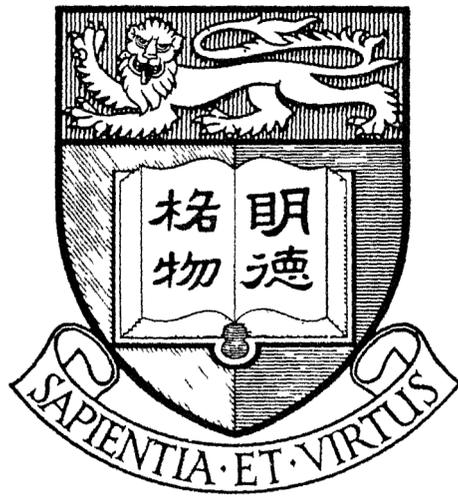


The Basic Law of the Hong Kong Special
Administrative Region of the People's
Republic of China : a Compilation of
Preparatory Materials



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Volume 5

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China : a Compilation of Preparatory Materials

Volume 1

	Date	Contents
1	22-Apr-86	[Translation]The Structure of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)
2	23-Apr-86	H.K. Standard : The Final Draft of the Basic Law
3	Nov/Dec 86	中華人民共和國香港特別行政區基本法起草委員會第三次全體會議文件匯編
4	Apr-87	中華人民共和國香港特別行政區基本法起草委員會第四次全體會議文件匯編
5	Apr-87	Collection of Documents for The Fourth Plenary Session of the Drafting Committee
6	22-May-87	香港基本法起草委員會第四次全體會議委員們對基本法序言、總則及第二、三、七、九章條文草案的意見匯集

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7	87,88	Documents Published by the Basic Law Consultative Committee and the Basic Law Drafting Committee
8	3-Jun-87	有關香港特別行政區宗教問題最後報告
9	Aug-87	對基本法序言和第一、二、七、九章條文(一九八七年八月)草稿的意見
10	Aug-87	Opinions on the Preamble and Charters 1, 2, 7, & 9 of the Draft (August 1987) of the Basic Law
11	Aug-87	對基本法第二章第六及第七條條文草稿(一九八七年八月)的意見
12	Aug-87	Opinions on Articles 6 & 7 of Chapter 2 of the Draft (August 1987) of the Basic Law
13	8-Aug-87	Final Report on Finance, Taxation, Monetary System, and Principles of the Economic System
14	8-Aug-87	Final Report on Policy Regarding Tourism and Policy Regarding Real Estate
15	8-Aug-87	Final Report on Policies Regarding Shipping and Civil Aviation
16	8-Aug-87	Final Report on the Relationship Between the Legislature and the Executive Authorities
17	8-Aug-87	Final Report on the Selection of the Chief Executive
18	8-Aug-87	Final Report on the Policy Regarding Industry and Commerce, Free Trade, and Policy Regarding Agriculture and Fishery
19	8-Aug-87	Final Report on Public Servants
20	8-Aug-87	Final Report on the Composition and Terms of Reference of the Executive Authorities
21	8-Aug-87	Final Report on Language of the Law
22	22-Aug-87	中央與香港特別行政區的關係專題小組工作報告
23	22-Aug-87	香港特別行政區政治體制專題小組的工作報告
24	22-Aug-87	教育、科學、技術、文化、體育和宗教專題小組工作報告
25	22-Aug-87	經濟專題小組的工作報告
26	22-Aug-87	Collection of Documents of The Fifth Plenary Session of the Drafting Committee

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27	4-Nov-87	對基本法第四章部份條文草稿(一九八七年八月)的意見
28	4-Nov-87	Opinions on Some of the Articles of Chapter 4 of the Draft (August 1987) of the Basic Law
29	4-Nov-87	法律專責小組對基本法第四章第四節[司法機關]條文草稿(一九八七年八月)的意見
30	4-Nov-87	Opinions of the Special Group on Law Regarding Section 4 of Chapter 4 "The Judicial Organs" of the Draft (August 1987) of the Basic Law
31	4-Nov-87	對基本法第五章[香港特別行政區的經濟]條文草稿(一九八七年八月)的意見
32	4-Nov-87	Opinions on Chapter 5 "The Economy of The HKSAR" of the Draft (August 1987) of the Basic Law
33	4-Nov-87	對基本法第六章條文草稿(一九八七年八月)的意見
34	4-Nov-87	Opinions on Chapter 6 of The Draft (August 1987) of the Basic Law
35	4-Nov-87	法律專責小組對基本法第九章[香港特別行政區基本法的解釋和修改]條文草稿(一九八七年八月)的意見
36	4-Nov-87	Opinions on of the Special Group on Law Regarding Chapter 9 "The Interpretation and Amendment of the Basic Law of the HKSAR" of the Draft (August 1987) of the Basic Law
37	4-Nov-87	對香港特別行政區全國人大代表問題的意見
38	4-Nov-87	Opinions on the Question of HKSAR Delegates to the National People's Congress
39	4-Nov-87	第一屆特區政府的產生專題研究報告
40	4-Nov-87	Report on the Summary of the Proposals Regarding the Selection of the Chief Executive
41	4-Nov-87	行政長官的產生方法方案歸納報告
42	4-Nov-87	Report on the Study of the "Formation of the First Government of the SAR"
43	4-Nov-87	政黨問題專題研究報告
44	4-Nov-87	Report on the Study of "Political Party"
45	23-Nov-87	對基本法第四章條文草稿(一九八七年十一月)的意見(一)
46	23-Nov-87	Opinions on Chapter 4 of the Draft (November 1987) of the Basic Law (I)
47	23-Nov-87	功能組別選舉方法方案歸納報告
48	23-Nov-87	Report on the Summary of Proposals Regarding Functional Constituencies Elections
49	23-Nov-87	直接選舉方法方案歸納報告
50	23-Nov-87	Report on the Summary of Proposals Regarding Direct Elections

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53	Dec-87	香港特別行政區基本法(草案)(匯編稿)
54	Dec-87	Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee (P.51 - P.52 missing)
55	5-Dec-87	[基本法委員會]最後報告
56	5-Dec-87	Final Report on the Basic Law Committee
57	5-Dec-87	對[香港特別行政區基本法委員會]的意見

58	5-Dec-87	Opinions on "HKSAR Basic Law Committee"
59	15-Dec-87	Chapter III : The Basic Rights and Obligations of the Hong Kong SAR Residents
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61	Apr-88	The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China for Solicitation of Opinions (With Introduction and Summary)
62	4/17-Jun-88	A Compilation of the Views of Visiting Mainland Drafters on Some Questions concerning the Draft Basic Law for Solicitation of Opinions
63	4/17-Jun-88	內地草委訪港小組就基本法(草案)徵求意見稿 一些問題的回應輯錄
64	3-Aug-88	Reference (2) The Concepts of "Act of State" and "Fact of State"
65	3-Aug-88	參考資料(三) 歐洲共同體法律的解釋程序
66	3-Aug-88	Reference (3) The Procedure for the Interpretation of European Community Law
67	3-Aug-88	參考資料(四) 適用於香港特區的中國法律
68	4-Aug-88	The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of The People's Republic of China
69	19-Aug-88	參考資料(七) 制定香港特別行政區基本法的原因、原則和應包含的內容以及表達方式
70	19-Aug-88	Reference (7) The reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression
71	19-Aug-88	參考資料(八) 設計香港未來政治體制的構思
72	26-Aug-88	討論文件(二) 跟進問題(1)第九、十六、十七、十八、二十二、一百六十九條及附件三
73	26-Aug-88	Discussion Paper (2) Follow-up questions (1) on Articles 9, 16, 17, 18, 22 and 169 and Annex III
74	26-Aug-88	參考資料(九)[越權無效]與[違憲審查]
75	26-Aug-88	參考資料(十)人大、人大常委與法律解釋
76	26-Aug-88	Reference (10) The National People's Congress, The Standing Committee of the National People's Congress, and the Interpretation of the Law
77	14-Jan-89	(Translation) The Draft Basic Law of the Hong Kong SAR of the PRC

This compilation is based on materials collected by Professor Johannes Chan, who has generously lent it to the Law Library to make a duplicate set for its Basic Law Collection.

Lui Che Woo Law Library
30-Oct-02

中华人民共和国
香港特别行政区基本法
(草案) 草稿

(经总体工作小组整理，供起草委员会第七
次全体会议讨论用。)

中华人民共和国香港特别行政区

基本法起草委员会秘书处

一九八八年四月

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序 言

香港自古以来就是中国的领土〔注1〕，一八四〇年鸦片战争以后被英国占领。一九八四年十二月十九日，中英两国政府签署了关于香港问题的联合声明，确认中华人民共和国政府于一九九七年七月一日恢复对香港行使主权，从而实现了长期以来全中国人民收回香港共同愿望。

为了维护国家的统一和领土完整，保持香港的繁荣与稳定，并考虑到香港的历史和现实情况，国家决定，在对香港恢复行使主权时，根据中华人民共和国宪法第三十一条的规定，设立香港特别行政区，并按照“一个国家，两种制度”的方针，不在香港实行社会主义的制度和政策。国家对香港的基本方针政策，已由我国政府在中英联合声明中予以阐明。

根据中华人民共和国宪法，全国人民代表大会特制定中华人民共和国香港特别行政区基本法，规定香港特别行政区实行的制度，以保障国家对香港的基本方针政策的实施。

第一章 总 则

第一条 香港特别行政区是中华人民共和国不可分离的部分。

第二条 全国人民代表大会授权香港特别行政区依照本法的规定实行高度自治，享有行政管理权、立法权、独立的司法权和终审权。

第三条 香港特别行政区的行政机关和立法机关由香港永久性居民依照本法有关规定组成。

第四条 香港特别行政区不实行社会主义制度和政策，保持原有的资本主义制度和生活方式，五十年不变。

第五条 香港特别行政区依法保障香港特别行政区居民和其他人的权利和自由。

第六条 香港特别行政区的法律保护财产所有权。

第七条 香港特别行政区境内的土地和自然资源属于国家所有，由香港特别行政区政府负责管理、使用、开发、出租或批给个人或法人团体使用或开发，其收入全归香港特别行政区政府支配。

第八条 香港原有法律，即普通法、衡平法、条例、附属立法和习惯法，除与本法相抵触或经香港特别行政区

的立法机关作出修改者外，予以保留。

第九条 香港特别行政区的行政机关、立法机关和司法机关，除使用中文外，还可使用英文。

第十条 根据中华人民共和国宪法第三十一条，香港特别行政区的政策和制度，包括社会、经济制度，有关保障居民的基本权利和自由的制度，以及行政管理、立法和司法方面的制度，均以本法的规定为依据。

香港特别行政区立法机关制定的任何法律，均不得与本法相抵触。

第二章 中央和香港特别行政区的关系

第十一条 香港特别行政区是中华人民共和国的一个享有高度自治权的地方行政区域，直辖于中央人民政府。

第十二条 中央人民政府负责管理与香港特别行政区有关的外交事务。

中央人民政府授权香港特别行政区依照本法自行处理有关的对外事务。

中华人民共和国外交部在香港设立机构处理外交事务。

第十三条 中央人民政府负责管理香港特别行政区的

防务。

中央人民政府派驻香港特别行政区负责防务的军队不干预香港特别行政区的地方事务。香港特别行政区政府在必要时，可向中央人民政府请求驻军协助维持社会治安和救助灾害。

驻军人员除应遵守全国性的法律外，还应遵守香港特别行政区的法律。

驻军费用由中央人民政府负担。

第十四条 中央人民政府依照本法第四章的规定任命香港特别行政区行政长官和行政机关的主要官员。

第十五条 香港特别行政区享有行政管理权，依照本法的有关规定自行处理财政、金融、经济、工商业、贸易、税务、邮政、民航、海事、交通运输、渔业、农业、人事、民政、劳工、教育、医疗卫生、社会福利、文化康乐、市政建设、城市规划、房屋、房地产、治安、出入境、天文气象、通讯、科技、体育和其他方面的行政事务。

第十六条 香港特别行政区享有立法权。

香港特别行政区的立法机关制定的法律须报全国人民代表大会常务委员会备案。备案不影响该法律的生效。

全国人民代表大会常务委员会在征询其所属的香港特别行政区基本法委员会〔注2〕后，如认为香港特别行政区的任何法律不符合本法或法定程序，可将有关法律发回重议或撤销，但不作修改。经全国人民代表大会常务委员会发回重议或撤销的法律立即失效。该法律的失效无溯及力。

第十七条 在香港特别行政区实行的法律为本法，以及本法第八条规定的香港原有法律和香港特别行政区立法机关制定的法律。

全国人民代表大会和全国人民代表大会常务委员会制定的法律，除本条第三款规定者外，不在香港特别行政区实施。

全国人民代表大会和全国人民代表大会常务委员会制定的有关国防、外交的法律以及其他有关体现国家统一和领土完整并且按本法规定不属于香港特别行政区高度自治范围的法律，凡须在香港特别行政区实施的，由国务院指令香港特别行政区政府在当地公布或立法实施。

除紧急情况外，国务院在发布上述指令前，均事先征询香港特别行政区基本法委员会和香港特别行政区政府的意见。

香港特别行政区政府如未能遵照国务院的指令行事，

国务院可发布命令将上述法律在香港特别行政区实施。

第十八条 香港特别行政区享有独立的司法权和终审权。

香港特别行政区法院除继续保持香港原有法律原则对法院审判权所作的限制外，对所有的案件均有审判权。

香港特别行政区法院对属于中央人民政府管理的国防、外交事务和中央人民政府的行政行为的案件无管辖权。香港特别行政区法院在审理案件中，如遇有涉及国防、外交和中央人民政府的行政行为的问题，应征询行政长官的意见。行政长官就该等问题发出的证明文件对法院有约束力。

行政长官在发出上述证明文件前，须取得全国人民代表大会常务委员会或国务院的证明书。

第十九条 香港特别行政区可享有全国人民代表大会和全国人民代表大会常务委员会及国务院授予的其他权力。

第二十条 香港特别行政区居民中的中国公民可依法参与国家事务的管理。

根据全国人民代表大会常务委员会确定的名额和代表产生办法，由香港居民中的中国公民在香港选出香港特别

行政区的全国人民代表大会代表，参加最高国家权力机关的工作。

第二十一条 中央人民政府所属各部门、各省、自治区、直辖市均不得干预香港特别行政区根据本法自行管理的事务。

中央各部门、各省、自治区、直辖市如需在香港设立机构，须征得香港特别行政区政府同意并经中央人民政府批准。

中央各部门、各省、自治区、直辖市在香港设立的一切机构及其人员均应遵守香港特别行政区的法律。

中国其他地区的人进入香港特别行政区需办理批准手续。

香港特别行政区可在北京设立办事机构。

第二十二条 香港特别行政区应以法律禁止任何破坏国家统一和颠覆中央人民政府的行为。

第三章 居民的基本权利和义务

第二十三条 香港特别行政区居民，简称香港居民，包括永久性居民和非永久性居民。

香港特别行政区永久性居民为：

(一) 在香港特别行政区成立以前或以后在香港出生的中国公民；

(二) 在香港特别行政区成立以前或以后在香港通常居住连续七年以上的中国公民；

(三) 第(一)、(二)两项所列居民在香港以外所生的中国籍子女。

(四) 在香港特别行政区成立以前或以后在香港通常居住连续七年以上并以香港为永久居住地的非中国籍的人；

(五) 在香港特别行政区成立以前或以后第(四)项所列居民在香港所生的未满二十一周岁的子女；

(六) 第(一)至(五)项所列居民以外在香港特别行政区成立以前只在香港有居留权的人。

以上居民在香港特别行政区享有居留权和有资格依照香港特别行政区法律取得载明其居留权的永久性居民身份证。

香港特别行政区非永久性居民为：有资格依照香港特别行政区法律取得香港居民身份证，但没有居留权的人。

第二十四条 香港居民，不分国籍、种族、民族、语言、性别、职业、宗教信仰、政见、教育程度、财产状

况，在法律面前一律平等。

第二十五条 年满二十一周岁的香港特别行政区永久性居民，均依法享有选举权和被选举权。

第二十六条 香港居民的财产所有权，包括财产的取得、使用、处置和继承的权利和依法征用财产得到补偿的权利，均受法律保护。征用财产的补偿应相当于该财产的实际价值、可自由兑换、不得无故迟延支付。

第二十七条 香港居民享有：

- (一) 言论、新闻、出版的自由；
- (二) 结社、组织和参加工会、罢工的自由；
- (三) 集会、游行的自由。

第二十八条 香港居民的人身自由不受侵犯。

香港居民不受非法逮捕、拘留或监禁。禁止以任何方法非法剥夺或限制居民的人身自由。禁止非法搜查居民的身体。

第二十九条 香港居民的住宅和其他房屋不受侵犯。禁止非法搜查或非法侵入居民的住宅和其他房屋。

第三十条 香港居民的通讯自由和通讯秘密受法律的保护。除因公共安全和追查刑事犯罪的需要，由有关机关依照法律程序对通讯进行检查外，任何部门或个人不得以

任何理由侵犯居民的通讯自由和通讯秘密。

第三十一条 香港居民有在香港特别行政区境内迁徙的自由，有移居其他国家和地区的自由。持有有效旅行证件的香港居民有旅行和出入境的自由，除非受到法律限制，可自由离开香港特别行政区，无需特别批准。

第三十二条 香港居民有信仰的自由。

香港居民有宗教信仰的自由，有传教和公开举行、参加宗教活动的自由。

第三十三条 香港居民有选择职业的自由。

第三十四条 香港居民有进行学术研究、文学艺术创作和其他文化活动的自由。

第三十五条 香港居民有权得到秘密法律咨询、向法院提起诉讼、选择律师及时保护自己的合法权益或在法庭上为其代理和获得司法补救。

香港居民有权对行政部门和行政人员的行为向法院申诉。

第三十六条 香港居民有享受社会福利的权利，劳工的福利待遇受法律保护。

第三十七条 香港居民的婚姻自由和自愿生育的权利受法律保护。

第三十八条 香港居民享有香港特别行政区法律保障的其他权利和自由。

第三十九条 《公民权利和政治权利国际公约》和《经济、社会与文化权利的国际公约》适用于香港的有关规定，通过香港特别行政区的法律予以实施。

第四十条 香港居民享有的权利和自由，除依法规定外不得限制。但此种限制应以维护国家安全、社会秩序、社会公安、公共卫生、公共道德以及保障他人的权利和自由所必需为限。

第四十一条 “新界”原居民的合法传统权益受香港特别行政区的保护。

第四十二条 在香港特别行政区内的香港居民以外的其他人，依法享有本章规定的香港居民的权利和自由。

第四十三条 香港居民和在香港的其他人有遵守香港特别行政区法律的义务。

第四章 政治体制

第一节 行政长官

第四十四条 香港特别行政区行政长官是香港特别行政区的首长，代表香港特别行政区。

香港特别行政区行政长官依照本法规定对中央人民政府和香港特别行政区负责。

第四十五条 香港特别行政区行政长官由年满四十周岁，在香港通常居住连续满二十年的香港特别行政区永久性居民中的中国公民担任。

第四十六条 香港特别行政区行政长官在当地通过选举或协商产生，由中央人民政府任命。

行政长官产生的具体办法由附件一《香港特别行政区行政长官的产生办法》规定。

附件一规定的行政长官的产生办法可根据香港特别行政区的实际情况和循序渐进的原则予以变更。此项变更须经香港特别行政区立法会议全体成员三分之二多数通过，行政长官同意，并报全国人民代表大会常务委员会批准。

第四十七条 香港特别行政区行政长官每届任期五

年，可连任一次。

第四十八条 香港特别行政区行政长官必须廉洁奉公、尽忠职守。

行政长官就任时应向香港特别行政区终审法院首席法官申报财产，秘密记录在案。

第四十九条 香港特别行政区行政长官行使下列职权：

(一) 领导香港特别行政区政府；

(二) 负责执行本法和依照本法适用于香港特别行政区的其他法律；

(三) 签署立法会议通过的法案，公布法律；

签署立法会议通过的财政预算、决算，报中央人民政府备案；

(四) 决定政府政策和发布行政命令；

(五) 提名并报请中央人民政府任命下列主要官员：各司司长、副司长，各局局长，廉政专员，审计署署长，警务处长，外事处长〔注3〕；建议中央人民政府免除上述官员职务；

根据需要并经中央人民政府批准，聘请相当于局级或局级以上的顾问；

- (六) 依照法定程序任免各级法院法官；
- (七) 依照法定程序任免公职人员；
- (八) 执行中央人民政府就本法规定的有关事务发出的指令；
- (九) 代表香港特别行政区政府处理中央授权的对外事务和其他事务；
- (十) 批准向立法会议提出有关财政收入或支出的动议；
- (十一) 根据安全和公共利益的考虑，决定政府官员或其他负责政府公务的人员是否向立法会议作证和提供证据；
- (十二) 赦免或减轻刑事罪犯的刑罚；
- (十三) 处理居民请愿、申诉的事项。

第五十条 香港特别行政区行政长官如认为立法会议通过的法案不符合香港特别行政区的整体利益，可在三个月内将该法案发回立法会议重议，立法会议如以不少于全体成员三分之二多数再次通过原案，行政长官必须在一个月內签署公布或按本法第五十一条的规定处理。

第五十一条 如行政长官拒绝签署立法会议再次通过的法案或立法会议拒绝通过政府提出的财政预算法案或其

他重要法案，经协商仍不能取得一致意见，行政长官可解散立法会议。

行政长官在解散立法会议前，须征询行政会议的意见。行政长官在其一届任期内只能解散立法会议一次。

第五十二条 如立法会议拒绝批准政府提出的财政预算法案，或由于立法会议已被解散而不能批准拨款，行政长官可在选出新的立法会议前的一段时期内，按上一财政年度的开支标准，批准临时短期拨款。

第五十三条 香港特别行政区行政长官如有下列情况之一者必须辞职：

（一）因严重疾病或其他原因无力履行职务；

（二）因两次拒绝签署立法会议通过的法案而解散立法会议，重选的立法会议仍以全体成员三分之二多数通过所争议的原案；

（三）因立法会议拒绝通过财政预算法案或其他重要法案而解散立法会议，重选的立法会议继续拒绝通过所争议的原案。

第五十四条 香港特别行政区行政长官短期不能履行职务时，依次由政务司长、财政司长、律政司长临时代理其职务。

行政长官缺位时，应在六个月内产生新的一届行政长官。行政长官缺位期间的职务代理，依照前款规定办理。

第五十五条 香港特别行政区行政会议是协助行政长官决策的机构。

第五十六条 香港特别行政区行政会议的成员由行政长官从行政机关的主要官员、立法会议成员和社会人士中委任，其任期或任期未满时终止委任，由行政长官决定。行政会议成员的任期应不超过委任他的行政长官的任期。

香港特别行政区行政会议成员由香港特别行政区永久性居民中的中国公民担任。

行政长官认为必要时可邀请有关人士列席会议。

第五十七条 香港特别行政区行政会议由行政长官主持。

行政长官在作出重要决策、向立法会议提交法案、制订附属法规和解散立法会议前，须征询行政会议的意见，但人事任免、纪律制裁和紧急情况下采取的措施除外。

行政长官如不采纳行政会议多数成员的意见，应将具体理由记录在案。

第五十八条 香港特别行政区设立廉政公署，独立工作，对行政长官负责。

第五十九条 香港特别行政区设立审计署，独立工作，对行政长官负责。

第二节 行政机关

第六十条 香港特别行政区政府是香港特别行政区行政机关。

第六十一条 香港特别行政区政府的首长是香港特别行政区行政长官。

行政长官下设政务司、财政司、律政司和各局、处、署。

香港特别行政区政府的组织由法律规定。

第六十二条 香港特别行政区的主要官员由在香港通常居住连续满十五年的香港永久性居民中的中国公民担任〔注4〕。

第六十三条 香港特别行政区政府行使下列职权：

- (一) 制定并执行政策；
- (二) 管理本法第十五条所规定的各项行政事务；
- (三) 办理本法第七章规定的中央人民政府授权的对外事务；
- (四) 编制并提出财政预算、决算；

(五) 拟定并提出法案、议案、附属法规。

第六十四条 香港特别行政区的检察部门独立处理刑事检察工作，不受任何干涉。

第六十五条 香港特别行政区行政机关必须遵守法律，对香港特别行政区立法会议负责：执行立法会议通过并已生效的法律；定期向立法会议作施政报告；答复立法会议成员的质询；征税和公共开支须经立法会议批准。

第六十六条 香港特别行政区行政长官和行政机关设立咨询组织的制度继续保留。

第三节 立法机关

第六十七条 香港特别行政区立法会议〔注5〕是香港特别行政区的立法机关。

第六十八条 香港特别行政区立法会议由混合选举产生。

立法会议的选举方式和比例由附件二《香港特别行政区立法会议的产生办法》规定。

附件二规定的立法会议的选举方式和比例可根据香港特别行政区的实际情况和循序渐进的原则予以变更。此项变更须经香港特别行政区立法会议全体成员三分之二多数

通过，行政长官同意，并报全国人民代表大会常务委员会批准。

第六十九条 香港特别行政区立法会议每届任期四年。

第七十条 香港特别行政区立法会议如经行政长官依本法规定解散，须于三个月内依本法第六十八条的规定，重行选举产生。

第七十一条

方案一：

香港特别行政区立法会议主席由立法会议成员互选产生。

香港特别行政区立法会议主席由年满四十周岁，在香港通常居住连续满二十年的香港特别行政区永久性居民中的中国公民担任。

方案二：

香港特别行政区立法会议主席由行政长官兼任。

第七十二条 香港特别行政区立法会议主席行使下列职权：

- (一) 主持会议；
- (二) 决定、掌握议程；

- (三) 决定开会时间；
- (四) 在休会期间可召开特别会议；
- (五) 立法会议事规则所规定的其他职权。

第七十三条 香港特别行政区立法会议行使下列职权：

(一) 根据本法规定并依照法定程序制定、废除和修改法律；

(二) 根据行政机关的提案，审核、通过财政预算、决算；

(三) 批准税收和公共开支；

(四) 听取行政长官的施政报告并进行辩论；

(五) 对行政机关的工作提出质询；

(六) 就任何有关公共利益问题进行辩论；

(七) 同意终审法院法官和高等法院首席法官的任免；

(八) 接受香港居民申诉并作出处理；

(九) 行政长官如有严重违法或渎职行为，由立法会议全体成员的四分之一联合动议，经立法会议通过，可组成独立的调查委员会，其主席由终审法院首席法官担任，负责进行调查并向立法会议提出报告。如该委员会认为有

足够证据构成上述指控，立法会议以全体成员三分之二多数通过，可提出弹劾案，报请中央人民政府决定。

第七十四条

方案一：

香港特别行政区立法会议员可根据本法规定并依照法定程序个别或联名提出法律草案，但下列三项在提出前必须得到行政长官的书面同意：

- (一) 涉及财政收入或支出者；
- (二) 涉及政府政策者；
- (三) 涉及政府的管理运作。

方案二：

香港特别行政区立法会议员根据本法规定并依照法定程序提出法律草案，凡不涉及公共开支和公共政策的法律草案，可由立法会议员个别或联名提出。

第七十五条 香港特别行政区立法会议员举行会议的法定人数为不少于全体成员的三分之一。

除本法另有规定外，香港特别行政区立法会议对法案和议案的表决，须经出席会议的过半数成员通过。

立法会议事规则由立法会议自行制定，但不得与本法相抵触。

第七十六条 香港特别行政区立法会议通过的法案，须经行政长官签署、公布，方能生效。

第七十七条 香港特别行政区立法会议员在立法会议的会议上发言，不受法律追究。

第七十八条 香港特别行政区立法会议员在出席会议时和赴会途中不受逮捕。

第七十九条 香港特别行政区立法会议员如有下列情况之一，由立法会议主席宣告其丧失立法会议员的资格〔注6〕：

（一）因严重疾病或其他情况无力履行职务；

（二）未得到立法会议主席的同意，连续三个月不出席会议；

（三）丧失或放弃香港特别行政区永久性居民的身份；

（四）破产或经法庭裁定偿还债务而不履行；

（五）在香港特别行政区区内或区外被判犯有刑事罪行，判处入狱一个月以上，并经立法会议出席会议的成员三分之二通过解除其职务；

（六）行为不检或违反誓言而经立法会议出席会议的成员三分之二通过谴责。

第四节 司法机关

第八十条 香港特别行政区各级法院是香港特别行政区的司法机关，行使香港特别行政区的审判权。

第八十一条 香港特别行政区设立终审法院、高等法院、区域法院、裁判署法庭和其他专门法庭。高等法院设上诉法庭和原讼法庭。

原在香港实行的司法体制，除因设立香港特别行政区终审法院而产生变化外，予以保留。

第八十二条 香港特别行政区的终审权属于香港特别行政区终审法院。终审法院可根据需要邀请其他普通法适用地区的法官参加审判。

第八十三条 香港特别行政区各级法院的组织和职权由法律规定。

第八十四条 香港特别行政区法院依照本法第十七条所规定的适用于香港特别行政区的法律审判案件，其他普通法适用地区的司法判例可作参考。

第八十五条 香港特别行政区法院独立进行审判，不受任何干涉，司法人员履行审判职责的行为不受法律追究。

第八十六条 原在香港实行的陪审制度的原则予以保留。

第八十七条 香港特别行政区的刑事诉讼和民事诉讼中保留原在香港适用的原则和当事人享有的权利。

第八十八条 香港特别行政区法院的法官〔注7〕，根据当地法官和法律界及其他方面知名人士组成的独立委员会推荐，由行政长官任命。

第八十九条 香港特别行政区法院的法官如无力履行职责或行为不检，行政长官可根据终审法院首席法官任命的不少于三名当地法官组成的审议庭的建议，予以免职。

香港特别行政区终审法院的首席法官如无力履行职责或行为不检，行政长官可任命不少于五名当地法官组成的审议庭进行审议，并可根据其建议，依照本法规定的程序，予以免职。

第九十条 除本法第八十八条和第八十九条规定的程序外，香港特别行政区终审法院的法官和高等法院首席法官的任命或免职，还须由行政长官征得香港特别行政区立法会议同意，并报全国人民代表大会常务委员会备案。

第九十一条 香港特别行政区法官以外的其他司法人员原有的任免制度继续保持。

第九十二条 香港特别行政区的法官和其他司法人员，应根据本人的司法和专业才能选用，并可从其他普通法适用地区聘用。

第九十三条 香港特别行政区成立前在香港任职的法官和其他司法人员均可留用，其年资予以保留，薪金、津贴、福利待遇和服务条件不低于原来的标准。

第九十四条 对退休或符合规定离职的法官和其他司法人员，包括香港特别行政区成立前已退休或离职者，不论其所属国籍或居住地点，香港特别行政区政府按不低于原来的标准，向他们或其家属支付应得的退休金、酬金、津贴和福利费。

第九十五条 香港特别行政区可与全国其他地区的司法机关通过协商依法进行司法方面的联系和相互提供协助。

第九十六条 在中央人民政府协助或授权下，香港特别行政区政府可与外国就司法互助关系作出适当安排。

第五节 区域组织

第九十七条 香港特别行政区可设立非地方政权性的区域组织，接受香港特别行政区政府就有关地区管理和其

他事务的咨询，或负责提供文化、康乐、环境卫生等服务〔注8〕。

第九十八条 区域组织的职权和组成方法由法律规定。

第六节 公务人员

第九十九条 在香港特别行政区政府各部门任职的公务人员必须是香港特别行政区永久性居民。本法第一百零一条规定者或法律规定某一薪级点以下者不在此限。

公务人员必须尽忠职守，对香港特别行政区政府负责。

第一百条 香港特别行政区成立前在香港政府各部门，包括警察部门任职的公务人员均可留用，其年资予以保留，薪金、津贴、福利待遇和服务条件不低于原来的标准。

第一百零一条 香港特别行政区政府可任用原香港公务人员中的或持有香港特别行政区永久性居民身份证的英籍和其他外籍人士担任政府部门的各级公务人员，但下列各职级的官员必须由香港特别行政区永久性居民中的中国公民担任：各司司长、副司长，各局局长，廉政专员，审

计署署长，保安局、铨叙局副局长，警务处长、副处长，外事处长、副处长，入境事务处长，海关总监。

香港特别行政区政府还可聘请英籍和其他外籍人士担任政府部门的顾问；必要时并可从香港特别行政区以外聘请合格人员担任政府部门的专门和技术职务。上述外籍人士只能以个人身份受聘，对香港特别行政区政府负责。

第一百零二条 对退休或符合规定离职的公务人员，包括香港特别行政区成立前退休或符合规定离职的公务人员，不论其所属国籍或居住地点，香港特别行政区政府按不低于原来的标准向他们或其家属支付应得的退休金、酬金、津贴和福利费。

第一百零三条 公务人员应根据本人的资格、经验和才能予以任用和提升，香港原有关于公务人员的招聘、雇用、考核、纪律、培训和管理制度的制度，包括负责公务人员的任用、薪金、服务条件的专门机构，除有关给予外籍人员特权待遇的规定外，予以保留。

第一百零四条 香港特别行政区行政长官、主要官员、行政会议成员、立法会议成员、各级法院法官和司法人员在就职时必须依法宣誓。

第五章 经济

第一节 财政和税收

第一百零五条 香港特别行政区的财政独立。

香港特别行政区的财政收入全部用于自身需要，不上缴中央人民政府。

第一百零六条 香港特别行政区政府财政预算，以量入为出为原则。

香港特别行政区政府财政总收入和财政总支出，在若干财政年度内，保持基本平衡。

香港特别行政区财政预算收支的增长率，在若干财政年度内，以不超过本地生产总值的增长率为原则。

第一百零七条 香港特别行政区实行独立的税收制度。

中央人民政府不在香港特别行政区征税。

第一百零八条 香港特别行政区继续实行低税政策。

第一百零九条 香港特别行政区的税种、税率和税收宽免，由法律规定。

第二节 金融和货币

第一百一十条 香港特别行政区政府提供条件，并采取措，以保持香港特别行政区的国际金融中心地位。

第一百一十一条 香港特别行政区继续实行自由开放的货币金融政策。货币金融制度由法律规定。

第一百一十二条 香港特别行政区不实行外汇管制政策。继续开放外汇、黄金、证券市场和期货市场。

第一百一十三条 香港特别行政区政府保障一切资金的流动和进出自由。

第一百一十四条 香港特别行政区政府保障金融企业和金融市场的经营自由，并依法进行管理和监督。

第一百一十五条 港元为香港特别行政区法定货币，继续流通，自由兑换。

第一百一十六条 港币的发行权属于香港特别行政区政府。港币的发行制度，由法律规定。

港币的发行，必须有不低于百分之百的可自由兑换外币的准备金。

香港特别行政区政府，在确知港币的发行基础健全和发行安排符合保持港币稳定的条件下，可授权指定银行根

据法定权限发行或继续发行港币。

第一百一十七条 香港特别行政区的外汇基金，由香港特别行政区政府管理和支配，主要用于调节港元汇价。

第三节 对外经济贸易

第一百一十八条 香港特别行政区继续实行自由对外经济贸易政策。

香港特别行政区政府保障货物、无形财产和资本的流动自由。

外来投资受法律保护。

第一百一十九条 香港特别行政区继续为自由港。

香港特别行政区除法律另有规定外不征收关税。

第一百二十条 香港特别行政区为单独的关税地区。

香港特别行政区可以“中国香港”的名义参加关税和贸易总协定、关于国际纺织品贸易安排等有关国际组织和国际贸易协定，包括优惠贸易安排。

第一百二十一条 香港特别行政区所取得的和以前取得仍继续有效的出口配额、关税优惠和达成的其他类似安排，全由香港特别行政区享有。

第一百二十二条 香港特别行政区根据当时的产地规则，可对本地产品签发产地来源证。

第四节 工商业和其他行业

第一百二十三条 香港特别行政区对工商业和其他行业，实行自由、开放的政策。

第一百二十四条 香港特别行政区政府提供环境和条件，鼓励工业投资、技术进步并开拓新兴产业。

第一百二十五条 香港特别行政区政府制定适当政策，促进和协调商业、旅游业、房地产业、运输业、公用事业、服务性行业、渔农业等各类行业的发展。

第五节 土地契约

第一百二十六条 香港特别行政区政府可自行制定有关土地的开发、管理和使用的政策。

第一百二十七条 香港特别行政区成立前已批出、决定、或续期的超越一九九七年六月三十日年期的所有土地契约和与土地契约有关的一切权利，均按香港特别行政区的法律继续予以承认和保护。

第一百二十八条 从一九八五年五月二十七日至一九

九七年六月三十日期间批出的，或原没有续期权利而获得续期的，超出一九九七年六月三十日年期而不超过二〇四七年六月三十日的一切土地契约，承租人从一九九七年七月一日起不补地价，但需每年缴纳相当于当日该土地应课差饷租值百分之三的租金。此后，随应课差饷租值的改变而调整租金。

第一百二十九条 原旧批约地段、乡村屋地、丁屋地和类似的农村土地，如该土地在一九八四年六月三十日的承租人，或在该日以后批出的丁屋地承租人，其父系为一八九八年在香港的原有乡村居民，只要该土地的承租人仍为该人或其合法父系继承人，原定租金维持不变。

第一百三十条 香港特别行政区成立以后满期而没有续期权利的土地契约，由香港特别行政区自行制定法律和政策处理。

第六节 航 运

第一百三十一条 香港特别行政区保持原在香港实行的航运经营和管理体制。

香港特别行政区政府自行规定在航运方面的具体职能和责任。

第一百三十二条 香港特别行政区经中央人民政府授权继续进行船舶登记，并可根据其自定的法律以“中国香港”的名义颁发有关证件。

第一百三十三条 除外国军用船只进入香港特别行政区须经中央人民政府特别许可外，其他船舶可根据香港特别行政区法律进出其港口。

第一百三十四条 香港特别行政区的私营航运企业及与航运有关的企业和私营集装箱码头，可继续自由经营。

第七节 民用航空

第一百三十五条 香港特别行政区政府应提供条件和采取措施，以保持其国际和区域航空中心的地位。

第一百三十六条 香港特别行政区继续实行原在香港实行的民用航空管理制度，并按中央人民政府关于飞机国籍标志和登记标志的规定，设置自己的飞机登记册。

外国军用航空器进入香港特别行政区须经中央人民政府特别许可。

第一百三十七条 香港特别行政区自行负责民用航空的日常业务和技术管理，包括机场管理，在香港特别行政区飞行情报区内提供空中交通服务，和履行国际民用航空

组织的区域性航行规划程序所规定的其他职责。

第一百三十八条 中央人民政府经与香港特别行政区政府磋商作出安排，为在香港特别行政区注册并以香港为主要营业地的航空公司和中华人民共和国的其他航空公司，提供香港特别行政区和中华人民共和国其他地区之间的往返航班。

第一百三十九条 凡涉及中华人民共和国其他地区与其他国家和地区的往返并经停香港特别行政区的航班，和涉及香港特别行政区与其他国家和地区的往返并经停中华人民共和国其他地区航班的民用航空运输协定，由中央人民政府签订。

中央人民政府在签订本条第一款所指国际民用航空运输协定时，应考虑香港特别行政区的特殊情况和经济利益，并与香港特别行政区政府磋商。

中央人民政府在与外国政府商谈有关本条第一款所指航班的安排时，香港特别行政区政府的代表可作为中华人民共和国政府代表团的成员参加。

第一百四十条 香港特别行政区政府经中央人民政府具体授权可：

(一) 续签或修改原有的民用航空运输协定和协议；

(二) 谈判签订新的民用航空运输协定，为在香港特别行政区注册并以香港为主要营业地的航空公司提供航线，以及过境和技术停降权利；

(三) 与没有签订民用航空运输协定的外国或地区谈判签订临时协议。

不涉及往返、经停中国内地而只往返、经停香港的定期航班，均由本条所指的民用航空运输协定或临时协议予以规定。

第一百四十一条 中央人民政府授权香港特别行政区政府：

(一) 与其他当局商谈并签订有关执行本法第一百四十条所指民用航空运输协定和临时协议的各项安排；

(二) 对在香港特别行政区注册并以香港为主要营业地的航空公司签发执照；

(三) 依照本法第一百四十条所指民用航空运输协定和临时协议指定航空公司；

(四) 对外国航空公司除往返、经停中国内地的航班以外的其他航班签发许可证。

第一百四十二条 在香港特别行政区注册并以香港为主要营业地的航空公司和与民用航空有关的行业，可继续

经营。

第六章 教育、科学、文化、体育、 宗教、劳工和社会服务

第一百四十三条 香港特别行政区保持原在香港实行的教育制度。

第一百四十四条 香港特别行政区政府自行制定教育政策，包括教育体制和管理、教学语言、经费分配、考试制度、学位制度和承认学历等政策。

社会团体和私人可依法在香港特别行政区兴办各种教育事业。

第一百四十五条 各类院校均可保留其自主性并享有学术自由，可继续从香港特别行政区以外招聘教职员和选用教材。宗教团体所办的学校可继续提供宗教教育，包括开设宗教课程。

学生享有选择院校和在香港特别行政区以外求学的自由。

第一百四十六条 香港特别行政区政府促进医疗卫生服务和中、西医药的发展，鼓励社会团体和私人提供各种医疗卫生服务。

第一百四十七条 香港特别行政区政府自行制定科学技术政策。香港特别行政区以法律保护科学技术的研究成果、专利和发明创造。

香港特别行政区政府自行确定适用于香港的各类科学、技术标准和规格。

第一百四十八条 香港特别行政区政府自行制定文化政策，保护作者在文学艺术创作中所获得的成果和合法权益。

第一百四十九条 香港特别行政区政府不干预宗教团体的内部事务，不限制与香港特别行政区法律没有抵触的宗教活动。

宗教团体依法享有财产的取得、使用、处置、继承以及接受资助的权利。财产方面的原有权益仍予保持和保护。

宗教团体可按原有办法继续兴办宗教院校、其他学校、医院和福利机构以及提供其他社会服务。

第一百五十条 香港特别行政区的宗教组织和教徒可与其他地方的宗教组织和教徒保持和发展关系。

第一百五十一条 香港特别行政区政府自行制定办法以审核和颁授各种专业的执业资格。原在香港实行的审核

和颁授办法可予保留和改进。

在香港特别行政区成立前已取得专业和执业资格者，可保持原有的资格。

香港特别行政区保留在特别行政区成立前已承认的专业和专业团体，所承认的专业团体可自行审核和颁授专业资格。

香港特别行政区政府可根据社会发展需要并咨询有关方面的意见，承认新的专业和专业团体。

第一百五十二条 香港特别行政区政府自行制定体育政策。香港原有的民间体育团体可依法继续存在和发展。

第一百五十三条 香港特别行政区保持原在香港实行的对教育、医疗、文化、艺术、康乐、体育、社会福利、社会工作等机构的资助政策。原在香港各资助机构任职的人员均可根据原有制度继续受聘。

第一百五十四条 香港特别行政区政府保持原有的社会福利制度，并根据经济条件和社会需要，自行制定其发展和改进的政策。

第一百五十五条 香港特别行政区从事社会服务的志愿团体可依法自主自行决定其服务方式。

第一百五十六条 香港特别行政区根据经济发展、社

会需要和劳资协商的实际情况，自行制定有关劳工的法律和政策。

第一百五十七条 香港特别行政区的教育、科学、技术、文化、体育、专业、社会福利等方面的民间团体和宗教团体与内地相应的团体的关系，应遵守互不隶属、互不干涉和互相尊重的原则。

第一百五十八条 香港特别行政区的教育、科学、技术、文化、体育、卫生、专业、劳工、社会福利和宗教等组织可同世界各国、各地区及有关国际组织保持和发展关系，各该组织可根据需要冠用“中国香港”的名义，参与上述活动。

第七章 对外事务

第一百五十九条 香港特别行政区政府的代表，可作为中华人民共和国政府代表团的成员，参加由中央人民政府进行的与香港特别行政区直接有关的外交谈判。

第一百六十条 香港特别行政区可在经济、贸易、金融、航运、通讯、旅游、文化、体育等领域以“中国香港”的名义，单独地同世界各国、各地区及有关国际组织保持和发展关系，签订和履行有关协议。

第一百六十一条 对以国家为单位参加的、与香港特别行政区有关的、适当领域的国际组织和国际会议，香港特别行政区可派遣代表作为中华人民共和国代表团的成员或以中央人民政府和上述有关国际组织或国际会议允许的身份参加，并以“中国香港”的名义发表意见。

香港特别行政区可以“中国香港”的名义参加不以国家为单位参加的国际组织和国际会议。

对中华人民共和国已参加而香港也以某种形式参加了的国际组织，中央人民政府将采取必要措施使香港特别行政区以适当形式继续保持在这些组织中的地位。

对中华人民共和国尚未参加而香港已以某种形式参加的国际组织，中央人民政府将根据需要使香港特别行政区以适当形式继续参加这些组织。

第一百六十二条 中华人民共和国缔结的国际协议，中央人民政府可根据香港特别行政区的情况和需要，在征询香港特别行政区政府的意见后，决定是否适用于香港特别行政区。

中华人民共和国尚未参加但已适用于香港的国际协议仍可继续适用。中央人民政府根据需要授权或协助香港特别行政区政府作出适当安排，使其他有关国际协议适用于

香港特别行政区。

第一百六十三条 中央人民政府授权香港特别行政区政府依照法律给持有香港特别行政区永久性居民身份证的中国公民签发中华人民共和国香港特别行政区护照，给在香港特别行政区的其他合法居留者签发中华人民共和国香港特别行政区的其他旅行证件。上述护照和证件，前往各国和各地区有效，并载明持有人有返回香港的权利。

世界各国或各地区的人入境、逗留和离境，香港特别行政区政府可实行出入境管制。

第一百六十四条 中央人民政府协助或授权香港特别行政区政府与各国或各地区缔结互免签证协议。

第一百六十五条 香港特别行政区可根据需要在外国设立官方或半官方的经济和贸易机构，报中央人民政府备案。

第一百六十六条 外国在香港特别行政区设立领事机构或其他官方、半官方机构，须经中央人民政府批准。

已与中华人民共和国建立正式外交关系的国家在香港设立的领事机构和其他官方机构，可予保留。

尚未与中华人民共和国建立正式外交关系的国家在香港设立的领事机构和其他官方机构，可根据情况允许保留

或改为半官方机构。

尚未为中华人民共和国承认的国家，只能在香港设立民间机构。

第八章 香港特别行政区的区旗、区徽

第一百六十七条 香港特别行政区除悬挂国旗和国徽外，可使用区旗和区徽（待拟）。

第一百六十八条 香港特别行政区的区旗（待拟）。

第一百六十九条 香港特别行政区的区徽（待拟）。

第九章 本法的解释和修改

第一百七十条 本法的解释权属于全国人民代表大会常务委员会。

全国人民代表大会常务委员会如对本法的条款作出解释，香港特别行政区法院在引用该条款时，即应以全国人民代表大会常务委员会的解释为准，但在此以前作出的判决不受影响。

香港特别行政区法院在审理案件时可对本法的条款进行解释。如案件涉及本法关于国防、外交和其他属于中央人民政府管理的事务的条款的解释，香港特别行政区法院

在对案件作出终局判决前，应提请全国人民代表大会常务委员会对有关条款作出解释。

全国人民代表大会常务委员会在对本法进行解释前征询其所属的香港特别行政区基本法委员会的意见。

第一百七十一条 本法的修改权属于全国人民代表大会。

本法的修改提案权属于全国人民代表大会常务委员会、国务院和香港特别行政区。香港特别行政区的修改议案，须经香港特别行政区的全国人民代表大会代表三分之二的多数、香港特别行政区立法机关全体成员三分之二多数和香港特别行政区行政长官同意后，交由香港特别行政区出席全国人民代表大会的代表团向全国人民代表大会提出。

本法的修改议案在列入全国人民代表大会的议程前，先由香港特别行政区基本法委员会研究并提出意见。

本法的任何修改，均不得与中华人民共和国对香港既定的基本方针政策相抵触。

第十章 附 则

第一百七十二条 香港特别行政区第一届政府和立法

会议根据体现国家主权，平稳过渡的原则，按照附件三《香港特别行政区第一届政府和立法会议的产生办法》的规定成立。

第一百七十三条 香港特别行政区成立时，香港原有法律除由全国人民代表大会常务委员会宣布为与本法相抵触者外，采用为香港特别行政区法律，如以后发现有的法律与本法相抵触，可依照本法规定的程序撤销或修订。

在香港原有法律下有效的文件、证件、契约和权利义务，在不抵触本法的前提下继续有效，受香港特别行政区法律的承认和保护。

注释：

注1：委员们建议，在全国人大颁布基本法时，由国务院发布香港特别行政区的行政区域图。

注2：委员们建议，在全国人民代表大会常务委员会下设立一个咨询机构，暂定名为香港特别行政区基本法委员会，由内地和香港人士参加，负责就基本法的解释和修改、香港特别行政区制定的法律是否符合基本法及法定程序、以及少数全国性法律在香港的适用等问题，向全国人民代表大会或其常务委员会提供意见。这个委员会的成立和隶属关系以及其职责、组成等须待全国人民代表大

会决定。

注3：关于香港特别行政区行政机关各部门的名称，暂定如下：1.政务司、财政司、律政司三个主要司仍称为“司”，其主管分别称为政务司司长、财政司司长、律政司司长；2.有拟定政策权力的部门称为“局”，如金融局、工商局、交通运输局、教育统筹局、铨叙局等；3.负责行政事务而不拟定政策的部门称为“处”，如警务处、外事处、入境事务处等；4.其工作较有独立性质的部门称为“署”，如廉政公署、审计署等。

注4：委员们认为，主要官员一般应从公务员中挑选，但也可从公务员以外的社会人士中挑选，后者担任主要官员期间，按合约公务员待遇，任满后即脱离公职；主要官员工作调动和增加司级官员编制须报中央人民政府批准。

注5：委员们同意，立法会议的英文译名仍为 LEGISLATIVE-COUNCIL。

注6：关于立法机关成员被任命为行政机关的主要官员后，是否要辞去其立法机关成员职务，留待研究。

注7：香港特别行政区法院的法官指区域法院以上的法官，其他司法人员指裁判署法庭及专门法庭的审判人员，其他在司法组织工作的人员均属公务员。

注8：委员们认为，如果保留三层架构，则区议会仍应为地区性咨询机构。

附件一：香港特别行政区行政长官的产生办法

方案一：

1. 香港特别行政区行政长官在当地通过一个有广泛代表性的选举团选举产生。

2. 选举团由香港各界人士代表组成，其成员包括：立法机关的成员、各区域组织的代表、各法定团体和永久性非法定团体的代表、各类功能界别的代表（包括工商、金融、专业人士、教育、劳工、宗教、社会服务及公务员等界别），共约600人。

3. 在选举团内的各个社团和组织可按内部的规定，用民主程序选出其代表。所选出的代表将以个人身份投票，一人不得兼代表多个组织，任期只维持到选举完成即解散。

4. 选举团设提名委员会，由选举团成员互选20人组成。提名委员会负责提名行政长官候选人三名。提名委员会成员不能作为行政长官候选人，亦无权投票选举行政长官。

5. 选举团根据提名委员会的提名进行投票，候选人必须获得半数票才能当选，如首轮投票无人获得过半数票，

则就得票最多的两名候选人进行次轮投票。选举团选举产生的行政长官人选报请中央人民政府任命。

6. 选举细则由香港特别行政区政府以法律规定。

方案二：

1. 香港特别行政区行政长官由不少于十分之一的立法机关成员提名，经由全港性的普及而直接的选举产生。

2. 立法机关成员每人只可提名一人为行政长官候选人。

3. 行政长官的选举必须为真正、定期的选举。选举权必须普及而平等，选举应以无记名投票法进行，以保证选民意志的自由表现。

4. 当选的行政长官如为立法机关、行政机关或司法机关的成员，则须在当选后立即辞去其原有职务。

5. 行政长官的选举细则由香港特别行政区的法律予以规定。

方案三：

1. 香港特别行政区行政长官由功能选举团一人一票方式选举产生。

2. 功能选举团的成员不超过六百人，由香港特别行政区永久性居民并属于对政府运作、社会服务有影响力的工

商、金融、专业、劳工等团体的人士互选出代表组成，其比例为：

工商、金融团体	25%
专业团体	35%
劳工团体	10%
宗教、社会及慈善服务机构	15%
街坊组织、小贩团体	15%

3. 凡符合本法第四十五条规定的资格，并得到五十名香港永久性居民提名的人，均可成为香港特别行政区行政长官的候选人。

4. 选举团的成员不得成为提名人或候选人；提名人不得参加选举团或当候选人；候选人不得为选举团的成员或其他候选人的提名人。

方案四：

1. 首数届（约二、三届）行政长官由顾问团协商产生。

顾问团由顾问50—100人组成，顾问人选由香港各界提名，经行政会议甄选，再由行政长官提请中央批准后任命（顾问应为政制专责顾问，有别于其他专业顾问）。

每届顾问团必须在前一届行政长官任期届满前六个月

产生。但如经顾问团及中央同意该届行政长官继续连任，则不必产生下一届顾问团。

2.以后各届由选举团选举产生。

选举团由已退休的历届立法会议成员、行政会议成员、行政长官和曾经中央任命的主要官员等组成，须达到250人才能成立，以后每届陆续增加，但最高人数不超过500人，如超过时以出任的先后依次退出，如有出任先后相同时，以年长者先行退出。

行政长官候选人由顾问团协商提名三人，经中央同意后，交选举团选举产生。

方案五：

1.行政长官由“香港特别行政区行政长官提名委员会”经协商或协商后投票程序提名三人，全港选民一人一票普选产生。

2.“香港特别行政区行政长官提名委员会”由香港永久性居民组成。必须具有广泛代表性，成员包括全国人民代表大会香港地区代表、全国政治协商会议香港地区委员、立法机构及区域组织代表、各阶层界别人士的代表。

3.“行政长官提名委员会”组成的比例如下：

工商、金融界代表	25%
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专业团体代表	25%
劳工、基层、宗教团体代表	25%
立法机关成员	12%
区域组织成员	8%
人大代表、政协委员	5%

4. “行政长官提名委员会”负责制定协商或投票程序，提名行政长官候选人，提名委员会的委员不得任行政长官候选人。

5. “行政长官提名委员会”成员由各界法定团体或永久性非法定团体选举、推举或协商产生。提名委员会的章程由香港特别行政区制定法律规定。

6. 以一人一票普选方式选举行政长官的选民登记、投票程序等项，由香港特别行政区以法律规定。

附件二：香港特别行政区立法会议的产生办法

方案一：

1. 香港特别行政区立法机关由80人组成，比例如下：功能团体选出的成员占50%，按地区直接选出的成员占25%，选举团选出的成员占25%。

2. 选举团和提名委员会的组成与《香港特别行政区行政长官的产生办法》方案一的规定相同，提名委员会的主席由行政长官担任。

3. 在上述三种选举方式中，每个选民只能参加其中的一种，并只能在一种选举方式中作为候选人。

4. 立法机关成员任期四年，每两年改选一半。功能团体每两年选一半席位，地区直接选举和选举团选举则轮流两年选举一次（地区直接选举与行政长官的选举同一年）。

5. 地区性直接选举——全港将划分为十个选区，每区两席，以得票最多的两位当选。

6. 选举细则由香港特别行政区政府以法律规定。

方案二：

1. 香港特别行政区立法机关组成安排如下：

不少于百分之五十经由普及而直接的选举产生；不多

于百分之二十五经由功能团体选举产生；不多于百分之二十五经由区域组织（即区议会、市政局和区域市政局或相类似的机构）选举产生。

2.立法机关的直接选举必须为真正、定期的选举。选举权必须普及而平等，选举应以无记名投票法进行，以保证选民意志的自由表现。

3.立法机关的选举细则由香港特别行政区的法律予以规定。

方案三：

1.香港特别行政区立法机关成员共60人。

2. 30%（即18人）的成员由顾问团推选非顾问担任，其中至少三分之一（即6人）为主要官员，其余（约三分之二）为行政会议成员及社会上其他人士。（顾问团产生的立法机关成员，必须有行政会议成员和主要官员，以贯通行政和立法机关的联系）。

3. 40%（即24人）由功能团体选出。

4. 30%由各地区直接选出。直接选举产生的立法机关成员人数，与顾问团产生的立法机关成员人数和产生时间须约略相同，以保持平衡。（如顾问团产生办法不被采用，则不能有地区直选）。

5.上述3、4两项的详细选举办法，由法律规定。

方案四：

1.香港特别行政区立法机关的组成：

工商界	30%
专业人士	25%
基层组织	20%
地区性普选产生	25%

2.组成的比例分为四大类，第一、第二、第三三个大类，再分为各个界别，每个界别的划分及所产生的立法机关成员的人数，由香港特别行政区以法律规定。

三个大类的立法机关成员均依法从各法定团体中产生。

各团体根据名额的分配，自行决定采取下列方式选出立法机关成员：（一）各会员以一人一票的直接选举选出；（二）团体会员以每一单位一票的间接选举选出；（三）会员大会授权理事会以间接选举选出。

3.地区性普选的选区划分、选民登记、投票程序、候选人提名方式等项，由香港特别行政区以法律规定。

（说明）1.提出第1、3两种方案的委员主张，他们方案中立法机关成员的各种产生办法是“一揽子”办法，即是否有地域性直

接选举，须视其他两种选举方式是否一并被接受为条件。

2.有些委员建议，香港特别行政区立法机关的成员全部由功能团体选举产生。功能团体选举的办法与附件--方案三相同。

3.有的委员提出，香港特别行政区立法机关的成员全部由地域性的、一人一票的直接选举方式产生。立法机关的选举必须为真正、定期之选举，选举权必须普及而平等，选举应以无记名投票法进行，以保证选民意志的自由表现。

4.有的委员提出，一人一票的普及选举方法应和国籍问题一起考虑，并必须研究已经移居外国（不一定已取得外国籍）的原香港永久性居民的选举权和被选举权。

附件三：香港特别行政区第一届政府和立法会议的产生办法

方案一：

1. 在一九九六年内，全国人民代表大会设立香港特别行政区筹备委员会，负责筹备成立香港特别行政区的有关事宜，决定产生第一届政府的具体办法。筹备委员会由内地和不少于百分之五十的香港委员组成，主任委员和委员由全国人民代表大会常务委员会委任。

2. 香港特别行政区筹备委员会负责筹组“香港特别行政区第一届政府推选委员会”。

“推选委员会”全部由香港永久性居民组成，必须具有广泛代表性，成员包括中华人民共和国全国人民代表大会香港地区代表、全国政治协商会议香港地区委员、香港特别行政区成立前曾在香港行政、立法、咨询机构任职并有实际经验的人士和各阶层界别中具有代表性的人士。

“推选委员会”组成的比例，建议暂定如下：

工商、金融界人士	25%
专业人士	25%
劳工、基层、宗教界人士	25%

原政界人士 20%

人大代表、政协委员 5%

3. “推选委员会”拟定程序，在当地以协商方式、或协商后提名选举，推举第一任行政长官人选，报中央人民政府任命，第一任行政长官的任期与正常任期相同。

4. 第一届香港特别行政区政府由香港特别行政区行政长官按本法规定负责筹组。

5. 香港特别行政区第一届（或临时）立法机关由“推选委员会”选举产生，原香港立法局议员都可以作为香港特别行政区第一届（或临时）立法机关的候选人。

香港特别行政区第一届（或临时）立法机关成员的任期为两年。

6. 香港特别行政区第一任行政长官于一九九七年七月一日宣誓就职。

香港特别行政区第一届政府和立法机关于一九七七年七月一日同时成立。

方案二：

本条附件内容暂不作规定，经广泛咨询和详加研究后再定。

附：

各专题小组的部分委员对本小组 所拟条文的意见和建议汇编

〔第一章〕

第二条

1.有的委员建议改为：“全国人民代表大会授权香港特别行政区按照本法的规定实行高度自治。对本法实施的监督权属于全国人民代表大会常务委员会。凡逾越本法所授之权力的行政、立法和司法行为均可由全国人民代表大会常务委员会宣布无效”。

2.还有的委员建议改为：“除外交和国防事务属中央人民政府管理外，香港特别行政区享有高度的自治权”。

第十条

有的委员建议，第一款最后一句改为：“均以本法的规定为最终的依据”，并将第二款单列一条。

〔第二章〕

第十三条

有的委员建议，关于驻军人员犯罪如何处理应有法律规定。

第十六条 第三款

1. 有的委员建议改为：“全国人民代表大会常务委员会在咨询香港特别行政区基本法委员会后，如果认为香港特别行政区的任何法律有不符合本法或法定程序的可能，可将有关法律转交香港特别行政区的终审法庭审议。若终审法庭认为有关法律之部分或全部不符合本法或法定程序，可宣布该法律之有关部分或全部无效，但其失效无溯及力”。

2. 有的委员建议，第十六条第三款最后一句改为：“该法律的失效除涉及刑事和宪制问题外无溯及力”。

第十七条

有的委员建议改为：“在香港特别行政区实行的法律为本法，以及本法总则第八条规定的香港原有法律和香港特别行政区立法机关制订的法律。

全国人民代表大会和全国人民代表大会常务委员会制定的法律，除有关国防、外交并且按本法规定不属于香港特别行政区高度自治范围者外，不在香港特别行政区实施。

上述有关国防、外交的法律，凡须在香港特别行政区实施的，由全国人民代表大会常务委员会指令香港特别行政区立法机关立法实施。

除紧急情况外，全国人民代表大会常务委员会在发布上述指令前，均事先征询香港特别行政区基本法委员会和香港特别行政区政

府的意见。

香港特别行政区立法机关如未能遵照全国人民代表大会常务委员会的指令行事，全国人民代表大会常务委员会可透过香港特别行政区行政长官将上述法律在香港特别行政区公布实施。

除上述有关国防、外交的法律外，少数有关体现国家统一和领土完整的全国性法律，即本法附件中所列者，适用于香港特别行政区。”

第十八条

有些委员还提出了如下两种方案：

方案一

香港特别行政区法院，除下列（1）至（4）项外，对原香港法院有权审判的案件均继续有权审判：

- （1）中央与香港特别行政区的关系；
- （2）中央行政行为（包括国防、外交）的有效性；
- （3）香港特别行政区政府按本法规定执行有关国防、外交的中央指令时的行政行为的有效性；
- （4）香港特别行政区政府按本法规定在中央授权下自行处理有关对外事务时的行政行为，按香港原有法律属“国家行为”者的有效性及属“国家事实”者的内容。

香港特别行政区法院在审理案件中，凡涉及上述（1）至（4）类问题时，应征询行政长官的意见，行政长官就该等问题发出的证

明文件对法院有约束力。

行政长官在发出上述证明文件前，须取得全国人民代表大会常务委员会或国务院之证明书。

〔说明：上述（1）至（4）类问题不适宜于由一个地方政权下享有终审权的法院审判。〕

方案二

香港特别行政区法院，除继续保持香港原有法律制度和原则对法院审判权所作的限制外，对香港特别行政区的所有案件有审判权。

香港特别行政区法院审理案件中，凡涉及外交、国防的问题时，均根据普通法之原则及判例，征询行政长官的意见，行政长官就该等问题发出的证明文件对法院有约束力。

行政长官在发出上述证明文件前，须取得全国人民代表大会常务委员会或国务院的证明文件。

有关特别行政区法院审理涉及中华人民共和国的机构及权力机关或其人员（包括第二章第十四条及第二十一条所提及者）的案件，以及有关该等机构及权力机关或其人员作出赔偿的规定，由特别行政区的法律予以订明。

第二十条

有的委员建议改为：“具有香港特别行政区永久性居民身份证的中国公民可以依照法律参与国家事务管理。根据全国人民代表大

会常务委员会确定的名额和代表产生办法，由具有香港特别行政区永久性居民身份的中国公民选出同等身份的中国公民为香港特别行政区的全国人民代表大会代表。香港特别行政区的全国人民代表大会代表不得干预香港特别行政区根据本法自行管理的事务”。

〔第三章〕

第二十四条

有的委员建议，本条可改写成：“香港居民在法律面前一律平等。不因国籍、种族、民族、语言、性别、职业、宗教信仰、政见、教育程度、财产状况而受歧视。”

第二十五条

有些委员提议本条改写为：香港特别行政区永久性居民都依照法律享有选举权和被选举权。

第二十七条

有些委员主张采用“香港居民依照法律享有：”的表述。

第三十条

有的委员提出，删去“除因公共安全和追查刑事犯罪的需要，……通讯秘密。”这一句，经小组研究结果，予以保留。

第三十二条

1. 有些委员建议本条加写第三款：“任何人士不应因宗教信仰而受歧视或致使其公民权利受亏损。”

2.有些委员建议本条改写为：“香港特别行政区居民有思想、信念及宗教之自由。此种权利包括保有或采奉自择宗教或信仰之自由，及单独或集体、公开或私自以礼拜、戒律、躬行及讲授表示其宗教或信仰之自由。”

第三十五条

1.有些委员建议删去“合法权益”中的“合法”二字。

2.香港居民是否有权对中央驻港机关及其工作人员的行为向香港法院起诉的问题，居民的基本权利和义务专题小组建议，由有关专题小组在司法管辖问题中加以规定。

第四十二条

有的委员建议将本条规定改为：“香港居民以外的其他人，依法享有本章规定的（除了选举权和被选举权外）香港居民的权利和自由”，经居民的基本权利和义务专题小组研究，“其他人”除不能享受选举权和被选举权外，还有个别的权利，如自由进入香港，也不能享有，因此未改。

〔第四章〕

第四十四条

有的委员建议本条改为：“香港特别行政区行政长官是香港特别行政区的首长和香港特别行政区行政机关的首长，代表香港特别行政区和领导香港特别行政区行政机关，依照本法规定对中央人

民政府、香港特别行政区和香港特别行政区立法机关负责。”

第四十五条

有的委员建议将本条改为：“香港特别行政区行政长官由年满四十周岁，在香港通常居住满二十年，就任前连续居住十年的香港特别行政区永久性居民中的中国公民担任。”

第四十七条

有些委员主张，行政长官的任期须联系立法机关成员的任期来考虑，任期均为四年，行政长官可连任两次。

第四十八条

有些委员提出，行政长官和主要官员退休后的职业限制问题，留待研究。有的委员建议，本条增加“行政长官在就任时必须辞去所有受薪或有报酬之职务”的内容。

第四十九条 第（一）项

有些委员认为，如采用大政府概念，本项应写成“领导香港特别行政区行政机关”。

第四十九条 第（十一）项

有的委员建议，本项改为“批准（或不批准）公职人员出席立法机关所辖的委员会就关于海、陆、空军事宜、香港的安全、中央人民政府对香港特别行政区的管治责任等事宜作证和提供证据。”

第四十九条

有的委员主张本条加进一项：“在按照本法规定执行职务时所

必要的而合理的其他权力”。有的委员主张写为：“行使本法规定的其他权力”。

第五十三条

有的委员主张本条增写第（四）项，即“立法机关全体成员以三分之二多数通过对行政长官的不信任票”；有的委员主张如要这样写，必须是立法机关投不信任票后，行政长官可解散立法机关，如重新选出的立法机关再次投不信任票，行政长官才必须辞职。

第五十五条

有的委员不赞成设立行政会议。

第五十六条

1.有的委员主张，参加行政会议的立法机关成员必须通过立法机关互选产生，社会人士也须经立法机关过半数成员的同意；有的委员主张，如果不是通过互选，则立法机关成员不必参加行政会议。

2.关于行政会议人数及各部份成员是否需要一个比例问题，有的委员主张，行政会议成员全部由主要官员组成；有的委员主张，行政会议的成员不少于半数为立法机关成员。委员们同意暂不作规定，待进一步研究。

第五十九条

有的委员建议，将本条改写为“行政长官经香港特别行政区立法机关批准后可任命审计署署长或将其撤职。审计署署长和其辖下

的审计署根据法律执行职责时，不受任何人士或机关的指令或管制所限制。”

第六十一条

有的委员建议，本条改写为：“行政机关成员包括：（1）行政长官；（2）由行政长官提名，经中央政府任命的主要官员（相当于“司”级官员）；（3）由行政长官和他委任的主要官员所组成的行政局。”

第六十三条

有的委员建议加第六项“在按照本法执行职务时所必要而合理的其他权力。”

第六十五条

有些委员不同意上述条文中“负责”之后用冒号，理由是“负责”的内容比条文所说的广泛。建议本条改为：“香港特别行政区行政机关必须遵守法律，对香港特别行政区立法机关负责。行政机关必须：（一）执行立法机关通过并已生效的法律；（二）定期向立法机关作施政报告；（三）接受立法机关的监察；（四）答复立法机关成员的质询，接受并协助立法机关就专门问题进行调查；（五）征税和公共开支经立法机关批准，接受立法机关对公共开支的运用情况进行监察。”

第六十七条

有些委员建议，第一条加第二款：“香港特别行政区的立法权

属于香港特别行政区立法机关。”有的委员则认为，“香港特别行政区立法权属于香港特别行政区。”

第七十一条

较多委员赞成方案一，有些委员赞成方案二。

第七十二条 第（二）项

有些委员认为应由行政长官决定议程。

第七十三条 第（五）项

有的委员建议改为“对行政机关的工作加以审查和提出质询。”

第七十三条 第（九）项

1.有的委员提出，立法机关经全体成员的四分之一联合动议，并经三分之二多数通过，可提出对行政长官和任何主要官员的不信任案，报请中央人民政府罢免行政长官或有关主要官员。但多数委员不同意。

2.有些委员认为，第（九）项规定的比例太低，文字也有些缺陷，建议将条文改写为：“立法机关全体成员的百分之五十以上如认为行政长官有严重违法或渎职的嫌疑，可提出联合动议，依法组成一个独立的调查委员会，其主席由终审法院首席法官担任，负责进行调查并向立法机关提出报告。如该委员会认为有足够证据构成上述指控，立法机关以全体成员四分之三多数通过，可提出弹劾案，报请中央人民政府决定处理。”

第七十三条

1.有的委员建议加进一项“立法机关及其所辖委员会，有权传召有关人士出席作证和提供证据。”

2.有的委员提出，本条应加进一项规定，立法机关可设立常设委员会和专责委员会。但有的委员认为，这些内容宜在立法机关会议常规中规定。

3.有的委员建议，本条加第十项：“在按照本法执行职务时所必要而合理的其他权力。”

第七十四条

有的委员主张，凡涉及公共开支或公共政策的法律草案，必须由不少于十分之一的立法机关成员联名提出，但不必得到行政长官的书面同意。

第七十五条

有些委员提出，立法机关举行会议的人数可少于半数或不少于三分之一，如法定人数太高，不易召集会议。

第八十五条

有的委员建议，在本条“不受任何干涉”后面加“但就是否逾越本法规定的管辖权问题，受全国人民代表大会常务委员会监督。”

第八十七条

有的委员建议，上述条文中所提到的原则和权利写入附件。

第八十八条

1.有的委员提出，独立委员会的人数不宜太多，推荐时应全体

一致同意。

2.有些委员提出，司法机关的财政独立或专门拨款，在本法中是否可明文规定。

第一百零一条

1.有的委员提出，铨叙局的副局长是否可考虑不一定限制外籍人士担任。

2.有的委员提出，入境事务处处长和海关总监不是司级官员，是否需要限制可研究。

第一百零三条

有的委员主张，在本条的最后加下列一句：“对上述制度，香港特别行政区政府可根据实际情况，为提高工作效率和公务人员的素质，依法加以发展和改进”。

第一百零四条

有的委员建议，本条宜放入总则。多数委员主张暂作为第一百零四条，待总体工作小组通盘考虑后再作决定。

〔第五章〕

第一百零六条

有些委员认为，第二款可不写进基本法。

第一百零八条

有的委员认为，本条可不写进基本法。

第一百一十二条

- i. 有的委员主张，本条应加“外币”。
2. 有的委员建议，在期货市场前加“商品”两字。

第一百三十六条

“外国军用航空器”包括什么，经济专题小组建议再研究加以明确。

〔第九章〕

第一百七十条

有的委员建议改为：“本法的解释权属于全国人民代表大会常务委员会。香港特别行政区法院可以对本法中所有条款进行解释。

本法中关于香港特别行政区自治范围内的条款，全国人民代表大会常务委员会将授权予香港特别行政区法院在审理案件中全权进行解释。

全国人民代表大会常务委员会如对本法中关于香港特别行政区自治范围外的条款作出解释，香港特别行政区法院引用该条款时，即应以全国人民代表大会常务委员会的解释为准，但在审理中的案件和在此以前作出的判决不受影响。

全国人民代表大会常务委员会在对本法进行解释前将先征询香港特别行政区基本法委员会的意见。

本法中第三、四、五、六、十各章的所有条款皆为香港特别行

政区自治范围内的条款。其他各章的条文是否属于香港特别行政区自治范围内可由香港特别行政区法院或全国人民代表大会常务委员会决定。全国人民代表大会常务委员会在作出决定前将先征询香港特别行政区基本法委员会的意见。全国人民代表大会常务委员会的决定为最后的决定。”

第一百七十一条

1.有的委员建议改为：“本法的修改权属于全国人民代表大会。

本法的修改提案权属于全国人民代表大会常务委员会、国务院和香港特别行政区。香港特别行政区的修改议案，须经香港特别行政区立法机关成员三分之二的多数及香港特别行政区行政长官同意后，交由国务院向全国人民代表大会提出。

本法的修改议案在列入全国人民代表大会的议程前，先由香港特别行政区基本法委员会研究并提出意见。本法的任何修改，都不得与序言所述的中华人民共和国对香港既定的基本方针政策相抵触。”

2.有的委员建议第二款改为：“本法的修改提案权属于全国人民代表大会常务委员会、国务院和香港特别行政区。香港特别行政区的修改议案，须经香港特别行政区的全国人民代表大会代表三分之二的多数及香港特别行政区行政长官同意后，交由香港特别行政区出席全国人民代表大会的代表团向全国人民代表大会提出。”

〔第十章〕

第一百七十二条

有的委员建议，本条条文和相应的附件为：

香港特别行政区第一届政府按照附件“香港特别行政区政府产生办法”的规定成立。据此附件的规定产生的第一届行政长官和第一届立法机关成员根据本法第四章的规定产生。唯第一届行政长官的任期须于第一届立法机关成员任期终结后半年结束。

附件：香港特别行政区第一届政府产生办法

1.在一九九六年內，全国人民代表大会常务委员会委任一个“香港特别行政区第一届政府筹备委员会”。筹备委员会成员均为香港永久性居民中的中国公民，主任委员由委员会互选产生。

2.在一九九六年中或年底，第一届政府筹备委员会在香港依照本法选举，经普及而直接的选举产生候任行政长官。

一九九七年七月一日，候任行政长官接受中央人民政府的任命，正式宣誓就职。

3.候任行政长官于一九九七年七月一日前提名香港特别行政区行政机关的各主要官员，报请中央人民政府任命。各主要官员于一九九七年七月一日宣誓就职。

4.一九九七年六月时的香港立法局议员到了七月一日自动成为香港特别行政区第一届立法机关成员，至其任期终结为止。除宣

誓效忠香港特别行政区等仪式外，不作特别安排。

THE DRAFT BASIC LAW OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA
FOR SOLICITATION OF OPINIONS

(With Introduction and Summary)

The Draft Basic Law
of the Hong Kong Special Administrative Region
of the People's Republic of China
for solicitation of opinions
is issued by
the Drafting Committee for the Basic Law

The Introduction and Summary
are compiled by
the Secretariat of the Consultative Committee for the Basic Law

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

April 1983

* This translation is prepared by the Secretariat of the Consultative Committee for the Basic Law. The official English translation will soon be released by the Secretariat of the Drafting Committee for the Basic Law.

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INTRODUCTION

The Government of the People's Republic of China states in Annex I to the Sino-British Joint Declaration that the People's Republic of China shall, upon the resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, establish the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). The National People's Congress (NPC) of the PRC shall enact and promulgate a Basic Law of the HKSAR of the PRC (hereinafter referred to as the Basic Law) in accordance with the Constitution of the PRC, stipulating that after the establishment of the HKSAR the socialist system and socialist policies shall not be practised in the HKSAR and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years.

The Basic Law: the Drafting Process

The third session of the Sixth NPC resolved on 10 April 1985 to establish a drafting committee for the Basic Law of the HKSAR of the PRC to be responsible for the drafting of the Basic Law. The eleventh meeting of the Standing Committee of the Sixth NPC passed the membership list of the Drafting Committee on 18 June 1985. The Drafting Committee comprises fifty-nine members, among whom twenty-three are from various sectors in Hong Kong.

The first session of the Drafting Committee held on 1 July 1985 planned that the drafting of the Basic Law would take five years. In consideration of the fact that the Basic Law will concern the interests and future of the 5.6 million people living in Hong Kong, the drafting of the Basic Law should as far as possible assimilate the opinions of the Hong Kong public at large. Consequently, the Drafting Committee resolved to set up a consultative committee for the Basic Law that has a wide basis of representation, and entrusted the Drafting Committee members residing in Hong Kong with the responsibility of forming this committee.

The Consultative Committee for the Basic Law (CCBL) was established on 18 December 1985, with a membership of 180, drawing representation from various sectors and strata in Hong Kong. The functions of the CCBL are as follows:

- (1) To collect extensively various views and suggestions concerning the Basic Law from different sectors of the community and reflect them to the Drafting Committee. These views and suggestions will, in effect, be reflected to the Standing Committee of the NPC;
- (2) To be consulted by the Drafting Committee; and

- (3) To collate, summarise and analyse, for the reference of the Drafting Committee, views and suggestions collected by the CCBL.

5. To receive and collect the views of the Hong Kong public on the structure of the Basic Law, the survey group of the Drafting Committee visited Hong Kong from 4 January to 5 February 1986. Upon scrutinising the reports of the six group discussions held by the CCBL and considering the opinions of the general public, the Drafting Committee laid down the draft of the structure of the Basic Law at its second plenary session. At the same time, five subgroups on specific topics were formed to draft the provisions of the various chapters of the Basic Law. The CCBL also set up eight special groups to provide opinions and background information on the various chapters for the subgroups of the Drafting Committee. The mainland co-convenors and members of the subgroups visited Hong Kong in 1986 and 1987 to hold exchange sessions with members and advisors of the CCBL as well as people from different sectors.
6. The drafting of the actual provisions began in 1987. After every subgroup meeting, the relevant subgroup co-convenor residing in Hong Kong would conduct a briefing session for the special group of the CCBL concerned. With this arrangement, CCBL members could promptly learn of the latest progress of the drafting and make timely response. During the drafting process, the CCBL carried out extensive consultative activities amongst its members and the public at large. At the end of 1987, fifteen preliminary reports and fifty-seven final reports were submitted by the CCBL for the reference of the Drafting Committee. The number of copies distributed to the public amounts to more than 120,000. When a rough draft of the various chapters was in shape, the fifth plenary session resolved to set up a co-ordinating group, comprising two vice-chairmen, the secretary-general, the deputy secretaries-general and the co-convenors of the subgroups, to be responsible for standardising the wording and revising the contents of the draft. The vice-chairman residing in the mainland from this co-ordinating group visited Hong Kong in October 1987 to receive the views of the CCBL special groups and of the people from various sectors of the community on the overall drafting of the Basic Law.
7. After more than two years of work, the Drafting Committee published at its sixth plenary session a collection of draft provisions of the various chapters prepared by the subgroups of the Drafting Committee. Based on this collection, the co-ordinating group worked out the "Draft Basic Law for Solicitation of Opinions" to be passed and published by the seventh plenary session of the Drafting Committee held on 26-28 April 1988, after which formal consultation on this draft with the people of Hong Kong will commence.

The Process of Legislation

8. According to Article 62 of the Constitution of the PRC, the Basic Law of the HKSAR will be a basic statute of the State, enacted by the NPC. The process of enacting basic statutes by the NPC includes the following procedures: motion, examination, approval and publication. The Drafting Committee, being a working body set up by the NPC for drafting the Basic Law, is responsible to the NPC, or to the Standing Committee of the NPC when the NPC is not in session. The "Draft Basic Law for Solicitation of Opinions" revised by the Drafting Committee will be submitted to the Standing Committee of the NPC for examination. With the approval upon examination of the Standing Committee of NPC, the draft will become a piece of proposed legislation. The proposed legislation Law submitted to the NPC by its Standing Committee will be equivalent to bill. After being proposed to the NPC by its Standing Committee and included in the agenda on the decision of the Presidium, the proposed legislation will be examined by the deputies to the NPC. Should there be any suggested amendments to the proposed legislation under examination, the meeting of the Presidium or delegation leaders will decide whether the amendments will be accepted. The suggested amendments will then be put to a vote. After being passed by a majority of the total number of deputies to the NPC, the Basic Law will be promulgated by the President of the PRC and take effect formally as law.

Consultation on the Basic Law

9. There will be two rounds of comprehensive consultation upon the completion of the "Draft Basic Law for Solicitation of Opinions". The first round is from May to September 1988, during which the Drafting Committee will openly solicit opinions from the general public regarding the consultation draft. After conducting repeated discussions on the opinions thus collected, and making any necessary amendments, the Drafting Committee will submit the proposed legislation to the Standing Committee of the NPC for examination. The second round of consultation to be launched in 1989 will concentrate on the proposal itself. This is another open solicitation of opinions from different sectors after the proposed legislation is passed and published by the Standing Committee of the NPC. It is hoped that the proposal could be further perfected before its formal submission to the NPC.
10. The objectives of the CCBL are to act as a bridge for liaison and communication between various sectors of the Hong Kong community and the Drafting Committee, and to carry out consultative activities in Hong Kong. According to the plans of the CCBL, during the five-month consultation period for the "Draft Basic Law for Solicitation of Opinions", discussions and extensive consultation will be held in five

phases according to the contents of draft Basic Law:

Phases	Topics for Consultation
1	Relationship between the Central Government and the HKSAR
2	Fundamental rights and duties of inhabitants
3	Political structure
4	Economy
5	Education, science, culture, sports, religion, labour and social services

Regarding the consultation on the draft Basic Law, the CCBL adopts the following objectives:

- (1) To collect opinions and suggestions of all kinds, including the rationales regarding these opinions and suggestions;
- (2) To ensure that all of the contents of the consultation draft will be given exhaustive and sufficient consideration;
- (3) To submit to the Drafting Committee reports that incorporate the views of the Hong Kong public on the consultation draft of the Basic Law (Bill) at the end of the five-month consultation period.

At the end of the consultation period for the draft Basic Law, the Secretariat of the Drafting Committee will collate the opinions obtained from all sources for the reference of the various subgroups which will be responsible for revising the chapters concerned. The co-ordinating group will again revise and amend the provisions under the various chapters. The proposed legislation will be put forward at the eighth plenary session of the Drafting Committee at the end of 1988 or in early 1989, and will be submitted to the Standing Committee of the NPC for examination.

Contents of the Draft Basic Law for Solicitation of Opinions

11. The draft Basic Law includes a preamble, ten chapters, three annexes and a collection:
- (1) The Preamble states that the PRC Government will resume the exercise of sovereignty over Hong Kong on 1 July 1997 and establish a Hong Kong Special Administrative Region under the guidance of the policy of "one country, two systems".
 - (2) The General Provisions contain the basic principles

regarding the political, economic and social systems of the HKSAR.

- (3) The chapter on the Relationship between the Central Government and the HKSAR prescribes the political status of the HKSAR, the scope of a high degree of autonomy enjoyed by the HKSAR, and the powers exercised by the Central Government.
- (4) The chapter on the Fundamental Rights and Duties of Inhabitants provides for the rights and freedoms of HKSAR inhabitants.
- (5) The chapter on the Political Structure of the HKSAR provides for the selection/formation and functions and powers of the Chief Executive, the executive authorities, the Legislative Council and the judicial organs of the HKSAR, and the relationships among them; provisions for regional organisations and the public service are also laid down.
- (6) The chapter on the Economy of the HKSAR provides for the principles governing the operation of the financial system, the economic system, external economic relations, the monetary system, land leases, shipping and civil aviation of the HKSAR, and the scope of their autonomy.
- (7) The chapter on Education, Science, Culture, Sports, Religion, Labour and Social Services provides for the scope of autonomy in such areas as education, science, culture, sports, religion, labour and social services in the HKSAR.
- (8) The chapter on External Affairs provides for the external affairs which the HKSAR may deal with on its own.
- (9) Regional flag and regional emblem.
- (10) The chapter on Interpretation and Amendment of the Basic Law prescribes the power and procedure of interpreting and amending the Basic Law.
- (11) The Supplementary Provisions provide for the method of forming the first government and Legislative Council, and the method of recognising the laws previously in force in Hong Kong, after the establishment of the HKSAR.
- (12) Annex I - "The Selection of the Chief Executive of the HKSAR" includes five proposals.

(13) Annex II - "The Formation of the Legislative Council of the HKSAR" includes four proposals.

(14) Annex III - "The Formation of the First Government and Legislative Council of the HKSAR" .

(15) "A Collection of Opinions and Suggestions Expressed by Some Drafters on the Provisions Drafted by Their Respective Subgroups" includes the Drafting Committee's supplementary opinions on the Preamble and on the various chapters of the Basic Law and the explanatory notes on certain articles.

Relationship between the Basic Law and the Hong Kong Public

12. Hong Kong entered the run-up to 1997 when the Sino-British Joint Declaration formally took effect on 27 May 1985. The enactment of the Basic Law is the most important task to be completed during the run-up. In fact, in the course of drafting the Basic Law, a number of organisations and individuals have given their opinions and suggestions on the Basic Law through different channels. After 1 July 1997, the Basic Law will replace the existing constitutional instruments of Hong Kong. Neither the laws previously in force in Hong Kong nor laws enacted by the Legislative Council may contravene the Basic Law. The Basic Law will have tremendous bearing on the future development of Hong Kong. It will be a determining factor as to whether Hong Kong may maintain political stability and economic prosperity; it will concern the daily life and future of every member of the Hong Kong community. Thus, the Drafting Committee and the CCBL hope that after the publication of the "Draft Basic Law for Solicitation of Opinions", more organisations and individuals will put forward different views or new proposals so that the Basic Law to be enacted in the near future will attend more comprehensively to the opinions of the Hong Kong public at large.

SUMMARY

1. This summary serves to explain the major points of the Draft Basic Law for Solicitation of Opinions. The summary does not cover every point in the chapters. It is designed to examine the Basic Law against the Sino-British Joint Declaration, and to explain in simple terms and illustrate where appropriate the main spirit of the Basic Law. The various proposals listed in the draft Basic Law will be further expounded but no preference will be shown for any particular proposal.

Preamble

2. The Preamble reviews the historical background of the Question of Hong Kong and the course of Sino-British negotiations over the Question of Hong Kong. It also states that the Basic Law is to provide for, in the form of law, the basic policies of the PRC Government regarding Hong Kong as indicated in the Sino-British Joint Declaration.

Chapter 1 General Provisions

3. The General Provisions list in detail the basic principles regarding the political, economic and social systems of the HKSAR. These basic principles include the following: The HKSAR is a part of the PRC and enjoys a high degree of autonomy. The social and economic systems, the systems relating to the protection of inhabitants' fundamental rights and freedoms, the systems relating to the use of land and property ownership and the systems relating to executive, legislative and judicial matters, as well as the laws in force and the languages used in the HKSAR, shall be based on the provisions of this Law.
4. These basic principles clearly show that the policies indicated by the PRC Government in the Sino-British Joint Declaration are all provided for in the Basic Law in the form of law. They ensure that the socialist system and socialist policies practised in other regions of the PRC shall not be implemented in the HKSAR, and that Hong Kong's existing social and economic systems and life-style shall remain unchanged for 50 years after the establishment of the HKSAR.
5. The chapter on General Provisions elaborates the established policies of the PRC Government regarding Hong Kong. As no amendment to the Basic Law shall contravene these established basic policies, Hong Kong's high degree of autonomy will be guaranteed.

Chapter 2 Relationship between the Central Government and the HKSAR

6. This chapter states that the HKSAR is a local administrative region of the PRC and is directly under the authority of the Central People's Government (CPG). Hence, the HKSAR is not subordinate to any departments under the CPG, or any provinces, or autonomous regions, or municipalities directly under the Central Government. Apart from managing the foreign affairs and defence of the HKSAR, the CPG is also responsible for appointing the Chief Executive of the HKSAR and the principal officials of the HKSAR executive authorities. These matters have already been specified in the Sino-British Joint Declaration.
7. The Sino-British Joint Declaration provides that the HKSAR shall enjoy a high degree of autonomy: the HKSAR shall be vested with executive, legislative and independent judicial power, including that of final adjudication. This chapter further defines the scope of the executive power, and provides that the HKSAR shall also enjoy other powers assigned to it by the NPC, the Standing Committee of the NPC and the CPG. These provisions show that the HKSAR is a regional regime whose powers shall be derived from the Central regime.
8. This chapter provides that the laws enacted by the Legislative Council of the HKSAR shall be reported to the Standing Committee of the NPC for the record. This provision has already been laid down in the Joint Declaration. The chapter also provides that the Standing Committee of the NPC has the power to return any law which is not in conformity with the Basic Law or legal procedures for reconsideration or revoke it.
9. This chapter also provides that the laws of the HKSAR shall be the Basic Law, the laws which are previously in force in Hong Kong and which do not contravene the Basic Law, and laws enacted by Legislative Council of the HKSAR. Of the laws enacted by the NPC and its Standing Committee, which relate to foreign affairs, defence or the expression of national unity and territorial integrity, and which are not within the scope of the high degree of autonomy of the HKSAR, a small number shall be applied in the HKSAR. Before the application of these laws in Hong Kong, the HKSAR Basic Law Committee and the HKSAR Government shall be consulted. The above-mentioned national laws which shall be applied in the HKSAR include the Nationality Law of the PRC, the Organic Law of the PRC, the Statement of the Government of the PRC on Territorial Sea, etc.
10. This chapter provides that no department under the CPG, or provinces, or municipalities, or autonomous regions may interfere in the affairs administered by the HKSAR on its own. If they need to set up offices in Hong Kong, they

should obtain the consent of the HKSAR Government and the approval of the CPG. Mainlanders who wish to go to the HKSAR have to apply for permission.

11. This chapter also provides that the HKSAR shall prohibit by law any act that would undermine the national unity or subvert the CPG.
12. The provisions under the Sino-British Joint Declaration regarding the external affairs to be dealt with by the HKSAR on its own in appropriate fields as authorised by the CPG are laid down in Chapters 5, 6 and 7.

Chapter 3 Fundamental Rights and Duties of Inhabitants

13. The definitions of permanent inhabitants and non-permanent inhabitants are laid down in this chapter. Permanent inhabitants of the HKSAR have the right of abode in the HKSAR. These include all categories of persons specified in the Sino-British Joint Declaration, that is, the majority of the present 5.6 million people living in Hong Kong.
14. This chapter lists in detail the rights and freedoms of Hong Kong inhabitants, including fundamental human rights and freedoms protected by law such as freedom of the person, of speech, of the press, of publication, of association, to form and join trade unions, of strike, of assembly, of demonstration, of entry and exit, of communication, of movement, of belief, of religion, of choice of occupation, of academic activities, of literary and artistic creation, of marriage, inviolability of the home, the right to enjoy social welfare, welfare and benefits of labour, and the right to raise a family freely. These rights and freedoms shall not be restricted unless in accordance with law. Such restrictions shall be limited to those which are necessary for the maintenance of national security, public order, public safety, public health, public morals or the protection of the rights and freedoms of others. Hence, Hong Kong inhabitants are obliged to abide by the laws of the HKSAR.
15. Apart from the above-mentioned areas, this chapter also provides 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 be enforced in the HKSAR. The provisions of the two international covenants also define in detail specific human rights and freedoms, including the right to work, the right to an adequate standard of living, the right to life and freedom, and the right to freedom of speech, of conscience, of religion and of association. It is thus made clear that Hong Kong inhabitants will enjoy the same protection of the law as they do now against infringements of their fundamental rights after the establishment of the

HKSAR. The provisions regarding rights and freedoms under the Joint Declaration are clearly laid down in this chapter.

16. This chapter also provides that the legitimate and traditional rights and interests of indigenous New Territories inhabitants shall be protected. With this provision, the traditional customs that have been and are still practised by the 460,000 New Territories inhabitants (including those residing overseas), such as funeral and burial conventions; the rates exemption policy for rural houses; and the rents of village lots will remain unchanged.

Chapter 4 Political Structure

17. Section 1 of this chapter provides that the Chief Executive of the HKSAR shall be the head of the HKSAR and shall be responsible to the CPG and the HKSAR. It also details the functions and powers of the Chief Executive. The Chief Executive must be a Chinese national who is no less than 40 years of age and who has ordinarily resided in Hong Kong for a continuous period of 20 years or more. The term of office of the Chief Executive shall be 5 years, and he may serve for no more than two terms.
18. The Sino-British Joint Declaration states that the Chief Executive shall be selected by election or through consultations held locally and be appointed by the CPG. Since many proposals have been put forward in respect of the method of selecting the Chief Executive, and no consensus has been reached during the drafting process, five proposals are listed in the Annex on "The Selection of the Chief Executive of the HKSAR" in the draft Basic Law. Decision shall be made after taking into consideration the opinions and suggestions of members of the public in Hong Kong.
19. According to Proposal 1, an electoral college shall elect 20 of its members to form a Nomination Committee, which would then nominate three candidates who are in every respect suitable for the post of the Chief Executive, to be elected by all members of the electoral college. The electoral college, comprising 600 members, shall include members of the Legislative Council, representatives of regional organisations, representatives of statutory bodies and permanent non-statutory bodies, and representatives of functional constituencies. The advantages of this proposal are that it will ensure that the Chief Executive has widespread support from all sectors of the community, will reduce the possibility of the emergence of parties and confrontational politics, and will provide checks and balances between the executive authorities and the Legislative Council.
20. According to Proposal 2, the Chief Executive shall be nominated by no less than one-tenth of the members of the Legislative Council and shall be elected in Hong Kong in a

direct election on a one-man-one-vote basis. The advantages of this proposal are that it will strengthen liaison between the executive authorities and the Legislative Council, will give expression to the principle of mutual checks and balances, and will ensure that the Chief Executive has sufficient representation and authority.

1. According to Proposal 3, the Chief Executive shall be elected by functional constituencies. The functional constituencies shall have no more than 600 members, to be selected from amongst representatives of the industrial, commercial and financial sectors (25%); professional bodies (35%); labour organisations (10%); religious, social and charity organisations (15%); and Kaifong and hawker associations (15%).
2. According to Proposal 4, the first three Chief Executives shall be selected through consultations by an advisory council and shall be appointed by the Central Government; and, for subsequent appointments, three candidates shall be nominated by the advisory council and elected by an electoral college following approval by the Central Government. The advisory council shall consist of 50-100 members who shall be nominated by people from various sectors of the community and selected by the Executive Council. The Chief Executive shall report the selection to the Central Government, which will decide on the appointment of the council members. The electoral college, with a minimum of 250 and a maximum of 500 members, shall consist of retired members of the Executive and Legislative Councils, retired Chief Executives, and retired principal officials who were appointed by the Central Government. The advantage of this proposal is that the reputation and experience of the advisory council will ensure the quality of the candidates.
3. According to Proposal 5, a Nomination Committee shall nominate three candidates through consultations or by election following consultations, and the Chief Executive shall be elected in a general election on a one-man-one-vote basis. The advantages of this proposal are that nomination will be made by a widely representative body, while one-man-one-vote election will ensure the authority of the Chief Executive.
24. The five proposals for the selection of the Chief Executive have one thing in common, that is, they all emphasise the need to ensure the representation and authority of the Chief Executive while giving due attention to coordination and checks and balances between the executive authorities and the Legislative Council.
25. This Section also provides that the Executive Council of the HKSAR shall be a body for assisting the Chief Executive in policy-making. Members of the Executive Council shall be

appointed by the Chief Executive. The Chief Executive shall consult the Executive Council before making any important policy decisions, submitting bills to the Legislative Council, making subordinate legislation and dissolving the Legislative Council.

26. Section 2 of this chapter provides that the executive authorities shall be vested with the executive power of the HKSAR and that the principal officials of the executive authorities shall be Chinese nationals who are Hong Kong permanent inhabitants having ordinarily resided in Hong Kong for a continuous period of 15 years or more. Under the provisions of the Joint Declaration, the executive authorities will be required to act in accordance with the law and will be accountable to the Legislative Council. This chapter further elaborates on the accountability of the executive authorities to the Legislative Council as follows: they shall implement the laws which have been passed by the Legislative Council and which have taken effect, submit periodic administrative reports to the Legislative Council, answer questions addressed by members of the Legislative Council and seek the approval of the Legislative Council for taxation and public expenditure.
27. Section 3 of this chapter provides that the Legislative Council shall be vested with the legislative power of the HKSAR, that the terms of office of members of the Legislative Council shall be four years, and that the president of the Legislative Council shall be a Chinese national who is a permanent inhabitant of the HKSAR of no less than 40 years of age and who has ordinarily resided in Hong Kong for a continuous period of 20 years or more. Under the provisions of the Joint Declaration, the HKSAR legislature shall be constituted by elections. Since many proposals have been put forward in respect of the method of selecting the members of the Legislative Council and no consensus has been reached during the drafting process, four proposals are listed in the Annex on "The Formation of the Legislative Council of the HKSAR" in the "Draft Basic Law for Solicitation of Opinions". Decision shall be made after taking into consideration the opinions and suggestions of members of the public in Hong Kong.
28. According to Proposal 1, 50% of the members of the Legislative Council shall be elected by functional constituencies, 25% shall be elected by geographical constituencies in direct elections, and 25% shall be elected by an electoral college. This proposal is put forward in conjunction with Proposal 1 for the selection of the Chief Executive and has the advantage of ensuring diversified and equal representation in the Legislative Council.
29. According to Proposal 2, no less than 50% of the members of the Legislative Council shall be directly elected by election with a universal franchise; no more than 25% shall

be elected by functional constituencies; and no more than 25% shall be elected by District Boards, the Urban Council and the Regional Council. Being put forward in conjunction with Proposal 2 for the selection of the Chief Executive, this proposal has the advantages of ensuring that the Legislative Council will take care of the interests of the Hong Kong public and will strengthen liaison between the Legislative Council and the District Boards.

30. According to Proposal 3, 30% of the members of the Legislative Council shall be recommended by an advisory council, of whom one-third shall be principal officials, 40% shall be elected by functional constituencies, and 30% shall be directly elected by geographical constituencies. This proposal is put forward in conjunction with Proposal 4 for the selection of the Chief Executive. It is advantageous in that it will strengthen the ties between the principal officials of the executive authorities and the Legislative Council.
31. According to Proposal 4, 30% of the members of the Legislative Council shall be elected by the industrial, commercial and financial sectors, 25% shall be elected by professionals from various disciplines, 20% shall be elected by grassroots organisations, and 30% shall be elected by geographical constituencies in a general election. This proposal is put forward in conjunction with Proposal 5 for the selection of the Chief Executive. It has the following advantages: in terms of functional and geographical constituencies, the former accounts for 75% while the latter 25%; in terms of economic interests, the upper-middle class accounts for 55% while the grassroots level accounts for 45%; and in terms of direct and indirect elections, the former accounts for over 50%.
32. The four proposals for selecting the members of the Legislative Council have one thing in common, that is, they all agree that the Legislative Council should be constituted by mixed elections and that the methods should be continuously and gradually improved in the days to come. They differ, however, in the manner of selection and in their composition.
33. Section 4 of this chapter provides that the courts of the HKSAR at various levels shall exercise judicial power in the HKSAR and that a court of final appeal shall be established in the HKSAR to exercise the power of final adjudication. The court of final appeal may invite judges from other common law jurisdictions to preside over trials. The courts at various levels may refer to precedents in other common law jurisdictions and may recruit judges from other common law jurisdictions. This chapter also provides that under the assistance or authorisation of the CPG, the HKSAR Government may make appropriate arrangements with foreign states for reciprocal judicial assistance. For example,

judgments obtained in Hong Kong may be enforced in foreign states, and evidence may be obtained overseas for use in proceedings in Hong Kong. These are provisions made in accordance with the Joint Declaration.

34. The Joint Declaration states that after the establishment of the HKSAR, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the HKSAR of the power of final adjudication. This section details the systems of appointing and removing judges of courts at various levels, of appointing and removing judges of the court of final appeal and the chief judge of the supreme court, as well as of appointing and removing judicial officers other than judges. This section also includes the following provisions: The courts of the HKSAR shall exercise judicial power independently and free from interference; members of the judiciary shall be immune from legal action in respect of their judicial functions; the principle of the jury system previously practised in Hong Kong shall be maintained; the principle previously applied in Hong Kong in respect of the conduct of criminal or civil proceedings and the rights enjoyed by parties to the proceedings shall be maintained. These provisions will ensure the independent exercise of judicial power.
35. Section 5 of this chapter provides that regional organisations which are not of the nature of local organs of political power may be established in the HKSAR, to be responsible for the provision of services in such fields as culture, recreation and environmental health. In accordance with this provision, existing regional organisations in Hong Kong, such as the Urban Council, the Regional Council and the District Boards, shall be maintained, or the HKSAR Government shall on its own decide whether or not changes are needed.
36. Section 6 of this chapter provides that public servants serving in all government departments of the HKSAR shall be permanent inhabitants of the HKSAR, that officials at or above the Secretary level must be Hong Kong inhabitants of Chinese nationality, and that foreign nationals may be employed as public servants below the Secretary level or as advisers to government departments in their individual capacities. All public servants and advisers shall be responsible to the HKSAR Government. This section also provides that the appointment and promotion of public servants shall be based on qualifications, experience and ability, and that the previous system of recruitment, employment, assessment, discipline, training and management for the public service shall be maintained. All these are formulated in accordance with the provisions of the Joint Declaration. This section also provides, in accordance with the Joint Declaration, that public servants previously

serving in Hong Kong in all government departments, including the police department, may all remain in employment with conditions of service no less favourable than before. These provisions will help maintain a fair, stable and efficient system of public service and protect the conditions of service (including pay and pension) and benefits of the existing 180,000 public servants in Hong Kong.

Chapter 5 The Economy

37. Section 1 of this chapter provides that the HKSAR shall have financial independence and shall use its financial revenues exclusively for its own purposes without having to hand them over to the CPG, and that the CPG shall not levy taxes on the HKSAR. These are stipulated in accordance with the provisions of the Joint Declaration. This section also provides that the HKSAR shall practise an independent taxation system and a policy of low tax rate, and shall adhere to the policy of maintaining a basic balance between revenue and expenditure. These provisions will ensure that the financial and taxation systems currently practised in Hong Kong will remain unchanged.
38. Section 2 of this chapter provides that the HKSAR shall decide on its own monetary and financial systems, and that the HKSAR Government shall issue freely convertible currency and manage and control the Exchange Fund on its own in order to provide backing for the notes issued and to regulate the exchange value of the currency. This section also makes clear that the markets for foreign exchange, gold, securities and futures in the HKSAR shall continue, and that the HKSAR shall safeguard the free operation of financial business and financial markets. These essential elements of the monetary and financial systems of Hong Kong, which are stipulated in accordance with the provisions of the Joint Declaration, will contribute towards the maintenance of Hong Kong's status as an international financial centre.
39. Sections c and d of this chapter incorporate the stipulations in the Joint Declaration which provide that the HKSAR shall adopt a free trade and economic system and decide on its own policies regarding external trade, including the implementation of the free enterprise system and free trade policies, the maintenance of the status of Hong Kong as a free port, and the right to participate in international organisations and international agreements in the economic, trade and financial fields in the name of "Hong Kong, China" as a separate customs territory, as provided for in the Joint Declaration. Under the provisions of these two sections, the HKSAR may on its own maintain and develop economic and trade relations with all states and regions, and the export quotas, tariff preferences and other similar arrangements obtained by the HKSAR from relevant international organisations and international agreements,

such as the General Agreement on Tariffs and Trade, Multi-fibre Agreement and arrangements regarding international trade in textiles, shall be enjoyed exclusively by the HKSAR.

40. Section 5 of this chapter incorporates the provisions in the Joint Declaration in respect of the Land Leases. Since land plays an important part in the development and economy of Hong Kong, this section provides that the HKSAR may on its own decide policies for the development, management and use of land.
41. Section 6 of this chapter incorporates the provisions in the Joint Declaration in respect of shipping. Under these provisions, the HKSAR shall on its own decide its systems of shipping management and shipping regulation, may maintain a shipping register and issue related certificates in the name of "Hong Kong, China," and shall be allowed to operate private shipping businesses and shipping-related businesses and container terminals freely. These provisions will contribute towards the preservation of Hong Kong's position as a major shipping centre.
42. Section 7 of this chapter incorporates the provisions in the Joint Declaration in respect of civil aviation. Under these provisions, the HKSAR shall continue to practise the existing system of civil aviation management, discharge the responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organisation, keep its own aircraft register in accordance with provisions laid down by the CPG concerning nationality marks and registration marks, and issue licences to airlines having their principal place of business in Hong Kong. This section also provides that all air service agreements providing for air services between other parts of the PRC and other states and regions with stops at the HKSAR and air services between the HKSAR and other states and regions with stops at other parts of the PRC shall be negotiated and concluded by the CPG, but representatives of the HKSAR may participate as members of delegations of the Government of the PRC concerning arrangements for such services. However, as authorised by the CPG, the HKSAR Government shall be responsible for negotiating and concluding agreements in respect of all air services to, from or through the HKSAR which do not operate to, from or through other parts of the PRC. These provisions will enable Hong Kong to preserve the rights it now enjoys and will contribute towards the maintenance of Hong Kong's status as a centre of international and regional aviation.

Chapter 6 Education, Science, Culture, Sports, Religion, and Social Service

43. This chapter provides that the HKSAR Government shall on its own decide policies on education, science and technology,

culture, professional qualifications, sports, labour and social service and shall not interfere in the internal affairs of religious bodies.

44. This chapter incorporates the following provisions in the Joint Declaration: Institutions of all kinds may retain their autonomy; they may continue to recruit staff and use teaching materials from outside the HKSAR; and students shall enjoy freedom of choice of education and freedom to pursue their education outside the HKSAR. These provisions provide a sound basis for the maintenance of the existing educational system in Hong Kong.
45. This chapter provides that the laws of the HKSAR shall protect achievements in research, patents, inventions and discoveries relating to science and technology, achievements and rights and interests in literary creation, the rights and interests in respect of property enjoyed by religious organisations, as well as their rights to run schools, hospitals and welfare institutions. By means of the method of accrediting and conferring professional qualifications stipulated in this chapter, the provisions of the Joint Declaration for local lawyers and lawyers from outside the HKSAR to work and practise in the HKSAR can be implemented.
46. This chapter also provides that the principles of non-subordination, non-interference and mutual respect shall be observed in respect of the relationship between non-governmental organisations in the HKSAR and their counterparts in other parts of the PRC. If necessary, organisations in all fields may maintain and develop relations with relevant organisations in other states and regions in the name of "Hong Kong, China". These provisions will help preserve Hong Kong's unique position as the meeting point of different cultures and intellectual influences.

Chapter 7 External Affairs

47. This chapter incorporates the stipulation in the Joint Declaration which provides that, subject to the principle that foreign affairs are the responsibility of the CPG, the HKSAR may participate in or manage external affairs of concern to Hong Kong. Under the provisions of this chapter, in which the scope of such external affairs is defined, the HKSAR may be represented in the delegation of the Government of the PRC at negotiations of direct concern to the HKSAR conducted by the CPG, and may conclude and implement agreements in various appropriate fields. With these provisions, the HKSAR will be able to take care of its own particular interests in certain fields, especially its interests in the economic field.
48. This chapter also incorporates the stipulations in the Joint Declaration which provide that the CPG shall take measures

to ensure the application of international agreements in the HKSAR and to enable the HKSAR to participate in international organisations. In fact, the Sino-British Joint Liaison Group and its subgroups have, by April 1988, assisted Hong Kong in obtaining independent membership in 15 international organisations, including the General Agreement on Tariffs and Trade.

49. Under the provisions of this chapter, the CPG shall authorise the HKSAR Government to issue passports of the HKSAR of the PRC to Chinese nationals in Hong Kong, and travel documents to all other persons lawfully residing in the HKSAR. The CPG shall authorise or assist the HKSAR Government to conclude with other states or regions agreements which provide for the mutual abolition of visa requirements. These are stipulated in accordance with the provisions of the Joint Declaration.
50. This chapter also incorporates the stipulation in the Joint Declaration which provides that foreign consular and other official or semi-official missions may be established in the HKSAR with the approval of the CPG. Under this provision, changes to the status of representation of all foreign states and organisations currently represented in Hong Kong may be required in order to take account of the existence or otherwise of formal relations between the PRC and a particular state.

Chapter 8 Regional Flag and Regional Emblem

51. The Joint Declaration provides that apart from displaying the national flag and national emblem of the PRC, the HKSAR may use the regional flag and regional emblem. Since the regional flag and regional emblem are still in the design stage, no provisions on this topic have been included in the "Draft Basic Law for Solicitation of Opinions".

Chapter 9 Interpretation and Amendment of the Basic Law

52. Under the provisions of this chapter, the power of interpretation of the Basic Law of the HKSAR shall be vested in the Standing Committee of the NPC. If the Standing Committee of the NPC has given an interpretation of a provision of the Basic Law, the courts of the HKSAR shall, in applying that provision, follow the interpretation of the Standing Committee of the NPC. Judgments previously given shall not, however, be affected. The courts of the HKSAR may, in adjudicating cases before them, interpret the provisions of the Basic Law. If a case involves an interpretation of those provisions of the Basic Law concerning defence, foreign affairs and other affairs managed by the CPG, the courts of the HKSAR shall, before giving their final judgments on the case, seek an interpretation of the relevant provisions from the Standing Committee of the NPC. This chapter also provides that the

Standing Committee of the NPC shall consult the HKSAR Basic Law Committee before giving an interpretation of this Law. This provision, which takes account of the current practice in the courts of Britain and the European Community, will help prevent possible conflicts between the interpretations given by the courts of Hong Kong and those given by the Standing Committee of the NPC while not affecting the power of final adjudication of Hong Kong.

53. Under the provisions of this chapter, the power to amend the Basic Law of the HKSAR shall be vested in the NPC. The power to propose amendments to the Basic Law shall be vested in the Standing Committee of the NPC, the CPG and the HKSAR. Amendment proposals from the HKSAR shall be submitted to the NPC by the HKSAR's delegation to the NPC after obtaining the consent of a two-thirds majority of Hong Kong's deputies to the NPC, a two-thirds majority of the members of the HKSAR Legislative Council and the Chief Executive of the HKSAR. Before a proposal for amendment to this Law is put on the agenda of the NPC, the Basic Law Committee of the HKSAR shall first study it and give advice on it. No amendment to this Law shall contravene the established basic policies of the PRC regarding Hong Kong. The stipulation that the Standing Committee of the NPC and the CPG shall have the power to propose amendments will restrict other departments under the CPG as well as provinces, municipalities under the Central Government and autonomous regions from playing a direct part in the amendment of the Basic Law of the HKSAR, whereas the stipulation that the HKSAR's delegation to the NPC shall be the third body vested with the power to propose amendments as well as the specific procedures for proposing amendments will ensure that amendments to the Basic Law will be made in accordance with the wishes of the Hong Kong public.

Chapter 10 Supplementary Provisions

54. Article 1 of the Supplementary Provisions provides that the (first Government and Legislative Council) of the HKSAR shall be formed under the guidance of the principles of giving expression to sovereignty and ensuring a smooth transition. The proposal in the Annex on "The Formation of the First Government and Legislative Council of the HKSAR" is as follows: The NPC shall set up a Preparatory Committee for the HKSAR in 1996, with members from both the mainland and Hong Kong. The Preparatory Committee shall be responsible for setting up a Selection Committee for the First Government of the HKSAR, the membership of which shall be restricted to permanent inhabitants of Hong Kong. Members of this Committee shall include representatives of the industrial, commercial and financial sectors, professionals, representatives of labour and grassroots organisations, as well as serving members of the Legislative Council, regional organisations and NPC deputies. The first Chief Executive shall be recommended by the Selection Committee either

through consultations or by election following consultations, and shall be appointed by the CPG. The Executive Council shall be formed by the Chief Executive. Members of the Legislative Council shall be elected by the Selection Committee, and serving members of the legislature may become candidates for the post-1997 Legislative Council.

55. Article 2 of the Supplementary Provisions provides that on the establishment of the HKSAR, laws previously in force in Hong Kong and documents legally valid in Hong Kong shall remain valid unless they contravene the Basic Law.

THE DRAFT BASIC LAW
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA
FOR SOLICITATION OF OPINIONS

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

April 1988

Preamble

Hong Kong, which has been part of the territory of China since ancient times [Note 1], was occupied by Britain after the Opium War in 1840. On 19 December 1984, the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong, confirming that the Government of the People's Republic of China would resume the exercise of sovereignty over Hong Kong on 1 July 1997, thus realising the long-cherished common aspirations of the entire Chinese people to recover Hong Kong.

In order to uphold national unity and territorial integrity and to maintain the prosperity and stability of Hong Kong, and taking account of the history of Hong Kong and its realities, the State decided that upon resuming the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region (HKSAR) should be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the policy of "one country, two systems", the socialist systems and socialist policies would not be practised in Hong Kong. The basic policies of the State regarding Hong Kong have been set out by our Government in the Sino-British Joint Declaration.

In accordance with the Constitution of the People's Republic of China, the Basic Law of the HKSAR of the People's Republic of China is enacted by the National People's Congress, prescribing the systems to be practised in the HKSAR in order to ensure the implementation of the basic policies of the State regarding Hong Kong.

Chapter 1 General Provisions

Article 1: The HKSAR is an inalienable part of the People's Republic of China.

Article 2: The National People's Congress authorises the HKSAR to exercise a high degree of autonomy and to have executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

Article 3: The executive authorities and the legislature of the HKSAR shall, in accordance with the relevant provisions of this Law, be composed of Hong Kong permanent inhabitants.

Article 4: The socialist system and socialist policies shall not be practised in the HKSAR, and the previous capitalist system and life-style shall remain unchanged for fifty years.

Article 5: The HKSAR shall protect the rights and freedoms of inhabitants and other persons in the HKSAR in accordance with law.

Article 6: Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance, and compensation for lawful deprivation shall be protected by law. The compensation for lawful deprivation shall correspond to the real value of the property concerned, freely convertible and paid without undue delay.

Article 7: Land and natural resources within the HKSAR belong to the State. The HKSAR Government shall be responsible for their management, use and development, and for their lease or grant to individuals or legal persons for their use or development. The revenue derived therefrom shall be controlled exclusively by the HKSAR Government.

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, save for any that contravene this Law and subject to any amendment by the HKSAR legislature.

Article 9: In addition to Chinese, English may also be used by the executive authorities, the legislature and the judicial

organs of the HKSAR.

Article 10: In accordance with Article 31 of the Constitution of the People's Republic of China, the policies and systems of the HKSAR, including the social and economic systems, the systems for protecting the fundamental rights and freedoms of inhabitants, and the systems regarding executive, legislative and judicial matters, shall be based on the provisions of this Law.

No law enacted by the HKSAR legislature may contravene this Law.

Chapter 2 The Relationship between the Central Government and the HKSAR

Article 11: The HKSAR is a local administrative region of the People's Republic of China with a high degree of autonomy and is directly under the authority of the Central People's Government.

Article 12: The Central People's Government shall be responsible for foreign affairs concerning the HKSAR.

The Central People's Government authorises the HKSAR to conduct on its own the relevant external affairs in accordance with this Law.

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

Article 13: The Central People's Government shall be responsible for the defence of the HKSAR.

Military forces sent by the Central People's Government to be stationed in the HKSAR for the purpose of defence shall not interfere in the local affairs of the HKSAR. The HKSAR Government may, where necessary, request the Central People's Government for the garrison to assist in maintaining public order and relieving disasters.

Apart from abiding by the national laws of the country, members of the garrison shall also abide by the laws of the HKSAR.

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

Article 14: The Central People's Government shall appoint the Chief Executive and the principal officials of the executive authorities of the HKSAR in accordance with the provisions in Chapter 4 of this Law.

Article 15: The HKSAR shall be vested with executive power. It shall, in accordance with the relevant provisions of this Law, on its own deal with executive affairs relating to public finance, monetary affairs, economy, industry and commerce, trade, taxation, postal service, civil aviation, maritime affairs, traffic and transport, agriculture and fishery, civil service, home affairs, labour, education, medical and health affairs, social welfare, culture and recreation, municipal construction, town planning, housing, real estate, public order, immigration, meteorology, communications, science and technology, sports and other areas.

Article 16: The HKSAR shall be vested with legislative power.

Laws enacted by the HKSAR legislature shall 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 HKSAR Basic Law Committee [Note 2] under it, considers that any law of the HKSAR is not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not make any amendment to it. Any law which is returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This cessation shall not have retrospective effect.

Article 17: The laws of the HKSAR shall be this Law, the laws previously in force in Hong Kong as prescribed in Article 8 of this Law, and laws enacted by the HKSAR legislature.

The laws enacted by the National People's Congress and its Standing Committee shall not be applied in the HKSAR except for those prescribed in paragraph 3 of this Article.

Of the laws enacted by the National People's Congress and its Standing Committee which relate to defence and foreign affairs, and other laws which relate to the expression of national unity and territorial integrity and which, in accordance with the provisions of this Law, are not within the scope of the high degree of autonomy of the HKSAR, those which shall be applied in the HKSAR shall be applied locally by the HKSAR Government by way of proclamation or legislation on the directives of the State Council.

Except in emergencies, the State Council shall consult the HKSAR Basic Law Committee and the HKSAR Government before issuing the above-mentioned directives.

If the HKSAR Government fails to comply with the directives of the State Council, the State Council may issue an order for the application of the above-mentioned laws in the HKSAR.

Article 18: The HKSAR shall be vested with independent judicial power, including that of final adjudication.

Save for the restrictions on the judicial power of the courts under the legal principles previously applied in Hong Kong, which shall be maintained, the courts of the HKSAR shall be vested with judicial power in respect of all other cases.

The courts of the HKSAR shall not have jurisdiction over the cases relating to defence and foreign affairs which are the

responsibilities of the Central People's Government, or the executive acts of the Central People's Government. Where a question relating to defence, foreign affairs or the executive acts of the Central People's Government arises in any proceedings before the courts of the HKSAR, the Chief Executive should be consulted, and a certificate issued by the Chief Executive regarding such a question shall be binding on the courts.

The Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council before issuing the above-mentioned certificate.

Article 19: The HKSAR may enjoy other powers assigned to it by the National People's Congress, the Standing Committee of the National People's Congress, and the State Council.

Article 20: HKSAR inhabitants who are Chinese nationals may, in accordance with law, participate in the management of state affairs.

In accordance with the number of seats and selection procedures specified by the Standing Committee of the National People's Congress, the deputies of the HKSAR to the National People's Congress shall be elected in Hong Kong by Hong Kong inhabitants who are Chinese nationals to participate in the work of the highest organ of state power.

Article 21: No department under the Central People's Government, or province, or autonomous region, or municipality directly under the Central Government may interfere in the affairs which are administered by the HKSAR on its own in accordance with this Law.

Departments under the Central Government, provinces, autonomous regions, and municipalities directly under the Central Government which need to establish offices in the HKSAR shall obtain the consent of the HKSAR Government and the approval of the Central People's Government.

All offices established in Hong Kong by departments under the Central Government, provinces, autonomous regions, and municipalities directly under the Central Government, as well as members of their staff, shall abide by the laws of the HKSAR.

People from other parts of China shall have to apply for permission for entry into the HKSAR.

The HKSAR may establish an office in Beijing.

Article 22: The HKSAR shall prohibit by law any acts that would undermine national unity or subvert the Central People's Government.

Chapter 3 Fundamental Rights and Duties of Inhabitants

Article 23: HKSAR inhabitants, hereinafter referred to as Hong Kong inhabitants, include permanent inhabitants and non-permanent inhabitants.

Permanent inhabitants of the HKSAR are:

- (1) Chinese nationals who were born in Hong Kong before or after the establishment of the HKSAR;
- (2) Chinese nationals who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of seven years or more;
- (3) Persons of Chinese nationality who were born outside Hong Kong of those inhabitants referred to in sub-paragraph (1) or (2);
- (4) Non-Chinese nationals who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of seven years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR;
- (5) Persons under 21 years of age who were born of those inhabitants referred to in sub-paragraph (4) before or after the establishment of the HKSAR; and
- (6) Persons other than those inhabitants referred to in sub-paragraphs (1) to (5), who had the right of abode only in Hong Kong prior to the establishment of the HKSAR.

The above-mentioned inhabitants shall have the right of abode in the HKSAR and, in accordance with the laws of the HKSAR, be qualified to obtain permanent identity cards which state their right of abode.

Non-permanent inhabitants of the HKSAR are persons who, in accordance with the laws of the HKSAR, are qualified to obtain Hong Kong identity cards but do not have the right of abode.

Article 24: Hong Kong inhabitants, irrespective of their nationality, race, ethnic origin, language, sex, occupation, religious belief, political opinion, education level, or financial condition, shall be equal before the law.

Article 25: Permanent inhabitants of the HKSAR who have attained 21 years of age shall have the right to vote and the right to stand for election in accordance with law.

Article 26: Hong Kong inhabitants shall enjoy freedom of speech, of the press, of publication, of association, to form and join trade unions, of strike, of assembly and of demonstration.

Article 27: The freedom of the person of Hong Kong inhabitants shall be inviolable.

No Hong Kong inhabitant may be unlawfully arrested, detained or imprisoned. Unlawful deprivation or restriction of the freedom of the person of inhabitants by any means shall be prohibited. Unlawful search of the person of inhabitants shall be prohibited.

Article 28: The home and other premises of Hong Kong inhabitants shall be inviolable. Unlawful search of, or intrusion into, the home or other premises of an inhabitant shall be prohibited.

Article 29: The freedom and privacy of communication of Hong Kong inhabitants shall be protected by law. No department or individual may, on any ground, infringe upon the freedom and privacy of communication of inhabitants except in cases where, to meet the needs of public security or of investigation into criminal offences, the relevant authorities are permitted to censor communication in accordance with legal procedures.

Article 30: Hong Kong inhabitants shall have freedom of movement within the territory of the HKSAR and freedom of emigration to other countries or regions, and Hong Kong inhabitants who hold valid travel documents shall have freedom of travel and of entry and exit, and shall, unless restricted by law, be free to leave the HKSAR without special authorisation.

Article 31: Hong Kong inhabitants shall have freedom of belief.

Hong Kong inhabitants shall have freedom of religious belief and the freedom to spread religions and to hold and participate in religious activities in public.

Article 32: Hong Kong inhabitants shall have freedom of choice of occupation.

Article 33: Hong Kong inhabitants shall have freedom of academic research, of literary or artistic creation and of other cultural activities.

Article 34: Hong Kong inhabitants shall have the right to confidential legal advice, access to the courts, prompt protection of their legitimate rights and interests by lawyers of their own choice or representation in the courts by lawyers of their own choice, and to obtain judicial remedies.

Hong Kong inhabitants shall have the right to challenge the actions of the executive or members of the executive in the courts.

Article 35: Hong Kong inhabitants shall have the right to enjoy social welfare. The welfare and benefits of labour shall be protected by law.

Article 36: Hong Kong inhabitants' freedom of marriage and right to raise a family freely shall be protected by law.

Article 37: Hong Kong inhabitants have other rights and freedoms which are safeguarded by the laws of the HKSAR.

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 enforced through the laws of the HKSAR.

Article 39: The rights and freedoms enjoyed by Hong Kong inhabitants may be subject only to such restrictions as are prescribed by law and are necessary for the maintenance of national security, public order, public safety, public health, public morals or the protection of the rights and freedoms of others.

Article 40: The legitimate traditional rights and interests of the indigenous "New Territories" inhabitants shall be protected by the HKSAR.

Article 41: Persons in the HKSAR other than Hong Kong inhabitants shall, in accordance with law, have the rights and freedoms of Hong Kong inhabitants prescribed in this Chapter.

Article 42: Hong Kong inhabitants and other persons in the HKSAR shall have the duty to abide by the laws of the HKSAR.

Chapter 4 The Political Structure

Section 1 The Chief Executive

Article 43: The Chief Executive of the HKSAR shall be the head of the HKSAR, representing the HKSAR.

The Chief Executive of the HKSAR shall be responsible to the Central People's Government and the HKSAR in accordance with the provisions of this Law.

Article 44: The Chief Executive shall be a Chinese national who is a permanent inhabitant of the HKSAR of no less than 40 years of age and who has ordinarily resided in Hong Kong for a continuous period of 20 years or more.

Article 45: The Chief Executive of the HKSAR shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The specific method of selecting the Chief Executive shall be prescribed in Annex I: "The Selection of the Chief Executive of the HKSAR".

The method of selecting the Chief Executive as prescribed in Annex I may be modified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual change. Such modifications shall require the endorsement of a two-thirds majority of the members of the HKSAR 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.

Article 46: Each term of office of the Chief Executive shall be five years. He may serve for no more than two terms.

Article 47: The Chief Executive of the HKSAR shall discharge the functions of his office with honesty and integrity, and shall perform his duties conscientiously.

Upon assumption of office, the Chief Executive shall declare his wealth and property to the chief judge of the court of final appeal of the HKSAR and the declaration shall be put on record in strict confidence.

Article 48: The Chief Executive of the HKSAR shall exercise the following functions and powers:

- (1) To lead the HKSAR Government;

- (2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the HKSAR;
- (3) To sign the bills passed by the Legislative Council and to promulgate laws;
- To sign the budgets and final accounts passed by the Legislative Council and report them to the Central People's Government for the record;
- (4) To decide policies and issue administrative orders;
- (5) To nominate the following principal officials and report such nominations to the Central People's Government for appointment: Secretaries, Deputy Secretaries, Director of Bureaus, Commissioner Against Corruption, Director of Audit, Commissioner of Police and Commissioner of External Affairs [Note 3]; and to propose to the Central People's Government the removal of the above-mentioned officials;
- To employ advisers equivalent to Bureau level or above where necessary and with the approval of the Central People's Government;
- (6) To appoint or remove judges of the courts at various levels in accordance with legal procedures;
- (7) To appoint or remove public officers in accordance with legal procedures;
- (8) To execute the directives given by the Central People's Government in respect of matters provided for in this Law;
- (9) To conduct external affairs and other affairs as authorised by the Central People's Government on behalf of the HKSAR;
- (10) To assent to any motions presented to the Legislative Council regarding revenue or expenditure;
- (11) To decide, in the light of security and public interest considerations, whether government officials or other personnel responsible for government affairs shall testify or give evidence before the Legislative Council;
- (12) To pardon or remit the punishment of persons convicted of criminal offences; and
- (13) To deal with petitions and complaints.

Article 49: If the Chief Executive of the HKSAR deems that a bill passed by the Legislative Council is not in the overall interests of the HKSAR, he may return it to the Legislative

Council within three months for reconsideration. If the original bill is again passed by no less than a two-thirds majority of the total membership of the Legislative Council, the Chief Executive shall sign and promulgate it within one month, or deal with it in accordance with the provisions of Article 50 of this Law.

Article 50: If the Chief Executive refuses to sign a bill which has twice been passed by the Legislative Council or the Legislative Council refuses to pass the budget or other important bills presented by the Government, and no consensus is reached even after consultation, the Chief Executive may dissolve the Legislative Council.

The Chief Executive shall consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once during each term of his office.

Article 51: If the Legislative Council refuses to approve the budget presented by the Government or it is impossible to approve any appropriation because the Legislative Council has already been dissolved, the Chief Executive may, during the interim period prior to the formation of a new Legislative Council, approve temporary short-term appropriations in accordance with the level of expenditure of the preceding financial year.

Article 52: The Chief Executive of the HKSAR shall resign under any one of the following circumstances:

- (1) he is unable to discharge the functions of his office due to serious illness or other reasons;
- (2) he has dissolved the Legislative Council after twice refusing to sign a bill passed by the Legislative Council; and the new legislature still passes the original bill, which was the subject of debate, with a two-thirds majority;
- (3) he has dissolved the Legislative Council because the Legislative Council refused to approve the budget or other important bills, and the new Legislative Council continues to refuse to pass the original bill, which was the subject of debate.

Article 53: When the Chief Executive of the HKSAR is unable to discharge the functions of his office for a brief period, his duties shall temporarily be assumed by the Secretary for Administration, the Financial Secretary or the Attorney General in descending order of priority.

When the post of the Chief Executive becomes vacant, a new Chief Executive shall be selected within six months. As to the

temporary assumption of the duties of the Chief Executive when the post is left vacant, the provision in the preceding paragraph shall apply.

Article 54: The Executive Council of the HKSAR shall be an organ for assisting the Chief Executive in policy-making.

Article 55: Members of the Executive Council of the HKSAR shall be appointed by the Chief Executive from amongst the principal officials of the executive authorities, members of the Legislative Council and members of the public. Their terms of office and the termination thereof before expiry shall be decided by the Chief Executive. The terms of office of members of the Executive Council shall not exceed that of the Chief Executive appointing them.

Members of the Executive Council of the HKSAR shall be Chinese nationals who are permanent inhabitants of the HKSAR.

The Chief Executive may invite the persons concerned to attend meetings of the Executive Council as non-voting members if he deems it necessary.

Article 56: The Executive Council of the HKSAR shall be presided by the Chief Executive.

Except for appointments and removals, disciplinary sanctions and measures taken in emergencies, the Chief Executive shall consult the Executive Council before making any important policy decisions, presenting bills to the Legislative Council, enacting subordinate legislation or dissolving the Legislative Council.

If the Chief Executive does not adopt the majority opinion of the Executive Council, he shall put on record his specific reasons.

Article 57: The HKSAR shall set up a commission against corruption which shall function independently and be responsible to the Chief Executive.

Article 58: The HKSAR shall set up an audit department which shall function independently and be responsible to the Chief Executive.

Section 2 The Executive Authorities

Article 59: The Government of the HKSAR shall be the executive authorities of the HKSAR.

Article 60: The head of the Government of the HKSAR shall be the Chief Executive of the HKSAR.

There shall be the Administrative Department, the Financial Department, the Legal Department, and various bureaus, offices and commissions.

The organisation of the Government of the HKSAR shall be prescribed by law.

Article 61: Principal officials of the HKSAR shall be Chinese nationals who are Hong Kong permanent inhabitants having ordinarily resided in Hong Kong for a continuous period of 15 years or more [Note 4].

Article 62: The Government of the HKSAR shall exercise the following functions and powers:

- (1) To formulate and implement policies;
- (2) To administer executive affairs prescribed in Article 15 of this Law;
- (3) To conduct external affairs as authorised by the Central People's Government as prescribed in this Law;
- (4) To draw up and present budgets and final accounts; and
- (5) To formulate and present bills, motions, and subordinate legislation.

Article 63: The prosecuting department of the executive authorities of the HKSAR shall independently deal with criminal prosecutions free from any interference.

Article 64: The executive authorities of the HKSAR shall abide by law and shall be accountable to the Legislative Council of the HKSAR. They shall implement the laws which have been passed by the Legislative Council and which have taken effect, submit periodic administrative reports to the Legislative Council, answer questions addressed by members of the Legislative Council, and seek the approval of the Legislative Council for tax levy and public expenditure.

Article 65: The previous system of establishing advisory bodies by the executive authorities shall be maintained.

Section 3 The Legislature

Article 66: The Legislative Council [Note 5] of the HKSAR shall be the legislature of the HKSAR.

Article 67: The Legislative Council of the HKSAR shall be constituted by mixed elections.

The method of forming the Legislative Council shall be prescribed in Annex II: "The Formation of the Legislative Council"

The method of forming the Legislative Council as prescribed in Annex II may be modified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual change. Such modifications shall require the endorsement of a two-thirds majority of the members of the Legislative Council of the HKSAR and the consent of the Chief Executive, and shall be reported to the Standing Committee of the National People's Congress for approval.

Article 68: Each term of office of the Legislative Council of the HKSAR shall be four years.

Article 69: If the Legislative Council of the HKSAR is dissolved by the Chief Executive in accordance with the provisions of this Law, it shall be reconstituted by election in accordance with Article 67 of this Law within three months.

Article 70:

Proposal 1:

The President of the Legislative Council of the HKSAR shall be elected from amongst the members of the Legislative Council.

The President of the Legislative Council of the HKSAR shall be a Chinese national who is a permanent inhabitant of the HKSAR of no less than 40 years of age and who has ordinarily resided in Hong Kong for a continuous period of 20 years or more.

Proposal 2:

The Chief Executive shall concurrently be the President of the Legislative Council of HKSAR:

Article 71: The President of the Legislative Council of the HKSAR shall exercise the following functions and powers:

- (1) To preside over meetings;
- (2) To decide and control the agenda of meetings;
- (3) To decide the time of meetings;
- (4) To call special meetings between sessions;
- (5) Other functions and powers prescribed in the standing orders of the Legislative Council.

Article 72: The Legislative Council of the HKSAR shall exercise the following functions and powers:

- (1) To enact, repeal, and amend laws in accordance with the provisions of this Law and legal procedures;
- (2) To examine and pass the budgets and final accounts as proposed by the executive authorities;
- (3) To approve taxation and public expenditure;
- (4) To receive the administrative reports of the Chief Executive and to debate thereon;
- (5) To question the work of the executive authorities;
- (6) To debate on any issue of public interest;
- (7) To assent to the appointment or removal of judges of the court of final appeal and the chief judge of the supreme court.
- (8) To receive and deal with complaints from Hong Kong inhabitants;
- (9) If the Chief Executive is guilty of serious breach of law or dereliction of duty, with a motion jointly moved by one-quarter of the members of the Legislative Council and passed by the Legislative Council, an independent investigation committee headed by the chief judge of the court of final appeal may be set up to carry out investigation and to report to the Legislative Council. If the committee deems that there is sufficient evidence to establish the above-mentioned charge, the Legislative Council may, with a two-thirds majority, pass an impeachment motion which shall be reported to the Central People's Government for decision.

Article 73:

Proposal 1:

Members of the Legislative Council of the HKSAR may, in accordance with the provisions of this Law and legal procedures, individually or jointly present any bills, save for the following three categories which will require the prior written approval of the Chief Executive:

- (1) Bills relating to revenue and expenditure;
- (2) Bills relating to government policies; and
- (3) Bills relating to the structure and operation of the Government.

Proposal 2:

Members of the Legislative Council of the HKSAR shall present bills in accordance with the provisions of this Law and legal procedures. Bills not relating to public expenditure or public policies may be presented individually or jointly by members of the Legislative Council.

Article 74: The Legislative Council of the HKSAR shall form a quorum of no less than half of its members for a meeting to be held.

Unless otherwise provided for in this Law, the passage of any bill or motion in the Legislative Council of the HKSAR shall require the votes of the majority of members present.

The standing orders of the Legislative Council shall be drawn up by the Legislative Council on its own, but they may not contravene this Law.

Article 75: A bill passed by the Legislative Council of the HKSAR may only take effect after it has been signed and promulgated by the Chief Executive.

Article 76: Members of the Legislative Council of the HKSAR shall be immune from legal action in respect of their speeches made at meetings of the Legislative Council.

Article 77: Members of the Legislative Council of the HKSAR shall not be subject to arrest when attending or on their way to meetings.

Article 78: The President of the Legislative Council of the HKSAR shall announce that a member of the HKSAR Legislative Council will no longer be qualified for such an office under any of the following circumstances [Note 6]:

- (1) inability to discharge the functions of his office due to

serious illness, or other reasons;

- (2) non-attendance at meetings of the legislature for three consecutive months without the consent of the President of the Legislative Council;
- (3) deprivation or renunciation of his status as a HKSAR permanent inhabitant;
- (4) bankruptcy or inability to honour the courts' judgment to pay debts;
- (5) Being relieved of his duties by the Legislative Council, with the consent of two-thirds of its members present, for having been convicted of a criminal offence within or outside the HKSAR and sentenced to imprisonment for one month or more;
- (6) Being reprimanded by two-thirds of the members of the Legislative Council present, for misbehaviour or breach of oath.

Section 4 The Judicial Organs

Article 79: The HKSAR courts at various levels shall be the judicial organs of the HKSAR, exercising the judicial power of the HKSAR.

Article 80: A court of final appeal, a supreme court, regional courts, magistrates' courts and other special courts shall be established in the HKSAR. The supreme court shall comprise the court of appeal and the high court.

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 HKSAR.

Article 81: The power of final adjudication of the HKSAR shall be vested in the court of final appeal of the HKSAR, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal.

Article 82: The organisation and jurisdiction of the courts of the HKSAR at various levels shall be prescribed by law.

Article 83: The courts of the HKSAR shall decide cases in accordance with the laws applicable in the HKSAR as prescribed in Article 17 of this Law and may refer to precedents in other common law jurisdictions.

Article 84: The courts of the HKSAR 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.

Article 85: The principle of the jury system previously practised in Hong Kong shall be maintained.

Article 86: In respect of the conduct of criminal or civil proceedings in the HKSAR, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to the proceedings shall be maintained.

Article 87: Judges of the HKSAR courts [Note 7] 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.

Article 88: A judge of the HKSAR courts may 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 no fewer than three local judges.

The chief judge of the court of final appeal may, under the procedures prescribed by this Law, be removed for inability to discharge the functions of his office, or for misbehaviour, by the Chief Executive acting in accordance with the recommendation of a tribunal consisting of no fewer than five local judges appointed by the Chief Executive.

Article 89: In addition to the procedures prescribed in Articles 87 and 88 of this Law, the appointment and removal of judges of the court of final appeal and the chief judge of the supreme court of the HKSAR shall be made by the Chief Executive with the endorsement of the HKSAR Legislative Council and reported to the Standing Committee of the National People's Congress for the record.

Article 90: The previous system of appointment and removal of judicial officers other than judges of the HKSAR shall be maintained.

Article 91: Judges and other judicial officers of the HKSAR

shall be chosen by reference to their judicial and professional qualities and may be recruited from other common law jurisdictions.

Article 92: Judges and other judicial officers serving in Hong Kong before the establishment of the HKSAR may remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 93: The HKSAR Government shall pay to judges and other judicial officers who retire or leave the service in compliance with regulations, as well as those who have retired or left the service before the establishment of the HKSAR, 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.

Article 94: The HKSAR may, through consultation, maintain judicial links with and render mutual assistance to the judicial organs of other parts of the State in accordance with law.

Article 95: Under the assistance or authorisation of the Central People's Government, the HKSAR Government may make appropriate arrangements for reciprocal juridical assistance with foreign states.

Section 5 Regional Organisations

Article 96: Regional organisations which are not of the nature of local organs of political power may be established in the HKSAR, to be consulted by the HKSAR Government on district administration and other matters, or to be responsible for the provision of services in such fields as culture, recreation, and environmental health [Note 8].

Article 97: The functions and powers of regional organisations and their composition shall be prescribed by law.

Section 6 Public Service

Article 98: Public servants serving in all government departments of the HKSAR shall be permanent inhabitants of the HKSAR, save as otherwise provided in Article 100 of this Law and save for those

below a certain salary point as prescribed by law.

Public servants shall perform their duties conscientiously and be responsible to the HKSAR Government.

Article 99: Public servants serving in all government departments, including the police department, before the establishment of the HKSAR may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 100: The HKSAR 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 HKSAR to serve as public servants at all levels, save that officials at the following levels shall be HKSAR permanent inhabitants who are Chinese nationals: Secretaries, Deputy Secretaries, Directors of Bureaus, Commissioner Against Corruption, Director of Audit, Deputy Director of the Security Bureau and Deputy Director of the Civil Service Bureau, Commissioner and Deputy Commissioner of Police, Director and Deputy Director of External Affairs, Director of Immigration, Commissioner of Customs and Excise.

The HKSAR 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 HKSAR to professional and technical posts in government departments. The above foreign nationals shall be employed only in their individual capacities and be responsible to the HKSAR Government.

Article 101: The HKSAR Government shall pay to public servants who retire or leave the service in compliance with regulations, as well as those who have retired or left the service in compliance with regulations before the establishment of the HKSAR, 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 or residence.

Article 102: 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.

Article 103: The Chief Executive, principal officials, members of the Executive Assembly, members of the Legislative Council, judges at all levels and members of the judiciary of the HKSAR shall take an oath in accordance with law when assuming office.

Section 1 Public Finance and Taxation

Article 104: The HKSAR shall have independent finances.

The HKSAR shall use its financial revenues exclusively for its own purposes and they shall not be handed over to the Central People's Government.

Article 105: The drawing up of the budgets of the HKSAR shall adhere to the principle of keeping expenditure within the limits of revenue.

The HKSAR Government shall maintain a basic balance between its total revenue and total expenditure over a certain number of financial years.

The rate of increase of revenue and expenditure in the budget of the HKSAR shall not, in principle, exceed the growth rate of the Gross Domestic Product over a certain number of financial years.

Article 106: The HKSAR shall practise an independent taxation system.

The Central People's Government shall not levy taxes on the HKSAR.

Article 107: The HKSAR shall continue to practise a policy of low tax rate.

Article 108: The types of taxes, the tax rates and tax exemptions in the HKSAR shall be prescribed by law.

Section 2 Finance and Monetary Affairs

Article 109: The HKSAR Government shall provide the conditions and take measures to maintain the status of the HKSAR as an international financial centre.

Article 110: The HKSAR shall continue to adopt free and open monetary and financial policies. The monetary and financial systems shall be prescribed by law.

Article 111: No exchange control policy shall be applied in the

HKSAR. Markets for foreign exchange, gold, securities and futures shall continue.

Article 112: The HKSAR Government shall safeguard the free flow of all capital within, into and out of the HKSAR.

Article 113: The HKSAR Government shall safeguard the free operation of financial business and financial markets, and regulate and supervise such business and markets in accordance with law.

Article 114: The Hong Kong dollar, as the legal tender of the HKSAR, shall continue to circulate and remain freely convertible.

Article 115: The authority to issue Hong Kong currency shall be vested in the HKSAR Government. The system regarding the issue of Hong Kong currency shall be prescribed by law.

The issue of Hong Kong currency shall be backed up by a reserve fund of no less than 100 per cent freely convertible foreign currency.

The HKSAR Government may authorise 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 maintenance of the stability of the currency.

Article 116: The Exchange Fund of the HKSAR shall be managed and controlled by the HKSAR Government, primarily for regulating the exchange rate of the Hong Kong dollar.

Section 3 External Trade and Economic Relations

Article 117: The HKSAR shall continue to practise free external economic and trade policies.

The HKSAR shall protect the free movement of goods, intangible property and capital.

Foreign investments shall be protected by law.

Article 118: The HKSAR shall continue to be a free port.

The HKSAR shall not impose any tariff unless otherwise stipulated by law.

Article 119: The HKSAR shall be a separate customs territory.

The HKSAR may, using the name "Hong Kong, China", participate in relevant international organisations and international trade agreements, including preferential trade arrangements, such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.

Article 120: Export quotas, tariff preferences and other similar arrangements which are obtained by the HKSAR, or which were previously obtained and which remain effective, shall be enjoyed exclusively by the HKSAR.

Article 121: The HKSAR may issue its own certificates of origin for local products in accordance with prevailing rules of origin.

Section 4 Industry, Commerce, and Other Trades

Article 122: The HKSAR shall adopt free and open policies regarding industry, commerce and other trades.

Article 123: The HKSAR Government shall provide the environment and conditions to encourage industrial investment and technological advancement, and develop new industries.

Article 124: The HKSAR shall formulate appropriate policies to promote and co-ordinate the development of various trades such as commerce, tourism, real estate industry, transport industry, public utilities, service industries, agriculture and fishery.

Section 5 Land Leases

Article 125: The HKSAR may on its own decide policies regarding the development, management and use of land.

Article 126: All leases of land granted, decided upon or renewed before the establishment of the HKSAR, which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognised and protected under the laws of the HKSAR.

Article 127: As regards all leases of land granted or (in respect of leases not originally containing a right of renewal) renewed within the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire no later than 30 June 2047, the lessee need not pay an additional premium as from 1

July 1997, but as from that date an annual rent equivalent to three per cent of the rateable value of the property at that date, adjusted in step with changes in the rateable value thereafter, shall be charged.

Article 128: 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 previous 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.

Article 129: Where leases of land not having a right of renewal expire after the establishment of the HKSAR, they shall be dealt with in accordance with the laws and policies decided by the HKSAR on its own.

Section 6 Shipping

Article 130: The HKSAR shall maintain Hong Kong's previous systems of shipping management and shipping regulation.

The specific functions and responsibilities of the HKSAR Government in the field of shipping shall be defined by the HKSAR Government on its own.

Article 131: The HKSAR shall be authorised 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".

Article 132: 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 HKSAR in accordance with the laws of the HKSAR.

Article 133: Private shipping businesses and shipping-related businesses and private container terminals in Hong Kong may continue to operate freely.

Section 7 Civil Aviation

Article 134: The HKSAR Government shall provide the conditions and take measures to maintain the status of Hong Kong as a centre

of international and regional aviation.

Article 135: The HKSAR shall continue to practise 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 for foreign military aircraft to the HKSAR shall require the permission of the Central People's Government.

Article 136: The HKSAR 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 HKSAR, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organisation.

Article 137: The Central People's Government shall, in consultation with the HKSAR Government, make arrangements providing for air services between the HKSAR and other parts of the People's Republic of China for airlines incorporated in the HKSAR and having their principal place of business in Hong Kong and other airlines of the People's Republic of China.

Article 138: 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 HKSAR and air services between the HKSAR 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.

When concluding the Air Service Agreements mentioned in the first paragraph of this Article, the Central People's Government shall take account of the special conditions and economic interests of the HKSAR and consult the HKSAR Government.

Representatives of the HKSAR 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 the services mentioned in the first paragraph of this Article.

Article 139: Acting under specific authorisations from the Central People's Government, the HKSAR Government 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 HKSAR and having their principal place of business in Hong Kong, and rights for overflights and technical stops; and

- (3) 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 Hong Kong 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 Article.

Article 140: The Central People's Government shall give the HKSAR Government the authority to:

- (1) negotiate and conclude with other authorities all arrangements concerning the implementation of the Air Service Agreements and provisional arrangements mentioned in Article 139 of this Law;
- (2) issue licences to airlines incorporated in the HKSAR and having their principal place of business in Hong Kong;
- (3) designate such airlines under the Air Service Agreements and provisional arrangements mentioned in Article 140 of this Law; and
- (4) issue permits to foreign airlines for services other than those to, from, or through the mainland of China.

Article 141: Airlines incorporated in Hong Kong prior to the establishment of the HKSAR and having their principal place of business in Hong Kong and civil aviation related businesses may continue to operate.

Chapter 6 Education, Science, Culture, Sports, Religion, Labour and Social Services

Article 142: The HKSAR shall maintain the educational system previously practised in Hong Kong.

Article 143: The HKSAR Government shall on its own decide educational policies, 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 organisations and individuals may operate various kinds of educational undertakings in the HKSAR in accordance with law.

Article 144: Educational institutions of all kinds may retain their autonomy and have academic freedom. They may continue to recruit staff and use teaching material from outside the HKSAR. Educational institutions run by religious organisations may continue to provide religious education, including running courses on religion.

Students shall enjoy freedom of choice of education and freedom to pursue their education outside the HKSAR.

Article 145: The HKSAR Government shall promote medical and health services, develop Chinese and Western medicine, and encourage community organisations and individuals to provide medical and health services of all kinds.

Article 146: The HKSAR Government shall on its own decide policies in the fields of science and technology. The laws of the HKSAR shall protect achievements in research, patents, inventions and discoveries relating to science and technology.

The HKSAR Government shall on its own determine the scientific and technological standards and specifications applicable in Hong Kong.

Article 147: The HKSAR Government shall decide its cultural policies on its own and protect the achievements and legitimate rights and interests resulting from authorship of literary and artistic creation.

Article 148: The HKSAR Government shall not interfere in the internal affairs of religious organisations and shall not impose

restrictions on religious activities which do not contravene the laws of the HKSAR.

Religious organisations shall, in accordance with law, enjoy rights concerning the acquisition, use, disposal, and inheritance of property, and the right to receive financial assistance. The previous rights and interests in respect of property shall be maintained and protected.

Religious organisations may, in accordance with the previous practice, continue to run theological institutions and other educational institutions, hospitals and welfare institutions, and to provide other social services.

Article 149: Religious organisations and believers in the HKSAR may maintain and develop relations with religious organisations and believers elsewhere.

Article 150: The HKSAR Government shall on its own decide the methods of assessing and accrediting qualifications for the various professions. The methods of assessing and accrediting qualifications previously practised in Hong Kong may be retained and improved.

Persons who obtained professional qualifications or qualifications for professional practice prior to the establishment of the HKSAR may retain their previous qualifications.

The HKSAR shall maintain the professions and professional organisations which were recognised prior to the establishment of the HKSAR. The recognised professional organisations may on their own assess and accredit professional qualifications.

The HKSAR Government may, in accordance with the needs arising from social development and in consultation with the parties concerned, give recognition to new professions and professional organisations.

Article 151: The HKSAR Government shall on its own decide sporting policies. Previous non-governmental sports organisations may continue to exist and develop in accordance with law.

Article 152: The HKSAR shall maintain the policy previously practised in Hong Kong in respect of the provision of subventions for organisations in such fields as education, medicine, culture, arts, recreation, sports, social welfare, and social work. Personnel previously serving in subvented organisations in Hong Kong may continue their employment in accordance with the previous system.

Article 153: The HKSAR Government shall maintain the previous social welfare system and shall on its own decide policies regarding the development and improvement of the social welfare system in the light of economic conditions and social needs.

Article 154: Voluntary organisations providing social services in the HKSAR may, in accordance with law, decide their modes of service on their own.

Article 155: The HKSAR shall on its own formulate laws and policies regarding labour in the light of economic development, social needs, and the actual circumstances of labour-management consultations.

Article 156: The principles of non-subordination, non-interference, and mutual respect shall be observed in respect of the relationship between non-governmental organisations in such fields as education, science, technology, culture, sports, the professions, and social welfare, as well as religious organisations in the HKSAR, and their counterparts in the mainland.

Article 157: Organisations in such fields as education, science, technology, culture, sports, health, the professions, labour, social welfare and religion in the HKSAR may maintain and develop relations with other states, regions and relevant international organisations. When necessary, these organisations may, using the name "Hong Kong, China", participate in the relevant activities.

Chapter 7 External Affairs

Article 158: Representative of the HKSAR 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 HKSAR conducted by the Central People's Government.

Article 159: The HKSAR 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 organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields.

Article 160: The HKSAR may send representatives to participate, as members of delegations of the Government of the People's Republic of China, in international organisations or conferences in appropriate fields limited to states and affecting the HKSAR, or may attend in such other capacity as may be permitted by the Central People's Government and the organisation or conference concerned, and may express their views in the name of "Hong Kong, China".

The HKSAR may, using the name "Hong Kong, China", participate in international organisations and conferences not limited to states.

The Central People's Government shall take the necessary steps to ensure that the HKSAR shall continue to retain its status in an appropriate capacity in those international organisations 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 HKSAR in an appropriate capacity in those international organisations 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.

Article 161: The application to the HKSAR 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 HKSAR, and after seeking the views of the HKSAR 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 HKSAR. The Central People's Government shall, as necessary, authorise or assist the HKSAR Government to make appropriate arrangements for the application to the HKSAR of other relevant international agreements.

Article 162: The Central People's Government shall authorise the HKSAR Government to issue, in accordance with law, passports of the HKSAR of the People's Republic of China to all Chinese nationals who hold permanent identity cards of the HKSAR, and travel documents of the HKSAR of the People's Republic of China to all other persons lawfully residing in the HKSAR. The above passports and documents shall be valid for all states and regions and shall record the holder's right to return to Hong Kong.

The HKSAR Government may apply immigration controls on entry, stay in and departure from the HKSAR by persons from various states and regions.

Article 163: The Central People's Government shall assist or authorise the HKSAR Government to conclude visa abolition agreements with states or regions.

Article 164: The HKSAR 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.

Article 165: Foreign consular and other official or semi-official missions may be established in the HKSAR 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 established in Hong Kong by states which have no formal diplomatic relations with the People's Republic of China may either be maintained or changed to semi-official missions.

States not recognised by the People's Republic of China can only establish non-governmental institutions.

Chapter 8 The Regional Flag and Regional Emblem of the HKSAR

Article 166: Apart from displaying the national flag and national emblem, the HKSAR may use the regional flag and regional emblem on its own (to be drafted).

Article 167: The regional flag of the HKSAR (to be drafted).

Article 168: The regional emblem of the HKSAR (to be drafted).

Chapter 9 The Interpretation and Amendment of this Law

Article 169: The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

If the Standing Committee of the National People's Congress has given an interpretation of a provision of this Law, the courts of the HKSAR shall, in applying that provision, follow the interpretation of the Standing Committee of the National People's Congress. Judgments previously given, however, shall not be affected.

The courts of the HKSAR may, in adjudicating cases before them, interpret the provisions of this Law. If a case involves the interpretation of a provision of this Law concerning defence, foreign affairs and other affairs which are the responsibilities of the Central People's Government, the courts of the HKSAR shall, before giving their final judgments on the case, seek an interpretation of the relevant provision from the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall consult its HKSAR Basic Law Committee before giving an interpretation of this Law.

Article 170: The power of amendment of this Law shall be vested in the National People's Congress.

The power to propose amendment to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council, and the HKSAR. Amendment proposals from the HKSAR shall be submitted to the National People's Congress by the HKSAR delegation to the National People's Congress after obtaining the consent of a two-thirds majority of the HKSAR deputies to the National People's Congress, a two-thirds majority of the members of the HKSAR legislature and the Chief Executive of the HKSAR.

Before a proposal to amend this Law is included in the agenda of the National People's Congress, the HKSAR Basic Law Committee shall first study it and give advice on it.

No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding the HKSAR.

Chapter 10 Supplementary Provisions

Article 171: Under the guidance of the principles of giving expression to the sovereignty of the State and ensuring a smooth transition, the first Government and the first Legislative Council of the HKSAR shall be formed in accordance with the provisions in Annex III: "The Formation of the First Government and Legislative Council of the HKSAR".

Article 172: Upon its establishment, the HKSAR shall adopt the laws previously in force in Hong Kong as the laws of the HKSAR save for any that are declared to be in contravention of this Law by the Standing Committee of the National People's Congress. Any existing laws which are found to be in contravention of this Law may be repealed or amended in accordance with the procedures prescribed in this Law.

Documents, certificates, contracts, rights and duties effective under the laws previously in force in Hong Kong shall continue to be effective and be recognised and protected by the laws of the HKSAR provided that they do not contravene this Law.

ANNEX I: THE SELECTION OF THE
CHIEF EXECUTIVE OF THE HKSAR

Proposal 1

1. The Chief Executive of the HKSAR shall be elected locally by an electoral college which has a wide basis of representation.
2. The electoral college shall be composed of representatives of various sectors in Hong Kong. Members of the electoral college shall include: Members of the legislature, representatives of various regional organisations, representatives of statutory bodies and permanent non-statutory bodies, representatives of various functional constituencies (including industrial, commercial, financial, professional, educational, labour, religious, social service, public service and other sectors), totalling about 600 in number.
3. Individual community bodies and organisations within the electoral college shall elect their representatives through democratic procedures in accordance with their own internal regulations. The elected representatives shall vote in their individual capacities. One person may not represent more than one organisation. The term of office shall terminate with the dissolution of the electoral college after the election.
4. A 20-member nomination committee constituted by election among members of the electoral college shall be set up. The nomination committee shall be responsible for nominating three candidates for the Chief Executive. Members of the nomination committee may neither run for the post of, nor vote in the election of, the Chief Executive.
5. The electoral college shall vote for candidates nominated by the nomination committee. A candidate must gain the majority vote in order to be elected the Chief Executive. If no single candidate managed to secure the majority vote in the first round, a second round of voting shall be conducted for the two leading candidates. The Chief Executive elected by the electoral college shall be appointed by the Central People's Government.
6. The detailed rules of election shall be prescribed by the HKSAR Government by means of legislation.

Proposal 2:

1. The Chief Executive shall be nominated by no less than one-tenth of the members of the legislature, and directly

elected by a territory-wide direct election with universal franchise.

2. Each member of the legislature may nominate only one candidate for the post of the Chief Executive.
3. The election of the Chief Executive must be a genuine election held at regular intervals. The right to vote must be universal and equal. Election should be by secret ballot in order to ensure the free expression of the will of voters.
4. If the selected Chief Executive is a member of the legislature, the executive authorities or the judicial organs, he must relinquish his former functions immediately after being elected.
5. The detailed rules for the election of the Chief Executive shall be prescribed by the HKSAR by means of legislation.

Proposal 3:

1. The Chief Executive of the HKSAR shall be elected by an electoral college of functional constituencies on a one-man-one-vote basis.
2. The electoral college of functional constituencies shall have no more than 600 members. Members shall be elected from amongst representatives of industrial, commercial, financial, professional, labour and other organisations who are permanent inhabitants of the HKSAR and who play an influential role in the workings of the government and in social services. The composition shall be as follows:

Industrial, commercial and financial organisations	25%
Professional organisations	35%
Labour organisations	10%
Religious, social and charity organisations	15%
Kaifong associations and hawker organisations	15%
3. Any person who meets the requirements prescribed in Article 44 of this Law and is nominated by fifty permanent inhabitants of the HKSAR may become a candidate for the post of the Chief Executive of the HKSAR.
4. A member of the electoral college may neither nominate candidates nor run for the post; a nominator may neither be a member of the electoral college nor run for the post; and a candidate may neither be a member of the electoral college nor nominate other candidates.

Proposal 4:

1. Except for the first term, which has been specially provided for, the first few (two or three) terms of office of Chief Executives shall be selected through consultations by an advisory council.

The advisory council shall consist of 50-100 members who shall be nominated by people from various sectors of the community and selected by the Executive Council. The Chief Executive shall report the selection to the Central Government, which will decide on the appointment of the council members. (Members of the advisory council shall be advisers specialising in the political structure, as distinct from other professional advisers.)

Each advisory council shall be formed six months before the expiry of the term of office of the incumbent Chief Executive. However, if both the advisory council and the Central Government agree that the incumbent Chief Executive should serve a further term, there is no need to form a new advisory council.

2. The Chief Executives of subsequent governments shall be elected by an electoral college.

The electoral college, comprising former Legislative and Executive Councillors, former Chief Executives and former principal officials who were appointed by the Central Government, shall be formed when its membership has reached 250 in number. Membership shall increase with each subsequent government until it has reached a maximum of 500. If this number is exceeded, some members shall have to retire in the order of seniority; if the seniority of the members concerned is identical, retirement shall be in the order of age.

The advisory council shall nominate three candidates through consultations and, with the endorsement of the Central Government, the Chief Executive designate shall be elected by the electoral college.

Proposal 5

1. The Chief Executive shall be elected by Hong Kong voters in a general election on a one-man-one-vote basis. The three candidates for the Chief Executive shall be nominated by the "Nomination Committee for the Chief Executive of the HKSAR" through consultations or by election following consultations.

2. The "Nomination Committee for the Chief Executive of the HKSAR" formed by permanent inhabitants of Hong Kong must have a wide basis of representation. Members shall include

Hong Kong deputies to the National People's Congress (NPC) and the Chinese People's Political Consultative Conference (CPPCC), representatives of the legislature and regional organisations, and representatives of various strata and sectors.

3. The composition of the "Nomination Committee for the Chief Executive of the HKSAR" shall be as follows:

Representatives of industrial, commercial and financial sectors	25%
Representatives of professional organisations	25%
Representatives of labour, grassroots and religious organisations	25%
Members of the legislature	12%
Members of regional organisations	8%
Deputies to the NPC and CPPCC	5%

4. The "Nomination Committee for the Chief Executive of the HKSAR" shall be responsible for drawing up consultation or voting procedures and nominating candidates for the post of the Chief Executive. Members of the Nomination Committee may not run for the post of the Chief Executive.

5. Members of the "Nomination Committee for the Chief Executive" shall be elected, recommended or selected through consultations by statutory bodies or permanent non-statutory bodies in various sectors. The constitution of the "Nomination Committee" shall be prescribed by the HKSAR by means of legislation.

6. Such matters as the registration of voters for the election of the Chief Executive on a one-man-one-vote basis and voting procedures shall be prescribed by the HKSAR by means of legislation.

ANNEX II: THE FORMATION OF THE
LEGISLATIVE COUNCIL OF THE HKSAR

Proposal 1

1. The legislature of the HKSAR shall be composed of 80 members. The composition shall be as follows: 50% elected by functional constituencies, 25% elected by geographical constituencies in direct elections, and 25% elected by an electoral college.
2. The composition of the electoral college and the nomination committee shall be the same as that prescribed in Proposal 1 under the Annex on "The Selection of the Chief Executive of the HKSAR". The Chief Executive shall be the chairman of the nomination committee.
3. A voter may only take part in one of the three forms of election mentioned above, and may only stand for election in one form of election.
4. The term of office of members of the legislature shall be four years, with elections to be held once every two years for half the number of seats. Elections by functional constituencies shall be held once every two years to fill 50% of the seats; direct elections by geographical constituencies and elections by the electoral college shall be held alternately once every two years (direct elections by geographical constituencies and the election of the Chief Executive shall be held in the same year.)
5. Direct elections by geographical constituencies -- The territory shall be divided into ten constituencies. In each constituency, two candidates with the highest number of votes shall win the election.
6. The detailed rules of election shall be prescribed by the HKSAR by means of legislation.

Proposal 2

1. The composition of the legislature of the HKSAR shall be as follows:

No less than 50% of the seats shall be constituted by direct elections with universal franchise; no more than 25% shall be elected by functional constituencies; and no more than 25% shall be elected by regional organisations (that is, District Boards, the Urban Council, the Regional Council and similar bodies).

2. Direct elections to the legislature must be genuine elections held at regular intervals. The right to vote must be universal and equal. Election should be by secret ballot in order to ensure the free expression of the will of the voters.
3. The detailed rules of elections to the legislature shall be prescribed by the HKSAR by means of legislation.

Proposal 3

1. The legislature shall be composed of 60 members.
2. 30% of members (18) shall be persons (who are not advisers themselves) recommended by an advisory council, of whom at least one-third (6) shall be principal officials while the remaining (about two-thirds) shall be members of the Executive Council and other people in the community. (Members selected by the advisory council must include members of the Executive Council and principal officials in order that better links between the executive authorities and the legislature can be maintained.)
3. 40% (24) shall be elected by functional constituencies.
4. 30% shall be directly elected by geographical constituencies. The number of directly elected members and members selected by an advisory council, as well as the time they are elected or selected, shall roughly be the same in order to maintain equilibrium. (There should not be any direct elections by geographical constituencies if the method of selection by an advisory council is not adopted.)
5. Detailed methods of elections mentioned in items 3 and 4 above shall be prescribed by law.

Proposal 4

1. The composition of the legislature shall be as follows:

Industrial and commercial sectors	30%
Professionals	25%
Grassroots organisations	20%
Geographical constituencies in general election	25%
2. The composition is divided into four major categories. The first three categories shall be subdivided into sectors. The division and the number of members to be elected from each sector shall be prescribed by the HKSAR by means of legislation.

Members from the first three categories shall be selected from various statutory organisations in accordance with law.

These organisations shall, in accordance with the number of seats allocated, decide on their own which of the following methods of elections they should adopt: (1) Direct election by all members on a one-man-one-vote basis; (2) Indirect election by member organisations on a one-unit-one-vote basis; and (3) Indirect election by the councils of these organisations with the authorisation of the general meeting.

- Such matters as the division of geographical constituencies, the registration of voters, voting procedures, and the nomination of candidates shall be prescribed by the HKSAR by means of legislation.

[Note]

- Members who put forward Proposals 1 and 3 pointed out that the methods of selecting members of the legislature outlined in their respective proposals were package deals. In other words, whether or not direct elections by geographical constituencies should be held would depend on whether the other two methods were accepted.
- Some members proposed that all members of the legislature of the HKSAR should be elected by functional constituencies and that the method of election by functional constituencies should be the same as that set out in Proposal 3 under Annex I.
- A member pointed out that all members of the legislature of the HKSAR should be elected by geographical constituencies in direct elections on a one-man-one-vote basis. He held that elections to the legislature must be genuine elections held at regular intervals, that the right to vote must be universal and equal, and that election should be by secret ballots to ensure the free expression of the will of voters.
- A member held that the question of general election on a one-man-one-vote basis should be considered in conjunction with the question of nationality, and that the right to vote and the right to stand for election in respect of former permanent inhabitants of Hong Kong who have emigrated to other countries (but not necessarily have acquired foreign nationality) should be looked into.

ANNEX III: THE FORMATION OF THE FIRST GOVERNMENT AND LEGISLATIVE COUNCIL OF THE HKSAR

- The National People's Congress shall set up a Preparatory Committee for the HKSAR in 1996, which shall be responsible for matters concerning the establishment of the HKSAR and for deciding the specific method of forming the first HKSAR government. The Preparatory Committee shall consist of mainland and Hong Kong members, with the latter accounting for no less than 50% of the seats. The chairman and members of this Committee shall be appointed by the Standing Committee of the National People's Congress.
- The Preparatory Committee for the HKSAR shall be responsible for forming a "Selection Committee for the First Government of the HKSAR".

The "Selection Committee for the First Government of the HKSAR", whose membership shall be restricted to permanent inhabitants of Hong Kong, must have a basis of wide representation. Members of this Committee shall include Hong Kong deputies to the National People's Congress (NPC) and the Chinese People's Political Consultative Conference (CPPCC) of the People's Republic of China, people with practical experience who have worked in the executive, legislative and consultative organs in Hong Kong prior to the establishment of the HKSAR, as well as representatives of various strata and sectors of the community.

It was suggested that the composition of the "Selection Committee" should tentatively be fixed as follows:

Representatives of industrial, commercial and financial sectors	25%
Professionals	25%
Representatives of labour, grassroots and religious organisations	25%
Retired and serving members of the various councils and boards of the government	20%
Deputies to the NPC and CPPCC	5%

- The "Selection Committee" shall draw up the procedures for the selection of candidates for the post of the first Chief Executive of the HKSAR either through consultations or by election following consultations held locally. The selected candidate shall then be appointed by the Central People's Government. The term of office of the first Chief Executive shall be the same as any regular term of office of this post.

4. The first government of the HKSAR shall be formed by the Chief Executive of the HKSAR in accordance with the provisions of this Law.
5. The first (or provisional) legislature of the HKSAR shall be constituted by election held by the "Selection Committee". Serving members of the Legislative Council in Hong Kong may be considered as candidates for the first (or provisional) legislature of the HKSAR.

The terms of office of members of the first (or provisional) legislature of the HKSAR shall be two years.
6. The first Chief Executive of the HKSAR shall take his oath of office on 1 July 1997.
7. The first government and legislature of the HKSAR shall be established simultaneously on 1 July 1997.

Explanatory Notes:

Note 1: Members proposed that a map showing the geographical boundary of the HKSAR be published by the State Council when the Basic Law was promulgated by the National People's Congress.

Note 2: The Subgroup on the Relationship between the Central Government and the HKSAR made the following proposal for the HKSAR Basic Law Committee:

1. Name - to be tentatively called "The HKSAR Basic Law Committee of the Standing Committee of the National People's Congress".
2. Affiliation - an organ under the Standing Committee of the National People's Congress.
3. Functions - to carry out discussions and advice the National People's Congress or its Standing Committee on the following matters:
 - (1) Whether the laws enacted by the HKSAR legislature are in accordance with the Basic Law and legal procedures [Article 16 of the consultation draft of the Basic Law (Bill)].
 - (2) The question of the applicability of national laws to the HKSAR [Article 17].
 - (3) The question of the interpretation of the Basic Law [Article 169].
 - (4) The question of amendment to the Basic Law [Article 170].
4. Composition - it shall comprise mainland and Hong Kong members, including members from the legal profession, to be appointed by the Standing Committee of the National People's Congress. The number and proportion of membership are to be decided at a later stage.

Note 3: The various departments of the HKSAR executive authorities are tentatively named as follows: 1. The three major departments: the Administrative Department, the Financial Department, and the Legal Department are called "si" (司) in Chinese, with their heads being called the Secretary for Administration (政務司司長), the Financial Secretary (財政司司長), and the Attorney General (律政司司長); 2. Departments which have the power to formulate policies are called "ju" (局) in Chinese, such as the Monetary Affairs Bureau, the Industry and Commerce Bureau, the Traffic and Transport Bureau, the Education Bureau, and the Civil Service Bureau; 3. Departments which are responsible for executive affairs rather

than formulation of policies are called "chu" (處) in Chinese, such as the Police Department, the External Affairs Department, and the Immigration Department; 4. Departments whose work are of a relatively independent nature are called "shu" (署) in Chinese, such as the Independent Commission Against Corruption, and the Department of Audit.

Note 4: Members held that principal officials should generally be selected from public servants but could also be selected from outside the public service. The terms of employment for principal officials of the latter kind should be equivalent to those of the contract staff in the public service; such principal officials should leave the public service upon completion of their terms of office. Deployment of principal officials and expansion of the establishment of officials at the level of "si" (司) and "ju" (局) should be reported to the Central People's Government for approval.

Note 5: Members agreed that the legislature should still be called "the Legislative Council" in English.

Note 6: Whether or not members of the legislature have to resign after being appointed as principal officials in the executive authorities has yet to be studied.

Note 7: Judges of the HKSAR courts refer to regional court judges or above. Other judicial officers include magistrates and presiding officers at other special tribunals. Other personnel working in the judiciary are considered public servants.

Note 8: Members held that if the present three-tier structure was retained, district boards should still be district consultative bodies.

A COLLECTION OF OPINIONS AND SUGGESTIONS
EXPRESSED BY SOME DRAFTERS ON THE PROVISIONS
DRAFTED BY THEIR RESPECTIVE SUBGROUPS

[Chapter 1]

Article 2

1. A member proposed that the article be amended as follows: "The National People's Congress authorises the HKSAR to exercise a high degree of autonomy in accordance with the provisions of this Law. The power of supervision on the implementation of this Law shall be vested in the Standing Committee of the National People's Congress. Any executive, legislative or judicial act which goes beyond the powers conferred by this Law may be declared invalid by the Standing Committee of the National People's Congress."
2. Another member proposed the following amendment: "The HKSAR shall enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government."

Article 10

A member proposed that the last phrase of paragraph 1 be amended to read "shall ultimately be based on the provisions of this Law", and that the second paragraph should become a separate article.

[Chapter 2]

Article 13

A member suggested that there should be separate laws to deal with members of the garrison who had committed crimes.

Article 16, Paragraph 3

1. A member proposed that the paragraph be amended to read: "If the Standing Committee of the National People's Congress, after consulting the Basic Law Committee of the HKSAR, considers that there is a possibility that a law of the HKSAR is not in conformity with this Law or legal procedures, it may refer the law in question to the court of final appeal for consideration. If the court of final appeal considers that the law in question, either in part or in its entirety, is not in conformity with this Law or legal procedures, it may declare the relevant part of the law or

the entire law invalid, but the cessation of force shall not have retrospective effect."

2. A member proposed that the last clause of paragraph 3 of Article 16 be amended to read: "This cessation of force shall not have retrospective effect save in relation to criminal and constitutional matters."

Article 17

A member proposed that this article be amended to read: "The laws of the HKSAR shall be this Law, the laws previously in force in Hong Kong as prescribed in Article 8 of the General Provisions of this Law, and laws enacted by the HKSAR legislature."

The laws enacted by the National People's Congress and its Standing Committee shall not be applied in the HKSAR save for those which relate to defence and foreign affairs and which, in accordance with the provisions of this Law, are not within the scope of the high degree of autonomy of the HKSAR.

Of the laws relating to defence and foreign affairs mentioned above, those which shall be applied in the HKSAR shall be applied by way of legislation by the HKSAR legislature on the directives of the Standing Committee of the National People's Congress.

Except in emergencies, the Standing Committee of the National People's Congress shall consult the HKSAR Basic Law Committee and the HKSAR Government before issuing the above-mentioned directives.

If the HKSAR legislature fails to comply with the directives of the Standing Committee of the National People's Congress, the latter may, through the Chief Executive of the HKSAR, apply the above-mentioned laws in the HKSAR by way of proclamation.

Other than those laws relating to defence and foreign affairs mentioned above, a small number of national laws relating to the expression of national unity and territorial integrity, that is, those set out in the Annex of this Law, shall be applied in the HKSAR."

Article 18

Members also put forward the following proposals for this article:

Proposal 1:

Save in issues referred to in sub-paragraphs (1) to (4) below, the courts of the HKSAR shall have the same jurisdiction as the previous Hong Kong courts:

- (1) the relationship between the Central Government and the HKSAR;
- (2) the validity of the executive acts of the Central Government (including defence and foreign affairs);
- (3) the validity of those executive acts relating to defence and foreign affairs carried out by the HKSAR Government in accordance with the provisions of this Law upon the directives of the Central Government;
- (4) the validity of those executive acts relating to external affairs which the HKSAR Government is authorised by the Central Government to handle on its own in accordance with the provisions of this Law and which are deemed to be "acts of state" under the laws previously in force in Hong Kong, and the contents of the same which are deemed to be "facts of state" under the laws previously in force in Hong Kong.

In adjudicating cases before them, the courts of the HKSAR shall consult the Chief Executive in respect of questions relating to any of the categories (1) to (4) above, and the certificate issued by the Chief Executive regarding such questions shall be binding on the courts.

The Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council before issuing the above-mentioned certificate.

[Note: It is inappropriate for a court of a regional government, which enjoys the power of final adjudication, to handle cases relating to categories (1) to (4) above.]

Proposal 2:

Save for the restrictions on the judicial power of the courts under the legal system and principles previously applied in Hong Kong, which shall be maintained, the courts of the HKSAR shall be vested with judicial power in respect of all cases in the HKSAR.

In adjudicating cases before them, the courts of the HKSAR shall, in accordance with the principles and precedents of the common law, consult the Chief Executive in respect of questions relating to defence and foreign affairs, and the certificate issued by the Chief Executive regarding such questions shall be binding on the courts.

The Chief Executive shall obtain a certificate from Standing Committee of the National People's Congress or the State Council before issuing the above-mentioned certificate.

The adjudication of cases involving organisations and organs of

power of the People's Republic of China, or members of their staff (including those referred to in Articles 13 and 21 of Chapter 2) by the courts of the HKSAR, and provisions in respect of compensation to be paid by the said organisations and organs of power, or by members of their staff, shall be provided for in the laws of the HKSAR.

Article 20

A member suggested that this article be amended to read as follows: "Chinese nationals holding permanent identity cards of the HKSAR may, in accordance with law, participate in the management of state affairs. The deputies of the HKSAR to the National People's Congress shall, in accordance with the number of seats and selection procedures specified by the Standing Committee of the National People's Congress, be elected in Hong Kong by and amongst Chinese nationals who are permanent inhabitants of the HKSAR.

[Chapter 3]

Article 24

A member proposed that the article be amended to read as follows: "Hong Kong inhabitants shall be equal before the law and shall not be subject to discrimination on the grounds of nationality, race, ethnic origin, language, sex, occupation, religious belief, political opinion, education level, or financial condition."

Article 25

Some members suggested that this article be amended as follows: "Permanent inhabitants of the HKSAR shall have the right to vote and the right to stand for election in accordance with law."

Article 26

Some members held that the expression "Hong Kong inhabitants shall, in accordance with law, have" should be adopted.

Article 29

A member proposed the deletion of "except in cases where, to meet the needs of public security or of of investigation into criminal offences, the relevant authorities are permitted to censor communication in accordance with legal procedures" from this article. After deliberation, the Subgroup decided to retain this clause.

Article 31

1. Some members proposed that the following paragraph be added to this Article: "No person may be subject to discrimination or deprivation of his civil rights on the grounds of religious belief."
2. Some members proposed that the article be amended to read as follows: "HKSAR inhabitants shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of one's choice, and freedom either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance practice, and teaching."

Article 34

1. Some members proposed that the word "legitimate" as in "legitimate rights" be deleted.
2. As to whether Hong Kong inhabitants shall have the right to challenge in court the actions of the offices established by the Central Government in Hong Kong, or of the staff of these offices, the Subgroup on the Fundamental Rights and Duties of Inhabitants proposed that relevant provisions be laid down under the topic of "jurisdiction of HKSAR courts" by the subgroup concerned.

Article 41

A member suggested that this article should be amended to read as follows: "Persons other than Hong Kong inhabitants shall, in accordance with law, have the rights and freedoms of Hong Kong inhabitants provided for in this Chapter (save for the right to vote and the right to stand for election)." After deliberation, the Subgroup on the Fundamental Rights and Duties of Inhabitants found that apart from the right to vote and the right to stand for election, there were other rights such as the right to enter Hong Kong freely which "other persons" were not entitled to. The article therefore remains unchanged.

[Chapter 4]

Article 43

A member suggested that this article should be amended to read as follows: "The Chief Executive of the HKSAR shall be the head of the HKSAR and the head of the executive authorities of the HKSAR, representing the HKSAR and leading the executive authorities of the HKSAR, and shall be responsible to the Central People's Government, the HKSAR and the legislature of the HKSAR in accordance with the provisions of this Law."

Article 44

A member suggested that this article should be amended to read as follows: "The Chief Executive of the HKSAR shall be a Chinese national who is a permanent inhabitant of the HKSAR of no less than 40 years of age and having ordinarily resided in Hong Kong for a continuous period of 20 years or more, and who has resided in the HKSAR for a continuous period of 10 years before his appointment."

Article 46

Some members held that the term of office of the Chief Executive should be considered in conjunction with the term of office of the legislature, both of which should be four years, and that he could serve for no more than three terms.

Article 47

Some members pointed out that the question concerning restrictions on the occupation of retired Chief Executives and principal officials had yet to be discussed. A member suggested adding in this article the following provision: "The Chief Executive shall, upon assumption of office, relinquish all functions with pay or remuneration."

Article 48, sub-paragraph (1)

Some members held that if the meaning of "Government" in the general sense was adopted, this clause should read "to lead the executive authorities of the HKSAR".

Article 48, sub-paragraph (11)

A member suggested amending this sub-paragraph to read: "To allow (or refuse to allow) public officers to appear before a committee under the legislature to testify or give evidence with regard to matters relating to the navy, the army or the air

force, the security of Hong Kong, or the Central People's Government's responsibility of governing the HKSAR."

Article 48

A member suggested adding the following sub-paragraph to this article: "Other powers which are essential and reasonable for the discharge of his functions in accordance with the provisions of this Law."

Article 52

A member suggested adding the clause "a two-thirds majority of the members of the legislature cast a vote of no confidence in the Chief Executive" as sub-paragraph (4) of this Article. Another member maintained that if this clause was to be included, the Chief Executive should be able to dissolve the legislature after it had cast a vote of no confidence in him, and the Chief Executive would have to resign only when the new legislature again cast a vote of no confidence in him.

Article 54

A member objected to the establishment of the Executive Council.

Article 55

1. A member held that members of the legislature who were to sit on the Executive Council should be elected from amongst the members of the legislature, whereas members of the public who were to sit on the Executive Council should also be approved by a simple majority of the members of the legislature. Another member maintained that if the legislators in the Executive Council were not elected through this process, there should not be any legislators sitting on the Executive Council.
2. As to the size of the Executive Council and the proportion of its various types of members, a member held that the Executive Council should entirely be composed of principal officials; another member held that at least half of the membership of the Executive Council should be members of the legislature. Members agreed that no stipulations should be made until further study.

Article 58

A member suggested amending this article to read: "The Chief Executive may appoint or remove the Director of Audit with the approval of the legislature of the HKSAR. In discharging their

functions in accordance with law, the Director of Audit and the Audit Department under him shall not be subject to any order or control of any person or organ."

Article 60

A member suggested amending this article to read: "Members of the executive authorities shall include: (1) the Chief Executive; (2) principal officials (equivalent to Secretaries) nominated by the Chief Executive and appointed by the Central Government; (3) the executive council composed of the Chief Executive and the principal officials appointed by him."

Article 62

A member suggested that the following should be included as sub-paragraph (6) of this article: "Other powers which are essential and reasonable for the discharge of its functions in accordance with this Law".

Article 64

Some members objected to the use of a colon after the phrase "accountable to the legislature" on the grounds that "accountability" was not confined to the contents listed in the provisions. They suggested amending this article to read: "The executive authorities of the HKSAR shall abide by law and be accountable to the legislature. The executive authorities shall: (1) implement the laws which have been passed by the legislature and which have taken effect; (2) submit periodic administrative reports to the legislature; (3) be subject to the supervision of the legislature; (4) answer questions addressed by members of the legislature and be subject to and assist in investigations by the legislature on special issues; and (5) seek the approval of the legislature for taxation and public expenditure, and be subject to supervision by the legislature on the use of public expenditure."

Article 66

Some members proposed that a second paragraph be added to this article: "The legislative power of the HKSAR shall be vested in the legislature of the HKSAR." However, a member held that the wording should be "The legislative power of the HKSAR shall be vested in the HKSAR."

Article 70

Most members were in favour of Proposal 1; some members were in favour of Proposal 2.

Article 71, sub-paragraph (2)

Some members held that the agenda should be decided by the Chief Executive.

Article 72, sub-paragraph (5)

A member suggested amending this sub-paragraph to read: "To review and question the work of the executive authorities".

Article 72, sub-paragraph (9)

1. A member proposed that the legislature should be able to present a motion of no confidence in the Chief Executive or any principal official if the motion was jointly moved by one-quarter of the members of the legislature and endorsed by a two-thirds majority. The no confidence motion would be reported to the Central People's Government for the removal of the Chief Executive or the principal official concerned. However, most members objected to this proposal.
2. Some members held that the proportions laid down in sub-paragraph (9) were too small and the wording left much to be desired. They proposed that this sub-paragraph be amended to read as follows: "If over 50% of the members of the legislature suspect that the Chief Executive is guilty of serious breach of law or dereliction of duty, with a motion jointly moved by them, an investigation committee headed by the chief judge of the court of final appeal may be set up in accordance with law to carry out investigation and to report to the legislature. If the committee deems that there is sufficient evidence to establish the above-mentioned charge, an impeachment proposal, if passed by three-quarters of the members of the legislature, may be presented by the legislature and reported to the Central People's Government for decision."

Article 72

1. A member proposed the inclusion of this clause: "The legislature and its subordinate committees shall have the power to summon the persons concerned to testify and give evidence before them."
2. A member suggested that a clause providing for the establishment of standing committees and select committees be added to this article. But a member held that these points should be covered by the standing orders of the legislature.
3. A member suggested that the following should be included as sub-paragraph (10) of this article: "Other powers which are

sub-paragraph (10) of this article: "Other powers which are essential and reasonable for the discharge of its functions in accordance with this Law."

Article 73

A member suggested that all bills relating to public expenditure and public policies should be presented jointly by no less than one-tenth of the members of the legislature, but that the written consent of the Chief Executive would not be required.

Article 74

Some members pointed out that the legislature should be able to hold a meeting even with less than half, or no less than one-third, of its members. They held that it would be difficult to call a meeting if the quorum was set too high.

Article 84

A member proposed amending this article to read: "The courts of the HKSAR shall exercise judicial power independently and free from any interference, but shall be subject to the supervision of the Standing Committee of the National People's Congress as to whether or not they have gone beyond the jurisdiction prescribed by this Law."

Article 86

A member suggested that the principles and rights referred to in this article should be set out in the annexes.

Article 87

1. A member pointed out that the independent commission should not comprise too many members and that unanimous agreement should be required for any recommendations made.
2. Some members asked if specific provisions could be made in this Law in respect of the financial independence of or special appropriations for the judicial organs.

Article 100

1. A member asked whether foreign nationals could be considered for the post of the Deputy Director of the Civil Service Bureau.
2. A member pointed out that whether restrictions should be

imposed on the posts of the Director of Immigration and the Commissioner of Customs and Excise could be further considered as these two posts were not ranked at Secretary level.

Article 102

A member proposed that the following be added at the end of this article: "The HKSAR Government may, in accordance with law, develop and improve the above system in the light of the actual situation for the purpose of improving the efficiency and quality of the public servants."

Article 103

A member suggested that this article should be included in the General Provisions. Most members were in favour of keeping it as Article 104 until the coordinating group decided otherwise after taking every issue into consideration.

[Chapter 5]

Article 105

Some members held that paragraph 2 should not be included in the Basic Law.

Article 107

A member held that this article should not be included in the Basic Law.

Article 111

1. A member suggested the inclusion of "foreign currencies" in this article.
2. A member suggested adding the word "commodities" before "futures".

Article 135

The Subgroup on the Economy suggested that the term "foreign military aircraft" should be defined after further deliberation.

Article 169

A member proposed that the article be amended to read as follows: "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The courts of the HKSAR may interpret all the provisions of this Law."

In respect of those provisions of this Law which are within the scope of the HKSAR's autonomy, the Standing Committee of the National People's Congress shall give full power to the courts of the HKSAR to interpret them in adjudicating cases before them.

If the Standing Committee of the National People's Congress has given an interpretation of a provision which is outside the scope of the HKSAR's autonomy, the courts of the HKSAR shall, in applying that provision, follow the interpretation of the National People's Congress Standing Committee. Cases under adjudication and judgments previously given, however, shall not be affected.

The Standing Committee of the National People's Congress shall consult the HKSAR Basic Law Committee before giving an interpretation of this Law.

All the provisions in Chapters 3, 4, 5, 6 and 10 are within the scope of the HKSAR's autonomy. Whether the provisions in the other Chapters are within the scope of the SAR's autonomy may be decided by the courts of the HKSAR or the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall consult the HKSAR Basic Law Committee before making a decision. The decision of the Standing Committee of the National People's Congress shall be final."

Article 170

1. A member proposed that the article be amended to read as follows: "The power of amendment of this Law shall be vested in the Standing Committee of the National People's Congress."

The power to propose amendment to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council, and the HKSAR. Amendment proposals from the HKSAR shall be submitted to the National People's Congress by the State Council after obtaining the consent of a two-thirds majority of the members of the HKSAR legislature and of the Chief Executive of the HKSAR.

Before a proposal to amend this Law is included the agenda of the National People's Congress, the HKSAR Basic Law Committee shall first study it and give advice on it. No

amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding the HKSAR as stated in the Preamble."

2. A member proposed that paragraph 2 be amended to read as follows: "The power to propose amendment to this Law shall be vested in the National People's Congress Standing Committee, the State Council and the HKSAR. Amendment proposals from the HKSAR shall be submitted to the National People's Congress by the HKSAR delegation to the National People's Congress after obtaining the consent of a two-thirds majority of the HKSAR deputies to the National People's Congress and of the Chief Executive of the HKSAR."

Article 171:

Other proposals put forward by the Subgroup on Political Structure include:

1. A member proposed that Annex III should read as follows:
 - (1) Before 1997 the Central Government shall set up a Preparatory Committee consisting of Hong Kong and mainland members. The Preparatory Committee will appoint no less than 50 members from various sectors in Hong Kong to form an advisory council, which will then select the Chief Executive through local consultations and report the nomination to the Central Government for appointment.
 - (2) The Chief Executive shall organise the Executive Assembly and nominate the principal officials for appointment by the Central Government.
 - (3) A provisional Legislative Council with councillors jointly nominated by the Chief Executive and the Executive Assembly and elected by the advisory council shall be set up.
 - (4) The terms of office of all members of the first government shall not exceed three years. A regular government must be formed within the three years in accordance with this Law.

A member proposed that Annex III should read as follows:

The first Chief Executive designate shall be elected through local consultations on 1 December 1996 in accordance with the method stated in Annex I. With the approval of the Central People's Government, the selected candidate shall be the first Chief Executive designate.

Before 1 April 1997, the first Chief Executive designate shall nominate members of the first Executive Council who shall be the members designate of the first Executive Council.

The first Chief Executive designate and the members designate of the first Executive Council shall jointly organise the "Preparatory Committee for the Formation of the First Government". At zero hour on 1 July 1997, with the assistance of the members of the first Executive Council, the first Chief Executive who will have been officially appointed by the Central People's Government shall, in accordance with the provisions of this Law, announce the formation of the first government of the HKSAR which, as authorised by the Central Government, shall take over the administration of the HKSAR from the Standing Committee of the National People's Congress. Prior to the formation of the first legislature, the provisional legislature shall execute provisional legislative power and, if necessary, enact provisional legislation.

[Note] The provisional legislature shall be constituted by election held locally by the electoral college in accordance with the method stated in Annex II. Legislative Councillors whose terms of office expire on 30 June 1997 shall not be excluded from candidature.

Within six months of the establishment of the first HKSAR Government, elections for the first District Boards and the first Urban Council shall be held in accordance with the method stated in the Annex. Within twelve months, elections of the first legislature shall be held in accordance with the method stated in Annex II to form the first legislature.

Appendix I: Procedures for the Selection of the First Chief Executive through Local Consultations among Various Sectors in Hong Kong

After the promulgation of the Basic Law, the National People's Congress shall appoint no less than 50 persons to form a "Preparatory Committee for the Implementation of the Basic Law". The duties of the Committee would be diverse, including the formulation (by itself or by a subordinate special group), after consultation with various sectors, of the draft "consultation procedures" to be submitted to the National People's Congress for examination and endorsement.

On 1 July 1995, members of the "Preparatory Committee for the Implementation of the Basic Law" shall elect from amongst themselves no less than 10 members to form a "Consultation Committee" which shall conduct open consultation in accordance with the "consultation procedures". Members of the "Consultation Committee" may neither run for the post of the Chief Executive, nor nominate or support any of the candidates for that post. The "Consultation Committee", which is responsible for promoting and supervising the conduct of consultation, shall have to remain objective and impartial.

The candidate for the first Chief Executive designate shall be selected on 1 December 1996, reported to the Central Government for approval, and be formally appointed on 1 July 1997.

Appendix II: Elections to the First Legislature

Electoral College - Half [of the members of the legislature] shall be elected by a widely representative grand electoral college. No less than two-thirds of them should be Chinese nationals.

Indirect election - One-quarter [of the members of the legislature] shall be elected from amongst District Board members and Urban Councillors who are Chinese nationals.

Direct election by functional constituencies - One-quarter [of the members of the legislature] shall be directly elected by functional constituencies. (Functional constituencies shall be registered as legal entities in accordance with local legislation, and shall have Chinese nationality. Members of the legislature directly elected by functional constituencies shall, by virtue of the Chinese nationality of their functional constituencies, exercise the civil rights enjoyed by Chinese nationals during their terms of office irrespective of their own nationality.)

3. Some members proposed that Annex III should read as follows:

(1) The Standing Committee of the National People's Congress of the People's Republic of China shall appoint a "Preparatory Committee for the First Government of the HKSAR". All members of the Preparatory Committee shall be Chinese nationals, including mainlanders and permanent inhabitants of Hong Kong. The chairman of the Committee shall be a member of the Standing Committee of the National People's Congress.

(2) The "Preparatory Committee for the First Government of the HKSAR" shall entrust its Hong Kong members with the responsibility of organising an electoral college in Hong

Kong. Members of the electoral college shall include representatives of the legislature and of regional organisations prior to the establishment of the HKSAR, representatives of various statutory bodies and permanent non-statutory bodies, and representatives from various strata and sectors of the community. The electoral college, which must have a wide basis of representation, shall be named the "Electoral College for the First Government of the HKSAR".

(3) The Electoral College for the First Government of the HKSAR shall be responsible for drafting the procedures for the selection of the first Chief Executive through consultations or by election following nomination through consultations.

(The qualifications, functions and powers, and so on of the Chief Executive shall be as prescribed in the provisions of Chapter 4 of this Law.)

(4) The Electoral College for the First Government of the HKSAR shall be responsible for drafting the procedures for the election of the first legislature. Serving members of the legislature prior to the establishment of the HKSAR may be elected as members of the first legislature if they conform to the provisions of Chapter 4 of this Law.

(The qualifications, functions and powers, and so on of the members of the legislature shall be as prescribed in the provisions of Chapter 4 of this Law.)

(5) Serving government officials, public servants and judicial officers prior to the establishment of the HKSAR shall serve in the first Government if they conform to the provisions of Chapter 4 of this Law.

(The qualifications, functions and powers of the executive authorities shall be as prescribed in the provisions of Chapter 4 of this Law.)

1. A member proposed that Article 171 should read as follows:

The first government of the HKSAR shall be formed in accordance with the provisions in the Appendix on "The Method of Forming the First Government of the HKSAR". The first Chief Executive and members of the first legislature selected in accordance with the provisions of this Appendix shall be as if selected under the provisions of Chapter 4 of this Law. However, the term of office of the first Chief Executive shall expire six months after the expiry of the terms of office of members of the first legislature.

Appendix: The Formation of the First Government of the HKSAR

(1) The Standing Committee of the National People's Congress

shall appoint a "Preparatory Committee for the First Government of the HKSAR" in 1996. All members of this committee shall be Chinese nationals who are permanent inhabitants of Hong Kong, and the chairman of the committee shall be elected from amongst the members themselves.

(2) In mid- or late 1996, the Preparatory Committee for the First Government shall, in accordance with this Law, select the Chief Executive designate through direct election with a universal franchise in Hong Kong.

On 1 July 1997, the Chief Executive designate shall be appointed by the Central People's Government and take the oath of office formally.

(3) The Chief Executive designate shall, before 1 July 1997, nominate the principal officials of the executive authorities of the HKSAR and report the nominations to the Central People's Government for appointment. The principal officials shall take the oath of office on 1 July 1997.

(4) Serving members of the Legislative Council in Hong Kong as in June 1997 shall automatically become members of the first legislature of the HKSAR on 1 July until their terms of office expire. Apart from such ceremonies as taking an oath of allegiance to the HKSAR, there shall not be any other special arrangements.

5. Some members proposed that Article 171 should read as follows: "The first Government of the HKSAR shall be formed under the principles of giving expression to the sovereignty of the State and ensuring a smooth transition." They proposed that decision on the contents of the Annex to this article shall be deferred until more extensive consultation and thorough study have been conducted.

[Note] The opinions and suggestions expressed by members at the seventh plenary session of the Drafting Committee concerning the articles in the Draft Basic Law for Solicitation of Opinions will be collated and published by the Secretariat after the session.]

If you have any opinions or suggestions as regards the scope, the provisions and so on of the Basic Law, please attend any of the public hearings and meet-the-public sessions organised by the Consultative Committee for the Basic Law, or send your written submissions with your name, age, identity card number, address, and telephone number to:

The Consultative Committee for the Basic Law
8/F Lane Crawford House
70 Queen's Road Central
Hong Kong

or

The Consultative Committee for the Basic Law
G.P.O. Box 138
Hong Kong

Enquiry number: 5-8100810

Reference (1)

A COMPILATION OF THE VIEWS OF
VISITING MAINLAND DRAFTERS
ON SOME QUESTIONS CONCERNING
THE DRAFT BASIC LAW FOR SOLICITATION OF OPINIONS

(4-17 June 1988)

Prepared by the Secretariat
of the Consultative Committee for the Basic Law*

* The Secretariat of the CCBL takes full responsibility for the way in which the views of drafters are expressed in this compilation.

INTRODUCTION

During their visit to Hong Kong from 4 to 17 June 1988, the mainland drafters, through arrangements made by the CCBL, held exchange sessions with 151 bodies in regard to the draft Basic Law which was published on 28 April. Representatives of the various bodies expressed their opinions and raised a number of questions concerning the Draft Basic Law, and the drafters responded to these questions in their individual capacities.

This paper is a compilation of the drafters' views expressed at the exchange sessions and it will serve as reference in facilitating in-depth discussion. But these views are merely explanations and interpretations given by individual drafters and do not represent the view of the Drafting Committee as a whole. This paper has not been read by the drafters concerned and the Secretariat will be responsible for any discrepancy.

Contents

1. General principles
2. Relationship between the Central authorities and the HKSAR
3. Fundamental rights and duties of residents
4. Political structure
5. Economy
6. Education, science, culture, sports, religion, labour and social services
7. Status of Chinese and English
8. English version of the Basic Law
9. Presentation
10. Expressions such as "previous", "existing" and "continue"

1. GENERAL PRINCIPLES

1.1 There are altogether ten articles. At first there were two articles on the protection of foreign investment and voluntary centres. But since no unanimous view was reached, the two articles were not included.

1.2 It is not possible to add the provisions in the latter part of the Basic Law to the General Principles. Otherwise repetition would result. There is already some repetition in the present Draft. For instance, Article 2 provides for a high degree of autonomy, executive, legislative and independent judicial power, the power of final adjudication to be enjoyed by the HKSAR. These provisions are also noted in Chapter 2. Article 4 and the Preamble are also repetitive. Some provisions which are particularly important may be reiterated, but there should not be too much repetition. The future legislation of Hong Kong will be based on the General Principles. The General Working Subgroup of the Drafting Committee is of the view that since the most important spirit of the Joint Declaration has already been reflected in the General Principles, other provisions need not be covered in this Chapter.

2. RELATIONSHIP BETWEEN THE CENTRAL AUTHORITIES AND THE HKSAR

2.1 One country, two systems and a high degree of autonomy

The concept of "one country, two systems" emerged as early as the signing of the Joint Declaration. Article 31 was added to the Constitution of the PRC when it was revised in 1982. Article 31 guarantees the spirit of "one country, two systems". This shows that the spirit of "one country, two systems" has been taken into consideration by the Chinese Constitution.

2.1.2 Many of the articles provide for administration by the Central authorities. These articles are laid down to meet political and legal needs. But in actual practice, the Central authorities will not have the time to continually interfere with the autonomy of Hong Kong and in addition might not understand the conditions in Hong Kong. Furthermore, the Central authorities also hope that Hong Kong people will be able to govern Hong Kong well enough to facilitate the development of China.

2.1.3 In a unitary state, power is of course derived from the Central authorities. The power of regional governments is also granted by the Central authorities. Hence, the source of power is the Central authorities and the power of the Central authorities is constituted by

deputies to the NPC and is granted by the practice is different from that in federations. The high degree of autonomy to be enjoyed will also be granted by the NPC.

2.1.4 In fact, the division of power between authorities and the regional governments is clearly defined. The division can only be on a principle. If executive and judicial powers are in Hong Kong, while the Chief Executive and other officials shall be appointed by the Central authorities, the power of the Central authorities and the regional governments will overlap. However, this power will be minimal. It is highly important that the Basic Law clearly define the division of power between the Central authorities and the regional governments. The relationship between them in order to allay the worries and misgivings of Hong Kong people. Hong Kong are after all one country. The issue of sovereignty should not be over-emphasized. Issues do involve sovereignty. For instance, the declaration in 1958 that the territorial waters of Hong Kong extend for 12 nautical miles, should Hong Kong be otherwise? It is not necessary for Hong Kong to make such a declaration in order to uphold its

2.1.5 Some people worry that the clause "comes directly under the Central People's Government" will affect the exercise of legislative power, judicial power and the high degree of autonomy. In fact, the Chinese version of the clause is copied verbatim from the Joint Declaration. In addition, Hong Kong as a special administrative region shall of course come under the Central Government. If not, who shall administer Hong Kong? In general, provinces and municipalities including Shanghai, Beijing, Tianjin, Guangxi come directly under the State Council. The future status of the HKSAR will correspond to that of a province or a municipality directly under the Central Government or an autonomous region such as Tibet. Hong Kong however will enjoy much more autonomy and a high degree of autonomy, but should remain directly under the Central People's Government.

2.1.6 How can Hong Kong come directly under the Central People's Government without its legislative, executive and judicial power being affected? "Provisions on the relationship between the Central Government and the HKSAR" mentioned in Article 17 points to the relationship between the Central Government and the HKSAR should be through the State Council. This does not mean that any of the 40-odd departments of the State Council may give directives to Hong Kong directly under the State Council which will act as a link between the Central People's Government

is the Hong Kong and Macao Affairs Office. If Hong Kong has any opinions or problems, it may reflect them to the State Council and the Premier will directly deal with them.

2.2 Article 17 "cases of emergency":

In general, the term refers to situations such as a state of war.

2.3 Article 18 "the executive acts of the Central People's Government":

2.3.1 Defence, foreign affairs and the executive acts of the Central People's Government actually refer to those acts which are, under common law, termed "acts of state". The Central People's Government refers to the State Council and its executive acts refer to the State Council's executive decisions, its executive decrees, executive laws and regulations enacted by it or measures with legal effect adopted by the State Council when it enforces laws. For instance, the appointment of the Chief Executive or a principal official by the Central People's Government is an executive act which is outside the jurisdiction of the courts of the HKSAR.

2.3.2 "Executive acts" are different from civil or commercial acts. For example, the acts of the Bank of China and the China Resources Group are not executive acts. Though they are state-owned enterprises, they are of a commercial nature. Hence, their acts are not executive acts.

2.4 Article 19 "other powers":

"Other powers" in Article 19 refer to the powers other than those to be enjoyed by the HKSAR as prescribed in the articles before Article 19 in Chapter 2. But what are these powers? They have not been specifically spelled out. Since all the powers which the HKSAR may require, as far as we can anticipate now, have already been laid down, "other powers" do not refer to these powers. The term refers to the powers the HKSAR may require should new conditions arise in the future. Article 19 implies that at such time the Central Government may grant further powers to the HKSAR. In this way, the question of new needs involving the granting of further powers may be resolved.

2.5 Article 22 "any act designed to undermine national unity or subvert the Central People's Government":

2.5.1 Considerations when drafting this article: The existing criminal law in Hong Kong provides against such acts. The common law consists of mostly unwritten

laws, whereas the criminal law is a statute specifically defines what constitutes a first part of the existing criminal law in on treason: betrayal of Britain or suggestion of murdering or overthrowing making war with Britain, and opposing or the British Government are all considered

2.5.2 The spirit of the Sino-British negotiations respect was that the laws of Hong Kong would force and that any laws which did not conform to the Basic Law would apply in the future. The considered the fact that British laws or criminal law may also apply but this part cannot be laid down because when China exercise of sovereignty in Hong Kong, residents will have no obligations towards British Government and this part of the shall no longer apply. In addition, provides that laws enacted by the Central i.e. the NPC and its Standing Committee shall not apply in Hong Kong, and neither criminal law apply in Hong Kong. The Chinese criminal law regarding crimes revolution, overthrowing the Central Government, violence, etc. shall not apply in Hong Kong, neither the British law on treason nor the of China shall apply in Hong Kong, legal this respect will be lacking. The draft deemed it necessary to state in the Basic Law relevant laws shall be enacted by the HKSAR any act designed to undermine national unity the Central Government. Owing to the Article 22 is essential.

2.5.3 Furthermore, this article is to allow the laws in this respect in accordance with its own legal system rather than the practice mainland. At present, laws of Hong Kong other countries contain provisions in this respect. The laying down of provisions like Article 22 is common. Since Hong Kong shall be vested with power, including that of final adjudication, cases of treason arise, they will be adjudicated by the courts of the HKSAR and the final and highest will be made by Hong Kong. Mainland courts, the highest people's court, and international courts will not deal with these cases, nor will appeal to Beijing.

2.5.4 As to what constitutes acts designed to undermine national unity or subvert the Central Government, this will be judged by the courts of Hong Kong. In addition, any act which constitutes a crime should be a conscious act and not just

remark. Hence, one does not need to worry that the prohibition of "any act designed to undermine national unity or subvert the Central Government" will restrict the freedom of speech. Similarly, though the British criminal law is in force in Hong Kong, there is no provision forbidding one from criticising Britain, or stating that if one says certain thing, one will have committed a crime. The existing practice will be preserved in the future legal system.

2.6 Applicability of nationwide laws in Hong Kong

2.6.1 The Joint Declaration contains an elaboration of the PRC's policies regarding Hong Kong. They should be directly provided for by the Basic Law. Since the Basic Law shall be enacted in accordance with the Constitution, the Constitution shall on the whole be applicable to Hong Kong. As the Constitution is the basic law of the country, it ranks above all other laws. Even the Drafting Committee was formed in accordance with the Constitution. If the Constitution shall not apply in Hong Kong, the status of the Drafting Committee and the Basic Law to be enacted by it will be open to question.

2.6.2 Being "on the whole applicable to Hong Kong" is not the same as being completely applicable to Hong Kong. Some of the articles in the Constitution shall not be applicable. It would be technically difficult if each and every article had to be explained and its applicability stated because in some cases, the whole article shall be applicable while in other cases, only part of the article shall be applicable. Hence, the Preamble mentions that the Basic Law shall be enacted in accordance with the Constitution and elaboration on this is provided in Article 10.

2.6.3 Article 10 specifically states that the policies and systems practised in the HKSAR shall be based on the Basic Law rather than the Constitution. Though the Basic Law shall be enacted in accordance with the Constitution, Article 31 of the Constitution allows the establishment of special administrative regions and allow them to be exceptions as far as the articles on the practice of socialism are concerned. In other words, the HKSAR shall not be required to act in accordance with the socialist systems and principles. Hence the basic ideologies, principles and socialist systems practised in the mainland shall not apply in Hong Kong. There is no contradiction. Article 31 of the Constitution has already resolved this question. The Preamble therefore states that the Basic Law will be based on Article 31 of the Constitution. Such a statement together with the elaboration in Article 10 is a better solution than explaining each and every

article of the Constitution.

2.6.4 Most of the nationwide laws enacted by the establishment of the PRC will not be Hong Kong. The civil law, criminal procedure law, criminal procedure law, (law on economic matters) will not be Hong Kong. In fact, only seven of the will be applicable to Hong Kong, namely to: 1) the decisions taken in 1949 in capital, calendar, national anthem and 2) the national day; 3) the national Chinese Government's statement on territorial 1958; 5) the statement on diplomatic immunities passed by the Standing Committee in 1986; 6) the Electoral Law of the Nationality Law. The HKSAR has no means to enact these laws on its own, but these have a legal basis. Furthermore, some on defence and foreign affairs may not be applicable to Hong Kong. For conscription law shall not apply in Hong

2.6.5 It was proposed that those nationwide laws apply in Hong Kong be written into the order to reassure Hong Kong people. But solution because if there were new laws applicable to Hong Kong in the future, would have to be amended. In order to as possible, amendment of the Basic Law, suggested that those applicable nationwide laws written in an annex because addition of the annex would be less complicated. This be further studied.

2.7 Laws of Hong Kong

2.7.1 The laws of Hong Kong are described mainly 8, 16 and 17:

Article 8 provides that the laws previously in Hong Kong shall be maintained, except if contravene the Basic Law or have been abolished by the HKSAR legislature.

Article 16 provides that the HKSAR has legislative power.

Article 17 provides that the HKSAR may enact and revise laws after 1997.

Article 172 should be considered with the other articles as a whole. Article 172 is an article to allow the HKSAR to adopt, at the establishment, the laws previously in

- Kong as laws of the HKSAR. Those laws which the NPC Standing Committee declares to be in contravention of the Basic Law will be excluded. If any laws are later discovered to be in contravention of the Basic Law, they can be annulled or revised according to the procedure as prescribed by the Basic Law.
- 2.7.2 Article 8 is a principle stating that except for a small number of laws, those laws previously in force in Hong Kong shall be maintained, whereas Article 172 which is to clarify the legal procedure states that on 1 July 1997, those laws with a colonial flavour, such as the Letters Patent and the Royal Instructions, shall be declared invalid by the NPC. If any laws are discovered to be in contravention of the Basic Law after 1 July 1997, they will be revised or annulled in accordance with the procedures prescribed in Articles 16 and 17. The declaration on 1 July 1997 that certain laws contravene the Basic Law and are therefore invalid, does not mean that other laws cannot be subsequently declared to be invalid.
- 2.7.3 If the NPC Standing Committee later discovers that certain laws are in contravention of the Basic Law, it will not revise them directly. It will only inform the HKSAR legislature and the laws will then be revised by the HKSAR legislature. If the HKSAR discovers directly that any law is in contravention of the Basic Law, its legislature will revise the law. Laws previously in force will remain in force but revision will be allowed. Thus development and changes will be possible. The development and changes will mainly be decided by the HKSAR. The Central authorities will not participate in the revision of legislation.
- 2.8 Jurisdiction
- 2.8.1 Which cases will the HKSAR courts be able to adjudicate? Which cases will the HKSAR courts not be able to adjudicate? The fundamental principle will be to follow the present practice in Hong Kong. The future courts will have the same jurisdiction as the present Hong Kong courts. No further restrictions will be imposed on Hong Kong courts.
- 2.8.2 Article 18 was drafted by the Hong Kong drafters who requested that the jurisdiction be laid down in the Basic Law. The essence of this article is that except for those changes consequent upon the vesting in the HKSAR courts of the power of final adjudication, the judicial system previously practised in Hong Kong shall be maintained and no further judicial restrictions will be imposed on the courts.
- 2.9 Power of interpretation of the Basic Law
- 2.9.1 The Basic Law as a law of the PRC shall in Hong Kong, but also in the main provinces, municipalities and departments by the Basic Law when dealing with matters in Hong Kong.
- 2.9.2 According to Article 67 of the Chinese Constitution, the power to interpret statutes is vested in the National People's Congress. But this does not mean that Hong Kong courts may not interpret the Basic Law when adjudicating cases. It is only when a case involves an interpretation of the provisions of the Basic Law concerning foreign affairs and other affairs that the responsibility of the Central People's Congress is involved. The courts of Hong Kong shall have the power of interpretation of the relevant provisions of the Basic Law before making judgment.
- 2.9.3 This method is based on the practice of the European Community. The European Community has known as Community law. Member States of the Community law and regard it as part of their national laws.
- 2.9.4 According to regulations of the European Community, the power of interpretation of Community law is vested in the European Court of Justice, while the adjudication is vested in the courts of the member states. In other words, the powers of first instance and final adjudication are not in the hands of the European Court of Justice. This gives rise to the possibility of an interpretation. The solution of the European Court of Justice is that if a case involves an interpretation of the provisions of the Basic Law, the courts of Hong Kong would, before making their final judgment, seek an interpretation of the relevant provisions of the Basic Law from the European Court of Justice, and make their judgment on the basis of the interpretation. The Community treaties contain provisions in this respect.
- 2.9.5 Britain, as a member of the European Community, has followed this practice. There are in fact several cases in which Britain has accepted the interpretation of the European Court and made its judgment accordingly. Britain does not think that this has impaired its judicial independence.
- 2.9.6 The question of judicial interpretation of the Basic Law and Hong Kong is of a similar nature to that of the European Community. The example cited above because the power of interpretation shall be vested in the NPC Standing Committee.

power of final adjudication shall be vested in the courts of the HKSAR. However, only a small part of the Basic Law, that is, provisions concerning defence, foreign affairs and other affairs which are the responsibility of the Central Authorities, will involve an interpretation by the NPC. In actual fact, the NPC Standing Committee has rarely given an interpretation of the Constitution in the 40 years since the founding of the People's Republic. It is therefore even less likely that the NPC Standing Committee will give interpretations on matters which affect Hong Kong.

2.9.7 Some people are of the view that the Central authorities should not interfere in affairs that fall within the limits of a high degree of autonomy, if this had been promised to Hong Kong. Of course the Central authorities have promised Hong Kong a high degree of autonomy. What this means is that affairs within the limits of autonomy shall be managed by the HKSAR on its own and the Central authorities shall not interfere. However, as stipulated in the Basic Law, there will be things which will require the approval of the Central authorities and which will have to be reported to them. When interpreting the Basic Law, the NPC Standing Committee will have to proceed from the principle and spirit of the provisions of the Basic Law, namely, "a high degree of autonomy" and "one country, two systems". It will not be able to give its interpretation any way it likes, for this would amount to an amendment of the Basic Law. The Central authorities will not be able to interfere when the Hong Kong courts make an interpretation of the Basic Law in a case which is within the limits of a high degree of autonomy of the HKSAR.

2.9.8 Another safeguard will come in the form of the Committee for the Basic Law. Hong Kong members will be adequately represented on this Committee and these members shall reflect the views of Hong Kong people. The NPC Standing Committee shall consult this Committee before giving an interpretation, and the opinions of this Committee shall definitely be respected. In the same spirit, the NPC shall respect the draft Basic Law prepared by the Drafting Committee when it is finally submitted.

2.9.9 It is not feasible to pass legislation stating that the NPC or its Standing Committee must accept the opinions of the Committee for the Basic Law and may not make any changes to decisions made by this Committee. The reason is that this would mean that the Committee for the Basic Law rather than the NPC is the organ of state power.

2.9.10 It was suggested that provisions concerning defence,

diplomatic affairs and affairs with responsibility of the Central Authorities interpreted by the NPC Standing Committee. Provisions which are within the limits of autonomy be interpreted by the court. This proposal is worthy of consideration must also take into account the difficulty of a legal document into two halves because provisions are interrelated. If we are an instance, that the provisions in Chapter 1 are within the limits of a high degree of autonomy whereas the provisions in the other chapters are the responsibility of the NPC Standing Committee. Interpretation of the provisions in Chapter 1 involve the General Principles laid down in the Basic Law. The General Principles should apply to all provisions of the Basic Law. Put in another way, when the Central Authorities give an interpretation of provisions in Chapter 1 and 9, would they be in a position to give an interpretation which concerns the other provisions in fact means that there would be contradictions, - and if each gives an interpretation, contradictions will arise.

2.10 Committee for the Basic Law

2.10.1 Since the Committee for the Basic Law is a subordinate organ of the NPC Standing Committee, it would appear to be an ultra vires body. It is suggested that the Drafting Committee to lay down the details of this committee. Everyone is free to express their views on this issue.

2.10.2 It was estimated that between one-third and one-half of the members of the Committee for the Basic Law will be from Hong Kong.

2.10.3 Since the NPC would not set up a permanent committee in Hong Kong, there would not be another committee outside the legislature.

2.11 Deputies to the NPC

2.11.1 Hong Kong deputies to the NPC participate in the NPC's affairs as representatives of the 5 million people of Hong Kong. These deputies shall inform the population of important decisions made by the NPC. Future proposals to amend the Basic Law submitted to the NPC by the Hong Kong delegation should obtain the consent of the parties concerned. If the NPC makes any decision which concerns Hong Kong, the Hong Kong delegation should speak on behalf of Hong Kong. On the question of the applicability of nation-wide laws in Hong Kong,

instance, Hong Kong deputies will be able to state their views.

2.11.2 Hong Kong deputies to the NPC have, since the founding of the PRC, been elected by the Guangdong Provincial People's Congress and formed part of the Guangdong delegation. Candidates are selected and their names submitted to the Guangdong Provincial People's Congress, elected as Guangdong deputies, and sent to Beijing to attend the NPC. This has been the practice because the conditions have not allowed the election of Hong Kong deputies locally.

2.11.3 There is at present no legislation on the election and qualifications of NPC deputies from Hong Kong. It is not yet certain whether the present method of selecting NPC deputies will still apply or whether a new set of methods should be instituted after the establishment of the HKSAR. However, one thing is clear, and that is, NPC deputies must be nationals of the PRC.

2.11.4 Under Article 20 in Chapter 2, residents of the HKSAR who are Chinese nationals may participate in state affairs in accordance with law. After 1997, NPC deputies from the HKSAR shall be elected locally in accordance with the assigned number of seats and the election procedures specified by the NPC.

2.11.5 Although non-Chinese nationals among the residents of Hong Kong will have the power to vote and to stand for election, they will not be able to vote in the election of NPC deputies because it concerns the whole of China. According to Article 20, the Chinese nationals do not necessarily have to be Hong Kong permanent residents. Thus, although a Chinese national who is not a permanent resident of Hong Kong may not be elected as the Chief Executive or hold a principal office, he may be elected as a NPC deputy from the HKSAR because he is a Chinese national. But then of course Hong Kong people may choose not to elect him.

3. FUNDAMENTAL RIGHTS AND DUTIES OF RESIDENTS

3.1 Labour rights

3.1.1 Labour rights are not mentioned in the Joint Declaration. At a seminar held in 1986, some labour representatives proposed that the question of labour welfare should be included in the Basic Law. This proposal was accepted by the Drafting Committee. Consequently Article 35 was added, stipulating that the welfare benefits of the working people shall be protected by law. The Drafting Committee is open to suggestions, but it must be understood that the Basic Law can only outline principles and cannot include too

many specific details.

2 On the relationship between Hong Kong and their counterparts on the mainland c Article 156, the Joint Declaration only s relationship between religious organis Hong Kong and those on the mainland shall be principles of non-subordination, non-ir mutual respect. In reality, national or 'he mainland do not have branches in Hong the question of Hong Kong organisati subordinate to the national organisati arise. Provided that this policy is me anxieties of Hong Kong people can be mit policy of "one country, two syste implemented.

3.1.3 Some labour representatives held that Art 157 would appear contradictory if read because Article 157 says that Hong Kong may develop relations with other cou Article 156 says that relations may not between mainland and Hong Kong organis problem needs further study.

3.2 "International Labour Convention"

3.2.1 Some people think that the "Interna Convention" is of great importance a included in Chapter 3 of the Basic Law. it should be written into Chapter 3 "International Covenant on Civil and Poli and the "International Covenant on Ecc and Cultural Rights" are also incorpor chapter.

3.2.2 The "International Labor Convention" importance, but then there are many covenants applicable in Hong Kong and i feasible to incorporate all these covenants into the Basic Law. Tw international covenants are included bec stipulated in the Joint Declar "International Labour Convention" how mentioned in the Joint Declaration.

3.2.3 Questions such as the applicabili "International Labour Convention" in Hong Kong's relationship with the Internat Organisation shall be discussed by the Group, and solutions thus reached shall b the International Labour Organisation for

3.3 The "International Covenant on Civil Rights" and the "International Covenant

Social and Cultural Rights"

3.3.1 Some people proposed that the articles of these two international covenants be written into the Basic Law. This is not feasible because the articles may not be able to take the changing situation in Hong Kong into account. The question of the indigenous inhabitants of the New Territories, for instance, is unique.

3.3.2 Furthermore, these two international covenants are now applied in Hong Kong through local legislation. They are not directly applied in the territory. Besides, Britain has reservations about the applicability of these two covenants in Hong Kong. At present, only about 10 articles are applied in Hong Kong. If these are written into the Basic Law, there would not be any room for further development. The fact is, the two covenants are rather lengthy and their contents have been covered in the Chapter on the Fundamental Rights and Duties of Residents. Thus, there is no need to incorporate the articles of these two covenants into the Basic Law.

3.4 Voting Age

There are the following four views on voting age: (1) It should be fixed at 21; (2) it should be fixed at 19; (3) it should be stated that a person has the right to vote on attaining legal age; and (4) no provisions should be made. It is hoped that more views will be collected.

3.5 Residents' duties

Under the provisions of Article 10, the rights and freedoms of Hong Kong residents are based on the Basic Law, and according to Article 42, the only obligation of Hong Kong residents is to be law-abiding. Since there is no provision on military service, Hong Kong residents shall not have the obligation to perform military service.

3.6 Freedom of the Press

The fact that the term "the press" is not included in Article 15 does not mean that this falls under the jurisdiction of the Central authorities. Article 15 deals with the executive power of the government. In order to have absolute freedom of the press, the government should not have any power to control the press, or lay down relevant policies, or set up a special department to dictate how news should be disseminated. Such situations would restrict the freedom of the press. Freedom of the press is a civil

residents' rights.

3.6.2 Restrictions on freedom of the press beyond the provisions prescribed in Art

3.6.3 In Hong Kong, as in the West, freedom that while expression of opinion does crime, actions taken have to be c different light. In the future, the g HKSAR shall decide its own policy on th authorities shall not interfere.

3.7 Indigenous inhabitants of the New Terri
During the Sino-British negotiations question, it was agreed that the indigenous inhabitants of the New Terr protected. These include the ri descendants to build small houses and a increase their land rent. After 1997, of the Joint Declaration should be adh the Basic Law seeks to maintain the after 1997, it should also ensure t enjoyed by the indigenous inhabitan protected by the laws currently in for remain unchanged.

3.7.2 From the legal perspective, it is contradictory to protect the interests large and the interests of a minority mainland, due attention is also given of the minority nationalities so that t self-rule. This will contribute to t minority nationalities and the rest of The question of the indigenous inhabit Territories is a question left by histo their rights will also contribute to th Kong residents.

3.7.3 Some women representatives object to policy on the ground that it protects t male population. Such objections are u

3.8 On the use of "according to law"

The use of the phrase "according to l have imposed restrictions on the wi freedoms and rights prescribed. No restrictions must be seen side by side and 39. According to Article 39, su shall not go beyond those necessary for of national security, public order, public health, public morals and for t of the rights and freedoms of other

International covenants. Thus, if restrictions are indeed in order, they "shall not go beyond those necessary" as detailed above.

3.9 On the requirement of "has ordinarily resided [in Hong Kong] for a continuous period of 20 years"

According to the electoral law currently in force in Hong Kong, persons are considered to have ordinarily resided in Hong Kong for a continuous period of 20 years if they regard Hong Kong as their place of residence, even if they have been away for a length of time, say 3 to 4 years, for reasons of study or employment, provided that they have not acquired or obtained the right of residence in a foreign country, since to have done so would be obviously in contravention of the requirement of "having taken Hong Kong as one's place of residence".

3.10 On the meaning of "having taken Hong Kong as the place of permanent residence"

If a person willingly chooses to stay in Hong Kong permanently, he is considered to have taken Hong Kong as his place of permanent residence.

3.11 The definition of residents and the nationality question

3.11.1 The definition of residents is, as stated in Article 23, based on the legal system currently in force in Hong Kong and on Section XIX of Annex I of the Joint Declaration.

3.11.2 The difference between permanent and non-permanent residents lies in the right of residence, which means that a person cannot be deported. However, permanent and non-permanents alike are issued Hong Kong identity cards. Other persons are not qualified to obtain Hong Kong identity cards and therefore shall not be issued passports.

3.11.3 Chapter 3 mainly concerns Hong Kong residents. "Other persons" mentioned in Articles 41 and 42 refer to transit travellers spending a few days in the territory, rather than to mainlanders. The definition is a bit vague, but basically they will also be entitled to the rights and freedoms enjoyed by Hong Kong residents.

3.11.4 The use of the two terms "Chinese nationals" and "persons of Chinese nationality" in Article 23 is chiefly based on the usage of the Joint Declaration.

3.11.5 The provisions of the Nationality Law are mainly based

on the concept of country of allegiance and of blood lineage. The concept of country means that any person born and raised on is a Chinese person. Hong Kong is part territory. China does not recognize occupation of Hong Kong and still regards its territory. For this reason, people of Hong Kong are still regarded as Chinese people. of blood lineage means that if a person's grand-parents are Chinese, he is also a Chinese. If one's parents are not Chinese, he is considered a Chinese person even if he was born on Chinese soil. However, he may apply for Chinese nationality in the future. He has to state if he wishes to apply for Chinese nationality and will be naturalized when his application has been approved after going through the normal procedures.

3.11.6 More than 2 million people in Hong Kong are British Dependent Territories citizens. In a Memo on 19 December 1984, the Ministry of Foreign Affairs of the PRC stated that "Under the Nationality Law of the People's Republic of China, all Hong Kong compatriots, whether they are holders of 'British Dependent Territories Citizens' Passport' or 'Chinese nationals'." Thus all Hong Kong compatriots are Chinese nationals regardless of whether they are holders of the "British Dependent Territories Citizens' Passport".

3.11.7 The Memorandum mainly deals with the problem of the status of people of Hong Kong. "Chinese compatriots" is obviously a concept. It will not do to say that all Hong Kong Chinese are Chinese nationals regardless of the type of passports they hold. In the future, all Hong Kong Chinese will be Chinese nationals, but under British occupation, it cannot be said that all people already have Chinese nationality. In line with its stand towards the old treaties, the Chinese government does not recognize that sovereignty over Hong Kong was transferred to Britain. Some Chinese come from British-occupied Hong Kong and have the status of British subjects. Under British law, Britain recognizes the local Chinese the status of "Dependent Territories citizens", making them subjects of the British government. This status is not recognized by the Chinese government. The status of Dependent Territories citizens granted by Britain to Hong Kong Chinese is illegal. After 1997, all Hong Kong people will be Chinese nationals whether or not they are holders of the Dependent Territories Citizens' Passport. How the BDTDC status is looked at on one level

3.11.8 On another level, China accepts Hong Kong people holding the Dependent Territories Citizens' Passport. China will not mind Hong Kong people using the Dependent Territories Citizens' Passport as a travel document when travelling from China or Hong Kong to another country. The Soviet Consulate in Xinjiang once issued Russian passports to the local people. This was not acceptable as the people of Xinjiang are Chinese nationals. They cannot be issued Russian passports. Hong Kong is an exception because Hong Kong has more overseas links. Besides, China is a socialist country and some countries are sometimes hostile to China. For instance, Hong Kong people cannot travel to South Korea on a Chinese Passport. They may also have problems going to Indonesia or Taiwan. Under the circumstances, the Dependent Territories Citizens' Passport may be used as a measure of expediency.

3.11.9 A Chinese-Hong Kong Passport may also be issued in Hong Kong in the future. Then, if you travel to Japan you can use your British Dependent Territories Citizens' Passport if you think it will be more convenient. You may also seek assistance from British consulates if you run into trouble in Japan or other countries. This will be tolerated by China. However, when you are caught by the police in Hong Kong or on the Chinese mainland, you cannot claim that you are a British citizen and that you hold a British passport. The question of Hong Kong people holding American, Canadian or other passports in addition to the British Dependent Territories Citizens' Passport has not been brought up in the Memorandum.

3.11.10 The PRC does not recognize dual nationality. Article 9 of the Nationality Law stipulates that a Chinese national automatically loses his Chinese nationality when he acquires a foreign nationality. However, there have been suggestions that the Nationality Law be amended to accommodate dual nationality so that people with dual nationality would be treated as Chinese nationals when they return to Hong Kong after 1997. This is a very complicated issue because it involves the relationship between two countries and it is not possible to regard all Chinese people holding other passports as Chinese nationals. The historical background of this is that after the founding of New China, some countries (particularly countries in South East Asia) with a large population of overseas Chinese did not quite trust the Chinese residing in their territory. In view of this, China adopted a policy of not recognizing dual nationality and encouraged the overseas Chinese to take up the nationality of their country of residence, abide by the local laws and develop the local economy and culture. Another point

is, if a person of Chinese descent American Passport is considered to national and should he be elected the Ch to whom should he pledge his allegiance America?

3.11.11 According to categories (1) and (2) of persons of Chinese nationality born out of HK SAR permanent residents, including the mainland or overseas of Hong residents, are Hong Kong permanent residents, have not taken up foreign nationality. been born in the Hong Kong, such people in Hong Kong or have not ordinarily resided in Hong Kong for a continuous period of 7 years they will still be considered Hong residents, but persons born of Hong permanent residents shall not be considered permanent residents. The status of resident cannot be passed down from generation. The gist of category (5) under 21 years of age born in Hong Kong Chinese nationality as listed in categories of residents of non-Chinese nationality.

3.11.12 Another question is whether the spouses of permanent residents who are Chinese nationals shall be permanent residents. This is a complicated issue has not been dealt with in the Basic Law. Mainland spouses of Hong Kong permanent residents to Hong Kong and they are considered permanent residents, the population of Hong Kong will increase. Their treatment will be different from children of Chinese nationals born outside Hong Kong of Hong Kong permanent residents. They are regarded as Hong Kong permanent residents because, as children, they need parental care until they have reached 21 years of age, they have the right to choose their own nationality.

3.11.13 What Article 23 deals with is the question of rights of permanent residents. Persons of non-Chinese nationality who are permanent residents will be entitled to the rights enjoyed by Hong Kong permanent residents including the right to vote and the right to stand for election. The only difference will be that they will not have the right to stand for election to the Executive, to take up principal offices or to be appointed as principal officials.

4. POLITICAL STRUCTURE

4.1 The drafting principle

A principle adhered to by the Special Administrative Region

on Political Structure during its discussion was to ensure that the interests of the various strata were taken into consideration. Thus, not only the interests of the industrialist and businessmen, but also the interests of the working class, were taken into consideration.

4.2 Democracy

The drafters all agreed that democracy must be practised in Hong Kong. Article 2 of the Chinese Constitution and China's political structure both emphasized that the people are the masters. The same will of course apply in Hong Kong. China's resumption of sovereignty over Hong Kong, which will free the territory from colonial rule, will be the first step towards making Hong Kong people their own masters. The next step will be to hold elections in order to give embodiment to genuine democracy and enable Hong Kong to make steady progress. Steady progress means that the measures taken must conform with the need to maintain Hong Kong's stability and prosperity and do what is best for Hong Kong.

4.3 The appointment and removal of the Chief Executive

The Central People's Government will have the power to appoint and remove the Chief Executive. The power of appointment and the power of removal go hand in hand; they are substantial rather than formalistic powers. For this reason, Article 72 states that the legislature has the power to pass a motion of impeachment against the Chief Executive, but the final decision still rests with the Central authorities. "Central authorities" refers to the Central People's Government. The Joint Declaration stipulates that the HKSAR shall be directly under the authority of the Central People's Government, meaning the State Council. Thus, the procedures for the appointment and removal of the Chief Executive will also be based on the regulations of the State Council.

4.4 The accountability of the Chief Executive and the legislature

The Chief Executive and the legislature shall be accountable to the Central authorities as well as the HKSAR, but what is going to happen when accountability overlaps? This should be handled in accordance with the provisions of the Basic Law and the provisions of law, meaning they should be accountable to the Central authorities if the question concerns the Central authorities, and to the HKSAR if it concerns the HKSAR. This is by no means contradictory from the legal point of view.

4.5 The definition of "accountability"

4.5.1 The term "accountability" has appeared in the Basic Law and the circumstances in which it differs. This may give rise to confusion. Article 64 which deals with the relationship between the executive authorities and the legislature. The scope of "accountability" is clearly defined. Although it only includes four aspects, these two organs are clearly defined.

4.5.2 The reason no provision has been made that "the executive authorities shall be under the supervision of the legislature" is that of an empty and unsubstantial concept. Its inclusion into the Basic Law would result in the executive authorities fighting for power and being unable to work in a coordinated way, and would make it impossible to establish effective checks and balances between the executive and legislative organs. The substance of the present provision, namely, that the executive authorities shall answer questions, and so on, is the same as a clause on subjection to supervision and checks and balances. Thus there is no need for a separate provision.

4.6 The executive authorities, the legislature and the judicial organs

4.6.1 The members of the Special Administrative Region Political Structure unanimously agreed that the relationship between the executive authorities and the legislature should be one of mutual checks and coordination. It will be different from the system of the National People's Congress on the mainland and from the parliamentary system of the West. It will be a system established according to the actual circumstances in Hong Kong. The executive and legislative organs are independent. The spirit of mutual checks and balances between the executive authorities and the legislature is enshrined in Articles 19, 57 and 72. The power of the Chief Executive to dissolve the legislature and the conditions requiring his resignation constitute a kind of checking and balancing mechanism. According to sub-paragraph (9) of Article 72, the Chief Executive will not be able to dissolve the legislature unconditionally like the present Governor. The power to dissolve the legislature will be exercised by the legislature and governed by strict legal procedures.

4.6.2 The scope of the "accountability" of the executive authorities to the legislature is defined in the Basic Law after the colon (in Article 64). It is based on the understanding of members present at the

British negotiations and on material furnished by them. It is also a kind of checking and balancing mechanism.

- 4.6.3 Impeachment of the Chief Executive is also a kind of checking and balancing mechanism. It may be incomplete, but it entails some degree of restriction and supervision. No one can impeach the present Governor. His appointment and removal are decided by London.
- 4.6.4 In addition to checks and balances, coordination is also very important. If, in the future, the executive authorities and the legislature cannot agree on certain important issues, issues which the Central authorities cannot interfere in under the provisions of the Basic Law, the two organs should then try to meet each other half way, because their constantly bickering would do more harm than good to the Hong Kong people. The concept of the Executive Assembly was put forward with this in mind. Similar in nature to the existing Executive Council, this body will not only help resolve contradictions and facilitate better coordination but may help the Chief Executive in the study of problems. Through it, the Chief Executive will also be able to hear the views of the principal officials and people from all walks of life.
- 4.6.5 In short, the Chief Executive will have less authority than the present Governor of Hong Kong, while the legislature will have greater power than the present Legislative Council.
- 4.7 **The prosecuting authority**
- 4.7.1 At present, prosecution is carried out by the Department of Justice, which also acts as legal adviser to the government and drafts legal documents. Strictly speaking, these are not the duties of the prosecuting authority. The principal duty of the prosecuting authority should be to institute public prosecution. This will also be the case in the future. It shall also be able to exercise its authority free from intervention from the executive authorities.
- 4.7.2 The prosecuting authority is included in the Section on the Executive Authorities because the Department of Finance and the Department of Justice are at present executive departments under the Governor.
- 4.8 **The question of extradition in Article 94**
- According to Article 94, the extradition of suspects between China and Hong Kong shall be arranged by the judicial organs of the HKSAR with their counterparts in

other parts of the country. Quest criminal law, civil law and procedura handled in accordance with the legal pro Kong. Mainland laws shall not apply.

- 4.9 On the meaning of "not local organs of p in Article 96
- Mainland municipalities, prefectures a well as the whole of Hong Kong are unit power and they can handle all matters. Urban Council of Hong Kong is not a l political power, and that is why its powers have to be defined as in Article
5. **THE ECONOMY**
- 5.1 **Article 105**
- 5.1.1 "Over a number of fiscal years taken as that if we have run into the red in a c but achieved surpluses in a couple of ye still have maintained a basic balance years taken as a whole. At first it wa this should be prescribed by the budget law formulated by the HKSAR itself r subject to interpretation by the Departr The phrase "over a number of fiscal ye whole" could perhaps be rewritten to precise.
- 5.1.2 Actually this Article involves more th of budgets. It also involves budget reseves. At present the Financial Sec increase the budget surplus and reserv the light of factors like economic growth. This in turn involves the financial objectives. The mere incorp principle of "basic balance" into the B to take account of the question objectives.
- 5.1.3 Paragraph 3 says that the rate of in budgetary revenues and the expenditure shall not exceed that of the gross dom However, if the Financial Secretary re. increase expenditure, he could, do so thr the expenditure of the enlarged Hou. because the expenditure of this Aut included in the government accounts. Housing Authority is an independent orga government to subsidize its deficits. . constitute an item of public expenditu The government may therefore increase i

through this channel. However, such attempts to hide the actual increase in expenditure not only will not do Hong Kong much good but will lead to undesirable consequences.

5.1.4 What will happen if huge deficits occur and continue unabated until the reserves are exhausted? Neither the Joint Declaration nor the Basic Law has made any provision for this eventuality. The logical inference is that because Hong Kong has independent finances, the Central People's Government will have no obligation to subsidize Hong Kong's financial deficits. In such circumstances, Hong Kong will have to borrow money by issuing bonds locally or on the international market. Of course the consequences of such a move would have to be given careful consideration.

5.2 Articles 105 and 107

There are the following three views concerning these two articles: (1) They may be retained after major changes in wording. (2) They should be deleted because they are policy statements and should not be written into Chapter 5 as legal provisions. (3) Some people believed that local taxes should be simple and tax rates should be low, and they hoped that this policy would remain unchanged. Thus they agreed in principle to the low tax rate policy. Considering that the nature of budgets may change and that the taxation system has to change and be regulated in the light of actual conditions, however, they saw the need for greater flexibility. They agreed with the essence of these articles, but did not want them incorporated into the Basic Law.

5.3 Articles 106, 107 and 108

Article 106 states that Hong Kong shall practice an independent taxation system, meaning that the taxation system of the mainland shall not be practised.

Article 107 stipulates that Hong Kong shall practise a low tax policy.

The former refers to tax types while the latter deals with tax rates. Article 108 is there to solve the problem created by the two preceding articles, that is, that Hong Kong must have an independent tax law to provide for Hong Kong's independent taxation system and to determine the tax rates. Thus, it was proposed that these three articles be written instead as three paragraphs of a single article.

5.4 Article 110

"Open and free" is an expression made with adjectives. "Free" here means being business without tight restrictions. For Hong Kong a person only needs to spend several dollars in order to have a company registered name. "Open" means that Hong Kong is an open city and funds from any country or region can flow in and out of Hong Kong without any discriminatory actual practice, there are management regulations. For example, the Stock Exchange underwriters are subject to control regulations and regulations may be amended in the future. Hong Kong is an international city, it should not to practise a free and open policy.

5.5 Article 111

There are two views on this article. (1) It should not be included because it is very dangerous to have such a legal provision in the Basic Law. (2) It is appropriate to delete this article because it is included in Annex I of the Joint Declaration.

5.6 Article 114

This article is taken from Section VII of the Joint Declaration. It states that the Hong Kong dollar shall continue to be the legal tender and its continued circulation will be an important factor for stability and prosperity. "Freely convertible" means that the Hong Kong dollar may be freely convertible with any currency. The Renminbi is not convertible with the Hong Kong dollar today because its export is prohibited.

5.7 Article 115

This article states that the authority to issue Hong Kong currency shall be vested in the government of the HKSAR, and that the government of the HKSAR shall authorize designated banks to issue Hong Kong currency. However, the issuing banks must fulfil obligations as prescribed in Paragraph 3, which is set out in the Joint Declaration, that is, it must authorize designated banks to issue or continue to issue Hong Kong currency under statutory authority, satisfying itself that any issue of currency is soundly based and that arrangements for the issue are consistent with the object of maintaining the stability of the currency." This means that the exchange rate of Hong Kong dollars against the Renminbi, namely, the Hong Kong and Shanghai Standard Chartered Bank, may continue to be fixed at 100 Hong Kong dollars to the Renminbi up to the end of 1997. However, the article does not

possibility of designating other banks to issue the currency.

5.8 Article 116

5.8.1 Some people noted that this article only stated that the government of the HKSAR shall have the authority to manage and control the Exchange Fund but said nothing about ownership. The Drafting Committee explained that ownership was already implied in the sentence "The Exchange Fund of the HKSAR shall be managed and controlled by the government of the Region".

5.8.2 The Exchange Fund should be handled in a way that is more open to the public. In other words, the management and control of the fund, even the assets, ought to be reported to the Legislative Council and made known to the public from time to time.

5.9 Article 117

Protection for foreign investment is not adequately provided for in this article. Perhaps separate provisions could be made. Another possibility is to have the policy written into the Chapter on General Principles after Article 6. The article should explicitly state that the Hong Kong government would treat foreign investors and local entrepreneurs as equals in terms of taxation, tenders for government contracts as well as the issuance of business licences. It may even make a special point of stating that Taiwanese capital in Hong Kong shall enjoy the same treatment as local capital.

5.10 Article 118

This article states that Hong Kong shall remain a free port. In principle, a "free port" has no tariff, but Paragraph 2 of this article provides that "the HKSAR shall not impose any tariff unless otherwise stipulated by law". What will the exceptions be? At present, Hong Kong imposes tariff on six kinds of commodities. These are the exceptions as well as what is meant by "unless otherwise stipulated by law". Hong Kong does not have import and export duties. The import and export of gold must be accompanied by a customs declaration. Arms, ammunition and nuclear weapons are also not covered and cannot be freely imported into or exported from Hong Kong.

5.11 Article 119

The Chinese and British governments have reached an agreement with GATT to the effect that Hong Kong may remain a separate customs territory and become an

independent member of GATT. By "a separate territory", it means that Hong Kong territory is separate from the rest of In the future, the Hong Kong customs subordinated to the Beijing General Adm Customs.

5.12 Articles 120, 121 and 160

The provision that export quotas for H be independent from those for the mainland in Articles 120 and 121 has not taken possible changes in the policy of the MF is no fixed provision as to whether the are to be obtained through bilateral multilateral agreements. Thus, Paragraph 160 is there to ensure that the existin be continued. In other words, in futu. on export quotas and other issues representatives may participate as me Chinese delegation and will have the r just as they now do as members of delegation. Hong Kong members of delegations shall express their views as "Hong Kong, China". Article 120 is provision in Annex I of the Joint Decla has no intention whatsoever of transferr quotas for the HKSAR to the mainland. If textile quotas are offered to China future, it will not enjoy the quotas e) forget about Hong Kong.

5.13 Article 121

5.13.1 The HKSAR may, in the light of the regulations prevailing at the time, i certificates of origin for products locally and affix labels on the products they were "Made in Hong Kong, China" or Kong".

5.13.2 At present, only five chambers of authorized to issue certificates of origi chambers of commerce do not have such a different chambers may discuss this among

5.14 Article 127

The reference to rates in this arti directly from Annex III of the Joint Decl calculation of rates is a very technical requires further study.

5.15 Article 139

This article only mentions "the mainland of China", meaning that Taiwan and Macau are not included. Taiwan and Macau are part of Chinese territory, but they are not on the mainland of China. The term "mainland" here refers to cities like Beijing, Shanghai and Guangzhou. The consent of the Chinese government has to be sought for flights passing over the mainland of China. Flights between Taiwan and Hong Kong are to be negotiated by the Hong Kong government acting under specific authorizations from the Central People's Government.

5.16 Shipping register

The Joint Liaison Group has already held one round of discussions on this issue. It is believed that Hong Kong needs its own shipping register. At the present stage of discussion, no decision has yet been reached on such questions as which flag should be flown, whether to fly one flag or two, seamen's licences, and so on.

5.17 Double taxation

5.17.1 The principle of taxation currently practised by the Hong Kong government is that locally registered companies and Hong Kong residents have to pay tax to the Hong Kong government if their income is derived in Hong Kong. If they have investments or other sources of income in Beijing, they have to pay tax to the Chinese government and be able to produce evidence of tax payment. In the latter case, the Hong Kong government will not levy tax on their income derived in China. Thus, there is in reality no question of double taxation between China and Hong Kong.

5.17.2 According to Article 108, Hong Kong will have its own tax laws after 1997. If the present principle remains unchanged, not only can double taxation between China and Hong Kong be avoided but double taxation between Hong Kong and other states can also be avoided. The latter however is more complicated.

5.18 Patent rights

5.18.1 The patent system is an important issue as it protects creations and inventions, but it is not included in the Basic Law. Two feasible alternatives have been put forward. (1) Patent rights may be applied for from, and be approved by, the State Patent Bureau, after which they would be protected in the whole of China and in Hong Kong. (2) Hong Kong shall determine its own patent system, patent law and assessors. This issue is still under discussion.

5.18.2 Hong Kong patent rights approved by continue to be recognized and remain valid even after the year 2000. However, applications after 1997 may not be approved.

5.18.3 In addition to patents, the questions of copyright also have to be considered.

6. EDUCATION, SCIENCE, CULTURE, SPORTS, RECREATION AND SOCIAL SERVICES

6.1 The drafting principles

The following principles were observed in the drafting of articles in Chapter 6: (1) The provisions must conform with the Joint Declaration. For example, Articles 147 and 153, are taken directly from the Joint Declaration. (2) The provisions must conform with the "one country, two systems". In other words, the provisions of the capitalist system must be retained. Empty promises should be made on behalf of the government. For example, nothing has been promised for future revenue because this would affect the future government.

6.2 The definition of the term "culture"

Many of the terms used in the Basic Law are difficult to define. On the mainland, culture and education are handled by the Ministry of Culture and Education of the People's Government, which does not handle sports and education. The meaning of "culture" used in the heading of Chapter 6, Articles 147, 156 and 157 is not easy to define, indeed difficult, and perhaps even impossible to define some of the terms. As long as the provisions are well drafted it will be all right.

6.3 "Previously practised" and "formulate on its own"

"Formulate policies on its own" and "system previously practised", which are used throughout the chapter in connection with education and other policies, sound content. They are direct quotes from the Joint Declaration. Further deliberation is necessary.

6.4 Professionals

6.4.1 The drafting principles in respect of qualifications are as follows: (1) The provisions must definitely be free from colonial connotations. (2) The provisions must be in line with the spirit of the Joint Declaration. (3) There will not be any preferential treatment.

nationals. Preferential treatment for people from the British Commonwealth will not be tolerated in future laws or legal clauses. (2) The status of practitioners of Chinese medicine will definitely become a cause for public concern, but how their status is to be determined is entirely up to the government of the HKSAR. (3) Details and much disputed issues should not be written into the Basic Law and should be left to the future HKSAR government.

6.4.2 Some people asked about the precise definition of the term "professionals". The fact is, definitions are not generally given in the Basic Law. Since many of the terms cannot be defined in one or two words, the Basic Law would become a very lengthy document if all concepts mentioned had to be explained. According to Article 150, professional qualifications and qualifications for professional practice shall be determined primarily in the light of existing conditions. Whether or not the provisions prescribed in Article 150 have already taken every situation into account can be further discussed.

6.4.3 Statutory bodies with special legislation for all aspects of their work are called professional bodies. Most people have no objection to any particular occupation being called a profession. Some occupations for which legislation was passed before the establishment of the HKSAR may also be called professionals.

6.4.4 The present provisions do not preclude the possibility of other professionals obtaining legal status. When applying for professional recognition, the practitioners will only have to demonstrate their worth to the community and the need to have their legal status. After going through the due process, they may set up their new professional body. The public shall be fully consulted before such a body is established. The idea of "in consultation with the parties concerned" mentioned in Article 150 is that the excellent system of consultation currently in force in Hong Kong should be continued.

6.4.5 Professional qualifications and qualifications for professional practice should be dealt with separately. Professional qualifications are set by the professional bodies concerned, while qualifications for professional practice are to be determined by the government of the HKSAR. Thus, professional qualifications may apply to professionals from the mainland and other countries. At present, professionals like doctors and architects with Commonwealth-recognized qualifications may all practice in Hong Kong. This is not reasonable. In the future this kind of inequality will disappear and every

one will be treated as equals. Professionals from mainland as well as from other countries allowed to practice in Hong Kong provided necessary qualifications and are considered qualified after going through set procedures sitting for relevant examinations required by the government of Hong Kong. China does not encourage mainland professionals to come in Hong Kong. There are many professionals. If they all rush to Hong Kong, the territory will not be able to bear the pressure.

6.4.6 Professionals from China should be treated and should not be given special treatment if they are minority nationalities. If nationalities are to be valued above all else, fair competition should be encouraged. Thus, the objective should be to put everyone on an equal footing while taking into account Hong Kong's overall interests.

6.5 Articles 157, 159 and 160--Sports Organizations

6.5.1 Article 157 says that Hong Kong sports organisations may maintain and develop relations with relevant countries and regions and with relevant organisations. This means that if Hong Kong sports organisations have already established relations with international organisations they may maintain, even develop, such relations in 1997. This is what is meant by "maintain relations". The organisations mentioned in Article 157, including those in the fields of science, technology, culture, sports, professions and labour, are not sports organisations. If, say, the South China Athletic Association is going to take part in a competition in the United States, it may either call itself "China Athletic Association, Hong Kong" or "China Athletic Association, Hong Kong, China". The article states that organisations "may, as required, use the name 'Hong Kong' in connection with the relevant activities". Thus, they may use "Hong Kong, China" as required, or decide if this is not necessary. It will not be a violation of the Basic Law either way, for these are governmental sports activities on an international level, not diplomatic activities.

6.5.2 Unlike Article 157, Articles 159 and 160 deal with external affairs. External affairs are the responsibility of the Central authorities of the name "Government of the HKSAR" which is Hong Kong an independent entity among nations, "Hong Kong, China" should be used. The HKSAR government will not be able to present

independent country in the international arena. Hong Kong will just be a "Special Administrative Region". If, in the future, some international organisations only allow each country to be represented by one team, would Hong Kong, being merely a part of China, be expelled? The crux of this question lies not in the name Hong Kong uses. Whether it calls itself "Hong Kong" or "Hong Kong, China", the reality remains that Hong Kong is a part of China. Thus whether or not Hong Kong will be expelled is not a matter of name, but whether the constitution of the organisation concerned allows Hong Kong to take part in this international organisation as a region. If both China and the HKSAR are members of this organisation, would Hong Kong be able to retain its membership? According to Article 160, the Central Government shall "take the necessary steps to ensure that the HKSAR shall continue to retain its status in an appropriate capacity".

7. STATUS OF CHINESE AND ENGLISH

- 7.1 Article 9 is taken directly from the Joint Declaration. It concerns the question of the official language, that is, the language used by government organs. The language of instruction in schools, of business contracts and of everyday life is not subject to the restrictions of Article 9 but is to be determined according to habits and personal preference. For example, the University of Hong Kong may continue to use English as its medium of instruction. At present, many contracts are written in the English language. They may continue to be written in English after 1997. There will not be any restrictions in such areas.
- 7.2 There is no provision in the Basic Law regarding the business language, meaning that the language previously used, namely English, shall be retained. There should not be any problem with this because Letters of Credit made out by local Chinese-financed banks are also written in the English language.
- 7.3 In consideration of China's resumption of the exercise of sovereignty over Hong Kong, the Chinese language is naturally made the official language of the executive authorities and the legislature under the provisions of Article 9. The clause "the English language may also be used" is added in consideration of the actual situation in Hong Kong. For a long time, the English language has been the working language of government departments, executive departments, legislative departments and judicial department, and many statutes and law cases are written in English.
- 7.4 Article 9 in fact suggests that the Chinese language will be the first official language while the English

language will be the second official language. It is difficult to avoid the possibility of discrepancy between two languages, if there is a discrepancy between two versions, the Chinese one will prevail in the case of the Basic Law, but not necessarily so in the case of other laws. Hong Kong laws are written in English. It is not to be Chinese laws as well in the future. In the event of any discrepancy between the English and Chinese versions, chances are the English version will prevail in the case of 50% of the laws. Thus the hard and fast rules.

- 7.5 Further, making the Chinese language primary and English language secondary is just an indication of the direction, to aim at. It does not mean the objective has to be attained immediately. We have to do things step by step in accordance with reality, and this is bound to take quite a long time. We have to study the issue, formulate a plan and gradually act them out. The actual measures should be devised by the HKSAR in the exercise of its powers under the Basic Law. Preparations have to be made to attain this objective, and the objective will be attained until the conditions are ripe. It is something that can be enforced by administrative orders.
- 7.6 Some of the independent countries within the Commonwealth have their own ways of dealing with the question of the official language. Some have adopted the bilingual system while others have their local language as the first language and English as a secondary one.
- 7.7 At one stage, there was a plan in Hong Kong to translate all laws into the Chinese language so that they could be read in English as well as Chinese texts of the laws. Later this full-fledged plan was abandoned. Now the focus is concentrated on the enactment of important laws in Chinese. The fact that this task has been reduced is an indication of the difficulty involved in making Chinese the official language.
- 7.8 It has been proposed that Putonghua be the official language of Hong Kong, but this definitely does not mean to replace the local dialect with Putonghua.
- ## 8. ENGLISH VERSION OF THE BASIC LAW
- 8.1 The English version of the "Draft Bill of Solicitation of Opinions" was translated by the Secretariat of the Drafting Committee of the Basic Law. The public may express their view

English version, which is identical in content to the Chinese version. Of course there may be imperfections, even some errors in translation. The English version at this stage is just a translation, not quite a legal document yet.

8.2 While the Chinese version of the Basic Law is the official version, there are suggestions that there should also be an official English version. Since the Basic Law shall mainly be implemented in Hong Kong, there must be an official English version if the English language is to be used in the courts of Hong Kong.

8.3 The Basic Law needs to have an official English translation because there would be many foreign judges sitting on the bench in Hong Kong in the future and they would need to have an authentic English version of the Basic Law when they refer to some of the clauses of this Law in adjudicating cases before them. The difference between the Basic Law and the Joint Declaration is that the latter is an international agreement concluded after negotiations between two countries, with some clauses originally written in Chinese and some originally written in English. Thus the English and Chinese versions are equally authentic. The Basic Law, on the other hand, was written in Chinese. Translated from the Chinese version, the English version has the same legal effect as the Chinese version. However, if there is any discrepancy between the two versions, the Chinese version would prevail. This does not mean that the English version does not have legal effect. The Drafting Committee will definitely produce an official English version of the Basic Law.

9. PRESENTATION

9.1 Policy guidelines and legal provisions

9.1.1 Many people held that the Basic Law, particular Chapter 5 of this Law, contained too many policy guidelines. Articles 105 and 107, for instance, are policies. According to the last of the 12 policies announced by the PRC in the Joint Declaration, the basic policies of the PRC regarding Hong Kong and the elaboration of them in Annex I to the Joint Declaration will be stipulated in a Basic Law of the HKSAR. That is why so many policy guidelines, even detailed provisions, have been incorporated into the Basic Law. This is a necessary step to avoid being accused of having violated the Sino-British agreement.

9.1.2 It has been suggested that policy statements be put in a separate annex so that the main text would only

include legal provisions on matters of law. However, it may not be easy to put this practice because it is very difficult to separate principles from policies.

9.1.3 Three alternatives have been suggested for the presentation: (1) The existing provisions be retained with amendments to some of the more vague expressions. (2) Some of the provisions be deleted. (3) The contents of some of the provisions should be amended.

9.1.4 It is true that as a mini-constitution the Basic Law should not be too detailed. However, it also has a special function to fulfil, and must also meet the needs of the territory and put people at ease. Thus the drafting of the Basic Law is different from the drafting of other constitutions. The important thing is that the Basic Law be suited to Hong Kong.

9.1.5 Whether or not the Basic Law should detail policies depends on the confidence of Hong Kong people. If they have confidence in the future HKSA, naturally some of the details may be deleted.

10. EXPRESSIONS SUCH AS "PREVIOUS", "EXISTING" AND "CONTINUE"

10.1 In the text, there are probably too many such expressions, which may be interpreted differently at different times. One thing is clear, however, and that is, they have to be given serious consideration before 1997.

10.2 In some cases, these expressions have been used when they appear in the Joint Declaration, but in other cases they have been inserted by the drafters. It is hoped that the use of such expressions will allay misgivings of some people, who have doubts about whether the capitalist social and economic systems and way of life will remain unchanged.

10.3 Article 4 states that "the existing capitalist social and way of life shall not be changed". The provisions also talk about "existing" policies. What time frame do they refer to after 1997? Article 4 should actually be seen from a long perspective. What is meant by the existing system is the capitalist system all along in Hong Kong. It means that the system is to remain unchanged as a whole, not from any particular perspective.

10.4 The Annexes of the Joint Declaration contain the basic policies. If these are not incorporated in

Law, we would risk being accused of violating the Joint Declaration. However, people are reluctant to leave the enactment of these policy provisions to the future HKSAR government. Thus, in the Joint Declaration, both the Chinese and British sides agree that Hong Kong's "existing" system should be maintained.

內地草委訪港小組就
基本法(草案)徵求意見稿
一些問題的回應輯錄

(一九八八年六月四日至十七日)

基本法諮詢委員會秘書處整理及負文責

引言

一九八八年六月四日至十七日，內地草委訪港小組通過基本法諮詢委員會秘書處的安排，與一百五十一個團體就四月二十八日公佈之基本法(草案)徵求意見稿進行交流。各團體代表發表了不少意見，並且就徵求意見稿提出了一些問題，而草委亦以個人身份就有關問題作出了一些回應。

此文件乃本會秘書處就草委在交流會上作出初步回應的整理，目的為向各界提供一些參考資料，以助繼續深入討論。但這些回應純屬各草委個別作出的說明及解釋，並不代表草委會的整體意見。此文件未經有關草委過目，如有差誤由本處負責。

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1. 總則

- 1.1 總則共有十條，原來還有二條是有關保護外來投資和志願中心的，但結果還沒有取得一致意見，故並沒有加上。
- 1.2 不可能將後部份的條文都加入總則中，否則便太重複了，現在已有些是重複的了，如第二條香港特區享有高度自治權、行政管理權、立法權、獨立司法權和終審權，這些在第二章中也有說明；另第四條和序言也是重複的，只是因為某些內容重要，故可重複一點，但卻不可有太多重複。將來香港的法律都以總則內的原則為依據，而總體小組認為總則已將《中英聯合聲明》中最重要的精神反映了，所以其他可以不寫入總則。

2. 中央和香港特別行政區的關係

2.1 一國兩制與高度自治

- 2.1.1 一國兩制的概念早在《中英聯合聲明》簽署前已出現。在一九八二年修改憲法時，就加上了第三十一條，這條就是把「一國兩制」的精神保證了，這證明中國憲法本身已有考慮「一國兩制」的精神。
- 2.1.2 基本法的條文中，有不少是規定由中央管理的，但這都是因政治上和法律上的需要而定的；實際執行時，中央根本沒有時間處處干預香港的自治，因為中央對香港的情況並不了解，且中央亦希望香港人能管治好香港，以助中國的發展。
- 2.1.3 作為單一制的國家，權力來源故然是屬於中央，地方政府的權力也是由中央政府授權，所以權力來源當然是中央，而中央的權力就是全國人大代表所組成的，是全國人大賦予的，這跟聯邦制國家不一樣，而香港要有高度自治權亦是由全國人大授予的。
- 2.1.4 其實中央與地方的權力是不能劃分得太清楚的，只可有原則上的劃分，因為如行政權與司法權是屬於香港特區的，但主要官員和行政長官卻由中央任命，這就是中央與地方權力的交叉，雖然中央與地方的權力交叉是很少的。基本法應怎樣將中央和地方的權力及關係寫得清楚以解決香港人的擔心及憂慮是很重要的，但中國與香港終究是一個國家，雖然不可過份強調主權，然而有些的確是主權的問題，如一九五八年宣佈中華人民共和國的海域是十二海哩，香港應否需要另搞個非十二海哩呢？這似乎是無此必要的，且這亦不會損害香港的自治權。
- 2.1.5 有人擔心「直轄於中央人民政府」會影響立法權、司法權和高度自治，但事實上「香港特別行政區直轄於中央人民政府」是《中英聯合聲明》的原話；再者香港是一個特別行政區，當然是直轄於中央，否則由誰來管理呢？一般來說，中國各省市，包括上海、北京、天津、廣東、廣西等均直轄於國務院，香港特區將來的地位，相當於一個省、或直轄市，如新疆、西藏這樣的自治區的地位，但權力卻大得多，有高度的自治權，然而都應當直轄於中央人民政府。
- 2.1.6 至於怎樣直轄於中央人民政府，而又不影響香港特區的立法權及司法權呢？基本法第十七條所指的「由國務院公佈指令」或「立法實施」，意思是中央與地方的關係要通過國務院，且不是國務院四十幾個部門的每一個部門都可向香港特區下指示，將來中央人民政府就是通過國務院港澳辦，而香港若有意見或問題，則可向國務院反映，而國務院總理是會直接管理這些問題的。

- 2.2 第十七條「緊急情況」：
一般就是指如戰爭等的情况便是緊急情況。
- 2.3 第十八條「中央行政行為」：
2.3.1 第十八條所指的國防、外交、和中央人民政府的行政行為，實際上就是普通法所指的國家行為。中央人民政府就是國務院，它的行政行為就是指國務院作出的行政決定，頒佈的行政命令，或者制定的行政法規，又或是國務院執行法律，在執行時所採取有法律效用的措施。如中央人民政府任命行政長官、主要官員，就是行政行為，地區法院是無權受理的。
2.3.2 而「行政行為」是有別於民事的、商業性的行為。如中國銀行、華潤公司的行為就不是行政行為，雖然這些是屬國家的，但都屬商業性的，故並非行政行為。
- 2.4 第十九條「其他權力」：
第十九條的「其他權力」是指第二章中第十九條以前規定香港特別行政區所享有的權力以外的權力，至於具體是什麼權力呢？這裡沒有確切的說出來，因為現在所知道香港特區需要的權力都已作了規定，「其他權力」就不是指現在的，而是指今後如果出現新的情況，香港特區便需要新的權力，因此第十九條就是說到這時候，中央可以再授權香港特區所需要的權力，新的需要和新的授權便可解決。
- 2.5 第二十二條「破壞國家統一和顛覆中央人民政府的行為」：
2.5.1 草擬這條文時的考慮：目前香港刑法中，就對此類行為作出規定。普通法中多是不成文法，但刑法則屬成文法，所指成文法就是規定什麼東西是犯罪什麼不是。而現在香港刑法第一部份是關於叛國罪的，就是香港人反叛英國、反叛英女皇、提出殺害英女皇、推翻英女皇，或和英國開戰、或反對和破壞英國政府，都是叛國罪。
2.5.2 中英兩國談判時的主要精神是：香港的法律繼續適用，凡是和基本法不抵觸的法律，將來都會適用。草委們更考慮到英國的法律，即英國的刑法，都可以適用，但這部份不能寫，因中國恢復行使主權，香港居民對英國皇室、英國政府便沒有義務，這部份刑法便不再適用。加上第十七條規定中央立的法律，即全國人大和人大常委會立的法律，基本上是不在香港適用的，中國刑法亦不適用於香港，所以中國刑法規定的那些反革命罪、不能用暴力推翻中央政府等都不適用於香港。由於英國的叛國罪和中國的刑法均不適用於香港，那麼這部份便有了空隙，需要另一法律代替，故草委們便考慮在這情況下有必要在基本法里寫上：這些法律將來由香港特別行政區自己立法，限制這些破壞國家統一、顛覆中央人民政府之行為。基於這些原因，第二十二條是有必要寫下的。
2.5.3 再者這條是讓特區按照自己法律的精神原則來制定這方面的法制，並不是按內地的尺度來立法的。而現時香港的法律以及世界各國亦有包括這方面的規定，因此第二十二條實屬平常。香港是有司法權的，亦有終審權，要是發生類似叛國罪的案件，亦由香港特區的法院自己審理，一直至最後最高的審定，都是由香港決定，國內，包括國家的最高人民法院、國際的法院都不會處理，也不會有向北京上訴的事情。

- 2.5.4 至於什麼是顛覆中央人民政府和破壞國家統一等罪行，亦是由香港的普通法去判斷的，且要構成犯罪，是要有意識的，不是隨便說的，因此無需擔心「顛覆中央」、「破壞國家」等罪項，會影響言論自由。就如英國的刑法雖在港實施，也沒有規定不可以隨便批評英國，講了些什麼言論便犯罪，而香港將來的法律體系會保留現有的制度。
- 2.6 全國性法律在港適用的問題
- 2.6.1 《中英聯合聲明》里載明中華人民共和國對香港地方政策之具體說明，應由基本法直接規定，而基本法是根據憲法決定的，所以憲法整體上是適用於香港的，因為憲法是國家的基本法，它的地位高於其他法律，至於起草委員會也是根據憲法規定產生的，若憲法不適用於香港，則起草委員會的存在和所制定的基本法皆有問題。
- 2.6.2 然而整體上適用於香港，不等於全部都適用，憲法中有許多條文是不適用的，但若要將每一條都進行解釋，列明是否適用於香港，則有技術上的困難，因為有的是全條不適用；有的是半條適用，半條不適用；有些是一句話適用，一句話不適用，因此序言中便提到基本法是根據憲法制定，及加上第十條的說明。
- 2.6.3 第十條具體地說到香港特區的政策和制度都是以基本法為依據，而不是以憲法為根據。雖然基本法是根據憲法制定，但因為憲法第三十一條允許有特別行政區，及允許特區之基本法對憲法實行社會主義等的規定有所例外，就是香港特區可不按社會主義制度和原則去做，所以內地實行的基本思想原則及社會主義制度便不適用於香港，這是沒有矛盾的，憲法第三十一條已解決了這問題，故序言說明基本法以憲法第三十一條為根據，加上第十條的說法，便比將憲法每一條加上說明為佳。
- 2.6.4 建國以來全國人大所制定的全國性法律大部份都不適用於香港，包括民法、刑法、民事訴訟法、刑事訴訟法、商法（經濟方面的法律）等都不適用於香港。實際上只有七種是對香港適用的，包括①一九四九年關於國都、紀年、國歌、國旗的決定；②國慶；③國徽；④一九五八年中國政府關於領海的聲明；⑤一九八六年由人大常委通過的外交特權及豁免的聲明；⑥全國人大代表選舉法；⑦國籍法。而這些法律都是香港特區自己沒法制立的，但這些問題又必須有法律來作依據。再者，有些全國性法律雖是屬國防外交的，但卻對香港不適用，如兵役法就不適用於香港。
- 2.6.5 有建議將這些適用於香港的全國性法律寫入基本法，便能使香港人安心，但這是有不妥之處的，因為將來若再有這一類的全國性法律，難道要改基本法嗎？為求盡量避免修改基本法，故有另一建議，就是將那些全國性法律寫在附件，因增加或修改附件是較容易的。這個提議可以研究。
- 2.7 香港的法律
- 2.7.1 香港的法律，主要在基本法第八、十六、十七條說明：
- 第八條規定九七年前之原有法律予以保留，但與基本法抵觸或經香港特別行政區立法機關修改者除外；
- 第十六條指香港特區有立法權；
- 第十七條指九七年後香港特區立法機關還要制定法律，還可修改法律；
- 而第一百七十二條應與以上三條連在一起看。第一百七十二條是一條過渡性的條款，讓香港特

區在成立時，香港原有法律除由全國人大常委宣佈與本法抵觸以外，採用為香港特區法律，如以後發現有些法律與本法抵觸，可依照本法所列的程序撤銷或修改。

2.7.2 第八條是個原則，指過去法律中除少數外皆有效，而第一百七十二條是指九七年七月一日那天，由人大宣佈，如英皇制誥、皇室訓令等有殖民主義色彩的法律不再有效，這是從法律手續上將之說清楚，至於九七年七月一日後如發現法律再有與本法有抵觸者，則再按第十六、十七條程序加以修改或撤銷，而不是九七年七月一日宣佈某法與基本法抵觸無效，以後便不能再宣佈另一法律也無效。

2.7.3 以後人大常委會如發現某些法律與基本法抵觸，是不會直接修改的，他只會告訴香港特區立法機關，由立法機關自己修改；若香港特區直接發現有抵觸者，則由立法機關自己修改。所以原有法律是保留了，但卻容許有修訂的，故不是沒有發展及變化的，只是這些發展和變化主要是由香港特區自行制定，中央是不參與修改立法的。

2.8 司法管轄權

2.8.1 香港特別行政區司法院可以審理哪些案件，不可以審理哪些案件呢？基本原則是按照目前香港的做法，就是現在香港有多少管轄權，將來也同樣有多少管轄權，而不會對香港的法院增加什麼限制。

2.8.2 第十八條是由香港委員提出要求將司法管轄權寫入基本法的，故便由他們起草。這條的主要意思是香港的司法制度除因香港特別行政區法院享有終審權而產生的變化外，原在香港實行的司法體制予以保留，而沒有給法院什麼司法限制。

2.9 基本法的解釋權

2.9.1 基本法是中華人民共和國的法律，不但對香港適用，對內地也同樣適用。內地各省市、各部門在處理與香港有關的問題時，都應遵守基本法的規定。

2.9.2 按照憲法第六十七條，解釋法律的權力屬於全國人大常委會，但這並不是說香港的法院審理案件中不能對基本法的條款進行解釋，而只是在香港法院作出最終判決前，對涉及國防、外交和其他屬於中央人民政府管理的事務的條款解釋問題的時候，才把案件之解釋提請全國人民代表常委會。

2.9.3 這個辦法是參考歐洲共同體的做法的。歐洲共同體有自己的法律，稱為歐洲共同體法，其下有很多成員國，他們都接受這個歐洲共同體法，並將之作為本國法律的一部份。

2.9.4 依照共同體的規定，共同體法的解釋權在於共同體法院，但案件的終審在其成員國法院，就是說解釋和終審權不在一個機構的手里，但這樣就出現解釋上不一致的可能。歐洲共同體的解決方法是成員國法院如遇到需要共同體解釋的問題的案件，便在終局判決前，把問題向共同體法院提出，請共同體法院作出解釋，然後成員國法院再根據這解釋對案件作出判決。共同體條約對這就作了規定。

2.9.5 英國作為共同體成員接受了這個辦法，而英國也曾有幾個案例是接受了共同體的解釋，並按着決定去處理，但英國並不認為這辦法損害了英國的司法獨立。

2.9.6 中國與香港的司法解釋權問題與此相似，因為今後解釋權在全國人大常委會，但終審權却在香港特區終審法院，而需要提請全國人大解釋的，亦只是基本法中的一小部份，就是有關國防、

外交及其他屬於中央管理的事務的條款，事實上中國建國四十年以來，人大常委會解釋憲法的例子很少，何況是香港，所以將來實際由人大常委替香港解釋的情況會更少。

2.9.7 有人認為中央既然把高度自治權給了香港特區，便不應去干預屬於高度自治範圍的事。當然中央將高度自治權給了香港，就是說這一部份事情由特區去管，中央不會管，但這是除却在基本法內明確規定的一些事務，這些事務是應經中央決定，或備案的。而人大常委解釋基本法，是要從基本法的條文原則和精神出發，就是「高度自治」和「一國兩制」，而非隨心所欲的去解釋，否則便是修改基本法了。至於屬於香港高度自治範圍的，當解釋基本法時，中央就不能干預。

2.9.8 另外，在解釋時還有一層保證，就是基本法委員會，這個委員會是有一定足夠比例的香港代表參與的，這便能夠充份反映香港方面的意見，而人大常委在解釋法律之前，是先要交基本法委員會去研究及提出建議的，人大常委對於基本法委員會經過研究提出來的意見，肯定會尊重，就如現在起草委員會寫了這本基本法，最後向人大提出草案，人大是會尊重草委提出來的草案的。

2.9.9 但若從法律規定人大或人大常委只能接受基本法委員會的意見，不可作任何改變，這是有困難的，因這會使人大變成一個非權力機關，而基本法委員會則變成權力機關。

2.9.10 曾有人建議將屬於國防、外交或屬中央管的事務的條款交由人大常委去解釋，而屬高度自治範圍內的條款則由香港法院來解釋，這個建議是值得考慮的，但是我們亦得考慮把一部法律文件一分為二的困難，因為條文與條文間是有關連的。即使把它分開，如第三章、四章、五章、六章屬於高度自治範圍的條文，其他則屬中央人大常委管的。若按此劃分，香港特區在解釋第三章的條文時會否涉及第一章總則呢？因為總則是總的原則，適用於全部基本法；相反，中央解釋第一章、二章、九章時，會否涉及其他章節，而他又沒有解釋權呢？再者，這樣便會產生兩個解釋的機關，最後就各說各的，因而產生解釋上的矛盾。

2.10 基本法委員會

2.10.1 基本法委員會是人大屬下的委員會，因此若由草委規定這委員會的細則，會有越權之嫌，但任何人均可對此自由提出意見。

2.10.2 有估計基本法委員會應該會有三分之一至二分之一的成員是香港代表。

2.10.3 人大不會在港設立常設機構，故不會成為立法機關以外的另一個權力中心。

2.11 全國人大代表

2.11.1 香港的全國人大代表是代表香港五百萬港人參與整個國家的管理。全國性的人大作出一些重大決定後，便由這些代表帶回香港，向香港居民解釋國家的根本政策。如將來修改基本法，全國人大代表、香港代表便有權按各方同意後，由他們提出。若全國人大推出任何涉及香港利益的決定時，香港代表便可替香港發表意見，如全國性法律在港適用的問題上，香港代表是可發表意見的。

2.11.2 自建國至現在，香港代表是由廣東的人大代表會選出的，是屬於廣東代表的一部份，在選出候選人名單後，便給與廣東人大，由廣東人大選出成為廣東代表，再派到北京參加全國人大代表會。這是因為現時沒有條件在香港選。

- 2.11.3 至於將來香港區的人大代表選舉法及選舉資格仍未有立法，香港特區成立後，人大代表產生的方法是否適合香港，或需另設一套則未能肯定，但有一點是清楚的，既然是全國人大代表，便需是中華人民共和國的公民。
- 2.11.4 根據第二章第二十條，香港特區居民中的中國公民可依法參與國家事務的管理。九七年後根據全國人民代表大會香港特別行政區確定的名額和代表產生方法，在香港選舉，產生香港特區的全國人大代表會代表。
- 2.11.5 香港居民中的非中國公民雖有選舉和被選舉權，但在人大代表的選舉上卻沒有權，因為這是全中國的事。而據第二十條的說法香港居民中的中國公民是沒有規定需要是香港永久性居民的，因此非永久性居民中的中國公民雖沒有權被選為行政長官及主要官員，但卻有權被選為香港特區的人大代表，因為他們是中國公民，當然香港人是可不選他。

3. 居民的基本權利與義務

3.1 勞工的權利

- 3.1.1 在《中英聯合聲明》里並沒有寫上勞工權利，而在一九八六年一個研討會中，一些勞工界代表提出需要將勞工福利問題寫進基本法內，結果草委會接納這建議，在基本法中增加了第三十五條，規定勞工的福利待遇受法律保護。草委是會聽取意見的，但大家都了解不能寫得太具體，只可寫原則性一點。
- 3.1.2 第一百五十六條有關香港組織與內地組織的關係中，《中英聯合聲明》里只是指香港的宗教團體與內地宗教團體互不抵觸、互不干涉和互相尊重。而實際上現時內地的全國性團體並沒有在港設立分會，故香港有關的團體也不會作為全國性有關團體的下屬。只要內地繼續實行這樣的政策，就可減少香港人的憂慮，亦貫徹了一國兩制的原則。
- 3.1.3 另外有勞工界的代表認為，若將第一百五十六條、第一百五十七條聯在一起看便很有問題，因為第一百五十七條指香港組織可對國際發展關係，但第一百五十六條卻說內地與香港不能發展關係，這問題可待再研究。

3.2 國際勞工公約

- 3.2.1 有認為國際勞工公約很重要，應寫入基本法第三章中，因為《公民權利和政治權利國際公約》和《經濟、社會與文化權利國際公約》均是寫在第三章。
- 3.2.2 雖然國際勞工公約很重要，但香港的國際公約是相當多的，如果都將這些國際公約寫進去、便有問題。至於將那兩個國際公約寫入基本法是因為《中英聯合聲明》里有這樣規定，而國際勞工公約便沒寫進去了。
- 3.2.3 至於《國際勞工公約》如何適用於香港，香港與國際勞工組織之關係如何等問題，會由中英聯合聯絡小組討論並找出解決方案，待國際勞工組織之批准。

3.3 《公民權利和政治權利國際公約》和《經濟、社會與文化權利國際公約》

- 3.3.1 有建議將兩個國際公約的條文都寫入基本法，這是有問題的，因為條文未必能照顧在變化中的香港狀況，如新界原居民等的獨特問題。

3.3.2 再者，現時兩個國際公約是通過香港的法律而適用的，不是兩個公約直接適用於香港；而且英國對兩個公約適用於香港的情況仍有保留，現時只有約十條是適用於香港的，若寫死了，便不可有所發展。事實上兩個國際公約很長，而內容已在居民基本權利和義務一章內包括了，故未必需要將兩個公約的條文寫入基本法。

3.4 選舉年齡

就選舉年齡的意見共有四個 ①規定為二十一歲；②規定為十八歲；③只寫規定法定年齡；④不作規定。希望對此收集意見。

3.5 居民的義務

香港居民的權利自由根據第十條的規定是以基本法為依據的，而第四十一條又規定香港居民只有遵守法律的義務，沒有說要服兵役，因此香港居民便沒有服兵役的義務。

3.6 新聞自由

3.6.1 不將“新聞”這詞寫入第十五條並不是代表這權歸入中央，而是因為第十五條是寫政府的權，若要絕對的新聞自由，政府應沒有權管，沒有有關的政策，或設一個部門來管新聞應如何傳播，因這其實是約束了新聞自由，所以新聞自由應是屬民間的權利，故應寫入居民權利一章內。

3.6.2 新聞自由的限制止於第三十九條所規定的條件。

3.6.3 言論自由，無論是在香港或西方國家，也是在於任何言論均不屬犯罪，然而行動則另議。將來香港如何處理這方面則要由將來香港特區政府自己決定，中央不加干預。

3.7 新界原居民

3.7.1 在中英談判時，在土地的問題上寫了一條有關保護新界原居民的權利，其中包括將來不增加租金、建丁屋的權利等，因此九七年後是要按照《中英聯合聲明》的規定來做。再者，基本法是要盡量保持九七年後原有制度不變，而原居民的權利也不要變，因為香港現行法律亦包括了他們的權利。

3.7.2 從法律的角度來看，既要包括一般利益，也要包括少數人利益，這並不矛盾。內地也會照顧少數民族的利益，使他們得到自治，這是有利於少數民族及人民間的團結。而新界原居民的問題是歷史遺留下來的問題，保障他們的權利是有利於香港居民的團結。

3.7.3 至於婦女界提出反對，認為丁屋是保護男性的權利，這是可以理解的。

3.8 有關「依法」的字眼

原來的權利自由是很寬的，但加了「依法」兩字便會有了限制，但這限制得與第三十八條和第三十九條一併來看。第三十九條規定其限制止於維護國家安全、社會秩序、社會公安、公共衛生、公共道德以及保障他人的權利和自由所必需為限。而這些是抄兩個國際公約內的規定的。因此如須加任何限制，便只可以上述幾方面「必需為限」。

3.9 有關「通常居住連續二十年」的規定

現在香港選舉法例已對此有規定，就是以香港為自己的居留地，在二十年內若因求學、任職等出外居住一段時間，甚至是三、四年也可算是在港通常居住連續二十年，只要不是到外國領取、獲取居留權便可以，因為這些明顯是與「以香港為居留地」之條件有抵觸的。

3.10 有關「以香港為永久性居留地」的意思

只要是個人願意永久居住在香港，就算是以香港為永久居留地。

3.11 居民的定義及國籍問題

3.11.1 第二十三條居民定義是有兩個依據的：一是香港現有的法律制度；二是《中英聯合聲明》的附件一第十四款。

3.11.2 永久性居民與非永久性居民的區別就是有沒有居留權，所謂居留權就是不能被逮解出境；但無論是永久性居民或非永久性居民均有香港身份證；至於其他人則無身份證，因而其他人也不能取得護照。

3.11.3 第三章主要是指香港居民，而第四十一條及第四十二條的「其他人」並非指內地的人，而是一兩天過境的也是其他人。至於其定義則是模糊的，但他們基本上是享有香港居民的權利和自由的。

3.11.4 而第二十三條中有「中國公民」和「中國籍的人」兩種說法，主要是因為依據《中英聯合聲明》的說法。

3.11.5 國籍法的規定主要是採取屬地主義與血統主義雙結合的。所謂屬地主義就是指在中國出身和生長的就是中國人。香港是中國領土，雖然被英國佔領，中國是不承認的，中國仍看香港為其領土，因此在港出生的仍是中國人。另外一個就是血統主義：父母、祖先是中國人，就是中國人。所以即使在中國領土內出生，但父母雙方不是中國人，就不算是中國人，但將來若想加入中國國籍，是可申請的，需要申請的原因是以表自願加入為中國籍，經一定程序批准便可加入中國籍了。

3.11.6 香港大約有二百多萬是英國屬土公民，而在一九八四年十二月十九日中華人民共和國外交部註了一個備忘錄，內容說：「根據中華人民共和國國籍法，所有香港中國同胞，不論是否持有英國屬土公民護照，都是中國公民。」就是說所有香港中國同胞，不論是否持有英國屬土公民護照，都是中國公民。

3.11.7 所以備忘錄主要是解決香港屬土公民的問題。「中國同胞」顯然是一個血統的概念。如果說所有的香港中國公民，不論他持有什麼護照都是中國公民，這是不行的，以後中國公民是中國公民，以前在英國統治下，不能說這些人已有中國國籍。但是從中國政府對中英舊條約的立場，實際上是不承認香港領土主權歸了英國，所以在這情況下，部份中國同胞限於英國佔了香港，他們處於英國人的統治下，英國用英國的法律給當地的中國人「屬土公民」的身份，就是英皇陛下的親民，這是中國不承認的。英國給香港人的屬土公民身份是不合法的，一九九七年後，不管你是否拿英國護照的屬土公民，都是中國公民，這是第一層意思。

3.11.8 第二層意思是中國接受拿屬土公民護照的香港人，以屬土公民護照為旅行證件離開中國、香港到另一個國家，中國是不理的。蘇聯曾在新疆領事館給當地居民發了一些俄國護照，這是不行

的，因為新疆的人是中國公民，不可隨便發給他們的。但香港的情況則例外，因為香港與海外的聯系比較多，另外，中國是社會主義國家，其他國家在某種情況下對中國是有敵意的，香港人拿中國護照到南朝鮮去是不行的，到印度尼西亞也是不方便的，去台灣便更加不好了，所以在這情況下就得變通一下，屬土公民護照便可以用。

- 3.11.9 將來亦可在香港發一個中國香港護照，如果去日本，拿着原來的英國屬土公民護照是更方便，這也是可以的。甚至到了日本或另一國家出了事，你到英國領事館尋求協助，中國也是不理的。但是若你到香港或到了中國內地，被警察抓著，你是不可說自己是英國公民，有英國護照。至於香港人除了拿英國屬土公民護照外，還拿着美國、加拿大，或別的護照，這問題則沒有在備忘錄中提及。
- 3.11.10 關於雙重國籍的問題，中華人民共和國是不承認的。國籍法第九條規定凡是雙重國籍，即中國公民持有外國國籍，便自動喪失中國國籍了。然而有提議修改國籍法為承認雙重國籍，讓這些持雙重國籍的人一九九七年後回港，把他們當作中國公民對待。這是很複雜的問題，因為這牽涉到兩個國家的關係，及不可能把拿有其他護照的中國人都當為中國公民。其歷史背景是新中國成立後，有一些國家，特別是東南亞，中國華僑特別多，這就產生那些國家對中國僑民有些不放心。有見及此，中國便採取了不承認雙重國籍的政策，鼓勵僑民加入所在國家，遵守當地的法律，發展當地的經濟文化。另外若一個持美國護照的中國血統人士，我們把他當為中國公民，若他當了行政長官，他應該效忠香港特區還是效忠美國呢？
- 3.11.11 第二十三條第一、二項是說永久性居民在香港以外所生的中國籍子女，包括香港永久性居民在內地所生的子女，或在外地所生的子女，若他沒有加入外國國籍，他便是香港永久性居民。假如他沒有住在香港或沒有住滿七年和不在港出生的，亦屬香港永久性居民，但這類永久性居民在外地所生的下一代子女就不能再被承認為香港永久性居民，這是不能傳代的。而第五項是指第四項非中國籍居民在香港出生未滿二十一週歲的子女，就是非中國籍的居民。
- 3.11.12 另一問題是香港居民的中國公民的配偶，是否可算為永久性居民，這個問題較複雜，沒有寫在基本法內。因為若香港永久性居民到內地找配偶結了婚，便帶他／她回港，當作香港永久性居民，那香港人口便會大大增加。這是有別於第二十三第一、二項香港永久性居民在香港以外所生的中國籍子女的處理的，因為子女是需撫養的，所以可將他當為香港永久性居民，而過了二十一歲後已成年，故有權選擇其國籍。
- 3.11.13 但第二十三條談到的是永久性居民的問題。而永久性居民中的非中國公民是享有所有永久性居民享有的權利的，包括選舉和被選舉權，只是行政長官的被選權及出任一些主要職位和主要官員的權利不同而矣。

4. 政制

4.1 起草原則

政制小組討論時的一個原則，就是要照顧各階層的利益，要照顧工商階層利益，也要照顧勞工階層的利益。

的，故應加以互相配合，便有設行政會議之構想，這是類似目前的行政局，這機關除了起解決矛盾、互相配合之功效，還可幫助行政長官具體研究問題，而行政長官亦有機會聽取主要官員

處。

4.3 行政長官的任免

中央人民政府有任免行政長官之權。因為有任命權就有免職權，這個是實際性的，不是形式性的。所以第七十二條說立法機關有對行政長官的彈劾權，但最後是需中央決定的。中央就是中央人民政府，《中英聯合聲明》規定香港特區直轄於中央人民政府，中央人民政府就是國務院，所以行政長官的任免程序也是按國務院的法律來進行的。

4.4 行政長官與立法機關向誰負責

行政長官與立法機關應向中央負責，亦向特區負責，在重覆的時候會怎樣呢？這應按基本法規定，也應照法律，對中央有關的就對中央負責，對特區有關的就向特區負責，從法律上來看是沒有矛盾的。

4.5 「負責」的定義

4.5.1 基本法內負責出現了許多次，是在不同情況下寫的，可能會有混淆的情況出現，故在基本法有關行政機關和立法機關的關係時，在第六十四條便寫明「負責」的內容。雖然這條只寫了四點，但兩個機關的職責已很清楚。

4.5.2 不加上「行政機關要接受立法機關監察」的原因是：只寫了監察這概念而不寫內容，兩機關間便會出現一個空洞而無實質內容的概念，在這情況下，兩機關便只會為了爭權而沒有方法配合和協調，但卻不能做到實質制衡的效果。因此只寫遵守法律或接受質詢等，其效果已與接受監察及制衡的實質內容沒有兩樣了，因此不需另加條文。

4.6 行政機關、立法機關與司法機關

4.6.1 政制小組一致同意行政與立法機關的關係是互相制衡、互相配合，但卻不是與內地的人民代表大會制相同，亦非西方的議會制，而是按香港的實際情況設立的制度。至於司法機關則是獨立的。行政與立法機關互相制衡是表現於第十九、五十、五十二、六十四、七十二條。其中行政長官的解散權與辭職的要求就是一種制衡，根據第七十二條第九款，行政長官並不如現在港督可以無條件的解散立法機關，而是有條件的，有嚴格法律程序規限的解散權。

4.6.2 至於行政機關向立法機關負責，「負責」的意思就已用冒號解決負責的內容，這是按中英談判時出席討論的委員了解，提供有關資料寫成的，這亦是制衡的一種。

4.6.3 對行政長官的彈劾亦是一種制衡，雖然不完全，但也有制約成份，有監督的性質。現時的港督是沒有人可以彈劾的，其任免只是決定於倫敦。

4.6.4 除了互相制衡，也需互相配合，這是重要的。若將來在一些重要的問題上行政機關與立法機關有矛盾，中央按基本法的規定又不能在一些事上加以干預，但若兩機關爭持不下是對港人不利

的，故應加以互相配合，便有設行政會議之構想，這是類似目前的行政局，這機關除了起解決矛盾、互相配合之功效，還可幫助行政長官具體研究問題，而行政長官亦有機會聽取主要官員及各方人士的意見。

4.6.5 總而言之，行政長官的權力相對現在的港督為少；立法機關的權力則比現在的大。

4.7 檢察部門

4.7.1 香港現在的檢察工作是由律政司提出訟訴的，現在律政司還替政府當法律顧問、起草法律文件，但這些嚴格上不是檢察工作。檢察工作主要是提出公訴，將來也是這樣，且不會受行政機關干涉。

4.7.2 將這意思寫在行政部門一節中，是因為現在財政司、布政司皆是港督下的行政部門。

4.8 第九十四條引導的問題

有關中港之間嫌疑犯的引導，是按第九十四條讓特區自己跟其他地方的司法機關決定有關引導等問題的。另外，刑法、民法和訴訟法方面的問題，是按照香港的法律規定來解決，內地法律並不適用。

4.9 第九十六條「非地方政權性」的意思

內地的市、區和縣，以及整個香港都算是政權，可以管理任何事務，但香港的市政局在地方上便是非政權性的，其職權便如第九十六條列出的有一定限度。

5. 經濟

5.1 第一百零五條

5.1.1 「若干財政年度內」是指在五年或十年內，有兩三年有赤字，另外兩三年有剩餘，加在一起便是基本平衡了，原本的建議是由將來香港特區自己編制財政預算稅收的法律來規定，而不是由財政司來解釋。但「若干財政年度」一詞或許是可寫得更確切。

5.1.2 其實這條的問題不單在於平衡的預算，更是涉及財政儲備與盈餘的問題，因為現時財政司需每年因經濟發展、人口膨脹等因素將財政盈餘及儲備增加，這條涉及財政目標的問題，故若單把「基本平衡」這條寫在基本法內，則未能顧及這個財政目標的問題。

5.1.3 第三款提到財政預算收支增長率以不超過本地生產總值的增長率為原則，但若財政司想增加的話，他可按目前拓大實行房屋委員會的方法來增加支出，因為這個會的支出不會算在政府的財政支出內的，這是由於整個委員會的管理是獨立的。政府只是補貼他的差額，而差額實際上是引致財政支出的，那麼政府部門便可按這方法增加支出。這做法只會將財政收支拓張掩飾了，不但起不了什麼作用，還會引致不良的後果。

5.1.4 若將來財政出現赤字，數字很大，時間很長，而過去的盈餘已用完了，那會怎辦？《中英聯合聲明》里没有對此作出規定，基本法也沒有規定，但從邏輯上推論，由於香港財政是獨立的，中央人民政府便沒有義務補足的香港財政赤字，這樣香港便只能借債了，或在香港或在國際上發行債券，但當然借債的後果需慎重考慮。

5.2 第一百零五、一百零七條

有三種意見：①保留這兩條，但文字上要作大修改；②取銷這兩條，因為這些都是政策，不可作為法律寫進第五章；③贊成地方稅應簡單，稅率也比較低，故希望將來不變。因此原則上贊同低稅率，但卻因為考慮到財政預算變質和稅收制度是要根據不同的實際情況而變化及調節的，故應比較有彈性，所以贊成這條款的實質，但不希望寫在條文中。

5.3 第一百零六、一百零七、一百零八條

第一百零六條：說明香港實行一個獨立的稅制，就是不實施內地的制度；

第一百零七條：規定要低稅制；

第一百零八條：第一百零六條是稅種，第一百零七條是說稅率；而第一百零八條就是要解決前兩條的問題，就是香港要有一個獨立的稅法來回答香港獨立的稅制是怎樣及稅率是怎樣。因而亦有人建議將這三條寫成一條三款。

5.4 第一百一十條

所謂自由開放，實際是兩個形容詞。「自由」的意思是沒什麼嚴格限制，自由經營，如在香港可以付幾百塊去登記，便可宣佈成立公司。至於「開放」，就是指香港是個國際城市，任何國家地區的資金均可進入香港，也可以離港，沒有歧視，這是一個政策。至於具體上，也有管理條例，如証卷交易所、保險公司等均有條例管制，這些將來當然也可作修改。而因為香港是一個國際城市，作為一個政策來說是不可能實行不自由開放的政策的。

5.5 第一百一十一條

對此條有兩種意見：①不寫，因為將來情況若發生變化，而基本法將這些變為法律條文是很危險的；②但另一方面《中英聯合聲明》附件一也是這樣寫的，若不寫進去也有問題。

5.6 第一百一十四條

這條是抄聯合聲明附件一(七)的。港幣將繼續為香港的法定貨幣，因港幣有很長久的法定地位，若繼續流通，可確保穩定繁榮。另外，「自由兌換」的意思是港幣可自由與任何其他貨幣兌換。人民幣現時不可在香港流通因人民幣是禁止出口的。

5.7 第一百一十五條

這條述及將來香港特區的發行權屬於香港特區政府，至於授權那一間銀行發行港幣也是由特區政府來決定。但發行港幣的銀行是要符合一個條件，就是第三款所指，即《中英聯合聲明》里提的：「在確知港幣的發行基礎健全和發行安排符合保持港幣穩定的條件下」，便可「授權指定銀行據法定權限發行或繼續發行港幣」，這里包括了原來發行港幣的銀行，繼續發行港幣，「原來」有匯豐、渣打。那麼九七年後，若它們符合這個條件，是可繼續發行的。但這里也不排除指定別的銀行。

- 5.8.1 有意見認為條文中只說香港特別行政區政府對外匯基金有管理和支配的權力，而沒有寫明擁有權，但草委解釋「香港特別行政區的外匯基金，由香港特別行政區管理和支配」一句，已包含了擁有權的意思。
- 5.8.2 外匯基金應以較為向民衆公開的原則來處理，就是包括外匯基金管理運用之形式，甚至資產方面均需要經常地向立法局及公開地向市民報告。
- 5.9 第一百一十七條
這條對外資保障仍不足，應可以獨立處理，亦可將之放進總則第六條之後。條文應清楚指出香港政府對外資的稅收政策、投標政府合約政策、以至發牌政策會與本地企業一視同仁。甚至可特別指明在港經營的台灣資本可受到一視同仁的看待。
- 5.10 第一百一十八條
這條規定香港繼續為自由港，「自由港」原則上是不徵收關稅的，而第二款則有「除法律另有規定外，不徵收關稅」，那麼什麼是例外呢？香港現在對六種商品徵關稅，那是例外，就是「除另有規定外」的意思。除了這些，香港沒有進口稅，也沒有出口稅，其他如黃金在進出海關時則要申報；軍火、武器彈劾亦不屬這範圍，也不能自由進出香港。
- 5.11 第一百一十九條
中英兩國政府及GATT已達成協議，香港可作為單獨的關稅地區，並可單獨參加GATT作為會員。所謂單獨的關稅地區，就是說香港本身作為關稅地區，與整個國家分開。將來的北京關稅總所與香港的海關也沒有上下的隸屬關係。
- 5.12 第一百二十、一百二十一、一百六十條
第一百二十及一百二十一條提到的配額，香港與內地是獨立的，但MFA的發展會否改變呢？配額的取得應是雙邊協定，還是多邊協定則沒有一定，所以第一百六十條第一段便保證與現在一致的做法，就是將來若發生雙邊會議協商配額或其他問題時，便按現時英國派出代表團的做法，國內有香港代表作為成員之一，並有相對的獨立發言權。所以將來中國派出代表團時，香港亦可有其代表，以「中國香港」名義發表意見。且第一百二十條的寫法是參照《中英聯合聲明》附件一的，中國全無意思把屬於香港特區的配額，投到中國去。萬一將來在某情況下，紡織品出口的配額只給了中華人民共和國作為一個單位，中國亦不會百分之一百地獨享配額，而不顧香港的。
- 5.13 第一百二十一條
- 5.13.1 香港特區可根據當時情況和規則，對本地產品簽發產地來源証，並可印上"made in Hong Kong, China"或"made in Hong Kong"。
- 5.13.2 至於現時只有五個商會簽發來源証，還有二個商會是沒有這個權力的，這個問題，商會間可以商量一下。

5.14 第一百二十七條

這條關於差額的問題是聯合聲明附件三的原話。差額怎樣計算是很技術性的問題，需再研究。

5.15 第一百三十九條

這裡只涉及「中國內地」，即不包括台灣、澳門。雖然台灣、澳門都是中國的領土，但不是中國內地，內地是指北京、上海、廣州等。因此若民航需經中國內地，便要中國政府贊成。但台灣與香港間，便要按香港政府經中央人民政府的具體授權的規定去處理。

5.16 船舶登記

中英聯合聯絡小組已就這問題討論了一次，相信香港本身需要有一個船舶登記處，至於掛什麼旗、掛一枝還是兩枝旗、船員的執照等，現仍在討論階段，未有結果。

5.17 雙重稅

5.17.1 現時香港政府徵稅的原則是：在香港註冊的公司或香港居民，他們所得之收入若是在香港所得，便要向香港政府納稅；但若是在北京從事投資或有其他收入便要向中國政府納稅，還要有納稅證明，那麼香港政府便不向香港之居民或在香港註冊之公司徵收在中國所獲取了收入的稅。因此實際上中國和香港之間沒有雙重徵稅的問題。

5.17.2 根據第一百零八條，九七年後香港有自己的稅法，若按現時原則不變的話，不單香港與中國間可避免雙重稅的問題，就是香港與其他國家的雙重徵稅問題，雖然較為複雜，但也是可以避免的。

5.18 專利權

5.18.1 專利權制度是保護創造發明的重要問題，基本法並沒有寫，但現有兩個可行的建議方案：①向中國專利處申請專利權批准以後，在全國，包括香港，也會受到保護；②香港自己決定本身的專利制度，有自己的專利法及審查人員。這問題仍在討論。

5.18.2 凡是香港已經在倫敦申請經過批准的專利權，在九七年後，甚至二零年仍是有效，還是會繼續被承認的。但九七年後新的專利申請，就不能到倫敦去了。

5.18.3 除專利外，還有商標及版權都應有同樣的考慮。

6. 教育、科學、文化、體育、宗教、勞工和社會服務

6.1 起草原則

第六章起草時的幾個原則是：①要符合聯合聲明，故常自《中英聯合聲明》中照抄，包括第一百四十二、一百四十九、一百五十一、一百五十三條；②要符合一國兩制的精神，就是將資本主義制度的優點保留；③不能為將來政府開空頭支票，例如不能說將來經濟收入的情況，因這會影響未來政府的運作。

6.2 「文化」的定義

基本法內很多名詞是很難準確地下定義的。內地是由中央人民政府文化部去處理文化事宜的，與管體育、教育的分開，但第六章標題與第一百四十七、一百五十六、一百五十七等條文內「文化」的定義則很難定。然而很多定義的確難下，亦可能定不到，只要這章寫得好便是。

6.3 「自行制定」與「原在香港」

「自行制定政策」與「保持原有政策」是有點矛盾的，這個說法在文化、教育等章節上均有出現，但這是《中英聯合聲明》的原話。這方面再待作研究。

6.4 專業人士

6.4.1 有關專業資格草擬時的原則是：①將來條文制定肯定無殖民地色彩，因根據《中英聯合聲明》的精神，外籍人士的優待待遇一定會被取消，故將來不容許在法律上或條文上會優惠英聯邦人士；②中醫的地位肯定會被關注，至於通過何種方式來肯定其地位，則是香港特區政府將來的事；③一些詳細及爭論最多的問題在基本法不能寫明，而留待將來香港特區政府去處理。

6.4.2 有人詢問「專業人士」的確切定義，但事實上基本法內一般是沒有下定義的。若要將所有概念都作解釋，基本法就會很長了，因這些定義是不能簡單地表達出來的，而第一百五十條却說明主要是根據香港現在的情況對專業資格和執業資格作出了規定，但問題是第一百五十條是否已把各種情況都已經規定得到，則有待討論。

6.4.3 凡事有特別通過立法的法定團體，就稱為專業。至於其他任何人皆稱為專業的，亦不會遭到反對，即特區成立前已立法制定的一些職業，也可稱為專業。

6.4.4 不排除有其他專業取得法律地位之可能性，將來承認專業時，只要證明自己是對社會有價值，有成立法定地位必要者，便可通過法定程序成立新專業，成立前亦會充份諮詢社會各界人士之意見。起草第一百五十條的原意就是「諮詢有關方面」，即沿用現行香港之優良諮詢制度。

6.4.5 專業資格應與執業資格分開。專業資格是由專業團體自己訂定的，而執業資格則由香港特區政府來定立。因此專業資格是可包括內地及其他外國的專業人士。現時凡英聯邦國家的專業都可在港執業，包括醫生、建築師等，這是不合理的，將來這些不平等不會出現，將來應是一視同仁的，無論內地專業人士或其他國家的專業人士，要到香港執業，便要取得專業資格，及經一定手續，如根據香港政府規定的考試，考試合格以後才可在港執業。而事實上中國是不鼓勵內地人士到香港來執業的，因中國有很多專業人士，若他們都湧到香港，香港是經不起這樣的壓力的。

6.4.6 對中國專業人士的處理，應是要平等對待，而不是要當作少數民族般給與特權，若是民族尊嚴至上則公平競爭更佳，故應以平等對待照顧到香港整體利益為目標。

6.5 第一百五十七、一百五十九、一百六十條——體育組織

6.5.1 第一百五十七條載明香港特區的體育組織可與世界各個地區就有關國際組織保持和發展關係，就是香港體育團體和組織跟國外一些國際組織，原來已建立了關係，在九七年以後仍可保持這關係，甚至發展，這就是「保持和發展關係」。第一百五十七條所指的都是民間團體，包括教育、科學、技術、文化、體育、衛生、專業、勞工都是民間團體，是非政府的。故南華足球隊

若到美國比賽，他們覺得需要時便稱為「香港南華足球隊」，又或願意可改為「中國香港南華足球隊」，因條文寫「各該組織可根據需要冠用「中國香港」的名義」，所以需要使用，不需要就不用，不是用了這名，或不用便違背了基本法。因為這些都是國際間的民間體育活動，是一種專業性的體育活動，而非外使活動。

- 6.5.2 至於第一百五十九、一百六十條都屬對外事務，這些就跟第一百五十七條不同。外交的活動就應屬中央管，若以「香港特別行政區政府」的名義，在國際上就是一個獨立的主體，這時就應該用「中國香港」。因為香港政府不可在國際上作為一獨立國家，香港只是一個「特別行政區」若將來某些國際組織只容許一個國家派一隊參加，而香港是中國的一部份，香港是否會被逐出呢？這問題關鍵並非在名稱，無論名稱是「香港」，或是「中國香港」，事實上香港是中國的一部份，故是否會被逐出並不在乎其名稱，而是在其章程，是否容許香港作為一個地區參加這個國際組織。若中國及香港特區都同時參加了這個組織，那麼香港能否存在？按第一百六十條的規定，中央政府是會「採取必要措施使香港特別行政區以適當形式繼續保持在這些組織中的地位」。

7. 中英文的地位

- 7.1 第九條是抄《中英聯合聲明》的條文的，目的是解決官方語文的問題，就是政府機關使用的語言。至於學校里用的教學語言、工商界訂定合約的語言、社會團體喜歡用甚麼等均不受第九條限制，而是根據其習慣、願望等去自行決定。例如港大可繼續以英文為教學語言，而現在香港很多契約均以英文來寫，這些在九七年後仍可繼續，不予限制。

- 7.2 至於商業用語，基本法並沒有規定，那便是保留原有的用語，實際上就是英語，即使在香港的中資銀行所用的信用狀也同樣用英語，這是沒有問題的。

- 7.3 第九條的規定，原來是考慮到在香港恢復行使主權，所以行政機關和立法機關所採用的法定語言當然是中文，但當再考慮香港的實際情況，便加寫「同時可以用英文」，這是因為長期以來政府部門、行政部門、立法部門及司法部門等都是用英文的，很多法律條款、法律個案都是用英文寫成。

- 7.4 事實上第九條跟本是有以中文為第一官方語言，英文為第二官方語言的意思。只是兩種文字是難以避免有解釋不完全一樣的可能，遇到不一樣的地方，基本法當然應以中文為標準，至於別的法律便不一定了，因香港一般的法律都是英文，當然將來也會有中文，那時中英文解釋不一樣的話，很可能有一半法律是以英文為標準的。所以在不同的範疇應有不同的區分。

- 7.5 再者，中文為主，英文為次只是一個目標，是一個方向，而不是九七後就馬上要實現這個目標，是要根據實際情況辦事，逐步解決，且必定是經歷一段很長的過程，經研究解決這個問題、制定方案，然後逐步實現，應該是由香港特區根據基本法的精神來採取實際措施的。因此要達致這個目標是需要預備條件，待條件成熟才可實行，而非以行政命令強制推行的。

7.6 參考現在英聯邦內的一些獨立國家，他們也有不同的做法，有採取雙語制，亦有以本土民族的語文為主，英文為副。

7.7 至於香港，也曾計劃將法律全部譯成中文，就是中英文本的法律，但後來却放棄了全面翻譯，而轉為着重先制定一些較重要的法律，將任務範圍縮少，可見要達至以中文為主是有一定困難的。

7.8 有人建議在香港推廣普通話，但這肯定不是以普通話來代替當地方言。

8. 基本法英文本

8.1 基本法(草案)徵求意見稿英文本亦是由起草委員會秘書處翻譯的，大家可根據英文本發表意見，內容是與中文本一樣的，但當中可能有不完善之處，或許有點翻譯上的出入。現階段的英文本只是翻譯本，不是太法律化的。

8.2 基本法的中文本固然是一個法定文本，但有建議認為一個法定的英文本也是需要的，因為基本法主要是在港實施，而將來香港法院是用英語的，當然需要一個法定的英文本。

8.3 基本法有一個英文的官方譯本是需要，因為將來香港法院有很多外國的法官，在審理案件時需要應用基本法的一些條款，那當然應該有一英文的官方譯本，跟中文本具同樣效力。但基本法與《中英聯合聲明》不同之處是在於聯合聲明是兩個國家經談判後寫成的國際協議，所以有用中文寫的條文，亦有用英文寫成的條文，因此中英文本都是同樣有效的，但基本法是用中文寫成的，英文本只是翻譯中文來的，雖然也是有效，但遇着中英文本不一致時，當然會以中文為準，但這不等於英文本沒有法律效力，草委會一定會有一個正式的官方基本法英文本。

9. 寫法

9.1 政策性與法律條文

9.1.1 有很多人認為整本基本法尤其是第五章有太多政策性的條文，如第一百零五、一百零七條就是政策性條文。這是因為《中英聯合聲明》中華人民共和國宣佈的十二條方針中的第十二條載明中華人民共和國對香港實行的基本方針政策和《中英聯合聲明》附件一中的具體說明，都要在基本法中表示出來，因此很多政策性的條款，甚至很細節的條文都要載於基本法內，這做法是避免被指為違反中英兩國之協議。

9.1.2 有建議把原則性的法律條文寫在基本法的正文中，把政策性的條文納入附件中。但這方法是有具體困難的，因很難將原則性與政策性的條文分開。

9.1.3 對於寫法，可以有三種選擇：①保留原有條文，將比較含糊或不明確的文字修改；②刪掉某些條文；③修改某些條文的實際內容。

- 9.1.4 雖然基本法作為一部小憲法，是不宜太過詳細的，但基本法却有其本身特殊的功能，就是要適合香港本身的需要和安定人心，故此，基本法的起草異於其他憲法，只要基本法是適用於香港，就可以了。
- 9.1.5 基本法是否需要詳列各項政策，是香港人的信心問題，若香港人對將來特區政府有信心，自然可刪除一些細節的條文。
10. 「原有」、「原在」、「繼續」等字眼
- 10.1 這等字眼可能多了點，且在不同的時期可以有不同的解釋，不同的界限，但肯定的這是指一九九七年前，然而這些詞句應再加考慮。
- 10.2 有些地方是按《中英聯合聲明》寫上的，有的是草委們起草時加上的，目的是消弭一些人的顧慮，因他們懷疑將來資本主義的社會、經濟等制度、生活方式是否可以不變。
- 10.3 第四條說到甚麼叫「保持原有資本主義制度和方式」，其他也有談及「原有」，這究竟是八四年還是九七年呢？第四條應從大的方面來看，這個原有的資本主義制度就是香港原來的資本主義制度，不是指某一點要不要改變，這應是從大的方面看的。
- 10.4 《中英聯合聲明》中的附件詳列了很多政策性的內容，若這些內容不在基本法中出現，便恐怕會被指為違反《中英聯合聲明》，若由將來特區政府自行制定的話，又不放心將來特區政府是否可以做到，故此在《中英聯合聲明》中，中英雙方同意香港保留「原有」制度。

「國家行為」與「國家事實」的概念

基本法草案第十八條第一、二款註明，香港特區享有獨立的司法和終審權，法院對案件的審判權保持香港原有的法律原則對審判權所作的限制。同條第三款註明屬於中央人民政府管理的國防、外交事務和中央人民政府行政行為的案件，香港特區的法院無權管轄。案件凡「涉及國防、外交和中央人民政府的行政行為的問題」，香港特區法院需要徵詢行政長官的意見，而行政長官根據第四款取得全國人大常委會或國務院證明書後，所發出的證明文件是對法院有約束力的。

在討論這條條文中，香港現行普通法中的兩個概念，「國家行為」(ACT OF STATE)和「國家事實」(FACT OF STATE)都不斷被談及及引用。本文就這兩個法律名詞，提供一些資料。

關於「國家行為」(ACT OF STATE)的問題：香港現行沿自英國的普通法(COMMON LAW)的法律原則里，法院是沒權管轄國家行為；國家行為的範圍在普通法上有清楚的界定，包括戰爭與和平的宣定、國際條約的締結、領土的併合和割讓、外交使節的交換、和對外國政府的承認等。

其實上述的「國家行為」只牽涉國與國之間關係的行為，如宣戰、訂條約、領土、外交、及承認外國政府等的事項，不過是普通法中「國家行為」這概念的一部份。「國家行為」在這里的用法，是指國家自主權的運用，國內法院是無權過問的。(比如說，英國在簽署羅馬條約成為歐洲共同市場成員國時，曾有人向法院提出這樣做會使英國國會的最高立法權受制於共同市場所定立的條例，但上訴庭裁定法院無權審轄國家簽定條約的權力。)

國家行為的另外一種用法，則是涉及國家與個人之間的關係，假如一外國公民受到了某本國公民的某種損害，而意圖在本國的法院索取賠償或補救，在適當的情形下被控的本國公民可以用「國家行為」作答辯，如能成立法庭會作出無權審轄的裁定。例如，本國為了某種政治原因(比如因為向他國宣戰或抗議某國侵略行為)而對某國實施經濟制裁，某類或所有與該國通商的合約都可能於本國的政策變得不合法，外國立約人如蒙受損失而於本國法院要求賠償，在這情況下本國立約人可以作出國家行為的答辯。

需要說明的一點是，法院雖不能過問國家行為，但對於一件案件是否涉及國家行為，却仍是由法院本身裁定的。

第二關於「國家事實」(FACT OF STATE)的問題：「國家事實」的意思跟「國家行為」的意思不同；「國家行為」如上述是指法院不能過問的國家自主權的運用，而「國家事實」却是指法院在確定某件事情是否牽涉國家行為而須依賴的事實證據。比如，外國某政府徵用了在其旗下註冊的一艘船，而本來的船主當船在本國停港時向本國法院申請重新接管，在法律上船主的申請是否能獲批准是要視乎徵用的政府是否受到本國承認；對外國政府的承認是一項國家事實，法院不能自行決定，必須向行政機關徵求有約束力的證明文件。(請留意：這只是一個說明甚麼是國家事實的簡單例子，並不代表本港根據英制現行的程序)。這些關係到國家整體的事實證明，任何法團、個人及法庭，都不適宜作出判斷的，根據普通法的做法，法庭就得向代表國家的行政機構，澄清有關這事實的正誤。而法庭本身是不能懷疑有關方面提出的證明文件的，亦即行政機關對國家行為，發出的證明文件，對法庭是有約束力的。

Reference (2)

THE CONCEPTS OF "ACT OF STATE"
AND
"FACT OF STATE"

Prepared by the Secretariat
of the Consultative Committee for the Basic Law

Paragraphs 1 and 2 of Article 18 of the Draft Basic Law provide for the independent judicial power of the HKSAR including that of final adjudication, and for the maintenance of the pre-existing legal restrictions on the jurisdiction of its courts. Paragraph 3 of the same Article provides that cases relating to defence and foreign affairs for which the Central People's Government is responsible, and cases relating to the executive acts of the Central People's Government, are not within the jurisdiction of courts of the HKSAR. In any case in which arise "questions concerning defence, foreign affairs or the executive acts of the Central People's Government" courts of the HKSAR are required to seek the advice of the Chief Executive, whose statement regarding such questions is binding on the courts after he obtains a certificate from the Standing Committee of the National People's Congress or the State Council according to paragraph 4.

In discussing this Article, two concepts in the common law currently in force in Hong Kong, namely that of "act of state" and of "fact of state", are continually referred to and relied upon. It is the purpose of this paper to provide some information on these two legal terms.

Regarding the question of "act of state": in the legal principles of the common law which originates from Britain and currently practised in Hong Kong, courts have no jurisdiction over acts of state; the ambit of acts of state are clearly defined in the common law, including the declaration of war and peace, the making of international treaties, the annexation and cession of territory, the exchange of diplomatic envoys, and the recognition of foreign governments etc.

In reality the above-mentioned "acts of state" only involve acts in interstate relations, such as war declaration, treaty making, territory, diplomacy, and the recognition of foreign governments, and thus make up only part of the concept of "act of state" in the common law. "Act of state" as used in this sense means the exercise of state sovereignty, which a municipal court has no jurisdiction to question. (For example, when the UK became a member of the Common Market by ratifying the Treaty of Rome, the objection was raised in court that such an action would compromise the highest power of Parliament to legislate in favour of regulations made by the Common Market, but on appeal it was held that the courts have no jurisdiction over the power of the state to make treaties.)

Another application of act of state concerns the relationship between state and individual, so that if a foreign national suffers some form of injury done by a national of the state and intends to seek relief from the courts of the state, in appropriate circumstances the accused national of the state may use "act of state" as a defence, which if established would lead the court to render a judgment of no jurisdiction. For example, if the state for some political reason (such as after declaring

war on another state or in protest against an act by another state) imposes economic sanctions on some categories or all contracts of trade with become illegal under state policy, so that contractor suffers loss and applies to the state for damages, the contractor who is a national of the state may claim the defence of act of state.

It must be pointed out that although the question of an act of state, whether or not a case of state is still up to the courts themselves to decide.

Secondly, regarding the question of "fact of state" meaning of "fact of state" is not the same as the "act of state"; as mentioned above "act of state" means state sovereignty which courts cannot question, while "fact of state" means the factual proof on which a court is determining whether something involves an act of state. In an instance, a foreign government expropriates a ship under its flag, and while the ship comes to port the original shipowner applies to the courts for re-possession of the ship, whether the shipowner's claim is permissible in law depends on whether the government is recognised by the state; the recognition of a foreign government is a fact of state which courts can determine for themselves, and they must seek a binding certificate from the executive. (Please note: this is only a simple illustration of what is a fact of state, and does not represent the present procedure in Hong Kong based on the English law. These factual proofs which relate to the state are not amenable to judgment by any group, individual or the practice of the common law; a court must seek a certificate from the executive representing the state for clarification of the question. The court itself cannot question the certificate issued by the authorities, that is, a certificate issued by the executive concerning a fact of state is binding on the courts.)

歐洲共同體法律的解釋程序

歐洲共同體的源起

所謂的「歐洲共同體」(EUROPEAN COMMUNITIES)，其實是對三個本來不同、卻後來結合了的彼此類似的國際組織的統稱。這三個都屬歐洲的地區性國際組織計為：成立於一九五二年的「歐洲煤鐵共同體」(EUROPEAN COAL AND STEEL COMMUNITY，簡稱ECSC)、成立於一九五八年的「歐洲經濟共同體」(EUROPEAN ECONOMIC COMMUNITY，簡稱EEC，亦普遍稱為「共同市場」COMMON MARKET)、與及也是成立於一九五八年的「歐洲原子能源共同體」(EUROPEAN ATOMIC ENERGY COMMUNITY，簡稱EURATOM)。

以上三者，都是根據國際條約成立的地區性國際組織。「歐洲煤鐵共同體」的成立條約為一九五一年簽訂的巴黎條約，而「歐洲經濟共同體」和「歐洲原子能源共同體」的成立條約則為一九五七年簽訂的兩條羅馬條約。成立這些條約的目的，是希望透過共同的政策促進各西歐成員國之間在煤鐵工業、經濟，與原子能源方面的緊密合作和發展；其後三個組織更進一步合而為一成為「歐洲共同體」，本着也是原來的為成立一個真正的「歐洲共同市場」的理想。

「歐洲共同體」有四個主要的機關，分別是「歐洲議會」(EUROPEAN PARLIAMENT)、「歐洲理事會」(EUROPEAN COUNCIL)、「歐洲委員會」(EUROPEAN COMMISSION)、和「歐洲公義法庭」(EUROPEAN COURT OF JUSTICE)。「歐洲議會」的形式就仿如一個國家的國會，其議員由成員國的代表組成，作用是監管共同體的行政機關的運作。「歐洲理事會」其實是由各成員國政府的首長及外長參與的關於共同體事務的高峰會議，目的是協商如何彼此合作施行共同體的政策。「歐洲委員會」是共同體的行政機關，責任是根據共同體的成立原則，制訂於成員國內實施的政策。「歐洲公義法庭」是共同體的最高司法機關，負責解釋共同體的成立條約條款、共同體機關所立的指示和條例及判定其條約根據的有效性。

原來的三個歐洲地區性國際組織的議會和法庭，是早在一九五八年便合併了，但是它們的理事會和專員會是到了一九六七年才合併而成為正式的「歐洲共同體」。原本的六個成員國為比利時、法國、西德、義大利、盧森堡和荷蘭；在一九七三年又加入了英國、愛爾蘭和丹麥。到了現在，還包括希臘、葡萄牙和西班牙。

歐洲共同體法律的來源

「歐洲共同體」的法律，最主要是來自原來的三個歐洲地區性國際組織的成立條約；這些條約的重要性，就好比一個國家的憲法，因為共同體一切事務的合法性和有效性都是基於其成立條約的。在使用上，最重要的成立條約是成立「歐洲經濟共同體」的羅馬條約；羅馬條約條款所規定的，其實大都有關成立一個經濟交易上沒有疆域界限的「共同市場」的原則，這從第二條所載的「四個自由」的宗旨便可知。所謂「四個自由」，是指：貨物來往自由、工人來往自由、就職自由、和資金來往自由。比如說，條約的第四十八條便註明，共同體內工人享有來往的自由，一個成員國不能對來自另一個成員國的工人作出不平等的管制。

共同體法律其次的來源，是成員國之間根據成立條約規定而互相制訂的附屬性條約，目的是具體實施在成立條約內立下了的共同體政策和方針。例如，羅馬條約的第二百二十條註明，成員國如有需要必須彼此進行協商，務求為國民爭取一些在條款中列明的權利，其中包括成員國間民事判決的承認和執行及對彼此公司及法人的承認。共同體成員國因此而訂立於一九六八年的「裁判權與民事及商業判決執行公約」(CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS) 和「公司與法人互相承認公約」(CONVENTION ON THE MUTUAL RECOGNITION OF COMPANIES AND LEGAL PERSONS)，便是這種附屬性條約。共同體新的成員國在加盟的時候不但要接受原本的成立條約，還要跟從英國、愛爾蘭和丹麥在一九七二年加盟時作的「第一增附條約」(FIRST ACT OF ACCESSION)第三條第二款的先例，增附於羅馬條約第二百二十條下的附屬性條約。

共同體法律最後的來源，是共同體機關根據成立條約的規定而制定的條例和指示。「歐洲經濟共同體」成立條約第一百八十九條和「歐洲原子能源共同體」成立條約第一百六十一條都註明，「歐洲理事會」和「歐洲專員會」有權根據成立條約制定適用於共同體的條例和指示。(由於「歐洲煤鐵共同體」的成立條約簽署較早的緣故，其相類的條款第十四條的用詞跟兩條羅馬條約有出入，理事會和專員會制立的不叫「條例」和「指示」)。所謂「條例」(REGULATIONS)和「指示」(DIRECTIVES)的分別，在於條例的約束力是一般性的，在共同體里與各成員國內都同樣有效；而指示的約束力卻是非一般性的，只是對之發出的成員國有效。比如說，共同體各國在歐洲理事會達成關於某類貨物(例如某種農業產品)的協議，理事會便制定一些有關的條例在各成員國實施，好像劃一的單位和品質管制等；而假如專員會發現有成員國本身有關條例跟共同體條例有所抵觸，便會對之發出指示令其加以糾正。

外來法律的納入

首先，許多法制都有一個共同的基本原則，便是本身法制內最高的立法機關所制立的法律是享有最高的地位的，其他外來的法律必須經過國內立法機關某種「納入」(INCORPORATION)的程序才能夠在國內法院得到承認。共同體法律最終的來源是共同體的成立條約：雖然在有些國家的法制里，政府對外簽訂的條約會自動變成在國內有效的法律，但另外一些國家(比如英國)的法制為了防止行政機關以制訂條約的方式刪改國內法律，規定對外條約必需經過某種納入的程序(比如經國會通過為國內法)才能成為國內有效的法律。英國一九七二年通過的「歐洲共同體法例」(EUROPEAN COMMUNITIES ACT 1970)便是以國會通過的方式把羅馬條約正式納入了英國法律，使之在國內等如國會制立的法律般有效，從而避開了共同體法律與英國憲法國會立法權至上的原則所產生的技術上矛盾。(可以指出的一點是，由於羅馬條約被納入了國內法，根據羅馬條約而有效的附屬性共同體法律，包括附屬條約、條例和指示，在理論上應該不用再次被納入便能在成員國內生效；這可說是對「納入」這概念的一種削弱。

納入外來法律後引起的衝突

歐洲共同體內的成員國，通過簽訂國際條約的方式，以直接或經過本國的立法程序，將條約內要執行的義務，納入本國的法律系統後，會引至兩方面的問題。首先，成員國內原有的一些法律，可能與這些外來的法律不一致，甚至引起衝突，互不相容。這問題牽涉到對共同體法律本身的解釋，對成員國國內法律的解釋，及以那一種法為準的幾個問題。最後的一個問題以「共同體法律至上」的原則解決了，但具體解釋兩種法律及執行的程序，仍需有具體安排才可以解決。

第二方面的問題，可以出現在各成員國在執行這些條約時，無論在直接有效的情况下，或在成員國按條約而制訂的國內法的情况下，也可能對條約的意義有不同的解釋，首先這可能引致成員國國內執行法律與條約本意不一致，也可能在各國各自執行條約法律時，對條約解釋的不一致。故此，共同體也需要制訂一個程序，在不影響各國獨立的司法制度下，使各國對條約的解釋趨向一致，才能貫徹實行執行條約統一共同體內這些經濟社會活動的目標。

司法制度上不同而引起的衝突

不同法制並存所產生的其次的技術困難，在於法律的解釋和執行之間所可能發生的衝突。在歐洲共同體里各成員國之間法制並不統一，其間最顯著的分別，是英國施行本身的「普通法」(COMMON LAW)法制，而歐陸普遍施行的却是源自古羅馬帝國法制的「民法」(CIVIL LAW)，兩者在體制和法律原則上很多地方都有分別：比如說，普通法內「衡平法」(EQUITY)的概念便是民法所沒有的；而就算使用民法的歐陸各國間在具體的法律上亦當然有很多不同之處。

共同體法律與成員國國內法關係的兩個原則

歐洲共同體主體與成員國之間法律的關係的基本原則有兩個，就是「直接有效」和「共同體法律至上」。

「直接有效」

「共同體法律直接有效」(DIRECT APPLICABILITY OF COMMUNITY LAW)的原則，意思是指共同體的法律不用成員國在國內立法實施，也一樣在成員國內直接生效。例如在英國的「雲端對內務部」(VAN DUYN V. HOME OFFICE (1975) ch. 358)一案中，歐洲法庭便裁定英國雖然沒有在國內立法保障工人的來往自由，但保障同樣的自由的羅馬條約第四十八條却直接地在成員國內有效。

「共同體法律至上」

「共同體法律至上」(SUPREMACY OF COMMUNITY LAW)的原則，這是說，共同體的條約、條例和指示是高於成員國內任何法律的，假如兩者出現矛盾的話，便必須以共同體的法律為準。例如英一九七零年的「相同工資法例」(EQUAL PAY ACT 1970)與羅馬條約第一百一十九

條關於男女同工同酬的規定，曾在「麥卡菲氏有限公司對史密斯」(MACARTHYS LTD. V. SMITH (1979) ICR 785) 一案中出現了分歧：英國法院裁定國內的相同工資法例只適用於男女雙方在同一時間做同樣工作的情况，但歐洲法庭却認為羅馬條約第一百一十九條亦包括男女雙方在不同時間做同樣工作的情况；結果是英國法院的原判被推翻了。

解決衝突的方法

雖然歐洲共同體以上述的「共同體法律直接有效」和「共同體法律至上」的原則提供了共同體法律與成員國國內法律在具體上的磨擦的解決方法，但不同法制並存所產生的技術困難還是需要有具體的方法與程序去解決的。

為了應付成員國法制不統一的困難，羅馬條約第一百七十七條把歐洲公義法庭和成員國法院的功能劃分得很清楚，使彼此不涉越對方的範圍而能合作得緊密融洽。

歐洲共同體法律解釋的制度

設於盧森堡的歐洲公義法庭是共同體最高的司法機關。根據「歐洲經濟共同體」的成立條約第一百七十七條規定：

「公義法庭有權對以下事項作出初步判決：

(甲). 對本條約的解釋；

(乙). 共同體機關法定 (ACTS) 的有效性和解釋；

(丙). 根據理事會條例成立的機關的章程 (STATUTES) 如有註明，對這些章程的解釋。

此等問題如出現於成員國的任何法院或裁判庭，法院或裁判庭如認為本身所作判決需要公義法庭對有關問題作出決定，可提請公義法庭對之作出決定。

此等問題如出現成員國法院或裁判庭正在處理的案件中，而根據國內法對該法院或裁判庭的判決是沒有補救方法的，即不能再上訴的，該法院或裁判庭必須把問題呈交公義法庭。」

「歐洲煤鐵共同體」的成立條約第十四條，和「歐洲原子能源共同體」的成立條約第一百五十條，都有類似以上的註明。這些條款的效果，是給與了歐洲公義法庭對歐洲共同體法律最高的解釋權。這權力不但包括對共同體成立條約的解釋權，也包括了對其他一切源自成立條約的附屬性共同體法律作解釋或判定其有效性的權力。按照羅馬條約第一百七十七條第二款，成員國法院審轄案件的時候如遇到有關羅馬條約條款的解釋、有關經濟共同體機關所作的法定 (包括附屬條約和條例及指示) 的有效性和解釋、或甚至有關於某些經濟共同體附屬性機關的成立章程的解釋的問題，國內法院如認為對案件的判決有幫助的話，可以 (但不一定需要) 把問題呈效歐洲法庭作答。不過根據同條第三款，出現上述問題的案件在國內法院如果是面臨終判而再沒有上訴餘地的話，國內法庭便沒有選擇的權利而必須把案件里出現有關共同體法律的問題呈交歐洲法庭作解答。

在習慣性使用上，提交歐洲法庭的關於共同體法律的問題，通常都是關於共同體條約、條例及指示的解釋，比較少涉及共同體機關根據成立條約作出法定的行為上的有效性，涉及共同體附屬性機關的成立章程的解釋也不多。

法庭上遞求解釋的有限自主權

歐洲法庭的功能，是完全負起了解釋共同體法律的工作，成員國法院根據規定在作出終局判決前必須把有關共同體法律的問題提交歐洲法庭，作用是盡可能避免各成員國彼此之間及與歐洲法庭因法制不同而產生對共同體法律在解釋上的歧見。共同體法律的解釋是完全屬於歐洲法庭的權力範圍的，成員國的法院沒有任何權力解釋共同體法律：雖然根據羅馬條約第一百七十七條第二款，國內法院未作終判前有權選擇不把有關共同體法律的問題提交歐洲法庭，但這只是在國內法院認為問題的解答不會影響本身對案件的判決的情況下才出現的權利，並不表示國內法院不把有關共同體法律的問題呈交歐洲法庭便可自行對之作出解釋。

歐洲法庭對共同體法律的解釋權，是完全被動的。亦即是說，它只可以在各成員國法庭、或共同體內的各種仲裁機構，依法律程序，上遞要求解釋某條文時，才可以對有關係文作出解釋。除這情況外，歐洲法庭不能只因其內部的理由，主動就某一條文，提供解釋，進而要求各國法庭遵守。

「終局判決」的意義

羅馬條約第一百七十七條第三款註明，關於歐洲共同體法律的問題，「如出現於成員國法院或裁判庭正在處理的案件中，而根據國內法對該法院或裁判庭的判決是沒有補救方法的，該法院或裁判庭必須把問題呈交公義法庭。」在共同體法律里，對其判決「是沒有補救方法」的最終法院是指成員國法制內對有關案件最後審理的任何法庭，而不需要一定是指成員國最高司法權的法院。例如，歐洲法庭在「歌斯特對 E. N. E. L.」(COSTA V. E. N. E. L. (1964) ECR 585)一案中，裁定義大利的裁判司署雖然並非國內最高的司法機關，但因為案件涉及的金錢數目根據義大利法律不足以作出上訴，所以裁判司署在該案件里便是對其判決「沒有補救方法」的最終法院，因而有責任把關於共同體法律的問題提交歐洲法庭。

司法執行與法律解釋分頭執行

歐洲法庭的作用純粹是對共同體法律作出解釋，但實際在每個成員國內執行共同體法律的却是每個成員國的國內法院。換言之，在共同體法制里面，歐洲法庭是解釋共同體法律的機關，成員國法院是執行共同體法律的機關，彼此不會雷池對方權力範圍半步。這做法的目的，是為了體恤各成員國因彼此法制不同，執行共同體法律的方式也因此互相各異，所以把共同體法律的實際執行留給成員國法院，採取分工合作的辦法把共同體法律的解釋權及執行權分別付予共同體與成員國的司法機關。

Reference (3)

THE PROCEDURE FOR THE
INTERPRETATION OF
EUROPEAN COMMUNITY LAW

Prepared by the Secretariat
of the Consultative Committee for the Basic Law

The Origin of the European Community

The so-called "European Community" is actually made up of three separate but similar European regional international organizations which subsequently joined together. These three European international organizations are the European Coal and Steel Community (ECSC) established in 1952, the European Economic Community (EEC) (also popularly known as the Common Market) established in 1958, and the European Atomic Energy Community (Euratom) which was also established in 1958.

All three are regional international organizations established by international treaties. The constitutive treaty of the European Coal and Steel Community is the Treaty of Paris signed in 1951, while the constitutive treaties of the European Economic Community and the European Atomic Energy Community are the two Treaties of Rome signed in 1957. The purpose of the signing of these treaties is to encourage and increase cooperation between the Western European member states by the utilization of uniform policies in the development of their coal and steel industries, commerce, and in the area of atomic energy. The subsequent merger of the three organizations into the European Community similarly stems from the original ideal of creating a truly European "Common Market".

The four main organs of the European Community are the European Parliament, the European Council, the European Commission and the European Court of Justice. The format of the European Parliament is akin to the parliament of a state: the members of this assembly consist of representatives from the member states, and their function is to supervise the operation of the executive organ of the Community. The Council of Europe is actually a summit meeting of the heads of the governments of the member states and their foreign ministers, who meet for the purpose of conferring upon how to cooperate to implement Community policies. The European Commission is the executive organ of the Community, and its responsibility is to produce policies based upon the founding principles of the Community for implementation within the member states. The European Court of Justice is the highest judicial organ of the Community, and its task is to interpret the constitutive treaties of the Community, and to interpret and determine the validity of directives and regulations made by Community institutions based upon the treaties.

The parliament and court of the three original European regional international organizations were merged as early as 1958; but it was not until 1967 that their council and commission merged to formally become the European Community. The six original member states are Belgium, France, the Federal Republic of Germany, Italy, Luxemburg and the Netherlands. Britain, Ireland and Denmark joined in 1973, and now the Community also include Greece, Portugal and Spain.

The Source of European Community Law

The law of the European Community comes primarily from the constitutive treaties of the three original regional international organizations. The importance of these treaties is comparable to that of a country's constitution. The legal validity of all Community acts stems from the founding treaties. In practice, the most important treaty is the Treaty of Rome which established the European Economic Community: the provisions of the Article of Rome are in reality mostly concerned with the prior creation of a "Common Market" without any territorial restrictions in economic transactions, and this may be called the concept of the "four freedoms" contained in Article 48 of the Treaty. The "four freedoms" are the free movement of goods, the free movement of workers, the freedom to practise a profession, and the free movement of capital. Article 48 of the Treaty states that workers have the right to move and work within the Community, and a member state shall not impose unequal restrictions on a worker coming from another member state.

A second source of Community law are the subsidiary treaties made between the member states according to the provisions of the founding treaties, for the purpose of implementing substantively the policies and aims of the Community laid down in the founding treaties. For example, Article 220 of the Treaty of Rome provides that where necessary the member states shall conduct negotiations with each other in order to ensure that their nationals certain rights identified in the Treaty shall be including inter alia the right to have civil judgments and enforced by other member states, and to the mutual recognition of companies and legal persons. To this end, the Convention on Jurisdiction and the Enforcement of Civil and Commercial Matters and the Convention on the Recognition of Companies and Legal Persons were signed by Community members in 1967. When new member states join the Community, not only do they become party to the original founding treaties, they also accept the example laid down by Britain, Ireland and Denmark. For example, paragraph 2 of the First Act of Accession that Ireland, Denmark and the United Kingdom joined in 1972, and accede to the subsidiary treaties under the founding treaties.

The final source of Community law are the regulations and directives formulated by Community organs according to the provisions of the founding treaties. Article 189 of the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community provide that the Council and the Commission have the power to formulate regulations and directives applicable to all member states. (Because the treaty establishing the European Coal and Steel Community was signed earlier, the terminology used in that treaty is comparable provision in Article 14 is different).

Treaties of Rome, and the rules formulated by the Council and the Commission are not called "regulations" and "directives".) The distinction between "regulations" and "directives" is that regulations are binding generally, having equal force in all member states, whereas directives are binding only specifically, having force only in member states to which they are issued. For example, when the member states reach an agreement in the Council of Europe regarding a certain type of goods (say a certain agricultural product), the Council will formulate certain regulations for implementation in each member state, such as uniform units of measurement and quality control; should the Commission then discover that relevant regulations within a member state are in conflict with Community regulations, it will then issue directives to the member state to make corrections

The Incorporation of External Law

First of all, a fundamental principle common to many legal systems is that laws made by the highest legislative body within the legal system are supreme, and other laws coming from outside the legal system must go through some procedure of "incorporation" by the national legislative body before they can be recognized by the municipal courts. The ultimate source of Community law are the founding treaties of the Community; although in the legal systems of certain states treaties made externally by the government automatically become effective law within the state, in order to prevent the executive from altering national law by means of treaty-making, the legal systems of other states (such as Britain) require that external treaties must go through some process of incorporation (such as enactment by Parliament as national legislation) before they can be legally effective internally within the state. The European Community Act 1972 enacted by Britain is an application of the method of enactment by Parliament incorporating the Treaty of Rome into English law, making it effective within the state as if it were legislation enacted by Parliament and thus avoiding the technical paradox created by Community law and the principle of the supreme power of Parliament to legislate in English constitutional law. (It may be pointed out that because the Treaty of Rome is incorporated into national law, subsidiary Community law including subsidiary treaties, regulations and directives in theory should not need to be incorporated again in order to become effective within member states; it may be said that this is an undermining of the concept of "incorporation".)

Conflict Resulting from the Incorporation of External

When member states of the European Community incorporate treaty obligations into their national legal systems through the treaty taking direct effect or through legislation, two issues arise. First, certain provisions within the member state may not be in accord with national laws, and may even lead to conflict if they are in conflict. This issue involves the question of the interrelationship of Community law itself and of the national law of member states and the question of which law prevails. The last issue is resolved by the principle of the supremacy of Community law, the substantive interpretation of the two kinds of laws, and the procedure for their enforcement still require special arrangements for resolution.

The second issue potentially arises when member states enforce these treaties, for whether in a situation of non-effectiveness or enactment by national legislative provisions, there may be different interpretations of the treaty, leading not only to the possibility of non-enforcement of the laws by member states may not be in accord with the intention of the treaties but also to the possibility that the member states in enforcing the laws do not conform themselves as to the interpretation of the treaties. Community law also required a procedure whereby uniform interpretation of the treaties may be achieved among member states without interfering with their judicial independence in order to bring about the goal of coordinating the activities within the Community.

Conflict Resulting from Differences between Legal Systems

Another technical difficulty created by the co-existence of different legal systems is the possible conflict of interpretation and the enforcement of law. The legal systems of the member states of the European Community are not uniform, the most significant difference being between the common law system which practises its own "common law" system, whereas the civil law system which derives from the law of the Roman Empire is practised on the Continent. The two systems differ in many and legal principles in many ways; for example, the concept of "equity" is absent in civil law; and even within countries practising civil law have many differences themselves in respect of substantive provisions of laws.

Two Principles in the Relationship between Community Law and National Laws of Member States

The two fundamental principles governing the relationship between the law of the European Community as a whole and its member states are the principles of "direct effect" and "supremacy of Community law".

Direct Applicability

The principle of the direct applicability of Community law means that Community law does not require enactment as national law within member states in order to be effective within the member states. For example, in the English case of Van Duyn v. Home Office (1975) Ch. 358, the European Court held that although no national legislation existed in Britain for the protection of the freedom of movement of workers, Article 48 of the Treaty of Rome which protected the same freedom was directly applicable within the member state.

Supremacy of Community Law

The principle of the supremacy of Community law means that the Community treaties, regulations and directives prevail over any law within the member state, and in the event of conflict Community law must be preferred. For example, the rules concerning equal pay for equal work for men and women in the Equal Pay Act 1970 of Britain and Article 119 of the Treaty of Rome were in conflict in the case of Macarthys Ltd. v. Smith (1979) ICR 785: the English court held that the Equal Pay Act only applied to situations in which both the man and the woman were engaged in the same work, but the European Court held that Article 119 included the situation in which the man and the woman were engaged in the same work at different times; in the end the original ruling of the English court was overturned.

The Solution to Conflict

Although the European Community provided an answer to the friction between Community law and national law of the member states with the above-mentioned principles of "direct applicability" and "supremacy of Community law", the technical problems surrounding the coexistence of different legal systems still required substantive methods and procedures for resolution.

In order to deal with the difficulty presented by the dissimilarity between the legal systems of the member states, Article 177 of the Treaty of Rome very clearly divides the functions of the European Court of Justice and the courts of the member states, so that neither infringes upon the boundaries of the other and thus ensuring closer cooperation.

The System of the Interpretation of Community Law

The European Court of Justice that sits in Luxemburg is the highest judicial organ of the Community. According to Article 177 of the constitutive treaty of the European Economic Community:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty

(b) the validity and interpretation of constitutions of the Community,

(c) the interpretation of the statutes established by an act of the Council, where those provide.

"Where such a question is raised before a tribunal of a member state, that court or tribunal considers that a decision on the question is necessary to give judgment, request the Court of Justice to give a ruling thereon.

"Where any such question is raised in a case before a court or tribunal of a member state, against which there is no judicial remedy under national law, that tribunal shall bring the matter before the Court of Justice.

Article 14 of the constitutive treaty of the European Coal and Steel Community and Article 150 of the Treaty of Rome have similar provisions. The effect of these provisions is to bestow upon the European Court of Justice the power to interpret Community law. This power not only includes the power to interpret the constitutive treaties of the Community but also the power to interpret or decide the validity of subsidiary Community law deriving from the constitutive treaties. According to Article 177 paragraph 2 of the Treaty of Rome, whenever the court of a member state in adjudication is asked to decide a question relating to the interpretation of the Treaty of Rome, the interpretation or validity of the constitutive treaties of the EEC (including subsidiary regulations and directives), or even the interpretation of the constitutive statutes of certain subsidiary EEC institutions, the national court may (but not necessarily must) submit the question to the European Court for an answer if it is of the opinion that this would help it in rendering its judgment. However, according to paragraph 3 of the same Article, if the case before the national court involves a final judgment from which there is no appeal, the national court has no discretion as to whether to refer the question in the case concerning Community law to the European Court for resolution.

In practice, the questions concerning Community law submitted to the European Court are mostly concerning the interpretation of Community treaties, regulations and directives, and only infrequently involve the validity of acts of the institutions based on the founding treaties. The interpretation of the constitutive statutes of the Community bodies.

The Limited Discretion of Courts over the Submission of Questions for Interpretation

The function of the European Court is involved entirely with the task of interpreting Community law, and the purpose of requiring the courts of member states to submit questions relating to Community law to the European Court before giving final judgment is to avoid as far as possible disagreement over the interpretation of Community law resulting from the difference between the legal systems of the member states among themselves and with the European Court. The interpretation of Community law is solely within the competence of the European Court, and the courts of member states have no right to interpret Community law; although according to Article 177 paragraph 2 of the Treaty of Rome national courts have the discretion before giving final judgment not to submit questions relating to Community law to the European Court, this discretion only appears in situations in which the national court is of the opinion that a resolution of the question will not affect the court's judgment in the case, and does not mean that the national court can interpret Community law by itself without having to submit the question to the European Court.

The power of the European Court to interpret Community law is entirely passive. That is to say, only when the courts of member states or various adjudicative bodies within the Community submit requests in accordance with the stipulated procedure for the interpretation of certain provisions can the European Court exercise its interpretative power. In situations other than these, the European Court cannot because of whatever reasons of its own take the initiative in rendering an interpretation of a certain provision and requiring the courts of member states to observe it.

The Meaning of "Final Judgment"

Article 177 paragraph 3 of the Treaty of Rome provides that where a question regarding Community law "is raised in a case pending before a court or tribunal of a member state, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice". In Community law, a final court "against whose decisions there is no judicial remedy" refers to any court within the legal system which is the last to deal with the case concerned, and does not necessarily indicate the highest judicial body within the member state.

For example, in the case of COSTA v. E.N.E.L. (1964) ECR 585 the European Court held that although the magistrate's tribunal was not the highest judicial body of the land in Italy, because the amount of money involved in the case concerned was not sufficient under Italian law to allow an appeal, the magistrate's tribunal was therefore the final court "against whose decision there is no judicial remedy" in that case, and being so was under an obligation to submit the question relating to Community law in that case to the European Court.

The Separation of Judicial Enforcement and Interpretation

The function of the European Court is purely interpretative of Community law, but it is the national court with which the state which in fact enforces Community law in the other words, in the legal system of the Community the European Court is the body for the interpretation of Community law; neither body would intrude upon the competence of the other. The reason behind this arrangement is the realization that the result of the diversity of legal systems among the member states and their methods of enforcing Community law would all be the same, and thus the method of cooperation by separate employment so that the powers of interpreting and enforcing Community law are separately invested in the European Court and the national courts respectively.

參考資料(四)

CCBL-SECR-RM04-880803

適用於香港特區的中國法律

基本法諮詢委員會秘書處提供

根據基本法(草案)徵求意見稿第十七條所載，在香港特別行政區實行的法律為基本法、特區立法機關制定的法律、和依照第八條所載不抵觸以上兩者的香港原有法律。

第十七條跟着又註明，全國人大和人大常委會制定的法律不在香港特區實施，但凡「有關國防、外交」以及「其他有關體現國家統一和領土完整」的法律則例外，凡須在香港特區實施的可由國務院指令特區政府在當地公佈或立法實施。基本法內地草委邵天任先生在一九八八年六月七日訪港期間與諮委會法律小組作意見交流時，指出上述的「有關國防、外交」和「體現國家統一和領土完整」的適用於香港特區的中國法律，大體有下列幾種：

- (一). 一九四九年關於國都、紀年、國歌、國旗的決議：一九四九年中國人民政治協商會議第一屆全體會議通過，中華人民共和國國都定於北平，即日起改名北京；國家紀年採用公元紀年；國歌為田漢作詞、聶耳作曲的「義勇軍進行曲」，在一九七八年三月五日第五屆全國人民代表大會通過國歌新詞，到了一九八二年十二月四日第五屆全國人大第五次會議又撤銷一九七八年通過的新詞而恢復原來的國歌歌詞；中國國旗為五星紅旗。
- (二). 國慶：一九四九年十月一日，中華人民共和國中央人民政府委員會在首都北京成立，同年十二月二日中央人民政府決定十月一日為中華人民共和國國慶日，政務院在十二月二十三日通過國慶紀念日放假兩天的規定。
- (三). 國徽：一九五零年六月十八日中國人民政治協商會議第一屆全國委員會第二次會議通過以國旗、天安門、齒輪和麥稻穗作圖案的國徽，於同年九月二十日由毛澤東主席公佈為中華人民共和國國徽。
- (四). 一九五八年中國政府關於領海的聲明：一九五八年九月四日全國人大常委第一百次會議批准的中華人民共和國關於領海的聲明，宣佈中國領海的闊度為十二海哩，採用直基線的方法劃定，適用於中華人民共和國一切領土，包括中國大陸及沿海島嶼、隔有公海的台灣及其周圍各島、澎湖列島、東沙、西沙、中沙、南沙群島以及其他屬於中國的島嶼。

根據「一九五八年日內瓦領海與毗連區公約」(1958 GENEVA CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE)所載，「領海」即沿着國家岸線的海域，其闊度不少於三海哩，而「毗連區」即毗連領海的海域，其闊度與領海合共不得超過十二海哩。雖然中華人民共和國並沒有參與制定日內瓦公約的第一次聯合國海洋法會議亦沒有簽署日內瓦公約，但這類公約在國際法上是有反映國際慣性規則的效力的，是以中國一九五八年宣佈領海十二海哩闊的聲明與當時國際法上的慣性規則是有出入的。可是其後愈來愈多國家放棄三海哩的規定而採用十二海哩作為領海的闊度，這做法終於在一九七四年被國際公義法庭 (INTERNATIONAL COURT OF JUSTICE) 在「冰島捕漁案」(ICELANDIC FISHERIES CASE) 中判定為新的國際慣性規則，而這十二海哩的新做法在第三次聯合國海洋法會議所制定的、雖未有效但却反映國際法慣性規則的「一九八二年聯合國海洋法公約」(1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)中得到承認；所以，在這點上中國一九五八年的領海聲明是合乎現行的國際法的。

不過，中國的領海聲明中劃定領海的方法跟國際法却可能有不同的地方，因為一九五八年及一九八二年的兩條國際公約都載明劃定領海的方法是採用「低潮線」(LOW-WATER MARK)的方法，從退潮時海水退至的最低點開始計算領海的闊度。中國採用的「直基線」(STRAIGHT BASELINES)方法，根據國際法庭在一九五一年「英國挪威捕漁權案」(ANGLO-NORWEGIAN FISHERIES JURISDICTION CASE)的判決和一九五八年及八二年兩條國際公約所載，是只有在非常特殊的情形導至低潮線方法不適用時才採用的方法。例如在英國挪威捕漁權案中，由於挪威的海岸呈現十分凹凸的深銳鋸齒形狀和非常斷續不平的裂口，很難妥善地採用低潮線方法劃定領海，所以才能夠以直基線的方式，在大陸、島嶼及礁石上適當的位置劃點以直線連接，再從這樣劃成的基線計算領海闊度；但在可以用低潮線時國際法是不准用直基線的。

- (五) 九八六年關於外交特權及豁免的法律： 九八六年九月五日第六屆全國人民代表大會常務委員會第十七次會議通過的中華人民共和國外交特權與豁免條例，管理外國駐中國使節的特權和豁免。

根據基本法(草案)徵求意見稿第十條第一款，與香港特別行政區有關的外交事務既由中央人民政府負責管理，未來外國在香港特區設立的領事機構並不屬於本地特區政府的管理範圍，故未來外國在港的領事機構和人員必須遵守中國(而非香港現存沿自英國的)有關外交事務的法例。

世界各國在彼此間外交關係的建立及運作上，長年累月經已演變出一些各國都可接受的基本原則，都已納入一九六一年的一條中國也參與的國際公約：維也納外交關係公約(1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS)。各國本身在國內關於外交特權與豁免的立法上，多以這條公約作為標準，英國與中國都如是，所以將來轉交主權之後對在港外交人員享有的特權與豁免的改變不會很大。例如中國外交特權與豁免條例第十四條：外交代表享有刑事管轄豁免的權利；即是說外國外交使節在接受國犯了任何刑事罪，接受國最多只能把犯罪者驅逐出境，而不能對其作出任何刑事制裁。這是有載於維也納公約的外交基本原則之一，理由是為了避免任何國家蒙上以刑事罪項(譬如說間諜活動的從事)作為藉口以對外國使節不利之嫌；英國本身有關外交特權與豁免的法例也有類似的條文。

然而這却並非表示外國使節可盡情肆意破壞接受國的刑事法規，因為維也納公約內的另一個基本原則是外交代表必須尊重當地的法律；這原則也被納入了中國外交特權與豁免條例第二十五條第一項。外國使節雖不受當地刑事法律的制裁，但情形如嚴重，接受國可把犯者逐回到發出國與及作出外交抗議，而犯者回到自己國家亦可能受到自己國家本身刑法的制裁。

至於民事及行政法規方面，維也納公約和英國的做法，是外國使節以私人而非外交人員身份進行的訴訟，如關於個人商業活動或遺產承繼的，都不包括在民事及行政管轄豁免的範圍內。但中國的做法却跟這有一點出入；中國外交特權與豁免條例第二十五條第三項註明，享有外交特權與豁免的人員不得在中國境內為私人利益從事任何職業或者商業活動，違者根據第十四條無權享受豁免，司法機關只要對其人身及寓所不構成侵犯可對其施行強制執行。

其間的分別，在於維也納公約及英國都有限制外國使節不能以私人身份從事商業性質的活動，而只不過規定外國使節假如以私人身份從事商業活動而發生訴訟的，必須放棄民事管轄的豁免權利。反之，中華人民共和國的做法，却是完全禁止外國使節在中國境內從事任何商業活動。

問題是，目前在港的外國使節可以在本地以私人身份作商業投資，到了主權交還中國後儘管香港特區繼續施行資本主義的政策，外國使節是否仍需遵照中國外交特權與豁免條例而不準在港作任何商業投資？

若說，中國外交特權與豁免條例第二十五條內所言的中國國境不包括香港特區，是以外國使節可以繼續在港以私人身份作商業投資却又並不可行；因為基本法(草案)徵求意見稿在第一條已明載香港特區是中華人民共和國不可分離的部份，第十二條亦說明外交事務由中央人民政府負責，若說施行中國外交特權與豁免條例，却又使里面所言的中國國境不包括香港特區未免有違其精神。而且假如當真不包括香港於中國條例所言的中國國境內，未來在港的使節不但不需在本港遵守不從事商業活動的禁例，另外也不需在本港遵守中國條例內只限於中國國境內的禁例，如第二十五條第二項不得干涉中國內政的條例。

另一個可行的辦法，是在主權交還後不直接在香港特區盲目實施中國有關外交的法律，而是依照基本法(草案)徵求意見稿第十七條第三款有載的方法，由國務院指令本地政府立法實施適合特區情況的法規。

- (六). 全國人大代表選舉法：包括一九七九年七月一日第五屆全國人大第二次會議通過的中華人民共和國全國人民代表大會和地方各級人民代表大會選舉法，和其後全國人大常委在一九八六年十二月二日第十八次會議對以上作出修改的決議。
- (七). 一九八零年中國國籍法：一九八零年九月十日第五屆全國人大第三次會議通過的中華人民共和國國籍法，管理中華人民共和國國籍的取得、喪失和恢復。

此外，中國的憲法整體來說，對香港特別行政區也是有效的。這憲法內，凡涉及社會、經濟制度的條款，經基本法以具體條文另行規定，故不在香港特別行政區實施外，其他一切有關整體國家的條文，也是在香港適用的，其中包括了第三章內有關國家機構的規定，第四章有關國旗、國徽和首都的規定，就是其中的例子。

全國性法律在港適用的問題，除了要清楚目前有甚麼法律是符合這情況外，也要制定一個程序，以照顧以後有關的法律符合這情況時，可以通過程序在香港實施，或對這些法律有修改時，對香港也能有效。

(★中國是於一九七五年加入維也納外交關係公約的，第十四、十六條持有保留；另外又在一九七九年無保留地加入一九六三年維也納領事公約。)

基本法諮詢委員會
THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA

Our Ref: CCBL-SECR-LE233-880804

4 August 1988

Dear Sir/Madam,

Since the publication of the "Draft Basic Law for Solicitation of Opinions", members of the public have expressed their respective views through different channels. The Secretariat has compiled their initial response in a report entitled "Preliminary Report--Focuses of Discussion", which has already been sent to you and to the persons and organizations concerned on 19 July in order to facilitate more in-depth discussion.

During their visit to Hong Kong from 4 to 17 June, the mainland drafters have, in their individual capacities, elaborated on and explained a number of questions concerning the draft Basic Law to members of the Consultative Committee and representatives of various organizations. The Secretariat has now compiled the drafters' views for your reference.

Enclosed please find four sets of reference materials, including the above-mentioned compilation of drafters' views and materials on three of the more controversial issues.

Sincerely yours,

Siu Sin Por
(Deputy Secretary General)

- Encl.:
1. Compilation of the Views of Visiting Mainland Drafters on Some Questions Concerning the Draft Basic Law for Solicitation of Opinions.
 2. The Concepts of "Act of State" and "Fact of State".
 3. The Procedure for the Interpretation of the European Community Law
 4. Chinese Laws Applicable to the Hong Kong Special Administrative Region (to follow)

制定香港特別行政區基本法的原因、 原則和應包含的內容以及表達方式

基本法起草委員會委員

張友漁

基本法諮詢委員會秘書處提供

(一) 制定香港特別行政區基本法的原因

(甲) 引言

香港本來就是中國的領土，清季以來，長期處在英國統治之下，現在，經過中英兩國政府和平談判，達成協議，簽署了《中華人民共和國政府和大不列顛及北愛爾蘭聯合王國政府關於香港問題的聯合聲明》，確定英國政府於一九九七年七月一日，將香港交還我國，同時，我國對香港恢復行使主權。(1) 在收回香港後，香港作為中國的一個地區，本來，在一般情況下，應當和其他各地區一樣，適用全國通用的法律，為甚麼要制定《香港特別行政區基本法》呢？這是因為香港的歷史背景和現實情況與其他地區不同，需要有適用於這個特殊地區的特殊法律。

(乙) 香港的特殊情況與“一國兩制”

香港人民長期生活在經濟比較繁榮的資本主義社會中，習慣於資本主義的生活方式，加以受敵視社會主義和擴大我國缺點的惡意宣傳的影響，對我國現行的社會主義制度是有所疑慮，有所恐懼，甚至根本反對的。如果我們強制實行社會主義制度勢必難免引起政治動亂，損害經濟繁榮。因此，我們採取了“一國兩制”的方針政策，根據憲法第三十一條的規定(2)，設立了享有高度自治權的不同於其他地區的香港特別行政區。並在《中英聯合聲明》中表明“香港的現行社會、經濟制度不變，生活方式不變”(3)。特別是在作為《聯合聲明》附件一的《中華人民共和國政府對香港的基本方針政策的具體說明》中，明確說：“香港特別行政區成立後，不實行社會主義制度，保持香港原有的資本主義制度和生活方式五十年不變”(4)。這樣做，有利於保持香港的繁榮與穩定，而香港的繁榮與穩定對我國社會主義經濟建設，特別是貫徹執行對外開放政策也是有裨益的。既然是保持資本主義制度，不實行社會主義制度的特別行政區就需要根據憲法第三十一條“在特別行政區內實行的制度按照具體情況由全國人民代表大會以法律規定”(5)的規定，制定作為全國性法律的例外，適應本行政區情況的基本法律。這就是制定《香港特別行政區基本法》的原因。

(丙) 是法律，不是“憲法”

這裡需要說明的一點，是《香港特別行政區基本法》是法律、不是“憲法”，雖然它在香港的法律中具有最高法律效力，但不具有憲法的性質，不能同國家的憲法處於同等的地位。這是因為我國是單一制國家，不是聯邦制或聯盟制國家，香港只是經憲法授予，取得了享有高度自治權的特別行政區的地位，而不是作為構成聯邦國的基礎之一的“邦”，“加盟國”或象美國的“州”。無論在中國或英國管治之下，香港一向沒有憲法，也無權制定憲法。《基本法》是全國人民代表大會制定的法律，而不是香港本身制定的“憲法”。它享有高度自治權，

是憲法作為例外，特別授予的，而不是它本身固有的。這本來是憲法第三十一條明確規定着的，該條說“在特別行政區內實行的制度，按照具體情況，由全國人民代表大會以法律規定。”很明顯，規定香港實行的制度的《基本法》是一種法律：《對香港的基本方針政策的具體說明》曾說：“在香港特別行政區實行的法律為《基本法》以及上述香港原有法律和香港特別行政區立法機關制定的法律。”(6)這也是把《基本法》列為法律之一的。事實上，現在《基本法》的起草工作，就是由全國人民代表大會決定成立的“香港特別行政區基本法起草委員會”負責進行的，這個委員會向全國人民代表大會及其常務委員會負責。它的成員包括香港各界人士都是由全國人民代表大會常務委員會決定的(7)。基本法起草委員會完成《基本法》草案後，該草案便會提交全國人民代表大會審議並制定為法律。它起草的《基本法》當然是法律而不是“憲法”。有人說《基本法》是香港的“小憲法”不怎麼恰當。

(二)、制定《香港特別行政區基本法》的原則

制定《香港特別行政區基本法》應當遵循下述原則，即 1) “一國兩制”，2) 保持香港的繁榮和穩定，3) 港人治港，4) 符合《聯合聲明》的原則。這四個原則詳述如下：

首先，是“一國兩制”的原則。前面說過，根據香港的歷史背景和現實情況，我們採取了“一國兩制”的方針政策。這個方針政策必須貫徹實行，堅持不變。所謂“一國兩制”，就是在一個統一的國家中，實行兩種不同的制度。既不是“一國一制”，也不是“兩國兩制”。香港雖然享有高度自治權，但它仍然是直接受中央人民政府管轄的，中華人民共和國的地方行政區域，而不是任何獨立的政治實體，不是一個“獨立王國”。這在《聯合聲明》也是確認了的。《聯合聲明》第三款第二項不就明確地說嗎？“香港特別行政區直轄於中華人民共和國中央人民政府。”“一國兩制”能不能真正成為現實，要體現在《基本法》里面。因為是“兩制”所以《基本法》的規定必須保證在香港保持資本主義制度而不實行社會主義制度；以及採取與此相適應的政治生活、經濟生活、社會生活等方面的措施，象《聯合聲明》和《對香港的基本方針政策的具體說明》所列舉那樣(8)。並且保證五十年不變。當然，所謂“不變”是“基本不變”，不是一切具體辦法都不變；是中央政府不去變它，不是香港人自己也不能變，這是一方面。另一方面，因為是“一國”這就包含着鞏固國家統一，保衛國家主權的原則。中國是社會主義國家，就整個國家來說，社會主義制度決不能變，只是在香港以及將來的澳門，台灣等這些特別地區，不實行社會主義。這一點，鄧小平同志講得很明確：“一國兩制”也要講兩個方面。一方面社會主義國家里，允許一些特殊地區搞資本主義，不是搞一段時間，而是搞幾十年，成百年。另一方面，也要確定整個國家的主體是社會主義(9)。“我們堅持社會主義制度、堅持四項基本原則，是老早就確定了的，寫在憲法上的，我們制定的一些政策，包括對香港、澳門、台灣的政策，也是在堅持四項基本原則的基礎上制定的。沒有中國共產黨，沒有中國的社會主義，誰能夠制定這樣的政策？”(10)如果在香港有人不是僅在言論上，而是在行動上，破壞香港除外的整個國家的社會主義制度，《基本法》是不應當允許的。也正因為是“一國”，香港是中國的一個地方行政區域，它所享有的高度自治權是中央權力機關授予的，不是毫無限度的。在行使高度自治權時，不是完全不受中央政府的領導，以至必要的干預的。更不能以行使高度自治權損害國家主權。本來，這是《聯合聲明》

和附件一就已明確講了的。如說“除外交和國防事務屬中央人民政府管理外，香港特別行政區享有高度自治權”，而“行政長官在當地通過選舉或協商產生，由中央人民政府任命，主要官員由香港特別行政區行政長官提名，報中央人民政府任命”；“香港特別行政區立法權屬於香港特別行政區立法機關。立法機關可根據《基本法》的規定並依照法定程序制定法律，報中華人民共和國全國人民代表大會常務委員會備案”；“主要法官(即最高一級法官)的任命和免職，還須行政長官徵得香港特別行政區立法機關的同意，並報全國人民代表大會常務委員會備案”等等(11)。這些都表明香港特別行政區是在中央政府的領導下，行使中央權力機關授予的高度自治權的。《基本法》應當以此為依據，並加以具體化，而不能與它相抵觸。關於干預問題，鄧小平同志曾在會見基本法起草委員會委員們時，明確指出：“切不要以為香港的事情全由香港來管，中央一點都不管，就萬事大吉了。這是不行的。這種想法不實際。中央確實是不干預特別行政區的具體事務的，也不需要干預。但是是不是特別行政區本身也會發生危害國家根本利益的事情呢？難道就不會出現嗎？那個時候，北京過問不過問？難道香港就不會出現損害香港根本利益的事情？能夠設想香港就沒有干擾，沒有破壞力量嗎？我看沒有這種自我安慰的根據。如果中央把甚麼權力都放棄了，就可能會出現一些混亂，損害香港的利益。所以保持中央的某些權力，對香港有利無害。”又說：“比如一九九七年後香港有人罵中國共產黨，罵中國，我們還是允許他罵；但是如果變成行動，要把香港變成一個在“民主”的幌子下，反對大陸的基地，怎麼辦？那就非干預不行。干預首先是香港行政機構要干預，並不一定要大陸的駐軍出動，只有發生動亂、大動亂，駐軍才會出動，但是總得干預嘛！”(12) 他要求《基本法》要照顧到這些方面。確實應當照顧。《基本法》決不能允許，更不能鼓勵擾亂香港社會治安，顛覆國家政權的反革命活動。總之，制定《基本法》必須堅持“一國兩制”原則。有的人只強調“兩制”，不強調“一國”，甚至不要“一國兩制”，而要“兩國一制”，就是要把香港作為一個獨立的資本主義國家，同時，要求整個中國也實行資本主義制度，這是十分荒謬的。

第二是保持香港的繁榮和穩定的原則，前面說過，保持香港的繁榮和穩定，不只是香港本身的要求。對我國社會主義經濟建設，貫徹執行對外開放政策也是有益的。象趙紫陽所說的“因為一個長期穩定和繁榮的香港，有利於中國的統一和四化建設，而一個動盪蕭條的香港，不符合中國人民的長遠利益。”(13) 正因為這樣，我們才採取了“一國兩制”的方針政策，從而要制定《基本法》。《基本法》必須體現這一原則。要保持香港的繁榮和穩定，基本上不外保持資本主義制度，並在具體上利用香港在歷史發展和現實情況中所形成的優勢，採取有利於發展經濟的措施，例如保持自由港和獨立關稅地區的地位，繼續實行自由貿易政策，保持國際金融中心的地位，並保障金融企業的經營自由以及資金在香港流動和進出香港的自由，保持原在香港實行的航運經營和管理體制，保持香港作為國際和區域航空中心的地位等等(14)。在勞資關係方面，《基本法》應當規定勞資兩利，團結生產，既保障勞動者的利益，也要使企業家有利可圖，勞動者不宜要求過高，企業家也不得過分剝削，可採用“福利國家”的措施，緩和階級鬥爭的激化。

第三是“港人治港”的原則。所謂“港人治港”就是香港作為特別行政區，享有高度自治權，在中央政府的領導下，香港人民自己管理立法、行政、司法等方面的具體事務，中央政府不派人去直接管理這些事務。象《聯合聲明》和附件一所說的“香港特別行政區享有行

政管理權，立法權，獨立的司法權和終審權”，“香港特別行政區政府由當地人組成，行政長官在當地通過選舉或協商產生”⁽⁶⁾；“香港特別行政區立法機關由選舉產生”；“香港特別行政區的審判權屬於香港特別行政區法院”，“香港特別行政區法院的法官，根據當地法官和法律界及其他方面知名人士組成的獨立委員會的推薦，由行政長官予以任命”⁽⁶⁾。另一方面，不能沿襲在英國殖民統治下的制度，允許外國人“治港”或仰外國人鼻息，為外國利益服務的壞人“治港”。“原在香港各政府部門任職的中外籍公務、警務人員可以留用，香港特別行政區各政府部門可以聘請英籍人士或其他外籍人士擔任顧問或某些公職”。⁽⁷⁾但他們必須“持有香港特別行政區永久性居民身份証”，並不得擔任“各主要政府部門（相當於‘司’級部門，包括警察部門）的正職和某些主要政府部門的副職”⁽⁸⁾。這就是說，香港的事應由香港的中國公民自己管，中央政府不派人去管，更不允許外國人掌握管理權。象鄧小平同志所說的，“港人治港有個界綫和標準問題。港人治港的標準須是以愛國者為主體的港人來治理香港，未來香港政府的主要成份是愛國者，當然也容納別的人，還可以聘請外國人當顧問。甚麼叫愛國者？愛國者的標準是尊重自己民族，誠心誠意擁護祖國恢復行使對香港的主權，不損害香港的繁榮和穩定。只要具備這些條件，不管他們相信資本主義，還是相信封建主義，甚至相信奴隸主義，都是愛國者。我們不要求他們都贊成中國的社會主義制度，只要求他們愛祖國、愛香港。”⁽⁹⁾我相信香港人民絕大多數是符合這個要求的，“港人治港”是能夠取得成效的。起草《基本法》應當認識這一點。

港人如何治港？也就是香港特別行政區如何行使高度自治權？首先，必須明確屬於殖民統治性質或帶有殖民主義色彩的法律制度必須廢除；在這種法律制度下設置的主要政府機構必須基本改變。有人主張原封不動地照抄照搬原有的上述法律制度，把原有的上述機構換個牌子，甚至連牌子也不換，就作為香港特別行政區的政府機構，這當然是不行的，起草《基本法》也必須認識這一點。其次必須實行民主政治，健全法制，不能象過去那樣，政府有權，人民無權，港督個人說了算，別人都是配角。當然，民主政治的實現，有個逐步完成的過程，高度民主，完備法制，不是一蹴可企及的。我們的國家的經驗說明了這一點。立國初期，我們也是要一下子發揚社會主義民主，健全社會主義，實現高度文明，高度民主的。但是，制定1953年的選舉法時，只能規定縣以下人民代表大會代表實行直接選舉，縣以上人民代表大會代表則實行間接選舉。現在，由於條件成熟了，縣人民代表大會代表也實行了直接選舉，但全國人民代表大會代表和省、直轄市、民族自治區的人民代表大會代表仍實行間接選舉。將來，也會向直接選舉前進，但現在還不能實行。在香港，現在就實行完全直接選舉，是不是條件已經成熟？是不是會惹起混亂，不利於繁榮和穩定？關於這個問題，存在着各種不同意見，有贊成的，有反對的，有持折衷主義的。《基本法》起草委員會應當理論聯繫實際地，深思熟慮，慎重研處。

第四是符合《聯合聲明》的原則。《聯合聲明》雖然形式上不同於一般的國際條約，但對簽署國也是具有國際法效力和法律的拘束力的。由於我國政府在《聯合聲明》中，對香港的基本方針政策作了聲明，並在作為《聯合聲明》的附件，同《聯合聲明》具有同等約束力的，《對香港的基本方針政策的說明》中，作了比較詳盡的、具體的說明⁽¹⁰⁾。我們說話是算數的，自應當遵守。特別是《聯合聲明》的第三款第十二項說：“關於中華人民共和國對香港的上述方針政策和本聯合聲明附件一對上述方針政策的具體說明，中華人民共和國全國人

民代表大會將以中華人民共和國香港特別行政區基本法規定之，並在五十年內不變。”⁽²¹⁾ 因此，制定《基本法》雖是我國的內政，但《基本法》的內容一定要符合《聯合聲明》。當然，符合《聯合聲明》是符合它的實質內容，而不是照抄它的文字。《聯合聲明》是國際協議，是政治性文件，不能直接作為國內法律，特別文字方面不完全是法律用語，不能完全適用於《基本法》。

(三)、香港特別行政區基本法應包含的內容以及表達方式

(甲) 主要內容：

根據上述《基本法》制定的原因和原則。《基本法》的內容主要應當包含：1. 有關國家統一和行使主權的部分，具體地說就是中央與香港特別行政區的關係問題；2. 有關實行民主政治、保護人民應享的權利，確定人民應盡的義務的部份；3. 有關政治體制的部分包括立法、行政司法各個方面及其相互關係，特別是行政長官和立法機關的產生、地位、職權及其相互關係的問題；4. 有關繁榮與穩定的部分，特別是經濟方面的問題；5. 有關教育、科學、文化、衛生等各方面的部份。《基本法》已就這些部分的內容，草擬了一個《香港特別行政區基本法》結構(草案)，分為《序言》和《總則》，《中央與香港特別行政區的關係》，《香港特別行政區居民的基本權利和義務》，《香港特別行政區的政治體制》，《香港特別行政區的經濟》，《香港特別行政區的教育、科學、技術、文化、體育和宗教》，《香港特別行政區的對外事務》《香港特別行政區的區旗、區徽》，《香港特別行政區基本法的解釋和修改》，《附則》等十章。經過各專責小組討論，分別擬定出了初步條文。對有的問題已取得一致意見，對有的問題則大相逕庭，例如關於行政長官的產生辦法就有四種方案，關於立法機關的產生辦法也有三種方案，關於法院對中央政府在香港的行政行為有無管轄權也有五種方案。

(乙) 基本法起草委員會所面對的幾個主要問題

這些問題還在討論中，不在本文論述的範圍內將另有人分別專文論述。我在這裡只談二個問題。第一個問題是第一屆香港特別行政區政府和立法機關如何產生，行使甚麼職權？這是香港各個階層、各個集團、各個派別、各個政治家所最關心的問題。老實說，由於關係到他們當前的切身利益，他們關心它，比對將來正常的政治體制、行政長官和立法機關如何產生，行使甚麼職權，更關心，這個問題解決不好，就不能穩定人心，順利交接，維持香港的繁榮和穩定。關於這個問題，在起草委員會中的香港委員間也是有爭論的。共提出了六種不同的方案。例如就政治體制來說，有人主張“行政主導”，有人主張“立法主導”；有人主張行政首長是行政機關的頭頭，有人主張行政首長象現在的總督一樣，是凌駕於立法機關，行政機關之上的；有人主張象前面所說的，把香港現有的機構照搬過來，只換一個牌子，有的主張在現在的香港政府主持下，經過協商或選舉，安排新的機關、新的人選。就行政首長和立法機關的產生來說，有人主張經過協商產生，有人主張經過選舉產生。而選舉的方法，有的主張以直接選舉為主；有的以間接選舉為主；有的主張以地區選舉為主；有的主張以職能

團體選舉為主；比較成為主流意見的是以混合選舉為主；但有一個爭論的問題不容易解決，即各方面所佔名額分配問題。再就是在英國政府還負責香港的行政管理的過渡時期，我國政府如何在香港進行選舉也有困難。又不能讓香港政府代替我們辦理選舉。選舉特別行政區的政府和立法機關的成員是我國的重要內政。這樣做是容許外國干涉內政，有損國家主權，《基本法》不解決這個問題，則其他規定都只成為紙上空談！《基本法》必須就這個問題作出明確規定，可以規定在《總綱》里，也可以規定在各有關章節里，最好是列為專章規定，至少，必須象現在所設想的，規定在《附則》中。第二個問題是《基本法》的表達方式問題。我的意見總的說來，“宜粗不宜細”。原則問題必須規定得明確，例如保持香港原有的資本主義制度和生活方式。具體問題不必規定得過多、過細、過死，可由一般法律文件去規定。例如正常的選舉程序，可另制定選舉法作出規定。因為《基本法》是在十年後才實施，並保持五十年以至更長的期間不變，既要適應當前的需要，也要照顧將來的情況，而客觀社會的具體情況是不斷發展變化的。《基本法》規定得過多、過細、過死，勢必不能完全適應將來每個發展階段的情況，因而使《基本法》變成不能適用，名存實亡，或者不斷修改，缺乏穩定性。一般法律當然也要有一定的穩定性，不能朝令夕改。但它不象《基本法》那樣，管得面寬。管得時間長，管得是根本大事，可以適應需要隨時修改補充。

總之制定《香港特別行政區基本法》是一件迫切需要而又關係重大的事，起草委員會的任務是很艱巨的，必須既積極、又慎重地進行工作，為香港的繁榮和穩定國家的統一和建設，做出貢獻！

本文註：

- (1) 參閱《聯合聲明》一、二款
- (2) 《中華人民共和國憲法》第三十一條
- (3) 《聯合聲明》第三款第五項
- (4) 附件一之三
- (5) 同(2)
- (6) 附件一之二
- (7) 《第六屆全國人民代表大會第三次會議「關於成立中華人民共和國和香港特別行政區基本法起草委員會的決定」
- (8) 《聯合聲明》第三款和附件一
- (9) 1987年4月16日會見香港特別行政區基本法起草委員會委員時的講話
- (10) 同上
- (11) 《聯合聲明》第三款
- (12) 會見香港特別行政區基本法起草委員會委員時的講話
- (13) 趙紫陽總理在會見香港政界知名人士訪問團時的講話
- (14) 《聯合聲明》第三款和附件一
- (15) 《聯合聲明》第三、四項
- (16) 附件一之一
- (17) 《聯合聲明》第三款第四項
- (18) 附件一之四
- (19) 1984年6月23日、30日，鄧小平會見香港工商界訪京團和香港知名人士鍾士元等的講話要點
- (20) 《聯合聲明》第二款和附件一
- (21) 《聯合聲明》第三款第十二項

Reference (7)

THE REASONS FOR AND BASIC PRINCIPLES IN
FORMULATING THE HONG KONG SPECIAL
ADMINISTRATIVE REGION BASIC LAW,
AND ITS ESSENTIAL CONTENTS AND
MODE OF EXPRESSION

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I. REASONS FOR DRAFTING THE HONG KONG BASIC LAW

A. Introduction

Hong Kong has always been Chinese territory. However, since late in the Qing Dynasty, it has been ruled by Great Britain. Recently, after peaceful negotiations, the Chinese and British governments signed the Joint Declaration on the Hong Kong Question (Joint Declaration). This agreement stipulates that on July 1, 1997, Great Britain will restore Hong Kong to China, and China will simultaneously resume the exercise of its full sovereignty over the region.(1) After control of Hong Kong is returned to China, Hong Kong will become an internal administrative region. It goes without saying that all else being equal, Hong Kong would be treated in the same way as all other parts of China. That is, generally applicable national laws would apply to Hong Kong. Thus, what need is there for a Hong Kong Special Administrative Region (SAR) Basic Law? The Basic Law is needed because Hong Kong's historical background and socio-economic circumstances differ from those of other parts of China. Thus, we must enact exceptional laws appropriate for this exceptional area.

B. Hong Kong's Special Circumstances and "One Country, Two Systems"

Hong Kong's long history of capitalism coupled with moderate economic prosperity have caused the Hong Kong people to become accustomed to the capitalist lifestyle. In addition, influenced by malicious propaganda which is hostile to socialism and which tends to magnify China's shortcomings, the Hong Kong people have some misgivings and fears concerning China's current socialist system. Some people even fundamentally oppose this system. If China attempted to force the socialist system on Hong Kong, political turmoil would undoubtedly be difficult to avoid, and damage to the now flourishing economy would result. This consideration was the genesis of China's adoption of the guiding policy of "one country, two systems" (yi guo liang zhi).

This policy is in accordance with the Constitution of the PRC. Article 31 of the Constitution allows for the creation of special administrative regions, such as the Hong Kong SAR, stipulating that unlike other regions of China the SARs will enjoy a high degree of autonomy.(2) In addition, the Joint Declaration clearly states, "The current social and economic systems in Hong Kong will remain unchanged, and so will the life style."(3) Of special significance in this regard is Annex I to the Joint Declaration, which elaborates the PRC government's policies regarding Hong Kong. It clearly states that "[a]fter the establishment of the Hong Kong SAR, the socialist system and socialist policies shall not be practised in the Hong Kong SAR and that Hong Kong's previous capitalist system and life style shall remain unchanged for 50 years."(4)

Following this course will preserve both Hong Kong's current prosperity and its continuing stability, which will in turn benefit the socialist economic construction of the nation and, in particular, the policy of opening to the outside world. The process of preserving Hong Kong's capitalist system must comply, of course, with the Constitution. Article 31 adds that "[t]he systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress (NPC) in the light of the specific conditions."(5) Thus the Basic Law will be an exception to the national laws, formulated to meet the special circumstances of the region.

C. A Law, Not a Constitution

At this juncture it is necessary to understand that the Hong Kong Basic Law will be legislation enacted pursuant to the PRC Constitution, and the Basic Law is not in and of itself a "constitution." Although the Basic Law will have the highest legal effect among Hong Kong's laws, it will neither be constitutional in character, nor, in any way, be placed on an equal plane with the PRC Constitution. Hong Kong's status -- that of a highly autonomous SAR -- will be conferred upon it by the national Constitution. It could not be otherwise, for China is a unitary country, not a union or a federation. Hong Kong, therefore, cannot be a component of a federal republic as in the German Federal system, nor a constituent republic of a larger union as in the Soviet system, nor a federal state as in the American system.

Moreover, under both British and Chinese administration Hong Kong has never had its own constitution. Hong Kong still has no power to formulate one. Hong Kong will enjoy a high level of autonomy, but only by virtue of the exceptional status conferred on it by the PRC Constitution and not by any inherent power it possesses. This conforms with Article 31 of the Constitution, noted above, which quite clearly stipulates that the Hong Kong Basic Law will be a form of legislation. Annex I of the Joint Declaration expands on this notion, specifying that besides the Basic Law, the laws of the Hong Kong SAR will include those previously in force in Hong Kong and those enacted by the future SAR legislature.(6)

The drafting process further demonstrates the statutory character of the Basic Law. In fact, the current drafting of the Basic Law is the responsibility of the Hong Kong SAR Basic Law Drafting Committee, established specifically for this purpose by decision of the NPC.(7) The Basic Law Drafting Committee is directly responsible to the NPC and its Standing Committee. Its members include Hong Kong people from all sectors of the community. Each member was appointed by decision of the Standing Committee of the NPC. When the Basic Law Drafting Committee completes its draft, this draft will be submitted to the NPC for evaluation and enactment. For these reasons, the draft Basic Law can be nothing but a statutory law. There are those who call the

Basic Law Hong Kong's "little Constitution," but as has been seen, this appellation is quite inappropriate.

II. THE NECESSARY UNDERLYING PRINCIPLES OF THE BASIC LAW

In formulating the Basic Law, there are four basic principles to which we should adhere: 1) "one country, two systems," 2) preservation of Hong Kong's prosperity and stability, 3) administration of Hong Kong by Hong Kong people and 4) conformity to the terms of the Joint Declaration. Each of these will be examined below.

A. "One Country, Two Systems"

As stated above, we adopted the guiding policy of "one country, two systems" to comport with Hong Kong's historical background and current conditions. This policy must be implemented and faithfully upheld. The so-called "one country, two systems" policy means simply that within a single unified country, two different systems are to be administered. It is neither "one country with one system," nor is it "two countries with two systems." Most importantly, although Hong Kong will enjoy a high degree of autonomy, it will remain under the direct jurisdiction of the Central People's Government. It will not be an independent political entity, nor will it be an "independent kingdom." As explicitly stated in the Joint Declaration, "The Hong Kong SAR will be directly under the authority of the Central People's Government of the PRC."

Whether or not "one country, two systems" can truly be realized depends on how it is embodied in the Basic Law. The fact that two different socio-economic systems will coexist in one country -- with Hong Kong as the exception to the rule -- underlines the need for the Basic Law to provide guarantees. The most important guarantees are, first, that the capitalist system in Hong Kong will remain unchanged, and, second, that socialism will not be implemented for fifty years. The PRC Elaboration in Annex I stipulates further that in order to carry out this plan, consistent provisions concerning political, economic and social life, and other areas must be adopted as part of Basic Law.(8)

Of course, "remain unchanged" means "remain fundamentally unchanged," and not that every detail will remain unchanged. It means, on the one hand, that the central government will not make any changes, not that the Hong Kong people themselves may not change anything. On the other hand, the concept of "one country" necessarily also encompasses the consolidation of national unity and the safeguarding of national sovereignty. China is and will remain a socialist country. The only exceptions to this system are Hong Kong and the future special (administrative) regions of Macao and Taiwan, where socialism will not be implemented.

Comrade Deng Xiaoping aptly stated:

"One country, two systems" must be discussed on two levels. On one level is the fact that within a socialist country we will be permitting a specially privileged area to be capitalist not just for a short period of time, but for decades or a full century. On another level, we must affirm that the principal system throughout the country is socialist ... (9)

That we uphold the socialist system and the "four cardinal principles" was determined long ago, and is inscribed in our Constitution. The policies we formulate, including our policies toward Hong Kong, Macao and Taiwan, are also determined on the basis of upholding the four cardinal principles. Without the Chinese Communist Party, and without China's socialism, who could formulate this type of policy?(10)

The Basic Law should not allow anyone in Hong Kong to undermine the socialist system of the entire country (excluding Hong Kong) not only verbally but with physical actions. On the premise of "one country", Hong Kong will be a local administrative region of China. The high level of autonomy it will enjoy is conferred on it by the central organs of state power, and this high level of autonomy is not without limits. When exercising its high level of autonomy, Hong Kong will not proceed entirely without guidance, and even necessary intervention, from the central government. However, China's national sovereignty may not be damaged by Hong Kong's enjoyment of its high level of autonomy. This has been clearly stated in the Joint Declaration and Annex I. Thus, in the areas of foreign and defense affairs, national sovereignty requires that the Central People's Government take full responsibility.

The PRC's protection of its interests also impinges on other aspects of governance covered by the Joint Declaration; these provisions must be more extensively detailed in the Basic Law. For instance, the Joint Declaration states:

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 SAR for appointment by the Central People's Government ...

The legislative power of the Hong Kong SAR shall be vested in the legislature of the Hong Kong SAR. 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 NPC for record.

[T]he 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 SAR legislature and reported to the Standing Committee of the NPC for the record. (11)

These provisions clearly articulate the notion of guidance of the Hong Kong SAR by the central government. The Basic Law must elaborate on these provisions and the policy of guidance embodied in them, but may not contradict them.

Comrade Deng, Xiaoping addressed this question of intervention when meeting with members of the Basic Law Drafting Committee:

Don't think that all of Hong Kong's affairs will be managed by Hong Kong, with the central government sitting by idly, and everything will be just fine. This is not acceptable. This type of attitude is not practical. The central government indeed will not meddle in the SAR's specific affairs; it will not need to meddle. However, what if something occurring within the SAR threatens the nation's basic interests? At that time, shouldn't Beijing concern itself with the matter? Can you say that no events will arise in Hong Kong which may be harmful to Hong Kong's own basic interests? Can you imagine that there will be no obstructions or destructive forces in Hong Kong? I see no grounds for such self consolation. If the central government abdicates all power over Hong Kong, then chaos may ensue, damaging Hong Kong's interests. Therefore, preserving certain powers for the central government is beneficial, not harmful, to Hong Kong.

For instance, after 1997 if someone in Hong Kong condemns the Communist Party and condemns China, we will still allow him to speak; but if the words become actions and he wants to turn Hong Kong into a "democracy" and set up a base to oppose the mainland, what then? If we cannot intervene at the time, it would not be acceptable. Intervention would first be by Hong Kong administrative organs; it is not at all certain that mainland troops stationed in Hong Kong would take any actions. If there is a disturbance or great turmoil, only then will the forces stationed in Hong Kong act; but in such circumstances they must always be able to intervene! (12)

Comrade Deng asked that the Basic Law attend to these issues, and of course it should do so. If someone in Hong Kong goes beyond verbally advocating the destruction of China's national socialist system and takes some concrete steps toward this end, then the Basic Law should in no way permit or foster disturbance of the public order of Hong Kong society or counterrevolutionary activities which subvert national sovereignty.

In short, in formulating the Basic Law, we must uphold the

principle of "one country, two systems." There are those who merely stress "two systems," without stressing "one country." There are even some who do not want "one country, two systems." They desire, instead, "two countries, one system" -- that is, they want Hong Kong to be an independent capitalist country, while at the same time they demand that all of China institute a capitalist system. This is completely absurd.

B. Preservation of Hong Kong's Prosperity and Stability

The second guiding policy is the principle of preserving Hong Kong's prosperity and stability. As noted above, the preservation of Hong Kong's prosperity and stability is not only a goal for Hong Kong itself, but will also benefit China's national socialist economic construction and the implementation of the "open policy." As Zhao Ziyang stated, "Hong Kong's long-term prosperity and stability will benefit China's unification and its Four Modernizations drive, but a turbulent and economically depressed Hong Kong would be inconsistent with the Chinese people's long term interests." (13) It is precisely for these reasons that we adopted the guiding policy of "one country, two systems." The Basic Law must give expression to this guiding policy.

Basically, in order to preserve Hong Kong's prosperity and stability, we must preserve its capitalist system. We must utilize Hong Kong's superior position -- resulting from its historical development and current conditions -- to adopt measures beneficial to the development of the economy. For example, we should preserve Hong Kong's status as a free port and independent tariff region, continue to implement the free trade policy and preserve Hong Kong's status as an international banking centre. Moreover, we must sustain, among other things, the independent management of financial industries, free capital flow into and out of Hong Kong, the existing system of transport management and administration and Hong Kong's status as an international and regional aviation centre. (14)

In the area of labour-capital relations, the Basic Law should provide for the interests of both labour and capital, and provide that labour and capital work together towards a common end. Not only must we ensure workers' benefits, but we must also ensure that entrepreneurs stand to gain under the system. While workers must not demand too much, entrepreneurs must not be too exploitative. Measures of the "welfare state" may be introduced to relax the tension of class struggles.

C. Hong Kong People Administering Hong Kong

The third guiding policy is the principle of "Hong Kong people administering Hong Kong (ganqren zhiqang)." Simply put, this means that Hong Kong will be an SAR and will enjoy a high degree of autonomy. This principle is reflected throughout the provisions of the Joint Declaration and Annex I, for instance,

The Hong Kong SAR will be vested with executive, legislative and independent judicial power, including that of final adjudication. The Government of the Hong Kong SAR 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.(15) The legislature of the Hong Kong SAR shall be constituted by elections. Judicial power in the Hong Kong SAR shall be vested in the courts of the Hong Kong SAR. Judges of the Hong Kong SAR courts shall be appointed by the chief executive of the Hong Kong SAR acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.(16)

"Hong Kong people administering Hong Kong" thus means that, under the leadership of the Central Government, the Hong Kong people themselves will manage specific legislative, administrative, judicial and other matters. The Central Government will not station people in Hong Kong to directly administer these affairs.

Under the policy of "Hong Kong people administering Hong Kong" we cannot allow the continuation of the British colonial system, wherein foreigners or local scoundrels pandering to foreign interests ruled Hong Kong. Instead, the Joint Declaration states that "Chinese and foreign nationals previously working in the public and police services in the government departments of Hong Kong may remain in employment. British and other foreign nationals may also be employed to serve as advisers or hold certain posts in government departments of the Hong Kong SAR."(17) There are, however, two conditions: 1) the foreign nationals must hold Hong Kong SAR permanent resident identity cards, and 2) they cannot serve as heads of major government departments (including the police) or as deputy-heads of certain departments.(18) These points merit reiteration: the affairs of Hong Kong should be administered by Hong Kong people; the Central Government will not delegate people to administer them, and will not permit foreigners to hold administrative powers. As stated by Comrade Deng Xiaoping:

There is the question of a demarcation line and criterion for the Hong Kong people to administer the region. The criteria for determining who is to rule Hong Kong under the principle of "Hong Kong people administering Hong Kong" must be that patriotic people are the specific Hong Kong people to rule Hong Kong. In the future, the Hong Kong government's key personnel will be patriots; of course, the government may also contain other types of people, and may even take on foreigners as advisers. Who are "patriots"? The touchstone of a patriot is respect for his own nation, earnest and sincere support for the motherland's resumption of its sovereignty over Hong Kong. So long as they meet these requirements, they are patriots, no matter whether they believe in capitalism or feudalism or even the slave-owning system. We don't require them all to favour China's

socialist system, but only ask them to love the motherland and Hong Kong.(19)

I believe the vast majority of Hong Kong people fit this description and that the principle of "Hong Kong people administering Hong Kong" can achieve success.

How will Hong Kong people administer Hong Kong and thus exercise Hong Kong's high degree of autonomy? First, all remnants of colonial control and all laws smacking of colonialism must be abolished. Key government organs devised by this legal system must be accordingly changed. However, some people advocate completely copying and maintaining the aspects of the existing legal system discussed above, merely changing the names of the existing governmental organs. Some do not even want to change the names. This attitude, of course, is unacceptable, and we must recognize this fact in the drafting of the Basic Law.

Second, we must implement democratic politics and perfect the legal system. The system cannot be as it was in the past, where the government had power but the people did not, and where the Hong Kong Governor made all the decisions and everyone else played minor roles. Of course, the realization of democratic politics must be gradually achieved. Advanced democracy and a perfect legal system cannot be achieved all at once. China's own experience illustrates this point. In the early days of the People's Republic, China wanted to develop socialist democracy, perfect socialism, and realize a high level of civilization and a high level of democracy all at once. However, when drawing up the 1953 Election Law it was only feasible to provide for direct elections of representatives to people's congresses below the county-level, while representatives to people's congresses above the county-level were indirectly elected. At present, because conditions have ripened, direct elections for representatives at county-level people's congresses have been instituted; however, the representatives to the NPC and provincial people's congresses, municipalities directly under the Central Government and national minority autonomous regions are still indirectly elected. In the future, these too will advance toward direct elections, but at present such elections cannot be held.

Are present conditions in Hong Kong ripe for implementing completely direct elections? Would it create disturbances detrimental to prosperity and stability? Views on this question range from favouring direct elections to opposing them, and include everything in between. The Basic Law Drafting Committee should integrate theory and practice; its members should carefully consider and prudently investigate solutions to this matter.

D. Conformity to the Joint Declaration

The fourth guiding policy is the principle of conforming to the requirements of the Joint Declaration. Although the Joint Declaration differs in form from most international agreements,

it has international legal effect and is legally binding on the two signatories. The Joint Declaration is certainly sufficiently specific to be binding. First, the Chinese government has stated its fundamental guiding policies towards Hong Kong in the Joint Declaration itself. Second, the PRC government has incorporated an even more detailed and concrete explanation of its policies towards Hong Kong in Annex I, (20) which has equally binding legal effect. Taken together, these documents are a fairly thorough and specific explanation of China's policies towards Hong Kong. China means what it says. It will respect these pronouncements.

Of special importance in this regard is paragraph 3, clause 12 of the Joint Declaration, which states that the basic policies of the PRC towards Hong Kong in both the Joint Declaration itself and in Annex I will be incorporated into the Hong Kong Basic Law by the NPC and will remain unchanged for 50 years. (21) Although the process of formulating the Basic Law is an internal matter, the above clause requires that the contents of the Basic Law must conform to the provisions of the Joint Declaration. Of course, conforming to the Joint Declaration means to conform to its substantive content; it does not mean the Basic Law must imitate the Joint Declaration word for word. The Joint Declaration is an international agreement and a political document; and therefore it cannot be converted directly into domestic law. Especially important in this regard is that the special terms used in the document are not all within the legal lexicon and therefore cannot all be utilized in the Basic Law.

III. THE ESSENTIAL STRUCTURAL COMPONENTS AND CONTENTS OF THE BASIC LAW AND THEIR MODE OF EXPRESSION

A. Essential Components

In accordance with the above-mentioned reasons for, and principles involved in, formulating the Basic Law, the final product should comprise the following essential components:

(1) A section concerning national unification and the exercise of sovereignty, specifically discussing the question of relations between the Central Government and the Hong Kong SAR;

(2) A section concerning the implementation of democratic politics, preserving the rights to which people are entitled, and stipulating people's obligations;

(3) A section concerning the political system, including each aspect of the legislature, administration and judiciary, as well as relations between these branches. This section must also specifically address questions concerning the selection, status, and powers and responsibilities of the Chief Executive and the legislature, as well as relations between them;

(4) A section concerning prosperity and stability, especially dealing with economic questions;

(5) A section concerning various topical areas such as education, science, culture, sanitation and others.

The embodiment of the above provisions in the Basic Law has already been crystallized in a preliminary structural draft of the Hong Kong SAR Basic Law. It contains the following sections: The Preamble and General Principles; The Relation Between the Central Government and the Hong Kong SAR; The Basic Rights and Duties of Residents of the Hong Kong SAR; The Political Structure of the Hong Kong SAR; The Economy of the Hong Kong SAR; Education, Science, Technology, Culture, Sports and Religion in the Hong Kong SAR; The External Affairs of the Hong Kong SAR; The Regional Flag and Regional Emblem of the Hong Kong SAR; Interpretation and Amendment of the Hong Kong SAR Basic Law; and Supplementary Provisions.

Several special subject subgroups have drafted the initial clauses of the Basic Law. On some issues, the members of the subgroups are unanimous, while on others there is wide disagreement. For example, there are four different proposals outlining ways through which the Chief Executive is to be selected; there are three different proposals concerning the means through which the legislature is to be constituted; and there are also five different proposals concerning whether or not courts have jurisdiction over administrative acts of the Central Government performed in Hong Kong.

B. Certain Key Issues Confronting the Drafting Committee

The issues noted above are still being discussed and are not within the scope of this article. Others will address these issues. I will confine my discussion to two important questions still being discussed: 1) the creation of the Hong Kong SAR's first government and legislature; and 2) the degree of specificity of the Basic Law.

1. The Creation of the Hong Kong SAR's First Government

The first issue regards how the first Hong Kong SAR government will be formed and how the first Legislative Council will be constituted and what functions and powers these organs will perform and exercise. This issue is the single greatest concern of each and every stratum, group, faction and politician in Hong Kong. Frankly, they are concerned because its resolution affects their current personal interests. This issue is of even greater concern to them than the future political structure and the means through which the Chief Executive and legislators will be selected. If this issue is resolved poorly, it will be impossible to set people's minds at ease, to accomplish the smooth transfer of Hong Kong, or to safeguard Hong Kong's prosperity and stability.

election procedures may be regulated by a separately formulated election law.

Because the Basic Law will not come into force until 1997, and because its provisions will remain unchanged for fifty years or more thereafter, we not only must take account of current circumstances and social needs, but must also allow for future developments. Society's objective, concrete circumstances ceaselessly develop and evolve. If the Basic Law's provisions are too excessive, meticulous or rigid, then at future stages of development they will be inappropriate to specific new situations. This would cause the Basic Law to become inapplicable, to exist in name only or to require such constant amendment so as to lack stability. Of course, ordinary laws must also possess a certain degree of stability, they cannot be issued in the morning and rescinded in the evening. However, ordinary laws are unlike a Basic Law. A Basic Law has a broad scope, will remain in force for a long period of time, and encompasses major fundamental issues, ordinary laws may be amended or supplemented whenever necessary.

The drafting of the Hong Kong SAR Basic Law is an urgently needed and crucial matter. The mission of the Basic Law Drafting Committee is formidable. It must carry out its work energetically and prudently so as to contribute both to Hong Kong's prosperity and stability, and to China's unification and socialist construction.

* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

There have been disputes among the Hong Kong members of the drafting committee on this issue. Altogether, six different alternatives have emerged. For example, on the issue of the political structure, some have advocated an "executive-led" structure while others have called for a "legislative-led" government. Some have urged that the Chief Executive be the head of the executive authorities while others have called for a senior executive position, like that of the current Governor, above the legislature and the executive authorities. Some members have advocated that the current Hong Kong government organs should be imitated in their entirety, only changing the names. Others have said that the existing Hong Kong government should oversee the organization of the new government institutions and personnel through consultations or elections. On the issue of the selection of the Chief Executive and legislators, some have urged that this be accomplished through consultations, while others have called for elections. When considering the specific means of selecting such officials, four different modes have been suggested: 1) direct elections; 2) indirect elections; 3) district elections; and 4) election mainly by functional constituencies. In the end, the notion of essentially relying on a combination of these electoral forms has garnered a relatively strong following. However, there remains the difficult problem of how to distribute the respective allotment of votes among these different modes.

There is also the difficult problem of how China is to conduct elections during the transition period, while Britain is still responsible for Hong Kong's administrative supervision. We cannot allow the present Hong Kong government to substitute for us in supervising the elections. Electing the SAR governmental personnel and legislature is an important Chinese internal affair. Allowing the Hong Kong government to fulfill China's role would permit foreign elements to interfere in China's internal affairs and would injure China's national sovereignty. If the Basic Law does not resolve this issue, then all of its provisions will be meaningless scraps of paper! The Basic Law must provide clear provisions resolving this question. Perhaps such provisions should be included in the General Principles section, or perhaps in each of the relevant articles; but the ideal method would be to include such provisions in a special article of their own. At the very least, they must be contained in the supplementary provisions, as is tentatively planned.

2. Mode of Expression: General, Not Detailed

The second problem involves how these provisions and principles are expressed. I believe that, basically speaking, the Basic Law should be general and not detailed. Major principles, such as preserving Hong Kong's existing capitalist system and lifestyle, must be clearly stated. However, concrete issues need not be addressed by the Basic Law too frequently, too meticulously or too rigorously. These issues may be dealt with in the provisions of ordinary laws. For instance, normal

Notes

- (1) See Paragraphs 1 and 2 of the Joint Declaration
- (2) Article 31 of the Constitution of the People's Republic of China
- (3) Clause 5 of Paragraph 3 of the Joint Declaration
- (4) Section III of Annex I
- (5) *ibid*
- (6) Section II of Annex I
- (7) "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"
- (8) Paragraph 3 and Annex I of the Joint Declaration
- (9) Address by Deng Xiaoping to the Drafting Committee on 16 April 1987
- (10) *ibid*
- (11) Paragraph 3 of the Joint Declaration
- (12) Address by Deng Xiaoping to the Drafting Committee
- (13) Address by Zhao Ziyang to the visiting political personalities from Hong Kong
- (14) Paragraph 3 and Annex I of the Joint Declaration
- (15) Clauses 3 and 4 of Paragraph 3 of the Joint Declaration
- (16) Section I of Annex I
- (17) Clause 4 of Paragraph 3 of the Joint Declaration
- (18) Section IV of Annex I
- (19) Main points of the addresses by Deng Xiaoping to the visiting commercial and industrial group, and Sir S. Y. Chung from Hong Kong
- (20) Paragraph 2 and Annex I of the Joint Declaration
- (21) Clause 12 of Paragraph 3 of the Joint Declaration

設計香港未來政治體制的構思

基本法起草委員會委員

蕭蔚雲

基本法諮詢委員會秘書處提供

一九八八年四月二十八日，香港特別行政區基本法起草委員會第七次全體會議公佈了基本法(草案)徵求意見稿，六月間部份草委在香港聽取各界意見時，有些人士在座談會上提出：政治體制這一章是按照甚麼原則起草的？對一九九七年以後的香港政治體制是如何設計、構思的？現根據基本法起草委員會政治體制專題小組的討論概括地談談對這些問題的認識。當然其中有些論述是個人的看法，將來政治體制中的一些條文在徵求意見後還需要修改，隨着條文的修改對某些看法也可能需要加以修改。

起草政治體制條文的幾項立法原則

制定香港特別行政區基本法的法律、政策依據是甚麼？主要是中國憲法和《中英聯合聲明》中中國對香港的基本方針政策及其具體說明。《中英聯合聲明》已經明確地指出了這一點：“中華人民共和國全國人民代表大會將根據中華人民共和國憲法制定並頒佈中華人民共和國香港特別行政區基本法”，“關於中華人民共和國對香港的上述基本方針政策和本聯合聲明附件一對上述基本方針政策的具體說明，中華人民共和國全國人民代表大會將以中華人民共和國香港特別行政區基本法規定之，並在五十年內不變。”這也是起草基本法政治體制條文的依據。但是起草這樣一部基本法是史無前例的，沒有現成的法律可以參考，《中英聯合聲明》中關於政治體制部份除司法體制和公務人員外，又規定得非常概括，不很具體。加以現在香港各界人士對政治體制問題還存在許多不同的意見，所以起草政治體制這一章又存在一定的難度。因此，遵循甚麼原則來指導起草香港特別行政區基本法政治體制部份的條文，就顯得非常重要了。

政治體制專題小組於一九八六年十一月第四次小組會上專門討論了起草政治體制部份的立法原則問題，根據專題小組會上的討論，作者認為下述這些原則是起草香港未來政治體制條文所應當遵循的：

(一) 要符合“一國兩制”的方針和中英關於香港問題的聯合聲明的精神

“一國兩制”的方針是中國實現國家統一和解決歷史遺留問題的偉大創造，並且以根本法的形式規定在第三十一條，這是全國必須要遵守的。《中英聯合聲明》中中國政府對香港的方針政策將“一國兩制”的方針進一步具體化，中國承擔了將這些方針政策寫入基本法的義務。因此，政治體制條文應當符合“一國兩制”的方針與聯合聲明的精神。

聯合聲明本文的第三點中的(一)至(四)項和附件一的第一至第四段都對香港未來的政治體制作了規定，例如聯合聲明附件一第一段規定：“香港特別行政區享有行政管理權、立法權、獨立的司法權和終審權。”“香港特別行政區政府和立法機關由當地人組成。香港特別行政區行政長官在當地通過選舉或協商產生，由中央人民政府任命。香港特別行政區政府的主要官員(相當於‘司’級官員)由香港特別行政區行政長官提名，報請中央人民政府任命。香港特別行政區立法機關由選舉產生。行政機關必須遵守法律，對立法機關負責。”這就規定了高度自治、“港人治港”、行政長官和立法機關的產生辦法、行政長官和主要官員由中央人民政府任命、行政機關對立法機關負責等內容。政治體制的條文應當體現這些精神。

(二). 既要維護國家的統一和領土完整，又要體現高度自治

在一九八二年十一月二十六日第五屆全國人民代表大會第五次會議上，彭真代表憲法修改委員會作《關於中華人民共和國憲法修改草案的報告》時對憲法第三十一條作了詳細的說明，他指出：“在維護國家的主權、統一和領土完整的原則方面，我們是決不含糊的”。同時他又指出：特別行政區「享有高度的自治權。這種自治權，包括台灣現行社會、經濟制度不變，生活方式不變，同外國的經濟、文化關係不變等等。……在具體政策、措施方面，我們又有很大的靈活性，充分照顧台灣地方的現實情況和台灣人民以及各方面人士的意見。這是我們處理這類問題的基本立場」。這就是說，在“一國兩制”方針中既要維護國家統一和領土完整，又要堅持高度自治，二者不可偏廢。在《中英聯合聲明》中中國仍然堅持了這一原則立場，基本法的政治體制條文當然也要遵守和反映這一原則。

(三). 要有利於香港的經濟繁榮與社會穩定，有助於香港的資本主義經濟的發展，同時兼顧各階層的利益

保持香港的經濟繁榮與社會穩定是香港特別行政區基本法要達到的目的之一。在《中英聯合聲明》中已經指明，香港的社會、經濟制度不變。保持香港原有的資本主義制度是為了使香港的經濟進一步繁榮、香港居民不斷提高其生活水平、繼續保持香港社會的穩定。這也有利於中國內地的經濟建設。所以政治體制的設計必須有利於香港的繁榮與穩定。

當然繁榮經濟不是保護某一階層的利益而忽視另一個階層的利益，而是要兼顧各個階層的利益，妥善地處理不同利益階層之間的利益和相互關係，以保持香港的經濟繁榮和社會穩定。

維持香港的繁榮與穩定，中英兩國都承擔了義務，取得了一致的看法。這在《中英聯合聲明》中也有明確的記載：中英兩國政府“一致認為通過協商妥善地解決歷史上遺留下來的香港問題，有助於維持香港的繁榮與穩定，……”“自本聯合聲明生效之日起至一九九七年六月三十日止的過渡時期內，聯合王國政府負責香港的行政管理，以維護和保持香港的經濟繁榮和社會穩定；對此，中華人民共和國政府將給與予合作”。一九九七年後香港特別行政區基本法當然更要維持香港的繁榮與穩定。

(四). 保持香港原有政治體制中的一些優點，並逐步發展適合於香港情況的民主參與

香港的經濟能夠發展到現在的規模與速度，有各方面的原因，但是在政治體制上有一些適應於經濟發展的特點，也是應當繼續汲取和保留的。例如，香港現在有一個長期形成的公務人員制度，公務人員的招聘、僱用、考核、紀律、培養和管理，都有一套適合於香港的辦法，能夠保持公務人員的穩定性和政策的連續性。又如，香港現在有三百多個諮詢組織，大體可分為五大類：向部門首長提供意見的法定組織和非法定組織，向政府提供意見的法定和非法定組織，以及負責執行某項事務的委員會，這些組織雖然不是行政組織，但是它們有利和適應於香港政府的工作。這些制度有利於香港的管理，促進了經濟的發展，將來香港特別行政區也可以利用它們來為發展香港的經濟服務。

香港有自己的具體情況和特點，應當依照聯合聲明的精神循序漸進地發展適合於香港實際的民主制度，應當體現香港各階層都能參與和“港人治港”的原則。

保持香港原有政治體制中的一些優點對那些在政治結構上屬於殖民主義的內容、與《中英聯合聲明》精神相違背的當然要去掉。聯合聲明中中國對香港的方針政策和附件一體現了中國堅持國家主權的立場，反映了中國人民的意志，堅持這些方針政策，其目的之一是為了堅持國家主權。這也是分清殖民主義和保持香港原有政治體制中的一些優點的界限。

要從香港的實際情況出發設計香港特別行政區政治體制的條文，就不能照搬、照抄別的國家或地區的政治結構。不能完全照抄歐美一些國家實行的“議會制”、“總統制”的政權形式，因為香港特別行政區不是一個國家，不應照抄這些形式。

搬用內地的人民代表大會制，可不可以？當然也不可以。人民代表大會制是中國人民在長期的革命和建設中發展形成的，它主要是適應於內地的情況，也不能搬用於香港，例如，在內地各省、自治區、直轄市的人民法院都是由這些地方的人民代表大會選舉產生，對這些地方的人民代表大會負責，人民檢察院也是這樣，這和香港現在的司法體制不同，和香港的律政司中設有檢控部門也不相同，如果照搬內地的人民代表大會制就要改變現在香港的司法體制和檢控部門的設置，而聯合聲明又規定“除因香港特別行政區法院享有終審權而產生的變化外，原在香港實行的司法體制予以保留”。

香港是否可以原封不動地保留其政治結構到一九九七年七月一日以後？當然也不能這樣。要維護香港的經濟繁榮和社會穩定，要便於一九九七年七月的平穩過渡和權力交接，要從香港的實際情況出發，香港特別行政區基本法對香港原有的政治機構儘可能不作大的變動。但是《中英聯合聲明》規定要改變的內容還必須加以改變，特別是涉及國家主權的內容或者屬於殖民主義的體制。

二、行政、立法、司法三機關的相互關係

香港特別行政區應當採取甚麼樣的政治體制？行政、立法、司法三機關之間應當是甚麼樣的關係？對於這一點在一九八六年十一月政治體制專題小組的第四次小組會上，委員們曾經達成一個共識，這就是：“司法獨立，行政機關和立法機關既互相制衡、又互相配合的原則”。

司法獨立是指司法機關即法院獨立地行使審判權，不受行政機關即政府、立法機關即立法會議、社會團體和個人的干涉。這是香港現行司法體制的重要原則，一九九七年後當然應予保留。基本法(草案)徵求意見稿第八十四條對此作了明確的規定：“香港特別行政區法院獨立進行審判，不受任何干涉，司法人員履行審判職責的行為不受法律追究”。第七十九條還規定：“香港特別行政區各級法院是香港特別行政區的司法機關，行使香港特別行政區的審判權”。這又從另一方面說明，審判權只屬於香港特別行政區各級法院，行政機關、立法機關沒有這一權力。

同時基本法(草案)徵求意見稿第二條、第十八條第一款都規定：香港特別行政區享有“獨立的司法權和終審權”。這就將司法獨立的原則全面地反複地規定在基本法(草案)徵求意見稿中，以確保司法機關能公平執行法律。雖然在法律條文上有些重複，但從基本法的整體上看還是可以的。

行政機關和立法機關都具有一定的權力，權力過大地集中於某一機關，將不利於香港特別行政區的發展。在“一國兩制”的方針下，行政機關和立法機關的權力如果能互相有所制衡，使兩機關能依照法律正確行使自己享有的職權，並起着互相監督的作用，這將有利於香港特別行政區的政治體制的運作，有利於香港特別行政區的經濟的發展。

行政長官、行政機關與立法機關的相互制衡關係主要體現在基本法(草案)徵求意見稿的第四十九條、第五十條、第五十二條、第六十四條以及第七十二條第(九)項。這些條文規定的內容是：

一. 在法律規定的條件和程序下，行政長官對立法機關有解散權。基本法(草案)徵求意見稿第四十九、五十條規定：“香港特別行政區行政長官如認為立法會議通過的法案不符合香港特別行政區的整體利益，可在三個月內將該法案發回立法會議重議，立法會議如以不少於全體成員三分之二多數再次通過原案，行政長官必須在一個月內簽署公佈或按本法第五十條的規定處理”。(此引文為第四十九條)“如行政長官拒絕簽署立法會議再次通過的法案或立法會議拒絕通過政府提出的財政預算法案或其他重要法案，經協商仍不能取得一致意見，行政長官可解散立法會議。行政長官在解散立法會議前，須徵詢行政會議的意見。行政長官在其一屆任期內只能解散立法會議一次”。(此引文為第五十條)可見行政長官對立法會議有相對的解散權，現在港督對立法局則有無條件的解散權。

二. 在法律規定的條件和程序下，立法機關有使行政長官辭職的權力。基本法(草案)徵求意見稿第五十二條規定：“香港特別行政區行政長官如有下列情況之一者必須辭職：(-)... ..(二)因兩次拒絕簽署立法會議通過的法案而解散立法會議，重選的立法會議仍以全體成員三分之二多數通過所爭議的原案；(三)因立法會議拒絕通過財政預算法案或其他重要法案而解散立法會議，重選的立法會議繼續拒絕通過所爭議的原案”。可見立法會議在法定條件下可以迫使行政長官辭職，現在香港則沒有這種規定。

三. 行政機關對立法機關負責。基本法(草案)徵求意見稿第六十四條規定：“香港特別行政區行政機關必須遵守法律，對香港特別行政區立法會議負責：執行立法會議通過並已生效的法律；定期向立法會議作施政報告；答覆立法會議成員的質詢；徵稅和公共開支須經立法會議批准”。這裡所說的“負責”的涵義，大體類似香港現行的作法和包含的內容，根據一些參加中英談判的起草委員的說明，這就是當時所指的“負責”的涵義。由於基本法(草案)徵求意見稿第五十九條、第六十條的規定，香港特別行政區政府是香港特別行政區行政機關，政府的首長是行政長官，政府設政務司、財政司、律政司和各局、處、署。所以行政機關對立法機關負責，當然包括行政長官和他所提名並經中央人民政府任命的主要官員在內，都要對立法機關負責。

對“負責”一詞在香港存在着不同的理解和分歧，現在這樣規定是比較適當的。第一，條文完全按照《中英聯合聲明》的內容，如實地作了明文規定；第二，條文對“負責”的內容作了符合中英談判時的實際情況的規定，第三，更為重要的是這一條文正確地規定了行政機關和立法機關的分工與制約關係。政權機關的工作是複雜而繁重的，應當有明確和恰當的分工，行政機關主管行政管理工作，立法機關制定和修改法律，本條明確地體現了這種正確的分工，而且從執行法律、作施政報告、答復質詢、徵稅與公共開支須經立法會議批准等四個方面說明了立法機關對行政機關的制約，這種制約關係也是正確的、適當的。

四. 立法機關有權彈劾行政長官. 基本法(草案)徵求意見稿第七十二條第(九)項規定: “行政長官如有嚴重違法或瀆職行為, 由立法會議全體成員的四分之一聯合動議, 經立法會議通過, 可組成獨立的調查委員會, 其主席由終審法院首席法官擔任, 負責進行調查並向立法會議提出報告。如該委員會認為有足夠證據構成上述指控, 立法會議以全體成員三分之二多數通過, 可提出彈劾案, 報請中央人民政府決定”。行政長官具有重要的政治地位, 掌握着一定的權力, 其行為對特別行政區的影響甚大, 因此賦予立法會議以彈劾權, 對行政長官進行監督和制約。但香港現在並無此制度。

從以上所引的第四十九、五十和五十二條等條文看, 行政長官有解散權、立法會議有要求辭職權, 都是為了使二者能正確地行使自己的職權, 合理地進行分工, 各得其所, 這是互相制衡的目的。而行政長官要行使解散權, 立法會議要迫使行政長官辭職, 都是很不容易、受到法律嚴格限制的。行政長官在行使解散權的時候, 還要考慮到可能帶來被要求辭職的後果, 立法會議再次通過行政長官發回重議的法案或拒絕通過政府提出的財政預算法案或其他重要法案的時候, 還要考慮到可能帶來被解散的後果。所以這種互相制衡又是希望行政長官不要輕易地行使解散權, 立法會議不要輕易地通過發回重議的法案或拒絕通過財政預算法案或其他重要法案, 而是二者既要互相制衡、又要互相配合。

基本法(草案)徵求意見稿規定的行政與立法機關的相互制衡關係是從香港的實際情況出發的。如本文前面所述, 沒有照搬別的國家的作法, 沒有採取通常的責任內閣制的作法, 即議會可以對內閣投不信任票, 內閣首相或總理可以解散議會。這樣作的結果, 在實行多黨制的國家而又沒有一個政黨能在議會中佔有多數議席時, 常常造成內閣的頻繁變更, 政府非常不穩定, 影響國家經濟的發展和社會的安定。現在西歐有的國家就有此情況。香港特別行政區是中華人民共和國的一個享有高度自治權的地方行政區域, 不是一個國家, 而且它的面積很小, 所以不宜採取類似一個國家的責任內閣制的制度, 不宜採取投不信任票的辦法, 也不能輕易地解散立法機關。這樣的制度容易造成香港特別行政區局勢的動盪, 不利於香港居民的生活和經濟繁榮, 香港特別行政區這樣小的地方是經受不起這樣動盪的。對於這一點政治體制專題小組有少數委員尚有不同意見, 有的主張應增寫投不信任票的內容。

行政機關與立法機關之間除了互相制衡的關係以外, 基本法還要強調行政與立法二者之間的互相配合, 這應當是起草基本法政治體制方面條文的一個重要出發點。這也是香港特別行政區政治體制的一個特點, 它與三權分立的觀點只講制約與平衡不同, 它非常重視互相配合。

對香港特別行政區政治體制來說, 在制衡與配合中, 缺少任何一點都是不適當的。只講制衡、不講配合, 將不利於香港特別行政區的工作和繁榮、穩定, 將使香港特別行政區的行政與立法機關的工作經常陷於停頓或無休止的爭論之中。行政機關與立法機關之間的關係也不應是上下級的關係, 不是領導與被領導的關係, 不是誰大誰小、誰能制服誰的關係, 而是二者要互配合, 使工作比較協調, 有利於香港的繁榮與穩定。

行政長官、行政機關和立法機關的互相配合主要體現在基本法(草案)徵求意見稿第五十五條。第五十四條規定香港特別行政區行政會議是協助行政長官決策的機構。第五十五條規定: “行政會議的成員由行政長官從行政機關的主要官員、立法會議成員和社會人士中委任”。

根據基本法(草案)徵求意見稿的規定;除人事任免、紀律制裁和緊急情況下採取的措施以外,行政長官在作出重要決策、向立法會議提交法案,制訂附屬法規和解散立法會議前,須徵詢行政會議的意見。由此可見,行政會議對行政長官、行政機關和立法機關起着互相配合的重要作用。

因為行政會議中有來自立法機關的成員,有來自行政機關的主要官員,可以使行政長官在決定問題時,既能聽到來自立法機關與行政機關的相同意見,也能聽到立法機關與行政機關的不同意見,便於行政機關和立法機關之間互相溝通情況,對兩機關間的不同意見進行磋商和協調,使兩機關能互相配合。在行政會議中還有社會人士,使行政長官在決定問題時經常能聽到社會人士的意見,便於行政長官瞭解社會上各方面的意見和情況,而且社會人士還可以對行政和立法機關二者之間的分歧意見,進行協調,促進行政機關和立法機關的互相配合。

行政會議在行政、立法機關之間所起的互相配合作用是政治體制專題小組要在基本法(草案)徵求意見稿中設立行政會議這一機構的一個重要原因。

三、行政長官的地位、產生和職權

行政長官在香港特別行政區佔有重要的地位。從基本法(草案)徵求意見稿對行政長官地位的規定看,行政長官既是香港特別行政區的首長,又是香港特別行政區行政機關的負責人。就是說香港特別行政區行政長官具有兩重身份。作為香港特別行政區的首長,他一方面代表香港特別行政區與中央聯繫,依照基本法的規定對中央人民政府負責,在某些外事禮儀上的活動也可以代表香港特別行政區;另一方面他又要對香港特別行政區負責,對香港居民負責。他作為行政機關的首腦,領導香港特別行政區政府。這樣,有利於加強對行政工作的統一領導,有利於提高行政工作的效能,有利於中央與香港特別行政區的工作聯繫。

關於行政長官的產生,《中英聯合聲明》及其附件一中只規定“在當地通過選舉或協商產生,由中央人民政府任命”。但是如何具體進行選舉或協商,《中英聯合聲明》明中並無規定。香港各界人士對行政長官產生的方式存在很大的分歧。作者在一九八六年八月收集香港各界人士的意見向政治體制專題小組報告時,一共歸納了二十六種方案和意見,基本法諮詢委員會在一九八七年的《行政長官的產生》(最後報告)和《行政長官的產生方法方案歸納報告》兩份文件中共收集了三十多種建議。基本法(草案)徵求意見稿附件一並列了五種方案,這些方案都是政治體制專題小組中的一些委員各自提出的,基本上反映了香港社會上各界對行政長官的產生的分歧意見。

附件一並列的五種方案是:(一)行政長官在當地通過一個有廣泛代表性的選舉團選舉產生;(二)行政長官由不少於十分之一的立法機關成員提名,經由全港性的普及而直接的選舉產生;(三)行政長官由功能選舉團一人一票選舉產生;(四)除第一屆另有規定外,開始幾屆(約二、三屆)行政長官由顧問團協商產生;(五)行政長官由“香港特別行政區行政長官提名委員會”經協商或協商後投票程序提名三人,全港選民一人一票普選產生。如何解決這些不同方案的分歧?這就須要慎重地找出一個符合《中英聯合聲明》精神、能為多數人接受的方案,這個方案應該有利於香港的繁榮與穩定,體現各階層的民主參與、“港人治港”、平穩過渡和循序漸進

等原則。現在基本法(草案)徵求意見稿用附件一的形式並列公佈了行政長官產生的五種方案,廣泛聽取香港各界人士的意見,通過諮詢、討論和協調,希望大家能以香港的繁榮、穩定和前途為重,互諒互讓,找出一個能為各方人士所接受的可行的方案。基本法起草委員會這種作法是好的、比較穩妥的。

基本法(草案)徵求意見稿對行政長官的職權一共提出了十三項,這十三項大體上可歸納為三大類:(一)政治法律方面,如領導香港特別行政區政府,公佈和執行法律,決定政策和發佈行政命令,批准向立法會議提出有關財政收支的動議,決定政府官員是否向立法會議作證和提供證據,赦免或減輕刑事罪犯的刑罰,處理請願申訴事項;(二)任免各類人員方面,如報請中央人民政府任免主要官員,依照法定程序任免各級法院法官、公職人員;(三)執行中央交辦或授權處理的事務,如執行中央發出的指令,處理中央授權的對外事務和其他事務。

行政長官的職權是根據甚麼來確定的?主要有三點:(一)依據行政長官的地位。因為行政長官具有特別行政區首長和行政機關的首長兩重身份,他的這種身份決定他負有重大的政治和行政責任,應有相應的職權作為履行責任的保證,要有一定的行政權和決策權,以保證行政工作的效率和協調各方面的關係。(二)政治體制專題小組的意見。一九八六年十一月政治體制專題小組第四次小組會在討論到行政長官應當有哪些職權時指出:行政長官“應有實權,但又應受到一定的監督”。基本法(草案)徵求意見稿第四十八條所列行政長官的職權就是保證有一定的實權。第五十二條、第六十四條、第七十二條等就是保證對他的監督。(三)參考了現在香港的實際情況。香港現行政治結構的一個特點是權力高度集中於港督,一九八六年的《香港》(年報)指出:“港督是英女王在香港的代表,具有指導香港政務的最高權力,名義上又是香港的三軍總司令。港督以政府首長的身份主持行政及立法兩局會議”。香港特別行政區基本法諮詢委員會執行委員會於一九八七年八月八日通過的《行政機關的組成與職權》(最後報告)中也指出:現時港督的職權主要有:主持行政局會議,提名行政局、立法局非官守議員、按察司及各部門首長,交英國外交及聯邦事務部任命,直接或間接委任高級公務員、批准或不批准條例草案等十五項。行政長官保留了一些原來由港督行使的權力,寫入了基本法(草案)徵求意見稿第四十八條。但是行政長官又與港督不同,他沒有港督享有的一些重要權力。行政長官不能無條件否決立法機關通過的法案和解散立法機關,不能委任立法機關成員,按照第七十條方案一的規定也不能兼任立法機關的主席,行政長官不是中央人民政府的代表,也不是當地駐軍的負責人。

從行政長官的上述職權來看,這些規定是比較適當的。第一,行政長官既有權獨立決定問題,發揮行政工作的效能,又有行政會議作為協助他進行決策的機構,起着諮詢和集體討論、甚至某些監督的作用,行政長官如不採納行政會議多數成員的意見,應將具體理由記錄在案。從各國的政治制度發展來看,從一定的意義上說,作為一個地方的行政長官應有這樣適當的職權,才能適應經濟發展和行政管理的需要。如果行政長官沒有適當的權力,就會影響經濟的發展和行政工作應有的效率。行政長官的權力如果很少,不利於香港的繁榮和穩定。第二,行政長官又不能集行政、立法權於一身。香港特別行政區享有高度的自治權,一九九七年後屬於香港特別行政區自治範圍內的事務,中央不能干預,而行政長官又有較高的地位,如果行政長官權力過大,則可能為所欲為,導至走向專權,對香港特別行政區將極為不利,基本法(草案)徵求意見稿沒有賦予行政長官以過大的職權是比較適當的。第三,如前所述,行政長官和立法機關之間有一定的制衡關係,也可以防止行政長官濫用職權和一意孤行。

當然，現在還有人認為行政長官權力較大，對這一點還可以進一步研究。

行政長官一節中為甚麼要設立行政會議？因為政治體制專題小組在一九八六年十一月第四次小組會上曾經有一個共識，這就是：“委員們認為可以考慮設立類似目前行政局的組織，作為協助行政長官進行決策的機構”。基本法(草案)徵求意見稿是根據政治體制專題小組的這一共識而產生第五十四條“行政會議是協助行政長官決策的機構”的。政治體制專題小組是從香港的實際情況出發來設計這一機構的，對於現在一些機構將來還有用處而不必改變或不必作重大改變的，就不作改變或不作大的改變，這有利於平穩過渡和減少政治動盪，而不是保留殖民制度，而且如前所述，這有利於行政與立法之間的互相配合。至於將行政會議列在行政長官一節中，是因為行政會議的性質和作用為協助行政長官進行決策，行政會議不能代替行政長官或自己獨立決策，它從屬於行政長官，所以應寫在行政長官一節中。

設立行政會議是不是與《中英聯合聲明》的精神不符？顯然不能這樣看，聯合聲明中沒有行政會議的內容，我們在本文前面已經分析了行政會議的性質、作用和必要性，沒有任何內容是不符合聯合聲明的，相反地行政會議的設立正是為了進一步貫徹聯合聲明的精神。判斷一個機構是不是符合聯合聲明，不能簡單地僅以聯合聲明中是否有此機構為標準，而要看是否對國家的統一和領土完整、香港的繁榮和穩定有利，是否有利於香港特別行政區的高度自治、“港人治港”等原則。正因為這樣，基本法(草案)徵求意見稿又規定“廉政機構”、“區域組織”等機構和內容，這些機構是現在香港已經有的，而又是聯合聲明中所沒有的，因為繼續保留這些機構對香港未來的繁榮、穩定和高度自治是有利的，基本法規定這些內容，並不違反聯合聲明的精神，更談不上是保留殖民主義制度。否則，基本法就只能照抄聯合聲明的內容，而不能多寫一點內容了。當然，基本法也應當宜粗不宜細，而不是越寫得多越好。

四、行政機關的地位、組成和職權，立法機關的地位、產生和職權

甚麼是行政機關？它的地位如何？基本法(草案)對此作了明確的規定。行政機關就是香港特別行政區政府，管理基本法規定的應當由它管理的各項行政事務。這樣，它的性質和法律地位就明確了。它還要對立法機關負責。

香港特別行政區政府如何組成？應當設立哪些機構？基本法(草案)徵求意見稿對此也作了規定。第六十條規定行政長官是香港特別行政區政府的首長，政府中設政務司、財政司、律政司和局、處、署。這就是香港特別行政區政府的組成。為了香港的繁榮、穩定以及平穩過渡，儘可能保持類似現在以布政司為首的香港行政機關體制。不同於現在的情況是行政長官兼政府首長，布政司改名為政務司，因為布政司是清朝時候的官職名職，辛亥革命以後就不用了；由於保留了三個大司的“司”的名稱，並區別三個大司與其他的現在的“司”的不同地位，第六十條將現在其他的“司”改稱為“局”，“局”的地位還是和現在的“司”以及聯合聲明中的“司級”相同。從香港的現實出發，基本法(草案)徵求意見稿還規定“原由行政機關設立諮詢組織的制度繼續保留”。

第六十二條規定了香港特別行政區政府的五項職權，這就是：制定並執行政策；管理行政事務；辦理中央人民政府授權的對外事務；編制並提出財政預算、決算；擬定並提出法案、議案和附屬法規。概括地列明了政府的職權有利於實現高度自治和提高行政工作的效率。

還應指出，基本法(草案)徵求意見稿第六十一條規定香港特別行政區的主要官員由在香港通常居住連續滿十五年的香港永久性居民中的中國公民擔任。這里充份體現了“港人治港的精神，排除了中央國家機關和內地各省、自治區、直轄市的中國公民參加香港特別行政區行政機關(也包括立法機關和司法機關)的工作，貫徹了聯合聲明中中國對香港的基本方針政策，體現了香港特別行政區享有高度自治權。

香港特別行政區的立法機關是立法會議，基本法(草案)徵求意見稿第六十六條明確地指出了這一點，說明香港特別行政區的立法會議是真正享有高度自治權的立法機關的性質和法律地位。它與香港現在的立法局不同，現在香港立法局的多數議員是委任的，其主席由總督兼任，總督參照立法局的意見及得該局同意制定法律，總督有權批准或拒絕批准法律或留待英王批准。所以香港特別行政區立法會議比現在香港立法局的權力要大得多，性質和法律地位亦不相同。現在總督及立法局制定任何法律時，都必須符合及遵守英王指令中的有關規則、規例及指示。根據《皇室訓令》規定，除特殊情況外有十類條例草案總督不能以英王名義批准。而香港特別行政區立法會議則由香港永久性居民選舉產生，它制定的法律只須報全國人民代表大會常務委員會備案，備案不影響法律的生效。這些也體現了立法會議享有高度自治權的精神。立法會議比香港立法局這種重大變化是必要的、適當的。它有利於香港各階層的民主參與和繁榮穩定。無論基本法起草委員會或諮詢委員會委員，多數都主張由直接選舉和間接選舉相結合的混合選舉方式產生立法機關，基本法(草案)徵求意見稿第六十七條第一款已規定了這一點。但是對於立法機關產生的具體辦法在香港各界長期以來存在着分歧，基本法諮詢委員會政制專責小組在它的關於立法機關的最後報告中歸納香港各界人士關於立法機關的產生和比例共有二十一種建議，根據基本法起草委員會政治體制專題小組中一些委員提出的方案並由基本法起草委員會今年四月決定公佈的有四種：(一)香港特別行政區立法機關由八十人組成，由功能團體選出50%，按地區直接選出25%，選舉團選出25%；(二)立法機關由不少於50%的普及而直接的選舉、不多於25%的功能團體選舉、不多於25%的區域組織選舉產生；(三)立法機關成員共六十人，30%由顧問團推選非顧問、40%由功能團體選舉、30%由各地區直接選舉產生；(四)立法機關由工商界佔30%、專業人士佔25%、基層組織佔20%和地區性普選佔25%產生，選舉辦法由法律規定。

以上四種辦法顯然存在着較大的分歧，主要的分歧在於直接選舉和間接選舉的比例的大小、選舉團或顧問團或立法機關是否參加選舉。因此，如何解決這些分歧，需要進行研究和討論，採取慎重的態度。現在基本法起草委員會把這四種辦法公佈出來，廣泛徵詢意見，通過協調再作決定，找出一種能為多數人接受的可行的辦法，是比較適宜的。

為了有助於解決這些分歧，政治體制專題小組提出在立法機關產生的條文中增加一款：“附件二規定的立法會議的產生辦法可根據香港特別行政區的實際情況和循序漸進的原則予以變更。此項變更須經香港特別行政區立法會議全體成員三分之二多數通過，行政長官同意並報全國人民代表大會常務委員會批准”(在行政長官的產生辦法中也增加了與此相同內容的一款)。這是考慮到現在香港各界人士在選舉辦法上有分歧，暫時難以取得完全一致的意見，增加這一款以便在將來適當的時候可以修改選舉辦法，而修改的程序又不是很困難，使分歧的意見逐步更加接近些，這就有可能促進不同意見將來得到進一步解決。所以在基本法(草案)徵求意見稿的第四十五條、第六十七條中都有一個如上述內容的第三款。

根據基本法(草案)徵求意見稿第七十二條,立法會議的職權有九項,大體上可歸納五類:(一)立法權。根據基本的規定並依照法定程序制定、廢除和修改法律;(二)審核財政預算和公共開支權。根據行政機關的提案,審核、通過財政預算、決算,批准稅收和公共開支;(三)聽取施政報告、進行辯論和質詢權。聽取行政長官的施政報告並進行辯論,對行政機關的工作提出質詢,就任何有關公共利益的問題進行辯論;(四)任免權。同意終審法院和高等法院首席法官的任免;(五)彈劾權。行政長官如有嚴重違法或瀆職行為,立法會議可依照法定程序進行彈劾。

立法會議的這些職權是根據立法會議的性質和地位、它和行政機關的相互關係、並參考香港現在的情況而訂的。立法會議是立法機關,這一性質決定了它應享有立法權。同時立法機關與行政機關應當互相制衡,行政機關應對立法機關負責,所以立法會議有權審查行政機關提出的財政預算和決算、稅收和公共開支,有權聽取行政長官的施政報告、進行辯論和質詢,有權彈劾行政長官。加上立法會議還可依法迫使行政長官辭職。所以立法機關是能夠實現對行政機關的制衡的。它的職權是比較適當的。

對於主要官員,基本法(草案)徵求意見稿沒有規定可以被彈劾。因為主要官員由行政長官提名,應對行政長官負責,他們是公務人員,還有廉政機構對他們進行監督,他們的違法、瀆職行為應按照一般的法律程序處理。

五、 司法體制、區域組織、公務人員制度基本不變

基本法(草案)徵求意見稿規定香港特別行政區設立終審法院,除因設立終審法院而產生的變化外,原在香港實行的司法體制,予以保留。所以說它是基本不變。因為有了終審法院,故將現在的最高法院改名為高等法院。地方法院改名為區域法院亦較適宜。

基本法(草案)徵求意見稿從多方面體現了保留原在香港實行的司法體制的內容:(一)原高等法院以下的法院、法庭體系不變;(二)法官的任用和免職的制度基本不變;(三)法官以外的其他司法人員的任免制度不變;(四)原在香港任職的法官和其他司法人員均可留用,其年資予以保留,薪金、津貼、福利待遇和服務條件不低於原來的標準;(五)退休或符合規定離職的法官和其他司法人員,包括香港特別行政區成立前已退休或離職者,不論其所屬國籍或居住地點,香港特別行政區政府都按不低於原來的標準,向他們或其家屬支付應得的退休金、酬金、津貼及福利費;(六)法院獨立審判和陪審制度不變;(七)保留原在香港適用的刑事訴訟和民事訴訟中的原則和當事人享有的權利;(八)法院在審理案件時,其他普通法適用地區的司法判例可作參考。以上這些規定也體現了香港特別行政區在司法方面的高度自治權。終審權在香港特別行政區而不在北京的最高人民法院,這在世界各國包括聯邦制國家可以說是個創舉。

香港特別行政區法院的司法管轄權應當加以明確規定,審判權屬於香港特別行政區法院,中央、香港特別行政區的行政機關和立法機關都不能加以干涉。但是香港特別行政區法院管轄的案件的範圍也應加以規定,使法院在審判案件時有所遵循,知道哪些案件屬於它所管轄的範圍,哪些案件不屬於它所管轄的範圍。因此基本法(草案)徵求意見稿第十八條規定:“香港特別行政區法院除繼續保持香港原有法律對法院審判權所作的限制外,對所有的案件均有審判權”。這就對原有的司法管轄範圍保持不變。

應該指出，司法管轄權和終審權有聯繫，又有區別。司法管轄權是指管轄審判哪些案件的權力，指管轄案件的範圍。終審權是指對所管轄的案件有最終一級判決的權力，不需要再到別的地方的法院去上訴，違背了這個原則，就是損害了終審權。如果正確地劃分管轄範圍，說明法院能夠審判、不能夠審判哪些案件，這就不屬於終審權範圍。基本法對香港特別行政區法院的司法管轄權作出仍維持原來的範圍的規定，是比較適當的。

基本法(草案)徵求意見稿還規定香港特別行政區可與全國其他地區的司法機關通過協商依法進行司法方面的聯繫和相互提供協助；在中央人民政府的協助或授權下香港特別行政區政府可與外國就司法互助關係作出適當安排。這些規定反映了香港特別行政區法院和全國其他地方的法院間的互不隸屬和平等關係，也體現了香港特別行政區在司法方面的高度自治。

兩年來政治體制專題小組多次討論過區域組織。大家認為現在的市政局、區域市政局、區議會都是非地方政權性的區域組織，基本法應當加以肯定。至於對兩個市政局和十九個區議會這兩層架構是否需要合併或進行調整，由於香港各界人士現在存有各種不同的意見，政治體制專題小組認為這個問題應當由香港特別行政區將來自己解決，現在還是維持和承認現狀，因此第九十六條寫得比較概括和靈活，其中將兩層架構及其職能都包括在內，沒有寫明是一層或兩層為好，這就給將來的特別行政區政府和居民留下自己決定問題的餘地。

關於香港的公務人員制度，政治體制專題小組參考現在的情況將《中英聯合聲明》中的有關內容完全寫在公務人員一節中，主要的內容是保留原有的公務人員制度，第一百零二條規定：“香港原有關於公務人員的招聘、僱用、考核、紀律、培訓和管理的制度，包括負責公務人員的任用、薪金、服務條件的專門機構，除有關給予外籍人員特權待遇的規定外，予以保留”。

此外，基本法(草案)徵求意見稿還規定在香港特別行政區政府各部門任職的公務人員必須是香港特別行政區永久性居民；原香港政府的包括警察部門任職的公務人員均可留用，其年資予以保留，待遇和服務條件不低於原來的標準；基本法(草案)徵求意見稿還對退休或符合規定離職的公務人員的退休金、酬金、津貼和福利費作了規定；對可任用原香港公務人員中的或持有香港特別行政區永久性居民身份證的英籍和其他外籍人士擔任政府部門的各級公務人員作了規定，還可聘請外籍人士擔任政府部門的顧問。只有主要政府部門的正職和某些主要政府部門的副職必須是香港特別行政區永久居民中的中國公民。

對公務人員的這些規定有利於香港的繁榮和穩定，有利於作為國際金融城市的香港的發展。

總之，政治體制一章經過兩年來政治體制專題小組十五次會議、總體小組一次會議和基本法起草委員會三次全體會議的討論，雖然在許多條文上達到了共識，取得了可喜的成果。但其中還存在一些分歧，還不夠完善，需要我們深入探討、再構思、協調分歧和不斷加以完善，使香港未來的政治體制設計得更好，更加符合香港的實際和未來，能為香港多數人所滿意。

跟進問題(1)

第九、十六、十七、十八、二十二、一百六十九條及附件三

1. 第九條

1.1 原文：香港特別行政區的行政機關、立法機關和司法機關，除使用中文外，還可使用英文。

1.2 問題

- i) 基本法要有與中文本同等法律效力的英文本，“同等法律效力”的意思是怎樣的？
- ii) 具法定地位的基本法英文本應如何制定？
- iii) 中、英文本如有差異時，如不以中文本為準，應如何處理？
- iv) 以中文運作的全國人民代表大會，有何方法、程序去制定一份英文法律，而不會削弱本身的立法責任？
- v) 在普通法制度下，司法人員需參考大量由英文寫成的案例。那麼，中文是否不能在高級法院，如高等法院、上訴庭，以及將成立的終審庭上使用？
- vi) 除了翻譯這技術性問題外，以中文作為普通法制度的法律用語是否可行呢？
- vii) 如果中文能在法庭上使用，又怎樣解決使用英文案例的技術問題呢？

2. 第十六條

2.1 原文：香港特別行政區享有立法權。

香港特別行政區的立法機關制定的法律須報全國人民代表大會常務委員會備案。備案不影響該法律的生效。

全國人民代表大會常務委員會在徵詢其所屬的香港特別行政區基本法委員會後，如認為香港特別行政區的任何法律不符合本法或法定程序，可將有關法律發回重議或撤銷，但不作修改。經全國人民代表大會常務委員會發回重議或撤銷的法律立即失效。該法律的失效無溯及力。

2.2 問題

- i) 審查香港法律的權力是由人大常委執行，還是由人大常委及香港法庭同時執行？
- ii) 根據第十六條的規定，香港法院是否沒有審查法律有否違反基本法或法定程序的權力？
- iii) 如果香港法院有這權力的話，其與人大常委在此權力上的關係又如何？兩個並行的審查權力機構是否可行？
- iv) 審查香港法律的權力，是否應該祇由香港法庭執行？
- v) 在現行的普通法制度下，香港法院是否擁有違憲審查權？香港法院在執行其司法審查權時，審查越權行為(Ultra Vires)的情況是怎樣的？與違憲審查有什麼分別？

3. 第十七條

3.1 原文：在香港特別行政區實行的法律為本法，以及本法第八條規定的香港原有法律和香港特別行政區立法機關制定的法律。

全國人民代表大會和全國人民代表大會常務委員會制定的法律，除本條第三款規定者外，不在香港特別行政區實施。

全國人民代表大會和全國人民代表大會常務委員會制定的有關國防、外交的法律以及其他有關體現國家統一和領土完整並且按本法規定不屬於香港特別行政區高度自治範

圍的法律，凡須在香港特別行政區實施的，由國務院指令香港特別行政區政府在當地公佈或立法實施。

除緊急情況外，國務院在發佈上述指令前，均事先徵詢香港特別行政區基本法委員會和香港特別行政區政府的意見。

香港特別行政區政府如未能遵照國務院的指令行事，國務院可發佈命令將上述法律在香港特別行政區實施。

3.2 問題

- i) 目前有哪些全國性法律是適用於將來香港特別行政區的？
- ii) 如何把須引用到香港的全國性法律列明？是否可採用附件方法？
- iii) 如採用列明的方法，將來同樣性質的新法律又怎樣處理？
- iv) 全國性法律在香港的執行由香港法院管轄，還是由中央政府有關方面直接管理？如香港法院有權審理涉及違反全國性法律的案件時，中央政府有關方面與香港法院在這權力和職責上的關係如何？
- v) 有建議認為，全國性適用在香港的法律應通過香港特別行政區立法機關的程序才能生效。
 - ① 這程序是否有權決定這條法律不適用香港、不用執行？即香港特別行政區的立法機關對這些法律是否有否決權？
 - ② 香港立法機關可否修改這些法律？
 - ③ 香港立法機關是否只能在不違背該法律原意下，作補充規定？
 - ④ 香港立法機關是否不能改動而只是程序上通過？

4. 第十八條

4.1 原文：香港特別行政區享有獨立的司法權和終審權。

香港特別行政區法院除繼續保持香港原有法律原則對法院審判權所作的限制外，對所有的案件均有審判權。

香港特別行政區法院對屬於中央人民政府管理的國防、外交事務和中央人民政府的行政行為的案件無管轄權。香港特別行政區法院在審理案件中，如遇有涉及國防、外交和中央人民政府的行政行為的問題，應徵詢行政長官的意見。行政長官就該等問題發出的證明文件對法院有約束力。

行政長官在發出上述證明文件前，須取得全國人民代表大會常務委員會或國務院的證明書。

4.2 問題

- i) 何謂“中央人民政府的行政行為”？
- ii) 由誰決定某一案件是否屬“國防、外交事務或中央人民政府的行政行為”？
- iii) 國營企業、金融經濟單位的一些商業行為，是否屬於中央政府行政行為？
- iv) 在現行的制度下，香港法院在司法管轄的範圍上有什麼的限制？
- v) 九七年後，香港法院作為一享有終審權的地區法院，其司法管轄範圍又會受到怎樣的影響？

5. 第二十二條

5.1 原文：香港特別行政區應以法律禁止任何破壞國家統一和顛覆中央人民政府的行為。

5.2 問題

- i) “破壞國家統一”和“顛覆中央人民政府”的意義是什麼？可否有更明確的方法去表達？
- ii) “行為”是否包括思想、言論或意見的發表？
- iii) 有建議認為這條應取消。具體理由是什麼？

理由如果是①香港可容許這些行為。請進一步解釋清楚？

②香港不會有這些行為，故無此需要。請說明理由？

③定義不能界定清楚，不寫為佳。見問題i)下半部。

④其他，請說明。

6. 第一百六十九條

6.1 原文：本法的解釋權屬於全國人民代表大會常務委員會。

全國人民代表大會常務委員會如對本法的條款作出解釋，香港特別行政區法院在引用該條款時，即應以全國人民代表大會常務委員會的解釋為準，但在此以前作出的判決不受影響。

香港特別行政區法院在審理案件時可對本法的條款進行解釋。如案件涉及本法關於國防、外交和其他屬於中央人民政府管理的事務的條款的解釋，香港特別行政區法院在對案件作出終局判決前，應提請全國人民代表大會常務委員會對有關條款作出解釋。

全國人民代表大會常務委員會在對本法進行解釋前徵詢其所屬的香港特別行政區基本法委員會的意見。

6.2 問題

- i) 人大常委會對基本法的立法解釋與香港法院對基本法司法的解釋有何分別？
- ii) 人大常委會對基本法解釋與香港法院享有終審權，在程序上的配合會是怎樣？
- iii) “終局判決”的定義為何？
- iv) 由誰決定某一案件是否涉及國防、外交及其他屬於中央人民政府管理的事務的條款

7. 附件三：

7.1 原文：香港特別行政區第一屆政府和立法會議的產生辦法：.... (略)

7.2 問題

- i) 中國政府如何能在九七年前在香港根據其法律——基本法安排第一屆特區政府的組成這純屬中國內政的事務，而不影響當時英國對香港的管治權，及兩國政府的關係？
- ii) 如英國在這安排上有所參與，是什麼性質的？如純屬技術上的協助，會否影響中國主權的體現？
- iii) 他國政府的配合，能否以中國法律規定之？如果不是立法的問題，這又是否基本法能解決的問題？
- iv) 基本法就這問題應否有頗為詳盡的規定？

跟進問題(1)

第九、十六、十七、十八、二十二、一百六十九條及附件三

基本法諮詢委員會秘書處提供

1.2 問題

- i) 基本法要有與中文本同等法律效力的英文本，“同等法律效力”的意思是怎樣的？
- ii) 具法定地位的基本法英文本應如何制定？
- iii) 中、英文本如有差異時，如不以中文本為準，應如何處理？
- iv) 以中文運作的全國人民代表大會，有何方法、程序去制定一份英文法律，而不會削弱本身的立法責任？
- v) 在普通法制度下，司法人員需參考大量由英文寫成的案例。那麼，中文是否不能在高級法院如高等法院、上訴庭，以及將成立的終審庭上使用？
- vi) 除了翻譯這技術性問題外，以中文作為普通法制度的法律用語是否可行呢？
- vii) 如果中文能在法庭上使用，又怎樣解決使用英文案例的技術問題呢？

2. 第十六條

2.1 原文：香港特別行政區享有立法權。

香港特別行政區的立法機關制定的法律須報全國人民代表大會常務委員會備案。備案不影響該法律的生效。

全國人民代表大會常務委員會在徵詢其所屬的香港特別行政區基本法委員會後，如認為香港特別行政區的任何法律不符合本法或法定程序，可將有關法律發回重議或撤銷，但不作修改。經全國人民代表大會常務委員會發回重議或撤銷的法律立即失效。該法律的失效無溯及力。

2.2 問題

- i) 審查香港法律的權力是由人大常委執行，還是由人大常委及香港法庭同時執行？
- ii) 根據第十六條的規定，香港法院是否沒有審查法律有否違反基本法或法定程序的權力？
- iii) 如果香港法院有這權力的話，其與人大常委在此權力上的關係又如何？兩個並行的審查權力機構是否可行？
- iv) 審查香港法律的權力，是否應該祇由香港法庭執行？
- v) 在現行的普通法制度下，香港法院是否擁有違憲審查權？香港法院在執行其司法審查權時，審查越權行為(Ultra Vires)的情況是怎樣的？與違憲審查有什麼分別？

3. 第十七條

3.1 原文：在香港特別行政區實行的法律為本法，以及本法第八條規定的香港原有法律和香港特別行政區立法機關制定的法律。

全國人民代表大會和全國人民代表大會常務委員會制定的法律，除本條第三款規定者外，不在香港特別行政區實施。

全國人民代表大會和全國人民代表大會常務委員會制定的有關國防、外交的法律以及其他有關體現國家統一和領土完整並且按本法規定不屬於香港特別行政區高度自治範

圍的法律，凡須在香港特別行政區實施的，由國務院指令香港特別行政區政府任當地公佈或立法實施。

除緊急情況外，國務院在發佈上述指令前，均事先徵詢香港特別行政區基本法委員會和香港特別行政區政府的意見。

香港特別行政區政府如未能遵照國務院的指令行事，國務院可發佈命令將上述法律在香港特別行政區實施。

3.2 問題

- i) 目前有哪些全國性法律是適用於將來香港特別行政區的？
- ii) 如何把須引用到香港的全國性法律列明？是否可採用附件方法？
- iii) 如採用列明的方法，將來同樣性質的新法律又怎樣處理？
- iv) 全國性法律在香港的執行由香港法院管轄，還是由中央政府有關方面直接管理？如香港法院有權審理涉及違反全國性法律的案件時，中央政府有關方面與香港法院在這權力和職責上的關係如何？
- v) 有建議認為，全國性適用在香港的法律應通過香港特別行政區立法機關的程序才能生效。
 - ① 這程序是否有權決定這條法律不適用香港、不用執行？即香港特別行政區的立法機關對這些法律是否有否決權？
 - ② 香港立法機關可否修改這些法律？
 - ③ 香港立法機關是否只能在不違背該法律原意下，作補充規定？
 - ④ 香港立法機關是否不能改動而只是程序上通過？

4. 第十八條

4.1 原文：香港特別行政區享有獨立的司法權和終審權。

香港特別行政區法院除繼續保持香港原有法律原則對法院審判權所作的限制外，對所有的案件均有審判權。

香港特別行政區法院對屬於中央人民政府管理的國防、外交事務和中央人民政府的行政行為的案件無管轄權。香港特別行政區法院在審理案件中，如遇有涉及國防、外交和中央人民政府的行政行為的問題，應徵詢行政長官的意見。行政長官就該等問題發出的證明文件對法院有約束力。

行政長官在發出上述證明文件前，須取得全國人民代表大會常務委員會或國務院的證明書。

4.2 問題

- i) 何謂“中央人民政府的行政行為”？
- ii) 由誰決定某一案件是否屬“國防、外交事務或中央人民政府的行政行為”？
- iii) 國營企業、金融經濟單位的一些商業行為，是否屬於中央政府行政行為？
- iv) 在現行的制度下，香港法院在司法管轄的範圍上有什麼的限制？
- v) 九七年後，香港法院作為一享有終審權的地區法院，其司法管轄範圍又會受到怎樣的影響？

5.1 原文：香港特別行政區應以法律禁止任何破壞國家統一和顛覆中央人民政府的行為。

5.2 問題

- i) “破壞國家統一”和“顛覆中央人民政府”的意義是什麼？可否有更明確的方法去表達？
- ii) “行為”是否包括思想、言論或意見的發表？
- iii) 有建議認為這條應取消。具體理由是什麼？

理由如果是①香港可容許這些行為。請進一步解釋清楚？

②香港不會有這些行為，故無此需要。請說明理由？

③定義不能界定清楚，不寫為佳。見問題i)下半部。

④其他，請說明。

6. 第一百六十九條

6.1 原文：本法的解釋權屬於全國人民代表大會常務委員會。

全國人民代表大會常務委員會如對本法的條款作出解釋，香港特別行政區法院在引用該條款時，即應以全國人民代表大會常務委員會的解釋為準，但在此以前作出的判決不受影響。

香港特別行政區法院在審理案件時可對本法的條款進行解釋。如案件涉及本法關於國防、外交和其他屬於中央人民政府管理的事務的條款的解釋，香港特別行政區法院在對案件作出終局判決前，應提請全國人民代表大會常務委員會對有關係款作出解釋。

全國人民代表大會常務委員會在對本法進行解釋前徵詢其所屬的香港特別行政區基本法委員會的意見。

6.2 問題

- i) 人大常委會對基本法的立法解釋與香港法院對基本法司法的解釋有何分別？
- ii) 人大常委會對基本法解釋與香港法院享有終審權，在程序上的配合會是怎樣？
- iii) “終局判決”的定義為何？
- iv) 由誰決定某一案件是否涉及國防、外交及其他屬於中央人民政府管理的事務的條款

7. 附件三：

7.1 原文：香港特別行政區第一屆政府和立法會議的產生辦法：.... (略)

7.2 問題

- i) 中國政府如何能在九七年前在香港根據其法律——基本法安排第一屆特區政府的組成這純屬中國內政的事務，而不影響當時英國對香港的管治權，及兩國政府的關係？
- ii) 如英國在這安排上有所參與，是什麼性質的？如純屬技術上的協助，會否影響中國主權的體現？
- iii) 他國政府的配合，能否以中國法律規定之？如果不是立法的問題，這又是否基本法能解決的問題？
- iv) 基本法就這問題應否有頗為詳盡的規定？

「越權無效」與「違憲審查」

基本法諮詢委員會秘書處提供

根據基本法(草案)徵求意見稿的第十六條的第三節,「全國人民代表大會常務委員會在徵詢其所屬的香港特別行政區基本法委員會後,如認為香港特別行政區的任何法律不符合本法或法定程序,可將有關法律發回重議或撤銷,但不作修改。經全國人民代表大會常務委員會發回重議或撤銷的法律立即失效。該法律的失效無溯及力。」規定香港特別行政區未來審查法律違反基本法的權力,是在人大常委。在討論這條文時,有意見認為目前香港的法庭,是有審查法律「越權無效」的權力的,故未來特別行政區有關這方面的權力,仍應由法庭執行。但有意見認為「越權無效」與「違憲審查」,在不同情況下,是有分別的。本文的主旨,是探討這個兩個法律觀念的含義,及他們引用在目前與將來的制度中的影響。

「越權無效」與「司法審轄違憲法律及行政行為」

不成文憲法下的普通法制度

任何基於某種法律而形成的體系,不論是國內法制里的公司和法人、國際法上的條約性組織,以至根據本身憲法而存在的政府和國家,其功能、運作及權力範圍在有關法律上都或多或少地受到一定的限制。而假如這體系在行事上超越了有關法律所賦予的權力範圍,其行為便會因為「越權無效」(ULTRA VIRES; i.e. "BEYOND THE POWERS")的原則而被判違法或無法律效力。至於「司法審轄違憲法律及行政行為」(JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF LEGISLATION AND EXECUTIVE ACTS)的意思,是指國家的司法機關審轄立法機關制立的法律及行政機關的行為是否符合憲法所賦予的權力範圍的力量。司法機關的這種權力在不同的法制下是有不同的性質的。

首先,英國的憲法是不成文的,其系統及原則乃經過長年累月的實際政治運作而演變出來,並受到國家司法機關的承認及執行,所以,實際上英國的憲法原則大都存在於其法院的判例里面。其中一個最重要的憲法原則,是「國會立法權至上」(SUPREMACY OF PARLIAMENT TO LEGISLATE)的原則,意思是英國國會制立的法律是不容行政或司法機關質疑的,行政及司法機關有責任一定要接受和執行國會制立的法律。國會至高無上的立法權在理論上唯一的限制,是它不能制訂任何約束本身無限立法權的法律:這即是說,國會不能有效地制立一條「永遠不能被廢除」的法律,因為這不符合國會可以隨時刪改、廢除或制訂新法取代舊法的力量。在這個政治架構下,司法機關並無對國會監察的權力,即審查「越權無效」與「司法審轄違憲法律」的程序,並不能用到國會身上去。

保證國會不制訂不公正法律的力量,在英國憲法內,並不屬於司法機關;這種保證實際上是來自純粹政治運作:英國政制是施行「國會政府」(PARLIAMENTARY GOVERNMENT)的制度,政府的行政權與立法權並不是完全分割的,因為代表行政機關的政府必須取得國會下議院多數議員的支持才能上台,所動議的法案才能獲得通過成為法律;一個專橫極權的政府假如失去了下議院的支持,不但動議的法案不能通過,而且一旦大多數議員對政府投「不信任」票(VOTE OF NO CONFIDENCE),政府便必須解散,再進行大選。

雖然英國法院無權審轄國會制訂的法律，但在國會以下「委任立法」(DELEGATED LEGISLATION)的層次卻是有審轄權的。所謂「委任立法」，是指國會授權在同一法制內讓國會以下的某些機關在有限的範圍內制訂法律，而法院則有權審轄這些經過授權而制訂的法律是否因超越其範圍而無效。例如，香港政府為本港立法的權力便是「委任立法」的一種。根據「英皇制誥」第七條，港督與行政局有權制訂治理香港的法律；這權力雖廣卻依然是有限的，因為香港的法律不能跟英國國會制訂的法律有所抵觸，如有出入的話，法院是會遵從國會的法律的。而香港的立法機關本身，在本港的法制內，也是可以授權以下的某些機關進行授權立法的：例如，香港法院的制度是根據香港的立法機關所制訂的「條例」而成立的，這些條例不但明定了各級法院的權力範圍，同時亦授權法院在其權力範圍內自行制定本身運作的「規則」(RULES)，規條如不符合其根據之指令，便是越權無效的。如在一九七五年的「周漢傑對鄭國材」(CHAU HON-LEUNG V. KONG KWOK-CHOI (1975) HKLR 529)一案中，「最高法院指令」第十八條第七項(S18(7) SUPREME COURT ORDINANCE)中，當事人可從經歷司(REGISTRAR)上訴到內庭法官(JUDGE IN CHAMBERS)的註明，便跟「最高法院規條」第五十八章第二條(ORDER 58 RULE 2, RULES OF THE SUPREME COURT)中當事人可從經歷司上訴到整個法庭的規定有出入，結果後者因為子法不能違反母法的原故而被判越權無效。

成文憲法下的普通法制度

美國雖然也是行佑源自英國的「普通法」法制，但由於美國政府是一個擁有明文憲法的聯邦共和國政府，基於政治體制的不同，在憲法上對司法審轄立法機關制定違憲法律的問題的處理，跟英國是不同的。在美國全國法律享有最崇高地位的是明文的憲法，美國政府的立法機關並不擁有像英國「國會立法權至上」的無限立法權力，因為其立法權是承自美國憲法的，而並非像英國國會般的來自本身。是以，在美國的法制里面，法院有權解釋美國憲法的條文，及拒絕執行立法機關所制訂的、因為違憲而無效的法律；這種司法審轄權最終由美國最高法院(SUPREME COURT)所擁有。這權力是在一八零三年的「馬貝利對麥迪遜」(MARBURY V. MADISON (1803) 1 Cr. 137)一案的判決中首先出現。在一八零零年大選落敗的總統亞當斯(ADAMS)在下台前委任了一些自己政黨的人作保安官(JUSTICES OF THE PEACE)，但新總統傑佛遜(JEFFERSON)上任後，卻指使自己的國務卿麥迪遜，不要送出這些前任總統發出的委任書的其中一部份。馬貝利是其中一個收不到委任書的人，他根據一七八九年「司法機關法例」第十三條(S. 13 JUDICIARY ACT 1789)中最高法院在初審中有權向政府人員發出執行令(MANDAMUS)的註明，把事情告上最高法院，要求發出執行令迫使國務卿送出委任書。可是法院卻發現，「司法機關法例」第十三條的註明並不符合美國憲法第三條第二款最高法院只能初審與外國政府或使節有關的案件的規定。由於馬貝利的情况並不屬這範圍內，其對法院的要求便沒有被接納。換言之，眾議院(CONGRESS)制訂的「司法機關法例」第十三條因抵觸美國憲法而得不到法院的執行；立法機關制定的法律如違反憲法都是越權無效的。

「越權無效」的原則，除了適用於司法審轄立法違憲的情形之外，對於法院對行政機關的行為的審轄也是適用的，在這方面便涉及了普遍所稱的「行政法」(ADMINISTRATIVE LAW)。與立法違憲的情况一樣，政府的行政機關的運作，是要依照法律的規定在所被賦與的權力範

可以判其行為越權無效，而且在有需要的情形下，還可發出禁制令 (INJUNCTION)，阻止有關的行政機關作出違憲行為，或發出執行令 (MANDAMUS) 迫令疏職的行政機關執行在法律上的職務。

審轄權的限制

可是，這不表示普通法法制內的法院在憲法上有無限的審轄政府行政機關行政為的權力，因為在普通法法制內的法院都會自律地對司法審轄行政行為的權力作出某些限制。例如美國憲法里面的所謂「政治問題」 (POLITICAL QUESTION) 的原則，又或是英國憲法內類似的所謂「國家事實」 (FACT OF STATE) 的原則，都屬於這種法院對司法審轄行政行為權力的自律性限制，在習慣上劃出一系列由於其政治性質不應由法院過問的事情；舉簡單的例子，法院是無權過問甚麼國家受本國承認、某人是否享有外交特權及豁免、和有關宣戰及和平等的問題的；凡涉及這些「國家事實」或「政治問題」，由政府行政機關對這些事情所發出的證明書是有法律上的約束力的，法院必須接受而不能過問。雖然法院無權自行決定「政治問題」或「國家事實」，但至於有關案件是否涉及「政治問題」或「國家事實」，是由法院本身判斷的，決定有涉及後才須交由行政機關證明，最後才根據證明作判決。（請見參考資料(二)「國家行為」和「國家事實」的概念一文。）

司法審轄立法違憲與「司法機關政治化」的問題

從上面所作的英、美兩國憲法的比較知道，美國法院是有權進行司法審轄最高立法機關所制立的違憲法律的，但英國的法院卻由於「國會立法權至上」的原則而只在國會以下「委任立法」的層面上才擁有這種權力。是以，英國國會在理論上能夠擁有無限的立法權力，但美國國會的立法權卻受到不能抵觸國家憲法的限制。

在英、美兩種不同的制度底下，國家的法院所扮演的角式也不同：在英制下的法院，只能執行卻不能過問最高立法機關制定的法律，但在美制下的法院，卻能夠以違反憲法的理由，否定最高立法機關所制立的法律的有效性。為此，美國的司法機關，由於其司法審轄立法違憲的權力的關係，是十分「政治性」的，因為法院在對憲法進行解釋的過程中，對廣泛的社會價值觀念對衡的問題有非常大的自由——譬如對不同社會階層的基本人權的衝突，或政府與個人政治權力的衝突——作出決定，甚至否定立法機關所制立的而法院卻認為是違憲的法律的有效性。

美國最高法院，在憲法的範圍內，對一些社會道德，或各種權力的衝突，都有絕對的解釋權，因而扮演了一個對各種觀點、利益協調者的角色，對一些社會道德問題作出標準，對一些衝突作出決擇。法官可以本着自己的信念，對憲法作出各種解釋，而不受立法機關和行政機關的監管。這個作用，在英國的制度里，是不存在的。故此，美國的一些法官是通過政治選舉產生的。如經委任產生的，過程中也受到一定的政治檢查，如經立法機關同意等。這些制度都是與英國制度不同的。

反之，在英制下的法院卻沒有美國法院那麼廣泛的對社會價值作出決定的「政治功能」因為英國法院沒有權力過問最高立法機關制訂的法律。一切對基本人權和政治權力等不同社會價值觀念的衡量和決定，只在國會辯論某法律的提案時才進行。法院只能在國會以下「委任立法」的有限層面上，才能運用較之美國法制狹窄得多的司法審轄立法違憲的權力。司法機關對一些利益重要問題，或道德標準問題判錯了，也可以由國會立法修正，司法機關並非最後的審判者。但在美國的情況下，最高法院的判決，只有它自己才能推反，不然就只能修改憲法，才能改變一些司法機關制定的標準。

香港法院現行英國的司法制度，司法審轄立法違憲的權力是有限的。雖然說香港立法機關為本港制立法律的權力是「委任立法」的一種，理論上可受到法院的審轄，但實際上，香港立法機關為本港制立的法律唯一可能「違憲」的情況，是當與英國國會制訂的法例或英國政府頒發的授權法令出現抵觸的時候，所以在傳統上香港法院司法審轄立法違憲的權力依照是很有限的。同時，因為香港的終審權在倫敦，故這審轄權是受到宗主國最後的監督的。

香港目前的法官，性質與英國一樣，是非政治性的。在他們受委任的過程中，也不會有任何政治檢查。制度對他們的要求，是純技術性的，只要他們熟悉法律便可以。因為他們在司法機關內，並沒有擔任最後協調各種社會價值、制定道德標準的功能。

簡單來說，「越權無效」的司法審查，是比較單純的檢查，大多是對程序及權力範圍大小的界定，但在違憲審查的程序中，如憲法涉及一些社會價值的取向時，司法機關的解釋，就不單是技術性的解釋，而是價值的取向了。這種社會價值的取向，可以因為時勢的轉變而有所改變，或有新的解釋。也可以因為人事的改變，而有新的解釋。判斷就不能單依靠“先例”來作準則。這令司法機關的人員，負上了一個不同的政治責任。

對於香港法庭他日應否肩負起協調社會價值的這個政治功能的問題，尚有待進一步的探討。如香港的司法制度負上這個政治工作後，應有何相應的改變，也是令人關心的問題。

人大、人大常委與法律解釋

基本法諮詢委員會秘書處提供

基本法(草案)徵求意見稿多處，均有提到全國人民代表大會常務委員會。根據目前的條文，這委員會在審查香港法律是否符合基本法，修改基本法和解釋基本法的各方面，均有重要的作用。故此對這國家機構的了解，對討論有關的條文是極其重要的。尤其是其對法律解釋方面的職能。根據目前的建議，對香港的司法制度，有一定的影響。

全國人民代表大會的體制

根據中華人民共和國一九八二年憲法第三章關於國家機構的第一節第五十七條的註明，中華人民共和國全國人民代表大會是國家的最高權力機關，全國人民代表大會常務委員會是其常設機關。根據第五十八條的註明，全國人民代表大會和全國人民代表大會常務委員會兩者均同時具有為國家立法的權力。

根據第六十二條所載，全國人大的職權包括：修改憲法和監督憲法的實施；制定和修改刑事、民事、國家機構的和其他的基本法律；選舉國家主席和副主席；根據國家主席的提名決定國務院總理的人選；根據國務院總理的提名決定國務院副總理、國務委員、各部部長及其他行政機關負責人的人選；選舉中央軍事委員會主席及根據其提名決定中央軍事委員會其他成員人選；選舉最高人民法院院長及最高人民檢察院檢察長；審查和批准國民經濟和社會發展計劃及國家的預算，與及對以上工作執行的報告；改變或撤銷全國人大常委不適當的決定；批准省、自治區和直轄市的建置，及決定特別行政區的設立及其制度；最後，還有決定戰爭與和平的問題，和其他應當由最高國家權力機關行使的職權。此外，根據第六十一條，全國人大又有權罷免所有根據上一條由它選舉及決定的國家機關各負責人的權力。

根據憲法第五十九條的註明，全國人民代表大會乃由省、自治區、直轄市和軍隊選出來的代表組成，各少數民族都應有適當名額代表；而全國人大代表的選舉是由全國人大常委主持的。全國人大每屆任期五年，除非常情況外，人大常委必須在全國人大屆滿前兩月完成下屆全國人大的選舉。全國人大會議每年舉行一次，由全國人大常委召集；如人大常委認為必要，或全國人大代表五分之一以上提議，可臨時召集全國人大代表會議。全國人大舉行會議時，須選舉主席團主持會議。

全國人民代表大會常務委員會的體制

根據憲法第六十五條，全國人民代表大會常務委員會是由下列人員組成的：委員長、副委員長若干、秘書長、委員若干；此外，人大常委成員應有適當名額的少數民族代表；全國人大推選並有權罷免人大常委的成員，而且人大常委的成員不得擔任國家行政、審判和檢察機關的職務。全國人大常委每屆任期與全國人大相同，行使其職權直到下屆全國人大選出新的常務委員會為止；其次，便是委員長與副委員長連續任職不得超過兩屆。

除了兩者都有權在本身的職責範圍內制定和修改法律（全國人大負責「刑事、民事、國家機構的和其他的基本法律」，人大常委則負責此範圍以外的其他法律）外，便是國家憲法的修改權只屬全國人大。而解釋一切法律（包括國家憲法）的權力，卻屬人大常委。此外，人大常委對中國法律其實還有廣泛的職權，例如在全國人大閉會期間，在不與該法律的原本原則相抵觸下，對全國人大制訂的法律進行部分補充和修改、撤銷國務院制定的同憲法、法律相抵觸的行政法規、決定和命令，以及撤銷省、自治區、直轄市國家權力機關制定的同憲法、法律和行政法規相抵觸的地方性法規和決議。

解釋法律的權力

根據第六十七條，解釋法律（包括憲法）的權力屬於全國人民代表大會常務委員會；然而這職權是受到人大監督的，因為根據中國憲法第六十二條第十一項，全國人民代表大會擁有權「改變或者撤銷全國人民代表大會常務委員會不適當的決定」，這當然包括人大常委所作的關於一切中國法律（包括憲法）的解釋的決定。是以，雖然在慣性使用上，所有中國法律的解釋由人大常委所進行，但這卻並非表示人大常委對法律的解釋權是絕對的，因為憲法為全國人民大會保留了否定人大常委任何決定的權力。

立法解釋與司法解釋

全國人民代表大會常務委員會為應付解釋法律問題的工作，消除由於對法律條文理解不一致而產生的對法律的正確實施的影響，於一九八一年通過了「關於加強法律解釋工作的決議」。這決議把有關法律解釋的問題分作幾類，實際是把各類別的法律功能，分派給有關的部門。決議中對法律解釋問題的分類如下：

- 「一、凡關於法律、法令條文本身需要進一步明確界限或作補充規定的，由全國人民代表大會常務委員會進行解釋或用法令加以規定。
- 二、凡屬於法院審判工作中具體應用法律、法令的問題，由最高人民法院進行解釋。凡屬於檢察院檢察工作中具體應用法律、法令的問題，由最高人民檢察院進行解釋。最高人民法院和最高人民檢察院的解釋如果有原則性的分歧，報請全國人民代表大會常務委員會解釋或決定。
- 三、不屬於審判和檢察工作中的其他法律、法令如何具體應用的問題，由國務院及主管部門進行解釋。
- 四、凡屬於地方性法規條文本身需要進一步明確界限或作補充規定的，由制定法規的省、自治區、直轄市人民代表大會常務委員會進行解釋或作出規定。凡屬於地方性法規如何具體應用的問題，由省、自治區、直轄市人民政府主管部門進行解釋。」

這個「決議」的效果，是把有關法律的具體應用的問題交由有關的政府機關進行，而法律條文本身需要進一步明確界限或作補充規定的則仍由人大常委本身負責（類似附屬立法）。這個決議亦首次說明了「立法解釋」、「司法解釋」與「行政解釋」並行的制度。「立法解釋」與「司法解釋」兩者有一定的關係。立法機關解釋法律，並非取代法庭上審案時對法律必須作出的解釋。也不能替代法庭對具體案件的審判工作及其在過程中引用法律的功能。這幾種並行解釋的一致性，由人大常委的立法解釋來統一，亦即「司法解釋」與「行政解釋」均要符合人大常委對那法律的解釋。為了保障司法獨立，人大常委在憲法下並無權撤銷最高人民法院和最高人民檢察院的決定。但人大常委在這決議中為本身保留了當這兩個機關對法律的解釋出現原則性的分歧時作出解釋或決定的權力。

反之，在英制下的法院卻沒有美國法院那麼廣泛的對社會價值作出決定的「政治功能」，因為英國法院沒有權力過問最高立法機關制訂的法律。一切對基本人權和政治權力等不同社會價值觀念的衡量和決定，只在國會辯論某法律的提案時才進行。法院只能在國會以下「委任立法」的有限層面上，才能運用較之美國法制狹窄得多的司法審轄立法違憲的權力。司法機關對一些利益重要問題，或道德標準問題判錯了，也可以由國會立法修正，司法機關並非最後的審判者。但在美國的情況下，最高法院的判決，只有它自己才能推反，不然就只能修改憲法，才能改變一些司法機關制定的標準。

香港法院現行英國的司法制度，司法審轄立法違憲的權力是有限的。雖然說香港立法機關為本港制立法律的權力是「委任立法」的一種，理論上可受到法院的審轄，但實際上，香港立法機關為本港制立的法律唯一可能「違憲」的情況，是當與英國國會制訂的法例或英國政府頒發的授權法令出現抵觸的時候，所以在傳統上香港法院司法審轄立法違憲的權力依照是很有限的。同時，因為香港的終審權在倫敦，故這審轄權是受到宗主國最後的監督的。

香港目前的法官，性質與英國一樣，是非政治性的。在他們受委任的過程中，也不會有任何政治檢查。制度對他們的要求，是純技術性的，只要他們熟悉法律便可以。因為他們在司法機關內，並沒有擔任最後協調各種社會價值、制定道德標準的功能。

簡單來說，「越權無效」的司法審查，是比較單純的檢查，大多是對程序及權力範圍大小的界定，但在違憲審查的程序中，如憲法涉及一些社會價值的取向時，司法機關的解釋，就不單是技術性的解釋，而是價值的取向了。這種社會價值的取向，可以因為時勢的轉變而有所改變，或有新的解釋。也可以因為人事的改變，而有新的解釋。判斷就不能單依靠“先例”來作準則。這令司法機關的人員，負上了一個不同的政治責任。

對於香港法庭他日應否肩負起協調社會價值的這個政治功能的問題，尚有待進一步的探討。如香港的司法制度負上這個政治工作後，應有何相應的改變，也是令人關心的問題。

Discussion Paper (2)

FOLLOW-UP QUESTIONS (1)

on

Articles 9, 16, 17, 18, 22 and 169

and

Annex III

-- -- --Prepared by the Secretariat
of the Consultative Committee for the Basic Law

1. Article 9

1.1 Text: "In addition to the Chinese language, the English language may also be used by the executive authorities, legislature and judicial organs of the Hong Kong Special Administrative Region."

1.2 Questions

- i) It is said that there will be an English version of the Basic Law which will have the same legal effect as the Chinese version. What does it mean by having "the same legal effect"?
- ii) How should a legally binding English version of the Basic Law be produced?
- iii) How should discrepancies between the Chinese and the English versions be resolved if the Chinese one would not prevail?
- iv) In what way or through what procedure could the NPC, with Chinese as its working language, pass a law in English without prejudice to its legislative responsibility?
- v) Under the common law system, judicial officers constantly have to refer to precedents written in English. Does this imply that the Chinese language will not be used in the higher courts, such as the High Court, the Court of Appeal and the future Court of Final Appeal?
- vi) The technical question of translation aside, is it feasible to use Chinese as language of the law under the common law system?
- vii) If Chinese could be used in the courts, how should the technicality of using English-based precedents be resolved?

2 Article 16

2.1 Text: "The Hong Kong Special Administrative Region is vested with legislative power

"Laws enacted by the legislature of the Hong Kong Special Administrative Region shall 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 its Committee for the Basic Law of the Hong Kong Special Administrative Region, considers that any law of the Region is not in conformity with the Law or legal procedure, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This provision shall not have retroactive effect."

2.2 Questions

- i) Will the authority to review Hong Kong laws be exercised by the NPC Standing Committee alone or both the NPC Standing Committee and Hong Kong courts?
- ii) Do the provisions of Article 16 imply that Hong Kong courts will not have the power to review whether any Hong Kong laws have violated the Basic Law or legal procedures?
- iii) If Hong Kong courts are vested with this power, how will they stand in relation to the NPC Standing Committee in the exercise of this power? Is it feasible to have two parallel organs responsible for reviewing laws?
- iv) Should the power to review Hong Kong laws be exercised by Hong Kong courts alone?
- v) Do Hong Kong courts have the power of constitutional review under the present common law system? In exercising their power of judicial review, how do they deal with ultra vires? In what way does it differ from constitutional review?

3. Article 17

3.1 Text: "The laws of the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as stipulated in Article 8 of this Law, and the laws enacted by the legislature of the Hong Kong Special Administrative Region.

"Laws enacted by the National People's Congress or its Standing Committee will not be applied in the Hong Kong Special Administrative Region except for those stipulated in Paragraph 3 of this Article

"Laws, enacted by the National People's Congress or its Standing Committee, which relate to defence and foreign affairs as well as other laws which give expression to national unity and territorial integrity and which, in accordance with the provisions of this Law, are outside the limits of the high degree of autonomy of the Hong Kong Special Administrative Region, shall be applied locally by the government of the Hong Kong Special Administrative Region by way of promulgation or legislation on the directives of the State Council, whenever there is the need to apply any of such laws in the Region.

"Except in cases of emergency, the State Council shall consult the Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Hong Kong Special Administrative Region before issuing the above-mentioned directives.

"If the government of the Hong Kong Special Administrative Region fails to act in compliance with the directives given by the State Council, the State Council may decree the application of the above-mentioned law in the Hong Kong Special Administrative Region."

3.2 Questions

- 1) What are the nation-wide laws which shall be applied in the future HKSAR?
- ii) If the nation-wide laws which shall be applied in the HKSAR are to be listed, can the list be in the form of an annex?
- iii) If these laws are to be listed, how should new laws of similar nature be dealt with in the future?
- iv) Would the implementation of nation-wide laws in Hong Kong be within the jurisdiction of Hong Kong courts or the relevant authorities of the Central People's Government? If Hong Kong courts have the power to adjudicate cases which involve violation of nation-wide laws, how will they stand in relation to the relevant authorities of the Central Government in the exercise of this power and in respect of their terms of reference?
- v) It was proposed that nation-wide laws applicable to Hong Kong should only take effect after going through a certain procedure with the HKSAR legislature.
 - (1) During this procedure, will the HKSAR legislature have the power to decide that a particular law is not applicable to Hong Kong and therefore need not be enforced? In other words, will the HKSAR legislature have the power to veto these laws?

- (2) Will the HKSAR legislature be in a position to amend these laws?
- (3) Will the HKSAR legislature only be allowed to add down additional stipulations provided that they are not inconsistent with the original intentions of these laws?
- (4) Is it true that the HKSAR legislature will not be allowed to make any amendment and will only be able to do so through the formality of passing these laws?

4. Article 18

- 4.1 Text: "The HKSAR is vested with independent judicial power including that of final adjudication.

"Courts of the HKSAR shall have jurisdiction over all cases in the Region, except that the restrictions of the jurisdiction imposed by Hong Kong's previous legal system shall be maintained."

"Courts of the HKSAR shall have no jurisdiction over cases relating to defence and foreign affairs, which are the responsibility of the Central People's Government, and cases relating to the executive acts of the Central People's Government. Courts of the HKSAR shall seek the advice of the Chief Executive whenever questions concerning defence, foreign affairs or the executive acts of the Central People's Government arise in any legal proceeding. A statement issued by the Chief Executive regarding such questions shall be binding on the courts.

"Before issuing such a statement, the Chief Executive shall obtain a certificate from the Standing Committee of the State Council or the State Council."

4.2 Questions

- i) What is meant by "executive acts of the Central People's Government"?
- ii) Who is to decide whether a case relates to "defence, foreign affairs or the executive acts of the Central People's Government"?
- iii) Do commercial acts of state enterprises and financial institutions come under the category of executive acts of the Central People's Government?
- iv) What are the restrictions on the jurisdiction of Hong Kong courts under the current system?

Reference (9)

"ULTRA VIRES"

AND

"CONSTITUTIONAL REVIEW"

Prepared by the Secretariat of
the Consultative Committee for the Basic Law

- v) Will there be any change to the jurisdiction of Hong Kong courts after 1997 as they become regional courts with the power of final adjudication?

5. Article 22

5.1 Text: "The HKSAR shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government"

5.2 Questions

- i) What does it mean by the expressions "undermine national unity" and "subvert the Central People's Government"? Is there a better way of expressing these two ideas?
- ii) Does the word "act" here also include the expression of thoughts, words and opinions?
- iii) It was suggested that this article should be deleted. What are the reasons given?
 - (1) If it is because Hong Kong can tolerate such acts, then further clarification is needed
 - (2) If it is because such acts will not happen in Hong Kong, then reasons for this claim should be given to show why this article is not necessary
 - (3) If it is because the terms are not well defined, then efforts should be made to find a better way of expressing them
 - (4) If it is because of other reasons, please explain

6. Article 169

6.1 Text: "The power of interpretation of this Law is vested in the Standing Committee of the NPC

"When the Standing Committee of the NPC makes an interpretation of a provision of this Law, the courts of the HKSAR, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

"The courts of the HKSAR may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government, the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the NPC.

"The Standing Committee of the NPC shall consult the Standing Committee for the Basic Law of the HKSAR before giving interpretation of this Law"

6.2 Questions

- i) What is the difference between the legislative interpretation of the Basic Law by the NPC Standing Committee and the judicial interpretation of the Basic Law by Hong Kong courts?
- ii) As the NPC Standing Committee shall interpret the Basic Law and Hong Kong courts shall have the power of final adjudication, how will they coordinate with each other in terms of procedures?
- iii) What is the definition of "final judgment"?
- iv) Who is to decide whether a case relates to provisions on defence and foreign affairs and other affairs which are the responsibility of the Central People's Government?

7. Annex III

7.1 Text "Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region" [Please refer to pp 87-88 of the "Draft Basic Law of the HKSAR (for Solicitation Opinions)"]

7.2 Questions

- i) How can the Chinese Government make arrangements for the formation of the first HKSAR Government, which purely its domestic affairs, in accordance with its own law (i.e the Basic Law), without affecting the British administration of Hong Kong at that time and the Sino-British relations?
- ii) If Britain is to play a role in this matter, what will be the nature of its role? If it is purely technical assistance, will it affect China's sovereignty?
- iii) If the assistance of a foreign country is involved, what provisions be made for this in the Chinese law? If it is not a matter of legislation, will the Basic Law be able to deal with the matter?
- iv) Should the Basic Law lay down the details regarding this matter?

* If there is any discrepancy between the Chinese and English versions, the Chinese version shall prevail

made by the legislature of Hong Kong. These ordinances not only expressly lay down the powers of all courts but also authorise the courts to formulate their own "rules" within their powers. Any rule that conflicts with the instructions on which it bases is ultra vires. In *Chau Hon-leung v Kong Kwok-choi* [1975] HKLR 529, there was a conflict between section 18(7) of the Supreme Court Ordinance, which enabled a person affected by any order of a Registrar to appeal to a judge in chambers, and Order 58 rule 2 of the Rules of the Supreme Court (RSC) providing for appeal from a Registrar's assessment of damages to the Full Court. The latter was held ultra vires and ineffective on the ground that no subsidiary legislation should be repugnant to the parent statute.

The system of common law under a written constitution

The United States of America adopts the system of common law originated from the British system. Being a federal government having a written constitution, the USA differs constitutionally from Britain in its provisions regarding the judicial review of unconstitutional legislation, reflecting the basic difference of the political systems of the two countries. In the USA, the written constitution enjoys the highest standing in the nation's legislation. The legislature of the USA does not enjoy the same unlimited legislative power as the supremacy of the British parliament because its power to legislate comes from the constitution, unlike the power of Parliament which derives intrinsically from Parliament itself. Hence, in the US legal system, the courts have the power to interpret the provisions of the constitution and refuse to enforce unconstitutional, thus ineffective, legislation made by the legislature. This power of judicial review ultimately rests with the Supreme Court. The judgement of the case *Marbury v Madison* [1803] 1 Cr. 137 provides the first precedent. President Adams, who lost the presidency election in 1800, had appointed some of his party members as Justices of the Peace before leaving office. When Jefferson, the newly elected president, assumed office, he gave instructions to Madison, then Secretary of State, not to deliver some of the appointment letters issued by the former president. Marbury was one of the persons who did not receive an appointment letter. Citing section 13 of the Judiciary Act 1789 which specified that the Supreme Court in the first instance had the authority to issue a mandamus to a government official, Marbury appealed to the Supreme Court for a mandamus to be directed to Madison requiring him to deliver the appointment letter. However, the court discovered that the specification in section 13 of the Judiciary Act was repugnant to section 3.2 of the constitution which provided that the Supreme Court could only handle first instances of cases relating to foreign governments or ambassadors. Marbury's case did not fall into this category and consequently the court rejected his appeal. In other words, the court refused to enforce section

13 of the Judiciary Act formulated by the Congress on the ground that the section was repugnant to the constitution. An unconstitutional legislation made by the legislature is ultra vires and ineffective.

In addition to judicial review of unconstitutional legislation, the doctrine of ultra vires also applies to the judicial review of executive acts. In this respect reference is made to what is generally called the "administrative law". Similar to the provisions of constitutional review, the operation of the executive must fall within the limits of its powers granted by law. If the executive does not act in accordance with legal procedure or if it acts beyond its powers, the court may hold its act ultra vires and may, where necessary, issue an injunction to prohibit the executive authorities concerned from performing the unconstitutional act or issue a mandamus to force the negligent executive authorities to perform their statutory duties.

Restriction on the power of judicial review

However, the aforementioned powers do not entail that the courts existing in a legal system under the common law may constitutionally exercise unlimited power to review executive acts. The reason is that the courts will, by self-regulation, restrict their own power of judicial review. This restriction may be illustrated by the "political questions" referred to in the US constitution and the so-called "fact of state" contained in the British constitution. In common practice, certain issues are deliberately excluded from the jurisdiction of the court due to their political nature. The courts, for instance, have no right to interfere with matters concerning the recognition of a foreign country, granting of diplomatic privilege and immunity, declaration of war or signing of peace pact. The certificates issued by the executive in relation to these "facts of state" or "political questions" are legally binding and the courts must accept without scrutiny. Although the courts have no power to make decisions on political questions or facts of state, they have the power to decide whether a case is a political question or fact of state. A case being determined as a political question or fact of state will be referred to the executive for certification, and judgement will be made eventually according to the certification granted. (See also Reference (2): The Concepts of "Act of State" and "Fact of State".)

Judicial review of the constitutionality of legislation and the question of "politicalization of the judiciary"

The above comparison between the British and US constitutions reveals that the courts of the USA have the power to review the constitutionality of the legislative

made by the highest legislature, while the courts of Britain, based on the doctrine of parliamentary supremacy, are only allowed to exercise judicial review of the legislation made by a body inferior to Parliament. The British parliament, in theory, is vested with unlimited legislative power. The US congress, on the other hand, has its legislative power restricted by the doctrine that it should not make any law repugnant to constitution.

This constitutional difference dictates the roles played by the courts of the two countries: in Britain, the courts should implement but not interfere with the legislation made by the highest legislature but under the US system, the courts may hold an unconstitutional legislation made by the highest legislature void or inoperative. The judiciary of the US is, therefore, very "political" in the sense that it has the power to perform constitutional review. In the process of interpreting the constitution, the courts enjoy a high degree of liberty in deciding upon questions that involve conflicts between social values -- such as the conflict of basic human rights between different classes, and the conflict of political powers between the government and individuals -- to the extent that they may pronounce a law made by the legislature void or ineffective if they decree the law unconstitutional.

The Supreme Court of the USA is constitutionally empowered to exercise absolute authority in the interpretation of issues involving conflicts between moral values of society or between different powers. Hence, the Supreme Court plays the role of a mediator, coordinating different views and interests of society, laying down standards for moral values and making decisions concerning conflicting issues. Judges may interpret the constitution according to their own beliefs without the supervision of the legislature and the executive. Such function, however, does not exist in the British system. In the US, most judges are elected. If appointed, they are subject to political examination, for instance the approval of the legislature. This is very much different from the British system.

The courts under the British system, unlike their counterparts in the US, do not have the broad "political function" of deciding upon issues that involve social values because the British courts have no authority to interfere with the legislation made by the highest legislature. Judgements or decisions regarding social values -- such as basic human rights and political powers -- are made only when a certain bill is under debate in Parliament. The courts can only perform judicial review of the legislation made by a body inferior to Parliament, but with lesser authority than their counterparts in the US system. Should the judiciary make a wrong judgement on issues of significant interest or on moral values, Parliament will

make a legislation to amend it. In other words, the ruling of the judiciary is not necessarily final. However, in the US, only the Supreme Court can declare cessation of its judgement, or the constitution has to be amended in order to modify the standards laid down by the judiciary.

While the courts of Hong Kong adopt the British judicial system, they have limited power to review the constitutionality of legislation. Although the legislature of Hong Kong is a form of delegated legislation and, in theory, is subject to judicial review, the only instance that a piece of legislation be deemed unconstitutional when it contradicts the Acts of Parliament or the delegated orders of the British government. Hence, traditionally the power with which the courts of Hong Kong review the constitutionality of legislation is very limited. While the authority of final adjudication still rests with London, this power of judicial review of Hong Kong is monitored by its suzerain state -- Britain.

Similar to those of Britain, the present judges of Hong Kong are non-political in nature. Their appointments are not subject to political examination. Under the existing system, judges are only required to have legal expertise since they do not eventually exercise the function of coordinating social and moral values within the judiciary.

In short, the judicial review of ultra vires acts is a simpler process since it mainly defines the dimensions of procedures and powers. However, in the process of constitutional review, if the provisions of the constitution in question involve judgement of certain social values, the interpretation of the judiciary is not only a technical judgement but a matter of value judgement. Such value judgement may change as circumstances change and new interpretations will emerge. Changes in the personnel structure may also lead to new interpretations. Precedent no longer serve as the only guidance for making judgement. Consequently, those working in the judiciary are assigned new political responsibilities.

Whether the courts of Hong Kong should assume the responsibility of coordinating different social values requires further exploration. The change that the court will undergo once the judiciary takes up such responsibilities is also a matter of public concern.

* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

「越權無效」與「違憲審查」

根據基本法(草案)徵求意見稿的第十六條的第三節,「全國人民代表大會常務委員會在徵詢其所屬的香港特別行政區基本法委員會後,如認為香港特別行政區的任何法律不符合本法或法定程序,可將有關法律發回重議或撤銷,但不作修改。經全國人民代表大會常務委員會發回重議或撤銷的法律立即失效。該法律的失效無溯及力。」規定香港特別行政區未來審查法律違反基本法的權力,是在人大常委。在討論這條文時,有意見認為目前香港的法庭,是有審查法律「越權無效」的權力的,故未來特別行政區有關這方面的權力,仍應由法庭執行。但有意見認為「越權無效」與「違憲審查」,在不同情況下,是有分別的。本文的主旨,是探討這個兩個法律觀念的含義,及他們引用在目前與將來的制度中的影響。

「越權無效」與「司法審轄違憲法律及行政行為」

不成文憲法下的普通法制度

任何基於某種法律而形成的體系,不論是國內法制里的公司和法人、國際法上的條約性組織,以至根據本身憲法而存在的政府和國家,其功能、運作及權力範圍在有關法律上都或多或少地受到一定的限制。而假如這體系在行事上超越了有關法律所賦予的權力範圍,其行為便會因為「越權無效」(ULTRA VIRES; i.e. "BEYOND THE POWERS")的原則而被判違法或無法律效力。至於「司法審轄違憲法律及行政行為」(JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF LEGISLATION AND EXECUTIVE ACTS)的意思,是指國家的司法機關審轄立法機關制立的法律及行政機關的行為是否符合憲法所賦予的權力範圍的力量。司法機關的這種權力在不同的法制下是有不同的性質的。

首先,英國的憲法是不成文的,其系統及原則乃經過長年累月的實際政治運作而演變出來,並受到國家司法機關的承認及執行,所以,實際上英國的憲法原則大都存在於其法院的判例里面。其中一個最重要的憲法原則,是「國會立法權至上」(SUPREMACY OF PARLIAMENT TO LEGISLATE)的原則,意思是英國國會制立的法律是不容行政或司法機關質疑的,行政及司法機關有責任一定要接受和執行國會制立的法律。國會至高無上的立法權在理論上唯一的限制,是它不能制訂任何約束本身無限立法權的法律:這即是說,國會不能有效地制立一條「永遠不能被廢除」的法律,因為這不符合國會可以隨時刪改、廢除或制訂新法取代舊法的力量。在這個政治架構下,司法機關並無對國會監察的權力,即審查「越權無效」與「司法審轄違憲法律」的程序,並不能用到國會身上去。

保證國會不制訂不公正法律的力量,在英國憲法內,並不屬於司法機關;這種保證實際上是來自純粹政治運作:英國政制是施行「國會政府」(PARLIAMENTARY GOVERNMENT)的制度,政府的行政權與立法權並不是完全分割的,因為代表行政機關的政府必須取得國會下議院多數議員的支持才能上台,所動議的法案才能獲得通過成為法律;一個專橫極權的政府假如失去了下議院的支持,不但動議的法案不能通過,而且一旦大多數議員對政府投「不信任」票(VOTE OF NO CONFIDENCE),政府便必須解散,再進行大選。

雖然英國法院無權審轄國會制訂的法律，但在國會以下「委任立法」(DELEGATED LEGISLATION)的層次卻是有審轄權的。所謂「委任立法」，是指國會授權在同一法制內讓國會以下的某些機關在有限的範圍內制訂法律，而法院則有權審轄這些經過授權而制訂的法律是否因超越其範圍而無效。例如，香港政府為本港立法的權力便是「委任立法」的一種。根據「英皇制誥」第七條，港督與行政局有權制訂治理香港的法律；這權力雖廣卻依然是有限的，因為香港的法律不能跟英國國會制訂的法律有所抵觸，如有出入的話，法院是會遵從國會的法律的。而香港的立法機關本身，在本港的法制內，也是可以授權以下的某些機關進行授權立法的：例如，香港法院的制度是根據香港的立法機關所制訂的「條例」而成立的，這些條例不但明定了各級法院的權力範圍，同時亦授權法院在其權力範圍內自行制定本身運作的「規則」(RULES)，規條如不符合其根據之指令，便是越權無效的。如在一九七五年的「周漢樑對鄺國材」(CHAU HON-LEUNG V. KONG KWOK-CHOI (1975) HKLR 529)一案中，「最高法院指令」第十八條第七項(S18(7) SUPREME COURT ORDINANCE)中，當事人可從經歷司(REGISTRAR)上訴到內庭法官(JUDGE IN CHAMBERS)的註明，便跟「最高法院規條」第五十八章第二條(ORDER 58 RULE 2, RULES OF THE SUPREME COURT)中當事人可從經歷司上訴到整個法庭的規定有出入，結果後者因為子法不能違反母法的原故而被判越權無效。

成文憲法下的普通法制度

美國雖然也是行佑源自英國的「普通法」法制，但由於美國政府是一個擁有明文憲法的聯邦共和國政府，基於政治體制的不同，在憲法上對司法審轄立法機關制定違憲法律的問題的處理，跟英國是不同的。在美國全國法律享有最崇高地位的是明文的憲法，美國政府的立法機關並不擁有像英國「國會立法權至上」的無限立法權力，因為其立法權是承自美國憲法的，而並非像英國國會般的來自本身。是以，在美國的法制里面，法院有權解釋美國憲法的條文，及拒絕執行立法機關所制訂的、因為違憲而無效的法律；這種司法審轄權最終由美國最高法院(SUPREME COURT)所擁有。這權力是在一八零三年的「馬貝利對麥迪遜」(MARBURY V. MADISON (1803) 1 Cr. 137)一案的判決中首先出現。在一八零零年大選落敗的總統亞當斯(ADAMS)在下台前委任了一些自己政黨的人作保安官(JUSTICES OF THE PEACE)，但新總統傑佛遜(JEFFERSON)上任後，卻指使自己的國務卿麥迪遜，不要送出這些前任總統發出的委任書的其中一部份。馬貝利是其中一個收不到委任書的人，他根據一七八九年「司法機關法例」第十三條(S. 13 JUDICIARY ACT 1789)中最高法院在初審中有權向政府人員發出執行令(MANDAMUS)的註明，把事情告上最高法院，要求發出執行令迫使國務卿送出委任書。可是法院卻發現，「司法機關法例」第十三條的註明並不符合美國憲法第三條第二款最高法院只能初審與外國政府或使節有關的案件的規定。由於馬貝利的情況並不屬這範圍內，其對法院的要求便沒有被接納。換言之，眾議院(CONGRESS)制訂的「司法機關法例」第十三條因抵觸美國憲法而得不到法院的執行；立法機關制定的法律如違反憲法都是越權無效的。

「越權無效」的原則，除了適用於司法審轄立法違憲的情形之外，對於法院對行政機關的行為的審轄也是適用的，在這方面便涉及了普遍所稱的「行政法」(ADMINISTRATIVE LAW)。與立法違憲的情況一樣，政府的行政機關的運作，是要依照法律的規定在所被賦與的權力範

圍內進行的，如果行政機關不依巡法定的程序行事，又或者超越了權力範圍的話，法庭不但可以判其行為越權無效，而且在有需要的情形下，還可發出禁制令 (INJUNCTION)，阻止有關的行政機關作出違憲行為，或發出執行令 (MANDAMUS) 迫令疏職的行政機關執行在法律上的職務。

審轄權的限制

可是，這不表示普通法法制內的法院在憲法上有無限的審轄政府行政機關行政為的權力，因為在普通法法制內的法院都會自律地對司法審轄行政行為的權力作出某些限制。例如美國憲法里面的所謂「政治問題」 (POLITICAL QUESTION) 的原則，又或是英國憲法內類似的所謂「國家事實」 (FACT OF STATE) 的原則，都屬於這種法院對司法審轄行政行為權力的自律性限制，在習慣上劃出一系列由於其政治性質不應由法院過問的事情；舉簡單的例子，法院是無權過問甚麼國家受本國承認、某人是否享有外交特權及豁免、和有關宣戰及和平等的問題的；凡涉及這些「國家事實」或「政治問題」，由政府行政機關對這些事情所發出的證明書是有法律上的約束力的，法院必須接受而不能過問。雖然法院無權自行決定「政治問題」或「國家事實」，但至於有關案件是否涉及「政治問題」或「國家事實」，是由法院本身判斷的，決定有涉及後才須交由行政機關證明，最後才根據證明作判決。（請見參考資料(二)「國家行為」和「國家事實」的概念一文。）

司法審轄立法違憲與「司法機關政治化」的問題

從上面所作的英、美兩國憲法的比較知道，美國法院是有權進行司法審轄最高立法機關所制立的違憲法律的，但英國法院卻由於「國會立法權至上」的原則而只在國會以下「委任立法」的層面上才擁有這種權力。是以，英國國會在理論上能夠擁有無限的立法權力，但美國國會的立法權卻受到不能抵觸國家憲法的限制。

在英、美兩種不同的制度底下，國家的法院所扮演的角式也不同：在英制下的法院，只能執行卻不能過問最高立法機關制定的法律，但在美制下的法院，卻能夠以違反憲法的理由，否定最高立法機關所制立的法律的有效性。為此，美國的司法機關，由於其司法審轄立法違憲的權力的關係，是十分「政治性」的，因為法院在對憲法進行解釋的過程中，對廣泛的社會價值觀念對衡的問題有非常大的自由——譬如對不同社會階層的基本人權的衝突，或政府與個人政治權力的衝突——作出決定，甚至否定立法機關所制定的而法院卻認為是違憲的法律的有效性。

美國最高法院，在憲法的範圍內，對一些社會道德，或各種權力的衝突，都有絕對的解釋權，因而扮演了一個對各種觀點、利益協調者的角色，對一些社會道德問題作出標準，對一些衝突作出決擇。法官可以本著自己的信念，對憲法作出各種解釋，而不受立法機關和行政機關的監管。這個作用，在英國的制度里，是不存在的。故此，美國的一些法官是通過政治選舉產生的。如經委任產生的，過程中也受到一定的政治檢查，如經立法機關同意等。這些制度都是與英國制度不同的。

反之，在英制下的法院卻沒有美國法院那麼廣泛的對社會價值作出決定的「政治功能」。因為英國法院沒有權力過問最高立法機關制訂的法律。一切對基本人權和政治權力等不同社會價值觀念的衡量和決定，只在國會辯論某法律的提案時才進行。法院只能在國會以下「委任立法」的有限層面上，才能運用較之美國法制狹窄得多的司法審轄立法違憲的權力。司法機關對一些利益重要問題，或道德標準問題判錯了，也可以由國會立法修正，司法機關並非最後的審判者。但在美國的情況下，最高法院的判決，只有它自己才能推反，不然就只能修改憲法，才能改變一些司法機關制定的標準。

香港法院現行英國的司法制度，司法審轄立法違憲的權力是有限的。雖然說香港立法機關為本港制立法律的權力是「委任立法」的一種，理論上可受到法院的審轄，但實際上，香港立法機關為本港制立的法律唯一可能「違憲」的情況，是當與英國國會制訂的法例或英國政府頒發的授權法令出現抵觸的時候，所以在傳統上香港法院司法審轄立法違憲的權力依照是很有限的。同時，因為香港的終審權在倫敦，故這審轄權是受到宗主國最後的監督的。

香港目前的法官，性質與英國一樣，是非政治性的。在他們受委任的過程中，也不會有任何政治檢查。制度對他們的要求，是純技術性的，只要他們熟悉法律便可以。因為他們在司法機關內，並沒有擔任最後協調各種社會價值、制定道德標準的功能。

簡單來說，「越權無效」的司法審查，是比較單純的檢查，大多是對程序及權力範圍大小的界定，但在違憲審查的程序中，如憲法涉及一些社會價值的取向時，司法機關的解釋，就不單是技術性的解釋，而是價值的取向了。這種社會價值的取向，可以因為時勢的轉變而有所改變，或有新的解釋。也可以因為人事的改變，而有新的解釋。判斷就不能單依靠“先例”來作準則。這令司法機關的人員，負上了一個不同的政治責任。

對於香港法庭他日應否肩負起協調社會價值的這個政治功能的問題，尚有待進一步的探討。如香港的司法制度負上這個政治工作後，應有何相應的改變，也是令人關心的問題。

人大、人大常委與法律解釋

引言

基本法(草案)徵求意見稿多處，均有提到全國人民代表大會常務委員會。根據目前的條文，這委員會在審查香港法律是否符合基本法，修改基本法和解釋基本法的各方面，均有重要的作用。故此對這國家機構的了解，對討論有關的條文是極其重要的。尤其是其對法律解釋方面的職能。根據目前的建議，對香港的司法制度，有一定的影響。

全國人民代表大會的體制

根據中華人民共和國一九八二年憲法第三章關於國家機構的第一節第五十七條的註明，中華人民共和國全國人民代表大會是國家的最高權力機關，全國人民代表大會常務委員會是其常設機關。根據第五十八條的註明，全國人民代表大會和全國人民代表大會常務委員會兩者均同時具有為國家立法的權力。

根據第六十二條所載，全國人大的職權包括：修改憲法和監督憲法的實施；制定和修改刑事、民事、國家機構的和其他的基本法律；選舉國家主席和副主席；根據國家主席的提名決定國務院總理的人選；根據國務院總理的提名決定國務院副總理、國務委員、各部部長及其他行政機關負責人的人選；選舉中央軍事委員會主席及根據其提名決定中央軍事委員會其他成員人選；選舉最高人民法院院長及最高人民檢察院檢察長；審查和批准國民經濟和社會發展計劃及國家的預算，與及對以上工作執行的報告；改變或撤銷全國人大常委不適當的決定；批准省、自治區和直轄市的建置，及決定特別行政區的設立及其制度；最後，還有決定戰爭與和平的問題，和其他應當由最高國家權力機關行使的職權。此外，根據第六十三條，全國人大又有權罷免所有根據上一條由它選舉及決定的國家機關各負責人的權力。

根據憲法第五十九條的註明，全國人民代表大會乃由省、自治區、直轄市和軍隊選出來的代表組成，各少數民族都應有適當名額代表；而全國人大代表的選舉是由全國人大常委主持的。全國人大每屆任期五年，除非常情況外，人大常委必須在全國人大屆滿前兩月完成下屆全國人大的選舉。全國人大會議每年舉行一次，由全國人大常委召集；如人大常委認為必要，或全國人大代表五分之一以上提議，可臨時召集全國人大代表會議。全國人大舉行會議時，須選舉主席團主持會議。

全國人民代表大會常務委員會的體制

根據憲法第六十五條，全國人民代表大會常務委員會是由下列人員組成的：委員長、副委員長若干、秘書長、委員若干；此外，人大常委成員應有適當名額的少數民族代表；全國人大推選並有權罷免人大常委的成員，而且人大常委的成員不得擔任國家行政、審判和檢察機關的職務。全國人大常委每屆任期與全國人大相同，行使其職權直到下屆全國人大選出新的常務委員會為止；其次，便是委員長與副委員長連續任職不得超過兩屆。

全國人民代表大會和全國人民代表大會常務委員會在對於中國憲法上的功能的主要分別，除了兩者都有權在本身的職責範圍內制定和修改法律（全國人大負責「刑事、民事、國家機構的和其他的基本法律」，人大常委則負責此範圍以外的其他法律）外，便是國家憲法的修改權只屬全國人大。而解釋一切法律（包括國家憲法）的權力，卻屬人大常委。此外，人大常委對中國法律其實還有廣泛的職權，例如在全國人大閉會期間，在不與該法律的原本原則相抵觸下，對全國人大制訂的法律進行部分補充和修改、撤銷國務院制定的同憲法、法律相抵觸的行政法規、決定和命令，以及撤銷省、自治區、直轄市國家權力機關制定的同憲法、法律和行政法規相抵觸的地方性法規和決議。

解釋法律的權力

根據第六十七條，解釋法律（包括憲法）的權力屬於全國人民代表大會常務委員會；然而這職權是受到人大監督的，因為根據中國憲法第六十二條第十一項，全國人民代表大會擁有權「改變或者撤銷全國人民代表大會常務委員會不適當的決定」，這當然包括人大常委所作的關於一切中國法律（包括憲法）的解釋的決定。是以，雖然在慣性使用上，所有中國法律的解釋由人大常委所進行，但這卻並非表示人大常委對法律的解釋權是絕對的，因為憲法為全國人民大會保留了否定人大常委任何決定的權力。

立法解釋與司法解釋

全國人民代表大會常務委員會為應付解釋法律問題的工作，消除由於對法律條文理解不一致而產生的對法律的正確實施的影響，於一九八一年通過了「關於加強法律解釋工作的決議」。這決議把有關法律解釋的問題分作幾類，實際是把各類別的法律功能，分派給有關的部門。決議中對法律解釋問題的分類如下：

- 「一、凡關於法律、法令條文本身需要進一步明確界限或作補充規定的，由全國人民代表大會常務委員會進行解釋或用法令加以規定。
- 二、凡屬於法院審判工作中具體應用法律、法令的問題，由最高人民法院進行解釋。凡屬於檢察院檢察工作中具體應用法律、法令的問題，由最高人民檢察院進行解釋。最高人民法院和最高人民檢察院的解釋如果有原則性的分歧，報請全國人民代表大會常務委員會解釋或決定。
- 三、不屬於審判和檢察工作中的其他法律、法令如何具體應用的問題，由國務院及主管部門進行解釋。
- 四、凡屬於地方性法規條文本身需要進一步明確界限或作補充規定的，由制定法規的省、自治區、直轄市人民代表大會常務委員會進行解釋或作出規定。凡屬於地方性法規如何具體應用的問題，由省、自治區、直轄市人民政府主管部門進行解釋。」

這個「決議」的效果，是把有關法律的具體應用的問題交由有關的政府機關進行，而法律條文本身需要進一步明確界限或作補充規定的則仍由人大常委本身負責（類似附屬立法）。這個決議亦首次說明了「立法解釋」、「司法解釋」與「行政解釋」並行的制度。「立法解釋」與「司法解釋」兩者有一定的關係。立法機關解釋法律，並非取代法庭上審案時對法律必須作出的解釋。也不能替代法庭對具體案件的審判工作及其在過程中引用法律的功能。這幾種並行解釋的一致性，由人大常委的立法解釋來統一，亦即「司法解釋」與「行政解釋」均要符合人大常委對那法律的解釋。為了保障司法獨立，人大常委在憲法下並無權撤銷最高人民法院和最高人民檢察院的決定。但人大常委在這決議中為本身保留了當這兩個機關對法律的解釋出現原則性的分歧時作出解釋或決定的權力。

Reference (10)

THE NATIONAL PEOPLE'S CONGRESS,
THE STANDING COMMITTEE OF THE
NATIONAL PEOPLE'S CONGRESS,
AND THE INTERPRETATION OF THE LAW

Prepared by the Secretariat
of the Consultative Committee of the Basic Law

Introduction

The Standing Committee of the National People's Congress (NPC) has been referred to time and again in the "Draft Basic Law for Solicitation of Opinions". Under the provisions of the present draft, this Committee will have an important part to play in reviewing whether Hong Kong laws conform to the Basic Law and in the amendment and interpretation of the Basic Law. A good understanding of this Committee is thus of crucial importance to our discussion on the relevant provisions. In particular, the functions and powers of this Committee in the interpretation of the law will have definite impact on Hong Kong's judicial system according to the present proposal.

Structure of the NPC

According to Article 57 under Section I, Chapter Three, of the 1982 Constitution of the People's Republic of China, the NPC of the People's Republic of China is the highest organ of state power, and its permanent body is the Standing Committee of the NPC. Article 58 provides that the NPC and its Standing Committee exercise the legislative power of the state.

Under the provisions of Article 62, the NPC exercises the following functions and powers: To amend and supervise the enforcement of the Constitution; to enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters; to elect the President and Vice-President of the People's Republic of China; to decide on the choice of the Premier of the State Council upon nomination by the President of the People's Republic of China; to decide on the choice of the Vice-Premiers, State Councillors, Ministers in charge of ministries, and the heads of other administrative organs; to elect the Chairman of the Central Military Commission and, upon nomination by the Chairman, to decide on the choice of all the others on the Central Military Commission; to elect the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate; to examine and approve the plan for national economic and social development and the state budget as well as the reports on their implementation; to alter or annul inappropriate decisions of the Standing Committee of the NPC; to approve the establishment of provinces, autonomous regions and municipalities directly under the Central Government and decide on the establishment of special administrative regions and the systems to be instituted there; and to decide on questions of war and peace. In addition, it also exercises other functions and powers as the highest organ of state power should exercise. According to Article 63, the NPC also has the power to recall or remove from office all responsible persons of state organs whose offices were elected or decided by the NPC according to the preceding article.

According to Article 59 of the Chinese Constitution, the NPC is composed of deputies elected by the provinces, autonomous regions and municipalities directly under the Central Government and by the armed forces. All the minority nationalities are entitled to appropriate representation. Election of deputies to the NPC is conducted by the Standing Committee of the NPC. The NPC is elected for a term of five years. Unless in exceptional circumstances, the Standing Committee of the NPC must ensure that the election of deputies to the succeeding NPC is completed two months before the expiration of the term of office of the current NPC. The NPC meets in session once a year and is convened by its Standing Committee. A session of the NPC may be convened at any time the Standing Committee deems this necessary or when more than one-fifth of the deputies to the NPC so propose. When the NPC meets, it elects a presidium to conduct its session.

Structure of the Standing Committee of the NPC

According to Article 65 of the Constitution, the Standing Committee of the NPC is composed of the following: the Chairman, the Vice-Chairmen, the Secretary-General and members. Minority nationalities are entitled to appropriate representation on the Standing Committee of the NPC. The NPC elects, and has the power to recall, all those on its Standing Committee, and no one on the Standing Committee of the NPC shall hold any post in any of the administrative, judicial or procuratorial organs of the state. The Standing Committee of the NPC is elected for the same term as the NPC; it exercises its functions and powers until a new Standing Committee is elected by the succeeding NPC. The Chairman and Vice-Chairmen of the Standing Committee shall serve no more than two consecutive terms.

As far as their constitutional functions are concerned, the main difference between the NPC and its Standing Committee is that the NPC alone has the power to amend the Constitution. Apart from this difference, they both have the power to enact and amend laws within their respective areas of responsibility. (The NPC is responsible for "basic statutes concerning criminal offences, civil affairs, the state organs and other matters", whereas the Standing Committee of the NPC is responsible for laws not enacted by the NPC.) However, the power to interpret laws is vested in the Standing Committee of the NPC. The Standing Committee of the NPC in fact has wide-ranging functions and powers relating to Chinese law. For example, it can, when the NPC is not in session, enact partial supplements and amendments to laws enacted by the NPC provided that they do not contravene the basic principles of these laws. It can also annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the laws, and annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the laws or the administrative rules and regulations.

The Power to Interpret Laws

Under the provisions of Article 67, the power to interpret laws (including the Constitution) is vested in the Standing Committee of the NPC. However, this power is subject to the supervision of the NPC. According to sub-paragraph (11) of Article 62, the NPC has the power "to alter or annul inappropriate decisions of the Standing Committee of the NPC", which naturally include the interpretation of any Chinese law (including the Constitution) by the Standing Committee of the NPC. Though in conventional practice the laws of China are interpreted by the Standing Committee of the NPC, its power of interpretation is not absolute. This is because the Constitution has reserved for the NPC the power to veto any decision of the Standing Committee of the NPC.

Legislative Interpretation and Judicial Interpretation

To cope with requests for interpretation of the law and eliminate instances where variance in understanding of some articles of the law has affected the proper enforcement of the law, the Standing Committee of the NPC has adopted in 1981 a "Resolution Providing An Improved Interpretation of the Law". By discussing the interpretation of the law in different situations, the Resolution has in fact assigned laws of different functions to different departments. The interpretation of the law is classified in the following way in the Resolution:

"1. In cases where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made, the Standing Committee of the NPC shall provide interpretations or make stipulations by means of decrees.

2. Interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People's Court. Interpretation of questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates shall be provided by the Supreme People's Procuratorate. If the interpretations provided by the Supreme People's Court and the Supreme People's Procuratorate are at variance with each other in principle, they shall be submitted to the Standing Committee of the NPC for interpretation or decision.

3. Interpretation of questions involving the specific application of laws and decrees in areas unrelated to judicial and procuratorial work shall be provided by the State Council and the competent departments.

4. In cases where the limits of locally enacted rules and regulations need to be further defined or additional stipulations need to be made, the standing committees of the people's congresses of the provinces,

autonomous regions, and municipalities directly under the Central Government which have formulated these rules and regulations shall provide the interpretations or make the stipulations. Interpretation of questions involving the specific application of local rules and regulations shall be provided by the competent departments under the people's governments of the provinces, autonomous regions, and municipalities directly under the Central Government."

This Resolution has the effect of assigning the questions involving the specific application of the laws to the competent government departments, while the Standing Committee of the NPC is still responsible in cases where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made (as in the case of subsidiary legislation). This Resolution also illustrates for the first time a system where "legislative interpretation" goes hand in hand with "judicial interpretation" and "administrative interpretation". "Legislative interpretation" and "judicial interpretation" are definitely related. Interpretation given by the legislature is not meant to replace the interpretation which the courts are required to give when adjudicating cases before them, neither is it meant to substitute the functions of the courts in adjudicating specific cases and in applying the laws during the adjudication process. These parallel interpretations converge under the legislative interpretation given by the Standing Committee of the NPC, that is, any "judicial interpretation" and "administrative interpretation" must conform to the interpretation given by the Standing Committee of the NPC. To ensure judicial independence, under the Constitution the Standing Committee of the NPC does not have the power to annul decisions reached by the Supreme People's Court and the Supreme People's Procuratorate. In this Resolution, however, the Standing Committee of the NPC reserves the power to give its own interpretation or decision if the interpretations provided by the two organs are in variance with each other in principle.

* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

(Translation)

The Draft Basic Law of the
Hong Kong SAR
of the PRC

Approved at the Eighth Plenary Session
of the Basic Law Drafting Committee

Secretariat of the BLDC of the
Hong Kong SAR of the PRC

14 January 1989

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Preamble

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

In order to uphold national unity and territorial integrity and to maintain Hong Kong's prosperity and stability, and taking account of the history of Hong Kong and its realities, the PRC has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong SAR will be established in accordance with the provisions of Article 31 of the Constitution of the PRC and that under the principle of "one country, two systems", socialist system and policies will not be practised in Hong Kong. The basic policies of the PRC regarding Hong Kong have been elaborated by our government in the Sino-British Joint Declaration.

In accordance with the Constitution of the PRC, the National People's Congress hereby enacts the Basic Law of the Hong Kong SAR of the PRC, prescribing the systems to be practised in the Hong Kong SAR in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong.

Chapter I : General Principles

Article 1

The Hong Kong SAR is an inalienable part of the PRC.

Article 2

The NPC authorizes the Hong Kong SAR to exercise a high degree of autonomy in accordance with the provisions of this Law and to enjoy executive, legislative and independent judicial power, including that of final adjudication.

Article 3

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

Article 4

The Hong Kong SAR safeguards the rights and freedoms of the residents and other persons in the Region in accordance with law.

Article 5

Socialist system and policies shall not be practised in the Hong Kong SAR and the existing capitalist system and way of life shall not be changed for 50 years.

Article 6

The Hong Kong SAR shall in accordance with law protect the rights of private property ownership.

Article 7

The land and natural resources within the Hong Kong SAR are the state property of the PRC. The Government of the Hong Kong SAR shall be responsible for their management, use and development and for their lease or grant to individuals or legal persons for use or development. The revenue derived shall be entirely at the disposal of the Government of the Hong Kong SAR.

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 those that contravene this Law or have been amended by the legislature of the Hong Kong SAR.

Article 9

In addition to the Chinese language, the English language may also be used by the executive authorities, legislature and judicial organs of the Hong Kong SAR. The English language is also an official language.

Article 10

Apart from displaying the national flag and national emblem, the Hong Kong SAR may use a regional flag and regional emblem of its own.

The regional flag of the Hong Kong SAR (to be drafted).

The regional emblem of the Hong Kong SAR (to be drafted).

Article 11

In accordance with Article 31 of the Constitution of the PRC, the systems and policies practised in the Hong Kong SAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents and the executive, legislative and judicial systems as well as the relevant policies, shall be based on the provisions in this Law.

No law enacted by the legislature of the Hong Kong SAR shall contravene this Law.

Chapter II : Relationship between the Central Authorities
and the Hong Kong SAR

Article 12

The Hong Kong SAR is a local administrative region of the PRC, enjoying a high degree of autonomy, and comes directly under the CPG.

Article 13

The CPG is responsible for the foreign affairs relating to the Hong Kong SAR.

The Ministry of Foreign Affairs of the PRC will establish an office in Hong Kong to deal with foreign affairs.

The CPG authorizes the Hong Kong SAR to deal with relevant external affairs on its own in accordance with this Law.

Article 14

The CPG is responsible for the defence of the Hong Kong SAR.

The Government of the Hong Kong SAR is responsible for the maintenance of public order in the Hong Kong SAR.

Military forces sent by the CPG to be stationed in the Hong Kong SAR for defence shall not interfere in the local affairs of the Region. The Government of the Hong Kong SAR may, in times of need, request the CPG for assistance from the garrison in the maintenance of public order and disaster relief.

Apart from abiding by nationwide laws, members of the garrison shall also abide by the laws of the Hong Kong SAR.

All expenses for the garrison shall be borne by the CPG.

Article 15

The CPG appoints the Chief Executive and principal executive officials of the Hong Kong SAR in accordance with the provisions of Chapter IV of this Law.

Article 16

The Hong Kong SAR is vested with executive power. In accordance with the relevant provisions of this Law, it shall on its own deal with administrative affairs of the Hong Kong SAR.

Article 17

The Hong Kong SAR is vested with legislative power.

Laws enacted by the legislature of the Hong Kong SAR shall be reported to the Standing Committee of the NPC for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the NPC, after consulting its Committee for the Basic Law of the Hong Kong SAR, considers that any law enacted by the legislature of the Hong Kong SAR is not in conformity with those provisions of this Law concerning any affairs which are the responsibilities of the central authorities or the relationship between the central authorities and the Hong Kong SAR, it may return the law in question, but it shall not amend it. Any law returned by the Standing Committee of the NPC shall immediately cease to have force. This cessation shall not have retroactive effect, unless otherwise provided for by the laws of the Hong Kong SAR.

Article 18

The laws of the Hong Kong SAR shall be this Law, the laws previously in force in Hong Kong as stipulated in Article 8 of this Law, and the laws enacted by the legislature of the Hong Kong SAR.

Laws enacted or confirmed by the NPC or its Standing Committee shall not be applied in the Hong Kong SAR except for those listed in Annex III to this Law. Laws listed in Annex III to this Law shall be applied locally by the Hong Kong SAR by way of promulgation or legislation.

The Standing Committee of the NPC, after consulting its Committee for the Basic Law of the Hong Kong SAR and the Government of the Hong Kong SAR, may make additions to or deletions from the list of laws set out in Annex III to this Law. Laws to be listed in Annex III shall be confined to those relating to defence and foreign affairs as well as other laws which, in accordance with the provisions of this Law, are outside the limits of the Hong Kong SAR's autonomy.

When the Standing Committee of the NPC decides to declare a state of war or decides that the Hong Kong SAR is in a state of emergency due to an unrest in the Hong Kong SAR which is beyond the control of the Hong Kong SAR, the State Council may decree the application of the relevant nation-wide laws in the Hong Kong SAR.

Article 19*

The Hong Kong SAR is vested with independent judicial power, including that of final adjudication.

Courts of the Hong Kong SAR shall have jurisdiction over all cases in the Hong Kong SAR, except that the restrictions of their jurisdiction imposed by Hong Kong's previous legal system and principles shall be maintained.

* This Article did not get the minimum number of votes required, i.e. a two-thirds majority, at BLDV VIII.

Courts of the Hong Kong SAR shall have no jurisdiction over cases which are constituted by acts of state. When the courts of the Hong Kong SAR come across questions concerning facts of state in adjudicating cases before them, they should obtain a statement issued by the Chief Executive regarding such questions. The above-mentioned statement shall be binding on the courts.

Before issuing a statement, the Chief Executive shall obtain a certificate from the Standing Committee of the NPC or the State Council.

Article 20

The Hong Kong SAR may enjoy other powers granted to it by the NPC, the Standing Committee of the NPC or the State Council.

Article 21

Residents of the Hong Kong SAR who are Chinese nationals are entitled to participate in state affairs as prescribed by law.

In accordance with the assigned number of seats and the election procedures specified by the Standing Committee of the NPC, the Chinese nationals among the Hong Kong residents shall locally elect deputies of the Hong Kong SAR to the NPC to participate in the work of the highest organ of state power.

Article 22

Departments under the CPG as well as provinces, autonomous regions and municipalities directly under the Central Government shall not interfere in the affairs which the Hong Kong SAR administers on its own in accordance with this Law.

If departments under the Central Government, provinces, autonomous regions and municipalities directly under the Central Government need to set up offices in the Hong Kong SAR, they must have the consent of the government thereof and the approval of the CPG.

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

People from other parts of China shall apply for approval for entry into the Hong Kong SAR.

The Hong Kong SAR may establish an office in Beijing.

Article 23

The Hong Kong SAR shall legislate on its own to prohibit any act of treason, splitting of the state, sedition and the theft of state secrets.

Chapter III : Fundamental Rights and Duties of the Residents

Article 24

Residents of the Hong Kong SAR, or Hong Kong residents for short, include permanent residents and non-permanent residents.

Permanent residents of the Hong Kong SAR are:

- (1) Chinese nationals born in Hong Kong before or after the establishment of the Hong Kong SAR;
- (2) Chinese nationals who have ordinarily resided in Hong Kong for a continuous period of no less than seven years before or after the establishment of the Hong Kong SAR;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
- (4) Persons of non-Chinese nationality who have ordinarily resided in Hong Kong for a continuous period of no less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong SAR;
- (5) Persons under 21 years of age born in Hong Kong of residents listed in category (4) before or after the establishment of the Hong Kong SAR; and
- (6) Persons other than those residents listed in categories (1) to (5), who had the right of abode only in Hong Kong before the establishment of the Hong Kong SAR.

The above-mentioned residents have the right of abode in the Hong Kong SAR and are qualified to obtain, in accordance with its law, permanent identity cards which state their right of abode.

Non-permanent residents of the Hong Kong SAR are persons who, in accordance with the laws of the Hong Kong SAR, are qualified to obtain Hong Kong identity cards but have no right of abode.

Article 25

All Hong Kong residents shall be equal before the law.

Article 26

Permanent residents of the Hong Kong SAR shall have the right to vote and the right to stand for election as prescribed by law.

Article 27

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of demonstration and of public protestation; the rights and freedoms to form and join trade unions, and to strike.

Article 28

The freedom of the person of Hong Kong residents is inviolable.

Hong Kong residents shall not be arbitrarily or unlawfully arrested, detained or imprisoned. Arbitrary or unlawful search of the body of any resident, and deprivation or restriction of the residents' freedom of the person shall be prohibited. Torture of any resident, and arbitrary or unlawful deprivation of any resident's life shall be prohibited.

Article 29

The homes and other premises of Hong Kong residents shall not be violated. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises is prohibited.

Article 30

The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any ground, infringe upon the residents' freedom and privacy of communication except in cases where, to meet the needs of public security or of investigation into criminal offences, the relevant authorities may censor communication in accordance with legal procedures.

Article 31

Hong Kong residents shall have the freedom of movement within the Hong Kong SAR and the freedom of emigration to other countries and regions. Hong Kong residents shall have the freedom to travel and the freedom of entry and exit. Unless restrained by law, Hong Kong residents who hold valid travel documents shall be free to leave the Hong Kong SAR without special authorisation.

Article 32

Hong Kong residents shall have the freedom of conscience.

Hong Kong residents shall have the freedom of religious belief and the freedom to preach and to carry out and participate in religious activities in public.

Article 33

Hong Kong residents shall have the freedom of choice of occupation.

Article 34

Hong Kong residents shall have the freedom of academic research, of literary and artistic creation, and of other cultural pursuits.

Article 35

Hong Kong residents shall have the right to confidential legal advice, access to the courts, and choice of lawyers for timely protection of their legitimate rights and interests, and for representation in the courts, and the right to judicial remedies.

Hong Kong residents shall have the right to institute proceedings in the courts against the actions of the executive organs or their personnel.

Article 36

Hong Kong residents shall in accordance with law have the right to social welfare; the welfare benefits of the working people shall be protected by law.

Article 37

The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.

Article 38

Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the Hong Kong SAR.

Article 39

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Labour Conventions as applied to Hong Kong shall remain in force, and shall be implemented through the laws of the Hong Kong SAR.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. But such restrictions shall not contravene the provisions of the first paragraph of this article.

Article 40

The legitimate traditional rights and interests of the indigenous inhabitants of "New Territories" shall be protected by the Hong Kong SAR.

Article 41

Persons within the territory of the Hong Kong SAR other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.

Article 42

Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws of the Hong Kong SAR.

Chapter IV : Political Structure

Section 1 : The Chief Executive

Article 43

The Chief Executive of the Hong Kong SAR is the head of the Hong Kong SAR and represents the Region.

The Chief Executive of the Hong Kong SAR shall be accountable to the CPG and the Hong Kong SAR in accordance with the provisions of this Law.

Article 44

The Chief Executive of the Hong Kong SAR shall be a Chinese national of no 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 20 years.

Article 45

The Chief Executive of the Hong Kong SAR shall be selected by election or through consultations held locally and be appointed by the CPG.

The method for selecting the Chief Executive shall be prescribed in the light of the actual situation in the Hong Kong SAR and in accordance with the principle of gradual and orderly progress with the ultimate objective of electing the Chief Executive by universal suffrage.

The specific method for selecting the Chief Executive is prescribed in Annex I : "Method for Selecting the Chief Executive of the Hong Kong SAR".

Article 46

The term of office of the Chief Executive of the Hong Kong SAR shall be five years. He/she may serve for no

Article 47

The Chief Executive of the Hong Kong SAR Region must be a person of integrity, dedicated to his/her duties.

The Chief Executive, on assuming office, shall declare his/her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong SAR. This declaration shall be put on record.

Article 48

The Chief Executive of the Hong Kong SAR 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 SAR;
- (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 CPG for the record;
- (4) To decide on government policies and to issue executive orders;
- (5) To nominate and to report to the CPG for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaus, Commissioner Against Corruption, Director of Audit and Commissioner of Police, and to propose to the CPG the removal of the above-mentioned officials;
- (6) To appoint or remove judges of the courts at various levels in accordance with legal procedures;
- (7) To appoint or remove public servants in accordance with legal procedures;
- (8) To implement the directives issued by the CPG in respect of the relevant matters provided for in this Law;

- (9) To deal with, on behalf of the Government of the Hong Kong SAR, external affairs and other affairs 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 significant public interest, 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.

Article 49

If the Chief Executive considers that a bill passed by the Legislative Council is not compatible with the overall interest of the Hong Kong SAR, he/she may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by no less than a two-thirds majority, the Chief Executive must sign and promulgate it within one month, or act in accordance with the provisions of Article 50 of this Law.

Article 50

If the Chief Executive refuses to sign the bill passed by the Legislative Council for a second time, or the Legislative Council refuses to pass the budget or other important bills introduced by the government and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

Before dissolving the Legislative Council the Chief Executive should ask for opinions from the Executive Council. A Chief Executive can dissolve the Legislative Council only once in each term of office.

Article 51

If the Legislative Council refuses to pass the budget bill presented by the government, the Chief Executive may apply for temporary appropriations from the Legislative Council. If appropriation of public funds cannot be approved because the Legislative Council is already dissolved, the Chief Executive may approve temporary short-term appropriations according to the level of the previous fiscal year's expenditure prior to the election of the new Legislative Council.

Article 52

The Chief Executive shall have to resign under any of the following circumstances :

- (1) When he/she loses the ability to discharge the functions of his/her office due to serious illness or other reasons;
- (2) When, after the Legislative Council is dissolved because he/she twice refuses to sign the bill it passes, the new Legislative Council has again passed the original bill in dispute with a two-thirds majority and he/she still refuses to sign it; and
- (3) When, after the Legislative Council is dissolved because it refuses to approve the budget or any other important bill, the new Legislative Council still refuses to pass the original bill in dispute.

Article 53

If the Chief Executive of the Hong Kong SAR is not able to discharge his/her duties for a brief period, such duties shall temporarily be assumed by Administrative Secretary, Financial Secretary, Secretary of Justice in the above 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/her duties shall be assumed according to the provisions of the preceding Paragraph.

Article 54

The Executive Council of the Hong Kong SAR is an organ for assisting the Chief Executive in policy-making.

Article 55

Members of the Executive Council of the Hong Kong SAR 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 shall not exceed that of the Chief Executive who appoints them.

Members of the Executive Council of the Hong Kong SAR shall be Chinese nationals who are permanent residents of the Region.

The Chief Executive may invite other persons concerned to sit in at Council meetings as he/she deems necessary.

Article 56

The Executive Council of the Hong Kong SAR shall be presided over by the Chief Executive.

Except for the appointment, removal and disciplining of public officers and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important decisions, introducing a bill to the Legislative Council, enacting subsidiary legislation, or dissolving the Legislative Council.

If the Chief Executive does not adopt a majority opinion of the Executive Council, he/she must put his/her specific reasons on record.

Article 57

A Commission Against Corruption shall be established in the Hong Kong SAR. It shall function independently and be accountable to the Chief Executive.

Article 58

A Commission of Audit shall be established in the Hong Kong SAR. It shall function independently and be accountable to the Chief Executive.

Section 2 : The Executive Authorities

Article 59

The Government of the Hong Kong SAR is the executive authorities of the Region.

Article 60

The Chief Executive of the Hong Kong SAR is the head of the government of the Region.

Department of Administration, Department of Finance, Department of Justice, bureaus, divisions and commissions shall be established under the Government of the Hong Kong SAR.

Article 61

The principal officials of the Hong Kong SAR shall be Chinese nationals who are permanent residents and have ordinarily resided in Hong Kong for a continuous period of 15 years.

Article 62

The Government of the Hong Kong SAR shall exercise the following powers and functions :

- (1) To formulate and implement policies;
- (2) TO manage various administrative affairs;
- (3) To manage the external affairs authorized by the CPG under this Law;
- (4) To draw up and present budgets and final accounts;
- (5) To draft and introduce bills, motions and subsidiary legislation; and
- (6) To send officials to attend meetings of the Legislative Council.

Article 63

The prosecuting authority of the Hong Kong SAR shall institute criminal prosecutions independently, free from any interference.

Article 64

The executive authorities of the Hong Kong SAR must abide by the law and shall be accountable to the Legislative Council of the Hong Kong SAR in the following respects: They shall implement laws passed by the Legislative Council and already in force; they shall present regular reports on their work to the Legislative Council; they shall answer questions raised by members of the Legislative Council; and they shall obtain approval from the Legislative Council for taxation and public expenditure.

Article 65

The establishment of advisory bodies under the executive authorities of the Hong Kong SAR shall be maintained.

Section 3 : The Legislature

Article 66

The Legislative Council of the Hong Kong SAR is the legislature of the Region.

Article 67

The Legislative Council of the Hong Kong SAR shall be constituted by elections.

The method for forming the Legislative Council shall be prescribed in the light of the actual situation of the Hong Kong SAR and in accordance with the principle of gradual and orderly progress with the ultimate objective of constituting the Council entirely by universal suffrage.

The specific method for forming the Legislative Council is prescribed in Annex II : "Method for Constituting the Legislative Council of the Hong Kong SAR".

Article 68

The term of office of members of the Legislative Council of the Hong Kong SAR shall be four years, except the first term which shall be two years.

Article 69

If the Legislative Council of the Hong Kong SAR is dissolved by the Chief Executive in accordance with the provisions of this Law, it shall be reconstituted by election within three months as prescribed by Article 67 of this Law.

Article 70

The President of the Legislative Council of the Hong Kong SAR shall be elected from among the members of the Legislative Council.

The President of the Legislative Council of the Hong Kong SAR shall be a Chinese national of no 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 20 years.

Article 71

The President of the Legislative Council of the Hong Kong SAR shall exercise the following powers and functions:

- (1) To preside over meetings;
- (2) To decide on the agenda. Items proposed by the government shall be given priority;
- (3) To decide on the time and duration of meetings;
- (4) To call special meetings during the recess; and
- (5) Other powers and functions as prescribed in the rules of procedure of the Legislative Council.

Article 72

The Legislative Council of the Hong Kong SAR 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 submitted by the government;
- (3) To approve taxation and public expenditure;
- (4) To hear and debate on the work reports of the Chief Executive;
- (5) To raise questions on the work of the government;

- (6) To hold debates on any issue concerning public interests;
- (7) To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Justice of the High Court;
- (8) To receive and deal with complaints from Hong Kong inhabitants;
- (9) On a motion jointly initiated by one-fourth of the members of the Legislative Council and passed by the Council alleging serious breach of law or dereliction of duty by the Chief Executive who, however, refuses to resign, the Legislative Council may entrust the Chief Justice of the Court of Final Appeal to be responsible for establishing an independent investigating committee to be chaired by himself. The committee will be responsible for carrying out investigations and reporting its findings to the Legislative Council. If the committee considers the evidence sufficient to substantiate the above allegations, the Legislative Council may pass an impeachment motion with a two-thirds majority and report it to the CPG for decision; and
- (10) To summon, in the exercise of the above powers and functions, persons concerned to testify before or to produce evidence to the Council if the need arises.

Article 73

Members of the Legislative Council of the Hong Kong SAR may, in accordance with the provisions of this Law and legal procedures, introduce bills. Bills which do not relate to public expenditure or the structure and operations of the government may be introduced individually or jointly by members of the Council. Written consent of the Chief Executive shall be required before bills relating to government policies are introduced.

Article 74

The quorum for the meeting of the Legislative Council of the Hong Kong SAR shall be no less than half of its members.

Unless otherwise provided for in this Law, the passage of any bill or motion in the Legislative Council of the Hong Kong SAR requires the votes of more than half of its members present.

The rules of procedure of the Legislative Council shall be established by the Council on its own, but they should not contravene this Law.

Article 75

A bill passed by the Legislative Council of the Hong Kong SAR takes effect only after it is signed and promulgated by the Chief Executive.

Article 76

Members of the Legislative Council of the Hong Kong SAR shall not be legally liable for speeches made at meetings of the Council.

Article 77

Members of the Legislative Council of the Hong Kong SAR shall not be subject to arrest when attending or on their way to a meeting of the Legislative Council.

Article 78

The President of the Legislative Council shall declare that a member of the Council is no longer qualified to serve under any of the following circumstances:

- (1) When he/she loses the ability to discharge the functions of his/her office due to serious illness or other reasons;
- (2) When he/she is absent from meeting for three consecutive months without the consent of the President of the Legislative Council and with no reasonable explanation;
- (3) When he/she loses or renounces his/her status as a permanent resident of the Hong Kong SAR;
- (4) When he/she accepts appointment by the government as public servant;
- (5) When he/she is bankrupt or fails to pay debts in defiance of a court ruling;
- (6) When he/she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Hong Kong SAR and is relieved of his/her duties by a motion passed by two-thirds of the members of the Legislative Council present;
- (7) When he/she is censured for misbehavior or breach of oath by a vote of two-thirds of the members of the Legislative Council present.

Section 4 : Judicial Organs

Article 79

The courts of the Hong Kong SAR at various levels are the judicial organs of the Region, exercising the judicial power of the Region.

Article 80

The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts are established in the Hong Kong SAR. The High Court comprises the Court of Appeal and the Court of the First Instance.

The judicial system previously in practice in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal in the Hong Kong SAR.

Article 81

The power of final adjudication of the Hong Kong SAR is vested in the Court of Final Appeal in the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.

Article 82

The structure, powers and functions of the courts of the Hong Kong SAR at various levels shall be prescribed by law.

Article 83

The courts of the Hong Kong SAR decide cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents in other common law jurisdictions.

Article 84

The courts of the Hong Kong SAR exercise judicial power independently and free from any interference. Members of the judiciary are immune from legal action in respect of their judicial functions.

Article 85

The principle of trial by jury previously practised in Hong Kong shall be maintained.

Article 86

In criminal or civil proceedings in the Hong Kong SAR, the principles previously applied in Hong Kong and the rights previously enjoyed by the parties to the proceedings shall be maintained.

All persons shall, after being lawfully arrested, enjoy the right to a fair trial by the judicial organs as early as possible. They shall be assumed innocent until the judicial organs find them guilty.

Article 87

Judges of the courts of the Hong Kong SAR shall be appointed by the Chief Executive acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.

Article 88

A judge of a court of the Hong Kong SAR may be removed for inability to discharge the functions of his office, or for misbehaviour, by the Chief Executive acting in accordance with the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of no fewer than three local judges.

The Chief Justice of the Court of Final Appeal in the Hong Kong SAR may be investigated for inability to discharge the functions of his office, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of no 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 provided for in this Law.

Article 89

The Chief Justice(s) of the Court of Final Appeal and the High Court of the Hong Kong SAR must be Chinese national(s) who are permanent residents of the Hong Kong SAR.

In addition to the procedures prescribed in Articles 87 and 88 of this Law, the appointment and removal of judges of the Court of Final Appeal and the Chief Justice of the High Court in the Hong Kong SAR shall be made by the Chief Executive with the endorsement of the Legislative Council of the Region and reported to the Standing Committee of the NPC for the record.

Article 90

The previous system of appointment and removal of members of the judiciary other than judges of the Hong Kong SAR shall be maintained.

Article 91

Judges and other members of the judiciary of the Hong Kong SAR shall be chosen by reference to their judicial and professional qualities and may be recruited from other common law jurisdictions.

Article 92

Judges and other members of the judiciary serving in Hong Kong before the establishment of the Hong Kong SAR may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

The Hong Kong SAR shall pay to judges and other members of the judiciary who retire or leave the service in compliance with regulations as well as to those who have retired or left the service before the establishment of the Hong Kong SAR, or to their dependents, 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.

Article 93

On the basis of the system previously operating in Hong Kong, the Hong Kong SAR shall on its own make provision for local lawyers and lawyers from outside the Hong Kong SAR to work and practise in the Hong Kong SAR.

Article 94

The judicial organs of the Hong Kong SAR may, through consultation and in accordance with law, maintain judicial relations with those of other parts of the country, and they may render assistance to each other.

Article 95

With the assistance or authorization of the CPG, the Government of the Hong Kong SAR may make appropriate arrangements with foreign states for reciprocal judicial assistance.

Section 5 : District Organizations

Article 96

District organizations which are not organs of political power may be established in the Hong Kong SAR, 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.

Article 97

The powers and functions of the district organizations and their composition shall be prescribed by law.

Section 6 : Public Servants

Article 98

Public servants serving in all government departments of the Hong Kong SAR shall be permanent residents of the Hong Kong SAR except where otherwise provided for in Article 100 of this Law in respect of expatriate civil servants 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 SAR.

Article 99

Public servants in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong SAR, may all remain in employment and retain their seniority with pay, allowance, benefits and conditions of service no less favourable than before.

Article 100

The Government of the Hong Kong SAR 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 at various levels, but only Chinese nationals among the permanent residents of the Region can fill the following posts : Secretaries and Deputy Secretaries of Departments, Directors of Bureaus, Commissioner Against Corruption, Director of Audit and Commissioner of Police.

The Government of the Hong Kong SAR shall also employ British and other foreign nationals as advisers to government departments and, when there is need, may recruit qualified candidates from outside the Region to 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.

Article 101

The Government of the Hong Kong SAR shall pay to public servants who retire or leave the service in compliance with regulations as well as to those who have retired or left the service in compliance with regulations before the establishment of the Hong Kong SAR, or to their dependents, 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.

Article 102

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 bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals.

Article 103

The Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of courts at all levels and other members of the judiciary in the Hong Kong SAR must be sworn in according to law when assuming office.

Chapter V : Economy

Section 1 : Finance, Monetary Affairs, Trade and
Industry and Commerce

Article 104

The Hong Kong SAR shall, in accordance with law, protect the rights of the acquisition, use, disposal and inheritance of the property of individuals and legal persons, as well as the right of the original owners to compensation for the lawful takeover of property of individuals and legal persons.

Compensation for the lawful takeover of property shall be corresponding to the prevailing real value of the property concerned, freely convertible to foreign currency and paid without undue delay.

Ownership of enterprises and investments from outside the Region shall be protected by law.

Article 105

The Hong Kong SAR shall have independent finances.

The Hong Kong SAR shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the CPG.

The CPG shall not levy taxes in the Hong Kong SAR.

Article 106

The Hong Kong SAR shall follow the principle of measuring expenditure by revenues in drawing up its budget. It shall strive to balance its expenditure and revenues and to avoid deficits. The budget should correspond to the rate of increase in the gross domestic product.

Article 107

The Hong Kong SAR shall practise an independent taxation system.

With reference to the low tax policy previously practised in Hong Kong, the Hong Kong SAR shall formulate laws on its own to prescribe the types of tax, tax rates, tax exemptions and other tax matters.

Article 108

The Government of the Hong Kong SAR shall create the appropriate economic and legal conditions for the maintenance of the status of the Hong Kong SAR as an international financial centre.

Article 109

The monetary and financial systems of the Hong Kong SAR shall be governed by law.

The Government of the Hong Kong SAR shall decide on its own its monetary and financial policies, shall safeguard the free operation of financial business and financial markets and shall regulate and supervise them in accordance with law.

Article 110

The Hong Kong dollar, as the legal tender in the Hong Kong SAR, shall continue to circulate.

The authority to issue Hong Kong currency shall be vested in the Government of the Hong Kong SAR. The system regarding the issue of Hong Kong currency and the reserve fund shall be prescribed by law.

The Government of the Hong Kong SAR 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.

Article 111

No exchange control policies shall be applied in the Hong Kong SAR. The Hong Kong dollar shall be freely convertible. Open markets for foreign exchange, gold, securities and futures shall continue.

The Government of the Hong Kong SAR shall safeguard the free flow of capital within, into and out of the Region.

Article 112

The Exchange Fund of the Hong Kong SAR shall be managed and controlled by the government of the Region, primarily for regulating the exchange value of the Hong Kong dollar.

Article 113

The Hong Kong SAR shall remain a free port. Unless otherwise stipulated by law, no tariff shall be imposed.

Article 114

The Hong Kong SAR shall practise the policy of free trade, and shall safeguard the free movement of goods, intangible assets and capital.

Article 115

The Hong Kong SAR shall be a separate customs territory.

The Hong Kong SAR 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 by the Hong Kong SAR or which were obtained and remain valid, shall be enjoyed exclusively by the Region.

Article 116

The Hong Kong SAR may issue its own certificates of origin for products in accordance with prevailing rules of origin.

Article 117

The Government of the Hong Kong SAR shall create the economic and legal conditions for encouraging various kinds of investment, technological progress and the development of new industries.

Article 118

The Government of the Hong Kong SAR shall formulate appropriate policies to promote and co-ordinate the development of various trades such as the manufacturing sector, commerce, tourism, real estate, transport, public utilities, services, agriculture and fishery.

Section 2 : Land Leases

Article 119

All leases of land granted, decided upon or renewed before the establishment of the Hong Kong SAR 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.

Article 120

As regards 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.

Article 121

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 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 previous 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.

Article 122

Where leases of land without a right of renewal expire after the establishment of the Hong Kong SAR, they shall be dealt with in accordance with laws and policies formulated by the Region on its own.

Section 3 : Shipping

Article 123

The Hong Kong SAR 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 Government of the Hong Kong SAR in respect of shipping shall be defined by it on its own.

Article 124

The Hong Kong SAR shall be authorized by the CPG to continue to maintain a shipping register and issue related certificates under the legislation of the Region using the name "Hong Kong, China".

Article 125

With the exception of foreign warships, access for which requires the special permission of the CPG, ships shall enjoy access to the ports of the Hong Kong SAR in accordance with the laws of the Region.

Article 126

Private shipping business and shipping-related business and private container terminals in the Hong Kong SAR may continue to operate freely.

Section 4 : Civil Aviation

Article 127

The Government of the Hong Kong SAR shall create conditions and take measures for the maintenance of the status of the Region as a centre of international and regional aviation.

Article 128

The Hong Kong SAR 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 CPG concerning nationality marks and registration marks of aircraft.

Access of foreign state aircraft to the Hong Kong SAR requires the special permission of the CPG.

Article 129

The Hong Kong SAR 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 SAR, and the discharge of other responsibilities allocated to it under the regional air navigation procedures of the International Civil Aviation Organization.

Article 130

The CPG shall, in consultation with the Government of the Hong Kong SAR, make arrangements providing for air services between the Region and other parts of the PRC for airlines incorporated in the Hong Kong SAR and having their principal place of business in Hong Kong and other airlines of the PRC.

Article 131

All Air Service Agreements providing for air services between other parts of the PRC and other states and regions with stops at the Hong Kong SAR and for air services between the Hong Kong SAR and other states and regions with stops at other parts of the PRC shall be concluded by the CPG.

In concluding the international Air Service Agreements referred to in the first Paragraph of this Article, the CPG shall take account of the special conditions and economic interests of the Hong Kong SAR and consult the government of the Region.

Representatives of the Government of the Hong Kong SAR may participate, as members of the delegations of the Government of the PRC, in air service consultations with foreign governments concerning arrangements for such services referred to in the first Paragraph of this Article.

Article 132

Acting under specific authorizations from the CPG, the Government of the Hong Kong SAR 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 SAR and having their principal place of business in Hong Kong and rights for over-flights and technical stops; and
- (3) negotiate and conclude provisional arrangements where no Air Service Agreement with a foreign state or with another region is in force.

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.

Article 133

The CPG shall give the Government of the Hong Kong SAR 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 132 of this Law;
- (2) issue licences to airlines incorporated in the Hong Kong SAR 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 132 of this Law; and
- (4) issue permits to foreign airlines for services other than those to, from or through the mainland of China.

Article 134

Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses there before the establishment of the Hong Kong SAR may continue to operate.

Chapter VI : Education, Science, Culture, Sports, Religion,
Labour and Social Services

Article 135

On the basis of the previous educational system, the Government of the Hong Kong SAR shall, on its own, formulate policies on the development and improvement of this system, 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 SAR.

Article 136

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 SAR. Schools run by religious organizations may continue to provide religious education, including courses on religion.

Students shall enjoy freedom to choose between educational institutions and to pursue their education outside the Hong Kong SAR.

Article 137

The Government of the Hong Kong SAR shall, on its own, formulate policies on the development of western and traditional Chinese medicine and on the promotion of medical and health services. Community organizations and individuals may, in accordance with law, provide medical and health services of various kinds.

Article 138

The Government of the Hong Kong SAR shall, on its own, formulate policies on science and technology, and shall protect by law achievements in scientific and technological research, patents, discoveries and inventions.

The Government of the Hong Kong SAR shall, on its own, decide on the scientific and technological standards and specifications applicable in Hong Kong.

Article 139

The Government of the Hong Kong SAR shall, on its own, formulate policies on culture and protect by law the achievements and the legitimate rights and interests of authors in their literary and artistic pursuits.

Article 140

The Government of the Hong Kong SAR shall not restrict the freedom of religious belief, shall not interfere in the internal affairs of religious organizations and shall not 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 SAR may maintain and develop their relations with religious organizations and believers elsewhere.

Article 141

On the basis of maintaining the previous systems for professional qualifications and practice, the Government of the Hong Kong SAR shall, on its own, formulate the methods for assessing the qualifications for professional practice for various professions.

Persons with professional qualifications or qualifications for professional practice obtained prior to the establishment of the Hong Kong SAR may retain their previous qualifications in accordance with the relevant regulations and codes of practice of the professions.

The Government of the Hong Kong SAR shall continue to recognize professions and professional organizations recognized prior to the establishment of the Hong Kong SAR. The recognized professional organizations may, on their own, assess and accredit professional qualifications.

The Government of the Hong Kong SAR may, as required by developments in society and in consultation with the parties concerned, recognize new professions and professional organizations.

Article 142

The Government of the Hong Kong SAR shall, on its own, formulate policies on sports. Non-governmental sports organizations may continue to exist and develop in accordance with law.

Article 143

The Government of the Hong Kong SAR shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental bodies and organizations in fields such as education, medicine and health, culture, arts, recreation, sports, social welfare and social work. Staff previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.

Article 144

On the basis of the previous social welfare system, the Government of the Hong Kong SAR shall, on its own, formulate laws and policies on the development and improvement of this system in the light of the economic conditions and social needs.

Article 145

Voluntary organizations providing social services in the Hong Kong SAR may, on their own, decide their forms of service provided that they do not contravene the law.

Article 146

The Government of the Hong Kong SAR shall, on its own, formulate labour laws and policies.

Article 147

The relationship between non-governmental organizations in fields such as education, science, technology, culture, arts, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong SAR and their counterparts on the mainland shall be based on the principles of non-subordination, non-interference and mutual respect.

Article 148

Non-governmental organizations in fields such as education, science, technology, culture, arts, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong SAR may maintain and develop relations with foreign countries and other regions and with relevant international organizations. They may, as required, use the name "Hong Kong, China" in the relevant activities.

Chapter VII : External Affairs

Article 149

Representatives of the Government of the Hong Kong SAR may participate, as members of the delegations of the Government of the PRC, in negotiations at the diplomatic level directly affecting the Region conducted by the CPG.

Article 150

The Hong Kong SAR 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, tourism, cultural and sports fields.

Article 151

Representatives of the Hong Kong SAR may participate, as members of delegations of the Government of the PRC, 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 CPG and the international organization or conference concerned, and may express their views, using the name "Hong Kong, China".

The Hong Kong SAR may, using the name "Hong Kong, China", participate in international organizations and conferences not limited to states.

The CPG shall take the necessary steps to ensure that the Hong Kong SAR shall continue to retain its status in an appropriate capacity in those international organizations of which the PRC is a member and in which Hong Kong participates in one capacity or another.

The CPG shall, where necessary, facilitate the continued participation of the Hong Kong SAR in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the PRC is not a member.

Article 152

The application to the Hong Kong SAR of international agreements to which the PRC is or becomes a party shall be decided by the CPG, 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 PRC is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong SAR. The CPG 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.

Article 153

The CPG shall authorize the Government of the Hong Kong SAR to issue, in accordance with law, passports of the Hong Kong SAR of the PRC to all Chinese nationals who hold permanent identity cards of the Region, and travel documents of the Hong Kong SAR of the PRC 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 Hong Kong.

The Government of the Hong Kong SAR may apply immigration controls on entry into, stay in and departure from the Hong Kong SAR by persons from foreign states and other regions.

Article 154

The CPG shall assist or authorize the Government of the Hong Kong SAR to conclude visa exemption agreements with states or regions.

Article 155

The Hong Kong SAR 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 CPG for the record.

Article 156

The establishment of foreign consular and other official or semi-official missions in the Hong Kong SAR requires the approval of the CPG.

Consular and other official missions established in Hong Kong by states which have formal diplomatic relations with the PRC 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 PRC may either be permitted to remain or be changed to semi-official missions.

States not recognized by the PRC can only establish non-governmental institutions in Hong Kong.

Chapter VIII: Interpretation and Amendment of the Basic Law

Article 157

The power of interpretation of this Law is vested in the Standing Committee of the NPC.

The Standing Committee of the NPC authorizes the courts of the Hong Kong SAR to interpret on their own those provisions of this Law falling within the scope of the Hong Kong SAR's autonomy in adjudicating cases before them.

The courts of the Hong Kong SAR may also interpret the other provisions of this Law in adjudicating cases before them. But if the courts of the Hong Kong SAR, in adjudicating cases before them, require an interpretation of those provisions of this Law concerning any affairs which are the responsibilities of the CPG or the relationship between the central authorities and the Hong Kong SAR, and if the interpretation of those provisions will affect the judgment on the case, the Court of Final Appeal of the Hong Kong SAR should, before a final judgment against which there can be no further appeal is made on the case, request the Standing Committee of the NPC to give an interpretation of the relevant provisions. If the Standing Committee of the NPC gives an interpretation, the courts of the Hong Kong SAR, in applying that provision, should follow that interpretation by the Standing Committee of the NPC. However, judgments previously rendered shall not be affected.

The Standing Committee of the NPC shall consult its Committee for the Basic Law of the Hong Kong SAR before giving an interpretation of this Law.

Article 158

The power of amendment of this Law is vested in the NPC.

The right to propose amendments to this Law rests with the Standing Committee of the NPC, the State Council and the Hong Kong SAR. Amendment proposals from the Hong Kong SAR shall be submitted to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.

Before a proposal for an amendment to this Law is put on the agenda of the NPC, the Committee of the Basic Law of the Hong Kong SAR, shall first study it and submit its views.

No amendment to this Law shall contravene the established basic policies of the PRC regarding Hong Kong.

Chapter IX : Supplementary Provisions

Article 159

At the time of the establishment of the Hong Kong SAR, 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 NPC declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they can be revised or will cease to have effect according to 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 SAR, provided that they do not contravene this Law.

* Previous Article 159 transposed to Annexes I and II and the draft NPC Resolution.

Annex I : Method for Selecting the Chief Executive
of the Hong Kong SAR

1. The Chief Executive shall be elected by a broadly representative Election Committee and be appointed by the CPG.

2. The Election Committee shall be composed of 800 members representing the following sectors:

Business and financial sectors 200

Professional sector 200

Labour, social service and religious
sectors etc. 200

Members of the Legislative Council,
representatives of members of
regional and district organizations,
deputies of the Hong Kong
region to the NPC and Hong Kong
delegates to the CPPCC 200

3. The delineation of various constituencies and the types of organizations within each constituency as well as the number of representatives they may return to the Election Committee shall be prescribed by an electoral law of the Hong Kong SAR.

The statutory bodies of the constituencies shall, in accordance with the allocation of seats and election methods prescribed by the electoral law, elect their representatives to the Election Committee.

Members of the Election Committee shall cast their votes in their personal capacities.

4. Candidates for the Chief Executive shall be nominated jointly by no less than 100 members of the Election Committee. Each member may nominate only one candidate.

5. The Election Committee shall elect the Chief Executive (Designate) by secret ballot from the nomination list and on a one-member-one-vote basis. Specific methods of the election shall be prescribed by the electoral law.

6. The Election Committee shall be dissolved upon the appointment of the Chief Executive by the CPG.

7. The first Chief Executive shall be selected in accordance with the "NPC Resolution on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong SAR".

The second and the third Chief Executives shall be selected in accordance with the method prescribed in this Annex.

During the term of the third Chief Executive, the Legislative Council shall formulate the specific method to decide, by holding a referendum among the electorate of the Hong Kong SAR, whether the Chief Executive shall be elected by universal suffrage after nominations have been made by a broadly representative nomination committee through democratic procedures. The result of the referendum shall be reported to the Standing Committee of the NPC for the record.

The above referendum shall be held only after obtaining the endorsement of the majority of the members of the Legislative Council, the consent of the Chief Executive and the approval of the Standing Committee of the NPC. The result of the referendum shall be valid and can be implemented only with the endorsement of 30 per cent or more of the eligible voters.

8. If it is decided by the above-mentioned referendum that the Chief Executive shall be elected by universal suffrage, such a decision shall be implemented from the fourth term of the Chief Executive. If the referendum decides that no change shall be made, the referendum prescribed in (7) may be held again every 10 years.

9. Except otherwise provided for in (7) and (8) of this Annex, any other modifications to the method for selecting the Chief Executive shall require the endorsement of a two-thirds majority of the members of the Legislative Council and the consent of the Chief Executive, and shall be reported to the Standing Committee of the NPC for the record.

Annex II : Method for Constituting the Legislative Council
of the Hong Kong SAR

1. The memberships and compositions of the first to the fourth terms of the Legislative Council of the Hong Kong SAR are as follows :

(A) First term	membership : 55
(i) District representatives	15
(ii) Business and financial sectors	16
(iii) Professional sector	12
(iv) Labour, social service and religious sectors etc.	12
(B) Second term	membership : 65
(i) Directly-elected on a district basis	25
(ii) Business and financial sectors	16
(iii) Professional sector	12
(iv) Labour, social service and religious sectors etc.	12
(C) Third and fourth terms	membership : 80
(i) Directly-elected on a district basis	40
(ii) Business and financial sectors	16
(iii) Professional sector	12
(iv) Labour, social service and religious sectors etc.	12

2. The delineation of constituencies and the voting procedures etc for the above district elections as well as the delineation of the various constituencies and their constituent statutory bodies, the allocation of seats and election methods shall be prescribed by an electoral law of the Hong Kong SAR.

Each voter shall have only one vote.

3. The first Legislative Council shall be formed in accordance with the "NPC Resolution on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong SAR".

The first to the fourth terms of the Legislative Council shall be constituted in accordance with the provisions in this Annex. During the fourth term of the Legislative Council, the Council shall formulate the specific method to decide, by holding a referendum among the electorate of the Hong Kong SAR, whether members of the Legislative Council shall all be returned by universal suffrage. The result of the referendum shall be reported to the Standing Committee of the NPC for the record.

The above referendum shall be held only after obtaining the endorsement of the majority of the members of the Legislative Council, the consent of the Chief Executive and the approval of the Standing Committee of the NPC. The result of the referendum shall be valid and can be implemented only with the endorsement of 30 per cent or more of the eligible voters.

4. If it is decided by the above-mentioned referendum that members of the Legislative Council shall all be elected by universal suffrage, such a decision shall be implemented from the fifth term of the Legislative Council. If the referendum decides that no change shall be made, the referendum prescribed in (3) above may be held again every 10 years.

5. Except otherwise provided for in (3) and (4) of this Annex, any other modifications to the method of constituting the Legislative Council shall require the endorsement of a two-thirds majority of the members of the Legislative Council and the consent of the Chief Executive, and shall be reported to the Standing Committee of the NPC for the record.

Annex III : Nationwide Laws Applicable in the Hong Kong SAR

The following nationwide laws shall be applied locally by the Hong Kong SAR by way of promulgation or legislation from 1 July 1997 :

1. "Resolution on 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 Issued by the Central People's Government on the National Emblem of the People's Republic of China" attached with the design and description of as well the method to use the national emblem;
4. "Statement on Territorial Sea by the Government of the People's Republic of China";
5. "Nationality Law of the People's Republic of China";
and
6. "Regulations on Diplomatic Privileges and Immunities of the People's Republic of China"

Draft Resolution on the Method for the Formation of the
First Government and the First Legislative Council of the
Hong Kong SAR by the National People's Congress of the
People's Republic of China

(Prepared for the NPC)

1. The first Government and the first Legislative Council of the Hong Kong SAR shall be established in accordance with the principles of national sovereignty and of smooth transition.

2. Within the year of 1996, the NPC shall establish a Preparatory Committee of the Hong Kong SAR, which shall be responsible for the preparations of the establishment of the Region, and shall decide on the specific method for the formation of its first government. The Preparatory Committee shall be composed of mainland members and of Hong Kong members who shall constitute no less than 50 per cent. Its chairman and members shall be appointed by the Standing Committee of the NPC.

3. The Preparatory Committee for the Hong Kong SAR shall be responsible for preparing the establishment of the "Election Committee for the First Government of the Hong Kong SAR".

The "Election Committee" shall be composed entirely of permanent residents of Hong Kong and must be broadly representative. It shall include deputies of the Hong Kong region to the NPC of the PRC, Hong Kong delegates to the CPPCC, experienced persons who have served in Hong Kong's administrative, legislative and advisory organizations before the establishment of the Hong Kong SAR, as well as persons representative of all strata and sections of society.

The "Election Committee" shall have 400 members, and the proportions of the composition of the Committee are as follows :

Business and financial sectors	25 per cent
Professional sector	25 per cent
Labour, grass-roots and religious sectors etc.	25 per cent
Previous political figures, Hong Kong deputies to the NPC and delegates to the CPPCC	25 per cent

4. The Election Committee shall recommend the candidate for the first Chief Executive through local consultation or local election after consultation, and report the recommended Chief Executive to the CPG for appointment. The term of the first Chief Executive shall be the normal term.

5. The Chief Executive of the Hong Kong SAR shall be responsible for preparing for the formation of the first government of the Region according to this Law.

6. The first Legislative Council of the Hong Kong SAR shall be composed of 55 members, comprising 15 district representatives, 16 elected by the business and financial sectors, 12 elected by the professional sector and 12 elected by the labour, social service and religious sectors etc. All members of the last Legislative Council of the former Hong Kong Government, who uphold the Basic Law, are prepared to pledge allegiance to the Hong Kong SAR and meet the provisions of the Basic Law, will become members of the first Legislative Council of the Hong Kong SAR after validation by the Preparatory Committee for the establishment of the Hong Kong SAR. If there are still vacant seats, the Election Committee may hold elections to fill these seats.

The term of office of the members of the first Legislative Council of the Hong Kong SAR shall be two years.

7. The first Chief Executive of the Hong Kong SAR shall be sworn in to office on 1 July 1997.

On 1 July 1997, the first Government and Legislative Council of the Hong Kong SAR shall be inaugurated simultaneously.

Standing Committee of the National People's Congress,

During its course of work, the Basic Law Drafting Committee of the Hong Kong SAR has considered that it will be necessary for some organ to examine and submit views to the NPC or its Standing Committee on questions relating to the Basic Law of the Hong Kong SAR upon its formal implementation. It is therefore recommended that, at the same time when the Basic Law enters into force, a working committee, formed by mainland and Hong Kong members appointed by the Standing Committee of the NPC, be set up under the Standing Committee. (Detailed proposal is attached)

Submitted for consideration and decision please.

The Basic Law Drafting Committee
of the Hong Kong SAR

Date:

Proposal by the Basic Law Drafting Committee on the
Establishment of the Committee for the Basic Law of the
Hong Kong SAR under the Standing Committee of the National
People's
Congress

1. Name
 The Committee for the Basic Law of the Hong Kong
 SAR under the Standing Committee of the NPC

2. Affiliation
 A working committee set up under the Standing
 Committee of the NPC

3. Duties
 To examine and submit its views to the NPC or its
 Standing Committee on questions arising from the
 implementation of Articles 17, 18, 19, 157 and 158
 of the Basic Law of the Hong Kong SAR.

4. Composition
 It shall be composed of 12 mainland and Hong Kong
 members, including persons from the legal
 profession, appointed by the Standing Committee of
 the NPC. Mainland and Hong Kong members shall
 each take up half of the seats of the Committee,
 and shall serve a term of five years. The Hong
 Kong members shall be Chinese nationals who are
 permanent residents of the Hong Kong SAR. They
 shall be nominated jointly by the Chief Executive,
 the President of the Legislative Council and the
 Chief Justice of the Court of Final Appeal of the
 Hong Kong SAR and reported to the Standing
 Committee of the NPC for appointment.

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