

香港基本法諮詢委員會
法律顧問
1989

REPORT OF THE SUBGROUP ON THE FUNDAMENTAL RIGHTS AND DUTIES
OF HONG KONG RESIDENTS
REGARDING THE AMENDMENTS TO THE ARTICLES

(9 January 1989)

Chairman, Vice-Chairmen, Fellow Members,

The twelfth meeting of the Subgroup on the Fundamental Rights and Duties of Hong Kong Residents was held in Guangzhou on 25 and 26 November 1988. The meeting studied the opinions on the articles of Chapter III collected in the consultation period from various sectors in Hong Kong, and the opinions on Chapter III raised by members at the seventh plenary session of the Drafting Committee. The articles of Chapter III were discussed one by one and further amendments were made to some of them according to the opinions of the various parties. These amendment proposals were examined at the enlarged meeting of the chairmen held in Guangzhou from 6 to 8 December. The amendments to the Chapter on the Fundamental Rights and Duties of the Residents were reported as follows:

1. Article 25

The article in the Draft Basic Law for Solicitation of Opinions (DBLSO) reads: "All Hong Kong residents shall be equal before the law, regardless of their nationality, race, ethnic origin, language, sex, occupation, religious belief, political views, educational level and property status." It is indicated in some opinions that the list "regardless of their nationality..." can hardly be exhaustive. The list is therefore deleted and the amended article reads: "All Hong Kong residents shall be equal before the law." This statement is concise and comprehensive. Some opinions suggest adding "shall be free from discrimination". But since "shall be equal before the law" implies the freedom from discrimination, no addition is made.

2. Article 26

The article in the DBLSO reads: "Permanent residents of the Hong Kong Special Administrative Region who have reached the age of 21 shall have the right to vote and the right to stand for election as prescribed by law." There are three kinds of opinions regarding this article. The first kind is in favour of retaining the provision for the age of 21. The second kind maintains that 21 should read 18. The third kind suggests that the voting age should not be stipulated in the Basic Law at all as it would be prescribed by the law enacted by the legislature of the HKSAR. We have adopted the third kind of opinions and amended the article to read: "Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law." The amended article is more flexible.

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3. Article 27

The article in the DBLSO reads: "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, to form and join trade unions, and to strike; and freedom of assembly and of demonstration." In accordance with the opinions raised, the following amendments have been made: (1) freedom of assembly and of demonstration should follow freedom of association, and freedom of procession is newly added. (2) The word "right" is added to the freedom to form and join trade unions and to strike. Thus the amended article reads: "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration, and the right and freedom to form and join trade unions and to go on strike."

4. Article 28

Paragraph 2 of the article in the DBLSO reads: "Hong Kong residents shall not be unlawfully arrested, detained or imprisoned. Unlawful deprivation or restriction of the residents' freedom of the person by any means shall be prohibited. Unlawful search of the body of any resident shall be prohibited." In the DBLSO, some opinions note that the concept of arbitrariness is more appropriate to the actual conditions and needs in Hong Kong under the common law and should therefore be added to the article. Some opinions suggest adding the prohibition of torture of any resident and the prohibition of arbitrary and unlawful deprivation of a resident's life. According to these opinions, the article is amended to read: "No Hong Kong resident shall be arbitrarily or unlawfully arrested, detained or imprisoned. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of his/her freedom of the person shall be prohibited. The torture of any resident or arbitrary or unlawful deprivation of his/her life shall be prohibited."

5. Article 29

The article in the DBLSO reads: "The homes and other premises of Hong Kong residents shall not be violated. Unlawful search of, or intrusion into, a resident's home or other premises is prohibited." According to the opinions raised, "arbitrary" is added. The amended article reads: "The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."

6. Article 31

The last sentence of the article in the DBLSO reads: "Hong Kong residents who hold valid travel documents shall have the freedom to travel and the freedom of entry and exit and, unless restrained by law, shall be free to leave the Hong Kong Special Administrative Region without special authorization." Some opinions indicate that the provision is not precise because the

enjoyment of the freedom to travel and the freedom of entry and exit by Hong Kong residents is based on the provisions in the laws of Hong Kong, and the holding of valid travel documents should not be taken as the prerequisite. Accordingly the sentence is amended to read: "They 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 Region without special authorization."

7. Article 32

Translator's note: This amendment only applies to the Chinese version. According to the article in the DBLSO in Chinese, "in public" does not govern "to preach"; "in public" is now moved to a place in the Chinese article where it governs both "to preach" and "participate in religious activities".

8. Article 35

Paragraph 2 of the article in the DBLSO reads: "Hong Kong residents shall have the right to challenge in the courts the actions of the executive organs or their personnel." According to the opinions of people in Hong Kong, the article is amended to read: "Hong Kong residents shall have the right to institute legal proceedings in the courts against the actions of the executive organs or their personnel." The expression "to challenge" is changed to "to institute legal proceedings... against".

9. Article 36

The article in the DBLSO reads: "Hong Kong residents shall have the right to social welfare; the welfare benefits of the working people shall be protected by law." According to the opinions raised by people in Hong Kong, the article is amended to read: "Hong Kong residents shall have the right to social welfare as prescribed by law; the welfare benefits of the labour force shall be protected by law." The phrase "as prescribed by law" is added. [Translator's note: The punctuation mark is also amended in the Basic Law (Draft).]

10. Article 39

The article in the DBLSO reads: "The provisions of the 'International Covenant on Civil and Political Rights' and the 'International Covenant on Economic, Social and Cultural Rights' as applied to Hong Kong shall be implemented through legislation by the Hong Kong Special Administrative Region." With regard to the DBLSO, some opinions suggest adding the International Labour Conventions; some opinions suggest adding "remain in force" according to Annex I to the Sino-British Joint Declaration. These opinions have been adopted. Article 39 in the DBLSO reads: "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. But such restrictions shall not go beyond the necessity for the maintenance of national

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security, public order, public safety, public health, public morals and for the safeguarding of the rights and freedoms of other persons." Some opinions point out that "[b]ut such restrictions shall not go beyond the necessity for the maintenance of... other people" is not totally consistent with the provisions of the two international covenants. According to these opinions, Article 39 is deleted and the contents of Article 39 are prescribed in Paragraph 2 of Article 38 after amendment: "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article." With such amendment, the restriction on Hong Kong residents' rights and freedoms as prescribed by law is closely integrated with the provisions in Paragraph 1 of Article 30* on the two international covenants, which will be favourable to the safeguarding of the rights and freedoms of the Hong Kong residents by the Government of the HKSAR in accordance with law.

* Translator's note: It should be Article 39 in the Basic Law (Draft).