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Opinions on articles 6 & 7 of
chapter 2 of the draft (August
1987) of the Basic law
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OPINIONS ON ARTICLES 6 & 7
OF CHAPTER 2
OF THE DRAFT (AUGUST 1987) OF THE BASIC LAW

(passed by the Executive Committee on 23 November 1987)

Special Group on Law

OPINIONS OF THE SPECIAL GROUP ON LAW
REGARDING THE DRAFT ARTICLES 6 & 7
OF CHAPTER 2 OF THE BASIC LAW

The Special Group on Law held two meetings to discuss the draft Articles 6 & 7 of Chapter 2 of the Basic Law. The following is a collation of the views expressed by members of the Special Group during the meetings. These views are now submitted for the reference of the Drafting Committee.

On Article 6:

1. A member held that it was difficult to discuss this article when the formation, terms of reference and membership of the Basic Law Committee were yet unknown. Besides, this article provided that any law which was returned for reconsideration or revoked by the NPC Standing Committee would immediately cease to have force, but it did not specify whether only the part which contravened the Basic Law and the legal procedures or the entire piece of legislation would cease to have force. In addition, this article did not state whether the NPC Standing Committee was required to give the reasons for returning a law for consideration or revoking it.
2. A member queried about the term "legal procedures" and proposed that it be deleted. However, some members objected to deleting the term for it was quoted from the Joint Declaration. A member proposed that this article should make it clear that the term referred to the legal procedures of which system.
3. With regard to Paragraph 3 of this article, a member proposed the following two amended versions:

Proposal 1:

"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 the provisions of this Law

that are beyond the scope of the HKSAR's autonomy, it may, in accordance with Article 1 of Chapter 9 of this Law, exercise its power of interpretation of the Basic Law, and declare the law or a part thereof invalid. Upon the publication of such declaration in the HKSAR Gazette, the law or the part thereof shall immediately cease to have force, but the cessation shall not have retrospective effect."

Proposal 2:

"If the NPC Standing Committee, after consulting the Basic Law Committee of the HKSAR, considers that any law enacted by the SAR legislature may not be in accordance with this Law or legal procedures, then it may refer such law to the court of final appeal for its consideration. If that court considers that such law or a part thereof is not enacted in accordance with the Basic Law or legal procedures, and if the NPC Standing Committee does not disagree, then such law or the part thereof shall cease to have force immediately, but the cessation shall not be retrospective. If the NPC Standing Committee disagrees with the view of the court of final appeal of the HKSAR, then the law may be referred to the HKSAR Basic Law Committee for its consideration. Its decisions will be adopted by the NPC Standing Committee without amendment. Any law or a part thereof that is considered by the HKSAR Basic Law Committee not to have been enacted in accordance with this Law or legal procedures shall cease to have force upon publication of such decision in the HKSAR Gazette, but the cessation shall not have retrospective effect."

Some members found Proposal 2 unacceptable because with such an arrangement the Basic Law Committee would be superior to the court of final appeal, which would undermine the high degree of autonomy of the SAR.

4. Most of the members agreed to the following basic principle:

"Any law that is within the scope of autonomy of the SAR shall be dealt with by the SAR on its own. Should any dispute arise, the law in question will be referred to the Basic Law Committee for decision as to whether the law is within the SAR's scope of autonomy, and whether it shall be dealt with by the SAR or the Central Government. Normally, the Central Government and the SAR shall adopt the decision of the Basic Law Committee."

5. As regards which articles in the Basic Law were within the scope of autonomy of the SAR, a member suggested specifying the articles which were within the scope of autonomy of the SAR and those which were not. However, some members had reservations about this suggestion.

On Article 7:

1. Members found it difficult to define the expression "laws within the scope of the high degree of autonomy of the HKSAR". It was proposed that the following be used to define the scope of the SAR laws: "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, the laws enacted by the HKSAR legislature and the laws concerning defence, foreign affairs and the expression of national unity and territorial integrity enacted by the NPC or its Standing Committee."
2. Members held that national laws to be applied to the SAR should go through the legislative procedure in the SAR before they could take effect.
3. Members pointed out that as the legal terms used in the mainland were very different from those used in Hong Kong, the Central Government only had to issue directives to the SAR so that national laws could be applied to the SAR by way of legislation by the SAR Government in accordance with the directives.
4. Members held that the term "emergencies" in this article was obscure. It was proposed that emergencies should refer to those proclaimed by the Central Government.

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

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

(1987年11月23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

法律專責小組對第二章第六 及第七條條文草稿的意見

本組曾就基本法第二章第六及第七條條文草稿舉行兩次會議。茲將本組委員在會議中發表的意見整理如下，供起草委員會參考。

關於第六條：1. 有委員認為在未清楚了解基本法委員會的組成、職權及成員問題之前，很難討論本條文。此外，本條文規定經人大常委會發回重議或撤銷的法律立即失效，卻沒有列明是該條法律中抵觸基本法及法定程序的部份失效抑或是整條法律失效。同時，本條文沒有規定人大常委會把某些特區法律發回重議或撤銷時，是否需要解釋理由。

2. 有委員對「法定程序」一詞提出疑問，認為可以刪除。但有些委員指出該詞乃出自聯合聲明，故不宜刪除。有委員提議要求在條文中詳述此詞所指是在甚麼制度下的法定程序。

3. 對本條文的第三款，有的委員提出下列兩種修訂建議：

建議一：「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中關乎香港特別行政區自治範圍外的條款，可依據本法第九章第一條之規定，行使其對本法之解釋權，並宣告該法律之有關部份或全部無效。此宣告經香港特別行政區憲報刊登後，該法律之有關部份或全部立即失效。該法律之失效無回溯力。」

建議二：「全國人民代表大會常務委員會在諮詢香港特別行政區立法機關後，如果認為香港特別行政區的任何法律有不符合本法或法定程序的可能，可將有關法律轉交香港特別行政區的終審庭審議。若終審法庭認為有關法律之部份或全部不符合本法或法定程序，而全國人民代表大會常務委員會沒有異議，則該法律之部份或全部立即失效，但其失效無溯及力。若全國人民代表大會常務委員會不採納香港特別行政區終審法庭的意見，可將該法律再交由香港特別行政區基本法委員會審理，全國人民代表大會常務委員會將採納基本法委員會的決定，不作修改。凡經由基本法委員會審理而被定為不符合本法或法定程序的法律之部份或全部，在刊登于香港特別行政區之憲報後，立即失效。其失效無回溯力。」

對以上兩種修訂建議，有些認為建議二不可行，因為這樣的安排會把基本法委員會凌駕於特區終審庭之上，這樣會影響特區的高度自治。

4. 大部份委員贊成下列基本原則：

「凡屬特區自治範圍內的法律，均由特區自行處理。遇有爭議時，該法律應交由基本法委員會決定是否屬於特區自治範圍內，應由特區或中央處理。

在一般情況下，中央及特區均應採納基本法委員會的決定。」

5. 關於基本法中哪些條文屬特區自治範圍內，有的委員建議在基本法中列明某章某節的條文屬特區自治範圍以內和哪些不屬於其範圍之內。但有委員對這種做法表示保留。

關於第七條：1. 委員認為「特區高度自治範圍的法律」難以界定，故建議用以下方法規定特區法律的範圍：

「香港特別行政區實行的法律為本法，以及本法總則第八條規定的香港原有法律，香港特別行政區立法機關制定的法律和全國人民代表大會和全國人民代表大會常務委員會制定，有關國防、外交和其他有關體現國家統一和領土完整的法律。」

2. 委員認為在特區實施的全國性法律應經特區的立法程序才可生效。

3. 委員指出，中國與香港的法律用語有很大差別，所以委員認為中央只需向特區發佈指令，而特區政府則可按指令立法實施某些全國性法律。

4. 委員建議本條文中「緊急情況」一詞意義含糊。委員認為「緊急情況」應由中央宣佈者為準。