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for the Basic Law of the Hong
Kong Special Administrative
Region. Special Group on Law.
Final report on the Basic Law
Committee

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FINAL REPORT ON
THE BASIC LAW COMMITTEE

(passed by the Executive Committee on 5 December 1987)

The Special Group on Law

FINAL REPORT ON THE BASIC LAW COMMITTEE

The Special Group on Law held three meetings to discuss issues regarding the Basic Law Committee (hereinafter referred to as the "BLC") such as its structure, composition, terms of reference, affiliation. Since the Special Group on the Relationship between the Central Government and the SAR has also compiled a report on the BLC, this Special Group only deals with its legal aspects. The views which are collated and listed out as follows will be submitted for the reference of the Drafting Committee:

I. General Principles

1. The power of final adjudication as stipulated in the Joint Declaration must not be diluted in any way.
2. The power of final adjudication includes the power of interpretation of all laws including the Basic Law. The Hong Kong courts shall therefore have jurisdiction to interpret the Basic Law in the course of deciding cases and their jurisdiction will be final in relation to the case adjudicated upon. No decision of the NPC shall affect a decision previously made by the Hong Kong courts so far as that case is concerned.
3. It is a basic tenet of the common law system as practised in Hong Kong that the power of interpretation of laws is vested in judicial bodies and not political bodies.
4. The Basic Law should contain a provision on the setting up of the BLC. The BLC has to play an effective and credible role as a "link", "interface", or "buffer" between the two systems. The terms of reference, membership, etc. of the BLC should be laid down in the Basic Law. A member however held that the composition and the terms of reference of the BLC should be decided by the NPC Standing Committee, and these should be promulgated concurrently with the Basic Law by the NPC. But in any event, the BLC should have been the subject of consultation and the decision thereon should be made known prior to the promulgation of the final draft of the Basic Law. It would not be fair to the Hong Kong public to keep them in the dark about the precise terms of reference, criteria for membership (as distinguished from actual membership), etc. of the BLC while expecting them to discuss

and accept the provisions of the draft Basic Law which refers to the BLC.

5. Judicial review of legislation, i.e. to decide whether any particular law is unconstitutional and therefore invalid or contrary to legal procedures, is likewise a feature of a common law system with a written constitution. The function is vested in the courts. In Hong Kong, the courts have experience in deciding and declaring whether a particular piece of legislation is ultra vires the legislature. Such decision is reached by the court only after hearing adversarial argument.

II. Structure

1. Two functions can be distinguished :-

- i) A political function, e.g.
to consider:
 - a) the application of National Laws;
 - b) any proposals to amend the Basic Law.
- ii) A legal function, e.g.
to consider:
 - a) the validity of any SAR laws;
 - b) the interpretation of the Basic Law.

2. There should therefore be a Legal Committee to perform the legal functions and another to perform the political functions. Even when the Legal Committee is structured within a larger body its decisions should not be the subject of review by the non-legal committee members of the BLC.

3. The Legal Committee would work out its own rules of procedure in accordance with general principles providing for :-

- i) open public hearings;
- ii) observance of the rules of natural justice;
- iii) representation of interested parties;
- iv) reasons to be given for every decision.

III. Membership

1. The BLC as a whole should comprise Hong Kong and mainland members in equal number. The Legal Committee should be composed of legally qualified Hong Kong and mainland members in equal number. Decision should be by majority vote. Some members held that as far as possible the Legal Committee should be composed of judges and if judges are not available

then of lawyers. The Hong Kong judicial members should be appointed by the NPC on the recommendation of the Judicial Service Commission of the SAR, and the lawyer members should be appointed by the NPC on the recommendation of the legal professional organisations.

2. A member held that the Hong Kong members of the Legal Committee should be chosen from the panel of the Court of Final Appeal. Other members held that it would suffice that all members of the Legal Committee be legal professionals.
3. One suggestion is that the Legal Committee should include 6 legal professionals (3 from Hong Kong elected by the legal professionals in Hong Kong from among themselves; 3 from the Central Government appointed by the Central Government from the legal professionals in Mainland China).
4. Some members were of the view that the Hong Kong members of the political committee of the BLC should comprise members of the legislature, Hong Kong delegates to the NPC and should also include some legal professionals.
5. To avoid any appearance of a conflict of interest and to ensure that justice is seen to be done, the members of the Legal committee should not participate in the political deliberations of the BLC or at least should be allowed to opt out of the main body in its political deliberations.
6. Membership to the BLC including its Legal Committee should not be subject to nationality restriction.

IV. Terms of reference

1. The political committee of the BLC will have a purely consultative function on such matters as proposals to amend the Basic Law or to apply any particular national law to the SAR although it should be emphasised that even in the case of application of national laws, strictly legal questions can arise e.g. as to whether such proposed application will be contrary to the Basic Law or against established legal procedures. In such cases the strictly legal questions should be referred to the Legal Committee.
2. The Legal Committee will have the function of dealing with legal issues which the Basic Law stipulates should be referred to it. One model of the function and operation of the BLC, incorporating suggestions from members in the course of more than one discussion, is as follows :-

Without prejudice to General Principles 1 and 2,

- 1) a. the Hong Kong courts will have final power of interpretation of the Basic Law in matters not relating to foreign affairs and defence.
 - b. If there is a conflict over whether the issue in dispute relates to matters other than foreign affairs and defence then the issue will be dealt with by the Hong Kong Court of Final Appeal in the first instance.
 - c. If the Standing Committee of the NPC disagrees with the decision on the issue of the Hong Kong Court of Final Appeal (presumably such disagreement would be confined to the question of whether the matter was within Hong Kong's autonomy), then the Standing Committee of the NPC should have the right to require the decision of the Court of Final Appeal to be referred to the BLC.
 - d. By way of a directive principle the NPC will accept the advice of the BLC as given through its Legal Committee. The decision of the Standing Committee of the NPC will not have retrospective effect in relation to any case finally adjudicated upon by the Hong Kong court.
 - e. If the Hong Kong Court of Final Appeal decides that a case is not within the jurisdiction of the Hong Kong courts, then machinery must be established to enable such cases to be transferred into the appropriate jurisdiction.
- ii) a. A similar situation will apply with regard to SAR legislation. Initially the decision as to whether such legislation is in accordance with the Basic Law and legal procedures should be dealt with by the courts of Hong Kong.
 - b. If the Standing Committee of the NPC disagrees that the legislation is valid, then it may require the decision of the Court of Final Appeal to be referred to the Legal Committee.
 - c. If there is no challenge in the courts of Hong Kong to a particular piece of Hong Kong legislation, the NPC should still have the right to refer that piece of legislation directly to the Legal Committee for a decision on its validity.
 - d. Here again the Standing Committee of the NPC should by way of a directive principle accept the advice of the BLC through its Legal Committee but the decision of the Standing Committee of the NPC will not have retrospective effect in relation to rights acquired or accrued prior to the declaration of invalidity.

- e. No legislation should be reviewed by the BLC unless it involved defence and foreign affairs.
- iii) In case a deadlock arises in the Legal Committee, the interpretation of the Final Court of Appeal of Hong Kong stands not only as to the past but also as to the future.
3. Another model proceeds on the following basis : the Hong Kong courts will have essentially the same kind and scope of jurisdiction as they have under the existing system, a jurisdiction that extends to all aspects of ordinary as well as constitutional laws, subject to such limits as are already found in the existing system (illustrated by the distinction between "facts of state" and "acts of state"). Such limits as already exist are sufficient to ensure that in matters that truly fall within defence and foreign affairs, the courts will not trespass into executive acts. If, however, a dispute arises as to whether a particular matter is or is not in the category of defence and foreign affairs, then it should be referred to the Legal Committee for classification.
4. In relation to matters touching on the Basic Law, both the Standing Committee of the NPC and the State Council should never act without consulting the BLC. Some members held that the advice of the Legal Committee should be binding on the Standing Committee of the NPC, others held that it should be consultative only. A compromise solution is to introduce the concept of a directive principle, namely, that although in legal theory the Standing Committee is technically not bound, it will as a matter of constitutional convention accept the advice of the Legal Committee.
5. Other views expressed by members during the meetings are reflected in the papers appended.

Our main concern is to look into the legal aspect of the proposed "Basic Law Committee" (hereinafter called "BLC").

SUGGESTION A

"BLC" is mentioned in the Report of the Central-SAR sub-committee of the Drafting Committee. It is mentioned that "BLC" shall have 4 functions (please see Schedule 1). It's establishment is a pre-condition of its suggested functions. But its establishment is not mentioned at all. It is not balance to have "BLC" carrying on statutory functions without itself incorporated under the same way.

SUGGESTION B

"BLC" should be incorporated under the Basic Law for the simple reason that there is no other suitable legislation to accommodate its formation. However, detail arrangements as to the composition of membership and its operation need not to be stated therein.

SUGGESTION C

"BLC" shall work under NPC Standing Committee which is responsible for its detail arrangements as to the composition of membership and its operation.

SUGGESTION D

1. NPC Standing Committee is obliged to obtain BLC's opinion before it shall decide on ;-
 - a. Whether any particular SAR legislation is not in accordance with the provision of Basic Law and legal procedure.
 - b. Which national law applicable to SAR ?
 - c. Proposing any amendment to the Basic Law.
2. NPC Standing Committee is obliged to obtain BLC's opinion as a matter of procedure before it shall interpret the provisos of Basic Law. Article 67 of Chinese constitution empowers NPC Standing Committee to interpret Laws and it is an unconditional power. However, it is a good practice as a matter of procedure to seek opinion from "BLC" first before it shall exercise this rarely exercised power.
3. Since it is proposed that State Council can initiate an amendment bill in NPC and that it can direct how some national laws are applicable to SAR, "BLC" shall also be obliged to give its opinion in these two matters to the State Council.

SUGGESTION E

1. The Basic Law Committee is an advisory body to NPC Standing Committee and the State Council respectively on specific matters. Advisory means 'giving advice'.
2. "BLC" is not an organ of power. "BLC" should operate on low profile. It's nature is a working committee rather than opinion gathering body. The Committee is apolitical.

SCHEDULE 1

Terms of reference of the Basic Law Committee :

1. In respect of Paragraph 2 of Article 6 of Chapter 3 of the Basic Law :

"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"

2. In respect of Paragraph 4 of Article 7 of Chapter 2 of the Basic Law :

"Except in emergencies, the State Council shall consult the HKSAR Basic Law Committee and the HKSAR Government before giving the above-mentioned directive [i.e. the directive by which Hong Kong is instructed to apply national laws by way of proclamation or legislation by the HKSAR Government]."

3. In respect of Paragraph 4 of Article 1 of Chapter 9 of the Basic Law :

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

4. In respect of Paragraph 3 of Article 2 of Chapter 9 of the Basic Law :

"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."

Steve Ng

BASIC LAW COMMITTEEGeneral Principles

1. Hong Kong courts must have the right of final adjudication in matters in which Hong Kong has autonomy.
2. The right of final adjudication includes the right of interpretation of all laws.
3. For the preservation of the existing legal system of law, it is imperative that judges interpret the law and not politicians or else members of the public because these people do not have judicial experience.

Suggested Provisions In Respect Of Basic Law Committee

1. Insofar as questions relate to matters within Hong Kong's autonomy, no questions or issues should be taken away from the powers of the court. This includes not only interpretation of the Basic Law but also the question of whether a law is ultra vires.
2. Insofar as any matters and this includes matters which are outside the jurisdiction of the Hong Kong courts, namely matters outside Hong Kong's autonomy, these must be dealt with by persons with judicial experience of the Common Law and, in that respect, at least 50% must be from Hong Kong. Again, there can be no question of non-judicial personnel being allowed to interpret or decide the validity of any law which is to be applied in Hong Kong otherwise the legal system as we know will be destroyed.
3. Insofar as there is a question of classification, i.e. whether a matter is within Hong Kong's jurisdiction, that matter must be dealt with according to the Common Law system, i.e. the Courts of Hong Kong decide the matter first. If they decide the matter is outside

Hong Kong's autonomy or if either party wishes to take the matter on appeal as to whether it is outside Hong Kong's autonomy, the matter can then be appealed to a committee of Judges 50% of which must be Judges of Hong Kong or eligible to sit in the Court of Final Appeal.

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4. There should be no review of any legislation by any body, whether it be a committee or tribunal, without the adversarial system of the Common Law. Hence, legislation should not be reviewed by any body in vacuo and without adversarial representation.

Dated the 12th day of November, 1987.

ANTHONY ROGERS

THE BASIC LAW COMMITTEE



In considering the establishment of the Basic Law Committee ("BLC") the following points must be kept firmly in mind.

A. General Principles

1. Hong Kong Courts must have right of final adjudication as stipulated in the Joint Declaration.
2. The right of final adjudication should not be watered down in any way.
3. "Adjudication" includes the judicial resolution of disputes which in turn involves the interpretation of laws including the Basic Law. The Hong Kong Courts therefore shall have jurisdiction to interpret the Basic Law in the course of deciding cases and that jurisdiction will be final in relation to the case adjudicated upon. No decision of the NPC shall affect a decision previously made by the Hong Kong Courts so far as that case is concerned.

B. 1. The BLC as proposed has two functions.

a) a Political Function

- i) the application of National Laws;
- ii) proposals to amend the Basic Law.

b) a Legal Function

- i) the validity of any SAR Law;
- ii) the interpretation of the Basic Law in matters relating to foreign affairs and defence.

2. The concept of the BLC has been devised as a compromise between the Chinese desire that the NPC should have final authority over all matters relating to the Basic Law and the Hong Kong view point that as the Basic Law is Hong Kong's constitution, matters relating to the Basic Law should be dealt with in Hong Kong. If therefore we accept the concept of the BLC as a necessary compromise then the following points arise:

- a) Because of the two different functions stated above the full BLC will be a political body but there must be a legal sub-committee which will deal with the legal functions.

- b) The BLC and its legal sub-committee must be established, its terms of reference set out and the membership delineated in the Basic Law itself. To leave this to the unrestricted jurisdiction of the NPC would be unacceptable so far as Hong Kong people are concerned. The BLC will have an important role to play in the Basic Law and must therefore come within the framework of the Basic Law.
- c) The legal committee should be comprised so far as possible of judges (including retired judges) and if judges are not available then of lawyers. The Hong Kong judicial members will be appointed by the NPC on the recommendation of the Judicial Services Commission and the lawyer members will be appointed by the NPC on the recommendation of the legal professional organisations.
- d) To avoid conflict of interest the members of the legal sub-committee should not participate in the political deliberations of the BLC.
- e) Suggest the legal committee should have six members with equal numbers of Hong Kong and PRC members with decision by a majority vote.
- f) If there is a deadlock in the legal committee then the decision of the Hong Kong courts will stand.
- g) The legal committee will work out its own rules of procedure. Such rules should provide for:
- i) open public hearings
 - ii) observance of the rules of natural justice
 - iii) reasons to be given for every decision
3. a) The Hong Kong courts will have final jurisdiction over the interpretation of the Basic Law in matters not relating to foreign affairs and defence.
- b) If there is a conflict over whether the matter in dispute relates to matters other than foreign affairs and defence then the matter will be dealt with by the Hong Kong Final Courts of Appeal in the first instance.
- c) If the NPC disagrees with the decision of the Hong Kong Final Courts of Appeal, and it presumably would only disagree if the decision was that the matter was within Hong Kong's autonomy, then the NPC should have the right to require the decision of the Final Court of Appeal to be referred to the BLC.

ON THE "BASIC LAW COMMITTEE"

Zee Sze Yong, CCBL member

According to the Collection of Documents of the Fifth Plenary Session of the Drafting Committee, the questions relating to the following articles in the Basic Law should be resolved by a "Basic Law Committee":

Article 6 of Chapter 2: "If the NPC Standing Committee, after consulting the HKSAR Basic Law Committee, 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."

Article 7 of Chapter 2: "Except in emergencies, the State Council shall consult the HKSAR Basic Law Committee and the HKSAR Government before giving the above-mentioned directive."

Article 1 of Chapter 9: "The NPC Standing Committee may consult the Basic Law Committee of the HKSAR before giving an interpretation of this Law."

Article 2 of Chapter 9: "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."

The above-mentioned articles reveal that the questions in two areas should be resolved by consulting the Basic Law Committee: they are (1) questions of a political nature; and (2) questions of a legal nature. Consequently, the Basic Law Committee should include members who would be capable of resolving these questions, and the participation of people both from Hong Kong and the Central Government is also required. Members from Hong Kong should comprise a judge (elected by the judges from among themselves), a legislator (elected by the legislators from among themselves), two legal professionals (elected by the legal professionals from among themselves) and three Hong Kong delegates to the NPC (elected by the Hong Kong delegates from among themselves). The Central Government will appoint 7 corresponding members from the mainland. A special group on law should be set up under the Basic Law Committee. Its members should include another 6 legal professionals (3 members from Hong

Kong, who may all be judges, will be elected by the legal professionals in Hong Kong from among themselves; and 3 members from the Central Government will be appointed by the Central Government from the legal professionals in Mainland China). Normally any questions of a strictly legal nature will be dealt with by the special group on law. After being selected, members of the Basic Law Committee and its special group on law will be appointed by the NPC Standing Committee.

As the composition and the terms of reference of the Basic Law Committee will be decided by the NPC Standing Committee, the NPC Standing Committee should announce the composition, the terms of reference and the work procedure of the Basic Law Committee when the Basic Law is promulgated. Hence, the following provision in the Basic Law will be sufficient: "The terms of reference of the Basic Law Committee mentioned in Articles 6 and 7 of Chapter 2 and Articles 1 and 2 of Chapter 9 shall be stipulated by the NPC Standing Committee."

Perhaps the functions and powers of the Hong Kong delegates to the NPC should also be mentioned here. Other than those prescribed in the Basic Law, the Hong Kong delegates to the NPC in the Basic Law Committee should serve the function of a bridge and buffer between the Central Government and the SAR. To achieve the above-mentioned function, I hope Hong Kong delegates to the NPC should be increased in number during the transitional period. Through the Guangdong Province, more Hong Kong people who are politically neutral and with an unbiased attitude should be allowed to participate in the work of the NPC and in the monitoring of the Central Government. After 1997, Hong Kong delegates to the NPC should be nominated by members of the Hong Kong legislature and the grand electoral college who are of Chinese nationality, and be selected by election.

* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

- d) By way of a directive principle the NPC will accept the advice of the BLC as given through its legal committee. The decision of the NPC will not have retrospective effect.
- e) If the Hong Kong Court of Final Appeal decides that a case is not within the jurisdiction of the Hong Kong courts then a machinery must be established to enable such cases to be transferred into the Chinese judicial system.
4. a) A similar situation will apply with regard to SAR legislation. Initially the decision as to whether or not such legislation is in accordance with the Basic Law and legal procedure should be dealt with by the courts of Hong Kong.
- b) If the NPC disagrees that the legislation is valid then it should require the decision of the Final Court of Appeal to be referred to the legal committee.
- c) If there is no challenge in the courts of Hong Kong to particular Hong Kong legislation the NPC should still have the right to refer that legislation directly to the legal committee for a decision on its validity.
- d) Here again the NPC should by way of a directive principle accept the advice of the BLC through its legal committee but the decision of the NPC will not have retrospective effect.

(Submitted by Mr. I. MacCallum)

Note In cases raising questions which need to be dealt with urgently there should be some form of leapfrog procedure to enable such constitutional questions to be dealt with by the Final Court of Appeal without going through all the appeal stages.

「基本法委員會」 最後報告

(1987年12月5日經執行委員會通過)

中華人民共和國香港特別行政區基本法諮詢委員會
法律專責小組

法律專責小組舉行了三次會議討論有關基本法委員會的問題，例如該委員會的結構、組成、職權、隸屬關係。中央與特區關係專責小組已完成一份有關基本法委員會的最後報告，因此本小組只處理該委員會在法律方面的問題。以下為經整理後的意見，將提交起草委員會參考。

(一) 一般原則

1. 不得以任何方法削弱中英聯合聲明所規定的終審權。
2. 終審權包括對所有法律(連基本法在內)的解釋權。香港法院應有權在審判過程中解釋基本法，而就所判的案件而言，其權力應是最終的。人大的決定不應影響香港法院對該案件已作的判決。
3. 根據香港現行的普通法制度，由司法機構(而非政治機構)享有法律解釋權是個基本原則。
4. 基本法應有條文規定基本法委員會的成立。基本法委員會應是兩個制度的「聯繫」、「相交處」或「緩衝」，發揮有效而可信的作用。該委員會的職權、成員等都應在基本法中明文規定。但有委員認為該委員會的組成和職權應由人大常委決定，這些規定應由人大在頒佈基本法時同時頒佈。但無論如何，基本法委員會都應該是個諮詢的題目，而有關該委員會的決定也應在頒佈基本法最後草案前公佈。如果一方面要香港市民討論並接受基本法草案中有關基本法委員會的條文，一方面又不讓他們知道該委員會確實的職權、成員資格等，對香港市民是不公平的。
5. 對法例的司法審查(即決定某一法律是否因違憲而失效，或是否抵觸法定程序)，也是設有成文憲法的普通法制度所具備的特色。香港的法院曾決定並宣佈某法例是否屬立法機關的越權立法，但法院是在聽過對抗的辯論後才作出裁決的。

(二) 結構

1. 可分為兩種功能：
 - a. 政治功能，例如考慮
 - i) 全國性法律的實施問題
 - ii) 修改基本法的建議
 - b. 法律功能，例如考慮
 - i) 特區法律的效力
 - ii) 基本法的解釋
2. 法律功能應由一「法律委員會」負責，政治功能則應由另一委員會負責。即使就結構而言，「法律委員會」是基本法委員會屬下的組織，但其決定應不必受其他基本法委員會成員(即非「法律委員會」成員)審定。

3. 「法律委員會」將根據以下一般原則制定其工作程序細則：

- i) 公開審訊
- ii) 符合自然公正定律
- iii) 有利害關係的當事人各獲代表
- iv) 任何裁決都應申述理由。

(三) 成員

1. 在整個基本法委員會中，香港成員及內地成員應各佔一半。「法律委員會」的成員必須是法律專業人士，香港與內地成員各佔一半。所有問題應以大多數票決定。部份委員認為「法律委員會」的成員應盡可能由法官出任；如不可能，則由律師出任。香港的司法成員須經特區的司法人員叙用委員會推薦，由人大委任；律師成員則經法律專業團體推薦，由人大委任。
2. 有委員認為「法律委員會」的香港成員應從終審法院的法官名單中選出。其他委員則認為只要所有成員都是法律專業人士便可。
3. 有委員提議「法律委員會」應包括六位法律專業人士（三位香港成員，由香港法律專業人士通過選舉產生；三位中央成員，由中央委任中國內地法律界人士出任）。
4. 部份委員認為基本法委員會內的政治委員會成員應包括立法機關成員、香港人大代表及一些法律專業人士。
5. 為避免利益衝突，及令人覺得公平合理，「法律委員會」的成員不應參與基本法委員會就政治方面的商議，或至少應可在基本法委員會商議政治方面的問題時，有權選擇退出。
6. 基本法委員會（包括法律委員會）的成員資格，不應有國籍限制。

(四) 職權

1. 基本法委員會屬下的政治委員會就下列問題發揮純諮詢性的功能：修改基本法或在特區實施某條全國性法律等建議。但應特別指出的，就是即使是全國性法律的實施問題，也會產生純法律方面的問題。例如建議在香港實施的法律是否違反基本法或既定的法定程序。在這類情況下，法律方面的問題應交由「法律委員會」處理。
2. 「法律委員會」應按基本法規定處理有關的法律問題。在參考了委員在多次討論中的建議後，基本法委員會的功能與運作可採用以下模式：
在不違反「一般原則」1、2點的情況下
 - i) a. 凡不涉及國防與外交的事務，香港法院對基本法享有最終解釋權。
 - b. 如在決定某問題是否屬國防、外交以外範圍時出現爭議，應先交由香港終審法院處理。
 - c. 如人大常委不同意香港終審法院決定（預料該不同意見只限於兩機構對該問題是否屬香港自治範圍所持的不同見解），人大常委則有權要求將終審法院的決定交由基本法委員會處理。
 - d. 根據指示性原則，人大得接納基本法委員會透過「法律委員會」所提交的意見。人大常委的決定對香港法院已終審的案件，並無回溯力。
 - e. 如香港終審法院裁定某一案件不屬香港法院的管轄範圍內，則應有一機構使此類案件得以轉交適當的司法機構處理。

- ii) a. 特區法例應以同樣辦法處理。首先由香港法院決定某特區法例是否符合基本法及法定程序。
 - b. 如人大常委不同意該法例有效，則可要求把終審法院的決定交由「法律委員會」處理。
 - c. 即使香港法院沒有對某香港法例提出質疑，人大依然有權把該法例直接交由「法律委員會」決定其效力。
 - d. 根據指示性原則，人大得接納基本法委員會透過「法律委員會」所提交的意見。但人大常委的決定對該法律宣告失效前已取得權利，並無回溯力。
 - e. 除涉及國防與外交事務的法律外，其他法律不得由基本法委員會審查。
 - iii) 如「法律委員會」內出現僵持情況，對過去及將來的有關案件都應以香港終審法院的解釋為準。
3. 另一模式則根據下列原則：香港法院的司法管轄範圍，其類別及大小基本上與目前的相同。除受目前已有的限制外（可見於「國家行為」與「國家事實」的分別），司法管轄範圍擴及所有一般及憲制性法律。目前制度的限制已足以確保凡真正屬於國防與外交的事務，法院不會干預行政行為。但如果因不能決定是否屬於國防或外交而發生爭議，則應交由「法律委員會」確定其類別。
 4. 凡涉及基本法的事情，人大常委與國務院均不能在未取得基本法委員會的意見前採取行動。有委員認為「法律委員會」的意見對人大常委應有約束力。另有委員則認為「法律委員會」僅屬諮詢性質。權宜之策是採用指示性原則——即根據法理，技術上人大是不受基本法委員會的意見約束的，但作為憲法慣例，人大常委得接納該委員會的意見。
 5. 在會議中其他委員的意見，可參閱各附件。

* 本報告的討論過程以英語進行，故可參考英文本。

基本法委員會

吳少鵬委員

我們主要關注的，是建議中的「基本法委員會」在法律方面的問題。

提議一：

起草委員會在中央與特區關係專題小組的報告中提及「基本法委員會」，並提出該委員會應有四種功能(見附表一)。要發揮這些功能，先要成立「基本法委員會」。但該報告卻完全没有提及基本法委員會的成立問題。只提出基本法委員會發揮法定功能，而不以同樣方式規定其組成，實在並不妥善。

提議二：

基本法委員會應根據基本法組成，理由很簡單，因為除此以外並沒有適當的法律可規定其產生，但其他有關成員組織及運作的細節安排，則不必在基本法內列出。

提議三：

「基本法委員會」應在人大常委之下工作。其成員組織及運作的細節安排也由人大常委負責。

提議四：

1. 人大常委在決定以下問題前，必須先徵詢基本法委員會的意見。
 - a. 某香港特區法例是否符合基本法的規定及法定程序。
 - b. 哪條全國性法律適用於香港特區？
 - c. 修改基本法的建議。
2. 在解釋基本法條文前，人大常委在程序上必須先徵詢基本法委員會的意見。中國憲法第六十七條授權人大常委解釋基本法，而這權力是沒有限制的。如人大常委在行使這種極少引用的權力前，在程序上先徵詢基本法委員會的意見，是個很好的做法。
3. 由於有建議認為國務院可向人大常委提出基本法修正案，並可指令部份全國性法律適用於香港特區，基本法委員會必須就這兩方面向人大提意見。

提議五：

1. 基本法委員會是人大常委與國務院的諮詢機構(advisory body)。「諮詢」(advisory)的意思就是「提出意見」。
2. 基本法委員會並非權力機關，其運作應保持低調，並應屬工作委員會性質，而非意見收集機構。該委員會是非政治性的。

附表一

基本法委員會的職權：

1. 基本法第二章第六條第二款：

全國人民代表大會常務委員會在諮詢香港特別行政區基本法委員會後，如果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. 基本法第二章第七條第四款：

除緊急情況外，國務院在發佈上述指令（即指令香港特別行政區政府公佈或立法實施全國性法律）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。

3. 基本法第九章第一條第四款：

全國人民代表大會常務委員會在對本法進行解釋前，可徵詢香港特別行政區基本法委員會的意見。

4. 基本法第九章第二條第三款：

本法的修改議案在列入全國人民代表大會的議程前，先由香港特別行政區基本法委員會研究並提出意見。

* 此附件原文為英文。

基本法委員會

羅傑志委員

一般原則

1. 香港法院應對香港自治範圍內的案件有終審權。
2. 終審權包括解釋所有法律的權力。
3. 為了保障現存的法律制度，法律必須由法官而非由一些沒有司法經驗的政治家或其他公眾人士解釋。

有關基本法委員會的條文建議

1. 法院對所有在香港自治範圍內的問題都有權處理，這不單包括解釋基本法，也包括決定某法律是否符合基本法及法定程序。
2. 至於其他案件，包括香港法院管轄範圍以外的案件(即在香港自治範圍以外的案件)，應由有普通法司法經驗的人士處理。在這些人士當中，最少應有半數為香港人。再者，絕對不能讓非司法人員解釋在香港實施的法律或決定這些法律是否有效。否則，現存的法律制度將遭受破壞。
3. 當案件的劃分出現問題時(即要決定某案件是否在香港的管轄範圍內)，該案件必須循普通法制度的方式處理；換言之，須首先由香港法院處理。若香港法院認為該案件在香港的自治範圍外，或任何一方當事人欲就該案件是否在香港自治範圍內而提出起訴時，該案件的上訴可由一個由法官組成的委員會處理，這委員會半數成員應由香港法官或有資格擔任終審庭法官者出任。
4. 在沒有普通法中辯論式的訴訟制度的情況下，任何法律均不應由任何機構(委員會或法庭)進行審查。故此，不應在沒有辯論式的訴訟和抽空(in vacuo)^①的情況下審查任何法律。

^①孤立處理；不管事實與證據。

基本法委員會

麥嘉霖委員

在討論設立基本法委員會時，需認真考慮以下各點：

I. 一般原則

1. 香港應按聯合聲明的規定享有終審權；
2. 在任何情況下，終審權不應被剝奪或削減；
3. “審判”包括以司法方式解決爭議，所以亦牽涉對所有法律（連基本法在內）的解釋。因此，香港法庭在審理案件時有權解釋基本法，而對該案件而言，其權力應是最終的。人大的任何決定對於已審結的案件均沒有影響。

II. 1. 建議基本法委員會應有以下兩種功能：

a) 政治功能

- i) 全國性法律的實施問題
- ii) 修改基本法的建議

b) 法律功能

- i) 特區法律的效力
- ii) 就有關國防外交的事務對基本法的解釋

2. 設立基本法委員會的構想是個能顧及中國及香港意願的權宜之計：中國希望人大能對所有有關基本法的事情都有最終權力，而香港則認為既然基本法將是特區的憲法，所有有關基本法的問題都應由香港處理。若我們同意基本法委員會的構想是必要的權宜之計，我們便需考慮以下各點：

- a) 鑒於基本法委員會將負起的兩種不同功能，基本法委員會整體將會是一個政治組織，其屬下應設有一個法律小組，專門負責處理法律問題。
- b) 基本法本身應有明確條文，規定基本法委員會及其法律小組之成立，職權及成員等問題。對香港市民來說，把這些問題交給全無職權限制的人大來處理，是不可接受的。基本法委員會將在基本法中扮演一重要角色，所以必須列入基本法範圍內。
- c) 法律小組應盡量由法官組成（包括退休法官），否則，可以由律師組成。香港的司法界成員將由人大按司法人員叙用委員會的推薦而委任；律師成員則由人大按法律專業團體的推薦而委任。
- d) 為了避免利益衝突，法律小組的成員不應參加基本法委員會的政治性討論。

- e) 建議法律小組應由六名成員組成：香港和中國成員各佔一半，所有問題應以大多數票決定。
 - f) 若法律小組內發生僵持，則以香港法庭的決定為準。
 - g) 法律小組得制定其工作程序細則。這些細則應包含下列各點：
 - i) 公開的聆訊；
 - ii) 符合自然公正定律；
 - iii) 任何裁決都應申述理由。
3. a) 香港法庭將對基本法中不涉及國防外交的條文享有最終解釋權。
- b) 如在決定某問題是否屬國防外交以外範圍時出現爭議，應先交由香港終審法院處理。
- c) 如人大不同意香港終審法院的決定（預料人大只會不同意香港終審法院指某案件屬特區自治範圍內的決定），人大應有權要求把終審法院的決定轉交基本法委員會處理。
- d) 基於指示性原則，人大得接納基本法委員會透過法律小組所提交的意見。人大的決定不具回溯力。
- e) 如香港的終審法院裁定某一案件不屬特區自治範圍內，應有一機構使這類案件得以轉交中國的司法機關審理。
4. a) 有關特區的法律應以同樣辦法處理。首先應由香港法庭決定某法律是否符合基本法及法定程序。
- b) 若人大不同意該法律有效，則應要求把特區終審法院的決定轉交法律小組處理。
- c) 即使香港法院沒有對某香港法律提出質疑，人大依然有權把該法律直接轉交法律小組決定其是否有效。
- d) 人大應同樣基於指示性原則接納基本法委員會透過法律小組所提交的意見，但人大的決定不具回溯力。

說明

若出現一些需要緊急處理的問題時，應有特快途徑，讓該等憲法性問題毋需經過所有上訴階段而能直接由終審法院處理。

* 此附件原文為英文。

有關設立「基本法委員會」的問題

基本法諮詢委員會委員 徐是雄

根據基本法起草委員會第五次全體會議文件匯編顯示，將來在基本法內以下幾條條文所涉及的問題需要一個「基本法委員會」作出處理：

第二章第六條：「全國人民代表大會常務委員會在諮詢香港特別行政區基本法委員會後，如果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。」

第二章第七條：「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。」

第九章第一條：「全國人民代表大會常務委員會在對本法進行解釋前，可徵詢香港特別行政區基本法委員會的意見。」

第九章第二條：「本法的修改議案在列入全國人民代表大會的議程前，先由香港特別行政區基本法委員會研究並提出意見。」

從以上的幾條條文我們可以看到在基本法內將有兩方面問題需要諮詢基本法委員會予以解決的：(一)政治方面的問題和(二)法律方面的問題。因此基本法委員會的組成必須包括能解決以上兩類問題的人士，並且還必須有香港和中央兩方面人士的參與。香港方面應有一位法官(經互選產生)，一位立法機關議員(經互選產生)，兩位法律界人士(經法律界人士互選產生)，三位香港的人大代表(經香港的人大代表互選產生)；而中央方面也委出相同性質的中國內地七位人士出任。在基本法之下還應設立一個法律專責小組，由另六位法律界人士出任(三位香港成員，可以全是法官，由香港法律界人士通過選舉產生；三位中央成員，由中央委任中國內地法律界人士出任)。純法律性的問題，一般由法律專責小組處理便可，基本法委員會與及屬下之法律專責小組成員產生後由人大常務委員會任命。

由於基本法委員會的組成和權限由人大常務委員會決定，故此在基本法正式公佈之時，人大常委應同時公佈有關基本法委員會的組成、權限和工作章程。故此在基本法內只要寫入以下條文便可：「有關第二章第六條、第七條以及第九章第一條、第二條所提及的基本法委員會的職權由全國人民代表大會常務委員會規定。」

這裡順便提一下有關將來香港的全國人大代表的職責問題。我認為除在基本法內所規定的職責之外，香港的全國人大代表還應在基本法委員會內負起中央與特區之間的溝通和緩沖作用。為了達致以上目的，我希望在過渡期香港的人大代表人數應予以擴大，通過廣東省多增加一些政治中立和態度持平的港人參加人大的工作和監督中央政府；而在九七年後香港的人大代表則改由香港的立法機關和大選舉團的中國籍成員提名和選舉產生。