.

The effect of the interpretation made by the NPCSC, its place in the article and its content, also underwent some major changes:

- From the first to third drafts, the provision “If the Standing Committee makes an interpretation of any provision of the Basic Law, 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.” were set out in the third paragraph.
- That provision was moved to and became the second paragraph from the fourth to seventh drafts.
- It was moved to the end of the third paragraph starting from the eighth draft.

At the initial stage of the drafting process, the article did not make any stipulation requiring the HKSAR courts to seek an interpretation of the relevant provisions of the Basic Law from the NPCSC. Subsequent changes were as follows:

- The third paragraph of the fourth draft read: “The courts of the Hong Kong Special Administrative Region may interpret, in adjudicating cases, the provisions of the Basic Law. If a case involves the interpretation of the provisions of the Basic Law concerning national defence, foreign affairs and other affairs which are the responsibility of the Central Authorities, the courts of the Hong Kong Special Administrative Region shall, before making their final judgments on the case, seek

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<sup>4</sup> *Overview of the Drafting Process*, Vol.3, pp.1192-1203.

<sup>5</sup> *Ibid.*



an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.”<sup>6</sup> The relevant content and wording of the fourth to seventh drafts remained roughly the same.

- Starting from the eighth draft, the second and third paragraphs set out in the fourth to seventh drafts were merged into one paragraph, except that the scope over which the HKSAR courts have to seek an interpretation from the NPCSC were revised from the earlier “provisions ... concerning national defence, foreign affairs and other affairs which are the responsibility of Central People's Government” to “provisions concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Hong Kong Special Administrative Region”.<sup>7</sup> At the same time, the words “which are not appealable” were added after “final judgments”, and it was stipulated that an interpretation shall be sought of the relevant provisions from the NPCSC through the CFA of the Region.<sup>8</sup> The relevant content and wording in the eighth to tenth drafts remained unchanged.

The provision in the fourth paragraph that the NPCSC shall consult its Committee for the Basic Law of the HKSAR before giving an interpretation of this Law first appeared in the third draft of the article. The content and wording in the third to tenth drafts of this article remained roughly the same.

Section I of Annex I to the Joint Declaration provides that “Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication.” And Section II of

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6 Ibid, footnote 3.

7 Ibid, footnote 4.

8 Ibid, footnote 4.

Annex I further states that “After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.” According to the *Final Report on Powers of Interpretation and Amendment of the Basic Law* issued by the Working Group on Powers of Interpretation and Amendment of the Basic Law of the Special Group on Law and the Special Group on the Relationship between the Central Authorities and the HKSAR in early 1987, at that time, under the common law, the legislature was responsible for making laws and the courts were responsible for interpreting laws and declaring their meaning.<sup>9</sup>

*Overview of the Drafting Process* shows that this article attracted many different views throughout its drafting process. As for the first paragraph, the dispute concerned whether or not the NPCSC should have the power to interpret the Basic Law. Many people believed that the Basic Law should be a national law enacted and promulgated by the NPC, and according to the Constitution, the power of interpretation rests with the NPCSC.<sup>10</sup> On the other hand, there was also a view that if the Central Authorities had the power to interpret the Basic Law, it would be regarded by Hong Kong people as an interference by the Mainland in the judicial independence of Hong Kong, thus affecting public confidence in Hong Kong,<sup>11</sup> and that since the Joint Declaration stipulated that the power of final judgment of the HKSAR shall be vested in the CFA in the HKSAR, so should the power to interpret

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9 Passed by the Executive Committee on 14 March 1987 in *Overview of the Drafting Process*, Vol.3, p.1184.

10 Secretariat of the Drafting Committee, *Extracts of Comments on the Basic Law in the Hong Kong Press*, February 1987 in *Overview of the Drafting Process*, Vol.3, pp.1182-1183.

11 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.3, pp.1179-1180.

the Basic Law, otherwise the power of final adjudication of HKSAR courts might be undermined, and the common law system impaired.<sup>12</sup> At the same time some members of the Drafting Committee pointed out that the Basic Law was not simply a local law, it stipulated many provisions relating to the relationship between the Central Authorities and the HKSAR, it would therefore be inappropriate to leave its interpretation entirely to local courts in adjudicating cases, which would affect not only Hong Kong but also the entire country.<sup>13</sup> In the end, the first paragraph stipulates that the NPCSC shall have the power to interpret the Basic Law.

With regard to the second paragraph, the dispute concerned whether the Hong Kong courts should only interpret matters “which are within the limits of the autonomy of the Region” and how to define the term “limits of the autonomy”. Many commentators opined that the words “which are within the limits of the autonomy of the Region” should be deleted to ensure that the Hong Kong courts have unlimited power of interpretation, because even if the interpretation of the Hong Kong courts was wrong, the NPCSC could make a final interpretation under the first paragraph to correct it. On the other hand, it was argued that after 1997, the CFA of the HKSAR had the power of final adjudication, and its judgments were final. In cases involving national defence, foreign affairs and affairs which are the responsibility of the Central Authorities, if the judgments of the Hong Kong courts were wrong, and such judgments could not be corrected, great damage would be caused to the country.<sup>14</sup> In the end, the second paragraph provides that the NPCSC shall authorize Hong Kong courts

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12 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1199-1200.

13 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.3, p.1187.

14 *Ibid.*

to interpret the provisions which are within the limits of the autonomy of the Region.

As for the third paragraph, the dispute concerned whether or not the scope and procedure by which the Hong Kong courts had to seek interpretations from the NPCSC would undermine Hong Kong's power of final adjudication and judicial independence. In relation to the retroactive effect of the interpretation, some people considered that if the interpretation made by the NPCSC had retroactive effect, it would cause technical difficulties for Hong Kong courts in adjudicating cases and weaken their power of final adjudication.<sup>15</sup> On the interpretation procedure, it was suggested that the provision should stipulate that the NPCSC shall, once a litigation or dispute had begun, suspend the interpretation of any articles that might be involved in the litigation process, so as to ensure that it would not influence the judicial adjudication in Hong Kong by exercising its interpretation power.<sup>16</sup> It was also suggested that the article should make it clearer whether the Hong Kong courts had the power to define which provisions concerned affairs that were the responsibility of the CPG, or the relationship between the Central Authorities and the HKSAR.<sup>17</sup>

Before the eighth draft was finalized, the visiting group of members of the Drafting Committee from the Mainland pointed out:

“2.9 Power of Interpretation of the Basic Law

2.9.1 The Basic Law is the law of the People's Republic of China, which applies not only to Hong Kong but also to the Mainland. All provinces, municipalities and departments on the Mainland

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15 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1187.

16 *Ibid*, footnote 13.

17 Special Group on the Relationship between the Central Authorities and the HKSAR, *Opinions on the Preamble and the Draft Articles in Chapters I, II, VII and IX of the Basic Law (August 1987)* (passed by the Executive Committee on 4 November 1987) in *Overview of the Drafting Process*, Vol.3, pp.1189-1190.

should abide by the Basic Law when dealing with issues related to Hong Kong.

2.9.2 According to Article 67 of the Constitution, the power to interpret laws is vested in the Standing Committee of the National People's Congress, but this does not mean that the courts in Hong Kong cannot interpret provisions of the Basic Law when adjudicating cases. This only means that the Hong Kong courts are required to, before making their final judgments on a case, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress when the interpretation concerns provisions relating to national defence, foreign affairs and other affairs which are the responsibility of the Central People's Government.

2.9.3 This is based on the practice of the European Community. The European Community has its own law, which is called the European Community Act. There are many member states under the European Community, all of which accept the European Community Act as part of their national law.

2.9.4 According to the requirements of the European Community, the power of interpretation of the European Community Act is vested in the Court of the Community while the power of final adjudication of the cases belongs to the courts of its member states, which means that the power of interpretation and the power of final adjudication are not assigned to the same institution, thus causing the possibility of inconsistency in interpretation. In this regard, the solution of the European Community is that the courts of the member states, when dealing with a matter requiring an interpretation from the Community, shall submit the matter to the Court of the Community for its interpretation before making the final judgment, and then decide the case on the basis of this interpretation, which is provided for in the Community Treaty.

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2.9.6 The issue of judicial interpretation power between China

and Hong Kong is similar, the power of interpretation will be vested in the Standing Committee of the National People's Congress, while the power of final adjudication will be vested in the Court of Final Appeal of the Hong Kong Special Administrative Region, and only a small part of the Basic Law relating to national defence, foreign affairs and other affairs which are the responsibility of the Central Authorities will require to be submitted to the Standing Committee of the National People's Congress for interpretation. In fact, in the 40 years since the founding of the People's Republic of China, the Standing Committee of the National People's Congress has rarely interpreted the Constitution, let alone for Hong Kong. Therefore, in reality, the occasions on which the Standing Committee of the National People's Congress having to make an interpretation for Hong Kong will be even lesser in the future.

2.9.7 Some people are of the view that since the Central Authorities has granted a high degree of autonomy to the Hong Kong Special Administrative Region, it should not interfere in matters that fall within the scope of the high degree of autonomy. As the Central Authorities has granted a high degree of autonomy to Hong Kong, it means that the Hong Kong Special Administrative Region will handle those affairs on its own and the Central Authorities will not interfere with such affairs. However, certain affairs which have been clearly stipulated in the Basic Law will be excluded, such affairs should be decided by the Central Authorities or reported to it for the record. When interpreting the Basic Law, the Standing Committee of the National People's Congress will proceed from the principles and spirit of the Basic Law, namely 'a high degree of autonomy' and 'one country, two systems', rather than interpreting the Basic Law according to its wishes, otherwise it would be amending the Basic Law. The Central Authorities will not interfere in matters that fall within Hong Kong's high degree

of autonomy when interpreting the Basic Law.”<sup>18</sup>

In the conclusion of the special report - *Power of Interpretation of the Basic Law and the Judicial System of the Hong Kong Special Administrative Region*, issued by the Consultative Committee in October 1988, it was pointed out that “It should not be ignored that the Basic Law is a part of the legal system of China, but it also stipulates that the common law will continue to be applied in Hong Kong. Under the ‘one country, two systems’ principle, in order for the two different legal systems to operate harmoniously, it is necessary to resolve problems in the light of the actual situation, rather than propose solutions from a single perspective. There must be consistency with the spirit of ‘one country, two systems’ while at the same time the judicial system previously practised in Hong Kong shall be maintained.”<sup>19</sup>

As to the fourth paragraph, the dispute concerned the composition and powers of the “Basic Law Committee”. Some members of the Drafting Committee proposed to clarify the meaning of the “Basic Law Committee”, a term which repeatedly appeared in the provisions of the Basic Law. Some members proposed that the Basic Law Committee should be composed of senior legal professionals from both the Mainland and Hong Kong, and that the committee should have no more than ten members, with the number of members equally divided between the two sides.<sup>20</sup> It was also proposed that “when the courts of the Hong Kong Special Administrative Region seek an interpretation

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18 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.1194.

19 *The Power of Interpretation of the Basic Law and the Judicial System of the HKSAR*, published in *Consultation Committee, The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.2 – Special Reports*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1199.

20 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.1191.

from the Standing Committee of the National People's Congress, the Standing Committee of the National People's Congress shall consult the Basic Law Committee, accept the opinions so provided and make an interpretation accordingly."<sup>21</sup> There were also views from different sectors of Hong Kong that the Basic Law Committee should be an organ of power, not just an advisory body, and that it should have the power to interpret the Basic Law and to decide whether laws enacted in Hong Kong violate the Basic Law.<sup>22</sup> However, visiting members of the Drafting Committee from the Mainland indicated that it would be difficult to provide by law that the NPC or NPCSC can only accept the opinions of the Basic Law Committee without making any changes, because this would turn the NPC into a non-power organ and the Basic Law Committee into an organ of power.<sup>23</sup> In the end, the fourth paragraph requires the NPCSC to consult the Basic Law Committee before interpreting the Law.

On 28 March 1990, Chairman Ji Pengfei's "Explanations" made at a session of the NPC pointed out:

"According to the Constitution, interpretation of laws is among the powers and functions of the National People's Congress Standing Committee. To take into account Hong Kong's special circumstances, the draft Basic Law, while stipulating that the power of interpretation of the Basic Law shall be vested in the National People's Congress Standing Committee, provides that the National People's Congress Standing Committee shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the Region. This stipulation will guarantee the power of the National People's Congress Standing Committee and

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21 Ibid.

22 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1193.

23 Ibid, footnote 18.



also facilitate the Hong Kong Special Administrative Region in exercising its autonomy. According to the draft, the Hong Kong Special Administrative Region courts may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government, or the relationship between the Central Authorities and the Region, and if such interpretation will affect their final judgments on the cases, the courts shall seek an interpretation of the relevant provisions from the National People's Congress Standing Committee through the Court of Final Appeal of the Region. The courts, in applying those provisions, shall follow the interpretation of the National People's Congress Standing Committee. This stipulation will provide the basis for the Region's courts, in adjudicating cases, to comprehend the provisions of the Basic Law concerning affairs which are the responsibility of the Central Government or the relationship between the Central Authorities and the Hong Kong Special Administrative Region, and prevent the courts from making erroneous judgments due to inaccurate understanding."<sup>24</sup>

## Article 159

“The power of amendment of this Law shall be vested in the National People's Congress.

The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National

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<sup>24</sup> *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 National People's Congress, 28 March 1990.)

People's Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.

Before a bill for amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views.

No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong."

Drafting materials in *Overview of the Drafting Process*<sup>25</sup> show that during the seminars in batches of the Consultative Committee in early 1986, there were views that the Basic Law should clearly define the power of amendment and the procedure for amendment. Some members of the Consultative Committee considered that Hong Kong people should be consulted first before submitting any amendment to the NPC for approval.<sup>26</sup> Later on 22 April 1986, the Drafting Committee adopted *Structure of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)*, of which Section III of Chapter IX is entitled "Amendments to the Basic Law".<sup>27</sup>

Before finalizing the first draft of the article, the Drafting Committee consulted the views of various sectors of Hong Kong on issues including the structure of the Basic Law. Views from Hong Kong were that "... As for the relationship between the Central Authorities and the local government, the following should be included: ... the power of interpretation and of amendment of the Basic Law should be divided into two parts – the part that is solely related to Hong Kong's internal issues where the power of interpretation and of amendment should be vested in Hong Kong, and the part that concerns the overall relationship between Hong Kong and China where the

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25 *Overview of the Drafting Process*, Vol.3, pp.1210-1227. The drafting of this article progressed through ten drafts.

26 Consultative Committee, *Summary of the Fourth Batch of Discussions*, February 1986 in *Overview of the Drafting Process*, Vol.3, p.1211.

27 See Appendix IV.

power of interpretation and of amendment should be vested jointly in the Central Authorities and Hong Kong”.<sup>28</sup>

Other views were that “... (1) The amendment of the Basic Law is a difficult issue. There are two principles to consider, namely China’s sovereignty and Hong Kong’s high degree of autonomy. The Basic Law is a law of the People’s Republic of China, so the National People’s Congress is the only one with the power to amend it, but Hong Kong should be able to participate to some extent. (2) Amendments to the Basic Law will undoubtedly need to be passed by the National People’s Congress, but the motions for amendments should come from Hong Kong. If the motions are proposed by China first, Hong Kong people should be consulted fully before the motions are submitted to the National People’s Congress. (3) Regarding amendments to the Basic Law, both the Central Authorities and the Special Administrative Region Government (Hong Kong) can propose amendment motions. (4) The power of amendment of the Basic Law should be vested in the National People’s Congress, and the amendments must be consistent with the Sino-British Joint Declaration.”<sup>29</sup>

According to the *Preliminary Report of the Special Group on the Structure of the Basic Law* of 20 August 1986, views were expressed that amendments to the Basic Law might lead to violation of the Joint Declaration.<sup>30</sup> *Progress Report of the Special Group on the Relationship between the Central Authorities and the HKSAR* of 29 August of the same year shows, however, that “The group also made great progress in discussing the power of amendment and of interpretation of the Basic Law. In general, the members agreed that the Basic Law is a law to be passed by the National People’s Congress of China and therefore the power of amendment and of

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28 *Collection of Views from Different Sectors of Hong Kong on the Structure of the Basic Law and Other Issues*, April 1986 (among the reference materials for the Second Session of the Drafting Committee for the Basic Law) in *Overview of the Drafting Process*, Vol.3, p.1211.

29 *Ibid*, pp.1211-1212.

30 *Overview of the Drafting Process*, Vol.3, p.1212.

final interpretation of the Basic Law should be vested in the National People's Congress. In terms of the power of amendment, they also agreed that there should be an appropriate channel for Hong Kong people to participate in the procedure ...”<sup>31</sup>

The first draft of the article formulated by the Special Group on the Relationship between the Central Authorities and the HKSAR of 11 November 1986 read:

“The power of amendment of the Basic Law shall be vested in the National People's Congress.

Each basic principle stipulated in the general principles of this Law shall not be amended. Bills for amendments to the other parts should be submitted by the Standing Committee of the National People's Congress, the State Council or the Hong Kong Special Administrative Region to the National People's Congress.”<sup>32</sup>

There was an explanatory note, as cited below, when the first draft of the article was finalized:

“Members considered that the Basic Law should not be easily amended in order to maintain the stability and prosperity of Hong Kong. The second paragraph of this article sets a relatively strict restriction on the amendment of the Basic Law, namely each basic principle stipulated in the general principles of the Basic Law shall not be amended. This means that Hong Kong shall exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication; the previous capitalist system shall be maintained and the socialist system shall not be practised, which shall remain unchanged for 50 years; way of life shall remain unchanged; and the laws shall remain basically unchanged. These principles will remain unchanged for 50 years after 1997.

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31 Document of the Second Plenary Session of the Consultative Committee, 30 August 1986 in *Overview of the Drafting Process*, Vol.3, p.1212.

32 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 11 November 1986, published in *Collection of Documents of the Third Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1212.

In future, the Hong Kong Special Administrative Region will have its own deputies to participate in the work of the National People's Congress and its Standing Committee. They may express their views on the interpretation and amendment of the Basic Law on behalf of Hong Kong. To enable Hong Kong to have more opportunities to participate in the interpretation and amendment of the Basic Law, members proposed to set up a committee under the National People's Congress or its Standing Committee, which would be joined by persons from both the Mainland and Hong Kong and be responsible for advising the National People's Congress or its Standing Committee on issues including the interpretation and amendment of the Basic Law and the recording of the laws enacted by the Hong Kong Special Administrative Region.

Some members considered that the procedure for proposing a bill for amendment of the Basic Law needed further study.”<sup>33</sup>

The Special Group on the Relationship between the Central Authorities and the HKSAR of the Consultative Committee conducted studies repeatedly between April and June 1987 and the Executive Committee passed *Final Report on the Right to Propose Amendment to the Basic Law* on 12 June.<sup>34</sup> This report elaborated as follows: Article 31 in Chapter I of the Constitution provided that “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”; Article 62(3) and (13) in Chapter III provided that the NPC had the power of “enacting and amending criminal, civil, state institutional and other basic laws” and of “deciding on the establishment of special administrative regions and the systems to be instituted there”; and the Basic Law of the HKSAR would be a basic law of the state which would be enacted and amended by the

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33 Ibid, pp.1212-1213.

34 Special Group on the Relationship between the Central Authorities and the HKSAR, *Final Report on the Right to Propose Amendment to the Basic Law* (passed by the Executive Committee on 12 June 1987) in *Overview of the Drafting Process*, Vol.3, pp.1217-1218.

NPC. The report also cited the *Organic Law of the National People's Congress of the People's Republic of China* and its relevant content, and pointed out that the legislative procedure for basic laws of the state was as follows: there was a proposal first, and then the presidium submitted it to the relevant special committees for deliberation; after a report was submitted and the proposal was put on the agenda of the NPC, the NPC would then adopt it by a majority vote of all of its deputies.

The report also indicated that the Drafting Committee had the following views on the authorities vested with the power to propose bills for amendments to the Basic Law: A bill for amendment could only be proposed:

(1) by the NPCSC;

(2) by the State Council; or

(3) with the approval of two-thirds of the HKSAR legislature and the consent of the CE and of two-thirds of the deputies of Hong Kong to the NPC.

In addition, the report listed the different opinions of members of the Consultative Committee on the power to propose bills for amendments to the Basic Law, including the opinion that except for the NPCSC and the State Council, other authorities which could propose bills under the *Organic Law of the National People's Congress of the People's Republic of China* should not be given such power as they were not familiar with the situation in Hong Kong.

When the second draft was finalized, the expression "within 50 years from the effective date of this Law" was added after "each basic principle stipulated in the general principles of this Law shall not be amended"; the expression "should be submitted by ... or the Hong Kong Special Administrative Region to the National People's Congress" was replaced by "should be submitted by ... or deputies to the National People's Congress"; and the expression "Before the deputies to the National People's Congress submit bills for amendments to the Basic Law, the consent of two-thirds of the

deputies of the Hong Kong Special Administrative Region to the National People's Congress, two-thirds of the legislature of the Region and the Chief Executive of the Region shall be obtained.” was inserted as the last sentence of the article.

Below is the explanatory note when the second draft of the article was finalized:

“Some members considered that the general principles currently drafted still have not included all the basic policies which will remain unchanged for 50 years set out in the Sino-British Joint Declaration, and therefore suggested that a table should be attached to the end of the Basic Law to list the basic policies contained in other chapters and sections that could not be amended, but it is sufficient to only indicate which chapters and sections and it is unnecessary to list the original text.

As for amendment bills for other parts, in addition to the Standing Committee of the National People's Congress and the State Council, the legislature of the Hong Kong Special Administrative Region should also have the power to make proposal if it is passed by a majority of above 75%.”<sup>35</sup>

Before the third draft was finalized, some members of the Drafting Committee proposed to insert a third paragraph into this article and proposed two versions: (1) The NPCSC or the State Council should consult the Committee for the Basic Law when exercising its power to propose bills; (2) The NPCSC or the State Council shall consult the Committee for the Basic Law before proposing a bill to amend this Law.<sup>36</sup>

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35 *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1215.

36 *Collection of Views from Members of the Drafting Committee for the Basic Law of Hong Kong at the Fourth Plenary Session on the Preamble, General Principles and Draft Articles of Chapters 2, 3, 7 and 9 of the Basic Law*, 22 May 1987 in *Overview of the Drafting Process*, Vol.3, pp.1216-1217.

A suggestion for amending the article recorded in *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR* of 22 August 1987 read as: "... The provision of the original draft that 'each basic principle stipulated in the general principles of this Law shall not be amended within 50 years from the effective date of this Law' may easily lead to misinterpretation that apart from this, the basic policies in other chapters can be amended. Therefore, the subgroup unanimously agrees to replace it with the sentence 'No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.'"<sup>37</sup>

When the third draft was finalized, the aforementioned suggestion was adopted by deleting the expression "each basic principle stipulated in the general principles of this Law shall not be amended within 50 years from the effective date of this" and inserting the sentence "No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong." as the fourth paragraph of the article. In addition, the second paragraph was changed to read as "The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People's Congress, two-thirds of the members of the legislature of the Hong Kong Special Administrative Region, and the Chief Executive of the Region."; the sentence "Before a bill for amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong

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<sup>37</sup> *Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR*, 22 August 1987, published in *Collection of Documents of the Fifth Plenary Session of the Drafting Committee in Overview of the Drafting Process*, Vol.3, p.1218.



Kong Special Administrative Region shall study it and submit its views.” was included as the third paragraph; and the term “Basic Law” in the first paragraph was replaced with “this Law”.

There was the following explanatory note when the third draft of the article was finalized: “Some members were of the view that for amendment motions to the Basic Law, in addition to the Standing Committee of the National People’s Congress and the State Council, the legislature of the Hong Kong Special Administrative Region should also have the power to make proposal if it is passed by a majority of above 75%.”<sup>38</sup>

Drafting materials in *Overview of the Drafting Process* show that the fourth to tenth drafts of the article did not change substantively in terms of content and wording when compared with the third draft.

According to *The Draft Basic Law of the Hong Kong Special Administrative Region (Compilation)* of the Secretariat of the Drafting Committee of December 1987, before the fourth draft was finalized, some members of the Drafting Committee proposed to remove from the article the expression “two-thirds of the deputies of the Region to the National People’s Congress”; to replace the expression “shall be submitted to the National People’s Congress by the delegation of the Region to the National People’s Congress” with “shall be submitted to the National People’s Congress by the State Council”; and to change the sentence “No amendment to this Law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong” to “No amendment to this Law shall contravene the established basic policies of the People’s Republic of China regarding Hong Kong as stated in the Preamble”.<sup>39</sup> These suggestions were not adopted.

Prior to the finalization of the fifth draft, some members of the Drafting Committee proposed to define clearly the meaning of the term “Committee for the Basic Law” which appeared repeatedly in the

38 Ibid.

39 *Overview of the Drafting Process*, Vol.3, p.1220.

provisions of the Basic Law. Some members suggested that the Group on the Relationship between the Central Authorities and the HKSAR be entrusted with the task of drawing up a draft on the Committee for the Basic Law.<sup>40</sup>

After the publication of *Draft Basic Law (for solicitation of opinions)* of April 1988, the Consultative Committee received opinions on the seventh draft of the article that the Hong Kong people should have a greater say in amending the Basic Law. There were also views that “It is not feasible if it is hoped that the Central Authorities will not have the power to amend the Basic Law, as the Central Authorities consider that the possession of such powers reflects sovereignty, otherwise Hong Kong would be suspected of being independent.” Some members of the Consultative Committee pointed out that this article provided that amendments to the Basic Law could be proposed at any time by the State Council and the NPCSC while the HKSAR would need to follow multilayered procedures to propose amendments. These members considered, however, that the procedures for the two should be reversed, namely the HKSARG should be able to propose amendments to the Basic Law more easily.<sup>41</sup>

Views were also expressed that an ad hoc court, which could decide which provisions were within the limits of the HKSAR’s autonomy and which were not, should be set up in the HKSAR; and that both the Central Authorities and the HKSAR should have the power to propose amendment motions to the Basic Law, but if an amendment motion was ruled by the ad hoc court to be within the limits of autonomy, the decision-making power would be vested in the HKSAR and the motion would be voted on by referendum or by the legislature, whereas if the motion was ruled to be outside the limits of

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40 *Collection of Views from Members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China at the Sixth Plenary Session on Chapters 4, 5, 6 and 10 and the Draft Articles of the Basic Law*, December 1987 in *Overview of the Drafting Process*, Vol.3, p.1220.

41 Secretariat of the Consultative Committee, *Report on the Preliminary Response to the Draft Basic Law (for solicitation of opinions)*, May 1988 in *Overview of the Drafting Process*, Vol.3, p.1222.

autonomy, the decision-making power would be vested in the NPC.<sup>42</sup>

The Drafting Committee received suggestions from Hong Kong to add the expression “and the interests of Hong Kong” after “regarding Hong Kong” in the last paragraph. There were also views that amendment motions proposed by the HKSAR should not be subject to the consent of the deputies of Hong Kong to the NPC and there was suggestion to insert in the second paragraph the following sentences “Before a bill for amendment to this Law is put on the agenda of the National People’s Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region should first study the bill and submit its views. Before submitting its views to the National People’s Congress, the Committee should consult the legislature and the Chief Executive of the Hong Kong Special Administrative Region on the bill.”<sup>43</sup>

The Consultative Committee also received a wide range of views on the seventh draft of the article in the draft for solicitation of opinions, including approval, opposition, suggestions for amendments and suggestions for rewriting. For example, views were expressed that this article was defective on the grounds that: the power to propose bills for amendments of the NPCSC and the State Council was not specified in detail; according to the provisions of this article, it would be very time-consuming to amend the Basic Law; and this article would weaken the power of the legislature of the HKSAR while causing the power of the deputies of Hong Kong to the NPC to be excessive. Other views were that this article was unacceptable on the grounds that: it was in breach of the Joint Declaration; the vesting of the power to amend the Basic Law in the NPC might cause Hong Kong people to lose confidence in the high degree of autonomy; and the arrangement under the article prevented the representatives elected

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42 Ibid.

43 Secretariat of the Drafting Committee, *Collection of Views from Different Sectors of Hong Kong on the Draft Basic Law of the Hong Kong Special Administrative Region (for solicitation of opinions) (I)*, August 1988 in *Overview of the Drafting Process*, Vol.3, p.1222.

by Hong Kong from proposing amendment motions independently and how the deputies of Hong Kong to the NPC would be elected was still unclear then.<sup>44</sup>

Prior to the finalization of the ninth draft, the Special Group on the Relationship between the Central Authorities and the HKSAR of the Consultative Committee discussed the procedure for amending the annexes to the Basic Law. Some members of the Consultative Committee suggested that the procedure for amending the annexes should be the same as that for amending the other articles, that is, in accordance with the method of this article, otherwise, if Annex III was to be amended only according to the provision of BL 18, i.e. “The Standing Committee of the National People’s Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region”, the procedure would appear to be too simple, while following the method of this article would ensure that amendments to the annexes would also go through rigorous procedure. A member had reservations about the said proposed amendment, considering that the deputies to the NPC would meet only once a year and if amendments to the annexes had to be in accordance with the procedure under this article, it would be too restrictive and the needs of wars or states of emergency could not be met. Some members were of the view that the content of each annex was different – Annexes I and II were on the political structure while Annex III concerned national laws, and therefore there was no need to standardize amendment procedures and suggested that it could be treated flexibly according to the specific content of each annex and the amendment procedure could be specified in each annex.<sup>45</sup>

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44 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, pp.1222-1225.

45 *Minutes of the Fourth Meeting of the Special Group on the Relationship between the Central Authorities and the HKSAR*, 20 September 1989 in *Overview of the Drafting Process*, Vol.3, p.1225.

During the consultation period prior to the finalization of the ninth draft, the Consultative Committee received further objections and suggestions for amendments, including the suggestion that before amending the Basic Law by the NPC, the amendment bills should be returned to the HKSAR for consultation with the Hong Kong people. Views were also expressed that for the 50 years after 1997, only the HKSAR should be allowed to propose bills for amendments in accordance with this article, on the ground that if amendment bills were to be proposed by the NPC or the State Council, it might contradict the spirit of the Joint Declaration. Some suggested that it should be stated that any amendment must not contravene the basic principles of international common law and human rights law.<sup>46</sup>

The tenth draft of the article was adopted by the NPC in April 1990 as BL 159. As mentioned above, there were no substantive changes in its wording and content compared with the third draft.

On 28 March 1990, Chairman Ji Pengfei's "Explanations" made at a session of the NPC pointed out:<sup>47</sup>

"The relationship between the Central Authorities and the Hong Kong Special Administrative Region is one of the important issues defined by the Basic Law and is touched upon not only in Chapter II but also in Chapter I, Chapter VII, Chapter VIII and other chapters.

...

In addition, in order to enable the National People's Congress Standing Committee to heed fully the opinions of the people from all walks of life in Hong Kong when it makes decisions on whether a law enacted by the Special Administrative Region legislature conforms to the provisions concerning affairs within the responsibility of the

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46 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1226.

47 *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 National People's Congress, 28 March 1990).

Central Authorities or to the provisions concerning the relationship between the Central Authorities and the Special Administrative Region, decisions on adding to or deleting from the list of national laws which are applicable in the Hong Kong Special Administrative Region in Annex III and decisions on the interpretation of and amendment to the Basic Law, the drafters have recommended that when the Basic Law comes into force, a working committee be set up under the National People's Congress Standing Committee to submit its views regarding the above questions to the National People's Congress Standing Committee. The working committee shall be composed of people from the Mainland and Hong Kong. To this end, the Hong Kong Basic Law Drafting Committee has drafted the "Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress."

## Chapter IX Supplementary Provisions

### Article 160

“Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress 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.

Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.”

Drafting materials in *Overview of the Drafting Process*<sup>1</sup> show that the current BL 160 had progressed through six drafts. Three options were set out in the first draft:

“Article 171 Option 1: Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be adopted as laws of the Region except for those listed in the annex.

The adoption of the above-mentioned laws shall not affect the power of the Standing Committee of the National People’s Congress, after the establishment of the Hong Kong Special Administrative Region, to declare as invalid, by exercising its power of interpretation of this Law, any laws previously in force in Hong Kong which it later discovers to be in contravention of this Law. Documents, certificates, contracts, and rights and obligations valid under the laws previously

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<sup>1</sup> *Overview of the Drafting Process*, Vol.3, pp.1228-1234.

in force in Hong Kong shall continue to be valid and be recognized and protected by the laws of the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

Explanation: The laws listed in the annex are those previously in force in Hong Kong which the Standing Committee of the National People's Congress considers to be in clear contravention of the Basic Law.

Option 2: Any laws previously in force in Hong Kong which are discovered to be in contravention of this Law, by the Basic Law Committee after examination, may be reported to the Standing Committee of the National People's Congress, which will declare their repeal upon the establishment of the Hong Kong Special Administrative Region. Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the laws of the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

Option 3: Ordinances and subordinate legislation previously in force in Hong Kong, except for those declared by the Standing Committee of the National People's Congress to be in contravention of this Law in accordance with Article 168 of this Law upon the establishment of the Hong Kong Special Administrative Region, shall be deemed to continue in force for the purposes of Article 8 of this Law, until revoked or amended in accordance with the procedure as prescribed by this Law.

Rights and obligations that are valid on account of laws previously in force in Hong Kong which continue to be in force after the establishment of the Hong Kong Special Administrative Region, shall continue to be valid and shall be protected and recognized by the laws of the Hong Kong Special Administrative Region.”<sup>2</sup>

*Overview of the Drafting Process* shows that *Collation of the*

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<sup>2</sup> *Overview of the Drafting Process*, Vol.3, p.1228.



*Opinions of the Subgroup on Political Structure of the Basic Law at the Press Conference of 31 October to 2 November 1987* contains a paragraph on the discussions that took place before the first draft was drawn up:

“(6) On the continued validity of existing legal instruments. Members, after synthesis and revision, agreed that existing laws which contravene the Basic Law, or which are not applicable to Hong Kong, or which belong to the colonial system, should be declared invalid by decree of the Standing Committee of the National People’s Congress upon the establishment of the Government of the Hong Kong Special Administrative Region. In view of the broad scope of the laws of Hong Kong and to avoid omissions in the declaration of invalidity, if any laws which should be repealed are discovered after the establishment of the Government of the Hong Kong Special Administrative Region, such laws shall be repealed or amended by the legislature. Some laws are basically valid, except that the title is not appropriate, in which case only the text of the title needs to be amended, some laws require a complete overhaul, while others are to be overturned in their entirety. Some members considered that although the Standing Committee of the National People’s Congress has no power to repeal British laws, it has the power to repeal those British laws that apply in Hong Kong because Hong Kong is a part of China.”<sup>3 4</sup>

Starting from the second draft, the article was revised as follows:

“Article 173 Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to

3 Published in *Bulletin 62 of the Secretariat of the Consultative Committee for the Basic Law*, 3 December 1987 in *Overview of the Drafting Process*, Vol.3, p.1231.

4 As to the relevant decision of the NPCSC, please refer to Appendix IX to this book: *Decision of the Standing Committee of the National People’s Congress on Treatment 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* (adopted at the Twenty-Fourth Meeting of the Standing Committee of the Eighth National People’s Congress on 23 February 1997).

be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be revoked or amended in accordance with the procedure as prescribed by this Law.

Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the laws of the Hong Kong Special Administrative Region, provided that they do not contravene this Law.”<sup>5</sup>

In the fourth draft, the words “shall be revoked or amended in accordance with the procedure as prescribed by this Law” in the first paragraph were amended to read “shall be amended or cease to have force in accordance with the procedure as prescribed by this Law”, while the rest of the text remained unchanged.

*Overview of the Drafting Process* shows the discussions before the fourth draft was finalized:

“2. Relationship between the Central Authorities and the Hong Kong Special Administrative Region

### 2.7 Hong Kong Laws

2.7.1 The provisions concerning Hong Kong laws are mainly explained in Articles 8, 16 and 17 of the Basic Law:

... and Article 172 should be read together with the above three articles. Article 172, as a transitional provision, provides that, upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be repealed or amended in accordance with the procedure as prescribed by this Law.

2.7.2 Article 8 is a principle which points out that the laws previously in force would, barring a few, remain valid. Article 172, on

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<sup>5</sup> *Overview of the Drafting Process*, Vol.3, p.1231.

the other hand, is to clarify, by legal process, that the National People's Congress shall declare on 1 July 1997 those colonial laws such as Hong Kong Letters Patent and Royal Instructions to be no longer valid, and that if any other law is discovered after 1 July 1997 to be in contravention of this Law, it would then be amended or repealed in accordance with the procedures set out in Articles 16 and 17. It does not mean that once the declaration of invalidity against some laws is made on 1 July 1997, no further declaration of invalidity could be made against other laws."<sup>6</sup>

Before the fifth draft was finalized, there were still suggestions that the first paragraph be deleted for the reasons that it might contravene the Joint Declaration, violate BL 8, and undermine public confidence in the Basic Law. Suggestions were also made to replace the words "except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law" in the first paragraph with "except for those which concern the responsibility of the Central People's Government, the relationship between the Central Authorities and the Special Administrative Region, and those which the Standing Committee of the National People's Congress declares to be in contravention of this Law"; and to insert the words "or the Court of Final Appeal of the Hong Kong Special Administrative Region" after the words "Standing Committee of the National People's Congress" in the same paragraph.<sup>7</sup> These suggestions were not adopted.<sup>8</sup>

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6 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, p.1232.

7 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1233.

8 On 23 February 1997, the NPCSC adopted at the Twenty-Fourth Meeting of the Standing Committee of the Eighth National People's Congress the *Decision on Treatment 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*, see Appendix IX.

## Annex I

### **“Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”<sup>9</sup>**

1. The Chief Executive shall be elected by a broadly representative Election Committee in accordance with this Law and appointed by the Central People’s Government.

2. The Election Committee shall be composed of 800 members from the following sectors:

Industrial, commercial and financial sectors	200
The professions	200
Labour, social services, religious and other sectors	200
Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference	200

The term of office of the Election Committee shall be five years.

3. The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall be prescribed by an electoral law enacted by the Hong Kong Special Administrative Region in accordance with the principles of democracy and openness.

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<sup>9</sup> Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990; amended, as approved at the Sixteenth Meeting of the Standing Committee of the Eleventh National People’s Congress on 28 August 2010; decision on improving the electoral system of the HKSAR adopted at the Fourth Session of the Thirteenth National People’s Congress on 11 March 2021 (see Appendix XII); and amended at the Twenty-Seventh Meeting of the Standing Committee of the Thirteenth National People’s Congress on 30 March 2021 (see Appendix XIII).

Corporate bodies in various sectors shall, on their own, elect members to the Election Committee, in accordance with the number of seats allocated and the election method as prescribed by the electoral law.

Members of the Election Committee shall vote in their individual capacities.

4. Candidates for the office of Chief Executive may be nominated jointly by not less than 100 members of the Election Committee. Each member may nominate only one candidate.

5. The Election Committee shall, on the basis of the list of nominees, elect the Chief Executive designate by secret ballot on a one-person-one-vote basis. The specific election method shall be prescribed by the electoral law.

6. The first Chief Executive shall be selected in accordance with the Decision of the National People's Congress of the People's Republic of China on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region.

7. If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval."

For more information on the drafting process of Annex I to the Basic Law, including the evolution and development of its content, please refer to the Note on BL 45 in this book.

## Annex II

### **“Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures<sup>10</sup>**

#### **I. Method for the formation of the Legislative Council**

1. The Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members for each term. In the first term, the Legislative Council shall be formed in accordance with the Decision of the National People’s Congress of the People’s Republic of China on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region. The composition of the Legislative Council in the second and third terms shall be as follows:

##### Second term

Members returned by functional constituencies	30
Members returned by the Election Committee	6
Members returned by geographical constituencies through direct elections	24

##### Third term

Members returned by functional constituencies	30
Members returned by geographical constituencies through direct elections	30

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<sup>10</sup> Adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990, amended, as recorded at the Sixteenth Meeting of the Standing Committee of the Eleventh National People’s Congress on 28 August 2010; decision on improving the electoral system of the HKSAR adopted at the Fourth Session of the Thirteenth National People’s Congress on 11 March 2021 (see Appendix XII); and amended at the Twenty-Seventh Meeting of the Standing Committee of the Thirteenth National People’s Congress on 30 March 2021 (see Appendix XIV).

2. Except in the case of the first Legislative Council, the above-mentioned Election Committee refers to the one provided for in Annex I of this Law. The division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods; and the method for electing members of the Legislative Council by the Election Committee shall be specified by an electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council.

## **II. Procedures for voting on bills and motions in the Legislative Council**

Unless otherwise provided for in this Law, the Legislative Council shall adopt the following procedures for voting on bills and motions:

The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present.

The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee.

## **III. Method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007**

With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record.”

With regard to the drafting process of Annex II to the Basic Law, including the evolution and development of its content, please refer to the Note on BL 68 in this book for details.

## **Annex III**

### **“Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region”<sup>11</sup>**

The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region:

#### 1. Resolution on the Capital, Calendar, National Anthem and National Flag of the People’s Republic of China

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11 For addition to and deletion from the list of laws in Annex III, please see:

- a. Decision of the Standing Committee of the National People’s Congress on Adding to and Deleting from the List of the National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted at the Twenty-Sixth Session of the Standing Committee of the Eighth National People’s Congress on 1 July 1997);
- b. Decision of the Standing Committee of the National People’s Congress on Adding a Law to the List of the National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted on 4 November 1998);
- c. Decision of the Standing Committee of the National People’s Congress on Adding a Law to the List of the National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted on 27 October 2005);
- d. Decision of the Standing Committee of the National People’s Congress on Adding a Law to the List of the National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted at the Thirtieth Session of the Standing Committee of the Twelfth National People’s Congress on 4 November 2017); and
- e. Decision of the Standing Committee of the National People’s Congress on Adding a Law to the List of the National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted at the Twentieth Session of the Standing Committee of the Thirteenth National People’s Congress on 30 June 2020)



2. Resolution on the National Day of the People's Republic of China

3. Order on the National Emblem of the People's Republic of China Proclaimed by the Central People's Government

Attached: Design of the national emblem, notes of explanation and instructions for use

4. Declaration of the Government of the People's Republic of China on the Territorial Sea

5. Nationality Law of the People's Republic of China

6. Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities<sup>12</sup>,

The Joint Declaration makes no reference to the applicability of national laws in the HKSAR. Drafting materials in *Overview of the Drafting Process*<sup>13</sup> show that Annex III had progressed through three

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12 The list of national laws in Annex III:

Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China

Resolution on the National Day of the People's Republic of China

Declaration of the Government of the People's Republic of China on the Territorial Sea

Nationality Law of the People's Republic of China

Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities

Law of the People's Republic of China on the National Flag

Regulations of the People's Republic of China Concerning Consular Privileges and Immunities

Law of the People's Republic of China on the National Emblem

Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone

Law of the People's Republic of China on Garrisoning the Hong Kong Special Administrative Region

Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China

Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks

Law of the People's Republic of China on the National Anthem

Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

13 *Overview of the Drafting Process*, Annex III, Vol.3, pp.1239-1243.

drafts, the first of which was issued in February 1989. The text of the first to third drafts remained unchanged. The first to third drafts of Annex III read:

“The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region:

1. Resolution on the Capital, Calendar, National Anthem and National Flag of the People’s Republic of China

2. Resolution on the National Day of the People’s Republic of China

3. Order on the National Emblem of the People’s Republic of China Proclaimed by the Central People’s Government

Attached: Design of the national emblem, notes of explanation and instructions for use

4. Declaration of the Government of the People’s Republic of China on the Territorial Sea

5. Nationality Law of the People’s Republic of China

6. Regulations of the People’s Republic of China Concerning Diplomatic Privileges and Immunities”

Since 1 July 1997, the NPCSC has made several additions to and deletions from the laws listed in Annex III.<sup>14</sup>

Before the first draft of Annex III was formulated, visiting members of the Drafting Committee from the Mainland had the following views on the applicability of national laws in the HKSAR: “Most of the national laws enacted by the National People’s Congress since the founding of the People’s Republic of China are not applicable to Hong Kong, including the civil law, criminal law, civil procedure law, criminal procedure law and commercial law (economic laws) etc. In fact, only seven types are applicable to Hong Kong, including (1) the decisions on the capital, calendar, national anthem and national flag made in 1949; (2) the national day; (3) the national emblem; (4)

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<sup>14</sup> Ibid, footnote 11.

the declaration of the Chinese Government on the territorial sea of 1958; (5) the declaration of diplomatic privileges and immunities adopted by the Standing Committee of the National People's Congress in 1986; (6) electoral law of National People's Congress deputies; and (7) nationality law.<sup>15</sup> These are laws that the Hong Kong Special Administrative Region cannot make on its own, but such matters must be governed by law. On the other hand, some national laws, though related to defence and foreign affairs, do not apply to Hong Kong, such as the conscript law. Some people suggested that all these national laws applicable to Hong Kong should be set out in the Basic Law to reassure Hong Kong people. However, there is a downside to this because if more national laws of this kind come up in the future, should the Basic Law be amended then? In order to avoid amendments to the Basic Law as far as possible, another suggestion was to include those national laws in an annex, which would be easier to add to or amend. This suggestion is worth considering."<sup>16</sup>

The Consultative Committee also received views that national laws should be listed in an annex: The six existing Chinese laws reflecting national unity and territorial integrity which should be applied to Hong Kong should be listed first in an annex to the Basic Law. If any further Chinese law needed to be applied to Hong Kong in the future, the annex to the Basic Law could be amended to include it. BL 45<sup>17</sup> and 67<sup>18</sup> of the draft for solicitation of opinions could be used as a reference on the procedure for amending the annex, 'approved by the Standing Committee of the National People's Congress and adopted by a two-thirds majority of the Legislature and the Chief

15 Reference Materials (4) of the Secretariat of Consultative Committee, 3 August 1988, *The Laws of the People's Republic of China Applicable to the HKSAR*, which sets out the seven types of laws applicable to the HKSAR in *Overview of the Drafting Process*, Vol.3, pp.1240-1241.

16 Reference Materials (1) of the Secretariat of Consultative Committee, 3 August 1988, *Summary of the Responses of the Visiting Group of Members of the Drafting Committee from the Mainland to Questions in relation to the Draft Basic Law (for solicitation of opinions) (4 to 17 June 1988)* in *Overview of the Drafting Process*, Vol.3, pp.1239-1240.

17 The current BL 45.

18 The current BL 68.

Executive of the Hong Kong Special Administrative Region'. The legislature of the HKSAR may then legislate to implement the laws listed in the annex. The reasons were as follows: this would make it clear to the people of Hong Kong which national laws had legal force in the HKSAR; these Chinese laws could still be applicable in the HKSAR and could naturally become part of the laws of the HKSAR because they were annexed to the Basic Law; the annex, being amendable, could remain flexible enough to accommodate future needs; as these Chinese laws were annexed to the Basic Law, rather than being directly enacted by the HKSAR, these Chinese laws would still have sufficient authority and credibility after being applied to the HKSAR; the HKSAR could have the right to participate in every step of the process under which a Chinese law was applied to the HKSAR and this would ease its suspicions about the Communist Party of China; for certain laws that needed to be enacted in the name of the sovereign state or with the authority of the CPG, such as the Nationality Law and the law on diplomatic immunities and privileges, they could be made applicable to the HKSAR by amending the annex to the Basic Law after the CPG formulated such laws; the NPC and NPCSC legislating directly for the HKSAR through the State Council issuing executive orders would be inconsistent with the provisions of the Joint Declaration, the introduction of which by force would lead to resistance and a crisis of confidence, thus hindering the high degree of autonomy of the HKSAR.<sup>19</sup>

Regarding the relationship between this annex and BL 18, *Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR on Amendments to the Articles* dated 9 January 1989 contains the following explanation: "... Article 17<sup>20</sup>(3) of the draft (for solicitation of opinions) stipulates that the national laws applicable to the Hong Kong Special Administrative Region shall be 'those

19 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions), Consultation Report, Vol.5 – General Report on the Articles*, October 1988 in *Overview of the Drafting Process*, Vol.3, p.1241.

20 The current BL 18.

relating to national defence and foreign affairs as well as other laws reflecting national unity and territorial integrity that are outside the limits of the high degree of autonomy of the Region in accordance with the provisions of this Law.’ Since some people considered that the legal meaning of the words ‘reflecting national unity and territorial integrity’ is not clear enough and could easily lead to difficulties in interpretation, it is therefore suggested that all national laws to be applied in the Hong Kong Special Administrative Region shall be listed in one table as an annex to the Basic Law. After discussion, members of this subgroup agree to adopt the suggestion by (1) deleting the reference to ‘reflecting national unity and territorial integrity’, and listing in one table the seven national laws which so far in their opinion are applicable in the Hong Kong Special Administrative Region as Annex III to the Basic Law; and (2) specifying the procedure for the addition and deletion of the laws listed in Annex III; ...”<sup>21</sup>

Chairman Ji Pengfei’s *Report on the Submission of “The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China” and Related Documents to the Standing Committee of the National People’s Congress for Examination* of 15 February 1989 also includes an explanation on the application of national laws to the HKSAR: “In relation to the issue of application of a few national laws to Hong Kong, as the systems, policies and legal system of the Hong Kong Special Administrative Region are different from those of the Mainland, national laws are generally not applicable in the Region. However, as a local administrative region of China, there will inevitably be a small number of national laws on national defence, foreign affairs and affairs that are not within the scope of autonomy of the Special Administrative Region that needs to be implemented in the Region. In this respect, Article 18 and Annex III of the Basic Law (Draft) specify the categories and the number of national laws applicable to the Hong Kong Special Administrative

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21 Published in *Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law*, January 1989 in *Overview of the Drafting Process*, Vol.3, pp.1241-1242.

Region, and facilitate necessary additions and deletions in the future.”<sup>22</sup>

Prior to the finalization of the second draft of Annex III, the Consultative Committee received suggestions to replace item 5 thereof with “Nationality Law of the People’s Republic of China and the provisions concerning the Hong Kong Special Administrative Region in the Constitution.”<sup>23</sup> The suggestion was not adopted.

There were also views that the procedure for amending Annex III should be the same as that for amending the Basic Law set out in BL 158<sup>24</sup>, i.e. it needed to be adopted by the NPC<sup>25</sup>. The procedure for amending Annex III is set out in the current BL 18(3): “The Standing Committee of the National People’s Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.”

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22 *Overview of the Drafting Process*, Vol.3, p.1242.

23 Consultative Committee, *The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Consultation Report, Vol.3 – General Report on the Articles*, November 1989 in *Overview of the Drafting Process*, Vol.3, p.1242.

24 The current BL 159.

25 *Ibid*, footnote 22.

**Interpretation by the Standing Committee of the  
National People's Congress Regarding Paragraph  
4 in Article 22 and Category (3) of Paragraph 2 in  
Article 24 of the Basic Law of the Hong Kong Special  
Administrative Region of the People's Republic of China**

(Adopted at the 10th Meeting of the Standing Committee of the Ninth  
National People's Congress on 26 June 1999)

At its 10th Meeting, the Standing Committee of the Ninth National People's Congress discussed the State Council's Proposal for Giving an Interpretation to Paragraph 4 in Article 22 and Category (3) of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. It is in order to respond to the report submitted by the Chief Executive of the Hong Kong Special Administrative Region in accordance with the relevant provisions of Article 43 and those of Category (2) of Article 48 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China that the State Council has put forward the proposal. In view of the fact that the issue raised in the proposal concerns the interpretation of the relevant articles of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Court of Final Appeal of the Hong Kong Special Administrative Region in its judgment made on January 29, 1999, that these provisions concern affairs which are the responsibility of the Central Authorities and the relationship between the Central Authorities and the Hong Kong Special Administrative Region, that the Court of Final Appeal, before making its judgment, failed to seek an interpretation of the provisions from the Standing Committee of the National People's Congress in accordance with the provisions of Paragraph 3 in Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and that the

interpretation of the Court of Final Appeal is not in conformity with the original legislative intent, the Standing Committee of the National People's Congress, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region, decides to give the following interpretations to the relevant provisions in the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China in accordance with the provisions of Category (4) of Article 67 of the Constitution of the People's Republic of China and Paragraph 1 in Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China:

1. The provisions of Paragraph 4 in Article 22 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China "for entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval", mean that persons from provinces, autonomous regions and municipalities directly under the Central Government, including the children of permanent residents of the Hong Kong Special Administrative Region born in the Mainland with Chinese nationality, who request to enter the Hong Kong Special Administrative Region with whatever reason shall, in accordance with the provisions of relevant laws and administrative regulations of the State, apply for approval from the relevant government department in the place of their residence and may only enter the Hong Kong Special Administrative Region with valid certificates issued by relevant authorities. It's illegal for any persons or children mentioned above to enter the Hong Kong Special Administrative Region without going through due approval procedures in accordance with the provisions of relevant laws and administrative regulations of the State.

2. The first three categories of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China provide: "The permanent residents of the Hong Kong Special Administrative Region shall be: (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region; (2) Chinese citizens



who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region; (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)”. Among these people, the persons provided for in Category (3) “Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)” mean that those persons, at the time of their birth, no matter whether they were born before or after the establishment of the Hong Kong Special Administrative Region, whose parents or whose fathers or mothers are Chinese citizens as provided for in Category (1) or Category (2) of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region. The original legislative intent elucidated by this Interpretation and the original legislative intent of the other categories of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region have been embodied in the Opinions on the Implementation of the Second Paragraph of Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, which were adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People’s Congress on August 10, 1996.

After promulgation of this Interpretation, the courts of the Hong Kong Special Administrative Region shall, in applying the relevant articles of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, follow this Interpretation. This Interpretation does not affect the right of abode in the Hong Kong Special Administrative Region granted to the litigating party in the case through the judgment made by the Court of Final Appeal of the Hong Kong Special Administrative Region on January 29, 1999. As to whether any other person conforms to the provisions of Category (3) of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region, the matter shall be decided according to this Interpretation.

**Interpretation by the Standing Committee of the  
National People's Congress Regarding Annex I (7) and  
Annex II (III) to the Basic Law of the Hong Kong Special  
Administrative Region of the People's Republic of China**

(Adopted at the 8th Meeting of the Standing Committee of the Tenth  
National People's Congress on 6 April 2004)

At its 8th Meeting, the Standing Committee of the Tenth National People's Congress examined the motion proposed by the Council of Chairmen requesting examination of the Draft Interpretation by the Standing Committee of the National People's Congress Regarding Annex I (7) and Annex II (III) to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. Having consulted the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, the Standing Committee of the National People's Congress has decided, in accordance with the provisions in Subparagraph (4) of Article 67 of the Constitution of the People's Republic of China and the provisions in the first paragraph of Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, to make the following interpretation of the provisions of Annex I (7) to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, under the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, which reads, "If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval", and the provisions of Annex II (III), under the Method for the Formation of the Legislative Council

of the Hong Kong Special Administrative Region and its Voting Procedures, which reads, “With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for the record”:

1. The phrases “subsequent to the year 2007” and “after 2007” stipulated in the two Annexes mentioned above include the year 2007.

2. The provisions in the two Annexes mentioned above that “if there is a need” to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007 or the method for forming the Legislative Council and its procedures for voting on bills and motions after 2007 mean that they may be amended or remain unamended.

3. The provisions in the two Annexes mentioned above that any amendment must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and shall be reported to the Standing Committee of the National People’s Congress for approval or for the record mean the legislative process that must be gone through before the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions are to be amended. Such an amendment may become effective only if it has gone through the said process, including the approval finally given by the said Committee in accordance with law or the reporting to the Committee for the record. The Chief Executive of the Hong Kong Special Administrative Region shall present a report to the Standing Committee of the National People’s Congress as regards whether there is a need to make an amendment, and the Committee shall, in accordance with the provisions in Articles 45 and 68 of the Basic Law of the Hong Kong Special Administrative

Region of the People's Republic of China, make a determination in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The bills on amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council.

4. If no amendment is made to the method for selecting the Chief Executive, the method for forming the Legislative Council and its procedures for voting on bills and motions as stipulated in the two Annexes mentioned above, the provisions relating to the method for selecting the Chief Executive in Annex I will remain applicable to the method for selecting the Chief Executive, and the provisions relating to the method for forming the third term of the Legislative Council in Annex II and the provisions relating to its procedures for voting on bills and motions in Annex II will remain applicable to the method for forming the Legislative Council and its procedures for voting on bills and motions.

This Interpretation is hereby announced.

**Interpretation by the Standing Committee of the  
National People's Congress Regarding the Second  
Paragraph in Article 53 of the Basic Law of the Hong  
Kong Special Administrative Region of the People's  
Republic of China**

(Adopted at the 15th Meeting of the Standing Committee of the Tenth  
National People's Congress on 27 April 2005)

At its 15th Meeting, the Standing Committee of the Tenth National People's Congress discussed the State Council's Proposal for Giving an Interpretation to the Second Paragraph in Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. After consulted its Committee for the Basic Law of the Hong Kong Special Administrative Region, the Standing Committee of the National People's Congress, in accordance with the provisions of the fourth paragraph in Article 67 of the Constitution of the People's Republic of China and the first paragraph in Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, gives the following interpretation to the provisions of the second paragraph in Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China:

The second paragraph in Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China stipulates, "In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law." The provision that "a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law" means that a new Chief Executive shall be selected in accordance with the method of selection provided for under Article 45 of the Basic

Law, and that the term of office of the new Chief Executive shall be determined in accordance with the method of selection provided for under Article 45 of the Basic Law.

The third paragraph in Article 45 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China stipulates, "The specific method for selecting the Chief Executive is prescribed in Annex I 'Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'." Clause 1 of Annex I stipulates, "The Chief Executive shall be elected by a broadly representative Election Committee in accordance with this Law and appointed by the Central People's Government." Under Clause 2 it is stipulated that, "The term of office of the Election Committee shall be five years." Clause 7 stipulates, "If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported the Standing Committee of the National People's Congress for approval." The provisions mentioned above indicate that before the year of 2007, under the arrangement made according to the system whereby the Chief Executive is elected by the Election Committee, the term of office of which is five years, in the event that the office of Chief Executive becomes vacant before the expiration of the five years prescribed in Article 46 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the term of office of the new Chief Executive shall be the remainder of the term of office of the previous Chief Executive; after 2007, should amendment be made to the above-mentioned method for selecting the Chief Executive, the term of office of the new Chief Executive shall be determined according to the specific method amended for selecting the Chief Executive, in the event that the office of the then Chief Executive becomes vacant.

This Interpretation is hereby announced.

**Interpretation by the Standing Committee of the  
National People's Congress Regarding the First  
Paragraph of Article 13 and Article 19 of the Basic Law  
of the Hong Kong Special Administrative Region of the  
People's Republic of China**

(Adopted at the 22nd Meeting of the Standing Committee of the  
Eleventh National People's Congress on 26 August 2011)

The Standing Committee of the Eleventh National People's Congress deliberated at its 22nd Meeting the Draft Interpretation by the Standing Committee of the National People's Congress Regarding the first paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China which was proposed for deliberation by the Chairmen's Council. The proposal of the Chairmen's Council was submitted upon the report by the Court of Final Appeal of Hong Kong Special Administrative Region requesting the Standing Committee of the National People's Congress to interpret the relevant provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, in accordance with the third paragraph of Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

The Court of Final Appeal of the Hong Kong Special Administrative Region needs to ascertain, in adjudicating a case involving the Democratic Republic of Congo, whether the Hong Kong Special Administrative Region should apply the rules or polices on state immunity as determined by the Central People's Government. For this purpose, in accordance with the provisions of the third paragraph of Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Court of Final Appeal of the Hong Kong Special Administrative Region

seeks an interpretation from the Standing Committee of the National People's Congress on the following questions: "(1) whether on the true interpretation of the first paragraph of Article 13, the Central People's Government has the power to determine the rule or policy of the People's Republic of China on state immunity; (2) if so, whether on the true interpretation of the first paragraph of Article 13 and Article 19, the Hong Kong Special Administrative Region (HKSAR), including the courts of the HKSAR: (i) is bound to apply or give effect to the rule or policy on state immunity determined by the Central People's Government under the first paragraph of Article 13; or (ii) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the Central People's Government under the first paragraph of Article 13 and to adopt a different rule; (3) whether the determination by the Central People's Government as to the rule or policy on state immunity falls within "acts of the State such as national defense and foreign affairs" in the first sentence of the third paragraph of Article 19 of the Basic Law; and (4) whether, upon the establishment of the HKSAR, the effect of the first paragraph of Article 13, Article 19 and the status of Hong Kong as a special administrative region of the People's Republic of China upon the common law on state immunity previously in force in Hong Kong (this is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the Central People's Government pursuant to the first paragraph of Article 13, was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the Central People's Government, in accordance with Article 8 and Article 160 of the Basic Law and the Decisions of the Standing Committee of the National People's Congress issued on February 23, 1997 made pursuant to Article 160." The above request for interpretation by the Court of Final Appeal of the Hong Kong Special Administrative Region complies with the provisions of the third paragraph of Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's



Republic of China.

Pursuant to Subparagraph (4) of Article 67 of the Constitution of the People's Republic of China and Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, the Standing Committee of the National People's Congress, in relation to the request for interpretation by the Court of Final Appeal of the Hong Kong Special Administrative Region, hereby makes the following interpretation of the provisions of the first paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and related issues:

1. On question (1) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to Subparagraph (9), Article 89 of the Constitution of the People's Republic of China, the State Council as the Central People's Government exercises the function and power to conduct the foreign affairs of the State; as the rules or polices on state immunity fall within diplomatic affairs in the realm of the foreign affairs of the state, the Central People's Government has the power to determine the rules or polices of the People's Republic of China on state immunity to be given effect to uniformly in the territory of the People's Republic of China. Based on the above, in accordance with the provisions of the first paragraph of Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China that "the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region", the conduct of the foreign affairs relating to the Hong Kong Special Administrative Region falls within the power of the Central People's Government. The Central People's Government has the power to determine the rules or polices on state immunity to be applied in the Hong Kong Special Administrative Region.

2. On question (2) on which an interpretation is sought by the

Court of Final Appeal of the Hong Kong Special Administrative Region. According to the provisions of the first paragraph of Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 1 of this Interpretation, the Central People's Government has the power to determine the rules or polices on state immunity to be applied in the Hong Kong Special Administrative Region. According to the provisions of Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 3 of this Interpretation, the courts of the Hong Kong Special Administrative Region have no jurisdiction over the act of the Central People's Government in determining the rules or polices on state immunity. Therefore, when questions of immunity from jurisdiction and immunity from execution of foreign states and their properties arise in the adjudication of cases, the courts of the Hong Kong Special Administrative Region must apply and give effect to the rules or polices on state immunity determined by the Central People's Government as being applicable to the Hong Kong Special Administrative Region. Based on the above, in accordance with the provisions of the first paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Hong Kong Special Administrative Region, including the courts of the Hong Kong Special Administrative Region, is under a duty to apply or give effect to the rules or polices on state immunity that the Central People's Government has determined, and must not depart from the abovementioned rules or polices nor adopt a rule that is inconsistent with the abovementioned rules or polices.

3. On question (3) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. State immunity concerns whether the courts of a state have jurisdiction over foreign states and their properties and whether foreign states and their properties enjoy immunity in the courts of a state. It directly relates to the state's foreign relations and international rights and obligations. Therefore, the determination as to the rules or polices

on state immunity is an act of state involving foreign affairs. Based on the above, “acts of the State such as national defense and foreign affairs” as stipulated in the third paragraph of Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China includes the act of determination by the Central People’s Government as to the rules or policies on state immunity.

4. On question (4) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to the provisions of Article 8 and 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, the laws previously in force in Hong Kong shall be maintained only if there is no contravention of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China. In accordance with the provisions of Article 4 of the 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, such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from July 1, 1997, be applied subject to such modification, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People’s Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law. The Hong Kong Special Administrative Region, as a local administrative region of the People’s Republic of China that enjoys a high degree of autonomy and comes directly under the Central People’s Government, must give effect to the rules or policies on state immunity as determined by the Central People’s Government. The laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after July 1, 1997 only if they comply with the above requirements. Based on the above, in accordance with the provisions of the first paragraph

of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, such of the laws previously in force in Hong Kong concerning the rules on state immunity which have been adopted as the laws of the Hong Kong Special Administrative Region according to the Decision of the Standing Committee of the National People's Congress Concerning the Handling of the Laws Previously in Force in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which applied as from July 1, 1997, must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to be consistent with the rules or polices on state immunity that the Central People's Government has determined.

The Interpretation is hereby announced.

**Interpretation of Article 104 of the Basic Law of the  
Hong Kong Special Administrative Region of the  
People’s Republic of China by the Standing Committee  
of the National People’s Congress**

(Adopted by the Standing Committee of the Twelfth National People’s  
Congress at its Twenty-fourth Session on 7 November 2016)

The Standing Committee of the Twelfth National People’s Congress examined at its Twenty-fourth Session the motion regarding the request for examination of the *Draft Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* submitted by the Council of Chairmen. Having consulted the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People’s Congress, the Standing Committee of the National People’s Congress has decided to make, under the provisions of Article 67(4) of the *Constitution of the People’s Republic of China* and Article 158(1) of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, an interpretation of the provisions of Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* regarding “When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China” as follows:

1. “To uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China” and to

bear “allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China” as stipulated in Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, are not only the legal content which must be included in the oath prescribed by the Article, but also the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article.

2. The provisions in Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* that “When assuming office”, the relevant public officers “must, in accordance with law, swear” bear the following meaning:

(1) Oath taking is the legal prerequisite and required procedure for public officers specified in the Article to assume office. No public office shall be assumed, no corresponding powers and functions shall be exercised, and no corresponding entitlements shall be enjoyed by anyone who fails to lawfully and validly take the oath or who declines to take the oath.

(2) Oath taking must comply with the legal requirements in respect of its form and content. An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law, the content of which includes “will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China”.

(3) An oath taker is disqualified forthwith from assuming the public office specified in the Article if he or she declines to take the oath. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article.

(4) The oath must be taken before the person authorized by law to administer the oath. The person administering the oath has the duty to ensure that the oath is taken in a lawful manner. He or she shall determine that an oath taken in compliance with this Interpretation and the requirements under the laws of the Hong Kong Special Administrative Region is valid, and that an oath which is not taken in compliance with this Interpretation and the requirements under the laws of the Hong Kong Special Administrative Region is invalid. If the oath taken is determined as invalid, no arrangement shall be made for retaking the oath.

3. The taking of the oath stipulated by Article 104 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* is a legal pledge made by the public officers specified in the Article to the People's Republic of China and its Hong Kong Special Administrative Region, and is legally binding. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law.

This Interpretation is hereby announced.

## Appendix I

### **Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China**

(Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990)

The Third Session of the Seventh National People's Congress adopts the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, including Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, Annex III: National Laws to Be Applied in the Hong Kong Special Administrative Region, and the designs of the regional flag and regional emblem of the Hong Kong Special Administrative Region. Article 31 of the *Constitution of the People's Republic of China* provides: "The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." The Basic Law of the Hong Kong Special Administrative Region is constitutional as it is enacted in accordance with the *Constitution of the People's Republic of China* and in the light of the specific conditions of Hong Kong. The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region.

The *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* shall be put into effect as of 1 July 1997.



## Appendix II

### Basic Law Drafting Committee

**Chairman:** Ji Pengfei

**Vice-Chairmen:** T. K. Ann, Y. K. Pao, Xu Jiatusun, Fei Yimin, Hu Sheng, Fei Xiaotung, Wang Hanbin, David Li

**All members** (in the same order as the Chinese version without honorifics):

Ma Lin	Xiao Weiyun	Mo Yinggui
Wang Hanbin	Wu Dakun	Jia Shi
Wang Shuwen	Wu Jianfan	Qian Weichang
Wang Teya	Zhang Youyu	Qian Changzhou
Mao Junnian	Chen Xin	Guo Dihuo
Y. K. Pao	Chen Chu	Sanford Yung
Peter Kwong*	Shao Tianren	Ji Pengfei
Szeto Wah*	Lin Hengyuan	Rayson Huang
Raymond Wu	Zhou Nan	Wong Po-yan
Lau Wong-fat	Cheng Ching-fun	Sik Kwok-Kwong
T. K. Ann	Zheng Weirong	Lu Ping
Xu Jiatusun	Xiang Chunyi	Qiu Shaoheng
Xu Chongde	Rong Yiren	Lei Jieqiong
Rui Mu	Hu Sheng	Liao Hui
Li Hou	Ke Zaishuo	Liu Yiu-chu
David Li	Louis Cha*	Duanmu Zheng
Martin Lee*	Cha Chi-min	Maria Tam
Li Yumin	Fei Xiaotung	Tam Yiu-chung
Simon Li	Fei Yimin	Fok Ying-tun
Li Ka-Shing	Yong Longgui	

**Secretary:** Li Hou

**Deputy Secretaries:** Lu Ping, Mao Junnian

\* Resigned

## Appendix III

### List of Members of the Basic Law Consultative Committee

All members (in the same order as the Chinese version without honorifics):

Van Lau	Shum Choi Sang	Louis Ha Keloon
Man Sai Cheong	Nick Griffin	Sun Ping Hsu, Samson
Man Hon Ming	Lee Wing Tat	Sun Sheng Tsang
Mo Kwan Nin	Peter Lee Chung-Yin	Tsui Sze-Man
Wilfred Wong Ying Wai	Arthur Li Kwok-cheung	Zee Sze-Yong
Peter Wong Man Kong	Lee Kai Yu Paul	Zee Kwoh Kung
Ronnie Wong Man Chiu	Lee Kai Ming	William H.C. Tsui
Wong Kwan Cheng	Li Siu Kei*	Joseph Ma Ching Chung
A Gaffarelli	Lee Lin Sang	Ko Siu Wah
Seto Fai	Li Richard King Hang	Ko Gra Yee
James Tien Pei-Chun	Ronald Li Fook Shiu	Ko Chan Gock William
Malcolm A Barnett	Elsie Tu	To Shui Moon
Shek Wai	A. de O. Sales	Cheung Sai Lam
Annie Wu Suk-Ching	Shung Jih-Chong	Tommy Cheung Yu Yan
Ann Tse-Kai	Shen Peng Ying	Cheung Yau Kai
Lawrence C.H. Chu	Michael Neale Somerville	Cheung Pak Chi
Kong Tak Yan	Yuen Philip Pak Yiu	Chang Ka Mun
Ho Man Fat	Nelson Chow Wing Sun	Cheung Chun Kwok
Ho Ting Kwan*	Wut Chiu	Denis Chang Khen-Lee
Edward Ho Sing-Tin	Lam Kwong Yu	Chang Wan-Fung
Raymond Ho Chung Tai	John Stove Lambourn	Cheung Yin Tung
Stanley Ho	Lam Po-wing	Cheong Stephen Kam-Chuen
Ewan Yee Lup Yuen	Erik Bøgh Christensen	Tso Wung-Wai
Lee Jung-Kong	Shao You Bao	Leung Siu Tong
Harold T. Wu	Yau Shik Fan Eddy	Leung Lam Hoi*
Steve Ng Siu Pang	Yu Wai Mui Christina	Leung Chun Ying
Peter Woo Kwong-ching	Veronica W. Cha	Leong Che-Hung
Ng Tor Tai	Louis Cha	Leung Yu Shing*
Ng Hong Mun	Hu Fa-Kuang	Kasim Wilson Tuet Wai-Sin
Agnes Ng Mung Chan	Hu Chu-Jen	
Ng Wai Kei*	Tang Hsiang-Chien	
Ng Kam Tsuen	Ha Man-Ho Anthony	Mok Ka Wing
Ng Yiu Tung	Hari N. Harilela	

Chuang Siu Leung	David Edward Leslie	Pun Kwok Shing
Andrew	Wong Yat-huen*	Pun Chiu Yin
Kwok Yuen-Hon*	Wong Wing Yan,	Choy Tak Ho
Kwok Man Cho	Kenneth	Tam Ling Kwan
Philip Kwok Chi-Kuen	Wong Kong Hon	Cheng Sow-bun, Kevin
Chan Pun	Wong Hong Yuen	Mignonne Cheng
Chan Chi-Kwan Peter	Philip Wong Yu-hong	Cheng Yu Tung
Chan Siu-Kam	Wong Po Yan	Cheng Yiu Tong
Chan Wing Kee	Raymond Huang*	Cheng Chung Wai
Chan Hip Ping	Wong Lai Chuen	Tang Hing Yee*
Edward K.Y. Chen	Rayson Huang Lisung	Lo King-Man
Chan Ying Lun	Yeung Yue Man	Tsin Sai Nin
Thomas Chen Tseng-Tao	Howard Young	Fok Wah Pun
Chan Cheng-Chun	T.L. Yang	Timothy Fok Tsun-ting
Luk Tung Chin Anthony	Wan Kwok-sing	Tai Keen Man
John Lok Hsiao Pei	Henrietta Ip Man-hing	Brian H. Tisdall*
Edwin Hsueh-Chi Tao	Ip Yeuk-Lam	Patrick Charles Samuel
Cheung Lun	Luke Yip Jing Ping	Deveson*
Mak Chan	Simon Ip Sik On	Benny Tai Yiu-ting*
Mak Hoi Wah	David Anthony Gledhill	Tse Daniel Chi Wai
Michael Miles*	Tung Chee Hwa	Char Nee Quin
Tsang Kwong To	Kenneth Chow Charn Ki	John C.M. Tse
Tsang Hin Chi	Peter J Wrangham*	Tse Jacob Wai Chee*
Jeffrey Y.S. Tsang	Wu Wai Yung Raymond	Chung King Fai
Cheng Kai Nam	Lawrence Kadoorie	Chung Chi Yung
Ching Yuen-Kai	Liu Ching Leung	Kan Fook Yee
Fung Ho-Keung	Liu Lit-Man	Kwong Hoi-ying
Fung Wing Cheung Tony	Lincoln Yung Chu-Kuen	Peter Kwong Kong Kit*
Fung Shing Kwong	William Mong Man Wai	Lo Hong Sui Vincent
William Fung Kwok Lun	Liu Yong Ling	Anthony Gordon Rogers
Daniel R. Fung*	Lau Nai Keung	Alex Yurk-Keung Kwan
Fung Wai Kwong*	Au Sing Wai Eric	Helmut Sohmen
Fung Kin Kee Frederick	Poon Chung Kwong	Ku Sze Chung
Wong Wan Tin	Poon Chun Leung	Kung Chi Keung

\* Resigned

## Appendix IV

### **Draft Structure of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China**

(Adopted at the Second Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on 22 April 1986)

#### **Explanation**

This draft was carefully discussed and amended repeatedly by all members of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the Second Plenary Session, and subsequently adopted on 22 April 1986.

This draft is only the preliminary outline for reference in the drafting process of the Basic Law after the conclusion of the meeting. It does not exhaustively cover all the queries raised by some members, and those not covered will be included in the Memorandum and referred to the relevant subgroups for further study.

Going forward, in the process of drafting specific provisions, if it is found that the draft contains any imperfections, necessary additions, deletions or adjustments may be made with the approval of the plenary meeting of the Drafting Committee.

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  - Section 2 The Executive Authorities
  - Section 3 The Legislature
  - Section 4 The Judiciary
  - Section 5 District Organizations
  - Section 6 Public Servants
- Chapter V Economy of the Hong Kong Special Administrative Region
- Chapter VI Education, Science, Technology, Culture, Sports and Religion of the Hong Kong Special Administrative Region
- Chapter VII External Affairs of the Hong Kong Special Administrative Region
- Chapter VIII Regional Flag and Regional Emblem of the Hong Kong Special Administrative Region
- Chapter IX Legal Status, Interpretation and Amendment of the Basic Law of the Hong Kong Special Administrative Region
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### **Preamble**

(1) Hong Kong's territory and historical background, the signing of the Sino-British Joint Declaration, and the resolution of the Hong Kong issue

(2) Establishment of the Hong Kong Special Administrative Region under the guiding principle of "one country, two systems"

(3) Formulation of the Basic Law of the Hong Kong Special

Administrative Region in accordance with Article 31 of the Constitution to safeguard state sovereignty and the prosperity and stability of Hong Kong

## **Chapter I General Principles**

(1) The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China. Authorized by the National People's Congress, the Hong Kong Special Administrative Region shall enjoy a high degree of autonomy.

(2) The executive authorities and the legislature shall be composed of local inhabitants

(3) The socialist system and policies shall not be practised, and the previous capitalist system and way of life shall remain unchanged for 50 years

(4) The ownership of private property shall be protected. The ownership of enterprises and the legal right of inheritance shall be protected.

(5) The right of ownership, management and disposal of land

(6) The right of ownership, management and disposal of natural resources

(7) The laws previously in force shall remain basically unchanged

(8) Languages and scripts

## **Chapter II Relationship between the Central Authorities and the Hong Kong Special Administrative Region**

(1) The Hong Kong Special Administrative Region shall come directly under the Central People's Government

(2) Foreign affairs shall be managed by the Central People's Government (the Hong Kong Special Administrative Region shall conduct external affairs as specified in Chapter VII and other related provisions)

(3) The Central Government is responsible for defence and garrison

(4) The Hong Kong Special Administrative Region shall be vested with administrative power (the executive power of the Hong Kong Special Administrative Region in matters of personnel, security, government finance, taxation, finance, currency, postal service, industry and commerce, trade, tariffs, education, science, culture, immigration and other fields)

(5) The Hong Kong Special Administrative Region shall be vested with legislative power

(6) The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication

(7) Other functions and powers delegated to the Hong Kong Special Administrative Region by the National People's Congress and the State Council

(8) Representatives of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs

(9) The relationship between the Hong Kong Special Administrative Region and all the departments of the Central Government, provinces, autonomous regions as well as municipalities directly under the Central Government (but there shall not be interference in the internal affairs of the Hong Kong Special Administrative Region)

### **Chapter III Fundamental Rights and Duties of Hong Kong Residents**

(1) Definition of Hong Kong residents

(2) Right to vote and to stand for election

(3) Freedom of speech, of the press, of assembly, of association, of forming and joining trade unions, of strike and of procession

(4) Freedom of the person

(5) Inviolability of the home, and freedom of communication

(6) Freedom of movement and to enter or leave the Region

(7) Freedom of religion and belief

(8) Freedom of choice of occupation and of academic research

(9) The right to have confidential legal advice, of access to the courts, to choose lawyers for representation in the courts, and to judicial remedies. Residents shall have the right to challenge the actions of the executive authorities in the courts in accordance with the law.

(10) The right to benefit from social welfare in accordance with law, and welfare benefits of public servants who have retired or who have left the service shall be protected

(11) The freedom of marriage and the right to raise a family freely shall be protected

(12) The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force

(13) Other rights and freedoms guaranteed by the common law shall be enjoyed

(14) The lawful rights and interests of persons in Hong Kong other than Hong Kong residents shall be protected

(15) The lawful rights and interests of the indigenous inhabitants of the New Territories shall be protected

(16) Hong Kong residents shall have the obligation to abide by the Basic Law and all laws in force in the Hong Kong Special Administrative Region



## **Chapter IV Political Structure of the Hong Kong Special Administrative Region**

### **Section 1 The Chief Executive**

- (1) Selection, appointment and removal of the Chief Executive
- (2) Term of office of the Chief Executive
- (3) Powers and functions of the Chief Executive

### **Section 2 The Executive Authorities**

- (1) Formation of the executive authorities, appointment and removal of their members
- (2) Term of office of principal officials of the executive authorities
- (3) Powers and functions of the executive authorities
- (4) Relationship between the executive authorities and the legislature

### **Section 3 The Legislature**

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- (2) Term of office of members of the legislature
- (3) Powers and functions of the legislature
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- (1) Organizational structure of the judiciary
- (2) Powers and functions of the judiciary
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(7) Criminal prosecution

(8) Judicial links with other provinces, autonomous regions and municipalities directly under the Central Government

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### **Section 5 District Organizations**

Functions and formation of district organizations

### **Section 6 Public Servants**

## **Chapter V Economy of the Hong Kong Special Administrative Region**

(1) Fiscal management, tax policy

(2) Financial system and policy (international financial centre, circulation and issue of the Hong Kong dollar, no application of foreign exchange control policies, markets for foreign exchange, gold, securities, futures shall remain open)

(3) Free trade policy (free port, independent customs territory and separately available export quotas, tariff preferences and other similar arrangements, issue of certificates of origin)

(4) Manufacturing and other industrial policies

(5) Policies on commerce, tourism and real estate

(6) Shipping management and civil aviation management

## **Chapter VI Education, Science, Technology, Culture, Sports and Religion of the Hong Kong Special Administrative Region**

(1) Educational system and policies

(2) Science and technology policies

(3) Cultural policies, sports undertakings

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## **Chapter VII External Affairs of the Hong Kong Special Administrative Region**

- (1) Participation in relevant diplomatic negotiations
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## Appendix V

### **Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region**

(Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990)

1. The first Government and the first Legislative Council of the Hong Kong Special Administrative Region shall be formed in accordance with the principles of State sovereignty and smooth transition.

2. Within the year 1996, the National People's Congress shall establish a Preparatory Committee for the Hong Kong Special Administrative Region, which shall be responsible for preparing the establishment of the Hong Kong Special Administrative Region and shall prescribe the specific method for the formation of the first Government and the first Legislative Council in accordance with this Decision. The Preparatory Committee shall be composed of Mainland members and of Hong Kong members who shall constitute not less than 50 per cent of its membership. Its chairman and members shall be appointed by the Standing Committee of the National People's Congress.

3. The Preparatory Committee for the Hong Kong Special Administrative Region shall be responsible for preparing the establishment of the Selection Committee for the First Government of the Hong Kong Special Administrative Region (hereinafter referred to as the Selection Committee).

The Selection Committee shall be composed entirely of permanent residents of Hong Kong and must be broadly representative.

It shall include Hong Kong deputies to the National People's Congress, representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference, persons with practical experience who have served in Hong Kong's executive, legislative and advisory organs prior to the establishment of the Hong Kong Special Administrative Region, and persons representative of various strata and sectors of society.

The Selection Committee shall be composed of 400 members in the following proportions:

Industrial, commercial and financial sectors	25 per cent
The professions	25 per cent
Labour, grass-roots, religious and other sectors	25 per cent

Former political figures, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference

25 per cent

4. The Selection Committee shall recommend the candidate for the first Chief Executive through local consultations or through nomination and election after consultations, and report the recommended candidate to the Central People's Government for appointment. The term of office of the first Chief Executive shall be the same as the regular term.

5. The Chief Executive of the Hong Kong Special Administrative Region shall be responsible for preparing the formation of the first Government of the Region in accordance with the Basic Law of the Hong Kong Special Administrative Region.

6. The first Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies. If the composition of the last Hong Kong Legislative Council before the establishment

of the Hong Kong Special Administrative Region is in conformity with the relevant provisions of this Decision and the Basic Law of the Hong Kong Special Administrative Region, those of its members who uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, and who meet the requirements set forth in the Basic Law of the Region may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region.

The term of office of members of the first Legislative Council of the Hong Kong Special Administrative Region shall be two years.

## Appendix VI

### **\* Decision of the Standing Committee of the National People's Congress on the English Text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China**

(Adopted on 28 June 1990)

The 14th Meeting of the Standing Committee of the Seventh National People's Congress decides: the English translation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, examined and approved under the aegis of the Law Committee of the National People's Congress, shall be the official English text and shall be equally authentic as the Chinese text. In case of any discrepancy in the meaning of wording between the English text and the Chinese text, the Chinese text shall prevail.

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#### Note:

\* This English translation text is reproduced from "The Laws of the People's Republic of China 1990-1992" compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China. It is for reference purposes and has no legislative effect.



## Appendix VII

### **\* Interpretation by the Standing Committee of the National People's Congress on Some Questions Concerning Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region**

(Adopted at the 19th Meeting of the Standing Committee of the Eighth National People's Congress on 15 May 1996)

According to the provisions of Article 18 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and of its Annex III, the Nationality Law of the People's Republic of China shall become effective in the Hong Kong Special Administrative Region as of 1 July 1997. In view of the historical background and the reality of Hong Kong, an interpretation regarding implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region is made as follows:

1. Any Hong Kong resident of Chinese descent Who Was born in the territory of China (including Hong Kong), or any other person who meets the requirements for Chinese nationality as prescribed by the Nationality Law of the People's Republic of China is a Chinese national.

2. All Chinese compatriots residing in Hong Kong, whether they are holders of the British Dependent Territories Citizens' Passport or the British National (Overseas) Passport, are Chinese nationals. These Chinese nationals may, as of 1 July 1997, continue to use their valid travel documents issued by the British government for the purpose of travelling to other countries or regions. However, they shall not be entitled to British consular protection in the Hong Kong Special

Administrative Region or in any other part of the People's Republic of China on account of their holding the British travel documents mentioned above.

3. The British citizen status of any Chinese national residing in Hong Kong granted by the British government under the British Nationality Selection Scheme shall not be recognized according to the Nationality Law of the People's Republic of China. Such person being still Chinese national, he or she shall not be entitled to British consular protection in the Hong Kong Special Administrative Region or in any other part of the People's Republic of China.

4. Any Chinese national who resides in the Hong Kong Special Administrative Region and has the right of abode in a foreign country may use the relevant document issued by the foreign government for the purpose of travelling to other countries or regions, but he or she shall not be entitled to the consular protection of the foreign country in the Hong Kong Special Administrative Region or in any other part of the People's Republic of China on account of his or her holding the foreign documents mentioned above.

5. Any Chinese national residing in the Hong Kong Special Administrative Region who wishes to change his or her nationality may, by producing valid documents, apply to the competent authorities of the Hong Kong Special Administrative Region that handle nationality applications.

6. The Government of the Hong Kong Special Administrative Region is authorized to designate its Immigration Department as the competent authorities for handling nationality applications. The Immigration Department of the Hong Kong Special Administrative Region shall deal with all matters relating to nationality applications in accordance with the Nationality Law of the People's Republic of China and the provisions mentioned above.

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Note:

\* This English translation is reproduced from "The Laws of the People's Republic of China 1996" compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China. It is for reference only and has no legislative effect.

## Appendix VIII

### **Opinions of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China**

(Adopted at the Fourth Plenary Session of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 10 August 1996)

Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China regulates matters concerning permanent residents of the Hong Kong Special Administrative Region. To implement the foregoing provision, the following opinions are hereby put forward for reference in formulating the implementation rules by the Hong Kong Special Administrative Region.

I. The term "Chinese citizens born in Hong Kong" as defined in Item 1 of Article 24(2) of the Basic Law refers to the children who are born when one or two of their parents are lawfully settled in Hong Kong, excluding those born by people during their stay in Hong Kong through illegal entry, overstay or temporary stay.

II. The following cases shall not be regarded as "ordinarily resided in" Hong Kong under Items 2 and 4 of Article 24(2) of the Basic Law:

(1) Illegal entry or being permitted to remain in Hong Kong by the Director of Immigration after illegal entry;

(2) Staying in Hong Kong in contravention of the limit of stay or other conditions;

(3) Staying in Hong Kong as a refugee;

(4) Detained under the law or sentenced to imprisonment by a court in Hong Kong;

(5) Received permission to remain in Hong Kong under special government policy.

III. The “continuous period of not less than seven years” for which Chinese citizens have ordinarily resided in Hong Kong as stipulated in Item 2 of Article 24(2) of the Basic Law shall be calculated as seven consecutive years at any time, and the “continuous period of not less than seven years” for which persons not of Chinese nationality who have entered Hong Kong with valid travel documents have ordinarily resided in Hong Kong as stipulated in Item 4 of Article 24(2) of the Basic Law shall be calculated as the consecutive seven years immediately preceding their application for permanent resident of the Region.

IV. For persons of Chinese nationality born outside Hong Kong under Item 3 of Article 24(2) of the Basic Law, at the time of their birth, either or both of their parents must be persons who have acquired the status of permanent residents in Hong Kong under Item 1 or 2 of Article 24(2) of the Basic Law.

V. A person not of Chinese nationality who has taken Hong Kong as his/her place of permanent residence as stipulated in Item 4 of Article 24(2) of the Basic Law shall meet the following requirements:

1. He/she shall sign a declaration of the intention to take Hong Kong as his/her place of permanent residence in accordance with the law when applying for permanent resident status in the Region.

2. When making the aforesaid declaration, he/she shall truthfully declare the following personal information for reference by the Government of the Hong Kong Special Administrative Region in examining his/her permanent resident status:

(a) Whether the person has a place of residence (habitual residence) in Hong Kong;

(b) Whether the principal members of his/her family (spouse and minor children) ordinarily reside in Hong Kong;

(c) Whether he/she has a legitimate occupation or a stable source of income in Hong Kong;

(d) Whether he/she has paid up taxes in Hong Kong according to law.

3. He/she shall be legally responsible for the truthfulness of the information stated in the declaration. The Government of the Hong Kong Special Administrative Region shall have the power, when it deems necessary, to require any applicant to provide necessary supporting documents and materials, and may, if the applicant's declaration is found to be inconsistent with the facts, deal with it in accordance with law, including the cancellation of his/her permanent identity card.

4. Where persons not of Chinese nationality who have acquired Hong Kong permanent resident status fail to meet the requirement of taking Hong Kong as their permanent residence by ceasing to have ordinarily resided in Hong Kong for a continuous period of time prescribed by the Hong Kong Special Administrative Region, their permanent identity cards may, except with special reasons, be cancelled under the law, and they shall no longer enjoy the right of abode. However, they may enter Hong Kong freely to live and work without restrictions in accordance with the law and become permanent residents of the Hong Kong Special Administrative Region subject to the fulfilment of the relevant requirements as stipulated in BL 24(2).

VI. For persons under 21 years of age born in Hong Kong of persons not of Chinese nationality under Item 5 of Article 24(2) of the Basic Law, at the time of or after their birth, either or both of their parents must be persons who have acquired the status of permanent residents in Hong Kong under Item 4 of Article 24(2) of the Basic Law. The above-mentioned children of persons with permanent resident status in Hong Kong may also enjoy the status after reaching the age of 21 when they meet other relevant requirements as stipulated

in Article 24(2) of the Basic Law.

VII. Arrangements are made for holders of Hong Kong permanent identity cards who have enjoyed the right of abode in Hong Kong before the establishment of the Hong Kong Special Administrative Region:

1. As for Chinese citizens born in Hong Kong or who have ordinarily resided in Hong Kong for a continuous period of not less than seven years, the Hong Kong permanent identity cards they hold shall continue to be valid beyond 1 July 1997 and they shall continue to enjoy the right of abode in the Region.

2. As for persons who were permanent residents of Hong Kong before the establishment of the Hong Kong Special Administrative Region and who, after emigrating overseas, returned to settle in Hong Kong as foreign citizens before 30 June 1997, the Hong Kong permanent identity cards they hold shall continue to be valid beyond 1 July 1997 and they shall continue to enjoy the right of abode in the Region.

3. As for persons who had the status of a permanent resident in Hong Kong before the establishment of the Hong Kong Special Administrative Region, but failed to continuously reside in Hong Kong for the prescribed period, and have returned to settle in Hong Kong as foreign citizens after 1 July 1997, they will have their permanent identity cards canceled in accordance with the law and no longer enjoy the right of abode in Hong Kong, provided that they are allowed to enter Hong Kong in accordance with the law and reside and work in Hong Kong without restrictions and may become permanent residents of the Region once they fulfill the relevant requirements set out in Article 24 of the Basic Law.

## Appendix IX

### **\* 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**

(Adopted at the 24th Meeting of the Standing Committee of the Eighth National People's Congress on 23 February 1997)

It is provided in Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law for short) that "Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress 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." Article 8 of the Basic Law stipulates: "The Laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law, shall be maintained, except for any that contravene this Law or are subject to any amendment by the legislature of the Hong Kong Special Administrative Region." In accordance with the provisions mentioned above, the Standing Committee of the Eighth National People's Congress at its 24th Meeting deliberated the proposal of the Preparatory Committee for the Hong Kong Special Administrative Region on handling the laws previously in force in Hong Kong and adopted the decision as follows:

1. The laws previously in force in Hong Kong, including the

common law, rules of equity, ordinances, subordinate legislation and customary law, shall be adopted as laws of the Hong Kong Special Administrative Region, except for any that contravene the Basic Law.

2. The ordinances and subordinate legislation previously in force in Hong Kong, listed in Appendix I of this Decision, which are in contravention of the Basic Law shall not be adopted as laws of the Hong Kong Special Administrative Region.

3. Since some provisions of the ordinances and subordinate legislation, which are previously in force in Hong Kong and listed in Appendix II of this Decision, contravene the Basic Law, they shall not be adopted as provisions of laws of the Hong Kong Special Administrative Region.

4. The laws previously in force in Hong Kong, which have been adopted as laws of the Hong Kong Special Administrative Region, shall be applied as of July 1, 1997 with such modifications, adaptations restrictions and exceptions as may be necessary for making them conform with the status of Hong Kong after the People's Republic of China resumes the exercise of sovereignty over it and with the relevant provisions of the Basic Law, for example, the New Territories Land (Exemption) Ordinance shall be applied in accordance with the principle mentioned above.

In addition to the above-mentioned principle, the following provisions shall be conformed with when applying the provisions of the ordinances and subordinate legislation previously in force:

(1) Where the provisions relating to the diplomatic affairs of the Hong Kong Special Administrative Region are found inconsistent with the national laws coming into effect in the Hong Kong Special Administrative Region, the national laws shall prevail, and the provisions shall be made in keeping with the international rights enjoyed by the Central People's Government and the international obligations it undertakes.

(2) No provisions which accord privileges to the United Kingdom or any other countries or regions of the British Commonwealth shall



be maintained with the exception of the reciprocity provisions in connection with Hong Kong and the United Kingdom or any other countries or regions of the British Commonwealth.

(3) The provisions regarding the rights, immunities and obligations of the British troops stationed in Hong Kong shall be maintained provided that they do not contravene the provisions of the Basic Law and the Law of the People's Republic of China on Garrisoning the Hong Kong Special Administrative Region and shall be applicable to the troops stationed in Hong Kong by the Central People's Government of the People's Republic of China.

(4) The provision that the English language is superior to the Chinese language in terms of legal effect shall be construed as that both the Chinese and English language are the official languages.

(5) If the provisions in the British laws that are quoted in Hong Kong ordinances and subordinate legislation do not jeopardize the sovereignty of the People's Republic of China or contravene the provisions of the Basic Law, they may, as a transitional arrangement, continue to be applied *mutatis mutandis* before they are amended by the Hong Kong Special Administrative Region.

5. On condition that the provisions in Article 4 are conformed with, the substitution rules prescribed in Appendix III of this Decision shall be followed when interpreting or applying the words and expressions in the laws previously in force in Hong Kong which are adopted as laws of the Hong Kong Special Administrative Region, except that they mean otherwise.

6. If the laws previously in force in Hong Kong which are adopted as laws of the Hong Kong Special Administrative Region are later discovered to be in contravention of the Basic Law, they may be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law.

## **Appendix I**

The following ordinances and subordinate legislation in the laws

previously in force in Hong Kong are in contravention of the Basic Law and therefore shall not be adopted as laws of the Hong Kong Special Administrative Region:

1. Trustees (Hong Kong Government Securities) Ordinance (Cap. 77);
2. Application of English Law Ordinance (Cap. 88);
3. Foreign Marriage Ordinance (Cap. 180);
4. Chinese Extradition Ordinance (Cap. 235);
5. Colony Armorial Bearings (Protection) Ordinance (Cap. 315);
6. Secretary of State for Defence (Succession to Property) Ordinance (Cap. 193);
7. Royal Hong Kong Regiment Ordinance (Cap. 199);
8. Compulsory Service Ordinance (Cap. 246);
9. Army and Royal Air Force Legal Services Ordinance (Cap. 286);
10. British Nationality (Miscellaneous Provisions) Ordinance (Cap. 186);
11. British Nationality Act 1981 (Consequential Amendments) Ordinance (Cap. 373);
12. Electoral Provisions Ordinance (Cap. 367);
13. Legislative Council (Electoral Provisions) Ordinance (Cap. 381);
14. Boundary and Election Commission Ordinance (Cap. 432).

## **Appendix II**

Some provisions of the following ordinances and subordinate legislation in the laws previously in force in Hong Kong are in contravention of the Basic Law and therefore shall not be adopted as provisions of laws of the Hong Kong Special Administrative Region:

1. The provisions regarding the definition of “Hong Kong permanent resident” in s2 and the provisions regarding “the Hong Kong permanent resident” in Schedule 1 of the Immigration Ordinance (Cap. 115);

2. Any provisions made for implementing the British Nationality Act applicable in Hong Kong;

3. Provisions for election in the Urban Council Ordinance (Cap. 101);

4. Provisions for election in the Regional Council Ordinance (Cap. 385);

5. Provisions for election in the District Boards Ordinance (Cap. 366);

6. Subsidiary legislation A: “Urban Council, Regional Council and District Boards Election Expenses Order” and subsidiary legislation C: “Resolution of the Legislative Council” in the Corrupt and Illegal Practices Ordinance (Cap. 288);

7. The provisions in s2(3) regarding the purpose of this ordinance for the purpose of its interpretation and application, in s3 regarding the effect on pre-existing legislation and in s4 regarding interpretation of subsequent legislation in the Hong Kong Bill of Rights Ordinance (Cap. 383);

8. The provisions in s3(2) that the ordinance acquires an overriding position in the Personal Data (Privacy) Ordinance (Cap. 486);

9. Major amendments to the Societies Ordinance (Cap. 151) made since July 17, 1992; and

10. Major amendments to the Public Order Ordinance (Cap. 245) made since July 27, 1995.

### **Appendix III**

The words and expressions in the laws previously in force in

Hong Kong which are adopted as laws of the Hong Kong Special Administrative Region, when construed or applied, shall be subject to the following substitution rules:

1. Any reference to “Her Majesty”, “Crown”, “The British Government, U.K.” and “Secretary of State” and other similar names or expressions, if the provision relates to the ownership of the land in Hong Kong or involves the affairs within the responsibilities of the Central Authorities and relationship between the Central Authorities and the Region as prescribed by the Basic Law, shall be construed correspondingly as a reference to the Central Authorities or other competent organs, and under other circumstances, as the Government of the Hong Kong Special Administrative Region;

2. Any reference to “Her Majesty in Council” or “Privy Council”, if the provision relates to the matter of right of appeal, shall be construed as a reference to the Court of Final Appeal of the Hong Kong Special Administrative Region, and under other circumstances, shall be dealt with in accordance with Item 1;

3. Any reference to the government organs or semi-official organs with the word “Royal” in their names shall be construed as reference to the corresponding organs of the Hong Kong Special Administrative Region with the word “Royal” being deleted;

4. Any reference to “the colony” shall be construed as a reference to the Hong Kong Special Administrative Region; any description of the territory of Hong Kong shall be applicable after being correspondingly interpreted in accordance with the administrative division map of the Hong Kong Special Administrative Region promulgated by the State Council;

5. Any reference to “the Supreme Court” and “High Court” shall be correspondingly construed as a reference to the High Court and the Court of First Instance of the High Court;

6. Any reference to “the Governor”, “Governor in Council”, “Chief Secretary”, “Attorney General”, “Chief Justice”, “Secretary for Home Affairs”, “Secretary for Constitutional Affairs”, “Commissioner

of Customs and Excise”, and “justices” shall be correspondingly construed as a reference to the Chief Executive, Chief Executive in Council, Secretary of the Department of Administration, Secretary of the Department of Justice, Chief Justice of the Court of Final Appeal or Chief Judge of High Court, Secretary for Home Affairs, Secretary for Constitutional Affairs, Commissioner of Customs and Excise, and judges of the High Court of the Hong Kong Special Administrative Region;

7. Any reference to the Legislative Council, Judiciary or the Executive Authorities and their staff in the Chinese text of the laws previously in force in Hong Kong shall be construed or applied correspondingly in accordance with the relevant provisions of the Basic Law;

8. Any reference to “the People’s Republic of China” and “China” or other similar names or expressions shall be construed as a reference to the People’s Republic of China including Taiwan, Hong Kong and Macao; any reference to the Mainland, Taiwan, Hong Kong and Macao, separately or together, shall be correspondingly construed as a reference to a component part of the People’s Republic of China;

9. Any reference to “ foreign country or foreign State” and other similar words or expressions shall be construed as a reference to any country or region other than the People’s Republic of China or, in accordance with the contents of the law or the provision, shall be construed as a reference to “any place other than the Hong Kong Special Administrative Region”; and any reference to “foreign national” or other similar words or expressions shall be construed as a reference to any person other than the citizen of the People’s Republic of China; and

10. Any reference to “Nothing in this ordinance shall affect or be deemed to affect the rights of Her Majesty the Queen, Her Heirs or Successors” shall be construed as a reference to “Nothing in this ordinance shall affect or be deemed to affect the rights enjoyed by the Central Government or the Government of the Hong Kong Special

Administrative Region in accordance with the provisions of the Basic Law and other enactments.”

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**Note:**

\* This English translation is reproduced from “The Laws of the People’s Republic of China 1997” compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China. It is for reference only and has no legislative effect.

## Appendix X

### **Diplomatic Note from Qin Huasun, Permanent Representative of the People's Republic of China to the United Nations, to the Secretary-General of the United Nations on the Application of Multilateral Treaties to the Hong Kong Special Administrative Region (Translation)**

New York, 20 June 1997

H.E. Mr. Kofi Annan  
Secretary-General of the United Nations  
New York

Your Excellency,

In accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and North Ireland and the Government of the People's Republic of China on the Question of Hong Kong signed on 19 December 1984 (hereinafter referred to as the Joint Declaration), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, Hong Kong will, with effect from that date become a Special Administrative Region of the People's Republic of China.

It is provided in Section I of Annex I to the Joint Declaration, "Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong", and in Articles 12, 13 and 14 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic

Law), which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China, that the Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government of the People's Republic of China. Furthermore, it is provided both in Section XI of Annex I to the Joint Declaration and Article 153 of the Basic Law that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.

In this connection, on behalf of the Government of the People's Republic of China, I would like to inform Your Excellency as follows:

I. The treaties listed in Annex I to this Note, to which the People's Republic of China is a party, will be applied to the Hong Kong Special Administrative Region with effect from 1 July 1997 as they:

(i) are applied to Hong Kong before 1 July 1997; or

(ii) fall within the category of foreign affairs or defence or, owing to their nature and provisions, must apply to the entire territory of a State; or

(iii) are not applied to Hong Kong before 1 July 1997 but with respect to which it has been decided to apply them to the Hong Kong Special Administrative Region with effect from that date (denoted by an asterisk in Annex I).

II. The treaties listed in Annex II to this Note, to which the People's Republic of China is not yet a party and which apply to Hong Kong before 1 July 1997, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997.

The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997.

III. The Government of the People's Republic of China has



already carried out separately the formalities required for the application of the treaties listed in the aforesaid Annexes, including all the related amendments, protocols, reservations and declarations, to the Hong Kong Special Administrative Region with effect from 1 July 1997.

IV. With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State.

The Government of the People's Republic of China have the honour to request Your Excellency kindly to place this Note and the Annexes to it formally on record and bring it to the attention of the other Members of the United Nations and the Specialized Agencies of the United Nations.

Please accept, Your Excellency, the assurances of my highest consideration.

(signed) Qin Huasun

Permanent Representative of the People's  
Republic of China to the United Nations  
Ambassador Extraordinary and Plenipotentiary

20 June 1997

# **List of multilateral treaties applied to the Hong Kong Special Administrative Region with effect from 1 July 1997**

Annex I:

## **Part I**

### **Treaties to which China is a party before 1 July 1997**

#### **I. Political, Diplomatic and Defence**

1. Charter of the United Nations, 26 June 1945
2. Statute of the International Court of Justice, 26 June 1945
3. Convention on the Privileges and Immunities of the United Nations, 13 February 1946
4. Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, 21 November 1947
5. Vienna Convention on Diplomatic Relations, 18 April 1961
6. Vienna Convention on Consular Relations, 24 April 1963
7. Protocol of Entry into Force of the Amendment to Article 61 of the Charter of the United Nations, 20 December 1971
8. Convention for the Pacific Settlement of International Disputes, 29 July 1899
9. Convention for the Pacific Settlement of International Disputes, 18 October 1907
10. Protocol on INTELSAT Privileges, Exemptions and Immunities, 19 May 1978
11. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925
12. Additional Protocol II to the Treaty for the Prohibition of

Nuclear Weapons in Latin America and the Caribbean, 14 February 1967

13. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 April 1981, and its Protocol

14. Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

16. Additional Protocols II and III to the South Pacific Nuclear Free Zone Treaty, 8 August 1986

17. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and Ocean Floor and in the Subsoil Thereof, 11 February 1972

18. United Nations Convention on the Law of the Sea, 10 December 1982

19. Antarctic Treaty, 1 December 1959

20. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armies in the Field, 12 August 1949

21. Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Ship-wrecked Members of Armed Forces at Sea, 12 August 1949

22. Geneva Convention on the Treatment of Prisoners of War, 12 August 1949

23. Geneva Convention on the Protection of Civilian Persons in Time of War, 12 August 1949

24. Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968

25. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on their Destruction, 10 April 1972

26. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993

## **II. Drugs**

27. Single Convention on Narcotic Drugs, 30 March 1961, as amended by the Protocol Amending the Convention done on 25 March 1972

28. Convention on Psychotropic Substances, 21 February 1971

29. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988

## **III. International Crime**

30. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948

31. Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963

32. Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970

33. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971

34. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agencies, 14 December 1973

35. International Convention Against the Taking of Hostages, 17 December 1979

#### **IV. Private International Law**

36. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 15 November 1965

37. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958

#### **V. Customs**

38. International Convention for Safe Containers, 2 December 1972

\*39. Customs Convention on Containers, 2 December 1979

40. Customs Convention on the "ATA Carnet" for the Temporary Admission of Goods, 6 December 1961

41. Convention on Temporary Admission, 26 June 1990

42. Customs Convention Concerning Facilities for the Importation of Goods for Display or Use at Exhibitions, Fairs, Meetings or Similar Events, 8 June 1961

#### **VI. Marine Pollution**

43. International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969 and its Protocol, 19 November 1976

44. International Convention Relating to Intervention on the High Seas in case of Oil Pollution Casualties, 29 November 1969 and its Protocol, 2 November 1973

45. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, 29 December 1972, and 1978 Amendments to Annexes I and II Concerning Incineration at Sea, 1980 Amendments to Annexes I and II Concerning Lists of Substances, and 1989 Amendment to Annex III

46. International Convention for the Prevention of Pollution from

Ships, 2 November 1972, as modified by the Protocol done on 17 February 1978, and Annexes III and V to the Convention

## **VII. Science and Technology**

47. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 27 January 1967

48. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 22 April 1968

49. Convention on International Liability for Damage Caused by Space Objects, 29 March 1972

50. Convention on the Registration of Objects Launched into Outer Space, 12 November 1974

## **VIII. Civil Aviation**

51. The Convention on International Civil Aviation, 7 December 1944, as amended by Protocols done on 27 May 1947, 14 June 1954, 21 June 1961, 15 September 1962, 24 September 1968, 12 March 1971, 7 July 1971, 16 October 1974 and 30 September 1977

52. Convention for the Unification of Certain Rules relating to International Carriage by Air, done on 12 October 1929, as amended by the Hague Protocol done on 28 September 1955

## **IX. Merchant Shipping**

53. International Load Line Convention, 5 April 1966, as amended by the 1971, 1975 and 1979 Amendments

54. International Convention on Tonnage Measurement of Ships, 23 June 1969

55. Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972, and Amendment done on 19

November 1981

56. International Convention for Safety of Life at Sea, 1 November 1974, and 1981, 1983 and 1988 Amendments, its Protocol done on 1 June 1978 and the 1981 Amendments to the Protocol

57. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 7 July 1978 and 1995 Amendments

58. International Convention on Maritime Search and Rescue, 27 April 1979

59. Convention on a Code of Conduct for Liner Conferences, 6 April 1974

60. International Convention on Salvage, 28 April 1989

61. International Convention for the Unification of Certain Rules of Law respecting Collisions between Vessels, 23 September 1910

62. Convention relating to the Carriage of Passengers and their Luggage by Sea, done at Athens on 13 December 1974, and its Protocol done on 19 November 1976

63. Convention on Facilitation of International Maritime Traffic, 9 April 1965 as amended by the 1973, 1977 and 1986 Amendments

## **X. Investment**

64. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965

65. Convention Establishing the Multilateral Investment Guarantee Agency, 11 October 1985

## **XI. Health**

66. The International Health Regulations, 25 July 1969

## **XII. Intellectual Property**

67. Convention for the Protection of Industrial Property, done at Paris on 20 March 1883, as revised in 1967

\*68. Convention for the Protection of Literary and Artistic Works, done at Berne on 9 September 1886 as revised in 1979

69. Universal Copyright Convention, 6 September 1952, as amended in 1971

70. Convention for the Protection of Products of Phonograms Against Unauthorized Duplication of their Phonograms, 29 October 1971

71. Patent Co-operation Treaty, 19 June 1970, as amended on 2 October 1979 and modified on 3 February 1984

## **XIII. Conservation**

72. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973

73. Convention for the Protection of the World Culture and Natural Heritage, 23 November 1972

74. International Convention for the Regulation of Whaling, 2 December 1946, and its 1956 Protocol

75. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989

76. Plant Protection Agreement for the South-East Asia and Pacific Region, 27 February 1956, and the Amendment to the Agreement done on 2 November 1957

77. Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990

78. Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 2 February 1971



#### **XIV. Postal**

79. Universal Postal Convention with Final Protocol and Detailed Regulations of UPU, 14 September 1994

80. General Regulations of the Universal Postal Union, 14 September 1994

81. Postal Parcels Agreement with Final Protocol and Detailed Regulations, 14 September 1994

82. Giro Agreement, 14 September 1994

83. Cash-on-Delivery Agreement, 14 September 1994

#### **XV. International Labour Conventions**

84. Minimum Age (Sea) Convention, 1920 (No.7)

85. Right of Association (Agriculture) Convention, 1921 (No.11)

86. Weekly Rest (Industry) Convention, 1921 (No.14)

87. Minimum Age (Trimmers and Stokers) Convention, 1921 (No.15)

88. Medical Examination of Young Persons (Sea) Convention, 1921 (No.16)

89. Equality of Treatment (Accident Compensation) Convention, 1925 (No.19)

90. Seamen's Articles of Agreement Convention, 1926 (No.22)

91. Repatriation of Seamen Convention, 1926 (No.23)

92. Protection against Accidents (Dockers) Convention (Revised), 1932 (No.32)

93. Underground Work (Women) Convention, 1935 (No.45)

94. Minimum Age (Industry) Convention (Revised), 1937 (No.59)

95. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

**XVI. Human Rights**

96. International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965

97. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979

98. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984

99. Convention on the Rights of the Child, 20 November 1989

**XVII. Trade**

100. International Convention relating to International Exhibitions, 22 November 1928, and its Protocol done on 30 November 1972, and Amendments done 24 June 1982

**XVIII. Conventions Establishing International Organizations**

101. Constitution of the Universal Postal Union, Vienna 10 July 1964 as amended by the 1969 Tokyo, 1974 Lausanne, 1984 Hamburg, 1989 Washington and 1994 Seoul Additional Protocols

102. Convention Establishing a Customs Co-operation Council, 15 December 1950

103. Statute of the International Atomic Energy Agency, 26 October 1956

104. Articles of Agreement of the International Monetary Fund, 22 July 1944

105. Articles of Agreement of the International Bank for Reconstruction and Development, 22 July 1944

106. Articles of Agreement of the International Development Association, 24 September 1960

107. Articles of Agreement of the International Finance Corporation, 25 May 1955

108. Convention on the International Hydrographic Organization, 3 May 1967

109. Constitution of the International Labour Organization, 11 April 1919

110. Convention on the International Maritime Organization, 6 March 1948

111. Convention on the International Mobile Satellite Organization, 3 September 1976

112. Agreement Relating to the International Telecommunications Satellite Organization, 20 August 1971

113. Constitution of the World Meteorological Organization, 11 October 1947

114. Constitution for the World Health Organization, 22 July 1946

115. Convention Establishing the World Intellectual Property Organization, 14 July 1967, as amended in 1979

116. The Constitution and General Regulations of the International Criminal Police Organization, 13 June 1956

117. Constitution of the Food and Agriculture Organization of the United Nations, 16 October 1945

118. Agreement on the Network of Aquaculture Center in Asia and the Pacific, 8 January 1988

119. Agreement on the Establishment of the Asia Pacific Fishery Commission, 24 November 1994

120. Agreement Establishing the Asian Development Bank, 4 December 1965

121. Constitution of the Asian-Pacific Postal Union and Final Protocol of the Union, 1 July 1987

122. Constitution of the Asia-Pacific Telecommunity, 27 March 1976

123. Charter of the Asian and Pacific Development Centers, 1 April 1982

124. Statute and Rules of Procedure of the Typhoon Committee, 2 March 1968

125. Statute of the Statistical Institute for Asia and the Pacific, 14 April 1995

126. Arrangement Establishing the International Textiles and Clothing Bureau, 21 May 1984

127. Constitution and Convention of the International Telecommunications Union, 22 December 1992

Annex II:

## **Part II**

### **Treaties to which China is not a party before 1 July 1997**

#### **I. International Crime**

1. Agreement for the Suppression of the Circulation of Obscene Publications, 4 May 1910, and its Protocol done on 4 May 1949

2. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 12 September 1923 and the Protocol amending the Convention, done on 12 November 1947

3. Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, done at Montreal, 24 February 1988

#### **II. Private International Law**

4. Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 5 October 1961

5. Convention on the Conflicts of Laws relating to the Form of

Testamentary Dispositions, 5 October 1961

6. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970

7. Convention on the Recognition of Divorces and Legal Separations, 1 June 1970

8. Convention on the Law Applicable to Trusts and on their Recognition, 1 July 1985

9. Convention on the Civil Aspects of International Child Abduction, 25 October 1980

### **III. Customs**

10. International Convention relating to the Simplification of Customs Formalities and Protocol of Signature, 3 November 1923

11. Agreement on the Importation of Educational, Scientific and Cultural Materials, 22 November 1950

12. International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 7 November 1952

13. Convention Concerning Customs Facilities for Touring and Additional Protocol relating to the Importation of Touring Publicity Documents and Material, 4 June 1954

14. Customs Convention on the Temporary Importation of Private Road Vehicles, 4 June 1954

15. Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats, 18 May 1956

16. Customs Convention on the Temporary Importation of Commercial Road Vehicles, 18 May 1956

17. Customs Convention on the Temporary Importation of Professional Equipment, 8 June 1961

18. European Convention on Customs Treatment of Pallets Used in International Transport, 9 December 1960

#### **IV. Marine Pollution**

19. International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, and its 1976 Protocol

#### **V. Science and Technology**

20. Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, with its Additional Protocol done on 28 January 1964, as amended by the 1982 Protocol

#### **VI. Civil Aviation**

21. Convention supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, 18 September 1961

22. International Air Service Transit Agreement, 7 December 1944

#### **VII. Merchant Shipping**

23. International Convention for the Unification of Certain Rules of Law in relation to Assistance and Salvage at Sea, 23 September 1910

24. Convention and Statute on Freedom of Transit, 20 April 1921

25. Convention and Statute on the Regime of Navigable Waterways of International Concern, 20 April 1921

26. Declaration Recognizing the Right to a Flag of States Having No Sea-coast, 20 April 1921

27. Convention and Statute on the International Regime of Maritime Ports, 9 December 1923

28. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924 and its 1968 and 1979 Protocols

29. International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, 10 May 1952

30. International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation, 10 May 1952

31. International Convention relating to the Arrest of Sea-going Ships, 10 May 1952

32. Special Trade Passenger Ships Agreement, 6 October 1971 and its 1973 Protocol on Space Requirements for Special Trade Passenger Ships

33. Convention on Limitation of Liability for Maritime Claims, 19 November 1976

### **VIII. Trade**

34. The Protocols done on 10 May 1948, 16 November 1966 of the International Convention relating to International Exhibitions, 22 November 1928

### **IX. Health**

35. Agreement respecting Facilities to be given to Merchant Seamen for the Treatment of Venereal Diseases, 1 December 1924

### **X. International Property**

36. The Protocols of the Universal Copyright Convention, 6 September 1952 as amended in 1971

### **XI. Conservation**

37. Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979

38. The Copenhagen Amendment to the Montreal Protocol on

Substances that Deplete the Ozone Layer, 25 November 1992

## **XII. Transport**

39. Convention on Road Traffic, 19 September 1949

## **XIII. Telecommunications**

40. International Agreement on the Use of INMARSAT Ship Earth Stations within the Territorial Sea and Ports, 16 October 1985

41. Convention for the Protection of Submarine Cables, 14 March 1884, amended by the Declaration on the Protection of Submarine Cables done on 2 December 1886, and the Protocol on the Protection of Submarine Cables done on 7 July 1887

## **XIV. Human Rights**

42. International Agreement for the Suppression of the White Slave Traffic, 18 May 1904

43. International Convention for the Suppression of the White Slave Traffic, 4 May 1910 and the Protocol amending the Convention, 1949

44. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956

45. Convention on the Political Rights of Women, 31 March 1953

46. Slavery Convention, 25 September 1926, and its Protocol amending the Slavery Convention, 7 December 1953

47. International Convention for the Suppression of the Traffic in Women and Children, 30 September 1921

48. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Open for Signature on 10 December 1962



49. Convention relating to the Status of Stateless Persons, 28 September 1954

### **XV. International Labour Conventions**

50. Unemployment Convention, 1919 (No.2)

51. Maternity Protection Convention, 1919 (No.3)

52. Minimum Age (Industry) Convention, 1919 (No.5)

53. Unemployment Indemnity (Shipwreck) Convention, 1920 (No.8)

54. Minimum Age (Agriculture) Convention, 1921 (No.10)

55. Workmen's Compensation (Agriculture) Convention, 1921 (No.12)

56. Workmen's Compensation (Accidents) Convention, 1925 (No.17)

57. Forced Labour Convention, 1930 (No.29)

58. Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No.42)

59. Recruiting of Indigenous Workers Convention, 1936 (No.50)

60. Minimum Age (Sea) Convention (Revised), 1936 (No.58)

61. Contracts of Employment (Indigenous Workers) Convention, 1939 (No.64)

62. Penal Sanctions (Indigenous Workers) Convention, 1939 (No.65)

63. Certificate of Able Seamen Convention, 1946 (No.74)

64. Labour Inspection Convention, 1947 (No.81)

65. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87)

66. Night Work of Young Persons (Industry) Convention (Revised), 1948 (No.90)

67. Accommodation of Crews Convention, 1949 (No.92)
68. Migration for Employment Convention (Revised), 1949 (No.97)
69. Right to Organize and Collective Bargaining Convention, 1949 (No.98)
70. Holidays with Pay (Agriculture) Convention, 1952 (No.101)
71. Abolition of Forced Labour Convention, 1957 (No.105)
72. Seafarers' Identity Documents Convention, 1958 (No.108)
73. Radiation Protection Convention, 1960 (No.115)
74. Employment Policy Convention, 1964 (No. 122)
75. Medical Examination of Young Persons (Underground Work) Convention, 1965 (No.124)
76. Accommodation of Crews(Supplementary Provisions) Convention, 1970 (No.133)
77. Rural Workers Organizations Convention, 1975 (No.141)
78. Human Resources Development Convention, 1975 (No.142)
79. Merchant Shipping (Minimum Standards) Convention, 1976 (No.147)
80. Working Environment (Air Pollution, Noise and Vibration) Convention. 1977 (No.148)
81. Labour Administration Convention, 1978 (No.150)
82. Labour Relations (Public Service) Convention, 1978 (No.151)
83. Labour Statistics Convention, 1985 (No.160)

## **XVI. Conventions Establishing International Organizations**

84. Final Acts of the Additional Plenipotentiary Conference of the International Telecommunication Union, done at Geneva, 29 December 1992

85. Final Acts of the Plenipotentiary Conference of the International Telecommunication Union, done at Kyoto, 14 October 1994

86. Agreement for the Establishment of a Regional Animal Production and Health Commission for Asia, the Far East and the South-west Pacific, entered into force on 29 December 1975

87. Agreement Establishing the World Trade Organization, 15 April 1994

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*Gazette of the State Council of the People's Republic of China,*

*16 January 1998, Issue No. 39(1997) at page 1688*

## Appendix XI

### **\* Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security**

(Adopted at the Third Session of the Thirteenth National People’s Congress on 28 May 2020)

The Third Session of the Thirteenth National People’s Congress (NPC) deliberated the motion regarding the request for examination of the “Draft Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security” submitted by the Standing Committee of the NPC. The session considered that the risks for national security in the Hong Kong Special Administrative Region (HKSAR) have become notable in recent years. Various unlawful activities such as advocacy for “Hong Kong independence” as well as acts of secession, violence and terrorism, etc have seriously jeopardized national sovereignty, unity and territorial integrity. Certain foreign or external forces have flagrantly interfered in Hong Kong’s affairs and utilized Hong Kong to carry out activities endangering national security. To safeguard national sovereignty, security and development interests, uphold and improve the “one country, two systems” regime, safeguard the long-term prosperity and stability of Hong Kong, and safeguard the legitimate rights and interests of Hong Kong residents, the NPC has made the following decision pursuant to Articles 31, 62(2), 62(14) and 62(16) of the Constitution of the People’s Republic of China (PRC) and the relevant provisions of the Basic Law of the HKSAR of the PRC:

1. The country unswervingly, fully and faithfully implements the principles of “one country, two systems”, “Hong Kong people administering Hong Kong” and a high degree of autonomy; upholds that Hong Kong be administered in strict accordance with the law; upholds the Constitution and the constitutional order in the HKSAR established by the Basic Law of the HKSAR; takes necessary measures to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security, as well as to prevent, stop and punish in accordance with the law acts and activities endangering national security.

2. The country resolutely opposes interference in the HKSAR’s affairs by any foreign or external forces in any form, and will take necessary countermeasures to prevent, stop and punish in accordance with the law activities of secession, subversion, infiltration and sabotage carried out by foreign or external forces in Hong Kong.

3. It is the HKSAR’s constitutional responsibilities to safeguard national sovereignty, unity and territorial integrity. The HKSAR must complete the national security legislation stipulated in the Basic Law of the HKSAR at an earlier date. The HKSAR’s administrative, legislative and judicial organs must, in accordance with relevant laws and regulations, effectively prevent, stop and punish acts and activities endangering national security.

4. The HKSAR must establish and improve the institutions and enforcement mechanisms for safeguarding national security, strengthen the enforcement forces for safeguarding national security, and step up enforcement to safeguard national security. When needed, relevant national security organs of the Central People’s Government (CPG) will set up agencies in the HKSAR to fulfil relevant duties to safeguard national security in accordance with the law.

5. The Chief Executive of the HKSAR must regularly report to the CPG on the HKSAR’s performance of the duty to safeguard national security, carry out national security education, and forbid acts and activities of endangering national security in accordance with the law, etc.

6. The NPC Standing Committee is entrusted to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, in order to effectively prevent, stop and punish acts and activities to split the country, subvert state power, organize and carry out terrorist activities and other behaviours that seriously endanger national security, as well as activities of foreign or external forces interfering in the affairs of the HKSAR. The NPC Standing Committee decides on including relevant laws into Annex III of the Basic Law of the HKSAR of the PRC to be promulgated and implemented by the HKSAR locally.

7. The decision shall go into effect as of the date of promulgation.

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Note:

\* This is an English translation of the original instrument in Chinese and is published for information.

## Appendix XII

### **\* Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region**

(Adopted at the Fourth Session of the Thirteenth National People's Congress on 11 March 2021)

The Fourth Session of the Thirteenth National People's Congress (NPC) deliberated the motion regarding the request for examination of the "Draft Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region" submitted by the Standing Committee of the NPC. The session considered that the return of Hong Kong to the motherland put the region once again under the overall governance system of the country, and the Constitution of the People's Republic of China (PRC) and the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the PRC jointly form the constitutional basis of the HKSAR. The electoral system of the HKSAR, which includes the methods for the selection of the Chief Executive and for the formation of the Legislative Council (LegCo), is an important part of the political structure of the HKSAR. It should conform to the policy of "one country, two systems", meet the realities in the HKSAR and serve to ensure that Hong Kong is administered by people who love the country and Hong Kong; be conducive to safeguarding national sovereignty, security, and development interests of the country and maintain the long-term prosperity and stability of Hong Kong. To improve the electoral system of the HKSAR and develop a democratic system suited to the HKSAR's realities, the NPC has made the following decision pursuant to Articles 31 and 62(2), (14) and (16) of the Constitution of the PRC and the relevant provisions of the Basic Law of the HKSAR of the PRC and the Law of the PRC on Safeguarding National Security in the HKSAR:

1. Improving the electoral system of the HKSAR must fully and faithfully implement the policy of “one country, two systems” under which the people of Hong Kong administer Hong Kong with a high degree of autonomy, uphold the constitutional order in the HKSAR as established by the Constitution of the PRC and the Basic Law of the HKSAR of the PRC, ensure the administration of Hong Kong by Hong Kong people with patriots as the main body, effectively improve the governance efficacy of the HKSAR, and safeguard the right to vote and the right to stand for election of permanent residents of the HKSAR.

2. The HKSAR shall establish an Election Committee which is broadly representative, suited to the HKSAR’s realities, and representative of the overall interests of its society. The Election Committee shall be responsible for electing the Chief Executive designate and part of the members of the LegCo. The Election Committee shall also be responsible for nominating candidates for the Chief Executive and LegCo members, as well as for other matters.

The Election Committee shall be composed of 1,500 members from the following five sectors: industrial, commercial and financial sectors; the professions; grassroots, labour, religious and other sectors; LegCo members and representatives of district organizations; Hong Kong deputies to the NPC, Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference and representatives of Hong Kong members of related national organizations.

3. The Chief Executive shall be elected by the Election Committee and appointed by the Central People’s Government.

Candidates for the office of the Chief Executive shall be nominated jointly by not less than 188 members of the Election Committee, among whom the number of members of each sector should be not less than 15. The Election Committee shall elect the Chief Executive designate by secret ballot on a one-person-one-vote basis. The election of the Chief Executive designate shall require a simple majority vote of all the members of the Election Committee.



4. The LegCo of the HKSAR shall be composed of 90 members in each term. Members of the LegCo shall include members returned by the Election Committee, those returned by functional constituencies, and those by geographical constituencies through direct elections.

5. A candidate qualification review committee of the HKSAR shall be established. The committee shall be responsible for reviewing and confirming the qualifications of candidates for the Election Committee members, the Chief Executive, and the LegCo members. The HKSAR shall improve the system and mechanisms related to qualification review, to ensure that the qualifications of candidates are in conformity with the Basic Law, the Law on Safeguarding National Security in the HKSAR, the NPC Standing Committee's interpretation of Article 104 of the Basic Law, the NPC Standing Committee's decision on the qualification of HKSAR LegCo members, and provisions of relevant local laws of the HKSAR.

6. The NPC Standing Committee is authorized to, in accordance with the decision on improving the electoral system of the HKSAR, amend Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region and Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, to the Basic Law.

7. In accordance with this decision and the Basic Law's Annex I and Annex II amended by the NPC Standing Committee, the HKSAR shall amend relevant local laws, and organize and regulate election activities accordingly.

8. The Chief Executive of the HKSAR shall submit in a timely manner reports to the Central People's Government on relevant important situations including the institutional arrangements for elections of the HKSAR and the organization of the elections.

9. The decision shall go into effect as of the date of promulgation.

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Note:

\* This is an English translation of the original instrument in Chinese and is published for information.

## Appendix XIII

### Annex I Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region

(Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, amended, as approved at the Sixteenth Meeting of the Standing Committee of the Eleventh National People's Congress on 28 August 2010, and amended at the Twenty-Seventh Meeting of the Standing Committee of the Thirteenth National People's Congress on 30 March 2021)

1. The Chief Executive shall be elected in accordance with this Law by an Election Committee which is broadly representative, suited to the actual situation of the Hong Kong Special Administrative Region (HKSAR), and represents the overall interests of society, and shall be appointed by the Central People's Government.

2. The Election Committee shall be composed of 1,500 members from the following sectors:

First Sector: Industrial, commercial and financial sectors	300
Second Sector: The professions	300
Third Sector: Grassroots, labour, religious and other sectors	300
Fourth Sector: Members of the Legislative Council, representatives of district organizations and other organizations	300
Fifth Sector: HKSAR deputies to the National People's Congress (NPC), HKSAR members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC), and representatives of Hong Kong members of relevant national organizations	300

Members of the Election Committee must be permanent residents of the HKSAR.

The term of office of the Election Committee shall be five years.

3. The delimitation of and the number of seats allocated to each sector of the Election Committee are as follows:

The First Sector shall be composed of the following 18 subsectors:

Industrial (first)	17
Industrial (second)	17
Textiles and garment	17
Commercial (first)	17
Commercial (second)	17
Commercial (third)	17
Finance	17
Financial services	17
Insurance	17
Real estate and construction	17
Transport	17
Import and export	17
Tourism	17
Hotel	16
Catering	16
Wholesale and retail	17
Employers' Federation of Hong Kong	15
Small and medium enterprises	15

The Second Sector shall be composed of the following 10 subsectors:

Technology and innovation	30
Engineering	30
Architectural, surveying, planning and landscape	30
Accountancy	30
Legal	30
Education	30
Sports, performing arts, culture and publication	30
Medical and health services	30
Chinese medicine	30
Social welfare	30

The Third Sector shall be composed of the following five subsectors:

Agriculture and fisheries	60
Labour	60
Grassroots associations	60
Associations of Chinese fellow townsmen	60
Religious	60

The Fourth Sector shall be composed of the following five subsectors:

Members of the Legislative Council	90
Heung Yee Kuk	27
Representatives of members of Area Committees, District Fight Crime Committees, and District Fire Safety Committees of Hong Kong Island and Kowloon	76

Representatives of members of Area Committees,  
District Fight Crime Committees, and District Fire

Safety Committees of the New Territories	80
Representatives of associations of Hong Kong residents in the Mainland	27

The Fifth Sector shall be composed of the following two subsectors:

HKSAR deputies to the NPC and HKSAR members of the CPPCC National Committee	190
Representatives of Hong Kong members of relevant national organizations	110

4. The Election Committee shall be constituted in the following manner:

(1) HKSAR deputies to the NPC, HKSAR members of the CPPCC National Committee, Hong Kong members of the Committee for the Basic Law of the HKSAR under the NPC Standing Committee, members of the Legislative Council, university presidents or chairpersons of the board of governors or the council of universities, and responsible persons of statutory bodies, advisory bodies and relevant associations of the subsectors of engineering (15), architectural, surveying, planning and landscape (15), education (5), medical and health services (15) and social welfare (15) shall be Election Committee members of the corresponding subsectors.

An HKSAR deputy to the NPC or an HKSAR member of the CPPCC National Committee may choose to register as an Election Committee member in a subsector other than one in the Fifth Sector with which he or she has a substantial connection. If an HKSAR deputy to the NPC or an HKSAR member of the CPPCC National Committee is registered as an Election Committee member in a subsector other than one in the Fifth Sector, his or her seat shall be counted as one in that subsector and the number of members to be returned by that subsector in accordance with paragraph (3) of this subsection shall be reduced accordingly. After the registration of HKSAR deputies to the NPC and HKSAR members of the CPPCC

National Committee as Election Committee members of the relevant subsectors, the number of members to be returned by those subsectors in accordance with paragraphs (1), (2) and (3) of this subsection, as determined by the provision in this sub-paragraph, shall remain unchanged within the term of office of the Election Committee.

(2) Election Committee members of the religious subsector shall be nominated;

15 members of the technology and innovation subsector shall be nominated from among Hong Kong academicians of the Chinese Academy of Sciences and the Chinese Academy of Engineering;

15 members of the accountancy subsector shall be nominated from among Hong Kong Accounting Advisors appointed by the Ministry of Finance;

9 members of the legal subsector shall be nominated from among Hong Kong members of the Council of the China Law Society;

15 members of the sports, performing arts, culture and publication subsector shall be nominated respectively by the Sports Federation and Olympic Committee of Hong Kong, China, China Federation of Literary and Art Circles Hong Kong Member Association and Hong Kong Publishing Federation;

15 members of the Chinese medicine subsector shall be nominated from among Hong Kong members of the Council of the World Federation of Chinese Medicine Societies; and

The 27 members of the subsector of representatives of associations of Hong Kong residents in the Mainland shall be nominated by such associations.

(3) Election Committee members of a subsector, except for those specified in paragraphs (1) and (2) of this subsection, shall be elected by eligible corporate voters for the corresponding subsector. Eligible corporate voters for subsectors shall be composed of institutions, organizations, associations or enterprises which are representative and specified by law. Unless specified in the electoral law of the HKSAR, an association or enterprise may become a corporate

voter for a subsector only if it has been operating for not less than three years after acquiring relevant qualifications for that subsector. Election Committee members of subsectors -- the Heung Yee Kuk, representatives of members of Area Committees, District Fight Crime Committees, and District Fire Safety Committees of Hong Kong Island and Kowloon, and representatives of members of Area Committees, District Fight Crime Committees, and District Fire Safety Committees of the New Territories in the Fourth Sector and representatives of Hong Kong members of relevant national organizations in the Fifth Sector may be elected by individual voters. A candidate for Election Committee member of a subsector shall be nominated by five voters for the subsector. The number of candidates each voter for a subsector may nominate shall not exceed the number of seats allocated to the subsector. Voters for a subsector of the Election Committee shall elect Election Committee members of that subsector from the list of nominations by secret ballot.

The specific method for returning the Election Committee members referred to in the preceding subsection, including the definition of statutory bodies, advisory bodies, relevant associations and eligible corporate voters for relevant subsectors, the method for nomination of candidates and the method for voting shall be prescribed by the electoral law of the HKSAR.

5. There shall be a system of conveners for the Election Committee. The conveners shall be responsible for convening meetings of the Election Committee as necessary and handle relevant matters. A chief convener shall be an Election Committee member who holds an office of state leadership. The chief convener shall designate a number of conveners for each sector of the Election Committee.

6. A candidate for the office of Chief Executive shall be nominated by not less than 188 members of the Election Committee, with not less than 15 members from each of the five sectors. Each Election Committee member may nominate one candidate only.

7. The Election Committee shall elect the Chief Executive designate from the list of nominations by secret ballot on a one-

person-one-vote basis. The Chief Executive designate must obtain more than 750 votes. The specific election method shall be prescribed by the electoral law of the HKSAR.

8. The Candidate Eligibility Review Committee of the HKSAR shall be responsible for reviewing and confirming the eligibility of candidates for Election Committee members and for the office of Chief Executive. The Committee for Safeguarding National Security of the HKSAR shall, on the basis of the review by the department for safeguarding national security of the Police Force of the HKSAR, make findings as to whether a candidate for Election Committee member or for the office of Chief Executive meets the legal requirements and conditions of upholding the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swearing allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, and issue an opinion to the Candidate Eligibility Review Committee of the HKSAR in respect of a candidate who fails to meet such legal requirements and conditions.

No legal proceedings may be instituted in respect of a decision made by the Candidate Eligibility Review Committee of the HKSAR on the eligibility of a candidate for Election Committee member or for the office of Chief Executive pursuant to the opinion of the Committee for Safeguarding National Security of the HKSAR.

9. The HKSAR shall, in accordance with the law, take measures against acts of manipulating or undermining election.

10. The NPC Standing Committee exercises in accordance with the law the power to amend this Method. Prior to making any amendment, the NPC Standing Committee shall solicit views of various sectors of Hong Kong by appropriate means.

11. The term of office of the Election Committee constituted under the Method previously in force shall terminate upon the commencement of term of office of the Election Committee constituted under this Method.

12. This Method shall come into force on 31 March 2021. Annex I and its amendment previously in force shall cease to apply.



## Appendix XIV

### **Annex II Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures**

(Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, amended, as recorded at the Sixteenth Meeting of the Standing Committee of the Eleventh National People's Congress on 28 August 2010, and amended at the Twenty-Seventh Meeting of the Standing Committee of the Thirteenth National People's Congress on 30 March 2021)

1. The Legislative Council of the Hong Kong Special Administrative Region (HKSAR) shall be composed of 90 members for each term. The composition of the Legislative Council shall be as follows:

Members returned by the Election Committee	40
Members returned by functional constituencies	30
Members returned by geographical constituencies through direct elections	20

The above-mentioned Election Committee refers to the one provided for in Annex I to this Law.

2. Candidates for members of the Legislative Council returned by the Election Committee shall be nominated by at least 10 but no more than 20 members of the Election Committee, with at least 2 but no more than 4 members from each sector. Any eligible voter in an election of the Legislative Council may be nominated as a candidate. Each Election Committee member may nominate one candidate only.

The Election Committee shall elect members of the Legislative Council from the list of nominations by secret ballot. A ballot paper

is valid only if the number of candidates voted for is equal to the number of members of the Legislative Council to be returned. The 40 candidates who obtain the highest numbers of votes shall be elected.

3. There shall be 28 functional constituencies for election of members of the Legislative Council:

Agriculture and fisheries

Heung Yee Kuk

Industrial (first)

Industrial (second)

Textiles and garment

Commercial (first)

Commercial (second)

Commercial (third)

Finance

Financial services

Insurance

Real estate and construction

Transport

Import and export

Tourism

Catering

Wholesale and retail

Technology and innovation

Engineering

Architectural, surveying, planning and landscape

Accountancy

Legal

Education

Sports, performing arts, culture and publication

Medical and health services

Social welfare

Labour

HKSAR deputies to the National People's Congress (NPC), HKSAR members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC), and representatives of relevant national organizations

Three members shall be returned by the labour functional constituency, and one member shall be returned by each of the other functional constituencies.

Members of the Legislative Council returned by the following functional constituencies shall be elected by individual voters:

Heung Yee Kuk

Engineering

Architectural, surveying, planning and landscape

Accountancy

Legal

Education

Medical and health services

Social welfare

HKSAR deputies to the NPC, HKSAR members of the CPPCC National Committee and representatives of relevant national organizations

Members of the Legislative Council returned by the other functional constituencies shall be elected by eligible corporate voters. Eligible corporate voters for functional constituencies shall be composed of institutions, organizations, associations or enterprises

which are representative and specified by law. Unless specified in the electoral law of the HKSAR, an association or enterprise may become a corporate voter for a functional constituency only if it has been operating for not less than three years after acquiring relevant qualifications for that functional constituency.

A candidate for a functional constituency shall be nominated by at least 10 but no more than 20 voters for the functional constituency as well as at least 2 but no more than 4 members from each sector of the Election Committee. Each Election Committee member may nominate one candidate only for the election of members of the Legislative Council returned by functional constituencies.

Voters for a functional constituency shall elect Legislative Council member for that functional constituency from the list of nominations by secret ballot.

The delimitation of corporate bodies and the definition of eligible corporate voters for functional constituencies, and the election method shall be prescribed by the electoral law of the HKSAR.

4. There shall be 10 geographical constituencies for returning members of the Legislative Council through direct elections. Two members shall be returned by each geographical constituency.

A candidate for a geographical constituency shall be nominated by at least 100 but no more than 200 voters for the geographical constituency as well as at least 2 but no more than 4 members from each sector of the Election Committee. Each Election Committee member may nominate one candidate only for direct election of members of the Legislative Council returned by geographical constituencies.

For each geographical constituency, a voter may vote for one candidate on the list of nominations by secret ballot. The two candidates who obtain the highest numbers of votes shall be elected.

The delineation of geographical constituencies and the voting method shall be prescribed by the electoral law of the HKSAR.

5. The Candidate Eligibility Review Committee of the HKSAR shall be responsible for reviewing and confirming the eligibility of candidates for members of the Legislative Council. The Committee for Safeguarding National Security of the HKSAR shall, on the basis of the review by the department for safeguarding national security of the Police Force of the HKSAR, make findings as to whether a candidate for member of the Legislative Council meets the legal requirements and conditions of upholding the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swearing allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, and issue an opinion to the Candidate Eligibility Review Committee of the HKSAR in respect of a candidate who fails to meet such legal requirements and conditions.

No legal proceedings may be instituted in respect of a decision made by the Candidate Eligibility Review Committee of the HKSAR on the eligibility of a candidate for member of the Legislative Council pursuant to the opinion of the Committee for Safeguarding National Security of the HKSAR.

6. The HKSAR shall, in accordance with the law, take measures against acts of manipulating or undermining election.

7. Unless otherwise provided for in this Law, the Legislative Council shall adopt the following procedures for voting on bills and motions:

The passage of bills introduced by the government shall require a simple majority of votes of the members of the Legislative Council present.

The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority of votes of each of the two groups of members present, i.e. members returned by the Election Committee, and those returned by functional constituencies and by geographical constituencies through direct elections.

8. The NPC Standing Committee exercises in accordance with the

law the power to amend this Method and the procedures for voting on bills and motions. Prior to making any amendment, the NPC Standing Committee shall solicit views of various sectors of Hong Kong by appropriate means.

9. This Method and the procedures for voting on bills and motions shall come into force on 31 March 2021. Annex II and its amendment previously in force shall cease to apply.

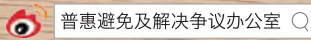




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