

REPORT OF THE SUBGROUP ON THE  
RELATIONSHIP BETWEEN THE CENTRAL AUTHORITIES AND THE HKSAR  
REGARDING THE AMENDMENTS TO THE ARTICLES

(9 January 1989)

Chairmen, Vice-Chairmen, Fellow Members,

Since the seventh plenary session held in last April, members of the Subgroup on the Relationship between the Central Authorities and the HKSAR have, in the months of consultation, extensively listened to the opinions and suggestions on the Draft Basic Law for Solicitation of Opinions (DBLSO) expressed by people from various sectors in Hong Kong and on the mainland. In particular, they have paid serious attention to those opinions and suggestions on the relationship between the Central Authorities and the HKSAR and read in detail the consultation report of the Consultative Committee for the Basic Law. At the 15th meeting of the Subgroup held from 16 to 18 November, members of the Subgroup studied these opinions and suggestions, the opinions put forward by drafters at the seventh plenary session of the Drafting Committee, especially those put forward by the Hong Kong drafters. Once again, they scrutinized the provisions in the Preamble, Chapters I, II, VII and IX of the DBLSO. In-depth discussions were held on some of the articles and a number of amendments were made. At the same time, they further discussed the composition of the Committee for the Basic Law and put forward several supplementary proposals. In this report, I will only focus on a few major amendments and the supplementary proposals on the the Committee for the Basic Law.

I. On legislative power

The third paragraph of Article 16 of the DBLSO provides: "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 this Law or legal procedures, 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 cessation shall not have retroactive effect." After discussion, members made three amendments to this provision: (1) The word "revoke" has been deleted and the phrase "return...for reconsideration" is replaced by the word "return". Whether the returned law should again be submitted to the Standing Committee after it has been amended by the Legislative Council or whether the bill should be revoked, will be up to the HKSAR to decide. (2) The scope of laws of the HKSAR which may be reviewed or returned by the Standing Committee has been narrowed down. Under the previous provisions, the Standing Committee of the National People's Congress may review any law of the HKSAR in connection with all

provisions of the Basic Law, and decide to return it for reconsideration or to revoke it. Under the amended provisions, the Standing Committee of the National People's Congress may review the law only in connection with the provisions of the Basic Law on affairs within the responsibility of the Central Authorities or on the relationship between the Central Authorities and the HKSAR, and decide whether or not to return it. That means, no laws enacted by the Legislative Council of the HKSAR will be interfered with by the Standing Committee of the National People's Congress, unless they have violated those provisions of the Basic Law on affairs within the responsibility of the Central Authorities or on the relationship between the Central Authorities and the HKSAR. (3) Taking into consideration the actual practice under Hong Kong's legal system, the provision that the cessation of force of the returned law shall have "no retroactive effect" has been changed to "[t]his cessation (of force) shall not have retroactive effect, unless otherwise provided for in the laws of the Hong Kong Special Administrative Region".

## II. On the application of national laws

The third paragraph of Article 17 of the DBLSO provides that the national laws to be applied in the HKSAR are those "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". As some people considered that the legal implication of the phrase "give expression to national unity and territorial integrity" was not clear enough and could cause difficulty in interpretation, it was therefore proposed that all the national laws to be applied in the HKSAR be listed separately as an annex to the Basic Law. After discussion, members of the Subgroup have agreed to adopt this proposal: (1) The phrase "give expression to national unity and territorial integrity" has been deleted. The seven\* national laws up to now which, according to the members, should be applied in the HKSAR are listed separately as Annex III to the Basic Law. (2) Specific provisions have been laid down regarding the addition to or deletion from the list of laws in Annex III. (3) With regard to the "cases of emergency" stipulated in the fourth paragraph of the Article, more specific provisions have been made. It is now amended to provide: "In case the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which is beyond the control of the Region, decides that the Region is in a state of emergency, the State Council may decree the application of the relevant national laws in the Region."

\* Translator's note: Only six national laws are listed in Annex III to the Basic Law (Draft).

III. On judicial jurisdiction

With regard to this issue, the opinions from various sources are not substantially different. The question is how to phrase the provisions to make them more precise in meaning. The third paragraph of Article 18 of the DBLSO provides: "Courts of the Hong Kong Special Administrative Region 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 Hong Kong Special Administrative Region 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 proceedings. A statement issued by the Chief Executive regarding such questions shall be binding on the courts." In the solicitation of opinions, a great number of people in Hong Kong considered the term "executive acts of the Central People's Government" not specific enough and will bring difficulty in adjudication by the future courts. They proposed replacing the phrases "cases relating to defence and foreign affairs" and "cases relating to the executive acts of the Central Government" by the terms "acts of state" and "facts of state" which are commonly used under the common law. After research, members of the Subgroup have agreed to adopt the proposal from people in Hong Kong and amended the third paragraph accordingly.

IV. On the power of interpretation of the Basic Law

With respect to the power of interpretation, two major amendments have been made: (1) In order to increase the power of the courts of the HKSAR in interpreting the Basic Law, the second paragraph of Article 169 of the DBLSO is amended to read: "The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases before them, the provisions of this Law which are within the limits of the autonomy of the Region." As a result of this authorization, the Standing Committee of the National People's Congress will not interpret those provisions of the Basic Law involved in the SAR courts' adjudication, which are within the limits of autonomy of the HKSAR. (2) In order to limit the number of requests submitted by the Hong Kong courts to the Standing Committee of the National People's Congress for an interpretation of the Basic Law, the third paragraph of Article 169 of the DBLSO has been amended. It now stipulates that the courts of the HKSAR, in adjudicating cases before them, may request the Standing Committee of the National People's Congress to give an interpretation of the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the HKSAR on two conditions: (1) that the interpretation will "affect the judgements on the cases" and (2) that the requests are submitted through the Court of Final Appeal of the HKSAR.

## V. On the Committee for the Basic Law

Before the seventh plenary session, the Subgroup put forward a proposal for the establishment of a committee for the Basic Law. It included preliminary suggestions on the name of the committee, and its affiliation, function and composition. Upon the examination of the plenary session, the proposal was presented as Note 2 to the DBLSO. In the solicitation of opinions, many views were put forward by people in Hong Kong. They showed particular concern for the size of membership of the Committee, the proportion of representation of Hong Kong members and the method of selecting Hong Kong members. At the meeting of the Subgroup held in last November, members studied these views and proposed that mainland members and Hong Kong members should respectively be given a 50% representation in the Committee, and that Hong Kong members should be Chinese citizens who are permanent residents of the HKSAR and should 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 HKSAR for appointment by the Standing Committee of the National People's Congress. According to the Subgroup, this arrangement will ensure that persons from Hong Kong who are competent and can meet public expectation will sit on the Committee for the Basic Law to reflect fully the opinions and requests of the HKSAR to the Committee and play their role in the actual implementation of the Basic Law. At the enlarged chairmen's meeting held in last December, this question was further discussed. The proposal that the Committee for the Basic Law should comprise twelve members whose term of office will be five years was put forward.

Apart from the above-mentioned amendments, the Subgroup has also amended other provisions in varying degrees. However, as time is limited, these amendments will not be enumerated.

This concludes the report of the Subgroup on the Relationship between the Central Authorities and the HKSAR. We ask the plenary session to examine our report.