

22 August 1987

Mr Chairman, Messrs Vice-Chairmen, and Members,

The Subgroup on the Relationship between the Central Government and the SAR has held three meetings since the fourth plenary session of the Drafting Committee in April to scrutinise the opinions raised by members at the fourth plenary session and proposals from members of the Consultative Committee for the Basic Law (CCBL). The draft provisions of the Preamble, Chapter 1, 2, 7, and 9 have been further revised. We would like to explain certain major issues regarding the revised draft:

I On the Preamble

The original draft stated the area of the HKSAR as follows: "Hong Kong, including Hong Kong Island, the Kowloon Peninsula to the south of the Shenzhen River, and its adjacent islands". At the fourth plenary session, some members held that the description under the Joint Declaration should be adopted i.e. Hong Kong area (including Hong Kong Island, Kowloon and the New Territories). Some members pointed out that the "New Territories", which is not a geographical term, carried colonial flavours and that since this term was in quotation marks in the Joint Declaration [the Chinese text], it should not be used to define the area of Hong Kong in the Basic Law. A large number of

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members maintained that it should be viable that the Preamble did not mention the area of the HKSAR at all but a map showing the administrative division of the HKSAR would be published by the State Council when the Basic Law was promulgated by the NPC. After some study, members of the Subgroup agreed to adopt the view expressed by the majority of members at the fourth plenary session. Consequently, the original statement regarding the area of Hong Kong is deleted and the first sentence in the Preamble reads: "Hong Kong, which has been part of Chinese territory from ancient times was occupied by Britain after the Opium War of 1840" and the above-mentioned proposal (for publication of a map) is stated in the Note.

II On Chapter 1: General Provisions

- (1) Some members of the CCBL suggested that the protection of inhabitants' rights and freedoms being a fundamental principle, should be included in the General Provisions. The Subgroup adopted the view and added a new article: "Article 5: The HKSAR shall protect the rights and freedoms of the HKSAR inhabitants and other persons in accordance with law." And the original Articles 5, 6, 7, and 8 now become Articles 6, 7, 8, and 9.
- (2) The relationship between the Constitution and the Basic Law was dealt with by Article 1 of Chapter 9 in the original draft. Considering that it is a general principle in nature, we have moved this article to Chapter 1 as Article 10 of the General Provisions. Since Article 8 of the General Provisions already provides that the law previously in force

in Hong Kong shall not contravene the Basic Law, a phrase in paragraph 2 of Article 10: "as well as any law previously in force in Hong Kong and continues to be used by the HKSAR" is deleted to avoid repetition.

III On Chapter 2: The Relationship between Central Government and the HKSAR

- (1) With regard to the applicability of the limited number of national laws to the HKSAR, the original draft contained two proposals. At the fourth plenary session, members expressed quite a number of views on this issue. After some study, members of the Subgroup held that, in accordance with the policy of "one country, two system", national laws should generally not be applied to the HKSAR. In cases of the limited number of national laws which must be applied, the scope should be clearly defined: it should be strictly confined to the laws relating to defence, foreign affairs, and the expression of national unity and territorial integrity. Furthermore, the Central Government should consult the HKSAR before deciding on the implementation of such laws. With these principles in mind, we redrafted the provisions.

In addition, some members proposed that the last paragraph of Section II of Annex I to the Joint Declaration be recorded in the Basic Law verbatim: "The laws of the HKSAR shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the HKSAR legislature as above." Members of this Subgroup agreed to this proposal

and considered that it would be appropriate to include this paragraph as well as the provisions on the applicability of national laws in Article 7.

- (2) In the progress report submitted to the third plenary session, the Subgroup had proposed to set up a committee under the NPC or its Standing Committee, comprising mainland and Hong Kong members, to be responsible for advising the NPC or its Standing Committee on such matters as the interpretation and amendment of the Basic Law, whether the laws enacted by the HKSAR are in accordance with the Basic Law and legal procedures, and the applicability of the limited number of national laws to Hong Kong. At the fourth plenary session, a large number of members again proposed that a consultative committee be set up under the NPC or its Standing Committee. After some discussion, the Subgroup resolved to call such committee tentatively the "HKSAR Basic Law Committee" and mention it in the provisions. The creation of a Basic Law Committee is only a proposal. Its establishment, affiliation, terms of reference and composition are yet to be decided by the NPC.

IV On Chapter 9: The Interpretation and Amendment of the Basic Law of the HKSAR

- (1) As Article 1 of this Chapter is moved to Chapter 1 on General Provisions, the term "Legal Status" in the heading is deleted accordingly.

(2) On the interpretation of the Basic Law, paragraph 2 of Article 2 of Chapter 9 of the original draft provides that "The courts in the HKSAR may, in adjudicating cases before it, interpret those articles of the Basic Law which are within the scope of the SAR's autonomy." Members of the Subgroup expressed divergent views on this paragraph. Some members held that the court's interpretation of the Basic Law when adjudicating cases should not be subject to restriction, and proposed that the expression "which are within the scope of the SAR's autonomy" be deleted. But some members did not accept this view and held that the original draft should remain unchanged.

In the course of discussing this issue, some members suggested that this issue might be resolved by considering the jurisdiction of the HKSAR courts. For this purpose, this Subgroup and the Subgroup on Political Structure have held 2 joint meetings and legal experts from the two Subgroups have also held discussion on this issue. After studying the proposal drawn up by the legal experts, some members of this Subgroup held that the present proposal did not resolve whether the courts may only interpret the articles of the Basic Law within a scope. Some members considered that under normal circumstances the NPC Standing Committee's interpretation of the Basic Law should not affect the adjudication made prior to such interpretation. But whether in certain exceptional cases, specific legal procedures would be required to resolve the question needed

further discussion. If the specific cases are also taken care of, the restriction on the scope of interpretation of the Basic Law may be abolished. Some members of the Subgroup held that, this would pose technical problem in the courts' adjudication. A member raised the question as to whether the power of final adjudication of the HKSAR courts would be affected if the NPC Standing Committee's interpretation was retrospective.

Members of the Subgroup were of the opinion that since the power of interpretation was a complicated issue and since the existing proposals were not well-considered, further study would be required.

- (3) On amendment to the Basic Law, some members suggested at the fourth plenary session that the following provision in the original draft was misleading: "The basic principles stipulated in the Chapter on General Principles in this Law shall not be amended within 50 years after the commencement of this Law." It might give a false impression that the basic principles and policies provided under other Chapters of the Basic Law were all subject to amendment. Hence, members of the Subgroup unanimously agreed to amend the provision as follows: "No amendment to this Law shall contravene the established basic policies of the NPC regarding the HKSAR."

On the right to propose amendment to the Basic Law, Article 3 of Chapter 9 in the original draft provides that it should be vested with the NPC Standing Committee, the State Council, and the NPC delegates. Before the NPC delegates initiate any proposal for amendment to the Basic Law, consent should be obtained from not less than two-thirds of HKSAR delegates to the NPC, two-thirds of members of the HKSAR legislature and the Chief Executive of the HKSAR. After discussion, members of the Subgroup held that apart from the NPC Standing Committee and the State Council, the HKSAR should also have the right to propose amendment. As amendment to the Basic Law is an important matter, the various parties of the HKSAR should have a unanimous opinion in order to facilitate discussion at the NPC. Thus we are of the view that consent from the majority of Hong Kong legislators and the Chief Executive of the HKSAR would be required before the initiation of any proposal.

After a brief explanation, the draft provisions of the Preamble and Chapter 1, 2, 7 and 9 which have been further amended by our Subgroup are reported as follows:

Preamble

Hong Kong, which has been part of Chinese territory from ancient times, was occupied by Britain after the Opium War of 1840. In December 1984, the Chinese and British Governments signed a Joint Declaration on the question of Hong Kong, and affirmed that the PRC will resume the exercise of sovereignty over Hong Kong on 1 July 1997, so as to realise the long-held common aspirations of the entire Chinese people to restore Hong Kong to the PRC.

Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the State has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the PRC, a HKSAR when resuming the exercise of sovereignty over Hong Kong. Under the guidance of the policy of "one country, two systems" the systems and policies practised in Hong Kong shall be different from those in the mainland, and will be maintained as such for at least 50 years. The basic policies of the People's Republic of China regarding Hong Kong has been expressed by our Government in the Sino-British Joint Declaration.

A Basic Law for the HKSAR will be enacted in accordance with the provisions of the Constitution of the PRC, setting out the systems of the HKSAR, so as to ensure the implementation of the basic policies of the State regarding Hong Kong.

[Note] It was proposed that a map showing the administrative division of the Hong Kong Special Administrative Region be published by the State Council when the Basic Law was promulgated by the National People's Congress.

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Article 1: The HKSAR is an inalienable part of the PRC.

Article 2: The NPC authorizes the HKSAR to exercise a high degree of autonomy in accordance with the provisions of this Law.

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

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.

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

Article 6: The right to ownership of property, including acquisition, use, disposition and inheritance of property, and the right to compensation for property lawfully requisitioned (compensation equivalent to the actual value of the property may be freely converted into money, and its payment shall not be delayed without reason) shall be protected by law.

Article 7: Land and natural resources within the HKSAR belong to the State, and the HKSAR shall be responsible for their management, use and their leasing to individuals or statutory corporations, and their resultant income shall be at the disposal of 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 HKSAR executive authorities, the legislature and the judiciary.

[Note] It was suggested that the term "executive authorities" be replaced with "organs of government". But another member held that this issue should be resolved after the Subgroup on Political Structure had determined the definitions for "government" or "executive authorities".

Article 10: In accordance with Article 31 of the Constitution of the PRC, the policies and systems of the HKSAR, including the social and economic systems, those relating to the protection of fundamental rights and freedoms, the executive, the legislature and the judiciary, shall be based on the stipulations of this Law.

Any law enacted by the HKSAR legislature shall not contravene this Law.

Article 1: The HKSAR is a local administrative region of the PRC with a high degree of autonomy. The HKSAR Government is directly under the authority of the Central People's Government (CPG).

[Note] Some members suggested to include the following "The laws which give expression to a relationship of direct subordination (to the CPG) shall be the laws and regulations enacted by the National People's Congress (NPC), the Standing Committee of the NPC, or the State Council".

Article 2: The Chief Executive and principal officials of the executive authorities of the HKSAR shall be appointed by the CPG in accordance with Chapter 4 of this Law.

Article 3: The CPG shall be responsible for the foreign affairs of the HKSAR.

The CPG authorizes the HKSAR Government to deal with on its own relevant external affairs in accordance with this Law.

The Ministry of Foreign Affairs of the PRC shall establish an office in Hong Kong to handle foreign affairs.

Article 4: The CPG shall be responsible for the defence of the HKSAR.

Military forces sent by the CPG to be stationed in the HKSAR for the purpose of defence shall not interfere in the internal affairs of the HKSAR. The HKSAR Government may, in times of need, request the CPG for the military forces to assist in maintaining public order and relieving disasters.

Apart from national laws of the country, members of the military forces shall also abide by the laws of the HKSAR.

Expenditure for the military forces shall be borne by the CPG.

[Note] It was suggested there should be separate laws to deal with members of the military force who had committed crimes.

Article 5: The HKSAR shall be vested with executive power. It shall, in accordance with the relevant provisions of this Law, on its own manage executive affairs relating to finance, monetary affairs, economy, industry and commerce, trade, taxation, postal service, civil aviation, maritime affairs, transport, agriculture and fishery, civil service, home affairs, labour, education, medical and health affairs, social welfare, recreation and culture, municipal affairs, town planning, housing, land and real property, internal security, immigration, climatology, communications, science and technology, sports and other areas.

Article 6: The HKSAR shall be vested with legislative power.

Laws enacted by the HKSAR legislature shall be reported to the NPC Standing Committee for the record, and such reporting will not affect the coming into operation of the laws.

If the NPC Standing Committee, after consulting the Basic Law Committee of the HKSAR, considers that any law of the HKSAR is not in accordance with this Law or legal procedures, it may return it 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 NPC Standing Committee shall immediately cease to have force, but this cessation shall not have retrospective effect.

[Note] The majority of members considered that the final decision over whether any law enacted by the HKSAR legislature was in accordance with the Basic Law and legal procedures should rest with NPC Standing Committee. They also suggested that a consultative body, tentatively called the HKSAR Basic Law Committee, be set up under the Standing Committee of the National People's Congress. The Committee, comprising both Hong Kong and mainland members, should be responsible for advising the NPC or its Standing Committee on matters concerning the interpretation and amendment of the Basic Law, whether the laws enacted by the HKSAR legislature were in accordance with the Basic Law and legal procedures, and the applicability of the national laws to the HKSAR. The establishment, affiliation and duties of this Committee were yet to be decided by the National People's Congress.

A member took the view that if the NPC Standing Committee considered that a law enacted by the SAR legislature was not in accordance with this Law and legal procedures, then it could refer such law to the court of final appeal for their consideration. If that court considered that such law was not enacted in accordance with the Basic Law and the legal procedures, and if the NPC Standing Committee did not disagree, then such law should cease to have force immediately, but the cessation would not be retrospective. If the NPC Standing Committee disagreed with the view of the court of final appeal of the HKSAR then the law could be referred to a special committee for its consideration. (Remarks: the special committee would be directly under the NPC, to be composed of legal experts from the mainland and Hong Kong, the majority of whom would be representatives from the HKSAR. Its decision would be adopted by the NPC Standing Committee without amendment.) Any law that was considered by the special committee not to have been enacted in accordance with this Law or legal procedures would cease to have force upon publication of such decision in the HKSAR Gazette, but the cessation would not have retrospective effect.

As regards the provision relating to the NPC Standing Committee to "return it for reconsideration or revoke it" in paragraph 3 of this Article a member considered that it was sufficient simply to return it for reconsideration; another member took the view that if the HKSAR should still insist on the original law, then the NPC Standing Committee could revoke it.

Article 7: The laws of the HKSAR shall be this Law, the laws previously in force in Hong Kong as provided in Article 8 of the General Provisions under 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 the following:

- 1) laws concerning defence and foreign affairs;
- 2) other laws relating to the expression of national unity and territorial integrity, and laws outside the scope of the high degree of autonomy of the HKSAR as provided by this Law.

Of laws set out in 1) and 2) above, those which need to be applied in the HKSAR shall be applied by way of proclamation or legislation by the HKSAR Government on the directive of the State Council. Except in emergencies, the State Council shall consult the HKSAR Government before giving the above-mentioned directive.

If the HKSAR Government does not act in accordance with the directives given by the State Council, the State Council may apply the above-stated law in the HKSAR by proclamation.

[Note] A member suggested that the last sentence of paragraph 3 of this Article should read: "the State Council may issue a directive to the effect that the HKSAR shall decide on its own the form and method regarding their implementation".

It was also proposed by a member that the following be included in paragraph 2 of this Article: "Except for those concerning defence and foreign affairs, laws enacted by the National People's Congress and its Standing Committee shall not be applied in the HKSAR".

A member pointed out that since the nature of work of the HKSAR Basic Law Committee and the HKSAR Government would be different, the matters for consultations with these institutions should also be different in nature.

A member held that the phrase "the expression of national unity" in the above-mentioned proposal should be interpreted as follows: all matters within the jurisdiction of the CPG should be administered by it.

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Article 8: The HKSAR shall be vested with independent judicial power, including that of final adjudication.

Article 9: The HKSAR shall be vested with other powers conferred by the NPC, the NPC Standing Committee, and the State Council.

Article 10: HKSAR inhabitants who are Chinese nationals may, in accordance with law, participate in the management of state affairs.

The delegates of the HKSAR to the NPC shall be elected in Hong Kong from the Chinese nationals among Hong Kong inhabitants in accordance with the number of seats and election procedures specified by the NPC Standing Committee.

[Note] Some members proposed to amend this Article to: "Chinese nationals who are permanent inhabitants of the HKSAR may, in accordance with law, participate in the management of state affairs. Chinese nationals who are permanent inhabitants of the HKSAR shall select from among themselves the delegates of the HKSAR to the NPC in accordance with the number of seats and election procedures specified by the NPC Standing Committee." However some members held that this Law should not deprive any Chinese nationals of their fundamental civil rights.

Article 11: The departments under the Central Government, the provinces, autonomous regions and municipalities under the Central Government shall not interfere in the affairs administered by the HKSAR on its own in accordance with this Law.

The departments under the Central Government, the provinces, autonomous regions and municipalities under the Central Government may, with the agreement of the HKSAR Government and the approval of the CPG, establish offices in the HKSAR. These offices and their personnel shall abide by the laws of the HKSAR.

People from other parts of China who wish to enter the HKSAR shall have to apply for approval.

The HKSAR may establish an office in Beijing.

Article 12: The HKSAR shall make laws to prohibit any activity that would damage the unity of the State or subvert the CPG.

[Note] A member suggested that "damage the unity of the State" should read "lead to disintegration of the unity of the State".

Chapter 7 The External Affairs of the HKSAR

Article 1: Representative of the HKSAR may participate, as members of delegations of the Government of the PRC, in negotiations at the diplomatic level directly affecting the HKSAR conducted by the CPG.

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Article 2: 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 3: The HKSAR may send representatives to participate, as members of delegations of the Government of the PRC, 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 CPG 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 CPG 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 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 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 PRC is not a member.

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Article 4: The application to the HKSAR of international agreements to which the PRC 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 PRC is not a party but which are implemented in Hong Kong may remain implemented in the HKSAR. The CPG shall, as necessary, authorise or assist the HKSAR Government to make appropriate arrangements for the application to the HSKAR of other relevant international agreements.

Article 5: The CPG shall authorise the HKSAR to issue, in accordance with law, passports of the HKSAR of the PRC to all Chinese nationals who hold permanent identity cards of the HKSAR, and travel documents of the HKSAR of the PRC 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 the HKSAR.

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

Article 6: The CPG shall assist or authorise the HKSAR Government to conclude visa abolition agreements with states or regions.

Article 7: 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 CPG for the record.

Article 8: Foreign consular and other official or semi-official missions may be established in the HKSAR with the approval of the CPG.

Consular and other official missions established in Hong Kong by states which have established formal diplomatic relations with the PRC may be maintained.

According to the circumstances of each case, consular and other official missions of states having no formal diplomatic relations with the PRC may either be maintained or changed to semi-official missions.

States not recognised by the PRC can only establish non-governmental institutions.

Chapter 9 The Interpretation and Amendment of the Basic Law of the HKSAR

Article 1: The power of interpretation of the Basic Law shall be vested in the NPC Standing Committee.

The courts in the HKSAR may, in adjudicating cases before it, interpret those articles of the Basic Law which are within the scope of the SAR's autonomy.

If the NPC Standing Committee has made an interpretation of an article of the Basic Law, the courts of the HKSAR shall in applying such article follow the interpretation of the NPC Standing Committee. However, judgments previously given shall not be affected.

The NPC Standing Committee may consult the Basic Law Committee of the HKSAR before giving an interpretation of this Law.

[Note] Members of this Subgroup were divided as to whether in adjudicating cases before them, the courts of the HKSAR could interpret only those articles of the Basic Law which were within the scope of the SAR's autonomy. Some members considered that there need not be a prescribed scope. Others considered that it was necessary to specify a scope.

Some members held that the phrase "within the scope of the SAR's autonomy" could be deleted if the last sentence of paragraph 3 was amended to "Unless otherwise specified by the NPC Standing Committee in its interpretation, judgments previously given shall not be affected". Some members pointed out that the courts would encounter technical problems in adjudication if the interpretation made by the NPC Standing Committee was retrospective; a member held that it would affect the power of final adjudication of the HKSAR courts.

Some members suggested to combine paragraphs 2 and 3 of this Article and express them as "The courts in the HKSAR, in exercising their jurisdiction within the scope specified by this Law, may, when adjudicating cases, give judicial interpretation of those articles of the Basic Law which are relevant to such case. Such interpretation will not affect the final interpretation as may be given on the Basic Law by the NPC Standing Committee." A member suggested to amend paragraphs 2 and 3 as follows: "The courts in the HKSAR may, when adjudicating any case, make judicial interpretation on those articles of the Basic Law which are relevant to such case. Such interpretation will not affect the power of final interpretation of the NPC Standing Committee."

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A member maintained that the HKSAR courts should have the power to interpret all legal provisions implemented in the territory; however, in interpreting national laws that were applicable to the territory, the judgments and interpretations made by the NPC Standing Committee or the Supreme People's Court should be adopted.

A member proposed to amend this Article as follows:
"The power of interpretation of the Basic Law shall be vested in the NPC Standing Committee.

"The courts of the HKSAR, in exercising their jurisdiction within the scope specified by this Law, may, when adjudicating cases, give judicial interpretation of those articles of the Basic Law which are relevant to such case.

"If the NPC Standing Committee has made an interpretation of an article of the Basic Law, the courts of the HKSAR shall in applying such article follow the interpretation of the NPC Standing Committee. (Note: The issue of retrospectivity is very complicated and has yet to be examined.)

"The NPC Standing Committee may consult the HKSAR Basic Law Committee prior to its interpretation of the Basic Law."

Article 2: The power of amendment of the Basic Law shall be vested in the NPC.

The power to propose amendment to this Law shall be vested in the NPC Standing Committee, the State Council and the HKSAR. Amendment proposals from the HKSAR shall be made to the NPC by the HKSAR's delegates to the NPC after obtaining consent of not less than two-thirds of the HKSAR delegates to the NPC, two-thirds of members of the HKSAR legislature and the Chief Executive of the HKSAR.

Before a proposal for amendment to this Law is put on the agenda of the NPC, 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 PRC regarding the HKSAR.

[Note] A member maintained that apart from the NPC Standing Committee and the State Council which would have the right to propose amendment, the HKSAR legislature should also be given such a right to propose an amendment if the proposed amendment had the approval of more than 75% of the members of the legislature.

The foregoing reports are submitted to the plenary session for examination.

Subgroup on the Relationship between
the Central Government and the HKSAR