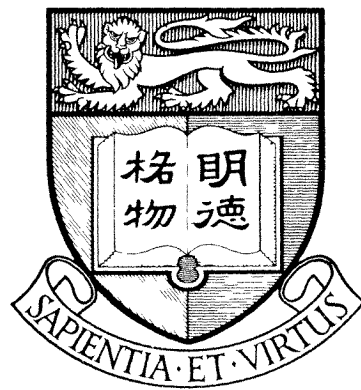


The Basic Law of the Hong Kong Special
Administrative Region of the People's
Republic of China : a Compilation of
Preparatory Materials



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**The Basic Law of the Hong Kong
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30-Oct-02

Documents published by the Basic Law Consultative Committee and
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Discussion Paper (1): Some Questions concerning Nationality
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Reference (8): Ideas on the Design of the Future Political System of Hong Kong (by Shao Weiyun)

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有關香港特別行政區宗教問題

最後報告

(1987年6月3日)

中華人民共和國基本法諮詢委員會秘書處

文化教育科技宗教專責小組

社會生活方式、宗教政策分組

宗教報告工作組

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引言

1.1 文化、教育、科技、宗教專責小組屬下之社會生活方式、宗教政策分組共召開過三次分組會議，討論了九七年後香港特別行政區的宗教政策。此外，秘書處亦收到一些委員及其他宗教團體就有關宗教問題所發表的意見書。秘書處已綜合三次會議所討論的結果及所收集到的書面意見，彙編成「宗教政策初步報告」；並舉行過公聽會，邀請公眾人士對該份「初步報告」提出補充或修改。目前這份「香港特別行政區宗教問題報告」就是按公聽會中與會人士對「初步報告」發表的意見，及公聽會後秘書處收到的書面意見及報刊上之資料，經工作組討論整理而成的；目的是將收集到的意見及建議（包括所能達致的共識及正反兩方意見），進行整理和綜合分析，經本專責小組及執行委員會通過後，供起草委員會參考。本報告內第4、5、6、7及第10段均是委員們的共識，其他凡在同一問題上委員有不同意見者，各種不同意見均已一一羅列。

2. 香港現時各宗教情況

- 2.1 本港居民享有絕對宗教自由，世界各大宗教在本港都有不同種族的人士信奉。因此，本港除佛寺和道觀外，復有基督教堂、天主教堂、清真寺、印度廟和錫克廟等。各大宗教團體除宣揚教義外，還興辦學校提供普通教育及各項社會福利事業。
- 2.2 佛教、孔教和道教都是中國的主要宗教，對本港的大部分市民，特別是年長的一輩，影響深遠。市民尊崇儒家祀祖的思想，有拜祭祖先的習慣；本港共有寺觀360多間，根據華人廟宇條例，本港所有廟宇均須註冊。
- 2.3 本港的天主教徒和基督教徒差不多有50萬人，各宗派和獨立教會達50多個。
- 2.4 本港約有天主教徒約二十七萬人（約佔全港人口5%），香港教區雖然有本身的行政組織，但仍然保持一向與教宗及其他教區之間的聯繫。
- 2.5 本港基督教徒人數超過20萬名，主要的基督教派有基督復臨安息日會、宣道會、聖公會、浸信會、中華基督教會、信義宗、循道衛理聯合教會、五旬宗和救世軍等。此外，還有多個獨立的地方教會。
- 2.6 本港約有回教徒5萬人，其中半數以上為華人，其餘為本港出生的非華籍人士，還有來自巴基斯坦、印度、馬來西亞、印尼、中東和非洲各國的回教徒。
- 2.7 本港有約一萬二千名印度教徒，其主要的宗教及社交活動由香港印度教協會負責管理。

不信的猶太教徒來自世界各地，會眾人數約一千名。除以上宗教外，香港還有錫克教等。

3 中國憲法、中英聯合聲明及有關國際公約之條文

2.1 《中華人民共和國憲法》中之有關條文：

第二十四條 國家通過普及理想教育、道德教育、文化教育、紀律和法制教育，通過在城鄉不同範圍的群眾中制定的執行各種守則、公約，加強社會主義精神文明的建設。國家提倡愛祖國、愛人民、愛勞動、愛科學、愛社會主義的公德，在人民中進行愛國主義、集體主義和國際主義、共產主義的教育，進行辯證唯物主義和歷史唯物主義的教育，反對資本主義的、封建主義的和其他的腐朽思想。

第三十六條：中華人民共和國公民有宗教信仰自由。

任何國家機關、社會團體和個人不得強制公民信仰宗教或者不信仰宗教，不得歧視信仰宗教的公民和不信仰宗教的公民。

國家保護正常的宗教活動。任何人不得利用宗教進行破壞社會秩序、損害公民身體健康、妨礙國家教育制度的活動。

宗教團體和宗教事務不受外國勢力的支配。

3.2 《中英聯合聲明》附件一第十三節：

香港特別行政區政府依法保障香港特別行政區居民和其他人的權利和自由。香港特別行政區政府保持香港原有法律中所規定的權利和自由，包括人身、言論、出版、集會、結社、組織和參加工會、通信、旅行、遷徙、罷工、遊行、選擇職業、學術研究和信仰自由、住宅不受侵犯、婚姻自由以及自願生育的權利。

任何人均有權得到秘密法律諮詢、向法院提起訴訟、選擇律師在法庭上為其代理以及獲得司法補救。任何人均有權對行政部門的行為向法院申訴。

宗教組織和教徒可同其他地方的宗教組織和教徒保持關係，宗教組織所辦學校、醫院、福利機構等均可繼續存在。香港特別行政區的宗教組織與中華人民共和國其他地區宗教組織的關係應以互不隸屬、互不干涉和互相尊重的原則為基礎。

《公民權利和政治權利國際公約》和《經濟、社會與文化權利的國際公約》適用於香港的規定將繼續有效。

3.3 「世界人權宣言」第十八條：

人人有思想、良心與宗教自由之權；此項權利包括其改變宗教或信仰之自由，及其單獨或集體、公開或私自以教義、躬行、禮拜及戒律表示其宗教或信仰之自由。

3. 「公民及政治權利國際公約」有關宗教之條文：

第十八條 一、人人有思想、信念及宗教之自由。此種權利包括保有或採奉自擇之宗教或信仰之自由，及單獨或集體、公開或私自以禮拜、戒律、躬行及講授表示其宗教或信仰之自由。

二、任何人所享保有或採奉自擇之宗教或信仰之自由、不得以脅迫侵害之。

三、人人表示其宗教或信仰之自由，非依法律，不受限制，此項限制以保障公共安全、秩序、衛生或風化或他人之基本權利自由所必要者為限。

四、本盟約締約國承允尊重父母或法定監護人確保子女接受符合其本人信仰之宗教及道德教育之自由。

第二十七條：凡有種族、宗教或語言少數團體之國家，屬於此類少數團體之人，與團體中其他份子共同享受其固有文化、信奉躬行其固有宗教或使用其固有語言之權利，不得剝奪之。

4. 基本原則：

4.1 真正的宗教自由，是基於人權。只有在尊重人權的社會中，才有真正宗教信仰和活動自由。在享受宗教自由時，個別居民及宗教團體必須尊重他人的權利，遵守法律的規定。

4.2 居民在法律上的平等地位，不得因宗教及信仰的理由受到任何損害或歧視。

4.3 在九七年後，香港政府應以一視同仁的態度對待所有宗教。

4.4 特別行政區政府不得剝奪居民信奉宗教的權利，只有政府在不干預宗教自由的政策下，香港才能繼續繁榮安定。

4.5 將來特區的宗教組織與中華人民共和國其他地區宗教組織的關係應以互不隸屬、互不干涉和互相尊重的原則為基礎。

4.6 九七年後香港的宗教應保持一貫方針，如服務社會、導人向善、使香港福利事業更加蓬勃。

4.7 宗教團體的獨立性及自主權應保持不變。宗教團體的“獨立性”和“自主權”應理解為：本地的宗教團體的內政不受政府的控制、影響或利用；亦不受任何其他國家的控制、影響或利用。

4.8 香港現時沒有一套明文的宗教政策，但容許一般人有實踐宗教的自由，這種情況應保留。

5. 宗教自由之意義

5.1 「宗教自由」的定義應從聯合國「世界人權宣言」第十八條及「公民及政治權利國際公約」有關係文作為基礎。

5.2 宗教信仰自由包括不接受歷史唯物主義、辯證唯物主義及共產主義的自由。

5.3 宗教自由應包括以下活動的自由：

(I) 舉行公共敬拜禮儀；

(II) 補助成員及其他願意接受信仰的人實踐宗教生活；

(III) 傳授教理；

(IV) 以口述或書刊或其他形式，公開傳授及借用公眾地方宣揚其信仰；

(V) 結社及成立修道團體，使成員按照其宗教原則共同工作及生活；

(VI) 自由選擇、培育、任命、調遣自己的僧侶、教士等；

(VII) 開設及舉辦教育、文化、醫療、福利、社會服務等事業；

(VIII) 建立、購置、擁有或使用其所需的產業；

(IX) 與居留世界各地的宗教首長及宗教團體自由交往；

(X) 每一父母均有權安排家庭中的宗教生活，及決定其未成年成員受何種宗教培育。香港特別行政區政府應尊重父母決定其子女受宗教教育的權利。

(XI) 有權拒絕履行與宗教信仰抵觸的行動，如墮胎、安死等。

6. 保障宗教自由之具體譯作

6.1 宗教團體可依法擁有自己的物業和財產，包括財產的取得、使用、處置和繼承的權利，以及依法徵用財產得到補償的權利（補償相當於該財產的實際價值、可自由兌換、政府不得無故遲延支付）。

6.2 特區政府依據法律保障宗教團體固有的各種權利，如有關撥地、豁免差餉與稅項、地契續約等。對宗教及慈善團體的稅收應保持固有的安排。

6.3 凡屬政務司立案法團的宗教團體用地（即由政府以特惠條件批給宗教團體建設及管理寺廟之用地），在九七年後該土地之使用權仍可由該宗教團體繼續保留。

6.4 現時已註冊成為法定團體的宗教組織，在九七年後其法定地位可繼續得到認可。

- 6 5 宗教機構所舉辦的文化、教育、福利、醫療等事業可繼續獲政府資助。
- 6 6 宗教信徒在申請政府部門職位、政府學校學位及租借公共文娛康樂體育設施時，不應受到歧視及不平等待遇。
- 6 7 市民可向法庭申訴及上訴任何因宗教問題而引起的不平等待遇。
- 6 8 由於宗教與迷信難以劃分界限，執政者不可以禁止迷信為名，去干預宗教活動。

7 宗教團體與外地聯繫之問題

- 7 1 香港的教會及宗教團體可與外國教會保持關係。
- 7 2 宗教機構可接受香港以外地區的資助，並可向香港以外地區給予捐助。
- 7 3 基本法應保證香港天主教在九七年後仍保持為教宗領導下的地方教會，而中國的宗教組織或政府不干預這方面的情況。
- 7 4 國外宗教組織可以在香港設立支部，同時任用本港及外地僱員為其服務。
- 7 5 個別信徒或宗教團體可依其慣行方式，保持與國際間的關係，並可邀請外國傳教士到來協助傳教服務，互通有無。個別信徒或宗教團體可繼續自由出國訪問觀摩及參加一切國際性宗教活動。
- 7 6 國內的宗教組織不影響香港的宗教組織。
- 7 7 外地宗教刊物(包括在臺灣出版之刊物)應可以自由進入香港。
- 7 8 特區的宗教組織可用獨立名義與世界各國、各地區及有關國際組織保持和發展關係，並簽訂和履行有關宗教、文化、教育、醫療、社會服務等協定。

8. 宗教假期之商榷

關於宗教假期之問題，共有以下意見：

- 8 1 香港是世界性的金融商業中心，其公眾假期應儘量與其他先進國家配合。將來最理想是保持現有的假期，必要時更改假期名稱便可。

- 2.2 應繼續保持現有的假期及其名稱，因為香港人對中國現行的宗教政策已很敏感，如九七年後驟然更改，便會使港人對宗教自由失去信心。
- 2.3 可以重新編訂公眾假期及節日假期，但要注意經濟及宗教因素；公眾假期與勞工假期應盡量求統一。
- 2.4 在可能的情况下，特區政府應考慮增加佛教和其他宗教的假期。
9. 有關宗教自由的其他意見
- 9.1 雖然現時中國所實施的宗教政策可能已很開放，但中國憲法第24條既列明國家要進行辯証唯物主義和歷史唯物主義的教育，此項明文的規定，勢必影響宗教政策。故此，香港需要一些正式的保證，在基本法中列明未來特區的宗教政策不會受到憲法或其他條例的影響，使特區居民有接受宗教教育及進行各種宗教活動和儀式的自由。
- 9.2 亦有委員認為因為大多數宗教基本是相信有神論，與共產主義的無神論有極大的衝突，如果基本法內僅寫明宗教自由，是不足為保證的。基本法應以詳細條文維護宗教方面的一切自由，並尋求方法消除特別行政區基本法與中華人民共和國憲法之間有關宗教自由方面所真正或表面存在的矛盾。
- 9.3 在基本法上應寫明教徒有信仰自由、實踐自由、宣傳自由、反對無神論及從宗教角度研究共產主義之言論自由。
- 9.4 基本法上應列明香港的宗教團體在九七年後，可繼續與外國保持聯繫。並保障這樣的規定不會與中國憲法第三十六條發生抵觸。
- 9.5 有關聯合聲明中“干涉”和“隸屬”兩詞的意義應加以解釋。
- 9.6 政府不得施任何壓力使居民追隨違反其宗教信仰的制度及活動。但亦有委員反對此項意見。
10. 基本法有關宗教問題條文建議
- 10.1 根據中華人民共和國憲法第三十一條，香港特別行政區有關宗教自由的制度，以本法的規定為依據。

10.2 香港特別行政區的宗教自由以聯合國「人權宣言」第十八條及「公民及政治權利國際公約」第十八條、第二十七條為依據。宗教自由應包括以下活動的自由：

- (I) 舉行公共敬拜禮儀；
- (II) 輔助成員及其他願意接受信仰的人實踐宗教生活；
- (III) 傳授教理；
- (IV) 以口述或書刊或其他形式，公開傳授及借用公眾地方宣揚其信仰；
- (V) 結社及成立修道團體，使成員按照其宗教原則共同工作及生活；
- (VI) 自由選擇、培育、任命、調遣自己的僧侶、教士等；
- (VII) 開設及舉辦教育、文化、醫療、福利、社會服務等事業；
- (VIII) 建立、購置、擁有或使用其所需的產業；
- (IX) 與居留世界各地的宗教首長及宗教團體自由交往；
- (X) 每一父母均有權安排家庭中的宗教生活，及決定其未成年成員受何種宗教培育。香港特別行政區政府應尊重父母決定其子女受宗教教育的權利。

10.3 香港特別行政區政府不干預和限制宗教活動。

10.4 香港特別行政區的宗教團體可與其在外國的宗教團體維持或建立從屬關係。

10.5 特區的宗教組織可用獨立名義與世界各國、各地區及有關組織保持和發展關係，並簽訂和履行有關宗教、文化、醫療、社會服務等協定。

10.6 香港特別行政區宗教團體與內地相應的團體應以互不隸屬、互不干涉和互相尊重的原則為基礎。

10.7 宗教組織所辦學校、醫院、福利機構等均可繼續存在和發展，並維持固有的獨立性、自主性、及財產擁有權維持不變。

10.8 香港居民有根據其宗教信仰自願生育的權利。

對基本法序言和第一、二、七、九章條文 (一九八七年八月)草稿的意見

(1987年11月4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
中央與特別行政區的關係專責小組

序言

有委員認為如第一句寫得更符合聯合聲明，則會表達得更妥善。該委員同意把後半部刪去可能更好，因為該部分對基本法沒有什麼積極作用。該委員又指出香港回歸中國不僅是中國的願望。

第一章

第五條

有委員認為現在這條文稿不夠有力，未經法律規定的權利自由，就不會受到保障，而且也會出現根據立法機關的法律而剝奪權利自由的情況。如果將來提出新法案的做法與現時的一樣，並由公務員執行行政機關的命令，則可能削弱權利與自由。行政機關可能不願授予充分有效的法定權利和自由，不想香港特別行政區居民和其他人因此而可以對行政機關的授權提出控訴。該委員並希望英文本能跟中文一樣採用主動語態。

第八條

有委員認為「除...經香港特別行政區的立法機關作出修改者外」一句令人擔憂，因為公務員及行政機關可提出修改，並由立法機關通過，即等於賦予行政機關及公務員比現在更大的權力。這可能是有效行政所必須的，但另一方面，這麼大的權力可能是很危險的。在未確定立法機關如何產生及修改法律的程序前，應對這規定有所保留。

有委員認為應有一關於口頭語及書面語的條文，第二次草委全體會議也提及這點。這條文應保障中、英文書面語及廣州話、英語(作為口頭語)在香港特別行政區的地位。

第二章

第一條

有委員認為這條提到香港特別行政區政府直轄於中央人民政府，似乎是指一種行政關係，所以不符合中英聯合聲明第三條第二款及附件一第一節的規定，該規定的措辭是香港特別行政區直轄於中華人民共和國中央人民政府(即在特區後沒有「政府」二字)，是指一種主權關係。該委員建議採用中英聯合聲明的寫法。

第二條

有委員指出如不界定何謂行政機關、主要官員及公務人員，則很難評論這條條文。

第六條

1. 有委員提及本條第二款人大常委會將有關香港特別行政區法律發回重議或撤銷的程序不清楚。有委員建議應該當香港法庭在審判過程中發覺某法例是不符合基本法的，法例才需呈報人大常委會，讓人大常委會作出發回重議或撤銷的決定。其他時間，人大常委會不應主動審查香港的法例。這程序亦適用於九七年以後制訂的法例，當特區政府將新訂法例交人大常委會備案時，為節省時間，人大常委會不用每次都審閱這些法例，只有當這些法例在實際審判時出現問題，才需呈交人大常委會以作決定。
2. 就人大常委會發回重議的法律是部份失效還是全部失效的問題，委員有不同意見。
有委員認為應該只是部份失效，因為很少情況是整章法例都與基本法抵觸的，通常只是其中的某些章節抵觸基本法。若法例經呈報人大常委之後，便全章失效，則有可能部份不抵觸基本法的條文附予市民某些權利，便會隨之喪失，縱使日後該部份條文斷定為合法，則在發出重議至再作決定的期間，該市民因著該部份條文所擁有的權利便被無端剝奪。
但亦有委員贊成當人大將某章法例發給特區政府重議時，它便應該立刻全部失效。特區政府可以只修改抵觸基本法的部份，而保留不抵觸基本法的條文，再將修訂的版本交與人大常委備案。這做法的好處是將條文是否違背基本法的決定權留給特區政府，避免人大常委會將某些香港人覺得極重要的條文定為無效。
3. 有委員認為需澄清香港特別行政區立法機關制定法律的程序及該法律的生效程序。「備案不影響該法律生效」，以及人大常委會可將有關法律發回重議或撤銷等規定，令人懷疑未經人大常委會通過之前，該法律是否有效。

第七條

1. 有委員認為「國防」、「外交」、「體現國家統一」及「領土完整」的定義並不清楚，他對此感到很擔憂。他尤其擔心是若大家對「國家統一」有不同的看法，將來可能產生衝突。
2. 有委員認為除牽涉及國防和外交之外其他全國性法律，比如國籍法，在港適用的情況都應該清楚列明。他建議由人大常委會下指令給香港特別行政區，由特區政府自行決定適用的情況。
3. 有委員認為本條末段的意思不清楚，是否指若特區政府未能遵照國務院的指令，則國務院可不經特區政府，而透過其他途徑指令該等法律在特區實施？若然，則會使特區政府與國務院的關係變得緊張。
4. 就第3點意見，有委員認為這只是保留人大常委會有最後的控制權，其實在整個過程中香港特別行政區法院已擁有很大的自由。
5. 有委員認為本條第五款(末段)應該與第四款的次序掉換，因為第五款的討論是緊貼第三款而作的，更改之後，整段的邏輯性更強。
6. 有委員認為根據本條行文，好像不只是全國性法律才能在港適用，而是人大常委會可在某些方面特別為香港訂立只適用於香港的法律。該委員認為此處有不清楚之點。
7. 有委員認為本條提及國務院可指令香港特別行政區實施某些法律，這種處理方法有問題，因為國務院也可能犯錯，作出違背基本法的決定。該委員認為應列明若這情況發生，香港特別行政區政府可以上訴的途徑。

8. 有委員認為解釋基本法的權力不在國務院，而在人大常委會，故應在條文中列明，必需先經「人大常委會決定或授權」，國務院才能指令香港特別行政區政府。
9. 有委員指出何謂「緊急情況」，條文中沒有清楚界定。他建議仿效其他國家的憲法，有特別章節列出「緊急情況」的定義及處理方法，免致將來中港之間產生衝突。
10. 有委員不贊成列出所有緊急情況的例子，因為恐怕會有遺漏，他建議基本法中列明中國政府要經過特別程序才宣佈何謂「緊急情況」。就此，有委員補充說條文應更改為：除「國家宣佈為國家的」緊急情況下，國務院在發布上述指令前.....
11. 有委員認為所有非國家的緊急情況，即只是發生在香港本土的緊急情況，應由特區政府自行決定。
12. 有委員指出根據中英聯合聲明附件一第二節，由全國人民代表大會或其常委會制定的法律都不能直接在香港實施。中英聯合聲明也沒有規定國務院可發布命令將法律在香港特別行政區實施或指令特區政府立法實施。但這似乎與附件一第一節有所矛盾，因為該節訂明中央保留所有有關外交和國防事務的權力。根據這規定，全國法律又似乎可以在香港直接實施。
13. 有委員認為如要充分瞭解「香港特別行政區政府立法實施」、「徵詢香港特別行政區政府」、「香港特別行政區未能遵照國務院的指令行事」等句子的意思，必須為「香港特別行政區政府」下一定義。
14. 有委員指出如香港特別行政區政府是在香港特別行政區代表中央人民政府的權力機關，不遵照中央指令行事是極嚴重和相等於反叛的行為。該委員認為這可歸入緊急情況一類，此外便不會有其他同樣嚴重的情況，是需要由國務院發布命令將法律在香港特別行政區實施的。

第九條

有委員提出這些由人大及其常委會與國務院授予的權力是否只限於行政機關所有。

第七章

第二條

有委員認為應該在航運之後，加進「民航」一項。

第五條

有委員問及根據這條文，所有其他人是否可以同時持有其本國護照及中華人民共和國旅遊證件。

第九章

第一條

就九七年後香港法院對基本法的解釋範圍，委員有下列意見：

1. 有委員認為若以「自治範圍」去定香港法院對基本法的解釋範圍，則會產生很大的問題，因為「自治範圍」將會難於定義。他擔心在審議案案件時，香港法院與人大常委會可能對案件是否屬於特區自治範圍產生矛盾，故建議香港法院應能解釋基本法所有內容，否則中央便會干預香港。
2. 有委員認為若用「自治範圍」去劃定香港法院的管轄範圍，則九七年後香港法院擁有的司法管轄權可能會與現在不同(可能增大或減少)。但中英聯合聲明及現有的基本法條文草稿顯示九七年後香港法院繼續擁有審判權及終審權，故其管轄範圍不應比九七年前少。而且該委員亦顯示，「司法管轄範圍」難用條文列出，故最好的方法是以普通法的慣用方法處理。

3. 有委員認為以國防、外交作法院管轄範圍不怎樣合適，因為在某些情況下，國防、外交屬於法院管轄範圍，但某些情況之下不屬於。故要強下定義並不容易，其實，可以考慮依普通法制度的處理方法，以過往的判例作基礎。
4. 有委員認為除國防、外交之外，其他所有範圍都屬香港的「自治範圍」，故此，九七年後香港法院的管理範圍會比九七年前更闊，而且到時香港更設有終審庭。人大常委會所以要保留最後的解釋權，只為體現主權，非為干預香港內政。而且日後人大常委會要解釋基本法將要先諮詢香港基本法委員會的意見。
5. 有委員認為不應過份擔心中央會干預香港。若他們真要這樣做，則不單止能在司法管轄方面干預香港，在其他方面亦可以。若此，則一國兩制的精神亦喪失了。香港人對北京政府應具更大的信心。
6. 有委員建議此條的二段可作以下修改：「香港特別行政區法院在審理案件時可以對基本法（刪去：中屬於香港特別行政區自治權範圍）的條款進行解釋。
該委員認為基本法中牽涉國防，外交的條款很少，故這樣更改亦不會影響中央對國防，外交方面的處理。委員亦認為人大常委會對基本法中有關特區自治權的條文不會輕易作出解釋，它只會對有關國防、外交的條款在適當的時候進行解釋。此外，若人大常委會真要解釋基本法時，它亦會事先徵詢基本法委員會的意見。
7. 有委員贊成香港法院有完全的解釋權，他指出，人大常委會不是香港政治架構的一部份，而屬於中國的政治架構，故若特區將某些案件交由人大常委審判，則好像將人大常委會當作上訴庭。
8. 就第7點，亦有委員補充說人大常委會是一政治機構，若容許此政治機構對香港某些非政治性的法律附予政治性的判決，則會影響某些香港法律的本質（比如，由非政治性變作政治性），會嚴重影響香港人的信心。該委員亦指出若要人大常委會具基本法的最後解釋權，則除非其性質改為非政治性機構。
9. 有委員認為可由「基本法委員會」靈活處理什麼案件屬人大常委會的解釋權，什麼屬於香港法院的，然後才遞交人大常委會決定處理方式。
10. 有委員認為香港現有的司法制度應盡量保持不變，香港法院應有權處理有關國防、外交的案件，而不是國防、外交本身。此外，香港法庭應保有完整的終審權。此乃保障外來投資者信心的重要因素，不可能部份（其內容未能界定清楚）的案件不能由香港法庭審理，這會嚇怕外來投資者。
11. 有委員指出除國防、外交之外，可能會有某部份其他牽涉全國重大利益的全國性法律在港應用。
12. 有委員建議在基本法中寫明香港法院有權解釋所有在港使用的法律，包括某部份中國全國性法律，如國籍法。
13. 有委員建議所有基本法中沒有列明是中央的權力，香港法院都能解釋。或者沒有寫明香港法院不能解釋的，本地法院都可以。

就有關基本法的最終解釋權，委員有下列意見：

1. 有委員認為雖然根據中國憲法，人大常委會有解釋所有法律的權利，但委員建議就基本法中某些完全屬於香港內部事務的條文，比如有關居民權利和義務，經濟及文化教育的章節，應在基本法中列明香港法院有最後解釋權，而人大常委會對此不作解釋。比如第三章第十五條中提及「香港居民享有的權利和自由，除依法律規定外不得限制。但此種限制需以維護國家安全、社會秩序、社會公安、公共衛生、公共道德以及保障他人的權利和自由所必要為限。」
該委員擔心若將來香港法院與人大會對「國家安全，公安」等字眼有不同的理解，便可能會引起矛盾和衝突。而且他認為香港人所擁有的自由不應由人大常委會決定。
2. 有委員認為中英聯合聲明只附予香港有終審權，但卻沒提及香港有基本法的解釋權。而且根據中國憲法，人大代表會有解釋所有中國法律的最後權力。

第二條

就香港特別行政區對基本法的修改提議程序，委員有三種不同的意見：

- A. 1. 有委員贊成現時草委所擬的條文，即：
香港特別行政區的修改議案，須經香港特別行政區的全國人民代表大會代表三分之二的多數、香港特別行政區立法機關成員三分之二的多數及香港特別行政區行政長官同意後，交由香港特別行政區出席全國人民代表大會的代表團向全國人民代表大會提出。
2. 有委員認為香港人大代表，立法機關成員及行政長官三者包括處理香港與中央關係，本地立法及行政事務的代表，若基本法的修改得到三者的同意，即表示該修改提議代表大部份香港人的意願。該委員認為修改基本法乃重要而必須謹慎處理的事情，故修改提議亦必須得到大部份具代表性的人的同意才應提出。
- B. 1. 有委員提出另一意見，指出：
「香港特別行政區的修改議案，須經香港特別行政區立法機關成員三分之二的多數及香港特別行政區行政長官同意後」，才由特區政府提出修改建議。
2. 該委員認為基本法的修改提議不用經香港人大代表同意，因為香港人大代表並不屬於香港政府架構中的一環，其選舉的方法及職權等都不清楚。除非基本法中列出一個為香港人同意的人大代表產生方法及職權的方案，否則基本法的修改不用經本地人大代表的同意。
3. 此外，亦有委員提出香港人大代表的主要工作乃參與管理中央事務及協調中港關係，故有關修改香港基本法的問題，不應由他們參與提案。他並指出關係如此重大的本地內部問題，香港人應該有更大的主動議。
4. 不過，就這提議，亦有反對的意見指出這完全抹煞香港人大代表的重要性，因為基本法的修改提議最後是由全國人大代表會討論的，如果該提議根本不為本地人大代表的同意，則他們根本不會在人大會上解釋及說服其他代表接受，故該條文的修改亦可能不會在人大代表會上通過。
5. 此外，有委員亦指出雖然現在香港的人大代表由廣東省選出，香港人可能覺得較陌生，但他相信九七年後香港人大代表在本地選出的機會很高，到時人大代表便足以代表香港人的意願，故在考慮提出基本法修改時便要顧及他們的意見。再者，有委員亦不同意事先假設人大代表與香港的其他代表會對立起來，因為將來可能有部份人大代表是從立法機關中選出的，而且未來的行政首長亦有可能是人大代表之一。

6. 就上述建議，有反對的意見是作人大代表與當香港政府成員是兩種不同的身份，因為只有中國公民才能當人大代表，但作本地立法機關成員的限制便較少，可能香港市民中部份非中國公民亦可擔任。故大家的代表性有不同。此外，就算人大代表在香港選出，亦不代表他們每事會以香港人的利益作依歸，因為他們的主要工作仍是參與管理全國事處。
- C. 1. 有委員提出第三個建議：
- 「香港特別行政區的修改議案，須經香港特別行政區立法機關成員三分之二的多數提出，再經香港特別行政區的全國人民代表大會代表過半數同意（不用三分之二的多數），然後經香港特別行政區行政長官同意，即由香港特別行政區政府遞交國務院向全國人民代表大會提出。」
2. 該委員認為這建議既保持香港人在提出基本法方面的主動權，但亦接受香港人大代表的意見，而且要求過半數人大代表同意（不用三分之二的多數），亦是一個可以接受的要求，因為若基本法的修改提議案完全不為香港人大代表接受，亦可反映該提議有不妥善之處。
3. 此外，這建議指出香港特別行政區政府可直接將修改提議遞交國務院，以向全國人大代表會提出。因為該委員覺得草稿中「香港特別行政區出席全國人民代表大會的代表團」的角色及職責並不清楚。若該代表團有刪改或者批准該修改提議的權力，則人大代表的權力就會過份重要。故建議香港政府可將該修改提議直接遞交國務院，無需再經另一重手續。
- D. 有委員提出草稿中只指出香港特別行政區出席全國人大代表會的代表團會向全國人大代表會「提出」該基本法的修改提議，但「提出」之後的程序卻沒有指出，委員希望草委能仔細列出整個程序。

OPINIONS ON THE PREAMBLE AND CHAPTERS 1, 2, 7, & 9
OF THE DRAFT (AUGUST 1987) OF THE BASIC LAW

(passed by the Executive Committee on 4 November 1987)

Special Group on
the Relationship between the Central Government and the SAR

Preamble

A member held that the first sentence could be expressed better if written more in line with the Joint Declaration. The member agreed that it might be better to omit the latter part because it seemed not to make a positive contribution to the Basic Law. He further commented that the restoration of Hong Kong to the PRC was not only a Chinese aspiration.

Chapter 1

Article 5

A member noted that the present draft was not strong enough, rights and freedoms were open to not being protected if not established in law. They were also open to being eroded according to the laws passed by the legislature. If initiation of new laws remained in future as now with the civil servants carrying out the instructions of the executive authorities there might well be a tendency to reduce the strength of rights and freedoms. The executive authorities might feel reluctant to give fully effective legal rights and freedoms because HKSAR inhabitants and other persons might then be able to take the executive authorities to court for compensation for infringement of their rights.

The member would like the article be reworded as follows: "The HKSAR shall protect by law the rights and freedoms of HKSAR inhabitants and other persons."

Article 8

A member remarked that the phrase "subject to any amendment by the HKSAR legislature" was rather worrying because amendments initiated by civil servants and the executive authorities and passed by the legislature could effectively give the executive authorities and civil servants more power than they now had. This might be necessary for effective execution on the one hand but dangerously powerful on the other. Until it was clear how the legislature was to be formed and the procedure for amendment of law, agreement on inclusion of this phrase should be reserved.

There should be an article on spoken and written languages as indicated at the second plenary session of the Drafting Committee. This article should be written to protect the status of written languages of Chinese and English and spoken Cantonese and English in the HKSAR.

Chapter 2

Article 1

A member noted that where this article referred to the HKSAR Government coming directly under the authority of the Central People's Government this seemed to be a reference to an executive relationship and therefore in conflict with the Joint Declaration 3 (2) and Annex 1 Section 1 which referred to the HKSAR being a sovereign relationship. The member preferred the wording in the Joint Declaration.

Article 2

A member commented that it was difficult to offer comment on this without definition of executive authorities, principal officials and public servants.

Article 6

1. A member noted that in paragraph 2 of this article, the procedure through which the NPC Standing Committee returned any laws of the SAR for reconsideration or revoked them was ambiguous. It was proposed that only when a court, in trying a case before it, found that a particular law contravened the Basic Law, would the law be required to be reported to the NPC Standing Committee which would then decide whether the law should be returned for reconsideration or revoked. In other circumstances, the NPC Standing Committee should not take the initiative to review the laws of Hong Kong. This arrangement should also apply to laws enacted after 1997. For the sake of efficiency, the NPC Standing Committee would not have to go through each and every new law submitted to it by the SAR for the record. Only when problems arose in the course of actual adjudication would a law need to be submitted to the NPC Standing Committee for its decision.
2. Members held different opinions as to whether a law being returned by the NPC Standing Committee for reconsideration would partially or totally cease to be in effect.

Some members held that it should only be partially cease to be in effect because the situation where an entire chapter of legislation contravened the Basic Law rarely occurred, and normally only parts of it were in contravention. If the entire chapter ceased to be in effect after being submitted to the NPC Standing Committee, certain rights conferred on the public by those articles which did not contravene the Basic Law would also be lost. Even though the validity of these articles might eventually be reinstated, the public would still be deprived of the rights conferred on them by those articles from the time this piece of legislation was returned for reconsideration to the time a decision was reached.

However, there were some members who held that when the NPC Standing Committee returned a particular chapter of legislation to the SAR for reconsideration, this chapter should immediately cease to be in effect in its entirety. The SAR Government would then only have to revise the part which contravened the Basic Law, while the articles which did not contravene the Basic Law would be left intact. Subsequently the revised version would be submitted to the NPC Standing Committee for the record. The advantage of this arrangement would be that the power to decide whether certain provisions contravened the Basic Law would be vested in the SAR Government, thus averting the possibility of the NPC Standing Committee declaring null and void provisions which Hong Kong people considered important.

3. A member pointed out that some clarification was needed on the process of the law being enacted by the HKSAR legislature and coming into effect. "Reporting to the NPC Standing Committee for the record which would not affect the coming into operation of the law" and the possibility of the NPC Standing Committee returning it for reconsideration or revoking it might raise doubts about its validity until it was passed by the NPC Standing Committee.

Article 7

1. A member held that the terms "defence", "foreign affairs", "the expression of national unity" and "territorial integrity" were ambiguous. The member was worried that conflicts might arise in the future over the interpretation of the term "national unity".
2. A member held that the applicability in Hong Kong of national laws, such as the Nationality Law, apart from those involving national defence and foreign affairs, should be clearly stipulated. He proposed that the NPC Standing Committee issue a directive authorising the HKSAR Government to determine, on its own, which laws are applicable to the SAR.

3. A member found the last paragraph of this article ambiguous. Did it mean that if the SAR Government did not follow the instructions given by the State Council, the State Council could put the laws into effect in the SAR by other means without going through the SAR Government? If this was the case, it might lead to tension between the SAR Government and the State Council.
4. Regarding the above-mentioned point, a member held that the arrangement was only intended to preserve the ultimate controlling power of the State Council. He noted that the SAR courts were already given much freedom in the overall process.
5. A member held that the order of the last paragraph (paragraph 5) of this article and the penultimate paragraph (paragraph 4) should be reversed because paragraph 5 was a follow-up of paragraph 3. The whole article would sound more logical after the change.
6. A member noted that the wording of this article gave one the impression that not only national laws would be applicable to Hong Kong, but that the NPC Standing Committee could enact, for Hong Kong, laws applicable to Hong Kong alone. The member held that this point was ambiguous.
7. This article provides that the State Council may issue orders to put certain laws into effect in the HKSAR. A member held that such an arrangement might lead to problems because the State Council might err and make decisions that contravened the Basic Law. The member proposed that provisions be made for the SAR Government to appeal should such a situation arise.
8. A member noted that since the power to interpret the Basic Law was vested in the NPC Standing Committee, not in the State Council, it should be stipulated in this article that the State Council could only issue orders to the SAR Government upon "the decision or authorisation of the NPC Standing Committee".
9. A member noted that the term "emergencies" was not clearly defined. He proposed that following the example set by the constitutions of other countries, a separate section dealing with the definition and handling of emergencies be added in order to avoid future conflicts between Hong Kong and China.
10. A member was opposed to the idea of enumerating examples of emergencies, the reason being there might be omissions. He proposed instead that it should be stated in the Basic Law that the Chinese Government would need to go through special procedures to announce a state of emergency. A member added that this article should be amended to read: "Except in a state of emergency proclaimed by the state, the State Council shall consult the HKSAR Government"

11. A member held that any non-national state of emergency, i.e., a state of emergency that occurs in Hong Kong, should be decided by the SAR Government on its own.
12. A member pointed out that according to Section II of Annex I to the Joint Declaration direct application of laws enacted by the National People's Congress and its Standing Committee was not possible. Neither was there provision for application by proclamation or directive of the State Council for the legislature to enact laws. However this seemed to clash with Section I of Annex I where all powers on foreign and defence affairs were reserved. Under that it would seem possible for the application of national laws directly.
13. A member held that a definition of HKSAR Government was needed so as to fully understand what the terms "legislation by the HKSAR Government", "consult the HKSAR Government", and "HKSAR Government does not act in accordance" meant.
14. A member pointed out that as long as the HKSAR Government was acting as the Central People's Government's authority in HKSAR the matter of not acting in accordance with the directive would be most serious and amount to an act of rebellion which would be interpreted as an emergency. The member could not see how a serious enough situation could develop where a proclamation would be needed.

Article 9

A member asked whether these conferred powers would be restricted to the executive authorities.

Chapter 7

Article 2

A member held that the words "civil aviation" should be added after "shipping".

Article 5

A member asked whether this would allow all other persons to hold their own national passports and PRC travel documents concurrently.

Chapter 9

Article 1

Regarding the scope of interpretation of the Basic Law by the courts of Hong Kong after 1997, members had the following views:

1. A member held that there would be problems if the scope of interpretation of the Basic Law by the courts of Hong Kong was delineated on the basis of "the scope of autonomy", because it would then be very difficult to define the "scope of autonomy". He was worried that in adjudicating cases before them, the courts of Hong Kong would find themselves in conflict with the NPC Standing Committee over the question of whether a particular case was within the scope of autonomy of the SAR. He thus proposed that the courts of Hong Kong should have the power to interpret all parts of the Basic Law, pointing out that the Central Government would intervene in the affairs of Hong Kong otherwise.
2. A member held that if "the scope of autonomy" was used to delineate the scope of jurisdiction of the courts of Hong Kong, the courts of Hong Kong would have a different scope of jurisdiction than what they now have (either larger or smaller in scope) after 1997. However, since the Sino-British Joint Declaration and the present draft of the Basic Law both indicated that the courts of Hong Kong would enjoy judicial power and the power of final adjudication after 1997, the scope of their jurisdiction should not be smaller than what it was before 1997. The member also noted that as it was difficult to set down provisions delineating "the scope of judicial jurisdiction", the best solution would be to follow customary practices of the Common Law.
3. A member deemed it inappropriate to take defence and foreign affairs as the dividing line in defining the scope of jurisdiction of the courts because defence and foreign affairs sometimes might come under the jurisdiction of the courts but sometimes might not. Since it was not easy to contrive a definition of the term, we could consider following the Common Law and taking past precedents as the basis.
4. A member held that since anything other than defence and foreign affairs would be within "the scope of autonomy" of Hong Kong, the jurisdiction of the courts of Hong Kong would be much greater after 1997, by then Hong Kong would even have its own court of final adjudication. He pointed out that the NPC Standing Committee only wanted to retain the final power of interpretation as a matter of sovereignty, not for the purpose of intervening in the internal affairs of Hong Kong. Besides, the NPC Standing Committee basically

5. A member maintained that there was no need to worry too much about the Central authorities intervening in the affairs of Hong Kong. He noted that if they really wanted to intervene, they could do so in other areas as well, not just in the matter of judicial jurisdiction, but this would mean forsaking the spirit of "one country, two systems". The people of Hong Kong should have greater confidence in the Beijing Government.

6. A member proposed that paragraph 2 of this article be amended as follows: "The courts in the HKSAR may, in adjudicating cases before them, interpret articles of the Basic Law". (Deleting the clause "which are within the scope of the SAR's autonomy.")

The member held that since very few articles involved defence and foreign affairs, the amendment would not affect the Central Government's authority in defence and foreign affairs. The member also maintained that the NPC Standing Committee would not easily interpret the articles of the Basic Law relating to the SAR's autonomy. It would only interpret the articles relating to defence and foreign affairs at an appropriate time. Furthermore, if the NPC Standing Committee would really have the interpret the Basic Law, it would first consult the Basic Law Committee.

7. A member favoured the idea that the courts of Hong Kong should enjoy full power of interpretation. He pointed out that since the NPC Standing Committee was part of the political structure of China, not of Hong Kong, if cases were to be put before the NPC Standing Committee, the NPC Standing would be like the court of appeal.

8. Regarding the above point, a member maintained that if the NPC Standing Committee, as a political body, was allowed to pass political judgment on certain non-political laws of Hong Kong, the nature of certain Hong Kong laws would be affected (for example, from being non-political to being political in nature), and this would seriously undermine the confidence of the people of Hong Kong. The member also pointed out that the NPC Standing Committee would have to be changed into a non-political body if it was to be vested with the final power of interpretation of the Basic Law.

9. A member suggested that the "Basic Law Committee" could flexibly sort out cases within the scope of interpretation of the NPC Standing Committee and those within the scope of interpretation of the courts of Hong Kong. The committee would then refer the cases to the NPC Standing Committee which would decide how they should be dealt with.

10. A member maintained that the judicial system now in force in Hong Kong should, as far as possible, be kept intact. The courts of Hong Kong should have the power to handle cases relating to defence and foreign affairs, but not the substance of defence and foreign affairs. In addition, the power of final adjudication of the courts of Hong Kong should be kept intact, since this would be an important element in ensuring the confidence of foreign investors. We could not have a situation where some cases could not be tried by the courts of Hong Kong (it was as yet impossible to clearly define what were to be excluded), as it would frighten off foreign investors.

11. A member pointed out that apart from laws concerning defence and foreign affairs, some other national laws involving major national interests could also apply to Hong Kong.

12. A member proposed that it should be clearly stipulated in the Basic Law that the courts of Hong Kong would have the power to interpret all laws in force in Hong Kong, including certain national laws of China, such as the Nationality Law.

13. A member proposed that either the courts of Hong Kong should be able to interpret any articles which the Basic Law did not classify as Central Government's authority, or the SAR courts should be able to interpret anything which was not clearly stipulated as beyond the power of interpretation of the SAR courts.

Regarding the final power of interpretation of the Basic Law, members had the following views:

1. A member held that although the NPC Standing Committee has the power of interpretation over all laws according to the PRC Constitution, it should be clearly stipulated in the Basic Law that the courts of Hong Kong should have the final power of interpretation over those provisions of the Basic Law which only concern the internal affairs of Hong Kong, such as the chapters on the rights and duties of inhabitants the economy, and culture and education, and the NPC Standing Committee should not concern itself with their interpretation. A case in point was Article 15 of Chapter 3: "The rights and freedoms of Hong Kong inhabitants shall not be restricted save as prescribed by law and necessary to protect national security, public order, public safety, public health, public morals or the rights and freedoms of others."

The member worried that if the courts of Hong Kong and the NPC interpreted words like "national security, public order" differently, it could lead to contradictions and conflicts. He also maintained that the freedom enjoyed by the people of Hong Kong should not be determined by the NPC Standing Committee.

2. A member noted that the Sino-British Joint Declaration only specified that the power of final adjudication be vested in Hong Kong, but made no mention of Hong Kong having the power of interpretation of the Basic Law. He pointed out that according to the PRC Constitution, the NPC had the final power of interpretation of all Chinese laws.

Article 2

Members had three different views regarding the procedure through which proposals to amend the Basic Law could be initiated.

A.1. A member was in favour of the present article proposed by the Drafters, i.e., "Amendment proposals from the HKSAR shall be submitted to the NPC by the HKSAR delegation to the NPC after obtaining the 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."

2. A member held that since the HKSAR delegates to the NPC, the legislators and the Chief Executive were representatives responsible for dealing with the relationship between Hong Kong and the Central Government, local legislation and administrative affairs respectively, the endorsement of a proposal to amend the Basic Law by these three parties would mean that the proposal represented the wish of the majority of Hong Kong people. Members noted that the amendment of the Basic Law would be an important matter which would have to be handled with great care. Hence, proposals to amend the Basic Law should have the endorsement of the majority of representative people.

B.1. However, a member suggested the following: Amendment proposals from the HKSAR shall be submitted by the SAR Government "after obtaining the consent of not less than two-thirds of the members of the HKSAR legislature and the Chief Executive of the HKSAR".

2. The member maintained that proposals to amend the Basic Law should not require the endorsement of the HKSAR delegates to the NPC because these delegates were not within the structure of the Hong Kong Government; besides, the method of the election of these delegates and their terms of reference were not clear. Unless the Basic Law included a proposal acceptable to Hong Kong people stipulating the method of the election of the NPC delegates and their duties, proposals to amend the Basic Law should not require the endorsement of the HKSAR delegates to the NPC.

3. Another member pointed out that since the main task of the Hong Kong delegates to the NPC was to participate in the management of state affairs and to liaise between the Central Government and Hong Kong, they should not take part in the submission of proposals to amend the Basic Law. He also pointed out that Hong Kong people should be allowed greater initiative in dealing with internal matters of such importance.

4. However, some members objected to the above view on the grounds that this would deny the importance of the Hong Kong delegates to the NPC. A proposal to amend the Basic Law would ultimately be discussed at the NPC. If the local delegates did not endorse the proposal, they would not be able to explain it at the NPC or to persuade the other delegates to accept it. Consequently, it would be highly unlikely that the proposal would be passed by the NPC.

5. In addition, a member noted that although Hong Kong people might find Hong Kong delegates currently elected by Guangdong province very distant, he believed it very likely that after 1997 Hong Kong delegates would be elected locally, by then the delegates would be able to represent the wishes of Hong Kong people. Thus their views should be heeded when proposing amendments to the Basic Law.

Some members objected to the presumption that delegates to the NPC would be in opposition to other representatives in Hong Kong. The reason given was that in future, some of the delegates might be elected from amongst the legislators and the Chief Executive himself might also be a delegate to the NPC.

6. Some members were against the above view for the following reasons: Delegates to the NPC and members of the Hong Kong Government were different in status. The former must be Chinese nationals, whereas the latter could be Hong Kong inhabitants who were not Chinese nationals. Their representativeness was thus different. Furthermore, even if the delegates were elected in Hong Kong, they might not work for the interests of Hong Kong people on every occasion because their main concern was state affairs.

C.1. A member put forward a third proposal:

"Amendment proposals from the HKSAR shall be referred to the State Council by the HKSAR Government for submission to the NPC after obtaining the consent of not less than two-thirds of the members of the HKSAR legislature, not less than half of the number of HKSAR delegates to the NPC (not necessarily a two-thirds majority), and the Chief Executive of the HKSAR.

2. The member held that such an arrangement not only preserved the initiative for Hong Kong people in the matter of proposing amendments to the Basic Law, but also took into consideration the views of the Hong Kong delegates to the NPC. Besides, endorsement by no less than half the number of HKSAR delegates to the NPC (not necessarily a two-thirds majority) was a reasonable requirement because if it was found totally unacceptable by the Hong Kong delegates, it would demonstrate the inadequacy of the proposal.
 3. Furthermore, this arrangement would allow the HKSAR Government to refer proposals to amend the Basic Law directly to the State Council for submission to the NPC for discussion. The member also found ambiguous the role and duties of the HKSAR delegation to the NPC as set down in the draft. If the delegation was in a position to revise or approve the amendment proposal, the power of the delegates would be excessive. He thus suggested that amendment proposals be submitted by the Hong Kong Government directly to the State Council without going through another procedure.
- D) A member pointed out that the draft only mentioned that the delegation of the HKSAR to the NPC would submit to the NPC proposals to amend the Basic Law, without saying anything as to the procedure after the submission. He hoped that the drafters would delineate the whole procedure.

* 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。

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.

FINAL REPORT ON
FINANCE, TAXATION, MONETARY SYSTEM, AND
PRINCIPLES OF THE ECONOMIC SYSTEM

(passed by the Executive Committee on 5 AUGUST 1987)

Special Group on
Finance, Business, and Economy

CHAPTER 5 - THE ECONOMY OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (HKSAR)

- (1) The HKSAR shall maintain the capitalist economic system previously practised in Hong Kong and shall not practise the socialist economic system or policies as applied in Mainland China. The HKSAR shall decide its economic policy on its own.
- (2) Rights concerning the ownership of property (including such intangible properties as knowledge, franchise, copy right, patent, etc) including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.
- (3) The principle whereby the distribution of resources, the production of commodities, the provision of services and their prices are determined by the market with minimum interference by the Government; the principles of free and fair competition, equality under the law without special privileges being given to any individual or corporation including any government department; shall be maintained.

SECTION 1 (1) - FINANCIAL MANAGEMENT

- (1) The HKSAR shall maintain its financial independence and shall manage its financial matters on its own, including the allocation of financial resources and preparation of financial budgets and final accounts.
- (2) The financial budgets and final accounts of the HKSAR shall be approved by the SAR legislature and submitted to the Central People's Government for record.
- (3) The HKSAR shall use its financial revenue exclusively for its own purposes and they shall not be handed over to the Central People's Government.

- (4) The HKSAR Government shall maintain its finance prudently, maintaining a policy of a balanced budget. The expenditure shall be maintained at an appropriate ratio to the Gross Domestic Product.
- (5) The HKSAR Government shall not engage in commercial activities. Individual special projects which must be undertaken by the Government must be approved by the legislature. The policies of assigning public projects to private enterprises through open and fair tender, awarding franchise to private enterprise to manage public utilities while at the same time maintaining adequate control and permitting a reasonable profit shall be maintained.

SECTION 1 (2) - TAXATION POLICY

- (1) The Central People's Government shall not levy taxes on the HKSAR Government and residents.
- (2) HKSAR shall maintain a simple taxation system and a relatively low tax rate.
- (3) The taxation laws and tax rates of the HKSAR and their amendments shall be approved by the SAR legislature.
- (4) The HKSAR shall be allowed to conclude taxation agreements with the Central People's Government as well as foreign countries.

SECTION 2 - FINANCIAL SYSTEM AND POLICY

- (1) "The HKSAR shall decide its own monetary and financial policy, and continue the practice of a free and open monetary and financial system to maintain its status as an international financial centre." (The word "continue" means to maintain the current condition.)
- (2) "Markets for foreign exchange, gold, securities and futures shall continue to open in the HKSAR."

- (3) "The authority to issue Hong Kong currency shall be vested in the HKSAR Government. The issue of Hong Kong currency must have not less than 100% currency reserve. The HKSAR Government may authorise designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of Hong Kong currency will be soundly based and that the arrangements for such issue are consistent with the object of maintaining the stability of Hong Kong currency. The Hong Kong currency may also be freely convertible with other international currencies." (Except for the clause on currency reserve, the paragraph is copied from the Sino-British Joint Declaration.)
- (4) "The Exchange Fund shall be managed and controlled by the HKSAR Government, primarily for regulating the exchange value of the HK dollar." (this clause is identical to the one contained in the Sino-British Joint Declaration.)

EXPLANATORY NOTES

- (1) The above are based on the Basic Law Structure (Draft) passed by the Basic Law Drafting Committee on 22 April 1986.
- (2) The working group has conducted a number of discussions on the topics of finance, taxation, financial system and economic system. A great deal of comments have been suggested and are now summarised for reference of the Special Group on Economy of the Basic Law Drafting Committee.
- (3) The first of the 4 topics: Economy
- Clause 1 is basically taken from Section 6 of Annex 1 of the Joint Declaration, with the addition only of "shall not practise the socialist system or policies as applied in Mainland China" and "The HKSAR shall decide its economic policy on its own."
- Clause 2 is basically taken from Section 6 of Annex 1 of the Joint Declaration, with the addition only of "including such intangible properties as knowledge, franchise, copy right, patent, etc".

Clause 3 is not found in the Joint Declaration. It has been discussed on several occasions in our group that whether we say "the original capitalist system" or "one country two systems", the important thing is to affirm the principles of "property ownership" and "production, distribution and prices to be determined by the market". If these two principles are not written into the Basic Law, any other suggestions would be too vague.

A member suggested to delete this clause since it comprised several concepts -- 1) market force; 2) judicial concept (which has already been included in the chapter on Law); and 3) the government shall not enjoy any privileges -- which were not consistent with the reality and it was desirable that the government should retain its privileges. In addition, the Basic Law should avoid the use of general expressions, nor should it be reduced to a list of apprehensions felt by Hong Kong people. Since this section was to state only the principles, the mention of the practice of capitalist system in clause (1) was already sufficient. A member however proposed that this clause be retained as all it mentioned were economic theories.

Apart from this, there seems to be no need to include too many details in the section related to economy in the Basic Law. Of course, we should give further thought to see whether there is anything missing and whether the abovementioned 3 clauses should be improved to make them more complete.

Looking at the Basic Law Structure (Draft) dated 22 April 1986, it would appear that the abovementioned 3 clauses should be included in the General Provisions of Chapter 1 while Chapter 5 on HKSAR Economy should deal directly with specific subjects such as financial management and taxation policy. This may be left to the Basic Law Drafting Committee to decide. As a working group under the Consultative Committee, we would only suggest those principles which are related to Economy and which should be written into the Basic Law.

- (4) The second topic: Financial Management

Clauses 1, 2, and 3 are basically taken from Section 5 of Annex 1 of the Joint Declaration.

Clause 4 represents an important view-point raised many times in our discussions. The majority of members feel that it is more appropriate to say "the expenditure should be maintained at an appropriate ratio to the Gross Domestic Product" than to indicate a specific ratio.

Some members thought that clause 4 was appropriate. But some thought that it was undesirable to include this clause in the Basic Law; they proposed this clause be deleted and the concept "to maintain its finance prudently" be incorporated into clause 1.

Clause 5 is a new point. In fact, this has always been practised in Hong Kong. It is believed that the inclusion of such a clause in the Basic Law not only guarantees that the SAR Government will not waste public money, but also strengthens the confidence of the public.

There seems to be no need to include too many details in the Basic Law such as the issue of Government bonds.

(5) The third topic: Taxation

Clause 1 is basically taken from Section 5 Annex 1 of the Joint Declaration, only the words of "government and residents" are added after "SAR". According to the Drafting Committee, this was the original meaning of Annex 1 of the Joint Declaration. It would be better to write it down clearly in the Basic Law. This clause applies to places outside Mainland China.

Clause 2 is a principle emphasised many times in our group discussions: "a simple taxation system and relatively low tax rate". It is more advantageous to the SAR just to mention a policy without quoting any specific figures.

Clause 3 in fact includes certain matters of our group's concern including: Will taxation be limited to profits generated in Hong Kong? The version we have suggested should be more acceptable and in fact should solve the problem which we are concerned about.

The background of clause 4 is similar to clause 3.

(6) The fourth topic: Financial System and Policy

All 4 clauses are taken from the draft of the Drafting Committee. On the word "full" in clause 3 "the issue of Hong Kong currency must have full reserve", a member suggested that it be replaced by "not less than 100%" as the latter expression was more specific.

The difference between the present 4 clauses and the original 12 clauses is that the banking supervisory system and the establishment of infrastructure such as the Trade Development Council are not mentioned specifically. Members feel that "providing the necessary conditions and adopting the appropriate measures" in clause (1) is too general and need not be written down.

As to the management of the Exchange Fund by an independent trust organization, our group has made such a proposal previously but this has not been included in the Basic Law Draft. It would seem that it may not be necessary to include this point into the Basic Law.

The question of whether it should be a floating exchange rate or a linked exchange rate would not be appropriate for discussion in the Basic Law and is therefore not included.

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

FINAL REPORT ON
POLICY REGARDING TOURISM
AND
POLICY REGARDING REAL ESTATE

(passed by the Executive Committee on 8 August 1987)

Special Group on
Finance, Business, and Economy

FOREWORD:

This discussion paper is prepared by the working group of the Special Group on Finance, Business, and Economy. Topics include two items under section 5 in Chapter V of the Structure of the Basic Law (Draft) -- policy regarding tourism and policy regarding real estate. Members of the working group collected the opinions of members of the Special Group expressed at former meetings and carried out further discussions on these opinions and extracted the main points to make preliminary suggestions on the stipulations in the Basic Law.

Members of the working group are of the opinion that some of the contents of the suggested stipulations contained in this paper are not confined to policy regarding tourism and policy regarding real estate. It is therefore considered feasible that the suggestions be included into the Basic Law as general provisions.

CONTENTS:

- I Policy regarding tourism
- II Policy regarding real estate

I Policy regarding tourism

- 1 The Basic Law should have provisions to cover the following points:
 - i) The Hong Kong Special Administrative Region Government shall on its own decide policies regarding tourism.
 - ii) Unless restrained by law, inhabitants of the Hong Kong Special Administrative Region shall have the right to obtain travel documents for entry to and exit from the HKSAR. Unless restrained by law, holders of valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorisation. (i.e. a paragraph in section XIV of Annex I to the Joint Declaration)
 - iii) The Hong Kong Special Administrative Region Government shall continue to subsidise semi-official organisations with the aim of promoting tourism, and protect such organisations from being subordinated to state organisations of a similar nature.
 - iv) The Hong Kong Special Administrative Region Government may on its own delegate powers to its official or semi-official overseas organisations to issue visas for entry into the Hong Kong Special Administrative Region, or request Chinese overseas organisations to issue such visas according to the criteria set down by the Hong Kong Special Administrative Region Government.
- 2 The following opinions concerning policy on tourism are for the reference of the Drafting Committee members:
 - i) It is stipulated in the Joint Declaration that "the Central People's Government shall assist or authorise the Hong Kong Special Administrative Region Government to conclude visa abolition agreements with states or regions." Members pointed out that at present Hong Kong adopted the practice of unilaterally abolishing entry visa requirements for people of certain states (or regions). Members were of the opinion that this arrangement could be maintained after 1997.
 - ii) Members raised the following question for the consideration of the Drafting Committee members: when the PRC is boycotting or on bad terms with a certain state/region, can the Hong Kong Special Administrative Region Government retain its visa abolition arrangement -- unilateral or otherwise -- for that state/region?

II Policy regarding real estate

1 The following points should be included in the Basic Law:

- 1) The Hong Kong Special Administrative Region Government may on its own decide its land policy, including policies on transaction of land, lease of land, payment of additional premium and taxation, and the utilisation of the revenue thus accrued.

(Note: not to be restricted by any authority similar to the present Sino-British Land Commission.)

- ii) "Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the Hong Kong Special Administrative Region."
(i.e. part of the second paragraph of Annex III to the Joint Declaration)

2 The following opinions concerning policy on real estate are for the reference of the Drafting Committee members:

- 1) At present, the British Government authorises the Hong Kong Government to issue leases. It is clearly stated on the leases that the source of authority lies with Britain. Members suggested that after 1997, it should be stated clearly in all leases: "authorized by the People's Republic of China"; but members reckoned that it would be a colossal task to change the wording in all leases. It was therefore suggested that the Hong Kong Special Administrative Region Government could legislate to achieve the same effect.

- ii) Members held that indigenous New Territories inhabitants should still be entitled to exempted houses. But this privilege need not be specified in the Basic Law.

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

FINAL REPORT ON
POLICIES REGARDING SHIPPING
AND CIVIL AVIATION

(passed by the Executive Committee on 8 August 1987)

Special Group on
Finance, Business, and Economy

I Policy regarding Shipping

The Basic Law should have provisions to cover the following points:

- 1 Free access to the port -- All ships may enjoy access to the port unless restricted by HKSAR laws or, in areas of foreign affairs or defence, by the Central Government.
- 2 There should be a general reference in the Basic Law to ensure that there will be no discrimination between privately-owned firms and organisations owned by the Central Government i.e. PRC organisations in public ownership engaging in commercial activities in the HKSAR cannot claim privileges as state organisations.
- 3 Ownership -- In the case of corporate-owned ships, the right to register on the Hong Kong Register should be limited to companies incorporated in the HKSAR. In the case of individual owners, persons with the right of abode in the HKSAR should have the right to register on the Hong Kong Register. In all cases, the management and control of the ship would have to be exercised from the HKSAR.
- 4 All qualified ship owners shall be free to register their ships on and deregister from the Hong Kong Register.

It is suggested that since Hong Kong-registered ships are Chinese ships, arrangements should be made under Chinese law to guarantee free access of these ships to all ports in the PRC, and the freedom to trade among these ports.
- 5 Taxation on ships registered on the Hong Kong Register shall be decided by the HKSAR Government.

(The Central Government shall not impose any other taxation on Hong Kong-registered ships.)

(It is suggested that this point may be included in a general provision on taxation in the Basic Law, and need not necessarily be written into the section on shipping.)
- 6 The nationality and flag of ships on the Hong Kong Register -- The arrangements should follow the proposals contained in the paper "Hong Kong Register of Shipping -- General

Principles to be Adopted for the Modified Register" prepared by the Economic Services Branch of the Government Secretariat. (Appendix I section 3), i.e. in order to indicate both the nationality of the ship and the fact that it is on the Hong Kong Register, a Hong Kong-registered ship shall fly two flags; the upper flag would be the flag of the PRC and the lower flag would be the HKSAR regional flag.

- 7 Jurisdiction over Hong Kong registered ships and their personnel when a foreign state is involved -- Although the nationality of the ships on the Hong Kong Shipping Register will be Chinese, these ships are registered in the HKSAR under the dual flag arrangement. It follows that the HKSAR should have autonomy in shipping administration and legislation i.e. the HKSAR Government should have jurisdiction over the HKSAR ships and their personnel but it is accepted that the PRC is entitled to requisition powers over Hong Kong-registered ships. Requisition powers are understood to mean the right of the sovereign state to take over control of ships in the event of war.
- 8 International protection for the ships -- In the international arena i.e. in the event of actions of other countries vis-a-vis Hong Kong-registered ships, protection of and responsibility for the ships will rest with the PRC.
- 9 The position of the HKSAR in international organisations and international maritime agreements -- As in the Joint Declaration, it should be stipulated in the Basic Law that, subject to the principle that foreign affairs are the responsibility of the Central People's Government, the HKSAR may on its own maintain and develop relations and conclude and implement agreements with relevant international organisations, for example, the HKSAR may retain its status in the IMO.
- 10 There should be no restrictions on the nationality of officers and seamen manning Hong Kong-registered ships. The HKSAR Government should however encourage the employment of HKSAR seamen on Hong Kong-registered ships and should encourage HKSAR seamen to serve on Hong Kong-registered ships.
- * Appended is the "Hong Kong Register of Shipping -- General Principles to be Adopted for the Modified Register" prepared by the Economic Services Branch of the Hong Kong Government Secretariat. Members are aware that the principles were discussed and agreed upon by the British and Chinese governments and acknowledge that these principles are to be the basis on which the Register of the HKSAR is to be established.

II Policy regarding Civil Aviation

The Basic Law should have provisions to cover the following points:

- 1 Nationality and registration marks of aircraft registered in the HKSAR: It is suggested that while the nationality of these aircraft will be Chinese, the HKSAR Government should have jurisdiction over these aircraft, their crew and passengers. International protection for the aircraft - In the international aspect i.e. in the event of actions of other countries vis-a-vis Hong Kong-registered aircraft, protection of and responsibility for the aircraft will rest with the PRC. Registration marks should follow the current practice (i.e. "VR" registration) while the HKSAR emblem shall be shown on the tail of each Hong Kong-registered aircraft.
- 2 The Joint Declaration stipulates that "airlines incorporated and having their principal place of business in Hong Kong may continue to operate". This will mean that any interested party of any nationality irrespective of any rights of abode in the HKSAR will be able to incorporate an airline in Hong Kong and seek an air operators certificate before 1997 and may continue to operate after 1997. But whether an airline will be able to be designated for scheduled services will depend on the terms of the Air Service Agreements concluded by the HKSAR with other countries. In other words, while an HKSAR airline could be in existence and in possession of all necessary HKSAR licences, its rights to fly to other countries on a scheduled basis will depend on whether or not other countries accept the lack of nationality criteria for ownership and control presently applied.
- 3 It is stipulated in the Joint Declaration that the HKSAR Government, "acting under the specific authorisations from the Central People's Government", may negotiate, conclude, renew, and amend Air Service Agreements or provisional arrangements for scheduled air services to, from or through the HKSAR which do not operate to, from, or through the mainland of China.

It should be made clear in the Basic Law that this specific authorisation should mean in the field of aviation and within the parameters laid down in the Joint Declaration that the HKSAR Government shall have autonomy to negotiate and conclude such agreements.

- 4 The designation of airlines under the Air Service Agreements or equivalent agreements mentioned in point 3 should be left to the HKSAR Government.

The HKSAR Government should have autonomy in deciding on its designation policy (such as the "one airline per route" policy announced by the Financial Secretary in the Legislative Council on 20 November 1985 or any change thereto or amendment thereof, or any contrary policy which may be adopted in future) for scheduled and non scheduled air services operating to, from, or through Hong Kong without touching on points in the mainland of China.

- 5 The system of civil aviation management, such as the Air Transport Licensing Authority (ATLA) regulations applicable to licensing, or the adoption of technical, operational, training, certification, etc. standards should be left to the administrative discretion of the HKSAR Government and need not be specified in the Basic Law.

- 6 It is stated in the Joint Declaration that "The Central People's Government shall, in consultation with the HKSAR Government, make arrangements providing for air services between the HKSAR and other parts of the People's Republic of China for airlines incorporated and having their principal place of business in the HKSAR and other airlines of the People's Republic of China". This consultation should include an assessment of an appropriate balance of opportunities for access for airlines of the PRC to the HKSAR, and airlines of the HKSAR to the PRC.

The designation issue does not arise here because the situation will be considered a "domestic" or "regional" one and be subject to special arrangements between the Central Government and the HKSAR Government.

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

FINAL REPORT ON
THE RELATIONSHIP BETWEEN THE LEGISLATURE
AND THE EXECUTIVE AUTHORITIES

(passed by the Executive Committee on 8 August 1987)

Special Group on
The Political Structure of the SAR

1. Introduction

The relationship between the legislature and the executive authorities is one of the central issues in the study of the political structure of the HKSAR. In the future, the roles played by the legislature and the executive authorities will be subject to changes as accorded with the Sino-British Joint Declaration, and their relationship will inevitably be influenced by these changes. The opinions regarding the relationship between the legislature and the executive authorities can be broadly categorised into four types: i) the legislature as the core of the political structure (legislature led); ii) the executive authorities as the core of the political structure (executive led); iii) mutual checks and balances under a system of separation of powers (executive, legislative, and judicial powers); and iv) integration of the executive and the legislature (as before 1976). As different standpoints are adopted in the discussions of this issue, there are different opinions on the relationship between the legislature and the executive authorities in various aspects.

2. Provisions under the Sino-British Joint Declaration and the related problems

2.1 In Section 1 of Annex 1 to the Sino-British Joint Declaration the provisions regarding the political structure of the HKSAR are as follows:

"The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature."

2.2 The legislature.

2.2.1 Present practice

The legislative Council is constituted in accordance with the Letters Patent and its terms of reference include the following:

- 1) Legislation -- private bills, government bills, and appropriation bills
- 2) Examination of the government budget -- appropriation, budget and increase of appropriation
- 3) To monitor government departments
- 4) To be consulted by the government
(For details of the present terms of reference of the Legislative Council, please see the report on "The Legislature")

2.2.2 Future practice

A government structure which is similar to the existing Legislative Council vested with the powers of legislation, monitoring the government, considering public finance, etc. (For details of the terms of reference of the legislature, see the report on "The Legislature")

2.3 The executive authorities

- 2 3.1 Present practice -- Apart from the government departments which are led by the Chief Secretary, there is the Executive Council which is presided by the governor and is the highest authority for deliberating administrative policy-making.

The terms of reference of the "Executive Council" include:

- 1) Shall give advice to the Governor on the various policies of Hong Kong
- 2) The Governor-in-Council shall make adjudication upon all appeals, petitions, oppositions made by the citizens with their lawful rights.
- 3) Shall consider all important proposals of laws before they are submitted to the legislative Council.
- 4) Shall be responsible for the formulation of subsidiary legislation of certain ordinances which will be reviewed by the Legislative Council, and the Legislative Councillors may propose amendment to the ordinances within 28 days
- 5) May give advice on policies concerned; yet if public fund is to be used, there must first be the permission for appropriation from the Committee for Financial Affairs of the Legislative Council.

2.3.2 Future practice -- the terms "executive authorities" may be interpreted in the following ways*:

2.3.2.1A view has been expressed that the "executive authorities" refers to a government body which is similar to the present Executive Council in nature. It is composed of the chief executive and members appointed by him, including official and unofficial members.

2.3.2.2A view has been expressed that the "executive authorities" refers to the administration of the government.

2.3.2.3A view has been expressed that the "executive authorities" refers to the administration of the government which includes a body similar to the present Executive Council.

2.4 Problems arising from the Sino-British Joint Declaration:

As far as the relationship between the legislature and the executive authorities is concerned, the Joint Declaration only contains the following stipulation:

"The executive authorities shall be accountable to the legislature",

with no elaboration on the term "accountable". Much debate thus arises.

2.4.1 Definition of "accountable":

There are four interpretations:

2.4.1.1 According to the interpretation of the Chinese Constitution** and ordinary usage, the term "accountable" refers to the relation in which the subordinate is supervised by its superior, and the superior has the power to select and remove the heads of the subordinate.

2.4.1.2 There is no implication of superior-subordinate relationship in the term "accountable". The relationship is that:

- i. the executive authorities makes periodic policy address to the legislature;
- ii. the executive authorities answers the questions raised by the legislature;

* This paper adopts the definition of 2.3.2.3 for "executive authorities" unless specified otherwise.

** In the English translation of the Constitution of the PRC, the term "responsible" is used instead of "accountable".

- iii. the legislature has the power to adopt the budget and examine the financial report; and
- iv. if any principal official of the executive authorities, including the chief executive, commits any crime, he will be subject to impeachment which will then be handled by the Central Government.

2.4.1.3 According to the English Oxford Dictionary definitions, "accountable" means "bound to give account, responsible", and "responsible" means "liable to be called to account, answerable, not autocratic, morally accountable for actions capable of rational conduct, of good credit or repute, respectable, apparently trustworthy." "Accountable" defines the relationship perfectly because there is no implication of superior or subordinate, or being led. In the case of the relationship between the legislature and the executive authorities the term implies mutual obligation.

A view has been expressed that as the Sino-British Joint Declaration is a legal document, it is inappropriate to interpret the term "accountable" according to the English Oxford Dictionary which is for general use.

2.4.1.4 The accountability of the executive authorities to the legislature refers to that the routine duties of the executive authorities shall be carried out according to law or as authorised by law.

2.4.2 A view has been expressed that as both the legislature and the executive authorities have their own terms of reference, if their relationship is only based on the interpretation of a single term, it is hardly of any help to the understanding of the relationship between legislature and the executive authorities. However, an opposing view has also been expressed. The aim of this paper is to explore the relationship between the legislature and the executive authorities in terms of their specific functions.

3. Major issues

A The relationship between the legislature and executive authorities:

3.1 Power of motion in legislation

3.1.1 Present practice

The Legislative Council is the legislature of Hong Kong. All the bills concerning public affairs are drafted by the departments of the Hong Kong Government, and after being approved by the Executive Council, they are submitted to the Governor and the Legislative Council for legislation which goes through three readings and a committee stage. The Legislative Council will pass or will not pass a bill, or pass it after it has been amended. All bills after going through the three readings have to be assented to by the Governor before they take effect.

Unofficial members of the Legislative Council can present private bills not of a policy nature. Bills concerning government policy and public ordinance are presented by the official members. If the Legislative Council does not pass the bills presented by the government, the policy concerned cannot be carried out. However, discord between the Legislative Council and the Executive Council rarely arises because all the proposed bills are first examined by the latter and many of its members also sit on the former, which is conducive to the understanding between the two Councils.

3.1.2 Provisions under the Sino-British Joint Declaration

In Section 2 of Annex 1 it is stipulated that:

"The legislative power of the Hong Kong Special Administrative Region shall be vested with in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid."

3.1.3 Proposals

1. The legislative power of the legislature includes that of motion (other than moving the bills concerning taxation or finance.) of adopting ordinances and of amending ordinances. The executive authorities can propose bills (including the budget) to the legislature. All bills having passed by the legislature have to be endorsed by the chief executive before they will be valid as laws.

Argument for:

An elected legislature should enjoy relatively complete legislative power including the power of motion. The legislature should not propose bills relating to taxation or the budget because when an elected legislature faces the issues relating to expenditure, it will encounter much pressure. Thus, the power of increasing tax or expenditure should not be vested in a body which is directly under the pressure of election.

Argument against:

If the legislature has the power of motion, confusion in policy may arise and executive efficiency will be at stake.

- ii. The legislature does not have the power of motion in legislation which should only be vested in the executive authorities. The legislative power of the legislature includes that of amending, passing and vetoing the bills.

Argument for:

This proposal is the same as the present practice by which the government operates efficiently. To separate the power of motion from that of endorsement is a means to achieve checks and balances.

Argument against:

Under the guidance of public opinion, the legislature should have the power to initiate bills (which may or may not include those concerning finance).

3.1.4 Other proposals

1. The legislature members may propose private motions not relating to finance or taxation
- ii. If the budget of the new financial year is not passed by the legislature, the government may use the budget of last year until the legislature passes the new one. However, if the legislature remains not agreeing to pass the budget, the legislature should be dissolved in accordance with the Basic Law and election will then be held.
- iii. To retain the present practice that principal officials of the executive authorities will propose, in person, motions in legislation at the meetings of the legislature.
- iv. Bills may take effect officially without the approval of the chief executive
- v. Bills (including bills relating to government expenditure) may be proposed by any legislature member.
- vi. Bills (including bills relating to government expenditure) may be proposed by either the government or members of the legislature.

3.2 Financial power

3.2.1 Present practice

(1) Consideration of expenditure

Should the implementation of any new government policy or legislation or amendment require any expenses, as a rule, prior approval must be sought from the Legislative Council. Details concerning the policy or legislation will not be drawn up, nor will other statutory procedures commence until the Legislative Council accepts the financial implication of the appropriation.

(2) Consideration of the Estimates

The government budget shall be passed through three readings. At the second reading, the Finance Committee shall be responsible for examining the draft Estimates of Expenditure. As its function is to prevent the abuses of public expenditure, it shall be subject to the following restriction:

- i. It may not propose to increase public expenditure. It may accept or not accept the estimates, or make proposals for reduction.
- ii. It may only discuss expenditure and may not propose amendment regarding the government revenue.

(3) Consideration of increase of expenditure

Should there be any new items of expenditure, which is additional to the Estimates passed, application must be made to the Legislative Council in order to seek endorsement of the Finance Committee. Of course in case of emergency, the payment can be made first and the procedures be completed afterwards. For expenditure under \$50,000 dollars, or under other specific circumstances, the Legislative Council may authorise the Chief Secretary to decide.

(4) Motion concerning public expenditure

Any motions concerning public expenditure have to receive the prior consent of the Governor before they can be proposed.

3.2.2 Provisions under the Sino-British Joint Declaration

In Section 5 of Annex 1 it is stipulated that:
"The systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained."

3.2.3 Proposals

- i. To retain the present system. The executive authorities is responsible for preparing the budget, while the legislature is responsible for deciding on the budget, voting on the taxation and expenditure, and inquiring publicly the budgets of all government departments. Since the legislature can refuse to pass the budget proposed by the executive authorities and renders the government unable to operate because of the lack of fund. The check on the executive authorities by the legislature in this aspect is very effective.

Argument for:

It is in accordance with the Joint Declaration.

Argument against:

The principle should be retained, but some outdated or complex procedures should be amended or simplified.

- ii. If the legislature does not pass the budget of the new financial year, the government will use the budget of last year until a new budget is passed by the legislature. If the legislature still refuses to pass the budget after consideration, the legislature should be dissolved according to the provisions under the Basic Law and a new legislature be elected. If most of its members are reelected but still refuse to pass the budget, the chief executive will have to resign.
- iii. If the legislature does not pass the budget after examining it for the first time, it may examine it again. If the legislature still insists on refusing the budget by a majority (2/3) vote after its second examination, the chief executive will have to adopt the budget of last year.
- iv. Any legislature member may propose amendment to the budget. The amendment can either be an increase or a reduction.

3.3 Monitoring power of the legislature

3.3.1 Present practice

The Governor of Hong Kong has to make annual policy address to the Legislative Council. Members of the Legislative Council may debate on the Governor's address. Unofficial members may address questions to the government on public issues for which the government is responsible, either seeking information on such issues or asking for official action on them. But members may not debate on the

statements made in the Legislative Council by ex-officio or official members regarding public issues for which the government is responsible. The President may, as he sees fit, allow members to address short questions to the official members who made the statements for the purpose of elucidating such statements. Members may move questions (such as those of public concern) for debate. Though the debate is neither a legislative procedure nor legally binding, it has definite bearing on the policy of the Hong Kong government. With the passing of the Legislative Council (Powers and Privileges) Bill in 1985, the Legislative Council members' freedom of speech and power to order witnesses to give evidence and information will be further protected so that the Legislative Council may discharge its monitoring functions more effectively.

3.3.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding this matter in the Joint Declaration.

3.3.3 Proposals

1. The legislature may address inquiries to the chief executive and the executive authorities, and answers have to be made by the authorities concerned. In addition, the legislature will set up committees for various public affairs so as to monitor the government departments concerned, be consulted and scrutinise the bills concerned.

In addition, the legislature has the power to investigate the government departments concerned, and to order witnesses to give information and evidence. If the chief executive or the executive authorities are proved, after the investigation, to have committed any crimes or erred seriously in administration, the legislature can pass an impeachment bill by a majority (2/3 or above) vote and report to the Central Government for removal of such persons.

Argument for:

To expand the monitoring power of the legislature so that the control over the executive authorities by the legislature can be strengthened.

Argument against:

With such monitoring power, the legislature is able to control the government and affect its efficient operation.

11. To retain the present system. Apart from the general monitoring of government policies, members of the Legislative Council may at any time request access to government documents or explanation from the government. But these powers are not statutory: the government may refuse to give them such access or explanation. On matters which are deemed to be of vital importance, the members of the Legislative Council may with the endorsement of the Council apply the Legislative Council (Powers and Privileges) Ordinance to request the department concerned to submit the documents and answer enquiries.

Argument for:

With the effective use of the powers of addressing inquiries and making investigation, the legislature can criticise on the maladministration of or the errors made by the executive authorities.

Argument against:

Under the present system, the power to investigate maladministration of the government is not sufficient. An independent authority, for example, the Commissioner for Administration as proposed by the Green Paper in 1986 should be set up specifically for this purpose.

3.3.4 Other proposals

1. The future legislature will not need the power to investigate maladministration of the government as government maladministration should be dealt with by an independent post, for example, the Commissioner for Administration as proposed by the Green Paper in 1986.
11. The legislature should have the power to monitor maladministration of the government whereas investigation will be carried out by an independent post e.g. the Commission for Administration.
111. The legislature has the power to monitor maladministration of the government, and an authority (accountable to the legislature) should be set up through the legislative procedure to investigate any maladministration of the government.

3.4 To be consulted by the executive authorities

3.4.1 Present practice

When the Hong Kong government adopts any new policy or revise its policy, the policy concerned is decided by the Executive Council. Then the Legislative Council will, in formulating the related ordinances, debate upon the policy

publicly, or will first discuss the policy at internal or group meetings so that proposed amendments will be submitted to Hong Kong government before legislation. However, the latter procedure is not a compulsory one. According to the existing provisions on legislative procedures, the Hong Kong government (i.e. a department of the government) has no statutory obligation to first consult members of the Legislative Council. In recent years, the Hong Kong government tends to consult unofficial members of the Legislative Council on some proposed legislation or questions before submitting the draft legislation to the Governor in Council for approval. Eventually, it will be forwarded to the Legislative Council for enactment. In sitting on the various consultative committees, Legislative Councillors help formulate the policies concerned.

3.4.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding this matter in the Joint Declaration.

3.4.3 Proposals

1. To retain the present system.

Argument for:

An efficient government is maintained under the present system, and the advisory committees in which unofficial members of the Legislative Council have active participation can carry out their functions independently. In addition, before and after the Executive Council decides on any important policies, it will carry out consultation. The work of the executive authorities and the legislature is complementary to each other.

Argument against:

If Hong Kong people ruling Hong Kong is to be realised, this will involve wider participation from the Hong Kong people in the decision making process of government. The present system without change will not allow this greater participation to develop.

11. Unofficial members of the executive authorities (as defined under 2.3.2.1) will chair the various advisory committees for important policies. Members of the legislature will be absorbed into these committees for helping in the making and monitoring of the policies.

Argument for:

As members of the legislature have the opportunity to participate in the formulating and monitoring of policies, the executive authorities will be able to understand the opinions of the legislature on the policies concerned. This is conducive to the formulation and implementation of policies.

Argument against:

As members of the executive authorities chair the various advisory committees for the important policies, such system is a disguised form of a ministerial or committee system in which the executive authorities is the central power of the political structure. In this way the principle of separation of powers is violated.

111. After the policies have been formulated by the executive authorities, advisory committee will be set up on the basis of the legislature to collect views of the public on the policies.

Argument for:

If the advisory committees are set up on the basis of the legislature, the executive authorities may consider the views of the legislature first before making any decision. If members of the legislature sit on the executive authorities as well as the advisory committees, the linkage between the legislature and the executive authorities may be strengthened.

Argument against:

If the advisory committees are set up on the basis of the legislature, they will be not independent enough to carry out their function of consultation.

3.4.4 Another proposal:

When the chief executive has been elected, he will have made his position clear on policies. Presumably in some sort of annual address he will announce to the legislature his intended policies, the necessity for the legislature to form special committees to look into each aspect will naturally arise. It is the job of each legislature member to reflect public opinion. The chairmanship of these committees will depend on how the executive authorities are formed.

3.5 Selection of the members of the executive authorities

3.5.1 Present practice

The Executive Council is constituted by virtue of the Letters Patent. There are, as on 31 December 1986, four ex-officio members -- the Chief Secretary, the Commander British Forces, the Financial Secretary and the Attorney General -- and 12 appointed members including two official members who are appointed in their own capacity. Appointed members hold office for fixed periods. Among the four ex-officio members, there are three - the Chief Secretary, the Financial Secretary and the Attorney General - who are also the ex-officio members of the Legislative Council. At present, there are seven unofficial members and the above mentioned two appointed official members in the Executive Council who also take seats in the Legislative Council. Although it is not specified in the Letters Patent and the Royal Instructions that members can sit on both Councils, appointing a few senior members or ex-members of the Legislative Council to the Executive Council has been a traditional practice for a long time. In so doing, the close relationship between the two Councils can be maintained. The main duty of the Executive Council is to advise the Governor on matters of policy and the Governor rarely rejects advice given by the Executive Council. In recent years, members of the Executive Committee have also taken the initiative to propose matters for discussion and request the government departments to submit documents to them for study. Therefore, as far as the terms of reference is concerned, the Executive Council has already become an collective policy-making body. The secondary functions of the Executive Council include the enactment of subsidiary legislation (to be passed by the Legislative Council before it takes effect), dealing with appeals and petitions according to different statutes.

3.5.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding the selection of members of the executive authorities under the Declaration. If the "executive authorities" is understood as the whole government body, the provision for its members in the Declaration is as follows:

"The government of the Hong Kong Special Administrative Region shall be composed of local inhabitants." (Para.4 of Article 3 and Section 1 of Annex 1)

If the executive authorities consists of "principle officials", it is stipulated in para.4 of Article 3 and Section 1 of Annex 1 of the Joint Declaration that:

"Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government."

3.5.3 Proposals

1. Members of the executive authorities (as defined under 2.3.2.1) are elected by or from amongst the legislature members; members of the legislature can take seats in the executive authorities.

Argument for:

Since the executive authorities is supported by the legislature, the spirit of the executive authorities being accountable to the legislature can be realised; the confrontation between the legislature and the executive authorities will be lessened; any constitutional or confidence crisis will also be avoided; and the efficiency in administration will be increased.

Arguments against:

1. The executive authorities will be put under the control of the legislature, and the power of the chief executive and the executive authorities will be whittled away. As a result, the aim of having checks and balances between the legislature and the executive authorities cannot be reached.
 2. This will not allow the chief executive to create an efficient team which is working cohesively towards an objective under his leadership and authority. The chief executive should not be restricted as to how he forms his team.
- ii. The present appointment system of the Executive Council is retained. Its members include official and unofficial members. Members of the legislature can take seats in the executive authorities.

Arguments for:

1. Members of the executive authorities who are appointed by the chief executive can foster the collective leading power of the executive authorities and the chief executive. Members of the executive authorities who also sit on the legislature may enable the legislature to understand the executive authorities, promote co-operation between the two bodies, and ultimately establish a harmonious relation between them, which will increase their efficiency in administration.

2. Appointment ensures a balance of backgrounds or homogeneity according to the management style of the chief executive. It is the creation of a team to carry out a function. The promotion or lack of promotion of co-operation or harmonious relationship between the executive authorities and the legislature is not an important criterion. What is more important is that each body carries out its function properly without abuse of power or neglect of duties. Checks and balances working efficiently do not go hand in hand with harmonious relationships anyway. Provided the chief executive is selected by nomination by the legislature for general election, he should be given the best opportunity for carrying out his difficult task. Creating his own executive team is fundamental to carrying out this task.

Argument against:

As members of the executive authorities are appointed by the chief executive, even though members of the legislature can sit on the executive authorities, the chief executive will, for the sake of efficiency in administration, appoint those members of the legislature who share with him the same political views to the executive authorities. Consequently, the checks and balances between the legislature and the executive authorities will be slack.

11. Members of the executive authorities (as defined under 2.3.2.1) are appointed by the chief executive; members of the executive authorities are not allowed to take seats or to be voting members in the legislature.

Argument for:

The executive authorities should be independent of the legislature so that the opinions of the legislature will not be hindrances or restrictions to the executive authorities, and the status of the legislature as a consultation body will not be affected.

Argument against:

As there will not be any bridge for communication between the legislature and the executive authorities, confrontation may arise, which will undermine the stability of society.

3.5.4 Other proposals

1. The official and unofficial members of the executive authorities are selected by appointment, and they will all be elected to the legislature through the grand electoral college election. A different view has been expressed that it cannot be guaranteed that official and unofficial members of the executive authorities will all be elected to the legislature through election.
11. To stipulate that the number of legislature members within the executive authorities should not exceed a certain fraction (e.g. 1/3) of the executive authorities. In this way, communication between the executive authorities and the legislature is maintained while independence of the two branches is also ensured.

- B. The relationship between the chief executive and the legislature

3.6 Selection of the chief executive

(This issue is explored in the light of the relationship between the executive authorities; for the overall discussion on the selection of the chief executive, please see the report on Selection of the chief executive.)

3.6.1 Present practice

The Foreign and Commonwealth Office of the United Kingdom selects the candidate of appropriate qualifications and experience from its civil servants to be the governor (in recent years, the governors are normally the staff of the Foreign and Commonwealth Office, but in the past, the governors were often selected from personnel of substantial experience in the Hong Kong government). With the approval of the Prime Minister, the selection is submitted to the Queen for appointment. The U.K. Government is responsible for the entire selection process in which the people of Hong Kong and the Legislative Council have no participation.

3.6.2 Provisions under the Sino-British Joint Declaration

In Section 1 of Annex 1 it is stipulated that:
"The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government."

3.6.3 Proposals

Whether the legislature participates in the selection of the chief executive will have direct bearing on the relationship between the executive and the legislature. The proposals can be summarised as follows:

1. To be selected by the legislature.

Nominated and elected by the legislature.

Argument for:

The chief executive who is elected by the legislature will be supported and trusted by the legislature. In this way the legislature and the executive will have a harmonious relation.

Argument against:

The principle of separation of powers will be violated, and confrontational party politics will arise if the chief executive is elected by the legislature.

ii. To be selected by the means other than the legislature.

a. The nomination for the chief executive is open to the public and qualified (electors should not be subject to requirements other than general electors' qualifications) electors may vote directly for any one of the candidates. The candidate with the majority of votes shall be the chief executive.

Argument for:

The chief executive who is selected by this method can strengthen the representativeness of the government.

Argument against:

The argument is basically against to the selection of the chief executive by direct election with universal suffrage (for details see report on the "selection of the chief executive"): As the chief executive who is selected by this method may not be able to gain the support of the legislature, it will be unfavourable to the relation between the legislature and the executive authorities.

b. Nominated by a specified nomination college/electoral college, and selected by direct election with universal suffrage.

Argument for:

The nomination college or the electoral college will ensure that there is a reasonable number of candidates of a certain calibre.

Argument against:

The argument is basically against restricted nomination (for details see the report on the selection of the chief executive). If the nomination college cannot represent the interests of all strata of society, the chief executive will not be supported by the legislature, and the relation between the executive authorities and the legislature will be adversely affected.

c. Nominated and elected by the grand electoral college which includes all members of the legislature.

Argument for:

It will avoid the confusion of powers between the legislature and the executive authorities which is the result of electing the chief executive from the legislature. In this way, the checks and balances between the legislature and the executive authorities can be maintained.

Argument against:

Restrictions are imposed on the composition of the electoral college. Only the right of a minority in society is protected. The chief executive elected may not be able to represent the interest of all sectors. If the legislature is formed by an open election method, there may be confrontation between the chief executive with the legislature and the executive authorities.

d. Nominated by the legislature or bodies of different sectors of society, and selected through consultations among the Central Government, the legislature and bodies of the various sectors. The selection will be submitted to the legislature for approval.

Argument for:

The participation of the Central Government in the selection will guarantee that the chief executive will be accepted by the Central Government. If the legislature also plays a role in the process of consultation, the chief executive will at the same time be accepted by the legislature, which will be conducive to a harmonious relation between the legislature and the executive authorities.

Argument against:

If the Central Government participates in the selection of the chief executive, it will be unlikely that the legislature will have much influence on the process. If the legislature does not give much support to the chief executive, the harmonious relation between the executive authorities and the legislature will be undermined.

- iii. To be selected through a process in which the legislature plays an active role.
 - a. Nominated by the members of the legislature, and selected by direct election with universal suffrage.

Argument for:

The principle of separation of powers and checks and balances between the executive authorities and the legislature can be realised; their communication and co-operation can be strengthened. This method will produce a chief executive who has support from the legislature and the public because they have both directly participated in the selection process. This support will inspire trust and confidence and encourage the chief executive to be more accountable to the legislature and responsive to public views.

Argument against:

Members of the legislature can exercise control over the candidates for the chief executive through the nomination process, thus the principle of separation of powers is violated. The public will not be able to directly participate in the selection of the chief executive:

- b. Candidates for the chief executive are nominated by the public. A selection committee (comprising members from the Central Government and Hong Kong), after having consulted the legislature and the public, short-lists the candidates for the chief executive who will be elected by the legislature and appointed by the Central Government.

Argument for:

As the legislature has much influence on the selection process of the chief executive, the chief executive will be accepted by the legislature and conducive to the harmonious relation between the executive authorities and the legislature.

Argument against:

As the Central Government participates in deciding the candidates for the chief executive, the legislature will not have much influence on the process. If the legislature does not support the chief executive, the harmonious relation between the legislature and the executive authorities.

- c. Nominated by the legislature and the Central Government, and selected by the latter.

Argument for:

As the legislature participates in the selection of the chief executive, he will then be supported by the legislature. In addition, the Central Government in participating in the consultation process will be conducive to the high prestige of the chief executive and the harmonious relation between the legislature and the executive authorities.

Argument against:

The influence of the Central Government is greater than that of the legislature on the process of selecting the chief executive. Thus the legislature may not have absolute support for the chief executive, and the harmonious relation between the legislature and the executive authorities will be undermined.

3.7 Removal of the chief executive

3.7.1 Present practice

At present, the power of removing the Governor lies with the Queen, and Britain has never exercised the power of removing the Governor of Hong Kong.

3.7.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding the removal of the chief executive in the Declaration. However, the chief executive is appointed by the Central Government as accorded with the Joint Declaration, the power of removing the chief executive should lie with the Central Government.

3.7.3 Proposals

1. The legislature can pass a bill of non-confidence by a majority (2/3 or above) vote so as to remove the chief executive, and then report the matter to the Central Government for approval.

Argument for:

The legislature has the power to remove the chief executive directly so that the spirit of the executive authorities being accountable to the legislature can be realised.

Argument against:

Since the chief executive is appointed by the Central Government, the power of removing him should lie with the Central Government. If such power is vested with the legislature, the legislature will have far greater power than the executive authorities, and the principle of having checks and balances between the legislature and the executive will be violated.

- ii. The legislature can pass an impeachment bill by a majority (2/3 or above) vote on the chief executive who has committed crimes or seriously neglected his duties, and then propose to the Central Government that the chief executive be removed.

Argument for:

Since the legislature has the power to impeach the chief executive, it will indirectly exercise checks and balances on the executive authorities. Thus, the chief executive will not become the centre of power in the political structure. Although the Central Government will not necessarily exercise the removal power, the administration of a chief executive who has been impeached by the legislature will be closely monitored in the future.

Argument against:

As impeachment will lead to removal, the power of removing the chief executive should lie with the Central Government. If the legislature can impeach the chief executive and propose his removal whenever it deems there is maladministration on the part of the chief executive, the chief executive will find it difficult to function properly, and his efficiency will also be affected.

- iii. Since the chief executive will be appointed by the Central Government, the final power to remove him will of course rest with the Central Government. Who may propose such removal will depend on how the chief executive is selected. If the chief executive is selected by the legislature, the legislature may propose his removal. But if the chief executive is not selected by the legislature,

his removal being proposed by the legislature will not be a proper procedure. In other words, the power of selection and the power to propose removal of the chief executive should be vested with one body. But under any circumstances, with a majority (2/3) resolution, the legislature may convene a meeting of the electoral college which has been responsible for selecting the chief executive, and propose the meeting take appropriate action against the chief executive (including impeachment and proposal to the Central for his removal).

- iv. It will be dealt with by a 12-member special group formed by the legislature. The group may not consist of more than 5 members of the legislature. Its proposal to remove the chief executive should be passed by not less than 2/3 of its members.

3.8 The power of veto

3.8.1 Present practice

All the bills having been approved by the Governor in Council are presented by the official members of the Legislative Council. As in the Legislative Council, the number of official members, unofficial members who are also Executive Councillors, and members who are executive appointees occupies more than a half of the seats. Thus the bills presented by the Executive Council are rarely rejected by the Legislative Council. In addition, the president of the Legislative Council is the Governor who, according to the Letters Patent, has the power to reject any bills which have been passed by the Legislative Council. However, such phenomenon rarely happens.

3.8.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding this matter in the Joint Declaration.

3.8.3 Proposals

1. The chief executive should have the power of veto.

Argument for:

This will prevent the emergence of motions which have not been thoroughly considered, and will also serve as a means for the executive authorities to exercise checks and balances on the legislature.

Argument against:

If the chief executive may veto the motions which have already been passed by the legislature, his power will be excessive.

11. The chief executive should have the power of veto. But such veto may only apply to the motions which are passed by less than a 2/3 majority vote. If the motions vetoed by the chief executive is then passed by a 2/3 (or more) majority vote, the veto of the chief executive will be nullified.

Argument for:

The legislature should have the power to vote down the veto because any motion passed by a 2/3 (or more) majority vote of the legislature must have gained wide support and the chief executive is also required to respect the decision of the legislature.

Argument against:

In an executive-led government, the chief executive should have the final power of veto to ensure high efficiency of government policies.

3.8.4 Another proposal

The legislature should have the power of final decision in respect of legislation.

3.9 The role of the chief executive in the legislature

3.9.1 Present practice

The Governor of Hong Kong is concurrently the President of both the Legislative Council and the Executive Council. The terms of reference of the President of the Legislative Council include:

- (1) The President shall preside at sittings of the Legislative Council;
- (2) The President shall determine the time to suspend, adjourn or commence a sitting;
- (3) The President shall be responsible for maintaining the order of the sitting;
- (4) The President's decision regarding proceedings at a sitting shall be final;
- (5) The President shall have a casting vote in addition to his original vote if the votes are equally divided;
- (6) The President may determine the number of members of the various select committees and appoint the chairmen and members of such committees;

- (7) The President or the chairman of a committee has the power to decide whether a question will be put to vote;
- (8) The President may order strangers (members of the public and of the press who are admitted as spectators of sittings of the Council) to withdraw;
- (9) In any matters not provided for in the Standing Orders, the practice and procedures to be followed in the Council shall be such as may be decided by the President who may, if he thinks fit, be guided by the practice and procedures of the House of Commons of the United Kingdom; and
- (10) The President shall decide whether a proposal concerns public spending; (any proposal concerning public spending requires the prior approval of the Governor.)

3.9.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding this matter in the Joint Declaration.

3.9.3 Proposals

1. The chief executive is concurrently the speaker of the legislature.

Argument for:

Serving as the bridge for communication between the legislature and the executive authorities, the chief executive may improve their relation and co-ordination and enhance the efficiency of the government; the chief executive can also raise his prestige.

Argument against:

It is not in accordance with the spirit of separation of powers and it may not be possible to achieve the effect of checks and balances; the work load of the chief executive will be much heavier. If the speaker of the legislature who is the chief executive is not selected by election, it will violate the provision that "the legislature of the Hong Kong Special Administrative Region shall be constituted by elections" under the Joint Declaration.

11. The deputy chief executive will be the speaker of the legislature.

Argument for:

The argument for this proposal is similar to that for the proposal of having the chief executive as the speaker of the legislature. In addition, the power to head the executive authorities and the power to head the legislature will not be vested in one person, and the chief executive will be relieved.

Argument against:

As the executive authorities and the legislature will not be truly independent of each other, it is not in accordance with spirit of separation of powers and it may not be possible to achieve the effect of checks and balances. If the speaker of the legislature who is the deputy chief executive is not selected by election, it will violate the provision that "the legislature of the Hong Kong Special Administrative Region shall be constituted by elections" under the Joint Declaration. Furthermore, the deputy chief executive will effectively be more influential than the chief executive who may as a result become only a figure head.

- iii. The chief executive will not be the speaker of the legislature. The legislature will select its speaker from amongst its members. The chief executive will give periodic address to the legislature.

Argument for:

It will ensure the independence of the legislature and the executive authorities and their check-and-balance relationship. The work load of the chief executive can also be reduced.

Argument against:

It may lead to a situation where the executive authorities and the legislature are each minding its own business; they do not have any communication or are even in opposition.

3.10 The power of dissolving the legislature

3.10.1 Present practice

According to Article XXVIII A of the Royal Instruction, the Governor of Hong Kong has the power to dissolve the Legislative Council.

3.10.2 Provisions under the Sino-British Joint Declaration

- There is no provision regarding this matter in the Joint Declaration.

3.10.3 Proposals

1. The chief executive will have the power to dissolve the legislature.

Argument for:

To check on the operation of the legislature.

Argument against:

It is not in accordance with the principles of separation of powers and of checks and balances.

- ii. The chief executive will not have the power to dissolve the legislature.

Argument for:

To put into practice the principle of separation of powers between the legislature and the executive authorities.

Argument against:

If the chief executive cannot come to an agreement with the legislature in administration (e.g. the legislature does not pass the budget), a deadlock will result.

3.10.4 Other proposals

1. If the legislature refuses to pass the budget time and again, the legislature should be dissolved and a new legislature be elected according to the Basic Law.
- ii. The chief executive should have the power to dissolve the legislature but only in specific instances and only on the authority of the Central Government. Each time the chief executive wishes to dissolve the legislature, he must seek authority to do so from the Central Government.
- iii. The chief executive should have the power to dissolve the legislature but only in the capacity of "head of the SAR" and with the prior approval of the Central Government.

C. The relationship between the principal officials of the executive authorities and the legislature

3.11 Principal officials of the executive authorities sitting on the legislature

3.11.1 Present practice

There are, as on 31 December, 1986, three ex-officio members - the Chief Secretary, the Financial Secretary and the Attorney General - and seven official members in the Legislative Council. Five of these official members are also members of the Executive Council.

3.11.2 Provisions under the Sino-British Joint Declaration

There is no provision for this matter in the Joint Declaration. However, since the Joint Declaration stipulates that: "the legislature of the HKSAR shall be constituted by election" (Section 1 of Annex 1), the issue of principal officials of the executive authorities sitting on the legislature will have to be discussed.

3.11.3 Proposals

- i. The principal officials are considered one of the functional constituencies. They can be elected to the legislature through the election of the functional constituencies. Members of the legislature can concurrently be members of the executive authorities (as defined under 2.3.2.1).

Argument for:

Members of the legislature can try to understand government policies through the members of the legislature who are principal officials. This is conducive to the communication between the legislature and the executive authorities. Similarly, members of the legislature who also sit on the executive authorities can also facilitate co-ordination between the two.

Argument against:

The legislature cannot maintain an independent image. This will weaken its role on the checks and balances against the executive authorities. If the civil servants stand for elections, the principle of the civil servants being politically neutral will be violated, and conflicts will arise among them.

- ii. The chief executive nominates a certain number of principal officials to sit on the legislature. But before they can do so, they must first be approved by the other members of the legislature. Members of the legislature can at the same time be the members of the executive authorities (as defined under 2.3.2.1).

Argument for:

Principal officials sitting on the legislature will facilitate other members of the legislature to understand government policies. Such officials, concurrently being members of the legislature and the executive authorities can act as a bridge between the two.

Argument against:

It is stipulated in the Sino-British Joint Declaration that the legislature of the HKSAR shall be constituted by election. The fact that this proposal does not suggest any form of an election, the principles laid down in the Joint Declaration is violated.

3.11.4 Other proposals

- i. Officials of the executive authorities should not be members of the legislature.
- ii. The chief executive will delegate principal officials to be in attendance at the meetings of the legislature so as to answer queries.
- iii. Representatives of the executive authorities will be in attendance at the meetings of the legislature to propose, in person, motions in legislation.

D. The relationship between the members of the executive authorities and the legislature

3.12 Cross membership between the executive authorities and the legislature

3.12.1 Present practice

The three ex-officio members - the Chief Secretary, the Financial Secretary, and the Attorney General of the Executive Council are also the ex-officio members of the Legislative Council. There are, as on 31 December, 1986, twelve appointed members in the Executive Council. Two of them are official members who are also the appointed official members of the Legislative Council. Among the remaining ten appointed members of the Executive Council,

there are seven who also Legislative Councillors (five are appointed members and two are elected members). It is a usual practice that the Governor appoints a certain number of Legislative Councillor to the Executive Council.

3.12.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding this matter in the Joint Declaration.

3.12.3 Proposals

1. The legislature will elect some members of the executive authorities (as defined under 2.3.2.1). Principal officials of the HKSAR government can sit in the meetings of the legislature for elucidating the government policy and the bills presented to the legislature, and answering the questions raised by it.

Argument for:

Principal officials of the executive authorities help the members of the legislature understand the formulation and implementation of the policies, and foster the communication between the two. Furthermore, the system of cross membership between the executive authorities and the legislature is conducive to their close relationship, and the stability of the government structure.

Argument against:

As there are members of the executive authorities in the legislature, the former will have considerable influence on the latter. Thus the independent image of the legislature will be affected adversely.

11. To retain the present system. The chief executive can appoint members of the legislature to the executive authorities (as defined under 2.3.2.1). (For the discussion on the role of the principal officials of the executive authorities in the legislature, see para.3.11.)

Argument for:

The harmonious relation between the legislature and the executive authorities can be maintained under the present system.

Argument against:

The legislature lacks an independent image which is not favourable for its checking on the executive authorities.

111. Neither the principal officials nor other members of the executive authorities (as defined under 2.3.2.1) should hold concurrent post in the legislature.

Argument for:

The principle of separation of powers between the legislature and the executive authorities can be realised if there is no cross membership between them. The independent image of the legislature is conducive to its function of monitoring, criticising and checking on the executive authorities.

Argument against:

As the legislature emphasises its independent image, it will be out of line with the power of policy making. Thus the legislature will not be regarded as important, and co-operation between the legislature and the executive authorities will be undermined.

3.12.4 Other proposals

1. All members of the executive authorities (as defined under 2.3.2.1) are appointed by the chief executive, and elected to the legislature through the grand electoral college election. As for the non-members who are the principal officials, they are to be in attendance at the legislature meetings to answer questions.
11. The chief executive's committee will comprise 12 members, among whom not less than 6 will be appointed from the legislature members. (There will be 3 ex-officio members in the committee i.e. the Chief Secretary, the Financial Secretary and the Attorney General. Three other government officials can also be appointed as committee members.)
111. A composition similar to that of the present Executive Council should include.
The chief executive
Secretary level officials -- nominated by the chief executive and appointed by the Central Government
Legislature membes -- their number should not exceed 1/3 of the membership of the Executive Council; appointed by the chief executive
Several other persons with expertise: appointed by the chief executive.

3.13 Removal of members of the executive authorities

3.13.1 Present practice

According to the Letters Patent, the Legislative Council has no power to impeach or remove any government officials or Executive Councillors.

3.13.2 Provisions under the Sino-British Joint Declaration

There is no provision regarding this matter in the Declaration.

3.13.3 Proposals

1. The legislature has the power to impeach members of the executive authorities; if the members of the executive authorities have erred seriously, the legislature can pass an impeachment bill by a majority (2/3 or above) vote, and the chief executive will report to the Central Government for their removal.

Argument for:

The checks and balances between the legislature and the executive authorities can be maintained.

Argument against:

Since the executive authorities is led by the chief executive and the principal officials who are among its members are appointed by the chief executive, all members of the executive authorities should be accountable to the chief executive who will decide on their removal.

- ii. The legislature does not have the power to remove members of the executive authorities.

Argument for:

The appointment of members of the executive authorities is made by the chief executive, thus the legislature should not have the power to remove them.

Argument against:

If the legislature cannot impeach or propose to remove members of the executive authorities, the checks and balances between the legislature and the executive authorities will by no means be realised.

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

FINAL REPORT ON
THE SELECTION OF THE CHIEF EXECUTIVE

(passed by the Executive Committee on 8 August 1987)

Special Group on
The Political Structure of the SAR

1 Introduction

1.1 Relevant provision under the Joint Declaration

The provision on the selection of the chief executive under the Joint Declaration is as follows:

"The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government." (Section I of Annex I). The details of elections and consultations are not specified in the Joint Declaration. The Joint Declaration also states that "The executive authorities shall abide by the law and shall be accountable to the legislature".

1.2 Present practice

The Foreign and Commonwealth Office of the United Kingdom selects the candidate of appropriate qualifications and experience from its civil servants to be the governor. With the approval of the Prime Minister, the selection is submitted to the Queen for appointment. The U.K. Government is responsible for the entire selection process in which the people of Hong Kong have no participation. Ever since 1971, the post of governor of Hong Kong has been filled by promoting non-colonial officials of considerable diplomatic experience.

1.3 The various proposals:

Hong Kong people from different sectors of society have the following proposals in respect of the selection of the chief executive (Please refer to the following table):

| | | |
|-----------------------|--|---|
| By election | I. Universal -- direct election | a. without restriction to nomination (see para. 2.3) b. with restriction to nomination (see para. 2.4) |
| | II. Indirect -- election | a. election by grand electoral college (see para. 3.1) b. election by the legislature (see para. 3.2) |
| Through Consultations | I. Consultations between the Central Government and the people of Hong Kong (see para.4) | |
| | II. Consultations within the HKSAR without participation of the Central Government | |

This paper discusses the various proposals regarding the selection of the chief executive, their reasons/ characteristics, and the arguments for and against them.

UNIVERSAL DIRECT ELECTION

2 Selection of the chief executive by universal direct election

2.1 Mode and process of election: Qualified (electors should not be subject to requirements other than general electors' qualifications) electors may vote directly for any one of the candidates. The candidate with the majority of votes shall be the chief executive. This kind of selection includes the processes of nomination and election.

2.2 Different views on the basic principles of the election method for universal direct election:

| Pros | Cons |
|---|--|
| 1) It is conducive to the stability and prosperity of Hong Kong. | - It is detrimental to the stability and prosperity of Hong Kong. |
| 2) The birth of political parties is an inevitable and healthy development. | - It will foster party and confrontation politics. |
| 3) Free competition among various interest groups and various sectors of society. | - Free competition of various sectors cannot be ensured. |
| 4) Civic sense has been growing. | - Before civic education is popularised, the electors may not have adequate ability to assess the qualities of the candidates. |
| 5) The best form in the development of modern society. | - The adoption of Western democracy in Hong Kong society is not appropriate. |
| 6) Democratization may tie in with the mode of economic development. | - Democracy practised too quickly or excessively will be harmful to economic development. |
| 7) Direct accountability to electors is more effective. | - The electors may not be rational and may be easily misled by political careerists. Thus "free lunch" may result. |

- 8) It will encourage people to participate in politics. - It may result in politicization of society and give rise to fanatic activities, undermining the stability of society.
- 9) A high degree of autonomy can be realized. - Direct election with universal franchise is not the only means to achieve a high degree of autonomy.
- 10) Without direct election with a universal franchise, there is no democracy. - Direct election with universal franchise is only one form of democracy. Without it, there can still be democracy.
- 11) There is still a long period from now to 1997 so that people can take this opportunity to accumulate their political assets. Thus there is an equal chance for everyone to participate in politics. - As the opportunity cost and the starting time may vary from sector to sector, the various sectors do not enjoy an equal chance to stand for election.
- 12) Most of the successful candidates are middle-of-the-roads, thus their predicability is greater. - Direct elections cannot ensure that the unbiased middle-of-the-roads can be elected. The unpredictability of direct elections will undermine the stability of society.

2.3 Universal direct election without restriction to nomination

The chief executive is to be openly nominated by the public, and directly elected on a one-person-one-vote basis. (Proposal for 1997 political structure of the Basic Law Special Group of the Student Union of the Hong Kong University 2/87)

Different views on the nomination method [1]:

- | Pros | Cons |
|---|---|
| 1) Open nomination of the chief executive will ensure that people of the various sectors may reflect their own interests through the process of nomination. | 1)' If the process of nomination is entirely open, the quantity quality of candidates can hardly be controlled. |

[1] The pros are taken from the proposal itself. If any point is a member's view, it will be indicated as such. The cons are opinions from different sectors of society.

- 2) As direct election with universal franchise will involve extensive manpower and resources, this is already a kind of guarantee on the quality of the candidates; no nomination process is required for this purpose. 2)' The requirement for manpower and resources may not necessarily guarantee the quality of the candidates.
- 3) If nomination is restricted, the nomination process is already an occasion for political bargaining, and relatively speaking, the public will lose their right to choose their chief executive independently. 3)' The nomination process does not necessarily provide the occasion for political bargaining. Nomination will allow the public to have more specific choices.

2.4 Universal direct election with restriction to nomination

2.4.1 Nomination by members of the legislature

The candidates for the chief executive are nominated by a certain number (e.g. 10 or one-tenth of the total number) of legislature members. Each member of the legislature may only nominate one candidate who will then stand for direct election with universal franchise. (Commission on Public Policy of Hong Kong Christian Council 10/86, "190 proposal" 10/86, Chung Keng 7/86, the Hong Kong Bar Association 11/86)

Different views on the nomination method:

- | Pros | Cons |
|--|--|
| 1) It can put into effect the principle of checks and balances between the executive authorities and the legislature, and foster communication and co-operation between the two. | 1)' It will violate the principle of separation of powers since members of the legislature can through nomination manipulate the candidates. |
| 2) Nomination by members of the legislature may control the quantity and guarantee the quality of the candidates. | 2)' It will violate the principle of fairness since members of the legislature may, through nomination, only select persons who can bring them benefits. |
| 3) Since all members of the legislature may nominate candidates of their choice, the process is not a closed one. | 3)' The process of nomination is not open enough. |

4) Some members considered that it was in accordance with the principle that the executive authorities should be accountable to the legislature.

5) Some members held that this would demonstrate support from the legislature and the electorate. This would inspire trust and confidence of both in the chief executive and encourage the chief executive and the executive authorities to the more responsive and accountable to both. In turn, this would give greater status to the legislature and the views of the people.

5)' According to the British experience, the choice of electors may not coincide with that of their political party. Candidates whom the electors favour may not necessarily be supported or nominated by the legislature.

2.4.2.2 All those who have registered as electors can nominate candidates for the chief executive. A "candidature body" will be responsible for preliminary selection of candidates. The "candidature body" comprises former elected members of the legislature, Urban Council, Regional Council, and District Boards, the chief executive in office and a certain number of representatives elected by functional constituencies. The chief executive will be elected by direct election with universal franchise. (Fraternity for the Sharing of the Christian Way 11/86)

Different views on the nomination method:

Pros

Cons

1) As all registered electors may nominate for the chief executive, the right of nomination will not be restricted to a small group of people. Thus it can be guaranteed that the various sectors can look after their own interests through the nomination process.

2) As the "candidature body" draws members from various sources, it can be guaranteed that opinions of the various sectors can be taken into consideration through the selection process of the chief executive.

3) As the "candidature body" will conduct a preliminary selection of the candidates, the quantity and quality of the candidates can be controlled.

3)' It is not very much in accordance with the principle that the executive authorities shall be accountable to the legislature.

1)' As the nomination process is open, it is difficult to guarantee the quality and quantity of the candidates for the chief executive.

2)' It cannot be guaranteed that members of the "candidature body" will look after the interests of the various sectors.

3)' It will violate the principle of equality if a small group of people have the prerogative to conduct preliminary

4)' It is not very much in accordance with the principle that the executive authorities shall be accountable to the legislature.

2.4.2 Nomination by a nomination college/electoral college

Candidates for the chief executive are nominated by a designated nomination college or electoral college, who will then stand for direct election with universal franchise. With regard to the formation of the nomination college or electoral college, there are different views under this proposal.

2.4.2.1 The nomination college is formed by all members of the legislature and the same number of local people appointed by the Central Government. Candidates for the chief executive have to be supported by one-eighth of the members of each of the two parties. (Political structure group of University Graduates' Association of Hong Kong Limited-11/86)

Different views on the nomination method:

Pros

Cons

1) It guarantees that candidate can gain the support of both the legislature and the Central Government, and foster communication among various parties.

2) As the nomination body includes all members of the legislature and local people appointed by the Central Government, the process is not a closed one.

1)' Allowing the Central Government to participate in selecting the candidates for the chief executive will violate the principle of high autonomy.

2)' The nomination process is not open enough.

2.4.2.3 A candidate for the chief executive is to be nominated by twenty qualified electors and each qualified elector can only nominate one candidate. If the number of candidates exceeds five, a selection committee will select five official candidates through consultation or election. The selection committee comprising 150 to 200 members who are representatives of various functional constituencies will be responsible for examining the qualifications of the candidates. After the selected chief executive takes the oath of office, the selection committee will be dissolved. Once the candidates for the chief executive are recognised as the formal candidates, they will stand for the direct election with universal franchise. (Hok Yau Club 8/86)

Different views on the nomination method:

- | Pros | Cons |
|---|--|
| 1) Since the selection committee has a large membership and strong representation, interests and opinions of the various sectors can be reflected in the selection process. | 1)' It cannot be guaranteed that opinions of the various sectors will be reflected by the selection committee. |
| 2) The quantity and quality of the candidates can be guaranteed by the preliminary selection by selection committee members. | 2)' If the power of selection is restricted to a small group of people, it will violate the principle of equality. |
| | 3)' The degree of its representativeness is not directly proportional to the size of its membership. |
| | 4)' It is not in accordance with the principle that the executive authorities shall be accountable to the legislature. |

2.4.2.4 A nomination committee for the chief executive will be established to nominate 3 to 5 candidates who will then stand for direct election with universal franchise. The nomination committee for the chief executive will be composed of 37 members including 5 Hong Kong deputies to the National People's Congress; 3 Hong Kong members of the Political Consultative Conference; 10 representatives of the legislature; 3 representatives of principal officials (equivalent to Secretaries); 2 representatives of the Urban Council and the Regional Council; 3 representatives of the District Boards; and 11 representatives of social organisations. These representatives will be elected by their respective organisations. (Ng Hong Man 11/86)

Different views on the nomination method:

- | Pros | Cons |
|--|--|
| 1) As the nomination committee members are representatives of the various strata of society, interests of these sectors and strata can be reflected and their opinions balanced in the selection process of the chief executive. | 1)' The combination in the nomination committee does not mean that opinions of the various sectors can be reflected. |
| 2) As the nomination committee will conduct selection of the candidates, the quantity and quality of the candidates can be guaranteed. | 2)' It will violate the principle of equality if the power of selection is restricted to a small group of people. |
| | 3)' It is not very much in accordance with the principle that the executive authorities shall be accountable to the legislature. |

2.4.2.5 A selection committee will be established. It will comprise about 60-80 members who are selected by various classified bodies and appointed by the National People's Congress. The list of classified bodies and number of members selected by each classified body should be more or less the same as those in the formation of the Consultative Committee for the Basic Law. Any amendments to the details of the formation of the selection committee will be the responsibilities of the NPC or its appointed institutions. All members of the selection committee should be Hong Kong inhabitants who are representative and are familiar with the situation and needs of Hong Kong. One of the important responsibilities of the selection committee is to select 3 to 5 candidates who with the approval of the Central Government will stand for the direct election with universal franchise. (Tso Wung Wai, Tong Yat Chu and Ho Chung Tai 8/86)

Different views on the nomination method:

- | Pros | Cons |
|--|---|
| 1) Since the formation of the CCBL is well accepted by the Hong Kong people, the selection committee will also be acceptable if the combination of its classified bodies take that in the CCBL as blueprint. | 1)' The combination of classified bodies in the CCBL is not impeccable. |

2 As the NPC and its appointed institutions may amend the details of the combination in the selection committee, the chief executive selected will be accepted by the Central Government and supported by the general public.

2)' It will violate the principle of a high degree of autonomy if the NPC participates in the selection of the chief executive.

4)' It is not in accordance with the principle that the executive authorities shall be accountable to the legislature.

3)' It is not in accordance with the principle that the executive authorities shall be accountable to the legislature.

2.4.2.6 A nomination committee will be constituted and appointed by the Central Government. Its membership which should not be large, will include ex-officio members such as Director of the Hong Kong and Macau Affairs Office (or corresponding position in the future), or Hong Kong people (it is still under consideration whether participation of Hong Kong people will be compulsory). The chief executive will then selected by universal franchise (the method of two-round majority voting may be adopted). (Louie King Sheun 1/87)

Different views on the nomination method:

Pros

1) The quality of the candidates can be guaranteed and the quantity controlled.

2) The nomination committee is to be organised and appointed by the Central Government. It will ensure that interests of the Central will be looked after, and prevent discordance between the Central Government and the SAR.

3) The nomination committee organised by the Central Government may ensure that the committee will have a common objective and unanimity. The aim of protecting the interests of a particular sector will be more effectively achieved.

Cons

1)' It will violate the principle of equality if the nomination process is conducted by only a small group of people.

2)' The Central Government's participation in selecting the chief executive is against the principle of high autonomy.

3)' Preservation of stability and prosperity of Hong Kong will rely on the collective effort of all Hong Kong citizens. The contribution of a particular sector should not be highlighted. Hence, there should not be any intentional protection of the interests of a particular sector.

2.4.2.7 A nomination committee for the chief executive with 128 members should be set up to nominate three candidates who will stand for election with universal franchise. The composition of the nomination committee is as follows

| | number of seats in the nomination committee |
|--|---|
| The first category of professional divisions should have a total number of | 32 seats |
| including: commercial sector [1] | 12 |
| industrial sector [2] | 8 |
| financial sector [3] | 4 |
| other employers | 8 |
| The second category of professional divisions should have a total number of | 32 seats |
| including: medical sector (registered practitioners) | 2 |
| other medical staff | 2 |
| educational sector | 4 |
| legal sector | 2 |
| social workers | 4 |
| engineers, architects, surveyors, and town-planners | 2 |
| accountants and auditors | 2 |
| information and mass media | 2 |
| culture and art | 2 |
| administrators | 4 |
| other professionals | 6 |
| The third category of professional divisions should have a total number of | 32 seats |
| including: clerical staff | 4 |
| sales personnel | 4 |
| service personnel | 4 |
| Those engaged in agriculture, forestry, livestock husbandry, and fishing | 4 |
| manufacturing, construction, and transportation personnel | 12 |
| students, retired persons, house-keepers, and others who are involved in non-economic activities | 4 |

| | |
|---|-----------|
| Members of the legislature | 16 seats |
| Deputies to the NPC, members of the Political Consultative Conference | 16 seats |
| TOTAL | 128 seats |

Footnotes:

- [1] Commercial sector refers to directors of the member-corporations of the Hong Kong General Chamber of Commerce and the Chinese Chamber of Commerce.
- [2] Industrial sector refers to directors of the member-corporations of the Federation of Hong Kong Industries and the Chinese Manufacturers Association of Hong Kong.
- [3] Financial sector refers to directors of the member-banks of the Hong Kong Association of Banks.

(Cheung Chun Kwok and Leung Siu Tong 3/87)

Different views on the nomination method:

- | Pros | Cons |
|---|---|
| 1) The representativeness of the nomination committee can be ensured as it is composed of members from various sectors and professions. | 1)' It cannot be ensured that members of the nomination committee will represent the interests of all strata. |
| 2) As the chief executive will ultimately be selected by universal franchise, he will have the support of the majority of Hong Kong people. | 2)' Restricted, nomination is against the principle of equality. |
| 3) To make it fair, the nomination committee members may not select from among themselves candidates for the chief executive. | 3)' It is not very much in accordance with the principle that the executive authorities shall be accountable to the legislature. (But some members did not agree to or understand the statement that "it is not very much in accordance with the principle that the executive authorities shall be accountable to the legislature" if the candidates for the chief executive were nominated by a nomination committee). |

- 2.4.2.8 The chief executive should be nominated by a relatively detached advisory committee composed of 30 to 60 members. The nomination should be passed by 2/3 of the legislative members and then forwarded to the Central Government for appointment. Members of the advisory committee should be people who have substantial experience in legislation, administration, law, industry, commerce, finance, or investment; they should be retired persons over 60 years of age or people who have withdrawn from the political arena. Also, they must have no vested interests in the power and status of the chief executive. In this way, they can make impartial, reasonable and valuable judgements for the benefits of Hong Kong people.

Members of the first advisory committee should be selected through consultations by the Joint Liaison Group, but those of the ensuing terms should be selected by the last chief executive in consultation with its advisory committee, the other half of the members should be elected by the legislature.

(Association for Democracy of Hong Kong Ltd)

INDIRECT ELECTION

- 3.1 Selection of the chief executive by the grand electoral college

One of the many proposals on the selection of the chief executive is the idea of setting up a grand electoral college to accomplish this task. But even within the same school of thought, there are differing views concerning various aspects of the grand electoral college i.e. its method of formation, its composition, and its functions. (Paragraphs 3.1-3.4 are background information for reference only.)

- 3.1.1 Functions of the grand electoral college

A summary of all the views given would show that the proposed functions of the Grand Electoral College are confined to the following four areas:

- (1) Be responsible for the nomination and election of the chief executive.
- (2) Be responsible for nominations during the process of election of the chief executive.

- (3) Be responsible for the election of some members of the legislature.
- (4) Performs the role of adviser to the chief executive.

3.1.2 Principle of formation regarding the grand electoral college

- (1) Wide representation -- The wider the representation, the better. All strata of society should be represented in the grand electoral college.
- (2) Large membership -- The rationale is to protect the grand electoral college from improper interference, "strings pulling", and manipulation. An electoral college of a small size may easily fall victim to control by a handful of members through proper or improper means. It is difficult to fix a definite number, since an objective criterion governing this is itself hard to set down. The principle, however, is that a larger membership of the grand electoral college is definitely better than a small one.
- (3) Members must have statutory status authorized by the public -- The members of the grand electoral college is charged with the responsibility to execute the most important right of political personnel selection on behalf of the public. Therefore, every member should be able to meet certain requirements, rather than just enter the electoral college simply because he or she is chosen according to the wishes of any individual or organisation. The requirements should best be endorsed and accepted before the election.
- (4) The method of formation must be simple and clear -- The method of formation for the grand electoral college's should best be institutionalized. The process of formation must be easy to understand and accept,

3.1.3 Composition of the grand electoral college

A summary of all the recommendations regarding the composition of the grand electoral college gives the following list of proposed components:

- (1) Unofficial executive councillors
- (2) Members of the legislature
- (3) Members of district authorities -- This may include members of the Urban Council, Regional Council, and District Boards.

- (4) Functional bodies -- The functional constituencies and organisations agreed upon by the legislation existing or amended hereafter should form units to elect representatives to the grand electoral college according to the seats allotted.

- (5) Community organisations -- Other than the constituencies and organisations under the classification of functional constituencies, the many community bodies which have their own representativeness, such as statutory bodies, permanent non-statutory bodies, charitable, welfare, and sports associations etc. should also be represented in the grand electoral college.

- (6) Basic Law Consultative Committee -- A grand electoral college, or a part of the grand electoral college should be formed with reference to the method of formation and composition of the Basic Law Consultative Committee.

- (7) Members of the National People's Congress and the Chinese People's Political Consultative Conference in the SAR -- Although it is still not clear how the future SAR representatives to the NPC and CPPCC will be selected, it is estimated that the SAR will definitely have representatives for national affairs. Since members of the local authorities in all levels are incorporated into the grand electoral college, the representatives from the HKSAR serving in national political institutions should also become members of the grand electoral college.

- (8) Respected senior members of the political, industrial, and commercial sectors -- Retired leaders from the civil service, or the industrial and commercial fields. This includes ex-members of the Executive Council and Legislative Council, and retired senior civil servants.

3.1.4 Ad-hoc or Permanent

Apart from those who held that the grand electoral college should become a standing advisory committee to the chief executive, all the other proposals did not advocate the existence of a permanent grand electoral college. It is generally agreed that the electoral college should be dissolved after performing its function in each election.

3.1.5 The different proposals concerning the selection of the chief executive by a grand electoral college are as follows:

3.1.5.1 Cha Chi Man's proposal (early 1985)

- (1) **Composition:** Advisers to the Hong Kong Government should form an advisory council. This should include ex-members of the Executive Council and Legislative Council, and professionals from sectors of industry, commerce, finance, law, and education. Serving members of the Executive and Legislative Councils should not be members of the Advisory Council simultaneously. Generally speaking, advisers should be retired or senior local personages. There should be no restriction on the number of members, and each member should enjoy a lifelong term of office.
- (2) **Method of Formation:** Nominated by the successive chief executives of Hong Kong, and approved by the Central Government.
- (3) **Functions:** The terms of reference of the advisory council should include the following - to nominate to the Central Government or be consulted on the candidate for the chief executive; to propose, after consultation with the Legislative Council, amendments to the details of the Basic Law for the Central Government's consideration; and to elect within the Council one-third of the Legislative Councillors. Besides, the members of this advisory council are also advisers to the Governor and principal ministers. However, the Governor will not consult the Advisory Councillors on everything as he now does with the Executive Councillors.
- (4) **Different views on this proposal:**

Pros

Cons

- 1) The permanent appointment of members of the Advisory Council will preserve the independence of the advisors, and prevent the chief executive from influencing the decisions of the councillors for his own interests.
- 2) The concept of respecting our senior is not unfamiliar in Hong Kong, China, or even Britain. In Hong Kong, there are a lot of organisations which have advisory committees other than its board of directors, and China also has its Central Consultative Committee. The concept of an advisory

- 1)' Since the advisors are to be permanently appointed, they cannot be dismissed. This will cause the formation of another centre of power and affect the administration of the chief executive.
- 2)' It will be extremely dangerous if the election of the chief executive relies on the spirit of traditions. A systematic method of election should be established.

committee is based on human faith in the spirit of traditions. Therefore, the chief executive is to choose advisers from personages of recognised accomplishments who are no longer engaged in day-to-day responsibilities, because he trusts that their experience and abilities are constructive to society.

3.1.5.2 Ku Sing Fai's proposal (2/1985) [The Mirror Monthly]

- (1) **Composition:** A large proportion of representative figures from the local industrial, commercial, and financial sectors, together with some members from the middle and lower strata should join to form an administrative advisory council of approximately 100 members.
- (2) **Method of Formation:** The Basic Law Drafting Committee members both from China and Hong Kong will look for suitable members of the following categories: classified organisation representatives, non-classified organisation representatives, and specially invited representatives.
- (3) **Functions:** The administrative advisory council is to nominate candidates for the chief executive, subject to twenty people seconding the nomination. Once the candidate is chosen, he must announce his platform. The administrative advisory council will then collect views from the public within a six-month consultative period, after which the chief executive will be selected either through democratic consultation or election by vote.

Besides, the administrative advisory committee is also to elect 30% of the Legislative Councillors.

(4) Different views on this proposal:

Pros

Cons

- 1) Since members of the administrative advisory council come from all walks of life, they will be able to represent the interests of different strata of society, and to reduce the confrontation and misunderstanding between different classes.

- 1)' Members of the administrative advisory council only come from certain prescribed sectors. Interests of the public at large cannot be protected.

3.1.5.3 Victor Sit's proposal (30/1/1986) (Ta Kung Pao)

- (1) Composition: A consultation college should comprise all unofficial members of the Executive Council, all Legislative Councillors, representatives from functional bodies, and community organisations.
- (2) Method of Formation: (unspecified)
- (3) Functions: Upon the basis of consultation, the members should discuss the suitable choice for the position of chief executive. If necessary, the chief executive may be elected on a one-man(or unit)-one-vote.
- (4) Different views on this proposal: (Unspecified)

3.1.5.4 Proposal of the Tritolaire Academy (3/1986)

- (1) Composition: The electoral college should be formed by members of the legislature and district authorities.
- (2) Method of Formation: Specify in relevant legislation that the above-mentioned members be ex-officio members of the electoral college.
- (3) Functions: Elect the future chief executive for the appointment by the Central Government.
- (4) Different views on this proposal: (Unspecified)

3.1.5.5 Albert Cheung's proposal (22/7/1986) [The Express]

- (1) Composition: The grand electoral college should comprise members of the Legislative Council, Regional Council, Urban Council, and District Boards.
- (2) Method of Formation: Specify in the legislation that the above-mentioned persons should become members.
- (3) Functions: The grand electoral college will vote on the list of chief executive candidates submitted by Legislative Councillors (Each candidate should be nominated by at least 10 legislature members). The candidate with the greatest number of votes will become the chief executive.
- (4) Different views on this proposal:

Pros

Cons

1) The election by the grand electoral college will ensure that the future chief executive be supported by members of the public from different strata.

1)' Restrictions are imposed on composition of the grand electoral college. The chief executive elected may not enjoy general support.

3.1.5.6 Proposal of the Business and Professional Group (71 members) of the CCBL (4/11/1986)

- (1) Composition: The chief executive is to be elected by an electoral college which comprises 600 members. The membership will consist of:

| | |
|--|----|
| Legislative Councillors | 80 |
| Statutory Bodies and Permanent Non-statutory Bodies | 50 |
| Urban Council, Regional Council, and District Boards | 50 |
| Social, Charitable, and Sports Organisations | 60 |
| Professionals | 60 |
| Labour | 60 |
| Industrial Sector | 80 |
| Commercial Sector | 50 |
| Financial Sector | 50 |
| Religious/Educational Sector | 30 |
| Civil Service | 30 |

- (2) Method of Formation: Formed by representatives elected from various classified organisations. (Details are under discussion)

- (3) Functions: The electoral college will mainly be responsible for the election of the chief executive. Under the electoral college, there will be a nomination committee which will comprise 20 members of the electoral college. The nomination committee will act as a search team to vet three candidates, each of whom is considered suitable in every respect to be the chief executive. Members of the nomination committee are not eligible to be candidates themselves, nor to vote. Only those who are non-nomination committee members in the electoral college are given the right to vote in the election of the chief executive.

In addition, the electoral college may also elect 25% of the members of the legislature.

(4) Different views on this proposal:

- | Pros | Cons |
|--|--|
| 1) Members of the electoral college are representative of a wide range of sectors. The chief executive elected may represent sufficiently the interests of all walks of life and all strata of society. | 1)' Restrictions are imposed on the composition of the electoral college. Only the right of a minority in society is protected. The chief executive elected may not be able to represent the interests of all sectors. |
| 2) Election of the chief executive by the electoral college may avoid party and confrontational politics which may be the result of universal franchise. | 2)' Election of the chief executive by one-person-one-vote may not lead to confrontational politics. |
| 3) It will avoid the confusion of powers between the legislature and the executive authorities which is the result of electing the chief executive from the legislature. In this way, the checks and balances between the executive and the legislature can be maintained. | 3)' If the chief executive is elected by the legislature, their communication and co-ordination will be enhanced. |
| | 4)' This form of election is undemocratic as the people of Hong Kong cannot directly participate in the selection of the chief executive on a universal franchise basis. (Some members added that even the chief executive of the U.K. was not selected on a one-person-one-vote universal franchise basis.) |

3.1.5.7 Proposal of the Hong Kong People's Association (2/1/1986)

- (1) Composition: The grand electoral college will be composed of the non-directly elected members of the legislature, including representatives of functional constituencies and members of regional electoral colleges. Representatives of functional constituencies will fall under 3 categories: industrial/commercial/financial sector; grassroots level (labour and social workers); and professionals.

- (2) Method of Formation: As to election of the legislature, functional constituencies and regional electoral colleges will elect representatives to the legislature. In selecting the chief executive, the above-mentioned bodies will elect 10 representatives to form the grand electoral college for electing the chief executive.

There are two proposals regarding the formation of the future legislature: 1) The existing 12 seats allocated to functional constituencies should be increased to 30. Together with the 12 seats allocated to electoral colleges, the future grand electoral college will consist of 420 members. 2) The seats for functional constituencies and for electoral colleges should be increased to 40 and 16 respectively i.e. membership of the future grand electoral college will amount to 560. (There are members to be selected by election with universal franchise, not including those selected by the grand electoral college).

- (3) Functions: The electoral college will mainly be responsible for selecting the future chief executive. The electoral college is a body vested with nomination power as well as election power. Only the candidates nominated by 10 percent of the electoral college members may stand for election. Should the candidate be a member of the electoral college, he is required to resign from the electoral college once he is nominated and the vacancy will be filled by a representative elected by the relevant electoral unit. Members of the electoral college are not eligible to sit in the legislature so as to maintain the checks and balances between the executive and the legislature. Apart from internal nomination, the electoral college should also openly invite nomination from outside. Those who are qualified to nominate from outside are social bodies other than district authorities and functional constituencies which are represented the electoral college. Individuals are not qualified to nominate.

On receiving the nominations for the chief executive, the electoral college is to examine the qualifications of the candidates and then make appointments with individual candidates to listen to their respective platforms and to address enquiries. Finally, members of the electoral college will vote by secret ballot. The successful candidate must obtain more than half of the votes.

(4) Different views on this proposal:

Pros

Cons

1) The basic framework of the electoral college includes functional bodies and district boards which have a long history and are accepted by the general public. They are considered the most important political ladder and they also fulfil the two main principles in election politics (the functional principle and the regional principle). Thus the origin of the electoral college inherits the present political basis and traditional wisdom. The chief executive elected by the electoral college will win the trust and acceptance of the general public.

2) If the sectors representing the two poles of society -- the industrial/commercial sector and the grassroots level -- are each entitled to 30-35% of the seats in the electoral college, whereas representatives of professionals and district authorities are each entitled to not more than 15-20% of the seats, no particular stratum of society will constitute an overwhelming majority. Hence, the chief executive elected by this electoral college must be one who can look after the interests of all sectors.

3.1.5.8 Zee Sze-yong's proposal (12/1986)

(1) Composition: The grand electoral college with about 300-600 members will be composed of:

1) Representatives or members of the legislature selected by direct elections and functional constituencies elections. [These persons shall not enjoy the right to stand for election by the grand electoral college]

1)' As there are drawbacks in functional groups and district boards elections, the chief executive elected by these bodies may not necessarily be accepted and trusted by the public.

- 2) Representatives or members of the Urban Council and Regional Council
- 3) Representatives or members of District Boards.
- 4) Representatives of classified groups including:
 1. Commercial/industrial sector
-- industry, trade, shipping, aviation, tourism.
 2. Finance; real estate
-- banking, insurance, securities, real estate, building, and construction.
 3. Legal sector
-- barristers, solicitors, judges.
 4. Professionals
-- academics, engineers, architects, surveyors, accountants, medical personnel, educationalists, artists, sports, science, and technology.
 5. Mass media
-- television, radio, newspapers, magazines, publishers.
 6. Social bodies; grassroots
-- labour, civil servants, social workers, political groups, charities, agriculture and fisheries, kai-fong associations, rural committees, Heung Yee Kuk, hawkers, students.
 7. Religions
-- Protestantism, Buddhism, Catholicism, Islam, Taoism, Confucianism.
 8. Foreign nationals
 9. Women
- 5) All or part of the Hong Kong deputies to the National People's Congress.
- 6) Representatives or members of the Political Consultative Committee.
- (2) Method of Formation: The NPC will appoint a number of representative people to form an electoral preparation group which will co-ordinate the formation of the grand electoral college. Members of the group will not be eligible to be members of the grand electoral college.
- (3) Functions: The grand electoral college will elect 1/3 of the members (i.e. 22 members) of the legislature. [The grand electoral college will nominate 2-3 candidates to stand for election of the first chief executive after 1997. After the nominations are approved by the Central Government, the grand electoral college will elect the chief executive. For the election of the second chief executive of the HKSAR, 2 - 3 candidates will be nominated by the grand electoral college.

After the nominations are approved by the Central Government, the second chief executive will be elected by universal franchise. If the grand electoral college is abolished in the future, the candidates for chief executive will be nominated by the legislature and stand for universal suffrage after the approval of the Central Government has been obtained.

- (4) Different views on this proposal: There is no provision in the Joint Declaration which allows the Central Government to approve nominations for the chief executive. There is provision only for appointment.

3.1.5.9 Hong Kong Chinese Civil Servants Association (2/87) and joint conference of the medical professional bodies (3/87)

- (1) Composition: The electoral college will comprise 500 to 600 members who are representatives of functional groups, the Urban Council, and the District Boards.
- (2) Method of Formation: unspecified
- (3) Functions: The electoral college will elect a nomination committee (composed of a certain number of people e.g. 5) which is responsible for nominating a certain number of candidates for the chief executive. The electoral college will then elect the chief executive from the candidates.

(4) Arguments in support of this proposal:

- 1) Recommendation of candidates by the nomination committee through consultations may ensure that the candidates in general are qualified. It is also in accordance with the provision in the Joint Declaration that the chief executive shall be selected by election or through consultations.
- 2) Members of the electoral college represent the interests of various sectors.

(Opposing views are not specified.)

3.1.5.10 In the proposal of the selection of the chief executive through consultation, there is also the suggestion that a designated the electoral college participate in the selection. (please refer to 5.1.2).

3.1.6 Different opinions in respect of "the grand electoral college election" in general

PROS

CONS

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| <p>1) To better look after the general interest of society since members elected by the grand electoral college are not required to be directly accountable to a functional or geographical constituency. Secondly, they can act as buffer and a balancing force to the conflict and confrontation between members elected by direct election and members elected by functional constituency election.</p> <p>2) To ensure balanced participation of all sectors of society.</p> <p>3) People who have objective and balanced viewpoints, who are practical and realistic with all-rounded political capabilities, and who are widely accepted can be elected. Elites from various sectors can be provided with an alternative means to participate so that the merits of the present appointment system can be retained.</p> <p>4) Politicization of society can be reduced.</p> <p>5) A grand electoral college comprising members of the National People's Congress and the Political Consultative Conference can ensure participation of those who are familiar with the functioning of the Central Government.</p> | <p>1)' It will easily lead to elite politics which only protects the interest of the minority.</p> <p>2)' Special emphasis is placed on the participation of upper strata of the industrial and commercial sectors.</p> <p>3)' Some sectors are repeatedly represented.</p> <p>4)' It will be easily manipulated by a few people.</p> <p>5)' The method of selection of the NPC and PCC members is still unclear; the representatives selected by other means will also include persons who are familiar with the functioning of the Central Government.</p> |
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- 5) It provides a channel to enter the political scene for people who possess the qualities and will contribute to the government but cannot be elected through functional constituency or district elections.
- 6)' It is not a genuine election, but an appointment system in disguised form.
- 7) To maintain stability and continuity.
- 7)' Political elitism will incur popular indignation and lead to social unrest.

3.2 Selection of the chief executive on the basis of the legislature

This method may take two forms: 1) Candidates are to be nominated and elected by members of legislature; 2) Members of the legislature are to set up by election among themselves an executive committee which is responsible for selecting the chief executive. There are different rationales behind the above methods, and the pros and cons are listed below.

3.2.1 Selected by direct election within the legislature:

There is no special requirement regarding the qualifications of candidates. They can stand for election as long as they are nominated by a certain number (e.g. 10) of the legislature members. Election is to be held by members of the legislature, candidates have to obtain the absolute majority of votes in order to win the election. [Meeting Point (7/86), Fung Wai Kwong (7/86), Joseph Y. S. Cheng (2/86), Li Wah Ming]

Different views on this election method:

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| Pros | Cons |
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| <p>1) The selection of the chief executive by the legislature can ensure that he will have the trust and support of the legislature, and they can exercise mutual checks and balances.</p> <p>2) Since the legislature is constituted by various modes of elections (functional constituency, direct and indirect elections), the representativeness of the members can be guaranteed. The chief executive selected by such a legislature will</p> | <p>1)' The selection of the chief executive by the legislature is against the principle of separation of powers.</p> <p>2)' Although members of the legislature represent interests of different sectors, it does not necessarily mean that the chief executive elected by them will be representative of the interests of the various sectors of society.</p> |
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also be representative of the views of the various sectors of society

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| <p>3) Since there is no special requirement regarding the qualifications of candidates, more aspiring persons will be allowed to stand for election.</p> <p>4) Some members considered that it was in accordance with the principle that the executive authorities should be accountable to the legislature.</p> | <p>3)' Since there is no special requirement regarding the qualifications of candidates, the quality of the candidates can hardly be guaranteed.</p> |
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3.2.2 Selected by indirect election within the legislature:

An executive committee is to be set up by election among the legislature members. The chief executive is to be selected by election or through consultations among members of the executive committee. The chief executive shall be the chairman of the executive committee, but he shall practise collective leadership and consult his committee members when making policies. Having a chief executive elected every two years with a non-renewable term of office would materialise the characteristic of collective leadership. The executive committee comprises different departments which enjoy equal status. In tackling important issues, decisions have to be made after discussion where the minority is subordinate to the majority and the chief executive does not have any prerogative. Apart from heading his department, the chief executive is to convene and preside at meetings of the executive committee, and externally, he is to perform protocol duties. [Albert Chan (27/1/86), Hong Kong Affairs Society (4/86)]

Different views on this election method:

| | |
|------|------|
| Pros | Cons |
|------|------|

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| <p>1) Collective leadership can prevent instability caused by having the chief executive as the centre of power in the executive authorities. If a fatuous and self-indulgent chief executive is selected as the only leader, or if this only leader has a bad relationship with the Central Government, society will be the victim of undesirable</p> | <p>1)' Having the chief executive as the centre of power in the executive authorities may not result in stability because the chief executive will be checked and balanced by the judiciary and the legislature.</p> |
|--|--|

consequences. However, under collective leadership, even if there are some fatuous members in the executive committee, the effect will be minimal because decisions are only made after discussion by the whole committee. On the other hand, if a capable chief executive is selected, he may become a "political giant" under the "system of chief executive leadership"; as the Central may not like a chief executive who exerts too much political influence, the relationship between the Central and the SAR may be adversely affected.

2) Collective leadership is suitable for the diversified community of Hong Kong because different sectors have different interests. Collective leadership ensures that representatives in different sectors can participate in the policy-making on the highest level.

It also provides the chance for communication and co-ordination among the various sectors, and enables an even distribution of power and interests.

3) Collective leadership can enhance co-operation among committee members who are to jointly lead the executive authorities. On one hand, it can prevent conflicts and suspicion among members who strive for the highest leading power; and on the other, political talents can be accommodated and preserved. If executive power is centralised in one person, many capable people will be

2)' Collective leadership is not the only way to provide the chance for communication and co-ordination among the various sectors.

3)' The terms of reference of each members under collective leadership are not clearly defined. Low efficiency will result and members will tend to shirk responsibilities. Moreover, even if executive power is centralised in one person, people of different views may not necessarily form opposition parties because it is very normal to have people of divergent views.

pushed out when their political beliefs are different from that of the leader, and they may resort to forming opposition parties.

4) Some members considered that it was in accordance with the principle that the executive authorities should be accountable to the legislature.

4)' It will lead to confrontational politics and the conflicts among various sectors in society will be intensified, undermining the prosperity and stability of Hong Kong.

CONSULTATIONS

4 Selection of the chief executive through consultations

The Joint Declaration stipulates that consultation is one of the methods for selecting the chief executive of the HKSAR, but there is no further elaboration on this method. According to the proposals for selecting the chief executive through consultations as submitted by the local people, the main characteristic of "consultations" is that the Central Government will be more involved in the selection of the chief executive (including nomination, consultation and decision), but it is also proposed that Hong Kong should carry out consultations on its own with no participation of the Central Government. The following are the proposals for selecting the chief executive through consultations.

4.1 Proposal for the selection of the chief executive through consultations

4.1.1 Candidates of the chief executive may be nominated by members of the legislature or other organisations. The Central Government will eliminate in the candidates' list those who cannot be accepted by the Central, most of the Hong Kong people or certain sectors of society. Then there will be a second round of consultation in which individual legislative members, various commercial and industrial organisations, political bodies and grassroot associations will be consulted by an indefinite means. Finally, a candidate who are most acceptable to the majority of people will be decided on and such decision will then be submitted to the legislature for endorsement. (Sin Ming Lun 3/86)

Different views on this proposal:

Pros

- 1) The Central Government's participation in the process of consultation ensures that the future chief executive will be accepted by the Central Government.
- 2) In the process of consultation, the Central Government will solicit opinions from Hong Kong people. This can ensure that the interests of Hong Kong people will be taken into consideration.
- 3) The final candidates for the chief executive must have been approved of by the legislature, so the chief executive elected will have the support of Hong Kong people.
- 4) The chief executive selected by this method will be a "low-key" person who can co-ordinate the interests of the various sectors. This kind of method which encourages co-operation will be favourable to the co-ordination of the various sectors, and it is especially meaningful to the weak political environment of Hong Kong. (A member noted that it was not clear whether "low-key" referred to the selection process or the chief executive selected by this process. If it was the latter case, he still did not understand what was meant by "low-key". Besides, the chief executive selected by this process would not necessarily be a "low-key" person.)

Cons

- 1)' The Central Government's participation in the process of consultation is against the principle of a high degree of autonomy.
- 2)' The Central Government will consult Hong Kong people only as it wishes. No one can guarantee that the people consulted are those who truly fight for the interests of Hong Kong people. Furthermore, the Central Government has the right of rejecting their views.
- 3)' The Central Government will only provide a list of candidates for the chief executive to the legislature for endorsement. The legislature will be nothing more than a rubber stamp.
- 4)' The chief executive who best suits the development of Hong Kong should not be a low-key leader.

- 4.1.2 The candidates for the chief executive will be freely nominated by people of the various sectors. Then the Central Government will set up a selection committee comprising Hong Kong people responsible for consulting members of the legislature and people of the various associations (including functional groups, political bodies, grassroot organisations). A list of not more than three candidates will be drawn up and submitted to the legislature for discussion. With the consent of a 2/3 majority of the legislature, an official candidate will be selected. This candidate will be appointed by the Central Government. After this mode of central consultation is practised for some time, and if social conditions allow, the list of three candidates will be given to the people of Hong Kong for election. (Sun Wai See 5/86)

Different views on this proposal:

Pros

- 1) The Central Government's participation in the process of consultation ensures that the future chief executive will be accepted by the Central Government.
- 2) The SAR legislature will be highly involved in the selection process, which will ensure that the future chief executive will also be accepted by the legislature.

Cons

- 1)' The Central Government's participation in the process of consultation is against the principle of a high degree of autonomy.
- 2)' Since the list of candidates for the chief executive will be drawn up by the Central Government, the influence of the legislature will be minimal.

- 4.1.3 With five members selected by the legislature members from among themselves and another five members selected by the Hong Kong deputies to the NPC from among themselves, an impartial and balanced "ten-member nomination group" will be formed. The group will, through consultations, recommend three candidates from 1) legislature members, 2) civil servants, and 3) the various sectors of society. Then the Central Government will appoint any one of the three candidates as the chief executive of the HKSAR.

If all of the three candidates are not acceptable, the nomination group will have to recommend once again. (K.S. Lo 9/86)

Different views on this proposal:

Pros

- 1) The participation of both the representatives of the HKSAR and of the Central Government in selecting the chief executive will ensure that the chief executive will have the support of both parties. It is a fair and balanced method which will gain support and trust of the general public.
- 2) The processes of consultation and selection ensure that only the people of most suitable background, qualifications and abilities will be selected and appointed. As selection is based on the abilities of the candidates, it will not be manipulated by interest groups or pressure groups.
- 3) It will avoid the confrontation caused by party politics.

Cons

- 1)' The Central's participation in the selection of the chief executive is against the principle of equality. Hence, such method will not gain the support and trust of the public.
- 2)' Only a small number of people may participate in nomination and consultation. This is against the principle of equality. Interest groups or pressure groups will nominate people whom they deem highly capable. The suitability of the chief executive can be guaranteed only when all sectors have the right to seek and nominate best qualified people.
- 3)' Party politics is an inevitable and healthy development. It may not necessarily lead to confrontation.
- 4)' It is not in accordance with the principle that the executive authorities shall be accountable to the legislature.

4.1.4 Among the proposals for selecting the chief executive by the grand electoral college, some of them also include consultations. Please refer to 3.1.5.1, 3.1.5.2, and 3.1.5.3.

5 Qualities and abilities of the chief executive

A member proposed the following:

The chief executive should:-

- a) inspire confidence and trust from the people, legislature, executive authorities and the Central Government;

- b) generate participating support from the people;
- c) be accountable to and supported by the legislature;
- d) provide leadership in the executive; and
- e) be acceptable and appointable to the Central Government.

A member, however, noted that these criteria were so vague that it would be inappropriate to put them down in the Basic Law as qualifications for the chief executive.

6 Conclusion

With regard to the proposals on the selection of the chief executive, they are summarised into four methods, namely:

- 1) Elected by direct election with universal franchise. There are two types: one with restriction to nomination and the other without. For the former type, candidates may be nominated by members of the legislature, a nomination committee or an electoral college.
- 2) Elected by a grand electoral college which is responsible for electing and/or nominating the chief executive.
- 3) Elected by the legislature. Members of the legislature are responsible for nominating the chief executive.
- 4) Selected through consultations. According to the existing proposals, the chief executive may be nominated by people from the various sectors and consultations will be held by a specific committee.

The various proposals have different characteristics and rationales, as well as cases for and against them.

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

FINAL REPORT ON
THE POLICY REGARDING INDUSTRY AND COMMERCE,
FREE TRADE, AND POLICY REGARDING AGRICULTURE AND FISHERY

(passed by the Executive Committee on 8 August 1987)

Special Group on
Finance, Business, and Economy

1 Foreign Trade

1.1 According to Mr Wong Po Yan's report, the provisions under section 3: "foreign trade" are as follows:

- (1) "The HKSAR shall continue a policy of free foreign trade."
- (2) "The HKSAR Government shall protect the freedom of foreign trade, and the free movement of goods (including invisible capital) and capital."

1.2 Members held discussions on the foregoing provisions and expressed the following comments:

- (1) The expression "a policy of free foreign trade" is obscure. It is not a common economic term. Does it refer to "a free trade policy" or "the freedom to conduct foreign trade" or other meanings?
- (2) "Invisible capital" is not a common economic term. Does it refer to "invisible trade" or "intellectual property" or other meanings? If "invisible capital" includes "intellectual property", the provision will be contrary to the view of the Working Group. Members hold that the free movement of intellectual property should not be allowed as the HKSAR Government should be responsible for protecting the copyrights, patents and registration in the HKSAR.

1.3 Members hold that the provisions regarding the trade policy should be re-drafted as follows:

- (1) The HKSAR shall practise a free trade policy and protect free trade. The features of a free trade policy are: free enterprise, minimum government intervention, no control on foreign exchange, free port status, free flow of capital, etc.
- (2) The HKSAR shall protect intellectual property such as copyrights, patents, and registration.
- (3) The HKSAR shall have the right to negotiate with foreign governments for the furtherance of trading benefits provided that such right is not a breach to the PRC sovereignty on the diplomacy level.
- (4) A view was expressed that it was preferable to allow the HKSAR Government to decide its economic and trade policies on its own.

1.4 The provisions proposed above by members are elaborations on a principle under the Joint Declaration i.e. the HKSAR shall be an independent economic entity. Members hold that the Basic Law should contain more detailed provisions to guarantee such independence.

1.5 In addition, members are very much concerned that the HKSAR Government should have the right to fight for a seat in any international body with the purpose of promotion of trade. Members are of the view that the Basic law should provide for such right.

2 Policy regarding industry and commerce

2.1 According to Mr Wong Po Yan's report, the provisions under section 4: "the various industries and commerce" are as follows:

- (1) "The HKSAR shall practise a free and open policy regarding industry and commerce".
- (2) "The HKSAR shall encourage industrial investment and technological advancement, and open up burgeoning industries in order to strengthen its competitiveness in the international arena."
- (3) "The HKSAR Government shall actively create the necessary environment and conditions for the development of industry and commerce."
- (4) "The HKSAR shall actively adopt appropriate policies to promote the development of commerce, transport industry, public utilities, service industries, tourism, real estate industry, and agriculture and fishery."
- (5) Some Drafting Committee members hold that there should be a separate clause providing for commercial development, e.g. "The HKSAR Government shall protect the freedom of commercial undertakings and shall adopt active measures to facilitate commercial development."

2.2 Members expressed the following views on the provisions regarding "the various industries and commerce":

- (1) Members hold that the provision on "a free and open industrial policy" is hardly comprehensible and may be misleading. "A free and open industrial policy" refers to the absence of any established policy, that is, the government would not interfere in any matter affecting industry e.g. environmental control, labour legislation etc. The Working Group advocates "free enterprise" and "a fully competitive economy" instead of "a free and open industrial policy".

- (2) If the Drafting Committee was in favour of a free and open industrial policy, the ensuing provisions on the encouragement of industrial investment would be inconsistent.
- (3) The provisions seem to have confused the terms "policy", "system", and "measure".
- (4) The draft version can better be summarised in six words "The HKSAR Government should encourage industrial development". The word "encourage" is capable of too broad an interpretation, ranging from verbal exhortation to a programme of action.
- (5) Technology and manufacturing are inseparable and by moving technology to chapter 6 which deals generally with science and technology for society as a whole, the industrial policy in chapter 5 has become vague and inconsequential.

2.3 Members hold that the provisions regarding industrial and commercial policy should be re-drafted as follows:

- (1) The HKSAR shall maintain the existing free enterprise policy to activate a free and fully competitive economy.
- (2) The HKSAR Government shall continue to create the necessary environment and conditions for the development of industry and commerce.
- (3) The HKSAR Government shall maintain the policy of giving investment incentives.
- (4) The HKSAR Government shall continue to pursue a programme of industrial support services.
- (5) The HKSAR shall promote:-
 - i) the development of industry (and take the role of small and medium industries into account);
 - ii) the establishment of new industries; and
 - iii) advances in technology capability.
- (6) The HKSAR will:-
 - a) be fully entitled to export quotas, tariff preferences and other similar arrangements obtained by itself;
 - b) operate as a separate customs territory.
- (7) The HKSAR shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.
- (8) The HKSAR Government shall on its own decide policies regarding commerce and various industries such as transport, public utilities, service, tourism, real estate, and agriculture and fishery.

* Appended for reference is the written submission from representatives of the agriculture and fishery sector.

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

1 Policy on agriculture and fishery

The Consultative Committee Members have received suggestions concerning the agricultural policy of the HKSAR submitted by representatives of the agricultural sector. Their suggestions are as follows:

- 1) The social and political status of farmers must not be overlooked. Agricultural bodies should be regarded as a functional constituency and there should be seats in the legislature allocated to agricultural representatives. Agricultural representatives should also participate in district organisations where there is a concentration of agricultural activities in the district.
- 2) Set up a consultative committee on agriculture to review policy on agriculture at regular intervals.
- 3) There should be an appropriate land policy to preserve agricultural land, develop agricultural resources and assist agricultural development.
- 4) Besides safeguarding the rights of landowners, those of the tenant farmers should also be safeguarded. Agricultural investment should be protected by law. In case of requisition of land, compensations to farmers' investments should be calculated in terms of actual materials, facilities and production cost, and should be reviewed at regular intervals. There should also be arrangements for reallocation or employment transfer so that the farmers' livelihood can be maintained.
- 5) Set up various sorts of markets for agricultural produce so that there will be a more reasonable supply and distribution situation.
- 6) Preserve the existing agricultural organisations and agricultural development funds to assist agricultural development.

The suggestions were raised at a seminar for representatives of the agricultural sector. The convenor of the seminar was Mr Lee Lin Sang, member of the Consultative Committee for the Basic Law.

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

FINAL REPORT
ON
PUBLIC SERVANTS

(passed by the Executive Committee on 8 August 1987)

Speical Group on
The Political Structure of the SAR

1. Foreword

The public service is a major component of the political structure of Hong Kong. Policies are formulated by public servants and decided by the Governor in Council. The formulation of policies is the principal work of Secretary level Administrative Officers. Some policies do not receive the Governor's decision in Council but are applied administratively. This discussion paper will focus on a number of issues: public servants and politics, nationality of public servants in relation to their treatment, conditions of service and employment protection, and Secretary level officials.

2. Civil servants in Hong Kong

The civil service provides the staff for all Government departments and other units of the Administration. It employs some 176,000 people, or about six percent of the labour force in Hong Kong. In recent years the size of the service is growing by about two percent a year in average in line with the expansion of services to the public. Wastage from all sources, including resignation and retirement, i.e. the turnover rate in public service has been averaging four percent per year: this reflects the fact that the Civil Service provides a full-time career up to the normal retirement age for most who work in it.

The civil service is a unified service in the sense that its 176,000 officers are all subject to common appointment procedures and common disciplinary codes for local officers or overseas officers as relevant. Officers may be transferred from one part of the service to another, and are subject to a common central direction under the Chief Secretary, who is both a member and head of the service. With the Governor, they represent the administration of Hong Kong. Civil servants are deployed to a total of 14 Branches and 57 Departments and Agencies of the Government. The heads of Branches are of Secretary rank. Some Secretaries are appointed to the Executive Council and the Legislature Council in their individual capacity. Together with the Chief Secretary, the Financial Secretary and the Attorney General, they make up about one-third of the Executive Council membership. Ten civil servants of Secretary rank and above are Official Members of Legislature Council.

Because of the compactness of the territory, it has been found advantageous to have a single Civil Service performing both central and local government functions, and also many of the functions undertaken elsewhere by statutory public bodies. The result is a Civil Service of very great diversity.

The Public Service Commission is responsible, in general terms, for advising the Government on civil service appointments, promotion and discipline: it also advises on some aspects of staff training. The Commission is an independent body, established by Hong Kong law, comprising a full-time chairman and several members appointed from among leading citizens. The advice of the Commission is customarily observed.

Appointments to the most senior 29,000 posts in the civil service are referred individually to the Public Service Commission for its advice before being made by the Secretary for the Civil Service or other appropriate authority. The authority to make appointments to more junior posts has been delegated to heads of department but the Public Service Commission advises on procedures and exercises a monitoring role.

There are prescribed qualifications for appointment to every post in the civil service. In most cases, the qualifications required are educational, professional or relevant experience. All vacancies are normally filled by promotion from within the service; if no suitable candidates are available, the vacancies will be advertised. Intake is determined strictly on the basis of qualification and competition among qualified candidates. Overseas recruitment is only undertaken where sufficient qualified local candidates are not available. Examples are administrative officers, police inspectors, lawyers, judicial officers, architects, engineers and surveyors.

On appointment each officer is provided with a letter of appointment and supporting memoranda setting out the terms and conditions of the appointment. The standard terms of appointment provide that, after satisfactorily completing a probationary period, the officer is confirmed to the permanent and pensionable establishment. The officer then has an expectation of a career until he reaches the normal retiring age laid down in the Pensions Ordinance. In addition a small number of officers is employed on contract or agreement terms, normally for a period of two and a half years. These contracts are renewable, subject to advice need.

The Civil Service provides appropriate in-service training for all officers, for example, training in Government procedures and supervisory skills. In some cases, officers are also given training, either locally or overseas.

to enable them to obtain some internationally recognised qualification required by their job. Thus, the training given in Hong Kong to health inspectors and nurses leads to qualifications recognised by the relevant professional bodies in Britain. Overseas training is provided to enable officers to acquire specialist qualifications for appointment to posts such as medical consultant or ship surveyor, or to develop their administrative skills.

The conduct and performance of all officers of the public service is assessed by a formal system of annual appraisal supervised by the Public Service Commission.

The Government is advised on matters relating to pay and conditions of service by two independent bodies composed of men and women from the private sector. The Standing Commission on Civil Service Salaries and Conditions of Service is responsible for advising the Government on all matters affecting the grade structure, salary scales, pay, allowances, conditions of service and fringe benefits of all non-directorate public officers. The Standing Committee on Directorate Salaries and Conditions of Service performs the same function in respect of Directorate officers.

Major Issues

3. Public servants and politics

3.1 Public servants' participation in politics

3.1.1 Present situation

As members of the public, Hong Kong's public servants have the right to vote for candidates they support in political elections. That is, they have the right to vote. However, according to the Civil Service Regulations, public servants cannot make public comments concerning politics in their personal capacity. An officer, whether on duty or on leave, may not publish anything which may reasonably be regarded as of a political or administrative nature without the permission of his Head or Deputy Head of Department or Head of Grades. But the fundamental principle to be borne in mind is that it is desirable for senior officers to discuss in their official capacity issues of public interest in public in a constructive way. Head of Departments should seek comments from the appropriate Branch of the Government Secretariat on the contents of speeches or papers to be published on controversial subjects of considerable public interest. "Publish" includes making public by interviews and speeches, by letters and articles in the press, or by talks and discussions on radio and television programmes.

According to the Electoral Ordinance, holders of any public office are disqualified from standing for election [1]. Public servants who wish to stand for elections must first resign from public office.

[1] Electoral Ordinance (1984):

19. A person shall be disqualified for being elected or being nominated as a candidate or holding office as a member if he

(a) holds any public office (other than as a member of an auxiliary force) or any office of emolument in the gift or disposal of the Urban Council or any committee thereof or having held such office has been dismissed therefrom;

3.1.2 Stipulations in the Sino-British Joint Declaration regarding public servants' standing for elections or serving as councillors.

The Joint Declaration has no stipulations on this issue.

3.1.3 Proposals regarding public servants' standing for elections or serving as councillors after 1997:

3.1.3.1 Public servants standing for election or serving as elected councillors.

Arguments for:

- (1) As a member of the public, the public servant should have the basic human right to stand for elections or serve as councillors.
- (2) Many public servants are qualified personnel with professional knowledge and are familiar with the running of the Government. The contribution of their specialties in their standing for elections or serving as councillors will be conducive to social development.
- (3) Among the current elected members, many of them are elected by functional constituencies so that in addition to representing the interests of Hong Kong people, they can also fully represent their respective functional constituencies and directly reflect interests of the various sectors. The public service comprising more than 100,000 members should be a constituency that is of substance and of importance in society; public servants should have equal right to stand for elections or serve as councillors so that they can represent the interests of the hundred of thousands of public servants and directly reflect their views.

Argument against:

- (1) The politically neutral role of public servants should be preserved in order that they can carry out (execute) policies impartially. Conflict of interests between their work and their standing for elections or serving as councillors should be minimised in order to stabilise the running of the Government.
- (2) A member pointed out that in Western countries, there was rarely any precedent of allowing public servants to stand for elections or serve as councillors. (But some members noted that the expression "stand for elections or serve as councillors" is not well defined; some members doubted the accuracy of the argument.)
- (3) Public servants should be restricted from discussing policies publicly from their own view points because should public servants stand for election, they would have to discuss policies publicly from their own view points. This would tend to generate public support or opposition for a particular public servant's view point and thus politicise the public service. Furthermore, if public servants as a body become involved in promoting support for or opposition to a particular public servant's participation in politics, the public will lose confidence in the ability of the public servants to conduct their work with political impartiality. This will generate suspicion and distrust of authority, create confusion in the mind of the public about the role of the public service and public servants, and blur the roles of the legislative and executive functions of government.

3.1.3.2 Serving public servants cannot be elected to the legislature, Urban Council, Regional Councils or District Boards. However, they should be allowed to stand for elections provided that they would resign from their posts in the public service or have an early retirement if elected.

Arguments for:

- (1) This will provide an opportunity for public servants to stand for elections or serve as councillors; they will not be deterred by the prospect of losing their jobs.
- (2) The arrangement of public servants having to resign from office or have an early retirement when elected can avoid any clashes of interests between their public office duties and their standing for elections or serving as councillors. Through this arrangement, the political neutrality of the Hong Kong public service structure can be maintained.

- (3) Participation of ex-public servants as elected members of the legislature would be extremely helpful to the legislature's understanding of the functioning of the executive authorities and government departments.

Argument against:

- (1) According to the present understanding, public servants should not as individual public servants become political figures in their own right outside the official executive function of the public office they held. If a public servant wishes to hold a political public post he must distance himself from the public service sufficiently so that no conflict of interest will arise or will be thought to arise. This might be done by resignation, no pay leave, special release etc. It very much depends which part of the public service he is involved in. But standing for election in this way will become a legitimate reason for early retirement, which may tend to have a detrimental effect on the public service by attracting many top public servants to retire early, thus creating a shortage of talent in the public service.

3.2 Members held that public servants should be unaffected by politics: The legislature has no power to remove public servants, only the chief executive or the one authorised by him has the power to do so by going through certain procedures (which is now known as the Colonial Regulations). It was proposed that the Colonial Regulations should be appended to the Basic Law after appropriate amendments are made. But reservations about this proposal were expressed by members who held that since amendment to the Basic Law would entail complicated procedures, details should not be spelt out in the Basic Law.

3.3 Members held that public servants could be appointed as members of the Executive Council or similar organisations (councils): In order to put the talents in the public service to full use, their appointment as members of the Executive Council or similar Councils should be allowed; however they must resign their post from the Public Service or have an early retirement when appointed (except for those who are appointed by virtue of their post).

3.4 Members held that public servants should not be persecuted for political reasons, nor should they suffer any loss in respect of their posts or other benefits when a new chief executive assumes office.

3.5 Members held that public servants should remain politically neutral.

4. On nationality and treatment of public servants

4.1 Definition of "public servants who are British and other foreign nationals"

(1) Members held that "public servants who are British and other foreign nationals" referred to the public servants holding non-PRC passports. Persons who hold no passports other than BNO passports or Certificates of Identity (CI) and are of Chinese blood will be considered persons of Chinese nationality.

(2) Some members were of the view that "public servants who are British and other foreign nationals" referred to public servants who were not Chinese nationals.

4.2 Nationality of public servants in relation to the posts that they can hold in the government. *

| | | |
|--------------|---|---|
| 4) Stateless | According to present practice: 1) public servants at all levels, including officials at Secretary level# | The Joint Declaration does not specify whether this category of people can serve as heads of major government departments and as deputy heads of some of them |
|--------------|---|---|

* The above chart is extracted from the appendix of the Final Report on Definition of Inhabitants, Right to Land, Right of Abode, Freedom from Deportation, and Rights to Vote and Stand for Election. Please refer to that document for further details.

** The actual provisions are as follows:

The Hong Kong Special Administrative Region Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the Hong Kong Special Administrative Region to serve as public at all levels, except as heads of major government departments (corresponding to branches or departments at Secretary level) including the police department, and as deputy heads of some of those departments. The Hong Kong Special Administrative Region Government may also employ British and other foreign nationals as advisers to government departments and, when there is a need, may recruit qualified candidates from outside the Hong Kong Special Administrative Region to professional and technical post in government departments. (Section I, Annex I)

Before 1985, all posts above the Secretary for District Administration had to be filled by British nationals.

4.2.1 Advisors are also members of the public service

Argument for:

(1) The Joint Declaration provides that "The Hong Kong Special Administrative Region Government may also employ British and other foreign nationals as advisors to government departments... The above shall be employed only in their individual capacities and, like other public servants, shall be responsible to the Hong Kong Special Administrative Region Government". The mention of "like other public servants" implies they themselves are also considered public servants.

| Nationality (the nationality of public servants after 1997) | Posts which they are eligible to hold in the government | |
|--|---|--|
| | Before 1997 | After 1997 |
| 1. Chinese (including persons of Chinese origin who are now holding C.I. and B.N.O.) | According to the present practice: 1) public servants at all levels, including officials at Secretary level# | According to the provisions under the Joint Declaration:** |
| 2. British (Resident British Citizens and Resident United Kingdom Belongers) | According to the present practice: 1) public servants at all levels, including officials at Secretary level# | According to the provisions under the Joint Declaration:** |
| 3. Other nationalities | According to the present practice: 1) public servants at all levels, including officials at Secretary level# | According to the provisions under the Joint Declaration:** |

Argument against:

- (1) There is not sufficient evidence to show that advisors are public servants. They may be contract staff but, like other public servants, shall be responsible to the HKSAR government.
- 4.2.2 Whether the chief executive is a public servant, or not is still an open question. The post of governor under the present system is not within the establishment of the public service.
- 4.3 Benefits of Hong Kong public servants who are recruited overseas:

The basic benefits enjoyed by public servants who are recruited overseas are the same as those of their local counterparts. However, because they are recruited from abroad they will have to be provided with (i) travelling expenses to come to Hong Kong; (ii) housing in Hong Kong; (iii) sufficient leave to return to their countries of origin; (iv) travelling expenses for leave; and (v) allowance for public servants recruited overseas.
- 4.4 Stipulations in the Joint Declaration regarding the benefits of public servants who are foreign nationals
 - (1) "The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence." (Section IV of Annex 1)
 - (2) "The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service (including special bodies for appointment, pay and conditions of service) shall, save for any provisions providing privileged treatment for foreign nationals, be maintained". (Section IV of Annex 1)
- 4.5 A view has been expressed that except for the stipulating regarding Secretary-level officials under the Joint Declaration, all public servants regardless of their nationalities should have equal chance of promotion.
- 4.6 Overseas recruitment of public servants

Members held that unless the talents in need could not be recruited locally, the HKSAR government should not recruit public servants from outside the HKSAR.

5. Conditions of service and employment protection for public servants

5.1 Pensions for public servants

In December 1986, the Hong Kong Government amended the original pensions scheme and announced a new proposal. This proposal was passed, and the new scheme commenced on 1 July 1987:

- (1) An extension of the normal retirement age from 55 to 60;
- (2) Pensions to be made a right rather than a privilege;
- (3) Under the new pension scheme, serving public servants (i.e. those who have joined the public service before 1 July 1987) may choose either the new or original pension scheme.

5.1.1 Stipulations in the Joint Declaration regarding pensions for public servants

Section IV, Annex 1 of the Joint Declaration:

"The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence."

5.1.2 Guarantee of payment of pensions to Hong Kong public servants after 1997

- (1) Members held the following view: The Hong Kong government has always been meeting its pensions commitments by drawing from its General Revenue; no special funds were ever set up to meet these payments. All along, there have not been any major problems arising from the payment of pensions to public servants. However, it was pointed out that most of the civil servants who retire now joined the government service in 1940's or 50's. As the number of civil servants during that time was only several tens of thousand, and their salaries were relatively low, the government, therefore, does not face a very heavy pensions commitment at present.

Public servants who will retire by 1997 were largely recruited in the 60's, when a large number of government posts were created and higher salaries were offered. When they will retire around 1997, a large amount of pensions will be due. Even though the Joint Declaration specifies that the HKSAR Government will pay out the pensions on terms no less favourable than before, it was pointed out that if the Government did not prepare in

advance this considerable amount of payment but would conform to the present practice of drawing on its General Revenue, this would adversely affect the finance of the Government.

- (2) Members held that the HKSAR government should set up a reserves fund for the pensions.
- (3) Members held that it was the right of public servants to receive pensions no matter they retired before or after 1997. If the government failed to pay their pensions according to law, they could make claims through legal means.
- (4) Members held that the HKSAR government should adjust the retirement benefits regularly and reasonably in order to maintain the consumption power of the retired public servants.
- (5) Members held that, in principle, public servants were employed under the pension system, but those of special posts could be employed on a contractual basis.
- (6) Under the present system, part of the pension is paid in a lump-sum which is not taxable, whereas the remaining sum is paid monthly and is subject to taxation. Some members proposed that after 1997, the pension paid monthly to public servants should not be subject to taxation.
- (7) Some members held that the pension system after 1997 should be the same as that before 1997.

5.2 Pay, allowances, benefits and conditions of service of public servants

- 5.2.1 Members held that in order to ensure the high quality of public servants, the benefits given to them by the HKSAR Government should be comparable to those given by employers in the private sector; in certain aspects, the government should set a good example so that the capable public servants can be kept on and the other talents can be attracted to join the public service.
- 5.2.2 If the HKSAR Government wishes to retain or recruit expertise provided by public servants from overseas, it will have to offer a package of pay, benefit and allowance which is attractive and internationally competitive especially for professionals and specialists; local conditions may or may not be relevant. If they are not satisfied, professionals and specialists will tend to leave.

But some members pointed out that this view was against the Joint Declaration. Some members were of the view that there were sufficient qualified personnel locally. If public servants are recruited overseas, they should enjoy the same treatment as their local counterparts.

- 5.2.3 Some members held that British and other foreign nationals could be recruited on permanent terms. Also arrangements will have to be made to provide an avenue to retain the talents of British and other foreign nationals who cannot become heads or deputy heads of departments. This should be at no less favourable pay, allowances, benefits and conditions of service than their previous posts in government departments.

5.3 Recruitment, appointment and employment of public servants

- 5.3.1 Members held that public servants should be appointed and promoted according to their qualifications, experience and ability.
- 5.3.2 Members held that except for dismissal as a result of neglect of duties there should be no requirement for public servants to leave Government employment, otherwise, they should be compensated.
- 5.3.3 Some members held that the Basic Law should state that after 1997 those in employment (whether they were recruited locally or overseas) could remain in employment if they wished.
- 5.3.4 Some members held that there was no need to continue the localisation policy in its present form, it should be modified to apply at the recruitment stage only.
- 5.3.5 Members held that political party membership should not be a requirement for appointment into the Public Service.
- 5.3.6 Members held that public servants who did not retire by 1997 should automatically become other officials.
- 5.3.7 Some members held that public servants should not be transferred to any place outside the HKSAR involuntarily.

5.4 Public service unions and associations

- 5.4.1 Members held that public servants should have the right to form unions, to negotiate the conditions of service and salaries, etc. with the government.
- 5.4.2 Members held that there should be a certain channel of consultation between public servants and the government after 1997.

5.4.3 Members held that there should be an independent channel through which public servants could launch complaints against the government, their employer.

5.5 Public servants' accountability

5.5.1 Some members held that public servants should not be persecuted or punished if they perform their duties according to prescribed policies. Unless they make serious mistakes or fail to perform their duties, public servants should have employment protection. They can only be removed from office according to the procedures provided by the Civil Service Regulations, and should not be held accountable for policies.

5.6 Public Service Commission

5.6.1 Some members held that the Public Service Commission should have the power to directly appoint public servants, and that the relationship of the two standing commissions with the government should be stated in the Basic Law. But a member pointed out that the Public Service Commission should only have the power to set down regulations in respect of employment of public servants.

5.7 Public Service Regulations

5.7.1 Members held that the Basic Law should provide that public servants are required to abide by the Public Service Regulations as promulgated by the head of the public service and that any of the existing Public Service Regulations which will be applicable after 1997 should remain in force.

6 Secretary level officials

6.1 The present situation of officials at Secretary level

6.1.1 There are at present 18 officials at Secretary level among whom the Chief Secretary, Attorney General and Financial Secretary are of the highest rank. Those who are directly responsible to the Chief Secretary include Secretary for Administrative Services and Information, Secretary for District Administration, Secretary for Education and Manpower, Secretary for Health and Welfare, Secretary for Housing, Secretary for Lands and Works, Secretary for Municipal Services, Secretary for Security, Secretary for Transport, Secretary for Civil Services, Secretary for General Duties, and the Deputy Chief Secretary -- they are the heads of branches under the Government Secretariat.

Those who are directly responsible to the Financial Secretary include Secretary for Economic Services, Secretary for Monetary Affairs and Deputy Financial Secretary.

6.1.2 The Secretaries in the Hong Kong public service exert significant influence on the formulation of governmental administrative policies. The Chief Secretary, the Attorney General and the Financial Secretary are ex-officio members of the Executive Council. The other two official members are also Secretary level public servants appointed by the Governor. The Executive Council is the Governor's principal consultative body on policy-making.

In the Legislative Council, the three ex-officio members are the Chief Secretary, the Attorney General and the Financial Secretary. The other seven official members are public servants at Secretary level and are appointed by the Governor.

6.1.3 At present, the most controversial aspect of the role of the Secretaries is that they are the executives, the supervisors of government departments, but on the other hand, they also participate in the formulation of policies.

At the moment, under the Secretaries who participate in the formulation of policies are directorate staff who have much executive authority and are responsible for executive duties. Thus there is not much problem.

All the Secretaries are public servants, and all public servants are politically neutral. However, since Secretaries have the opportunity to participate in the Executive Council where they have to take some political standpoint and play certain political roles.

6.2 Stipulations in the Joint Declaration regarding officials at Secretary level

Section I, Annex 1 of the Joint Declaration:

"Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government."

This section mentions only the nomination and appointment of the Secretaries but does not specify their political status.

6.3 Discussion on the status of principal officials (corresponding to officials at Secretary level) after 1997

6.3.1 Views on appointment and promotion of public servants to be principal officials (corresponding to officials at Secretary level)

Arguments for:

- (1) The present system will be retained.
- (2) As public servants will not be influenced by the partial interests of voters, they will take the overall interests of society into consideration when formulating policies.
- (3) Public servants must be involved to some extent in policy formulation because the workability of the proposals will be best assessed by those who have to carry out the executive function. This is very different from deciding policies. The practice that public servants can take up secretarial posts has definite advantages.
- (4) After 1997, the chief executive will be a political appointee and the Secretaries will take orders from him. If the Secretaries commit any error, the chief executive and executive authorities will have to face the consequence of impeachment or removal. Thus, despite their status as public servants, the Secretaries have to assume direct or indirect responsibilities.

Arguments against:

- (1) After 1997 the Secretaries should be political appointees instead of public servants. According to the Joint Declaration they can be created by a process of nomination by the Chief Executive or appointment by the Central Government. The process of selecting the Chief Executive by consultation or by election held locally implies a democratic process, therefore political. In turn this indicates that the Chief Executive himself will be a politician, therefore, the nomination he himself made will be political. Because political aspects are not one of the criteria for promoting public servants, it follows public servants cannot be principal officials. If the chief executive wishes to appoint a public servant to be a principal official, that public servant should relinquish his public servant's status.
- (2) It is unreasonable that despite their influence on the government's policy-making, the Secretaries do not have to assume any political responsibilities for their decisions, i.e. the public cannot impeach or dismiss a Secretary when they are not in favour of his views.

- (3) Public servants must be involved to some extent in policy formulation because the workability of the proposals will be best assessed by those who have to carry out the executive function. Formulating policies and policy deciding functions are not the same, so a clear division should be drawn between them. Because whoever decides policy should be accountable to the legislature, this is an inappropriate function for public servants who are expected to be politically neutral.

- 6.3.2 It was suggested that in order to implement the Joint Declaration and to ensure the efficiency of the government, the government driven by the civil service as of the pre-1997 period should be developed into a political structure which includes a neutral civil service and is driven by a responsible Executive Council. Principal officials (equivalent to Secretaries) in the Executive Council are responsible for giving advice to the chief executive and also monitoring and supervising the work of their departments. Under this system, civil servants under the principal officials are only responsible for assisting the principal officials and implementing policies; whereas the formulation of policies is left to the principal officials or the Executive Council. This arrangement not only retains the valuable administrative experience of the civil servants, but also maintains the political neutrality of the civil service, thus ensuring that administrative efficiency will not be affected by political changes.

With a neutral civil service, the promotion of public servants (civil servants) in the future SAR can be decided on the basis of or with reference to the pre-1997 Civil Service Regulations. As regards the ceiling for promotion, the highest rank to which public servants can be promoted is the "chief administrative officers" of the various departments. They are responsible for assisting the principal officials of the SAR; they only implement policies but do not assume any political responsibilities.

After the establishment of the HKSAR, the Secretaries of the Hong Kong government before 1997 can automatically become the "chief administrative officers" of the SAR. However, the right of policy-making enjoyed by the Secretaries (i.e. the "chief administrative officers" after 1997) at present will be taken over by the principal officials nominated by the chief executive of the SAR.

- 6.3.3 A view has been expressed that the public servants currently in office (except for those of foreign nationalities) should all be nominated by the chief executive and reported to the Central Government for appointment as principal officials after 1997.

6.3.4 Public servants must be involved to some extent in policy formulation because the workability of the proposals will be best assessed by those who have to carry out the executive function.

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

FINAL REPORT ON
THE COMPOSITION AND TERMS OF REFERENCE
OF THE EXECUTIVE AUTHORITIES

(passed by the Executive Committee on 8 August 1987)

Special Group on
The Political Structure of the SAR

1 Foreword

This paper is the part on executive authorities of the discussion paper on "The Composition of the Executive Authorities and the Selection of the Chief Executive" (the other part is on the selection of the chief executive). The paper focuses on the composition and terms of reference of the executive authorities, the terms of reference of the chief executive, the appointment and the term of office, and officials on the secretary level.

With regard to each of the said issues, the present situation, the provisions under the Letters Patent and Royal Instructions and those under the Joint Declaration and the proposals for future arrangements are described.

2 Terms of Reference of the Chief Executive

2.1 Present Terms of Reference of the Governor

- 1) Shall preside at meetings of the Executive Council and seek advice from members of the Executive Council on various policies.
- 2) Need not follow the suggestions of the members of the Executive Council but decide on his own in policy-making, yet he must report his decision to the Foreign and Commonwealth Office of the United Kingdom.
- 3) May nominate unofficial members of the Executive Council and the Legislative Council, Chief Justices, judges and heads of different departments and submit the nominations to the Foreign and Commonwealth Office of the United Kingdom for appointment.
- 4) May directly or indirectly appoint senior civil servants.
- 5) May remove the judges from office upon the advice of a special committee for legal affairs.
- 6) Shall preside at meetings of the Legislative Council and may vote on every policy; and should the votes be equally divided, he shall have a casting vote in addition to his original vote.
- 7) Shall be the only person to propose financial bills for discussion at meetings of the Legislative Council.

- 8) All laws passed by the Legislative Council shall be signed by the Governor before taking effect.
- 9) May grant amnesty, and the Governor in Council may grant remission, even in the case of capital punishment.
- 10) May execute dispositions of any lands.
- 11) Shall be the titular commander of British forces.
- 12) May represent Hong Kong to sign any agreements on economic affairs with other countries.
- 13) Shall represent the Queen of the United Kingdom in Hong Kong.
- 14) Shall report the conditions of Hong Kong to the Foreign and Commonwealth Office of the United Kingdom regularly.
- 15) May exercise the power of deportation.

2.2 Provisions regarding the terms of reference of the Governor under the Letters Patent and Royal Instructions.*

2.2.1 Provisions regarding the terms of reference of the Governor under the Letters Patent:

- II We do hereby authorise, empower, and command Our said Governor and Commander-in-chief (hereinafter called the Governor) to do and execute all things that belong to his said office, according to the tenour of these Our Letters patent and any Commission issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the Colony.
- IV The Governor shall keep and use the Public Seal of the Colony for sealing all things whatsoever that shall pass the said Public Seal.
- V There shall be an Executive Council in and for the Colony, and the said Council shall consist of such persons as We shall direct by Instructions under Our Sign Manual and Signet, and all such persons shall hold their places in the said Council during Our pleasure.

* The Roman numbering is according to the original numbering of the Letters Patent and Royal Instruction.

The Governor may upon sufficient cause to him appearing suspend from the exercise of his functions in the Council any Member thereof pending the signification of Our pleasure, giving immediate notice to Us through one of Our Principal Secretaries of State. If the suspension is confirmed by Us through one of Our Principal Secretaries of State the Governor shall forthwith by an instrument under the Public Seal of the Colony revoke the appointment of such Member, and thereupon his seat in the Council shall become vacant.

VI(2) Appointments to the Legislative Council shall be made by the Governor, in pursuance of any Instructions under Our Sign Manual and Signet or through one of Our Principal Secretaries of State, by an instrument under the Public Seal of the Colony.

VII(1) The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.

X When a Bill passed by the Legislative Council is presented to the Governor for his assent he shall, according to his discretion, but subject to any Instructions addressed to him under Our Sign Manual and Signet or through one of Our Principal Secretaries of State, declare that he assents thereto, or refuses his assent to the same, or that he reserves the same for the signification of Our pleasure.

XI A Bill reserved for the signification of Our pleasure shall take effect so soon as We shall have given Our assent to the same by Order in Council, or through one of Our Principal Secretaries of State, and the Governor shall have signified such assent by message to the Legislative Council or by proclamation: Provided that no such message shall be issued after two years from the day on which the Bill was presented to the Governor for his assent.

XII In the making of any laws the Governor and the Legislative Council shall conform to and observe all rules, regulations, and directions in that behalf contained in any Instructions under Our Sign Manual and Signet.

XIII

(1) The Governor, in Our name and on Our behalf, may make and execute grants and dispositions of any lands within the Colony that may be lawfully granted or disposed of by Us.

(2) The powers conferred on the Governor by this Article may be exercised on behalf of the Governor by any person authorised, whether by name or by reference to an office, to exercise those powers by the Governor and such authorisation shall be notified in Hong Kong Government Gazette.

(3) Any such authority shall be subject to such conditions and restrictions (if any) as the Governor may specify, and may be varied or revoked by the Governor, and such conditions, restrictions, variation or revocation shall be notified in the Hong Kong Government Gazette.

XIV The Governor may constitute and appoint such Judges, Justices of the Peace and other public officers as may be lawfully appointed, all of whom shall, unless otherwise provided by law, hold their offices during Our pleasure.

XV When any crime or offence has been committed within the Colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders, if more than one; and further, may grant to any offender convicted of any crime of offence by any court of law in the Colony (other than a court martial established under any Act of Parliament), either free or subject to such conditions as the Governor may think fit to impose, a pardon or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor think fit, and may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself or be removed from the Colony.

XVI Subject to the provisions of Article XVII, the Governor may, subject to such instructions as may from time to time be given to him by Us through one of Our Principal Secretaries of State, upon sufficient cause to him appearing, dismiss or suspend from the exercise of his office any person holding any public office within the Colony, or, subject as aforesaid, may take such other disciplinary action as may seem to him desirable.

XVI A

(6) If the Governor considers that the question of removing a judge of the Supreme Court or the District Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then --

a) the Governor shall, by instrument under the Public Seal (which he may vary or revoke by another such instrument), appoint a tribunal, which shall consist of a Chairman and not less than two other members selected by the Governor from among judges who hold or have held office as judge of a court having unlimited jurisdiction in any part of the Commonwealth or a court having jurisdiction in appeals from any such court;

b) the tribunal shall enquire into the matter and report on the facts thereof to the Governor and recommend to the Governor whether he should request that the question of the removal of the judge should be referred by Us to the Judicial Committee; and

c) if the tribunal so recommends, the Governor shall request that the question should be referred accordingly.

(7) If the question of removing a judge of the Supreme Court or the District Court from office has been referred to a tribunal appointed under paragraph (6) of this Article, the Governor may suspend the judge from performing the functions of his office.

(8) Any such suspension may at any time be revoked by the Governor and shall in any case cease to have effect --

a) if the tribunal recommends to the Governor that he should not request that the question of the removal from office of the judge should be referred by Us to the Judicial Committee; or

b) if the Judicial Committee advises Us that the judge ought not to be removed from office.

XVII

(4) The holder of the office of Governor or any other person as aforesaid shall not, for the purposes of this Article, be regarded as absent from the Colony or as unable to perform the functions of that office at any time when there is a subsisting appointment of a Deputy under Article XVIIIA of these Our Letters.

XVIII And we do hereby require and command all Our officers and ministers, civil and military, and all other the inhabitants of the Colony, to be obedient, aiding and assisting unto the Governor and to any person for the time being administering the Government of the Colony.

XIX In these Our Letters Patent the term "the Governor" shall include every person for the time being administering the Government of the Colony

2.2.2 Provisions regarding the terms of reference of the Governor under the Royal Instructions:

I The Governor may, whenever he thinks fit, require any person in the public service of the Colony to take the Oath of Allegiance, in the form prescribed by the Act mentioned in Our said recited Letters Patent, together with such other Oath or Oaths as may from time to time be prescribed by any laws in force in the Colony. The Governor is to administer such Oaths, or to cause them to be administered by some public officer of the Colony.

II The Executive Council of the Colony shall consist of the Officer for the time being in command of Our regular forces within the Colony (hereinafter called the Commander British Forces), the persons for the time being lawfully discharging the functions of Colonial Secretary, of Attorney General, of Secretary for Home Affairs, and of Financial Secretary of the Colony, who are hereinafter referred to as ex-officio Members, and of such other persons as We may from time to time appoint by any Instructions or Warrant under Our Sign Manual and Signet, or as the Governor in pursuance of Instructions from Us through one of Our Principal Secretaries of State may from time to time appoint by an Instrument under the Public Seal of the Colony. Persons so appointed are hereinafter referred to as Official Members or Un-official Members according as they hold, or do not hold, office under the Crown in the Colony at the time of appointment

III Whenever any Member, other than an ex-officio member, of the Executive Council of the Colony shall, by writing under his hand, resign his seat in the Council, or shall die, or be declared by the Governor by an Instrument under the Public Seal of the Colony to be incapable of exercising his functions as a Member of the Council, or be absent from the Colony, or shall be acting in an office the holder of which is an ex-officio Member of the Council, or shall be suspended from the exercise of his functions as a Member of the Council, or whenever the seat of any such Member shall otherwise become vacant, the Governor may, by an Instrument under the Public Seal of the Colony, provisionally appoint any public officer to be temporarily an Official or Unofficial member of the

Council, and any person not a public officer to be temporarily an Unofficial Member of the Council in the place of the Member so resigning, or dying, or being suspended, or declared incapable, or being absent, or sitting as an ex-officio Member.

Such person shall forthwith cease to be a Member of the Council if his appointment is disallowed by Us, or if the Member in whose place he was appointed shall be released from suspension, or, as the case may be, shall be declared by the Governor by an Instrument under the Public Seal capable of again discharging his functions in the Council, or shall return to the Colony, or shall cease to sit in the Council as an ex-officio Member.

- IV The Governor shall, without delay, report to Us for Our confirmation or disallowance, through one of Our Principal Secretaries of State, every provisional appointment of any person as a Member of the said Executive Council. Every such person shall hold his place in the Council during Our pleasure, and the Governor may by an Instrument under the Public Seal revoke any such appointment.
- VI The Governor shall forthwith communicate these Our Instructions to the Executive Council, and likewise all such others, from time to time, as We may direct, or as he shall find convenient for Our service to impart to them.
- VII The Executive Council shall not be summoned except by the authority of the Governor.
- VIII(1) The Governor shall, so far as is practical be, preside at meetings of the Executive Council.
- IX(3) The Governor or the Member presiding, when in his opinion the business before the Executive council makes it desirable, may summon any person to a meeting of the Council, notwithstanding that that person is not a member of the Council.
- X In the execution of the powers and authorities granted to the Governor by Our said recited Letters Patent, he shall in all cases consult with the Executive Council, excepting only in cases relating to the appointment, disciplinary control or removal from office of a public officer or in cases which may be of such a nature that, in his judgment, Our service would sustain material prejudice by consulting the Council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters.

In all such urgent cases he shall, at the earliest practicable period, communicate to the Executive Council the measures which he may so have adopted, with the reasons therefor.

- XI The Governor shall alone be entitled to submit questions to the Executive Council for their advice or decision; but if the Governor decline to submit any question to the Council when requested in writing by any Member so to do, it shall be competent to such Member to require that there be recorded upon the Minutes his written application, together with The answer returned by the Governor to the same.
- XII The Governor may, in the exercise of the powers and authorities granted to him by Our said recited Letters Patent, act in opposition to the advice given to him by the Members of the Executive Council, if he shall in any case deem it right to do so; but in any such case he shall fully report the matter to Us by the first convenient opportunity, with the grounds and reasons of his action. In every such case it shall be competent to any Member of the said Council to require that there be recorded at length on the Minutes the grounds of any advice or opinion he may give upon the question.
- XIII The Governor may upon sufficient cause to him appearing suspend from the exercise of his functions in the Legislative Council any Official or Appointed Member thereof pending the signification of Our pleasure, giving immediate notice to Us through one of Our Principal Secretaries of State. If the suspension is confirmed by Us through one of Our Principal Secretaries of State, the Governor shall forthwith by an instrument under the Public Seal of the Colony revoke the appointment of such Official or Appointed Member and thereupon his seat in the Legislative Council shall become vacant.
- XIV Whenever any Member of the legislative Council, other than an ex-officio Member, shall, in the manner hereinafter provided, have resigned his seat in the Council or shall die, or whenever the seat of any such Member shall otherwise become vacant, or whenever any such member shall be suspended from the exercise of his functions as a Member of the Council, or be declared by the Governor by an Instrument under the Public Seal to be incapable of exercising his functions as a Member of the Council, or be absent from the Colony, or shall be acting in an office the holder of which is an ex-officio Member of the Council, the Governor may, by an Instrument under the Public Seal, appoint some person to be provisionally a Member of the Council in the place of such Member.

Such person shall hold his place in the Council during Our pleasure and shall forthwith cease to be a Member of the Council, if his appointment is disallowed by Us, or revoked by the Governor or superseded by the definitive appointment of a Member of the Council, or if the Member in whose place he was appointed shall be released from suspension, or, as the case may be, shall be declared by the Governor capable of again exercising his functions in the Council, or shall return to the Colony, or shall cease to sit in the Council as an ex-officio Member

When any person shall be lawfully discharging the functions of more than one of the offices the holders of which are ex-officio Members of the said Council, the Governor may, by an Instrument under the Public Seal, appoint any fit person to be provisionally a Member of the Council so long as the said offices shall continue to be so discharged by one person but any such appointment may be disallowed or revoked as aforesaid.

The Governor shall, without delay, report to Us, through one of Our Principal Secretaries of State, every provisional appointment of any person as a Member of the Legislative Council.

XVII Without prejudice to clause XIII, if the office of any Appointed Member of the Legislative Council would become vacant (directly or by reason of a disqualification for holding office) under a law in force in the Colony were he an Elected Member of the Council on any of the following grounds --

- a) that he holds any office specified in such law or has been dismissed therefrom;
- b) that he has been convicted of any offence so specified;
- c) that he has been sentenced to any punishment so specified, whether in the Colony or elsewhere;
- d) on the ground of his bankruptcy or other ground relating to indebtedness so specified;
- e) on the ground of his non-attendance at sittings of the Council;
- f) that he has been elected as an Elected Member of the Council,

the Governor shall declare in writing that the seat of such Appointed Member is vacant and, immediately on the publication of such declaration in the Hong Kong Government Gazette, he shall cease to be a Member of the Council.

XVIII Any Official or Appointed Member of the Legislative Council, other than an ex-officio Member, may resign his seat in the Council by writing under his hand, but no such resignation shall take effect until it be accepted by the Governor in writing, or by Us through one of Our Principal Secretaries of State.

XXI(1) The Governor shall, so far as is practicable, preside at meetings of the Legislative Council.

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(2) The Governor, by notice published in the Hong Kong Government Gazette, may summon special sittings of the Legislative Council to be held in any period between the end of one session of the Council and the beginning of the next session.

XXII All questions proposed for debate in the Legislative Council shall be decided by the majority of votes, and the Governor or the Member presiding shall have an original vote in common with the other Members of the Council, and also a casting vote, if upon any question the votes shall be equal

XXIV Provided always that every ordinance, vote, resolution, or question, the object or effect of which may be to dispose of or charge any part of Our revenue arising within the Colony, shall be proposed by the Governor, unless the proposal of the same shall have been expressly allowed or directed by him.

XXVI The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes:-

1. Any Bill for the divorce of persons joined together in holy matrimony;
2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself,
3. Any Bill affecting the Currency of the Colony or relating to the issue of Bank notes;
4. Any Bill establishing any Banking Association, or amending or altering the constitution, powers, or privileges of any Banking Association;
5. Any Bill imposing differential duties;
6. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty;

7. Any Bill interfering with the discipline or control of Our forces by land, sea, or air;
8. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of Our United Kingdom and its Dependencies, may be prejudiced;
9. Any Bill whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable; and
10. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us.

Unless in the case of any such Bill as aforesaid the Governor shall have previously obtained Our instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed on Us by Treaty. But he is to Transmit to Us, by the earliest opportunity, the Bill so assented to, together with his reasons for assenting thereto.

XXVII Every Bill, not being a Government measure, intended to affect or benefit some particular person, association or corporate body shall contain a section saving the rights of Us, Our heirs and successors, all bodies politic and corporate, and all others except such as are mentioned in the Bill and those claiming by, from, and under them. No such Bill shall be introduced into the Legislative Council until due notice has been given by not less than two successive publications of the Bill in the Hong Kong Government Gazette, and in such other manner as may be required by the Standing Rules and Orders for the time being in force; and the Governor shall not assent thereto in Our name until it has been so published. A certificate under the hand of the Governor shall be transmitted to Us with the Bill signifying that such publication has been made.

XXVIII When any Ordinance shall have been passed or when any Bill shall have been reserved for the signification of Our pleasure, the Governor shall transmit to Us, through one of Our Principal Secretaries of State, for Our final approval, disallowance or other direction thereupon, a full and exact copy in duplicate of the same, and of the marginal summary thereof, duly authenticated under the Public Seal of the Colony, and by his own signature. Such copy shall be accompanied by such explanatory observations as may be required to exhibit the reasons and occasion for passing such Ordinance or Bill.

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(1) The Governor may at any time, by Order published in the Hong Kong Government Gazette, dissolve the Legislative Council: Provided that unless it has been sooner dissolved, the Council shall stand dissolved on the ninetieth day before the third anniversary of the first sitting of the Council following the latest election for all the Elected Members of the Council.

XXXI Before disposing of any vacant or waste land to Us belonging, the Governor shall cause the same to be surveyed, and such reservations to be made thereout as he may think necessary for roads or other public purposes. The Governor shall not, directly or indirectly, purchase for himself any of such lands without Our special permission given through one of Our Principal Secretaries of State.

XXXIV Whenever any offender shall have been condemned by the sentence of any Court in the Colony to suffer death, the Governor shall call upon the Judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at a meeting of the Executive Council, and he may cause the said Judge to be specially summoned to attend at such meeting and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all such cases he is to decide either to extend or to withhold a pardon according to his own deliberate judgment, whether the Members of the Executive Council concur therein or otherwise, entering, nevertheless, on the Minutes of the Executive Council a Minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the Members thereof.

XXXVI The Governor shall not upon any pretence whatever quit the Colony without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State.

XXXVII In these Our Instructions the term "the Governor" shall, unless inconsistent with the context, include every person for the time being administering the Government of the Colony.

2.3 The terms of reference of the chief executive after 1997

2.3.1 Provisions regarding the terms of reference of the chief executive under the Joint Declaration:

- 1) Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government. (Section 1, Annex 1)
- 2) "Judges of the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons." (Section III, Annex I)
- 3) "A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges." (Section III, Annex I)
- 4) "The appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the chief executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People's Congress for the record." (Section III, Annex I)

2.3.2 Proposed terms of reference of the chief executive after 1997:

A. The following are the less controversial duties:

- 1) To lead in the work of the various departments
- 2) To act as the liaison person between the Central People's Government and the HKSAR, and to report the affairs of the HKSAR to the Central People's Government regularly.
- 3) To represent the HKSAR Government to communicate and contact with other countries regarding affairs (such as economic issues) other than defence and foreign affairs.

- 4) To ratify, nullify or implement agreements concluded with overseas countries or international organisations by the HKSAR using the name "Hong Kong, China".
 - 5) To implement, as authorised by the Central People's Government, the parts of the agreements concluded by the Central People's Government with overseas countries or international organisations that are applicable to Hong Kong.
 - 6) To appoint civil servants at all levels according to the statutory procedures
 - 7) To set up investigation committee for issues of public concern
 - 8) To appoint and remove members of the various statutory committees.
 - 9) To appoint or remove 1/3 of the members of any advisory committee. (A view was expressed that the reason for this ratio should be specified.)
 - 10) To grant amnesty and remission to prisoners including convicts sentenced to death.
 - 11) To make decisions regarding petitions.
 - 12) To execute dispositions of lands.
 - 13) To supervise the police force of the HKSAR for the maintenance of internal security.
 - 14) To impose a curfew jointly with the executive authorities and report to the Central People's Government for the record.
 - 15) To implement the laws of the HKSAR and other provisions laid down by the Basic Law.
 - 16) To draw up and implement the budget of the HKSAR.
 - 17) To exercise the power of deportation.
- ##### B. The following are the more controversial duties:
- 18) Terms of reference in relation to the legislature:
 - (1) As the president of the legislature:

Arguments for:

- The chief executive being the president of the legislature can exercise leadership and ensure an executive led political structure.

- It will be conducive to the communication and co-ordination between the legislature and the executive authorities.

Arguments against:

- This will lead to an inflation of power of the chief executive. It will undermine the development of society and is also against the principle of the checks and balances between the legislature and the executive authorities.
- The workload of the chief executive will be so heavy that it is not suitable for him to be the president of the legislature concurrently.
- It contravenes the provision of the Joint Declaration that the executive authorities shall be accountable to the legislature.

(2) The power to dissolve the legislature

Arguments for:

- The chief executive having the power to dissolve the legislature when necessary can ensure an executive led political structure.
- The chief executive's power to dissolve the legislature can be regarded as a check on the power of the legislature.
- This power is needed in case of prolonged discord between the executive authorities and the legislature.
- It will not be against the spirit of separation of powers if the chief executive exercises this power in the capacity of leader of the SAR.
- The power can only be exercised under special circumstances and when delegated by the Central Government.

Arguments against:

- The Joint Declaration mentions that the legislature shall be constituted by elections. If the chief executive has the power to dissolve the legislature, the whole political structure of Hong Kong will become unstable.
- The chief executive will become too powerful if he can dissolve the legislature.

- Under certain circumstances, such power will be against the principle that the executive authorities shall be accountable to the legislature.

(3) To veto the bills passed by the legislature:

Arguments for:

- If the chief executive has the power to veto the bills passed by the legislature, the two will have mutual checks and balances.
- Since the future legislature will be constituted by elections, in order to please their electors, the candidates may raise proposals which are not favourable to the general public. But as the chief executive is to look after the interests of society at large, he should have the power to approve or veto the bills passed by the legislature.
- The legislation passed by the legislature are to be implemented by the chief executive, therefore he should have the power to approve or veto the bills, otherwise conflicts may arise when he implements the legislation.

Arguments against:

- The chief executive will be too powerful if he can approve or veto the bills passed by the legislature.
- (4) To approve the bills passed by the legislature.
 - (5) To address the legislature on administration annually.
 - (6) To attend the meetings of the legislature on request in order to answer queries of the legislative members on his policies.
 - (7) To shelve a bill for a certain period.

3 Appointment of the chief executive

3.1 Appointment of the Governor at present:

The Foreign and Commonwealth Office selects the candidate of appropriate qualifications and experience from the civil service to be the governor. With the approval of the Prime Minister, the selection will be submitted to the Queen for appointment. The whole process of selection and appointment is the responsibility of the British Government. Ever since 1971, the post of governor of Hong Kong has been filled by promoting non-colonial officials of considerable diplomatic experience.

3.2 Provisions regarding the appointment of the Governor under the Letters Patent and Royal Instructions

3.2.1 Provisions regarding with the appointment of the Governor under the Letters Patent:

I There shall be a Governor and Commander-in-Chief in and over Our Colony of Hong Kong and its Dependencies (hereinafter called the Colony), and appointments to the said Office shall be made by Commission under Our Sign Manual and Signet.

3.2.2 There is no provision regarding the appointment of the Governor under the Royal Instructions.

3.3 Provisions regarding the appointment of the chief executive under the Joint Declaration:

"The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government." (Section I, Annex I)

The Joint Declaration only stipulates that the chief executive shall be appointed by the Central People's Government, but the meaning of "appointment" is not specified. There are divergent views as regards whether "appointment" refers to nominal appointment or substantive appointment.

3.4 Appointment of the chief executive after 1997:

1) Nominal appointment:

In order to respect the views of Hong Kong people, the Central People's Government will only make nominal appointment of the chief executive who is selected by election or through consultations held in Hong Kong. The Central People's Government will not object to the result of elections or consultations of the Hong Kong people.

Arguments for:

- This indicates that the Central People's Government will respect the views of the Hong Kong people, and will not act contradictory to their choice.
- This will materialise the spirit of a high degree of autonomy stipulated in the Joint Declaration, and it can strengthen the confidence of the Hong Kong people.

Arguments against:

- If the Central People's Government can only appoint the chief executive according to the decision of the Hong Kong people, the sovereignty of China over Hong Kong cannot be materialised.
- If the Central People's Government has to appoint the chief executive chosen by Hong Kong people regardless of whether it finds him acceptable or not, conflict and disharmony may arise between the chief executive and the Central People's Government.
- This is not in line with the Joint Declaration. The whole content of the Joint Declaration has to be implemented.

2) Substantive appointment

Though the chief executive is to be selected by election or through consultations held locally in Hong Kong, the Central People's Government does not necessarily have to appoint the selected candidate. The Central People's Government can reserve its right to veto, so its appointment is substantive.

Arguments for:

- This will materialise the sovereignty of China over Hong Kong.
- This can ensure that the chief executive will be accepted by the Central People's Government and will enhance co-ordination and cooperation between them.
- This will increase the authoritativeness of the chief executive.

Arguments against:

- If the Central People's Government does not appoint the chief executive selected by election or through consultations held locally, the confidence of Hong Kong people will be greatly stricken, it may even lead to constitutional crisis.
- This is against the principle of a high degree of autonomy.

4. Term of office of the chief executive

4.1 The present term of office of the Governor:

There is no provision on the term of office of the Hong Kong Governor in the Royal Instructions and Letters Patent, but generally speaking, the term of office of the recent Governor are not less than 5 years.

4.2 Provisions regarding the term of office of the chief executive under the Joint Declaration:

The Joint Declaration has no provision regarding the term of office of the chief executive.

4.3 Proposals on the term of office of the chief executive after 1997:

1) 4 years

2) 5 years

3) If the chief executive is elected from among members of the legislature, his term of office should be the same as that of the legislature members. The actual term can be decided with reference to the term of office of the legislative members.

4.4 Proposals on whether the chief executive after 1997 can renew his term of office:

1) No limit to the renewal of term of office. (Some members held that there should be an age limit.)

2) Can serve not more than two consecutive terms of office.

5 Secretary level officials

5.1 The present situation of officials at Secretary level

5.1.1 There are at present 18 officials at Secretary level among whom the Chief Secretary, Attorney General and Financial Secretary are of the highest rank.

Those who are directly responsible to the Chief Secretary include Secretary for Administrative Services and Information, Secretary for District Administration, Secretary for Education and Manpower, Secretary for Health and Welfare, Secretary for Housing, Secretary for Lands and Works, Secretary for Municipal Services, Secretary for Security, Secretary for Transport, Secretary for Civil Services, Secretary for General Duties, and Deputy Chief Secretary -- they are the heads of branches under the Government Secretariat.

Those who are directly responsible to the Financial Secretary include Secretary for Economic Services, Secretary for Monetary Affairs and Deputy Financial Secretary.

5.1.2 The Secretaries in the Hong Kong public service exert significant influence on the formulation of governmental administrative policies. The Chief Secretary, the Attorney General and the Financial Secretary are ex-officio members of the Executive Council. The other two official members are also Secretary level public servants appointed by the Governor. The Executive Council is the Governor's principal consultative body on policy-making.

In the Legislative Council, the three ex-officio members are the Chief Secretary, the Attorney General and the Financial Secretary. The other seven official members are public servants at Secretary level and are appointed by the Governor.

5.1.3 At present, the most controversial aspect of the role of the Secretaries is that they are the executives, the supervisors of government departments, but on the other hand, they also participate in the formulation of policies.

At the moment, under the Secretaries who participate in the formulation of policies are directorate staff who have much executive authority and are responsible for executive duties. Thus there is not much problem.

All the Secretaries are public servants, and all public servants are politically neutral. However, since Secretaries have the opportunity to participate in the Executive Council where they have to take some political standpoint and play certain political roles.

5.2 Stipulations in the Joint Declaration regarding officials at Secretary level

Section I, Annex 1 of the Joint Declaration:

"Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government."

This section mentions only the nomination and appointment of the Secretaries but does not specify their political status.

5.3 Discussion on the status of principal officials (corresponding to officials at Secretary level) after 1997

5.3.1 Views on appointment and promotion of public servants to be principal officials (corresponding to officials at Secretary level)

Arguments for:

- (1) The present system will be retained.
- (2) As public servants will not be influenced by the partial interests of voters, they will take the overall interests of society into consideration when formulating policies.
- (3) Public servants must be involved to some extent in policy formulation because the workability of the proposals will be best assessed by those who have to carry out the executive function. This is very different from deciding policies. The practice that public servants can take up secretarial posts has definite advantages.
- (4) After 1997, the chief executive will be a political appointee and the Secretaries will take orders from him. If the Secretaries commit any error, the chief executive and executive authorities will have to face the consequence of impeachment or removal. Thus, despite their status as public servants, the Secretaries have to assume direct or indirect responsibilities.

Arguments against:

- (1) After 1997 the Secretaries should be political appointees instead of public servants. According to the Joint Declaration they can be created by a process of nomination by the Chief Executive or appointment by the Central Government. The process of selecting the Chief Executive by consultation or by election held locally implies a democratic process, therefore political. In turn this indicates that the Chief Executive himself will be a politician, therefore, the nomination he himself made will be political. Because political aspects are not one of the criteria for promoting public servants, it follows public servants cannot be principal officials. If the chief executive wishes to appoint a public servant to be a principal official, that public servant should relinquish his public servant's status.
- (2) It is unreasonable that despite their influence on the government's policy-making, the Secretaries do not have to assume any political responsibilities for their decisions, i.e. the public cannot impeach or dismiss a Secretary when they are not in favour of his views.
- (3) Public servants must be involved to some extent in policy formulation because the workability of the proposals will be best assessed by those who have to carry out the executive function. Formulating policies and policy

deciding functions are not the same, so a clear division should be drawn between them. Because whoever decides policy should be accountable to the legislature, this is an inappropriate function for public servants who are expected to be politically neutral.

- 5.3.2 It was suggested that in order to implement the Joint Declaration and to ensure the efficiency of the government, the government driven by the civil service as of the pre-1997 period should be developed into a political structure which includes a neutral civil service and is driven by a responsible Executive Council. Principal officials (equivalent to Secretaries) in the Executive Council are responsible for giving advice to the chief executive and also monitoring and supervising the work of their departments. Under this system, civil servants under the principal officials are only responsible for assisting the principal officials and implementing policies, whereas the formulation of policies is left to the principal officials or the Executive Council. This arrangement not only retains the valuable administrative experience of the civil servants, but also maintains the political neutrality of the civil service, thus ensuring that administrative efficiency will not be affected by political changes.

With a neutral civil service, the promotion of public servants (civil servants) in the future SAR can be decided on the basis of or with reference to the pre-1997 Civil Service Regulations. As regards the ceiling for promotion, the highest rank to which public servants can be promoted is the "chief administrative officers" of the various departments. They are responsible for assisting the principal officials of the SAR; they only implement policies but do not assume any political responsibilities.

After the establishment of the HKSAR, the Secretaries of the Hong Kong government before 1997 can automatically become the "chief administrative officers" of the SAR. However, the right of policy making enjoyed by the Secretaries (i.e. the "chief administrative officers" after 1997) at present will be taken over by the principal officials nominated by the chief executive of the SAR.

- 5.3.3 A view has been expressed that the public servants currently in office (except for those of foreign nationalities) should all be nominated by the chief executive and reported to the Central Government for appointment as principal officials after 1997.

6 Composition of the executive authorities:

6.1 The present composition of the executive authorities:

At present there is no clear definition for the term "executive authorities" in Hong Kong Administrative policies are decided by the Governor-in-Council, and implemented by the Secretaries and their subordinate departments.

The Executive Council is set up in accordance with the Royal Instructions and Letters Patent. It is the main advisory body to the Governor in policy-making.

Composition of the present Executive Council is as follows:

The Governor is the President of the Executive Council.

4 ex-officio members: The Chief Secretary, the Commander British Forces, the Financial Secretary, and the Attorney General.

2 appointed official members.

10 appointed un-official members (from 1987 onward).

6.2 Provisions regarding the composition of the executive authorities under the Royal Instructions and the Letters Patent.

6.2.1 Provisions regarding the composition of the executive authorities under the Letters Patent:

V There shall be an Executive Council in and for the Colony, and the said Council shall consist of such persons as We shall direct by Instructions under Our Sign Manual and Signet, and all such persons shall hold their places in the said Council during Our pleasure. The Governor may upon sufficient cause to him appearing suspend from the exercise of his functions in the Council any Member thereof pending the signification of Our pleasure, giving immediate notice to Us through one of Our Principal Secretaries of State. If the suspension is confirmed by Us through one of Our Principal Secretaries of State the Governor shall forthwith by an instrument under the Public Seal of the Colony revoke the appointment of such Members, and thereupon his seat in the Council shall become vacant.

6.2.2 Provisions regarding the composition of the executive authorities under the Royal Instructions:

II The Executive Council of the Colony shall consist of the Officer for the time being in command of Our regular forces within the Colony (hereinafter called the Commander British Forces), the persons for the time being lawfully discharging the functions of Colonial Secretary, of Attorney General, of Secretary for Home Affairs,

and of Financial Secretary of the colony, who are hereinafter referred to as ex-officio Members, and of such other persons as We may from time to time appoint by any Instructions or Warrant under Our Sign Manual and Signet, or as the Governor in pursuance of Instructions from Us through one of Our Principal Secretaries of State may from time to time appoint by an Instrument under the Public Seal of the Colony. Persons so appointed are hereinafter referred to as Official Members or Un-official Members according as they hold, or do not hold, office under the Crown in the Colony at the time of appointment.

Every unofficial Member shall vacate his seat at the end of five years from the date of the Instrument by which he is appointed or of such other period as may be specified in that Instrument, but shall be eligible to be re-appointed in the manner aforesaid for a further period or periods, each period not exceeding five years.

Provided that if any such member is provisionally appointed to fill a vacant seat in the Council and his provisional appointment is immediately followed by his definitive appointment, the said period of five years shall be reckoned from the date of the Instrument provisionally appointing him.

If any Official Member cease to hold office under the Crown in the Colony his seat in the Council shall thereupon become vacant.

III Whenever any Member, other than an ex-officio member, of the Executive Council of the Colony shall, by writing under his hand, resign his seat in the Council, or shall die, or be declared by the Governor by an Instrument under the Public Seal of the Colony to be incapable of exercising his functions as a Member of the Council, or be absent from the Colony, or shall be acting in an office the holder of which is an ex-officio Member of the Council, or shall be suspended from the exercise of his functions as a Member of the Council, or whenever the seat of any such Member shall otherwise become vacant, the Governor may, by an Instrument under the Public Seal of the Colony, provisionally appoint any public officer to be temporarily an Official or Unofficial member of the Council, and any person not a public officer to be temporarily an Unofficial Member of the Council in the place of the Member so resigning, or dying, or being suspended, or declared incapable, or being absent, or sitting as an ex-officio Member.

Such person shall forthwith cease to be a Member of the Council if his appointment is disallowed by Us, or if the Member in whose place he was appointed shall be released from suspension, or, as the case may be, shall be declared by the Governor by an Instrument under the Public Seal capable of again discharging his functions in the Council, or shall return to the Colony, or shall cease to sit in the Council as an ex-officio Member.

IV The Governor shall, without delay, report to Us for Our confirmation or disallowance, through one of Our Principal Secretaries of State, every provisional appointment of any person as a Member of the said Executive Council. Every such person shall hold his place in the Council during Our pleasure, and the Governor may by an Instrument under the Public Seal revoke any such appointment.

VIII(1) The Governor shall, so far as is practical be, preside at meetings of the Executive Council.

(2) In the absence of the Governor there shall preside at any meeting of the Council --

- a) such Member of the Council as the Government may appoint; or
- b) in the absence of a Member so appointed, the senior ex-officio member present; or
- c) in the absence of a Member so appointed or of an ex-officio member, the senior Official member present.

(3) For the purposes of sub-paragraphs (b) and (c) of paragraph (2) of this clause --

- a) the Commander British Forces shall not be regarded as an ex-officio Member of the Council;
- b) the remaining ex-officio Members of the Council shall have seniority in the order in which their offices are mentioned in clause II of these Instructions; and
- c) the Official Members of the Council shall have seniority according to the priority of their respective appointments to the Council;

Provided that Members appointed by the same Instrument shall have seniority among themselves according to the order in which they are named therein.

IX (1) No business except that of adjournment shall be transacted in the Executive Council if objection is taken by any Member present that there are less than four Members present besides, the Governor or the Member presiding.

(2) Subject to the provisions of paragraph (1) of this clause, the Executive Council shall not be disqualified for the transaction of business by reason of any vacancy in the membership of the Council, and any proceedings in the Council shall be valid notwithstanding that some person who was not entitled to do so took part in those proceedings.

(3) The Governor or the Member presiding, when in his opinion the business before the Executive Council makes it desirable, may summon any person to a meeting of the Council, notwithstanding that that person is not a Member of the Council.

6.3 Provisions regarding the composition of the executive authorities under the Joint Declaration:

6.4 Composition of the executive authorities after 1997:

There are three definitions:

- 1) The "executive authorities" refers to a government body which is similar to the present Executive Council in nature. It comprises the chief executive and members appointed by him.
- 2) The "executive authorities" refers to the administration of the government.
- 3) The "executive authorities" refers to the administration of the government which includes a body similar to the present Executive Council.

There are two main views in respect of the composition of the executive authorities after 1997. The following is an introduction of the two views and the arguments for and against each of them:

6.4.1 The executive authorities are to comprise the chief executive and members appointed by him.

6.4.1.1 The executive authorities are led by the chief executive, and members appointed by him may include the following:

- 1) Secretaries nominated by the chief executive and appointed by the Central People's Government: such as the Chief Secretary, the Financial Secretary, the Attorney General, etc.

2) People that are representative of the various sectors: such as experts in finance, public utilities, and the legal profession.

3) Members of the legislature.

6.4.1.2 The executive authorities are led by the chief executive, and members appointed by him may include the following:

1) ex-officio members: including the Chief Secretary, the Financial Secretary, the Attorney General, etc.

2) other secretary-level officials: such as the Secretary for Security, the Secretary for District Administration (whose scopes of administration are not covered by any advisory committees).

3) chairmen of major advisory committees (such as the Transport Advisory Committee and Social Services Advisory Committee).

4) Other persons representative of the commercial, industrial or professional sectors.

6.4.1.3 The executive authorities comprise the chief executive, and principal officials. And the body resembling the present Executive Council can be replaced by the Chief Executive's Advisory Committee with its terms of reference similar to those of the present Executive Council. Since its main responsibility is to advise the chief executive on policy-making instead of administration, its members need not be appointed by the Central Government.

Arguments for:

- The general structure of the present Executive Council should be maintained in order to avoid a sudden and radical change.
- Members of the executive authorities will be appointed by the chief executive. This can ensure that they will work and together effectively and can enhance co-ordination among them.
- The chief executive will appoint suitable members to the executive authorities according to the needs of society. This can ensure that the composition of the future executive authorities will best meet the needs of social development.
- The chief executive will be the final decision-maker of the executive authorities. With this centralisation of power, efficiency can be improved.

- If members of the legislature are also members of the executive authorities, communication between the two arms will be enhanced.

Arguments against:

- All power vested in the chief executive alone will easily lead to autocratic government.
- If members of the legislature are also members of the executive authorities, it will be against the principle of checks and balances.
- The definition is too narrow.

6.4.2 Members of the legislature elect among themselves from members of the executive authorities. Members of the executive authorities then elect from among themselves the chief executive

There are two main proposals on this method:

6.4.2.1 Members of the legislature elect among themselves 10 members to form of the executive authorities. The chief executive is then to be selected either by election or through consultations held among members of the executive authorities. Subsequently the chief executive is to be appointed by the Central People's Government. A term of 4 years for everyone, and re-election of the executive members is to be held at the same time with that of the legislature members. The chief executive will preside at meetings of the executive authorities. He is to implement decisions of the Central People's Government in respect of defence and foreign affairs. In addition, he is to be accountable to the Central People's Government regarding the maintenance of stability and prosperity of Hong Kong and the implementation of the Basic Law.

On matters within the scope of Hong Kong's autonomy, the executive authorities will practise collective leadership. (Albert Chan 1 86)

6.4.2.2 Members of the executive authorities are to be selected by elections to form the executive authorities (executive committee). The chief executive is to be elected from among these members.

There are two types of candidates for members of the executive authorities: the first type of members are to be nominated by legislature members who represent the functional constituencies; the second type of members are to be nominated by directly elected legislature members.

All candidates must either be current legislature members or members of the executive authorities who stand for re-election.

The election is to be held by all members of the legislature. Not less than 1/3 of the seats of the executive authorities should be elected from candidates nominated by members of the functional constituencies, and not less than 1/3 from the candidates nominated by directly elected members.

The executive authorities are to practise collective leadership. Members are of equal status, to be in charge of different departments. In dealing with important issues, they have to make decisions according to the views of the majority.

Apart from supervising the departments under his authority, the chief executive is also responsible for convening and presiding at meetings of the executive authorities, and externally, he is to perform protocol duties.

Different views:

Arguments for:

- Under collective leadership, any business is to be discussed and decided by members collectively and hence there will rarely be any power-abuse.
- Collective leadership can prevent totalitarianism or incompetence, which may be the result of having the chief executive as the centre of power. Even if there are one or two incompetent members in the executive authorities, the effect will be minimal because decisions are only made after discussion by the whole body.
- Collective leadership is suitable for the diversified capitalist society of Hong Kong because it ensures a balanced participation of different forces which leads to an even and reasonable distribution of power. It is conducive to the setting up of a political system and culture built upon a high degree of consensus.
- Collective leadership can enhance co-operation among members and prevent any conflict or suspicion caused in the striving for the highest leading power. Under this system, political talents can be accommodated and cultivated. Whereas if executive power is centralized in one person, many capable people will be pushed out when their political views are different from that of the leader, and they may resort to forming opposition parties.

- If legislature members elect from among themselves the executive authorities, the two authorities will surely co-operate with each other and work in co-ordination. At the same time, their efficiency will be strengthened.

- If the legislature members elect from among themselves the executive authorities, it can be guaranteed that the elected will be supported by most of the members of the legislature, and hence the prestige of the executive authorities will be enhanced.

Arguments against:

- Collective leadership leads to decentralisation of the power of the executive authorities which will be less responsive.

- If the executive authorities consists of members of the legislature, the former will be controlled by the latter. This is against the principles of separation of powers and of checks and balances.

- The role of the decision-maker under collective leadership is not defined clearly, so members will tend to depend on each other and shirk responsibilities, low efficiency will then be resulted.

- In this proposal, members of the executive authorities will be in charge of different departments. If these departments refer to departments under the present Secretaries, then members of the future executive authorities will play the same role as the present Secretaries. Thus it will be against the provision under the Joint Declaration that principal officials shall be nominated by the chief executive of the HKSAR and appointed by the Central Government if the chief executive is to be elected from amongst members of the executive authorities

6.4.3 The executive authorities may be composed of the bodies as proposed in 6.4.1 and 6.4.2 as well as the public service so that the public service may be included in the executive under the principle of separation of powers. In this proposal, the policy-making body may be selected according to 6.4.1 or 6.4.2.

7 Terms of Reference of Members of the Executive Authorities

7.1 Present Practice:

- 1) Shall give advice to the Governor on the various policies of Hong Kong.

- 2) The Governor-in-Council shall make adjudication upon all appeals, petitions, oppositions made by the citizens in respect of lawful rights vested in them by certain ordinances.
- 3) Shall consider all important bills before they are presented to the Legislative Council.
- 4) Shall be responsible for the formulation of subsidiary legislation (regulations) of certain ordinances.
- 5) May give advice on the policies concerned; if public fund is to be used, the permission for appropriation shall be sought from the Committee for Financial Affairs of the Legislative Council.

7.2 Provisions regarding the terms of reference of the Executive Council under the Royal Instructions and Letters Patent:

- 7.2.1 There is no provision regarding the terms of reference of the Executive Council under the Letters Patent.
- 7.2.2 Provisions regarding the terms of reference of the Executive Council under the Royal Instructions:

X In the execution of the powers and authorities granted to the Governor by Our said recited Letters Patent, he shall in all cases consult with the Executive Council, excepting only in cases relating to the appointment, disciplinary control or removal from office of a public officer or in cases which may be of such a nature that, in his judgment, Our service would sustain material prejudice by consulting the Council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. In all such urgent cases he shall, at the earliest practicable period, communicate to the Executive Council the measures which he may so have adopted, with the reasons therefore.

XI The Governor shall alone be entitled to submit questions to the Executive Council for their advice or decision; but if the Governor decline to submit any question to the Council when requested in writing by any Member so to do, it shall be competent to such Member to require that there be recorded upon the Minutes his written application, together with the answer returned by the Governor to the same.

XII The Governor may, in the exercise of the powers and authorities granted to him by Our said recited Letters Patent, act in opposition to the advice given to him by the Members of the Executive Council, if he shall in any case deem it right to do so; but in any such case he shall fully report the matter to Us by the first convenient opportunity, with the grounds and reasons of his action. In every such case it shall be competent to any Member of the said Council to require that there be recorded at length on the Minutes the grounds of any advice or opinion he may give upon the question.

XXXIV Whenever any offender shall have been condemned by the sentence of any Court in the Colony to suffer death, the Governor shall call upon the Judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at a meeting of the Executive Council, and he may cause the said Judge to be specially summoned to attend at such meeting and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all such cases he is to decide either to extend or to withhold a pardon according to his own deliberate judgment, whether the Members of the Executive Council concur therein or otherwise, entering, nevertheless, on the Minutes of the Executive Council a Minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the Members thereof.

7.3 Provisions regarding the terms of reference of the executive authorities under the Joint Declaration:

There is no provision under the Joint Declaration which defines the terms of reference of the executive authorities expressly, except that it is mentioned in Section I of Annex I that: "The executive authorities shall abide by the law and shall be accountable to the legislature".

7.4 Proposals on the terms of reference of the executive authorities after 1997:

- 1) To plan and formulate all policies of the HKSAR Government.
- 2) To implement policies concerning the HKSAR passed by the Central People's Government.
- 3) To administer matters concerning the civil service, lead and monitor the work of the various government departments.
- 4) To make adjudications on the various appeals, petitions and oppositions which are launched according to law.

- 5) To exercise the power of delegated legislation and formulate decrees for the implementation of the provisions under the Basic Law and other legislation.
- 6) To propose bills to the legislature.
- 7) To draw up and propose budget and final accounts to the legislature.
- 8) All bills must be approved by the executive authorities before they are forwarded to the legislature for review. (Some members held that the bills can be initiated by members of the legislature. Please refer to the Report on the Legislature.)
- 9) Members of the executive authorities must be in attendance at the meetings of legislature to answer questions within their jurisdiction, as raised by members of the legislature.

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

FINAL REPORT ON
LANGUAGE OF THE LAW

(passed by the Executive Committee on 8 August 1987)

Special Group on Law

1 Introduction:

- 1.1 With China's resumption of sovereignty over Hong Kong in 1997, the Hong Kong Special Administrative Region will be established. Under the concept of "One Country, Two Systems" the prevailing capitalist system and lifestyle of Hong Kong will remain unchanged for 50 years. On the other hand, the judicial system previously practised in Hong Kong will also be maintained. The problem of the language of the law thus arises.
- 1.2 Hong Kong has long been one of the common law jurisdictions in which English is the language of the law. Since the common law (including the rules of equity) will be maintained after 1997, the link with the language of the law, English, will persist because the common law is primarily expressed through decided cases and the courts look at decided cases not only from Hong Kong and the United Kingdom, but from the whole of the English speaking world where the system of common law is practised.
- 1.3 On the other hand, though English is the language of the common law and judges from other common law jurisdictions may be invited to sit on the court of final appeal in the HKSAR, it is politically and socially unacceptable to adopt English as the only language of the law after 1997 when China resumes its sovereignty over Hong Kong. Besides, with 98% of the population being Chinese and most of them do not understand English, the use of Chinese as a language of the law will have to be developed.
- 1.4 Members were of the view that the ideal solution was to develop a bilingual system ultimately, but they were also aware of the possible difficulties arising from differences in cultures, concepts, etc. between Chinese and English. Besides, it will take a considerable period of time for such a bilingual system to be fully developed. Nevertheless, members believed that attempts should be made to achieve this regardless of the difficulties.

2 Relevant Provisions in Annex I to the Joint Declaration

- 2.1 Section I, paragraph 4 - "In addition to Chinese, English may also be used in the organs of government and in the courts in the Hong Kong Special Administrative Region".

2.2 Section II, paragraph 1 - "After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained ...".

2.3 Section III, paragraph 2 - "The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions".

2.4 Annex III, paragraph 4 - "The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdiction to sit on the court of final appeal".

3 Questions to be considered:

- 3.1 To what extent should the use of Chinese language be promoted for legal purpose, and what will be the future status of English as a language of the law?
- 3.2 Will it be possible to maintain the essential features of the existing legal system after 1997 if that system is to be conducted in the Chinese language? i.e. Will a common law system operate effectively in the Chinese language?
- 3.3 What strategies should be adopted in order to promote the use of Chinese as a language of the law?

4 Use of Chinese in the Government at present:

- 4.1 Communication with the public
 - Public notices, official forms, licences, and correspondence with the public are bilingual.
- 4.2 Councils and other advisory bodies
 - Papers are bilingual and simultaneous interpretation is provided at meetings.
- 4.3 Internal administration
 - With the localisation scheme, the Chinese language has been more commonly used, eg. in the Mechanical and Electrical Engineering Department.
 - In civil service recruitment, grades which require regular use of Chinese in their work, a minimum requirement of a knowledge of Chinese is normally stipulated.

5. Other developments in the wider use of Chinese language

- The Education Commission has recommended that individual secondary schools be encouraged to adopt Chinese as the medium of instruction.
- Additional teaching resources are provided for such school.
- A Chinese Textbooks Committee was established to ensure the availability of good quality textbooks in Chinese.
- The Working Party into Greater Use of Chinese Language in Courts and Court Procedure is also carrying out study in the use of Chinese.

6 Language of the Legislation

6.1 Background

- The third report of the Chinese Language Commission proposed in 1970 that all existing and future bills and ordinances be published in English and Chinese, but this recommendation has not been implemented due to the difficulty of legal translation, including a lack of sufficient expertise for such purpose.
- The Chinese Language Division later translated legislation of popular interest into Chinese and so far about 110 pieces of legislation or subsidiary legislation have been translated. But such translations are not authoritative, they are for information and guidance only, and there is room for improvement.

6.2 Present practice:

- The "Discussion Paper on the Laws in Chinese" was published in April 1986. The purpose of the Laws in Chinese project is to improve public legal knowledge by producing an authentic Chinese text of legislation enacted in Hong Kong.
- The Government has now embarked upon the task of producing by stages authentic bilingual legislation.
- The Interpretation and General Clauses (Amendment) Ordinance 1987 and the Official Languages (Amendment) Ordinance 1987 mainly provide for:
 - (1) enacting new legislation in Chinese as well as English, both texts being equally authentic.
 - (2) publishing authentic texts in Chinese of laws enacted in English, to be authorised by order of the Governor in Council after consultation with a Bilingual Laws Advisory Committee;

(3) empowering the Attorney General to amend the text of an ordinance in one language, but without affecting its meaning, to ensure its harmonisation with an authentic text in the other official language;

(4) resolving differences of meaning between the two texts;

(5) empowering the Governor in Council to specify words and expressions in one language to be treated as equivalents of words and expressions in the other language.

- The power under (2), (3) and (5) above will be subject to the prior approval of the draft text by resolution of the Legislative Council.

6.3 Future practice:

There are three different views regarding the future practice on language of the legislation:

- (1) Bilingual legislation;
- (2) English as the language of legislation and Chinese as a translation (but this proposal contravenes the Joint Declaration); and
- (3) Chinese as the language of legislation and English as a translation.

6.3.1 Bilingual legislation

- The Chinese and English texts are equally authentic. There may be a period for gradual transition from having English as the primary language to having both Chinese and English of equal status.

- Under a bilingual system, both languages have equal status.

Pros:

- 1) When legislation is enacted in both Chinese and English, persons who are not proficient in English will be able to understand the legislation in Chinese which is equally authentic. Members of the legislature who are not proficient in English can also effectively participate in the process of law-making through the Chinese language.
- ii) It will maintain and strengthen the status of Hong Kong as an international business and financial centre. It will realise the resumption of China's sovereignty over Hong Kong on the one hand, and also take the practical value of English into consideration.
- iii) It is for the benefit of Hong Kong people since most of them are Chinese who are not proficient in English.

- v) Since the Joint Declaration stipulates that in addition to Chinese, English may also be used, it is desirable that legislation should be in both languages.

Cons:

- 1) When there are discrepancies between the two texts, it is difficult to decide which one shall prevail.

6.3.2 English as the language of legislation and Chinese as a translation.

-- This proposal is not in line with the Joint Declaration.

6.3.3 Chinese as the language of legislation and English as a translation.

Pros:

- 1) It can realise the resumption of China's sovereignty over Hong Kong.
- ii) It is for the benefit of Hong Kong people since most of them are Chinese who are not proficient in English.

Cons:

- 1) The status of Hong Kong as an international financial centre will be undermined.
- ii) Most legal professionals are trained in English. There may not be enough legal professionals who are proficient in Chinese. It will take a very long time before legal professionals who can practise or teach law in Chinese are available to adequately meet the demand of such change.
- iii) Quite a number of legal concepts of the Common Law System have no Chinese equivalents, and it may be very difficult to translate the jurisprudential thinking behind those concepts.
- iv) There may be difficulties in inventing Chinese Common Law terminology.

7. Language of the Courts

7.1 Present practice

At present, the proceedings in magistrate's courts and most tribunals may be conducted in either the English language or the Chinese language as the court thinks fit. Proceedings in the Court of Appeal, the High Court and the District Courts however must be conducted in the English language.

However, it does not preclude any party to or witness in proceedings in any court to use either the English language or the Chinese language, or such other language as the court may permit. (Please refer to Section 5 of the Official Languages Ordinance, Chapter 5 of the Laws of Hong Kong).

Court interpretation is available whenever required, but the language of the record is English. There may be a need for record to be kept in English until sufficient judicial personnel proficient in Chinese are available.

7.2 Proposals on the language of the courts after 1997

There are three different views in respect of the language of the courts after 1997.

- 1) "Higher courts"* may continue to conduct proceedings in English while proceedings in lower courts should be conducted in Chinese.
- 2) Chinese should be the language of the courts and English be a translation.
- 3) "Higher courts" may continue to conduct proceedings in English while proceedings in lower courts should be conducted in Chinese. This should be practised for a period of time and ultimately Chinese should be the language of the courts.

7.2.1 English should be used in "higher courts" whereas Chinese in lower courts

Pros:

- 1) Since most personnel of the legal profession are proficient in English and receive their legal training in English, it will be more convenient and practical to take English as the language of the courts.
- ii) It is difficult to translate legal concepts under the Common Law system into Chinese. Some terms have no Chinese equivalents, which may have to be invented.
- iii) It is difficult to invent Chinese Common Law terminology.
- iv) Since the record is taken in English, there should be a continued use of English in "higher courts".

* High courts refer to the High Court and above. But if the jurisdiction of the existing district courts is to be expanded to include e.g. jury trial, then higher courts should include also the district courts.

- v) It will be a compromise in respect of the actual operation of the judiciary and the fact that China will be the sovereign state of Hong Kong. Since courts of the higher level have to handle cases that involve complicated legal principles, English should be used. On the other hand, courts of a lower level usually handle cases that are of simple factual nature, so Chinese can be used.
- vi) English is the language of international trade and finance as well as of technology. If Hong Kong is to maintain its position as an international commercial and financial centre as well as to attract foreign investment and technology, it is necessary that the international community has full confidence in its legal system. It is particularly important that the legal proceedings be conducted in the language which will be understood by the majority of the international community. For this reason, English should be used in the "higher courts".
- Cons:
- 1) Since records have to be kept in English, the trial judge may have to act as his own interpreter (i.e. the trial proceedings are conducted in Chinese, and the judge interpret what he hears and writes the record in English).
- ii) Difficulties should not prevent earnest attempts from being made to implement the bilingual system in all of the courts.
- 7.2.2 Chinese as the sole language of the courts and English as a translation.
- Pros:
- 1) It is a realisation of the resumption of China's sovereignty over Hong Kong.
- ii) It is in-line with the provision in para 4 of Section I of Annex I to the Joint Declaration, "In addition to Chinese, English may also be used.....", which implies a priority of Chinese over English.
- Cons:
- 1) It will take a long time to train a new group of legal experts and staff who are proficient in Chinese. It is not practical for the time being.
- ii) Since the Common Law is essentially an accumulation of court cases which will be difficult to translate into Chinese, the need to rely on pre-existing case law may be reduced and the Common Law system may be eroded.
- iii) There are fundamental conceptual differences between the two languages and it is difficult to translate the legal terminology from one language to the other.

7.2.3 Bilingualism practised for a period of time and ultimately leading to using only Chinese in the courts.

Pros:

- i) It will be a natural development from a system of bilingual legislation. Initially, little Chinese will be used in courts but eventually with the availability of Chinese-proficient personnel, Chinese will become the sole language of the courts.
- ii) It is difficult to envisage the perpetual use of English in the SAR courts.
- iii) For the purpose of establishing a Common Law system in Chinese in the SAR ultimately, the use of Chinese as the language of the courts is advantageous, although the process will take a very long time.

8. Language problem of the Basic Law and resolution of conflicts

8.1 The Basic Law will be promulgated by the NPC in accordance with Article 31 of the Constitution of the PRC, hence the Basic Law will be written in Chinese.

8.1.1 However, in consideration of the unique situation of Hong Kong, and with the unprecedented practice of "One country, Two systems", a view held that the English version of the Basic Law should be given equal legal status as the Chinese original; and versions in both languages should be treated as official.

8.1.2 An opposing view held that since the Basic Law would be promulgated by the NPC which did not operate in English, it would be impossible for the NPC to pass an authentic English version of the Basic Law.

8.2 It was also suggested that the NPC should recognise an English version that has been adopted by the HKSAR legislature. In this way, the English version can be given authenticity and be used in the courts whenever necessary.

8.3 Another option would be the setting up of a Basic Law Committee under the NPC. All disputes regarding the discrepancies between the original Chinese text and the translated text of the Basic Law will be referred to this committee.

8.4 It was also proposed that in case of discrepancy between the texts, the Vienna Convention on the Law of Treaties (Cap 1) should be used.

8.5 Another view was that in case of discrepancy, the Chinese version should prevail.

9 Conclusion

- 9.1 Members generally maintained that a functional approach should be adopted in tackling the language problem of the legal field brought about by the establishment of the SAR. Objective elements such as the availability of Chinese-proficient judges, lawyers and interpreters, etc. should be taken into consideration.
- 9.2 Members advocated bilingualism and held that despite tremendous difficulties, an earnest attempt should be made to implement a bilingual system.

中央与香港特别行政区的关系专题小组 工作报告

(一九八七年八月二十二日)

主任委员、副主任委员、各位委员：

自今年4月基本法起草委员会第四次全体会议以来，中央与香港特别行政区的关系专题小组先后举行了三次会议，研究了第四次全体会议上委员们提出的意见和基本法咨询委员会的建议，对基本法的序言和第一章、第二章、第七章、第九章的条文草案作了进一步的修改。现在，我们就修改稿中的几个主要问题作如下说明：

一、关于序言

在基本法的序言部分，原草稿对香港特别行政区的区域范围表述为：“香港，包括香港岛和深圳河以南的九龙半岛及附近岛屿”。在起草委员会第四次全体会议上，有些委员认为，应采用中英《联合声明》的写法，即香港地区，包括香港岛、九龙和“新界”。还有一些委员认为，“新界”不是一个地理名词，并且带有殖民主义色彩，在中英《联合声明》中是加引号的，不宜在基本法中用来表述香港的区域范围。许多委员则认为，序言可不写香港特别行政区的区域范围，建议在将来全国人民代表大会颁布基本法时，由国务院发布香港特别行政区的行政区域图。经过研究，本组委员一致同意采纳第四次全体会议

上多数委员的意见，在序言中删去了关于香港区域范围的表述，将第一句改为“香港自古以来就是中国的领土，1940年鸦片战争以后被英国占领”，并将上述建议写入序言的说明。

二、关于第一章 总则

(一)香港特别行政区基本法咨询委员会一些委员提出，保障居民的权利和自由是一项基本的原则，应该包括在基本法总则内。本组采纳了这个意见，增写了新的第五条：“香港特别行政区依法保障香港特别行政区居民和其他人的权利和自由”，并将原第五、六、七、八条依次顺延为第六、七、八、九条。

(二)关于宪法与基本法的关系，原草稿是列在第九章第一条的。考虑到本条带有总则性质，因此我们将该条移到第一章总则部分，列为第十条。由于总则第八条已对香港原有法律不得与基本法相抵触作出了规定，为避免重复，将本条第二款中的“以及香港特别行政区沿用的法律”一句删去，改为“香港特别行政区立法机关制定的任何法律，均不得与本法相抵触”。

三、关于第二章 中央与香港特别行政区的关系

(一)关于少数全国性法律在香港特别行政区适用的问题，原草稿第二章第五条提出了两个方案。在第四次全体会议上，委员们对这个问题提出了不少意见。经过研究，本组委员认为，根据“一国两制”的方针，全国性法律一般不在香港特别行政区实施，少数必须实施的，也应该定出一个明确的范围，严格限于

有关国防、外交以及体现国家统一和领土完整的法律，而且中央决定在香港特别行政区实施上述法律前，还要征求香港特别行政区的意见。根据这些考虑，我们重新拟出了条文。

此外，有些委员认为，中英《联合声明》附件一第二部分末段的一段话：“在香港特别行政区实行的法律为基本法，以及上述香港原有法律和香港特别行政区立法机关制定的法律”，应全文载入基本法。本组委员经过研究，同意这一建议，并认为将这段话与少数全国性法律适用于香港特别行政区的规定放在一起写入第七条比较合适。

(二)本组在向第三次全体会议提交的工作报告中，曾经建议在全国人民代表大会或其常务委员会之下，设立一个委员会，由内地和香港人士参加，负责就基本法的解释和修改、香港特别行政区制定的法律是否符合基本法及法定程序以及少数全国性法律在香港的适用等问题，向全国人民代表大会或其常务委员会提供意见。在第四次全体会议上，许多委员又一次提出在全国人大或其常委会下设立一个咨询性质的委员会的建议。本组经过讨论，暂将这个委员会定名为香港特别行政区基本法委员会，写入有关条文。设立基本法委员会现在只是作为一项建议提出，它的成立和隶属关系以及其职责、组成等将由全国人民代表大会决定。

四、关于第九章 香港特别行政区基本法的解释和修改

(一)由于本章原第一条已移到第一章总则部份，因此本章的标题相应改为

“香港特别行政区基本法的解释和修改”。

(二)关于基本法的解释问题，原草稿第九章第二条第二款规定：“香港特别行政区法院在审理案件时可以对基本法中属于香港特别行政区自治权范围内的条款进行解释”。本组委员对此款规定尚有不同意见。一些委员认为，法院在审理案件时解释基本法不应受到限制，主张将规定中的“属于香港特别行政区自治权范围内的条款”一语去掉。但另一些委员不同意此项意见，主张保留。

在研究这个问题的过程中，有些委员提出，是否能够从香港特别行政区法院的司法管辖权方面来寻求解决办法。为此，本组和政治体制小组举行了两次联席会议，两组的法律专家也对这个问题专门进行了讨论。本组在研究了两组法律专家提出的解决方案后，有些委员认为，目前的方案也还不能解决法院解释基本法是否应有一个范围的问题。有些委员认为，全国人民代表大会常务委员会对基本法所作的解释在一般情况下不影响在此以前法院作出的判决，但是否也有某种例外的情况，需要有特殊的法律程序来解决。如果可以照顾到这种特殊情况，那么法院解释本法的范围限制就可以取消。但本组有些委员认为，这样做对法院审理案件会造成技术性困难。也有委员提出，如果全国人民代表大会常务委员会的解释有溯及力，是否会影响香港特别行政区法院的终审权。

本组委员认为，解释权的问题比较复杂，现在提出的各种方案都还不够成熟，尚需要作进一步研究，以期获得解决。

(三)关于基本法的修改问题，在起草委员会第四次全体会议上，部分委员提出，本章原草稿第三条关于“本法总则所规定的各项基本原则自本法生效之日

起五十年内不作修改”的规定，容易使人误解为除此以外的其他章节里的基本方针政策都是可以修改的。因此，小组一致同意改为：“本法的任何修改，都不得与中华人民共和国对香港既定的基本方针政策相抵触”。

关于修改基本法的议案，原草稿第九章第三条规定由全国人民代表大会常务委员会、国务院或全国人民代表大会的代表提出。全国人民代表大会代表在提出修改基本法的议案之前，须经香港特别行政区出席全国人民代表大会代表三分之二的多数、香港特别行政区立法机关成员三分之二的多数及香港特别行政区行政长官的同意。本组委员经过讨论认为，除全国人民代表大会常务委员会、国务院外，香港特别行政区也应有提案权。考虑到修改基本法是一件大事，香港特别行政区各方面要有一个统一的意见，才便于全国人民代表大会进行讨论。因此我们认为，香港特别行政区修改基本法的议案，应由香港特别行政区的全国人大代表的多数、香港立法机关成员的多数及香港特别行政区行政长官共同同意才能提出。

以上是关于几个主要问题的简单说明。

现将本组进一步修改的基本法序言和第一章、第二章、第七章、第九章的条文草案报告如下：

序 言

香港自古以来就是中国的领土，一八四〇年鸦片战争以后被英国占领。一九八四年十二月，中英两国政府签署了关于香港问题的联合声明，确认中华人民共和国政府于一九九七年七月一日恢复对香港行使主权，从而实现了长期以来全中国人民收回香港的共同愿望。

为了维护国家的统一和领土完整，保持香港的繁荣与稳定，并考虑到香港的历史和现实情况，国家决定，在对香港恢复行使主权时，根据中华人民共和国宪法第三十一条的规定，设立香港特别行政区，并按照“一个国家，两种制度”的方针，实行不同于内地的制度和政策，五十年不变。国家对香港的基本方针政策，已由我国政府在中英联合声明中予以阐明。

根据中华人民共和国宪法，特制定中华人民共和国香港特别行政区基本法，规定香港特别行政区实行的制度，以保障国家对香港的基本方针政策的实施。

〔说明〕 委员们建议，在全国人大颁布基本法时，由国务院发布香港特别行政区的行政区域图。

第一章 总 则

第一条 香港特别行政区是中华人民共和国不可分离的部分。

第二条 全国人民代表大会授权香港特别行政区按照本法的规定实行高度自治。

第三条 香港特别行政区的行政机关和立法机关由香港永久性居民按本法有关规定组成

第四条 香港特别行政区不实行社会主义制度和政策，保持原有的资本主义制度和生活方式。

第五条 香港特别行政区依法保障香港特别行政区居民和其他人的权利和自由。

第六条 财产所有权，包括财产的取得、使用、处置和继承的权利，以及依法征用财产得到补偿（补偿相当于该财产的实际价值、可自由兑换、不无故迟延支付）的权利，均受法律保护。

第七条 香港特别行政区境内的土地和自然资源属于国家所有，由香港特别行政区政府负责管理、使用、出租或批给个人或法人团体使用，其收入全归香港特别行政区政府支配。

第八条 香港原有法律，即普通法及衡平法、条例、附属立法、习惯法，除与本法相抵触或经香港特别行政区的立法机关作出修改者外，予以保留。

第九条 香港特别行政区的行政机关、立法机关和司法机关，除使用中文外，还可以使用英文。

〔说明〕 有的委员建议用“政府机关”代替“行政机关”，但另有委员认为，这个问题应待政治体制专题小组确定“政府”或“行政机关”的含义后，再作决定。

第十条 根据中华人民共和国宪法第三十一条，香港特别行政区的政策和制度，包括社会、经济制度，有关保障基本权利和自由的制度，以及行政管理、立法和司法方面的制度，均以本法的规定为依据。

香港特别行政区立法机关制定的任何法律，均不得以本法相抵触。

第二章 中央与香港特别行政区的关系

第一条 香港特别行政区是中华人民共和国的一个享有高度自治权的地方行政区域。香港特别行政区政府直辖于中央人民政府。

〔说明〕有的委员认为，应加“体现直辖关系的法律是全国人民代表大会和全国人民代表大会常务委员会及国务院制定的法律和法规”

第二条 中央人民政府依照本法第四章的规定任命香港特别行政区行政长官和行政机关的主要官员。

第三条 中央人民政府负责管理与香港特别行政区有关的外交事务。

中央人民政府授权香港特别行政区依照本法自行处理有关的对外事务。

中华人民共和国外交部在香港设立机构处理外交事务。

第四条 中央人民政府负责管理香港特别行政区的防务。

中央人民政府派驻香港特别行政区负责防务的军队不干预香港特别行政区的地方事务。香港特别行政区政府在必要时，可以向中央人民政府请求驻军协助维持社会治安和救助灾害。

驻军人员除应遵守全国性的法律外，还应遵守香港特别行政区的法律。

驻军费用由中央人民政府负担。

(说明)有的委员建议，关于驻军人员犯罪如何处理应另有法律规定。

第五条 香港特别行政区享有行政管理权，按本法的有关规定自行处理财政、金融、经济、工商业、贸易、税务、邮政、民航、海事、交

通运输、渔业、农业、人事、民政、劳工、教育、医疗卫生、社会福利、文化康乐、市政建设、城市规划、房屋、房地产、治安、出入境天文气象、通讯、科技、体育以及其他方面的行政事务。

第六条 香港特别行政区享有立法权。

香港特别行政区的立法机关制定的法律须报全国人民代表大会常务委员会备案。备案不影响该法律的生效。

全国人民代表大会常务委员会在咨询香港特别行政区基本法委员会后，如果认为香港特别行政区的任何法律不符合本法或法定程序，可将有关法律发回重议或撤销，但不作修改。

经全国人民代表大会常务委员会发回重议或撤销的法律立即失效。该法律的失效无溯及力。

〔说明〕本组多数委员认为，关于香港特别行政区立法机关制定的法律是否符合基本法和法定程序，应由全国人民代表大会常务委员会最后确定。委员们并建议，在全国人民代表大会常务委员会下设立一个咨询性机构，暂定名为香港特别行政区基本法委员会，由内地和香港人士参加，负责就基本法的解释和修改，香港特别行政区制定的法律是否符合基本法及法定程序，以及少数全国性法律在香港的适用等问题，向全国人民代表大会或其常务委员会提供意见。这个委员会的成立和隶属关系以及其职责、组成等须待全国人民代表大会决定。

有的委员提出，如果全国人民代表大会常务委员会认为香港特别行政区的立法机关制定的法律有不符合本法或法定程序的可能，可将有关法律转交香港特别行政区的终审法庭审议。若终审法庭认为有关法律不符合基本法或法定程序，而

全国人民代表大会常务委员会没有异议,则该法律立即失效,但该法律的失效无溯及力。若全国人民代表大会常务委员会不采纳香港特别行政区终审法庭的意见,可将该法律再交由一特别委员会审理。(备注:该委员会直属于全国人民代表大会之下,成员由内地和香港法律专家组成,以香港特别行政区之代表占多数。全国人民代表大会常务委员会将采纳该特别委员会的决定,不作修改。)凡经由特别委员会审理而被定为不符合基本法或法定程序的法律,在刊登于香港特别行政区之宪报后,立即失效,但该法律的失效无溯及力。

有的委员认为,本条第三款中“可将有关法律发回重议或撤销”的规定,有“发回重议”就够了,“撤销”可以不要;有的委员则认为,发回重议后如香港立法机关仍坚持原案,再予撤销。

第七条 在香港特别行政区实行的法律为本法,以及本法总则第八条规定的香港原有法律和香港特别行政区立法机关制定的法律。

全国人民代表大会和全国人民代表大会常务委员会制定的法律,除以下(一)、(二)两项所列者外,不在香港特别行政区实施:

(一)有关国防、外交的法律;

(二)其他有关体现国家统一和领土完整并且按本法规定不属于香港特别行政区高度自治范围的法律。

本条前款(一)、(二)所列的法律,凡须在香港特别行政区实施的,由国务院指令香港特别行政区政府公布或立法实施。

除紧急情况外,国务院在发布上述指令前,均事先征询香港特别行政区政府的意见。

香港特别行政区政府如未能遵照国务院的

指令行事，国务院可发布命令将上述法律在香港特别行政区实施。

〔说明〕有的委员建议，本条第三款最后一句应写作：由国务院指令香港特别行政区自行决定实施的形式和方法。

有的委员建议，本条第二款作如下规定：全国人民代表大会和全国人民代表大会常务委员会制定的法律，除有关国防和外交者外，不在香港特别行政区实施。

有的委员认为，因香港特别行政区基本法委员会和香港特别行政区政府的工作性质各有不同，征询这两个机构的事的性质也应各有不同。

有的委员认为，上述方案中“体现国家统一”应理解为凡是应该由中央管辖的事务均由中央管辖。

第八条 香港特别行政区享有独立的司法权和终审权。

第九条 香港特别行政区可以享有全国人民代表大会和全国人民代表大会常务委员会及国务院授予的其他权力。

第十条 香港特别行政区居民中的中国公民可以依照法律参与国家事务的管理。

根据全国人民代表大会常务委员会确定的名额和代表产生办法，由香港居民中的中国公民在香港选出香港特别行政区的全国人民代表大会代表。

〔说明〕有些委员建议，本条改为“具有香港特别行政区永久居民身份的中国公民可以依照法律参与国家事务管理。根据全国人民代表大会常务委员会确定的名额和代表产生办法，由具有香港特别行政区永久居民身份的中国公民

选出同等身份的中国公民为香港特别行政区的全国人民代表大会代表”。

但有些委员认为，本法不能剥夺任何中国公民的基本公民权。

第十一条 中央人民政府所属各部门、各省、自治区、直辖市均不得干预香港特别行政区根据本法自行管理的事务。

中央各部门、各省、自治区、直辖市在香港设立机构须征得香港特别行政区政府的同意和中央人民政府的批准。上述机构及其人员应遵守香港特别行政区的法律。

、中国其他地区的人进入香港特别行政区需办理批准手续。

香港特别行政区可以在北京设立办事机构。

第十二条 香港特别行政区应以法律禁止任何破坏国家统一和颠覆中央人民政府的行为。

〔说明〕有的委员建议，在“破坏国家统一……”前加上“导致”两字。

第七章 香港特别行政区的对外事务

第一条 香港特别行政区政府的代表，可作为中华人民共和国政府代表团的成员，参加由中央人民政府进行的与香港特别行政区直接有关的外交谈判。

第二条 香港特别行政区可以“中国香港”的名义，在经济、贸易、金融、航运、通讯、旅游、文化、体育等领域单独地同世界各国、各地区及有关国际组织保持和发展关系，签订和履行有关协议。

第三条 对以国家为单位参加的、与香港特别行政区有关的、适当领域的国际组织和国际会议，香港特别行政区可派遣代表作为中华人民共和国代表团的成员或以中央人民政府和上述有关国际组织或国际会议允许的身份参加，并以“中国香港”的名义发表意见。

香港特别行政区可以“中国香港”的名义参加不以国家为单位参加的国际组织和国际会议。

对中华人民共和国已经参加而香港也以某种形式参加了的国际组织，中央人民政府将采取必要措施使香港特别行政区以适当形式继续保持在这些组织中的地位。

对中华人民共和国尚未参加而香港已经以某种形式参加的国际组织，中央人民政府将根据需要使香港特别行政区以适当形式继续参加这些组织。

第四条 中华人民共和国缔结的国际协议，中央人民政府可根据香港特别行政区的情况和需要，在征询香港特别行政区政府的意见后，决定是否适用于香港特别行政区。

中华人民共和国尚未参加但已适用于香港的国际协议仍可继续适用。中央人民政府根据

需要授权或协助香港特别行政区政府作出适当安排，使其他有关国际协议适用于香港特别行政区。

第五条 中央人民政府授权香港特别行政区政府依照法律给持有香港特别行政区永久性居民身份证的中国公民签发中华人民共和国香港特别行政区护照，给在香港特别行政区的其他合法居留者签发中华人民共和国香港特别行政区的其他旅行证件。上述护照和证件，前往各国和各地区有效，并载明持有人有返回香港特别行政区的权利。

世界各国或各地区的人入境、逗留和离境，香港特别行政区政府可实行出入境管制。

第六条 中央人民政府协助或授权香港特别行政区政府同各国或各地区缔结互免签证协议。

第七条 香港特别行政区可根据需要在国外设立官方或半官方的经济和贸易机构，报中央人民政府备案。

第八条 外国在香港特别行政区设立领事机构或其他官方、半官方机构，须经中央人民政府批准。

已同中华人民共和国建立正式外交关系的国

家在香港设立的领事机构和其他官方机构可予保留。

尚未同中华人民共和国建立正式外交关系国家的领事机构和其他官方机构，可根据情况允许保留或改为半官方机构。

尚未为中华人民共和国承认的国家只能设立民间机构。

第八章 香港特别行政区的区旗、区徽 (待拟)

第九章 香港特别行政区基本法的 解释和修改

第一条 基本法的解释权属于全国人民代表大会常务委员会。

香港特别行政区法院在审理案件时可以对基本法中属于香港特别行政区自治权范围内的条款进行解释。

全国人民代表大会常务委员会如对基本法的条款作出解释，香港特别行政区法院引用该条款时，即应以全国人民代表大会常务委员会

的解释为准，但在此以前作出的判决不受影响。

全国人民代表大会常务委员会在对本法进行解释前，可征询香港基本法委员会的意见。

第二条 本法的修改权属于全国人民代表大会。

本法的修改提案权属于全国人民代表大会常务委员会、国务院和香港特别行政区。香港特别行政区的修改议案，须经香港特别行政区的全国人民代表大会代表三分之二的多数、香港特别行政区立法机关三分之二的多数及香港特别行政区行政长官同意后，交由香港特别行政区出席全国人民代表大会的代表团向全国人民代表大会提出。

本法的修改议案在列入全国人民代表大会的议程前，先由基本法委员会研究并提出意见。

本法的任何修改，都不得与中华人民共和国规定的对香港的基本方针政策相抵触。

香港特别行政区政治体制专题小组的 工作报告

(一九八七年八月二十二日)

主任委员、副主任委员、各位委员：

1986年12月基本法起草委员会第三次全体会议结束后，政治体制专题小组共举行了六次会议，着手进行基本法第四章《香港特别行政区的政治体制》的具体条文的起草。9个多月来，委员们经过认真的研究和讨论，除部分比较复杂的问题尚未形成条文外，基本法第四章大部分内容已有了初步的条文。此外本专题小组还初步讨论了基本法附则第二条。现将本专题小组9个月来的工作过程报告如下：

1986年12月3日下午，本专题小组在北京举行了第五次会议。这次会议主要讨论了小组的工作计划，并确定按先易后难的原则来起草有关章节的条文。根据这一原则，小组进一步决定在第四次全体会议之前，先讨论基本法第四章第四节司法机关、第五节区域组织、第六节公务员的初步条文。为了加快工作进程，会议还委托数位委员分别负责具体章节的起草，提交小组会议讨论。

1987年2月12日至14日，本专题小组在昆明召开了第六次会议。会上李福善、谭惠珠、司徒华委员分别提交了司法机关、区域组织、公务员三节的条文初稿和起草意见。委员们对这三节条文进行了讨论，最后形成了司法机关、公务员的条文第一稿，对区域组织的条文起草也有了比较一致的意见。

1987年3月16、17日，本专题小组在广州举行了第七次会议。会上廖瑶珠、谭惠珠委员分别提交了基本法附则第二条和区域组织的条文初稿。这次会议继续讨论了第四章后三节的条文，并形成了司法机关、公务员条文第二稿，区域组织条文第一稿。委员们经过讨论认为，附则第二条要对1997年后原有法律、法律文件的效力延续问题作出规定，内容比较复杂，需要进一步研究。

1987年4月17日下午，在第四次全体会议后，本专题小组在北京举行了第八次会议，讨论并确定了第四次全体会议后的工作安排。

1987年6月9日至11日，本专题小组在广州举行了第九次会议。这次会议继续讨论了司法机关、区域组织、公务员三节的条文；初步讨论了萧蔚云委员提交的第四章行政长官、行政机关、立法机关三节部分条文初稿。经过这次会议，形成了行政长官、行政机关、立法机关三节条文第一稿；司法机关、公务员条文第三稿；区域组织条文第二稿。

1987年7月31日至8月3日，本专题小组在广州举行了第十次会议，再一次讨论了第四章的六节条文，并通过了向起草委员会第五次全体会议提交的工作报告。

1987年3月、8月，本专题小组和中央与香港特别行政区关系专题小组在广州举行了两次联席会议，两个专题小组的法律专家也召开了两次联席会议，讨论司法管辖权问题。

以下是本专题小组所草拟的初步条文，请大会予以审议。

政治体制专题小组

第四章 香港特别行政区的政治体制

第一节 行政长官

第一条 香港特别行政区行政长官是香港特别行政区的首长，依照本法规定对中央人民政府和香港特别行政区负责。

〔说明〕有的委员提出，“依照本法规定”六字可以删去；有的委员提出，在“首长”之前加“最高”两字；有的委员提出，在“负责”之前加“政府”两字。

第二条 香港特别行政区行政长官由年满四十周岁，在香港通常连续居住满二十年的香港特别行政区永久性居民中的中国公民担任。

〔说明〕关于行政长官人选的年龄，有些委员认为，必须年满四十五周岁；也有的委员认为，只须三十五周岁。关于行政长官人选在港居住年限，有些委员认为，只须连续住满十五年。

第三条 香港特别行政区行政长官的产生
(待拟)。

第四条 香港特别行政区行政长官的任期为五年，可以连任一次。

〔说明〕有的委员主张行政长官的任期为四年，可以连任两次；有些委员主张行政长官的任期须联系立法机关成员的任期来考虑；有些委员主张行政长官的任期应与立法机关成员相同。

第五条 香港特别行政区行政长官行使下列职权：

（一）代表香港特别行政区；

〔说明〕有的委员主张写成“代表香港特别行政区政府”。

（二）领导香港特别行政区政府；

〔说明〕委员们认为，本章所提“政府”一词的概念应有统一的理解。有些委员主张“政府”仅指行政机关；有些委员主张采用大政府的概念；多数委员同意待进一步研究后再作确定，暂时可先按大政府的概念草拟本章条文。

有些委员认为如采用大政府概念，本项应写成“领导香港特别行政区行政机关”。

（三）负责执行本法及依照本法适用于香港特别行政区的其他法律；

〔说明〕有些委员主张将本项内容写入第一条。

（四）批准或不批准立法机关通过的法律，签署并公布法律；

〔说明〕有的委员认为，行政长官对立法机关通过的法律无否决权，签署法律只是一种形式；有的委员认为，行政长官不批准的法律，可发回重议，如立法机关再以三分之二多数通过，行政长官必须签署，否则可解散立法机关（参见第三节第八条的说明）。

（五）决定政策和发布行政命令；

（六）提名主要官员，报请中央人民政府任命；
经中央人民政府批准，聘请相当于司级和司级
以上的顾问；

〔说明〕有的委员主张“经中央人民政府批准，聘请相当于司级和司级以
上的顾问”一句可删去；有的委员主张在“聘请”前加“依法定程序”；有的
委员认为，经中央批准就是程序，不必加这五个字。

有些委员提出，主要官员和司级以上顾问的免职，应当加以规定。

（七）依照法定程序任免公职人员；

〔说明〕部分委员主张不必加“依照法定程序”；有的委员提出，“依照
法定程序”改为“按本法规定”。

（八）按本法规定任免各级法院法官；

〔说明〕部分委员主张写成：“按法定程序任免各级法院法官”；也有些
委员主张写成：“任免各级法院法官”。

（九）执行中央人民政府就本法规定的有关事
务发出的指令；

（十）代表香港特别行政区政府处理中央授权
的对外事务及其他事务；

（十一）建议或拒绝建议立法机关接受有关税项
或动用政府收入等方面的请求或动议；

〔说明〕有的委员主张本项权力应由立法机关主席行使。

（十二）批准或拒绝批准有关人士出席立法机关
所辖的委员会作证和提供证据；

〔说明〕有些委员主张本项权力应属立法机关主席；有些委员认为，“有
关人士”应改为“政府官员”；有的委员认为，作证和提供证据的范围还需要
研究。

(四) 经中央同意可解散立法机关；

(说明) 有的委员主张立法机关解散后，行政长官也应辞职。

(四) 赦免或减轻刑事罪犯的刑罚。

(说明) 此外，有些委员主张行政长官是立法机关的当然主席，并作为一项写进本条；但也有些委员表示反对；多数委员同意这个问题留后研究。

第六条 香港特别行政区行政长官不能履行职务时，由秘书长（布政司）代理其职务

(说明) 有些委员主张，行政长官不能履行职责时，必须有一个代理其职务的人的顺序名单；有的委员认为不必规定代理人选，届时由行政长官指定；还有的委员提出设副行政长官，但多数委员表示反对。

第七条 香港特别行政区行政长官不得利用职权为自己谋私利。

(说明) 有些委员提出，行政长官要宣誓效忠于中央和香港特别行政区，遵守法律，把“不得利用职权为自己谋私利”改为“尽忠职守”。关于行政长官和主要官员退休后的职业限制问题，留待研究。

第八条 香港特别行政区行政会议（暂定名）是协助行政长官进行决策的机构。

(说明) 有的委员建议，将行政会议的条文写进行政机关一节中；有的委员不赞成设立行政会议。

第九条 香港特别行政区行政会议的成员由行政长官从主要官员、立法机关成员和社会人士中提名，报请中央人民政府任命。

〔说明〕有些委员主张参加行政会议的立法机关成员必须通过立法机关互选产生，社会人士也须经立法机关过半数成员的同意；有的委员主张，如果不是通过互选，则立法机关成员不必参加行政会议。关于行政会议人数及部分成员是否需要一个比例等问题，同意暂不作规定，待进一步研究。还有的委员主张，行政会议成员不必报中央人民政府任命；有些委员认为，行政会议成员可因严重罪行、严重不当行为、严重失职或无力履行职责等理由被行政长官撤职。

第十条 香港特别行政区行政会议由行政长官主持。行政长官如不采纳行政会议多数成员的意见，应将具体理由记录在案，并报中央人民政府备案。

〔说明〕有的委员主张删去本条第二句；有的委员主张，只要将具体理由记录在案就可以，不必报中央备案。

第十一条 香港特别行政区行政会议成员的任期不超过五年。

〔说明〕有的委员主张不确定任期，届时由行政长官确定；有些委员认为，行政会议成员的任期应不超过提名他的行政长官的任期。

第十二条 香港特别行政区行政会议的成员必须宣誓效忠香港特别行政区。

第十三条 香港特别行政区继续保留廉政机构，独立向行政长官负责。

第十四条 行政长官设立咨询组织的制度继续保留。

〔说明〕此外，有些委员建议本节须加进一条：“司级以上顾问可以组成一个顾问团，执行本法赋予的职责。”

第二节 行政机关

第一条 香港特别行政区××是香港特别行政区行政机关。

香港特别行政区行政机关的首长是香港特别行政区行政长官。

〔说明〕香港特别行政区行政机关的名称，有的委员建议为“行政总署”；有些委员建议为“行政公署”；有的委员建议为“行政管理署”或“行政管理”。

有些委员提出，行政机关应包括行政长官、行政会议和布政司署等具体的行政部门；有些委员认为，行政会议是行政长官的咨询机构，不是行政机关的一部分；还有的委员主张，行政机关的首脑是布政司。

第二条 香港特别行政区行政机关各部门的主要官员由香港特别行政区行政长官提名，报请中央人民政府任命。

香港特别行政区的主要官员由在香港通常连续居住满十五年的香港永久性居民中的中国公民担任。

〔说明〕委员们认为，主要官员一般应从公务员中挑选，后者担任主要官员期间，按合约公务员待遇，任满后即脱离公职；主要官员工作调动及增加司级官员编制须报中央人民政府批准；主要官员包括哪些职级必须确定一个范围。关于主要官员必须在香港通常连续住满多少年，有些委员主张十年，有的委员主张二十年，也有的委员主张不作规定。

第三条 香港特别行政区行政机关行使下列职权：

(一) 向行政长官提出政策性建议；

□依据本法规定执行行政决策，管理行政事务；

□编制并提出财政预算、决算；

□拟定并提出法案和议案。

〔说明〕有的委员提出，如果行政机关只包括执行机构，其职权第二项就应写成：“经行政长官同意后，依据本法规定执行行政决策，管理行政事务”；多数委员认为，第四项职权中的“法案”包括“附属法规”。

第四条 香港特别行政区行政机关的检察部门独立处理刑事检控，不受任何干涉。

第五条 香港特别行政区行政机关必须遵守法律，对香港特别行政区立法机关负责，执行立法机关通过并已生效的法案；定期向立法机关作施政报告；答复立法机关成员的质询；

〔说明〕有些委员不同意上述条文中“负责”之后用冒号，理由是“负责”的内容比条文所说的广泛，并建议加上“接受立法机关的监察”、“行政长官及任何主要官员可受立法机关依法规定的弹劾和投不信任票”两项。但多数委员不同意上述意见。

第六条 行政机关设立咨询组织的制度继续保留。

第三节 立法机关 (名称待定)

第一条 香港特别行政区××_人是香港特别行政区的立法机关。

第二条 香港特别行政区立法机关的组成和产生办法（待拟）。

第三条 香港特别行政区立法机关成员任期为四年。

第四条 香港特别行政区立法机关主席的产生（待拟）。

第五条 香港特别行政区立法机关主席的资格（待拟）。

第六条 香港特别行政区立法机关行使下列职权：

（一）根据本法规定并依照法定程序制定和修改法律；

〔说明〕有的委员提出，在“法定程序”后加“提出法律草案”；但有些委员不同意，认为如在基本法中规定立法机关成员可提出法律草案，则必须按现行办法作明确的限制。

（二）根据行政机关的提案，审核、通过财政预算、决算；

（三）批准税收和公共开支；

（四）听取行政机关的施政报告；

（五）对行政机关的工作提出质询；

〔说明〕有的委员建议改为“对行政机关的工作加以审查和提出质询”

（六）接受香港居民的申诉；

（七）行政长官如有严重违法或渎职行为，经立法机关全体成员的三分之一联合动议，并经四分之三多数通过，可以提出弹劾案，报请中央人民政府决定。

〔说明〕有的委员主张，提出动议的人数应为全体成员的四分之一，通过弹劾案的人数应为三分之二。有的委员提出，立法机关可以过半数弹劾主要官员。有的委员提出，立法机关可以三分之二多数对行政长官和任何主要官员投不信任票，但多数委员不同意。

〔说明〕此外，有的委员建议本条加进一项：“立法机关所辖委员会在得到行政长官批准后，有权传召有关人士出席作证和提供证据”。有的委员提出，本条应加进一项，规定立法机关可以设立常设委员会和专责委员会，但有的委员认为，这些内容宜在立法机关会议常规中规定。

第七条 香港特别行政区立法机关举行会议的法定人数为不少于全体成员的二分之一。

除本条另有规定者外，香港特别行政区立法机关对法案和议案的表决，须经出席会议的过半数成员通过。

立法机关的工作程序由法律规定。

〔说明〕有些委员提出，立法机关举行会议的人数可少于半数，如法定人数太高，不易召集会议。

第八条 香港特别行政区立法机关通过的法律，须经行政长官签署、公布，方能生效。

〔说明〕有些委员提出，行政长官对立法机关通过的、与香港公众利益有违的法案，可发回重议；有些委员建议，行政长官必须在一年内签署，若十年内发回重议，超过时限不签署，该法案就不生效；有些委员认为，超过时限不签署，应自动生效。

第九条 香港特别行政区立法机关成员在立法机关会议上的发言，不受法律追究。

第十条 香港特别行政区立法机关成员在

出席会议时和赴会途中不受逮捕。

〔说明〕有的委员提出，目前香港立法局议员如犯有刑事罪行，只有开会时才不受逮捕

第十一条 香港特别行政区立法机关必须遵守法律，宣誓忠于香港特别行政区。

〔说明〕此外，有的委员提出，关于立法机关会议公开、会议纪要公开及立法机关成员的薪金等应在本节作出规定；也有些委员认为这些内容不宜写进基本法，应在立法机关会议常规中规定

有些委员建议，立法机关成员如有严重违法或渎职行为，在本法中应有作适当处置的规定。

第四节 司法机关

第一条 香港特别行政区各级法院是香港特别行政区的审判机关，行使香港特别行政区的审判权。

第二条 香港特别行政区设立终审法院、高等法院、区域法院、裁判署法庭和其他专门法庭。高等法院设上诉法庭和原讼法庭。

原在香港实行的司法体制，除因设立香港特别行政区终审法院而产生变化外，予以保留。

第三条 香港特别行政区的终审权属于香港特别行政区终审法院。终审法院可根据需要邀请其他普通法适用地区的法官参加审判。

〔说明〕有的委员提出，本条可参见第二章第六条的说明

第四条 香港特别行政区各级法院的职权划分由香港特别行政区的法律规定。

〔说明〕有的委员提出，香港特别行政区法院的职权是由本法和其他法律规定，此条宜在司法管辖权条文确定后再作斟酌。

第五条 香港特别行政区法院的司法管辖权〔待拟〕。

〔说明〕中央与香港特别行政区的关系专题小组和香港特别行政区的政治体制专题小组的八位法律专家经过研究，提出了一个条文初稿，此条文初稿已得到两个专题小组联席会议的原则同意，但认为文字还要推敲：

“香港特别行政区法院除依照香港原有法律制度对有关国防、外交和中央政府行政行为的案件无管辖权外，对其他在香港特别行政区境内的案件均有审判权。

“香港特别行政区法院在审理案件中，凡涉及国防、外交和中央政府行政行为的问题时，应征询行政长官的意见。行政长官就该等问题发出的证明文件对法院有约束力

“行政长官在发出上述证明文件前，须取得全国人民代表大会常务委员会或国务院之证明书”。

对上述条文，有的委员表示不同意“中央政府行政行为”一词；有的委员认为，对叛国一类的案件及香港特别行政区法院逾越本法授予的管辖权时如何处理等问题，留后研究。

第六条 香港特别行政区法院依照香港特别行政区的法律审判案件，其他普通法适用地区的司法判例可作参考。

〔说明〕有的委员提出“依照”两字后加“适用于”三字

第七条 香港特别行政区法院的法官，根据适地法官和法律界及其他方面知名人士组成的独立委员会推荐，由行政长官予以任命。

〔说明〕香港特别行政区法院的法官指区域法院以上的法官。其他司法人员指裁判署法庭及专门法庭的审判人员，其他在司法组织工作的人员均属公务员

第八条 香港特别行政区法院的法官在：力履行职责或行为不检的情况下，行政长官根据终审法院首席法官任命的不少于三名当法官组成的审议庭的建议，予以免职。

第九条 除本节第七条和第八条规定的程序外，香港特别行政区终审法院及高等法院首席法官的任命和免职，¹⁹⁸⁷须由行政长官征得香港特别行政区立法机关同意并报全国人民代表大会常务委员会备案。

第十条 香港特别行政区法官以外的其他司法人员原有的任免制度继续保持。

第十一条 香港特别行政区的法官和其他司法人员应根据本人的司法和专业才能选用，并可从其他普通法适用地区聘用。

第十二条 香港特别行政区成立前在香港任职的法官和其他司法人员均可留用，其年资予以保留，薪金、津贴、福利待遇和服务条件不低于原来的标准。

第十三条 对退休或符合规定离职的法官和其他司法人员，包括香港特别行政区成立前已退休者，不论其所属国籍或居住地点，香港特别行政区政府按不低于原来的标准向他们或其家属支付应得的退休金、酬金、津贴及福利费。

第十四条 香港特别行政区法院独立进行审判，不受任何干涉。司法人员履行审判职责的行为不受法律追究。

第十五条 原在香港实行的陪审制度的原则予以保留。

第十六条 香港特别行政区的刑事诉讼和民事诉讼中保留原在香港适用的原则和当事人享有的权利。

[说明] 有些委员介绍了目前香港刑事诉讼中适用的原则及被告人享有的权利，见附件。

第十七条 香港特别行政区可与全国其他地区司法机关通过协商进行司法方面的联系和依法提供协作

[说明] 有些委员主张“依法提供”四字应删去。

第十八条 在中央人民政府协助或授权下，香港特别行政区政府可与外国就司法互助关系作出适当安排。

[说明] 此外，有的委员提出，香港现行的公证人制度，既是一个司法问题，也有涉外性质，香港特别行政区成立后，公证人的任命须由中央行使。这个问题如何处理，希望关系小组和政制小组研究。

有的委员提出，司法机关的财政独立必须单列一条。这个问题尚待研究。

第五节 区域组织

第一条 香港特别行政区可设立非地方政权性的区域组织，接受香港特别行政区政府就有关地区管理及其他事务的咨询，或负责提供文化、康乐、环境卫生等服务。

〔说明〕委员们认为，如果保留目前三层架构，则区议会仍应为地区性咨询机构。

第二条 区域组织的具体职权及组成方法，由法律规定。

第六节 公务员

第一条 在香港特别行政区政府各部门任职的公务人员必须是香港特别行政区永久性居民。本节第四条规定者或法律规定某一薪级点以下者不在此限。

公务人员必须尽忠职守，对香港特别行政区政府负责。

〔说明〕关于公务人员的定义，本小组经多次讨论，尚无适当的结论。

第二条 香港特别行政区政府可自行任用政府各部门的各级公务人员，但本法所规定的主要官员除外。

〔说明〕有的委员建议，此条如与其他章节条文重复，则不写

第三条 香港特别行政区成立前在香港政府各部门（包括警察部门）任职的公务人员均可留用，其年资予以保留，薪金、津贴、福利待遇和服务条件不低于原来的标准。

第四条 香港特别行政区政府可任用原香港公务人员中的或持有香港特别行政区永久性居民身份证的英籍和其他外籍人士担任政府部门的各级公务人员，但主要政府部门（相当于“司”级部门，包括警察部门）的正职和某些主要政府部门的副职除外。

香港特别行政区政府还可聘请英籍和其他外籍人士担任政府部门的顾问；必要时并可从香港特别行政区以外聘请合格人士担任政府部门的专业和技术职务。上述外籍人员只能以个人身份受聘，并和其他公务人员一样，必须尽忠职守，对香港特别行政区政府负责。

〔说明〕委员们认为，主要政府部门的正职和某些主要政府部门的副职的范围需明确规定

第五条 对退休或符合规定离职的公务人员，包括香港特别行政区成立以前退休或符合规定离职的公务人员，不论其所属国籍或居住地点，香港特别行政区政府按不低于原来的标准向他们或其家属支付应得的退休金、酬金、津贴及福利费。

第六条 公务人员应根据本人的资格、经验和才能予以任用和提升。香港原有关于公务人员的招聘、雇用、考核、纪律、培训和管理的制度（包括负责公务人员的任用、薪金、服务条件的专门机构），除有关给予外籍人员特权待遇的规定外，予以保留。

〔说明〕有的委员主张，在本条的最后，加下列一句：“对上述制度，香港特别行政区政府可根据实际情况，为提高工作效率和公务人员的素质，依法加以发展和改进”。

附件：第四章第四节司法机关第十六条的说明

根据一些委员的介绍，目前香港刑事诉讼中适用的原则及被告人享有的权利包括：

1. 任何人受刑事检控或因其权利义务涉讼须予以判定时，应有权受独立无私之法定管辖法院公开审问；

2. 法院得因风化、公共秩序或国家安全关系、或于保护当事人私生活有此必要时，或因情形特殊，公开审判势必影响司法，而在其认为绝对必要之限度内，禁止新闻界及公众旁听审判程序之全部或一部；

3. 除保护少年有此必要，或事关婚姻争执或子女监护问题外，判决应一律公开宣示；

4. 受刑可控告之人，未经依法确定有罪之前，应假定其无罪；

5. 审判被控刑事罪时，被告一律平等享受下列最低限度之保障：

(1) 迅即以其通晓之语言，详细告知被控罪名及案由；

(2) 给予充分之时间及便利，准备答辩并与其任选之辩护人联络；

(3) 立即受审，不得无故稽误；

(4) 到庭受审，及亲自答辩或由其选任辩护人答辩；未经选任辩护人者，应告以有这种权利；

(5) 法院认为审判有此必要时，应为其指定公设辩护人，如被告无资力酬偿，得免付之；

内，禁止新闻界及公众旁听审判程序之全部或一部；

3.除保护少年有此必要，或事关婚姻争执或子女监护问题外，判决应一律公开宣示；

4.受刑可控告之人，未经依法确定有罪之前，应假定其无罪；

5.审判被控刑事罪时，被告一律平等享受下列最低限度之保障：

(1)迅即以其通晓之语言，详细告知被控罪名及案由；

(2)给予充分之时间及便利，准备答辩并与其任选之辩护人联络；

(3)立即受审，不得无故稽误；

(4)到庭受审，及亲自答辩或由其选任辩护人答辩；未经选任辩护人者，被告以有这种权利；

(5)法院认为审判有此必要时，应为其指定公设辩护人，如被告无资力酬偿，得免付之；

(6)得亲自或间接诘问他造证人，并得声请法院传唤其证人在与他造证人同等条件下出庭作证；

(7)如不通晓或不能使用法院所用之语言，应免费为备通译协助之；

(8)不得强迫被告自供或认罪。

6.少年之审判，应顾念被告年令及宜使其重适社会生活，而酌定程序；

7.经判定犯罪者，有权声请上级法院依法复判其有罪判决及科刑罚；

8.经终局判决判定犯罪，如后因提出新证据或因发现新证据，确实证明原判错误而经撤销原判或免刑者，除经证明有关证据之未能及时披露，应由其本人全部或局部负责者外，因此判决而服刑之人应依法受损害赔偿；

9.任何人依法律经终局判决判定有罪或无罪开释者，不得就同一罪名再予审判或科刑。

教育、科学、技术、文化、体育和宗教 专题小组工作报告

(一九八七年八月二十二日)

主任委员、副主任委员、各位委员：

教育、科学、技术、文化、体育和宗教专题小组于一九八六年九月在香港进行了调查研究之后，曾举行过四次专题小组会议，即一九八六年十二月三日在北京举行了第四次小组会议，一九八七年二月十六日、十七日在昆明举行了第五次小组会议，四月十七日在北京举行了第六次小组会议，六月三日、四日在广州举行了第七次小组会议。

第四次小组会议后，钱伟长委员根据本小组委员的意见，并参考了香港基本法咨询委员会委员及有关人士的意见，按照《中华人民共和国香港特别行政区基本法结构（草案）》，草拟了第六章条文草稿。在昆明召开的第五次小组会议上，委员们对条文草稿逐条进行了讨论和修改，形成了第六章条文草案第二稿。一九八七年三月三

日，小组召集人钱伟长、马临委员联名将草案第二稿分送
在港的部份草委、咨询委员会文化教育科技宗教专责小组
委员以及有关社会人士共八十五人，并附函征询对该稿的
意见。受征询的草委、咨委和社会人士对草案第二稿提出
了一些意见和建议。在广州召开的第七次小组会议上本组
的起草委员会委员们对这些意见和建议，以及随后收到的
咨询委员会文化教育科技宗教专责小组的《最后报告》，
认真地进行了研究，对条文作了进一步的修改，并决定将
小组初步通过的《第六章 香港特别行政区的教育、科
学、技术、文化、体育和宗教（讨论稿）》及其说明提交
基本法起草委员会第五次全体会议讨论。

教育、科学、技术、文化、体育和宗教
专 题 小 组

第六章 香港特别行政区的教育、科学、 技术、文化、体育和宗教

(讨论稿)

第一条 香港特别行政区保持原在香港实行的教育制度。

香港特别行政区教育事业的发展和改进，由香港特别行政区政府自行决定。

第二条 香港特别行政区政府自行制定本行政区教育方面的政策，包括教育体制及管理、教学语言、经费分配、考试制度、学位制度和承认学历等政策。

各社会团体和私人可依法在香港特别行政区兴办各种教育事业。

第三条 各类院校均可保留其自主性并享有学术自由，可继续从香港特别行政区以外招聘教职员，选用教材。宗教团体所办的学校可继续开设宗教课程。

学生享有选择院校和在香港特别行政区以外求学的自由。

第四条 香港特别行政区政府发展医疗卫生事业，发

展现代医药和我国传统医药，鼓励和支持社会团体和私人机构举办各种医疗卫生事业。

第五条 香港特别行政区政府发展科学技术事业，奖励和保护科学、技术的研究成果和发明创造。

香港特别行政区政府自行决定科学、技术的各类标准和规格。

第六条 香港特别行政区政府发展文化事业，奖励和保护作者在文化创作中所获得的成果、荣誉和合法权益。

第七条 香港特别行政区政府不干预、不限制宗教活动和宗教团体的内部事务。宗教活动不得与香港特别行政区法律相抵触。

宗教团体依法享有财产的取得、使用、处置、继承以及接受资助的权利。财产方面的原有权益仍予保持和保护。

宗教团体所办的宗教院校和其他院校以及医院、福利机构和其他社会事业，可按照原有的办法继续存在和发展。

〔说明〕有的委员建议，本条应增写“香港特别行政区政府得将宗教纪念日及民间节日，例如佛诞、圣诞节、复活节等，统一编列为公众

假期”。有的委员则认为，如特别规定宗教假日，各界可能要求增写本界的节假日，故不宜特别规定。

有的委员建议，应增写“香港特别行政区政府依据法律保障宗教及慈善团体的各种固有权利，如有关拨地、批续地契、豁免差饷与税项等，均予继续保持”。有的委员认为上述内容属经济范畴，建议由经济专题小组研究解决。

第八条 宗教组织和教徒可同其他地方的宗教组织和教徒保持原有的关系。

第九条 香港特别行政区政府自行制定关于各种专业执业资格的审定和授予办法。

在香港特别行政区成立以前原已取得专业执业资格者，可以保持原有的资格。

香港特别行政区保留在特别行政区成立以前已承认的专业和专业团体，并根据社会发展需要承认新的专业和专业团体。

（说明）有的委员提出，条文还应写明专业团体可自行制定专业资格，确定有关的专业水平和制定及执行专业守则。多数委员认为这是专业团体内部事务，不宜写在基本法内。

第十条 香港特别行政区政府支持和发展体育事业。
香港原有的民间体育团体可依法继续存在和发展。

第十一条 香港特别行政区保持原在香港实行的对教育、医疗、文化、艺术、康乐、体育、社会福利、社会工作等机构的资助政策。香港特别行政区成立后，原在香港各资助机构任职的人员均可根据原有制度继续聘用。

第十二条 香港特别行政区政府保持原有的社会福利，并根据经济条件和社会需要，自行决定其发展和改进。

第十三条 香港特别行政区从事社会服务的志愿团体可自行决定其服务方式。

第十四条 香港特别行政区根据经济发展、社会需要和劳资协商的实际情况，自行制定有关劳工的法律和政策。

第十五条 香港特别行政区的教育、科学、技术、文化、体育、专业、社会福利等方面的民间团体以及宗教团体同内地相应的团体的关系，应遵守互不隶属、互不干涉和互相尊重的原则。

第十六条 香港特别行政区的教育、科学、技术、文化、体育、卫生、专业、社会福利以及宗教等组织可以“中国香港”的名义，同世界各国、各地区及有关国际组

织保持和发展关系。

〔说明〕如果第七章“香港特别行政区的对外事务”的有关条文中增列上述内容，则本条可删去。

讨论文件
请勿发表

经济专题小组的工作报告
一九八七年八月二十二日

主任委员、副主任委员、各位委员：

经济专题小组第六次全体委员会议，一九八七年六月十二日至十四日在广州举行。内地和香港共有三位委员因公务关系请假。参加会议的全体委员一致认为，在起草基本法结构（草案）第五章《香港特别行政区的经济》时，应充分地体现中华人民共和国政府所提出的有关基本方针和政策，以维持香港特别行政区的繁荣与稳定。但考虑到基本法结构（草案）有关章节之间的衔接，因此建议：

（一）有关在香港特别行政区现行的资本主义社会、经济制度，在国家恢复行使主权后五十年内

不变，已在本法（草案）的《序言》和《总则》中有所规定，因此本章不需重复；

□本法（草案）第二章第六条，规定“香港特别行政区享有行政管理权，按本法的有关规定自行处理财政、金融、经济……及其他方面的行政事务”。因此，本章的起草，以规定有关财政、金融、贸易等各重要经济领域的根本方针政策为原则，不宜涉及若干细节规定；

□关于香港特别行政区的对外经济贸易关系，均将由本法（草案）第七章《香港特别行政区的对外事务》系统地表述之，本章拟从略。

经过委员们的热烈讨论，本章拟调整、修改并补充为如下七节，即：第一节—财政和税收；第二节—金融和货币；第三节—对外贸易；第四节—工商业和其他产业；第五节—土地契约；第六节—航运管理；第七节—民航管理；共四十八条。

以上各节、各条、各款的草拟，是否有当，请求全体委员会议予以审议，以便作进一步的修改补充。本小组并请求，根据本法结构（草案）

有关《说明》第三段的规定，批准本章有关的分节和标题，作如上的增删和调整。

第五章《香港特别行政区的经济》初步草案如下，请审议。

第五章 香港特别行政区 的经济（草稿）

第一节 财政和税收

第一条 香港特别行政区的财政独立。

香港特别行政区的财政收入全部用于自身需要，不上缴中央人民政府。

第二条 香港特别行政区的财政预算应保持收支基本平衡。

香港特别行政区财政预算收支的增长率以不超过本地生产总值的增长率为原则。

〔说明〕个别委员建议，将第二款的两个“率”字删去。有些委员则认为，第二款可不写进基本法。

第三条 香港特别行政区实行独立的税收制度。

第四条 香港特别行政区继续实行低税政策。

第五条 香港特别行政区税种、税率、税收宽免，由特别行政区以法律规定。

〔说明〕有的委员主张把“香港特别行政区不向特别行政区居民的区外收入征收所得税”的

内容作为本条的第二款写进基本法。有的委员不赞成将这样的具体内容写进基本法。

第六条 中央人民政府不在香港特别行政区征税。

〔说明〕有的委员建议将本条文字改为“香港特别行政区不承担向中央人民政府纳税的义务”。

第七条 香港特别行政区的财政预算，由特别行政区行政机关编制，特别行政区立法机关审议批准，并报中央人民政府备案。

第八条 香港特别行政区政府的开支必须符合预算的规定。

超过预算的开支应提请特别行政区立法机关审议批准或者追认。

第九条 香港特别行政区的公共开支帐目必须由特别行政区审计机关审核。

特别行政区审计机关每年均必须将审核结果报告特别行政区立法机关。

第十条 香港特别行政区的财政决算，由特别行政区行政机关编制、审计，特别行政区立法

机关审议，报中央人民政府备案。

第二节 金融和货币

第十一条 香港特别行政区政府应提供必要条件和采取适当措施，以保持香港特别行政区的国际金融中心地位。

第十二条 香港特别行政区自行制定货币金融制度。

第十三条 香港特别行政区继续实行自由、开放的货币金融政策。

第十四条 香港特别行政区政府保障金融企业和金融市场的经营自由，并依法进行管理和监督。

第十五条 香港特别行政区政府保障资金在香港特别行政区流动的自由和进出香港特别行政区的自由。

第十六条 香港特别行政区不实行外汇管制政策。

第十七条 香港特别行政区继续开放外汇、外币、黄金、证券、期货市场。

〔说明〕有的委员认为，外汇本身就包含外币在内，不必另加。

第十八条 港元为香港特别行政区法定货币，继续流通，自由兑换。

第十九条 港币的发行权属于香港特别行政区政府。

港币的发行，必须有充足的准备金。

香港特别行政区政府，在确知港币的发行基础健全和发行安排符合保持港币稳定的条件下，可授权指定银行根据法定权限发行或者继续发行港币。

第二十条 香港特别行政区的外汇基金，由香港特别行政区政府管理和支配，主要用于调节港元汇价。

第三节 对外贸易

第二十一条 香港特别行政区实行自由的对外贸易制度。

香港特别行政区政府保障对外贸易的自由保障货物、无形财产和资本的流动自由。

第二十二条 香港特别行政区自行制定对外贸易政策。

香港特别行政区可单独地同世界各国、各地区保持和发展经济、贸易关系。

第二十三条 香港特别行政区为自由港。

香港特别行政区除法律另有规定外不征收关税。

第二十四条 香港特别行政区为单独的关税地区。

第二十五条 香港特别行政区可以“中国香港”的名义参加关税和贸易总协定、关于国际纺织品贸易安排等有关国际组织和国际贸易协定，包括优惠贸易安排。

第二十六条 香港特别行政区根据所参加的国际协定取得的及以前取得仍继续有效的出口配额、关税优惠和达成的其他类似安排，全由香港特别行政区享有。

第二十七条 香港特别行政区根据当时的产地规则，可对本地产品签发产地来源证。

第四节 工商业和其他产业

第二十八条 香港特别行政区实行自由、开放的工业政策和商业政策。

第二十九条 香港特别行政区鼓励工业投资、技术进步和开拓新兴产业，以增强国际竞争能力。

第三十条 香港特别行政区政府积极创造必要的环境和条件，以利工业的发展。

第三十一条 香港特别行政区政府积极采取适当政策，促进商业、旅游业、房地产业、运输业、公用事业、服务性行业、渔农业等产业的发展。

第五节 土地契约

第三十二条 香港特别行政区政府可自行制定有关土地的开发、管理和使用的政策。

第三十三条 香港特别行政区成立之前已经批出、决定、或者续期的超越一九九七年六月三十日年期的所有土地契约和与土地契约有关的一切权利，均按照香港特别行政区的法律继续予以

承认和保护。

第三十四条 从一九八五年五月二十七日至一九九七年六月三十日期间批出或者原没有续期权利而获得续期的越出一九九七年六月三十日年期而不超过二〇四七年六月三十日的一切土地契约，承租人从一九九七年七月一日起不补地价，但需每年缴纳相当于当日该土地应课差餉租值百分之三的租金。此后，随应课差餉租值的改变而调整租金。

第三十五条 原旧批约地段、乡村屋地、丁屋地和类似的农村土地，如该土地在一九八四年六月三十日的承租人，或在~~该日~~以后批出的丁屋地承租人，其父系为一九八年在香港的原有乡村居民，只要该土地的承租人仍为该人或其合法父系继承人，原定租金维持不变。

第三十六条 香港特别行政区成立以后满期而没有续期权利的土地契约，由特别行政区自行制定法律及政策处理。

〔说明〕有些委员认为，有关土地契约的具

体问题。在基本法中不必写得过细，建议把《中英联合声明》附件三有关规定概括为一条写进本章第四节。

第六节 航运管理

第三十七条 香港特别行政区保持原在香港实行的航运经营和管理体制。香港特别行政区政府自行规定在航运方面的具体职能和责任。

第三十八条 香港特别行政区经中央人民政府授权继续进行船舶登记，并可根据其法律以“中国香港”名义颁发有关证件。

第三十九条 一切民用船舶可根据香港特别行政区法律进出港口。

外国军用船只进入香港特别行政区须经中央人民政府特别许可。

第四十条 香港特别行政区的私营航运企业与航运有关的企业和私营集装箱码头，可继续自由经营。

第七节 民航管理

第四十一条 香港特别行政区政府应提供必要条件和采取适当措施，以保持其国际和区域航空中心的地位。

第四十二条 香港特别行政区继续实行原在香港实行的民用航空管理制度，并按中央人民政府关于飞机国籍标志和登记标志的规定，设置自己的飞机登记册。

外国军用航空器进入香港特别行政区须经中央人民政府特别许可。

第四十三条 香港特别行政区自行负责民用航空的日常业务和技术管理，自行负责机场管理。

香港特别行政区负责在特别行政区飞行情报区内提供空中交通服务，履行国际民用航空组织的区域性航行规划程序所规定的其他职责。

第四十四条 中央人民政府经同香港特别行政区政府磋商作出安排，为在香港特别行政区注册并以香港特别行政区为主要营业地的航空公司和中华人民共和国的其他航空公司，提供香港特

特别行政区和中华人民共和国其他地区之间的往返航班。

第四十五条 涉及中华人民共和国其他地区与其他国家和地区往返并经停香港特别行政区的航班，和涉及香港特别行政区与其他国家和地区往返并经停中华人民共和国其他地区航班的民用航空运输协定，由中央人民政府签订。

在签订本条第一款所指国际民用航空运输协定时，应考虑香港特别行政区的特殊情况和经济利益，并同香港特别行政区政府磋商。

中央人民政府在同外国政府商谈有关本条第一款所指航班的安排时，香港特别行政区政府的代表可作为中华人民共和国政府代表团成员参加。

第四十六条 香港特别行政区政府经中央人民政府具体授权可

(一) 续签或者修改原有的民用航空运输协定和协议（这些协定和续协议原则上都可续签或者修改），并尽可能保留原协定和协议规定的权利；

(二) 签订新的民用航空运输协定，为在香港特

别行政区注册并以香港特别行政区为主要营业地的航空公司提供航线，以及过境和技术停降权利

~~（白）如果同外国和其他地区没有民用航空运输协定，签订临时协议。~~

不涉及往返。经停中国内地而只往返。经停香港特别行政区的定期航班，均由本条所指的民用航空运输协定或者临时协议予以规定。

第四十七条 中央人民政府授权香港特别行政区政府：

（一）同其他当局商谈并签订有关执行本法第四十六条所指民用航空运输协定和临时协议的各项安排；

（二）对在香港特别行政区注册并以香港特别行政区为主要营业地的航空公司签发执照；

（三）按照本法第四十六条所指民用航空运输协定和临时协议招定航空公司；

（四）对外国航空公司往返。经停中国内地的航班以外的其他航~~机~~签发许可证。

第四十八条 在香港~~特别行政区~~注册并以香

港~~特别行政区~~为主要营业地的航空公司和与民用航空有关的行业，可继续经营。

〔说明〕有的委员建议，将第四十六条和第四十七条合并，并改写为：“经中央人民政府具体授权，香港特别行政区政府对与香港特别行政区政府有关的民用航空运输协定、协议、或临时协议，可以谈判、修改、续签或签署，并依法作出安排，报中央人民政府批准或备案”。

~~基本法起草委员会~~

经济专题小组

COLLECTION OF DOCUMENTS OF
THE FIFTH PLENARY SESSION OF THE DRAFTING COMMITTEE

Compiled by the Secretariat of
the Drafting Committee for the Basic Law

Translated by the Secretariat of
the Consultative Committee for the Basic Law

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22 August, 1987

**Mr Ji Pengfei's Speech at the Fifth Plenary Session
of the Drafting Committee for the Basic Law**

Members,

I now call the fifth plenary session of the Drafting Committee for the Basic Law to order.

The subgroups have stepped up the drafting process since the last plenary session. During the last four months, the Subgroup on the Relationship between the Central Government and the SAR and the Subgroup on Fundamental Rights and Duties of Hong Kong Inhabitants further amended the Preamble, General Provisions and Chapters 2, 3, 7 and 9 in accordance with the ideas suggested by members at the session and the proposals made by the Consultative Committee for the Basic Law (CCBL) in Hong Kong. The Subgroups on Political Structure, on Economy and on Education, Science, Technology, Culture, Sports and Religion also prepared the drafts of other Chapters. The Chairmen's Committee is pleased with the work of the various subgroups of the Drafting Committee and would like to express appreciation.

We have begun collecting designs for the regional flag and emblem of the HKSAR. The adjudicating panel for the design competition, which is composed of five members of the Drafting Committee for the Basic Law and six experts from mainland China

and Hong Kong, held its first meeting on 21 August 1987 to discuss how adjudication would be carried out. We are sure that the adjudicating panel will do a good job.

We have received a number of final reports which were prepared by the special groups of the CCBL and endorsed by its executive committee, together with other reference material from the CCBL, since our last plenary session. These submissions have been of great help to the drafters. On behalf of the Drafting Committee, I would like to thank the Consultative Committee.

According to the decision of the fourth plenary session, the agenda for this session include the following items:

1. to continue with the discussion on the drafts of the Preamble, General Provisions and Chapters 2, 3, 7 and 9;
2. to hold preliminary discussion on the draft provisions prepared by the Subgroup on Economy;
3. to hold preliminary discussion on the draft provisions prepared by the Subgroup on Education, Science, Technology, Culture, Sports and Religion; and
4. to hold preliminary discussion on the draft provisions prepared by the Subgroup on Political Structure.

As we shall be discussing the progress reports and draft provisions of the five subgroups, our schedule for the next five days will be rather tight. Members and convenors should make sure that the progress of discussion is under control. We hope you can fully express yourselves within the time constraints so

PROGRESS REPORT OF THE SUBGROUP ON
THE RELATIONSHIP BETWEEN THE CENTRAL GOVERNMENT AND THE SAR

that individual subgroups may conduct further study with your recorded opinions.

Members, as this plenary session is charged with important tasks, may we make concerted efforts to achieve the best results.

Thank you.

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

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.

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- (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

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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.

Chapter 1 General Provisions

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

Article 2: The NPC authorises 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.

Chapter 2 The Relationship between the Central Government and the HKSAR

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 authorises 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.

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.

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.

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 HKSAR 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."

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.

PROGRESS REPORT OF THE SUBGROUP ON FUNDAMENTAL RIGHTS
AND DUTIES OF HONG KONG INHABITANTS

No amendment to this Law shall contravene the established basic policies of the PRC regarding the HKSAR.

22 August, 1987

[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

Mr Chairman, Messrs Vice-Chairmen, and Members,

After the fourth plenary session of the Drafting Committee, the Subgroup on Fundamental Rights and Duties of Hong Kong Inhabitants held its eighth meeting on 17 April, 1987 in Beijing to discuss the proposals for major amendments to Chapter 3 raised at the fourth plenary session. The Subgroup resolved to hold another meeting for further discussion and revision regarding the draft of Chapter 3.

The ninth meeting of the Subgroup was held on 12-13 June 1987 in Guangzhou. The meeting looked closely into the opinions on Chapter 3 proposed at the fourth plenary session. The meeting also received further opinions from some of the CCBL members and other persons concerned in Hong Kong regarding the draft provisions of Chapter 3. Taking into consideration opinions from the various sources, members went over the provisions of Chapter 3 of the Basic Law one by one, and further amendments were made.

The following revised draft of Chapter 3 on the fundamental rights and duties of HKSAR inhabitants is submitted to the plenary session for examination and approval.

**Chapter 3 Fundamental Rights and Duties of HKSAR Inhabitants
(Revised Draft of August 1987)**

Article 1: HKSAR inhabitants include permanent inhabitants and non-permanent inhabitants.

(There are two proposals for amendment to paragraphs 2 and 3)

Proposal 1:

Hong Kong permanent inhabitants are:

- (1) Chinese nationals who were born in Hong Kong before or after the establishment of the HKSAR;
- (2) Chinese nationals who have ordinarily resided in Hong Kong for a continuous period of at least seven years before or after the establishment of the HKSAR;
- (3) Persons of Chinese nationality who were born outside Hong Kong of the inhabitants under sub-paragraphs (1) and (2);
- (4) Non-Chinese nationals who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of at least seven years and who have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR;
- (5) Persons under 21 years of age who were born of the inhabitants under paragraph (4) before or after the establishment of the HKSAR; and

- (6) Persons who had the right of abode only in Hong Kong before the establishment of the HKSAR.

The above-mentioned inhabitants shall have the right of abode in the HKSAR and be qualified to obtain permanent identity cards in accordance with the laws of the HKSAR.

Hong Kong non-permanent inhabitants are persons other than the above-mentioned six categories of persons; they may reside in the HKSAR but are not qualified to obtain permanent identity cards in accordance with the laws of the HKSAR.

Proposal 2:

Hong Kong permanent inhabitants are the following categories of persons who have the right of abode in the HKSAR and are qualified to obtain permanent identity cards in accordance with the laws of the HKSAR:

- (1) Chinese nationals who were born in Hong Kong before or after the establishment of the HKSAR;
- (2) Chinese nationals who have ordinarily resided in Hong Kong for a continuous period of at least seven years before or after the establishment of the HKSAR;
- (3) Persons of Chinese nationality who were born outside Hong Kong of the inhabitants under sub-paragraphs (1) and (2);

- (4) Non-Chinese nationals who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of at least seven years and who have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR;
- (5) Persons under 21 years of age who were born of the inhabitants under paragraph (4) before or after the establishment of the HKSAR; and
- (6) Persons who had the right of abode only in Hong Kong before the establishment of the HKSAR.

Hong Kong non-permanent inhabitants are persons who are qualified to obtain Hong Kong identity cards but do not have the right of abode.

[Note]

1. The term "temporary inhabitants" is amended to "non-permanent inhabitants".
2. Members unanimously agreed that Hong Kong inhabitants were differentiated from other persons by the fact that the former were qualified to obtain Hong Kong identity cards while the latter were not. In accordance with the laws of the HKSAR, Hong Kong inhabitants under eleven years old are qualified to obtain permanent identity cards or Hong Kong identity cards, as the case may be, but they are not required to do so. As to "other persons", they are not qualified to obtain either of the above-mentioned identity cards under the laws of the HKSAR.
3. The two proposals regarding permanent inhabitants in this Article are identical in meaning; their difference is in expression. The former first lists the six categories of persons contained in Annex I (XIV) to the Joint Declaration before specifying that they have the right of abode and are qualified to obtain permanent identity cards. The latter proposal is expressed in the same way as the Joint Declaration and it is stylistically consistent with the paragraph on "non-permanent inhabitants".

Article 2: Hong Kong inhabitants, irrespective of their nationality, race, ethnic, sex, occupation, religion, belief, education level, and financial condition, shall be equal before the law.

[Note] "Religious belief" of the original Article is amended to "religion, belief". "Belief" also includes "political belief".

Article 3: Hong Kong permanent inhabitants who have attained 21 years of age shall have the right to vote and the right to stand for election in accordance with law.

[Note]

1. After reconsideration, 21 years of age is still preferred as the age for entitlement to vote.
2. This Article lays down a general provision for the inhabitants' rights to vote and to stand for election. But there may be other specific provisions under the law e.g. the age and residence requirements for candidates for the Chief Executive as prescribed by law. Hence, the phrase "in accordance with law" should be retained.
3. According to the provisions under the Constitution of the PRC and the Nationality Law of the PRC, the concept of "nationals of the HKSAR of the PRC" should not be adopted.
4. A member expressed that Hong Kong permanent inhabitants who were not of Chinese nationality should not have the rights to vote and to stand for election. After further study, the present Article is found to be consistent with the following provision under the Joint Declaration: "The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants."

Article 4: Hong Kong inhabitants shall, in accordance with law, have

- (1) freedoms of speech, of the press and of publication;
- (2) freedom of association, freedom to form and join trade union and freedom to strike; and
- (3) freedoms of assembly and of demonstration.

[Note] In the discussions of the Subgroup, two proposals for amendment to this Article were raised:

Proposal 1:

Amend "Hong Kong inhabitants shall, in accordance with law, have..." to "Hong Kong inhabitants shall have...."

Proposal 2:

Amend "Hong Kong inhabitants shall, in accordance with law, have...." to "The HKSAR shall, in accordance with law, ensure that Hong Kong inhabitants have...."

Article 5: The personal liberty of Hong Kong inhabitants shall not be violated.

Hong Kong inhabitants shall not be unlawfully arrested, detained or imprisoned. Unlawful deprivation or limitation of the personal liberty of any inhabitant in any way shall be prohibited. Unlawful search of the person of any inhabitant shall be prohibited.

Article 6: The home and other premises of any Hong Kong inhabitant shall not be violated. Any unlawful search or unlawful entry into the home or other premises of any inhabitant shall be prohibited.

Article 7: Freedom of communication and secrecy of communication of Hong Kong inhabitants shall be protected by law. Any department or individual shall not for any reason infringe upon the freedom of communication and secrecy of communication of any inhabitant save that the relevant organisation may inspect communication according to the procedure as prescribed by law which is necessary for the purposes of maintaining public security and investigation of crime.

[Note] "Correspondence" is amended to "communication" to cover a broader scope.

Article 8: Hong Kong inhabitants shall have the freedom of movement within the HKSAR and the freedom of emigration to other countries or territories, and Hong Kong inhabitants who hold valid travel documents shall have the freedoms of travel and of departure and entry.

Article 9: Hong Kong inhabitants shall have the freedom of belief.

Hong Kong inhabitants shall have the freedom of religious belief and the freedoms to spread religions and to hold and participate in religious activities in public.

[Note]

1. "Hong Kong inhabitants have the freedom of other beliefs" is amended to "Hong Kong inhabitants shall have the freedom of belief" and is stated as paragraph 1.

2. "Hong Kong inhabitants shall have the freedom of religious belief and the freedoms to spread religions and to hold and participate in religious activities in public" is stated as paragraph 2. "To believe in religions" is amended to "of religious belief".

Article 10: Hong Kong inhabitants shall have the freedom of choice of occupation.

Article 11: Hong Kong inhabitants shall have the freedoms of academic research, of literary or artistic creation and of other cultural activities.

Article 12: Hong Kong inhabitants shall have the right to confidential legal advice, access to the courts, prompt protection of his lawful rights and interests by lawyers of his own choice, representation in the courts by lawyers of his own choice and to obtain judicial remedies.

Hong Kong inhabitants shall have the right to challenge the actions of the executive or members of the executive personnel in courts.

[Note] Whether Hong Kong inhabitants shall have the right to challenge the actions of Central State organs or their personnel in courts has yet to be decided after further study with the Subgroup concerned.

Article 13: Hong Kong inhabitants shall have the right to enjoy social welfare. The welfare of labour shall be protected by law.

Article 14: Hong Kong inhabitants' freedom of marriage and right to raise a family freely shall be protected by law.

Article 15: Hong Kong inhabitants shall have all other rights and freedoms which are ensured by the laws of the HKSAR.

The rights and freedoms of Hong Kong inhabitants shall not be restricted save as prescribed by law and necessary to protect national security, public order, public safety, public health, public morals or the rights and freedoms of others.

[Note]

1. The following is added to paragraph 2 as a result of an expressed opinion: "and necessary to protect of others".
2. In the discussions of the Subgroup, a member proposed to delete the expression "in accordance with law" in Article 4 and to amend paragraph 2 of this Article as follows: "Hong Kong inhabitants, in exercising their rights and freedoms, shall not infringe upon national security, public order, public health or the rights and freedoms of others."

Article 16: 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 enforced in accordance with the laws of the HKSAR.

Article 17: The lawful and traditional rights and interests of the indigenous "New Territories" inhabitants shall be protected by the HKSAR.

[Note]

1. According to the expression in the Joint Declaration (Chinese text), the term "New Territories" is in quotation marks.
2. The expression "lawful rights and interests" is amended to "lawful and traditional rights and interests".

Article 18: Persons in the HKSAR other than Hong Kong inhabitants shall, in accordance with law, have the rights and freedoms of Hong Kong Inhabitants as stipulated by this Chapter.

[Note] A members proposed that this Article be amended as follows: "Persons other than Hong Kong inhabitants shall, in accordance with law, have the rights and freedoms of Hong Kong inhabitants as stipulated by this Chapter (save for the right to vote and the right to stand for election)". After study by the Subgroup, it was found that, apart from the rights to vote and to stand for election, "other persons" would not have other rights such as the right to freedom of entry into Hong Kong. Consequently no amendment has been made to the original Article.

Article 19: Hong Kong inhabitants and all other persons in the HKSAR shall have the duty to abide by the laws of the HKSAR.

PROGRESS REPORT OF
THE SUBGROUP ON POLITICAL STRUCTURE

22 August 1987

Mr Chairman, Messrs Vice-Chairmen, and Members,

The Subgroup on Political Structure have held six meetings since the third plenary session of the Drafting Committee in December 1986 to draft the provisions of Chapter 4 of the Basic Law -- "The Political Structure of the HKSAR". Members have conducted conscientious study and discussion for the past nine months. Apart from the relatively complicated issues, most of the preliminary provisions of Chapter 4 were drafted. In addition, our Subgroup has preliminarily discussed Article 2 of the Appendix to the Basic Law. The progress of our Subgroup for the past nine months is reported as follows:

Our Subgroup held its fifth meeting in Beijing in the afternoon of 3 December 1986. The meeting mainly discussed the work schedule of the Subgroup and adopted the principle of "resolving the easier issues first" in the drafting process. According to this principle, the Subgroup further decided to first discuss the preliminary provisions regarding the judicial organs (Section 4), regional organizations (Section 5), and the public service (Section 6) of Chapter 4 of the Basic Law. To speed up our work, the meeting entrusted several members with the responsibility of drafting specific sections to be discussed at the Subgroup meetings.

From 12 to 14 February 1987, our Subgroup held its sixth meeting in Kunming where Mr Simon Li, Ms Maria Tam, Mr Szeto Wah submitted the draft provisions regarding the sections on the judicial organs, regional organisations, and the public service as well as views expressed thereon. Members discussed these provisions and completed the first draft on the judicial organs and the public service; on the draft regarding regional organisations, members' views were not very much divided either.

The Subgroup held its seventh meeting on 16 and 17 March 1987 in Guangzhou. Ms Liu Yiu Chu and Ms Maria Tam submitted the first draft of Article 2 of the Appendix to the Basic Law and the section on regional organisations respectively. The meeting continued with the discussion on the provisions of the last three sections under Chapter 4, and completed the second draft on the judicial organs and the public service and the first draft on regional organisations. After the discussion members held that since Article 2 of the Appendix which dealt with the continued validity of previous laws and legal documents after 1997 was rather complicated, further study was required.

Our Subgroup held its eighth meeting in Beijing in the afternoon of 17 April 1987, following the fourth plenary session of the Drafting Committee. The work arrangements after the fourth plenary session was discussed and decided upon.

The ninth meeting of our Subgroup was held in Guangzhou from 9 to 11 June 1987. The meeting continued to discuss the provisions under the sections on the judicial organs, regional

organisations, and the public service. The meeting also preliminarily discussed the draft sections on the chief executive, the executive authorities, and the legislature prepared by Mr Xiao Weiyun. After the meeting, the following drafts were ready: the first draft on the chief executive, the executive authorities, and the legislature; the third draft on the judicial organs and the public service; and the second draft on regional organisations.

From 31 July to 3 August 1987, we held our tenth meeting in Guangzhou to further discuss the provisions of the six sections under Chapter 4 and passed the progress report to be submitted to the fifth plenary session of the Drafting Committee.

Our Subgroup and the Subgroup on the Relationship between the Central Government and the SAR have held two joint meetings in March and August 1987 in Guangzhou. The legal experts of the two Subgroups have also held two joint meetings to discuss the jurisdiction of the HKSAR courts.

The following preliminary provisions drafted by Our Subgroup are submitted for the scrutiny of the plenary session.

Subgroup on Political Structure

Chapter 4 The Political Structure of the HKSAR
(Discussion Draft)

Section 1 The Chief Executive

Article 1: The Chief Executive of the HKSAR shall be the head of the HKSAR and shall be accountable to the Central People's Government and the HKSAR in accordance with the provisions of this Law.

[Note] A member proposed that the phrase "in accordance with the provisions of this Law" be deleted. With regard to the phrase "the head of the HKSAR", a member proposed to add the word "supreme" before the word "head". A member suggested that "the Central People's Government and the HKSAR" should read "the Central People's Government and the HKSAR Government".

Article 2: The Chief Executive of the HKSAR shall be a Chinese national who is a permanent inhabitant of the HKSAR of not less than 40 years of age and having ordinarily resided in Hong Kong for a continuous period of 20 years or more.

[Note] With regard to the age of the Chief Executive, a member considered that it should not be less than 40. Another member considered that it should be not less than 35. Some members held that the period of continuous residence should be 15 years.

Article 3: The selection of the Chief Executive (has yet to be drafted).

Article 4: The term of office of the Chief Executive shall be 5 years and may be extended once.

[Note] A member held that the term of office should be 4 years and could be renewed twice. Some members were of the opinion that the term of office of the Chief Executive should be considered in relation to the term of office of the members of the legislature. Some members considered that the term of office of the Chief Executive and that of the legislators should coincide.

Article 5: The Chief Executive of the HKSAR shall exercise the following powers:

(1) To represent the HKSAR;

[Note] A member held that it should read "to represent the HKSAR Government".

(2) To lead the HKSAR Government;

[Note] Members considered that the meaning of the term denoted by "Government" should be consistent throughout this Chapter. Some members held that "Government" referred to the executive authorities, whereas some members maintained that "Government" should be understood in the general sense. The majority of members agreed to determine the meaning after further study but for the time being, the meaning of "Government" in the general sense should be adopted for the drafting of the provisions of this Chapter.

A member held that if the meaning of "Government" in the general sense was adopted, this clause should read "to lead the executive authorities of the HKSAR".

(3) To be responsible for implementing this Law and other laws which, in accordance with this Law, apply to the HKSAR;

[Note] Some members held that this clause should be included in Article 1.

(4) To assent to or withhold his assent to laws passed by the legislature, and to sign and promulgate laws;

[Note] A member maintained that the Chief Executive should not have veto power over the laws passed by the legislature and that his signing of the laws was only a formality. A member held that any law which the Chief Executive did not approve could be referred back to the legislature for reconsideration. If it was passed by a 2/3 majority of the legislature, the Chief Executive had to sign it or dissolve the legislature (see the note of Article 8 under Section 3).

- (5) To decide policies and issue executive orders;
- (6) To nominate principal officials, and report to the Central People's Government for appointment; to employ advisers (corresponding to Secretary level or above) with the approval of the Central People's Government;

[Note] A member proposed the latter part of the clause: "to employ advisers....Government" be deleted. A member proposed to add "according to the procedure prescribed by law" before "with the approval of the Central People's Government", whereas another member deemed it unnecessary to add such a phrase as the approval by the Central People's Government would be all that was required as far as the procedure was concerned.

A member considered that provisions should be made for the removal of principal officials and advisers above the Secretary level.

- (7) To appoint or remove public servants according to the procedure prescribed by law;

[Note] Some members considered that the phrase "according to the procedure prescribed by law" was unnecessary. A member proposed to replace the phrase with "in accordance with the provisions under this Law".

- (8) To appoint or remove judges of the courts at various levels in accordance with the provisions under this Law;

[Note] Some members suggested that this clause to read: "to appoint or remove judges of the courts at various levels in accordance with procedures established. Some members suggested that it should be rewritten as "to appoint or remove judges of the courts at various level".

- (9) To execute the instructions given by the Central People's Government in respect of matters provided by this Law;

- (10) To represent the HKSAR to deal with external affairs and other affairs as authorised by the Central People's Government;

- (11) To propose or refuse to propose that the legislature accept any petition or motion, including those regarding taxation or appropriation of government revenue;

[Note] A member held that this power should be exercised by the president of the legislature.

- (12) To allow or refuse to allow the appearance of persons concerned before any committee under the legislature to testify or give evidence;

[Note] Some members held that this power should be vested with the president of the legislature. Some members proposed to amend "the persons concerned" to "any government official". A member noted that the scope within which testimony was to be made and evidence given should be further studied.

- (13) To dissolve the legislature with the approval of the Central Government; and

[Note] A member held that the Chief Executive should resign upon dissolving the legislature.

- (14) To pardon or remit the punishment of persons convicted of criminal offences.

[Note] In addition, some members maintained that the Chief Executive shall be the president of the legislature and this Article should contain such clause. But some members opposed to it. The majority of member agreed that this issue should be further studied.

Article 6: When the Chief Executive of HKSAR is unable to perform the functions of his office, the Secretary-General (Chief Secretary) shall assume his duties.

[Note] Some members held that there should be a list indicating, in order of priority, the persons eligible to assume the Chief Executive's duties when the Chief Executive was unable to perform his functions. A member held that it was unnecessary to specify the person here as that person should be designated by the

Chief Executive as and when necessary. A member proposed that the post of Deputy Chief Executive be created; but the majority of members objected to the proposal.

Article 7: The Chief Executive of the HKSAR shall not take advantage of his office to seek personal benefits.

[Note] Some members proposed that the Chief Executive should take an oath of allegiance to the Central People's Government and the HKSAR, and that he should abide by the law. The clause "shall not take advantage of his office to seek personal benefits" should be replaced with "shall perform his duties conscientiously". Restrictions on the employment of retired Chief Executives and principal officials have yet to be discussed.

Article 8: The Executive Assembly (tentatively named) shall be a body for assisting the Chief Executive in policy-making.

[Note] A member proposed that the provisions regarding the Executive Assembly be contained in the section on the executive authorities. A member objected to the establishment of an Executive Assembly.

Article 9: Members of the Executive Assembly shall be nominated by the Chief Executive from among principal officials, members of the legislature and members of the public, and reported to the Central People's Government for appointment.

[Note] Some members held that the legislators who were to sit on the Executive Assembly should be selected from among members of the legislature themselves, whereas members of the public who were to sit on the Executive Assembly should also be approved by a majority of members of the legislature. A member maintained that if the legislators in the Executive Assembly were not selected through this process, there should not be any legislators sitting on the Executive Assembly. As to the size of the Executive Assembly and the proportion of its various types of members, it was agreed that further study would be held. A member held that members of the Executive Assembly need not be

reported to the Central People's Government for appointment. Some members considered that the Chief Executive could remove any member of the Executive Assembly who was guilty of serious crime, misbehaviour, neglect of duty or inability to perform his functions.

Article 10: The Executive Assembly shall be chaired by the Chief Executive. If the Chief Executive did not accept the advice of the majority of members of the Executive Assembly, he shall put on record the specific reasons and report them to the Central People's Government for the record.

[Note] A member proposed that the second sentence be deleted. A member held that it would be sufficient just to put the reasons on record without reporting them to the Central People's Government.

Article 11: The terms of office of members of the Executive Assembly shall not exceed 5 years.

[Note] A member held that the term of office should not be fixed but should be at the discretion of the Chief Executive. Some members maintained that the term of office of any member of the Executive Assembly should not exceed that of the Chief Executive who nominated him.

Article 12: Members of the Executive Assembly shall take an oath of allegiance to the HKSAR.

Article 13: The HKSAR shall retain an anti-corruption body accountable independently to the Chief Executive.

Article 14: The system of advisory bodies to be established by the Chief Executive shall be maintained.

[Note] In addition, some members suggested adding the following article to this section: "An advisory body comprising advisers above Secretary level may be established to carry out the functions conferred by this Law."

Section 2 The Executive Authorities

Article 1: The _____ (has yet to be named) of the HKSAR shall be the executive authorities of the HKSAR.

The head of the executive authorities shall be the Chief Executive of the HKSAR.

[Note] There are various suggestions as to what the executive authorities of the HKSAR should be called. A member proposed to call it the "Executive Department". Some members proposed to call it the "Executive Commission". A member proposed to call it the "Executive Management Department" or the "Executive Management Council".

Some members held that the executive authorities should include specific executive post/organs such as the Chief Executive, the Executive Assembly and the Government Secretariat. Some members noted that the Executive Assembly was an advisory body to the Chief Executive and should not be considered part of the executive authorities. A member held that the head of the executive authorities should be the Chief Secretary.

Article 2: Principal officials of the various departments of the HKSAR executive authorities shall be nominated by the Chief Executive of the HKSAR and reported to the Central People's Government for appointment.

Principal officials of the HKSAR shall be Chinese nationals and Hong Kong permanent inhabitants who have ordinarily resided in Hong Kong for a continuous period of 15 years or more.

[Note] Members held that principal officials should generally be selected from public servants but could also be selected from outside the public service. The terms of employment for principal officials of the latter kind should be equivalent to those of the contract staff in the public service; such principal officials should leave the public service upon completion of their terms of office. Deployment of principal officials and expansion of the establishment of principal officials should be approved by the Central People's Government. There should be clear definition as to what grades of officials would be considered principal officials. Regarding the period of continuous residence in Hong Kong required of principal officials, there were proposals for 10 years and 20 years; some members held that it should not be stipulated at all.

Article 3: The executive authorities of the HKSAR shall exercise the following functions and powers:

- (1) To submit proposals on policies to the Chief Executive;
- (2) To implement executive decisions and to administer executive affairs in accordance with the provisions under this Law;
- (3) To draw up and present budgets and final accounts; and
- (4) To formulate and present bills and motions.

[Note] A member held that if the executive authorities only referred to those organs with executive functions, the second clause should read: "with the approval of the Chief Executive, to implement executive decisions and administer executive affairs in accordance with the provisions under this Law". The majority of members were of the opinion that "bills" also referred to "subsidiary legislation".

Article 4: A prosecuting authority under the executive authorities of the HKSAR shall independently deal with criminal prosecutions free from any interference.

Article 5: The executive authorities shall abide by law and shall be accountable to the legislature of the HKSAR; it shall implement the laws which take effect after having been passed by the legislature; it shall submit periodic reports to the legislature; it shall answer queries by members of the legislature; and taxation and public expenditure are subject to approval by the legislature..

[Note] Some members objected to the use of a colon after the phrase "accountable to the legislature" on the ground that "accountability" was not confined to the contents listed in the provision, and proposed that the following be included: "to be monitored by the legislature" and "the Chief Executive and any principal official may be subject to impeachment or vote of non-confidence by the legislature in accordance with law". But the majority of members opposed to this opinion.

Article 6: The system of advisory bodies to be established by the executive authorities shall be maintained.

Section 3 The Legislature

Article 1: The _____ (has yet to be named) of the HKSAR shall be the legislature of the HKSAR.

Article 2: The composition and method of formation of the HKSAR legislature (has yet to be drafted).

Article 3: The terms of office of members of the HKSAR legislature shall be 4 years.

Article 4: The selection of the president of the HKSAR legislature (has yet to be drafted).

Article 5: The qualifications for the president of the HKSAR legislature (has yet to be drafted).

Article 6: The HKSAR legislature shall exercise the following functions and powers:

(1) To enact and amend laws in accordance with the provisions under this Law and the procedure prescribed by law;

[Note] A member suggested to add "propose bills and" after "To". But some members objected to this suggestion and held that if the Basic Law provided for the proposal of bills by members of the legislature, specific restrictions should be laid down in accordance with the present practice.

(2) To examine and pass the budgets and final accounts as proposed by the executive authorities;

(3) To approve taxation and public expenditure;

(4) To receive the administrative report of the executive authorities;

(5) To question the work of the executive authorities;

[Note] A member proposed that this clause be amended as follows: "To examine and question the work of the executive authorities."

(6) To receive complaints from Hong Kong inhabitants; and

(7) If the Chief Executive is guilty of serious breach of law or dereliction of duty, with a motion proposed by 1/3 of the members of the legislature and passed by 3/4 of the members of the legislature, the legislature may submit a proposal to impeach the Chief Executive. Such a proposal shall be reported to the Central People's Government for decision.

[Note] A member held that the number of members required for moving an impeachment motion should be 1/4 of the legislature, and for the passage of the motion, a 2/3 majority should be sufficient. A member suggested that the legislature could impeach any principal official with a simple majority. Another member suggested that the legislature could pass a vote of non-confidence against the executive or any principle official. But the majority of members objected to the suggestion.

[Note] In addition, a member proposed to include the following clause: "With the approval of the chief executive, committees under the legislature may summon the persons concerned to appear before them to testify and to give evidence." A member proposed that a clause providing for the establishment of standing committees and select committees be added to this Article. But a member held that these contents should be covered by the standing orders of the legislature.

Article 7: The quorum for meetings of the legislature shall be at least half of its total membership.

Unless otherwise provided under this Law, the passage of any bill or motion in the legislature shall require the votes of more than half of its members present at the meeting.

The work procedure of the legislature shall be prescribed by law.

[Note] Some members suggested that the quorum could be less than half of the membership: if a large quorum was required, it would not be easy to convene a meeting.

Article 8: A law passed by the legislature of the HKSAR may only take effect after it has been signed and promulgated by the Chief Executive.

[Note] Some members suggested that any bill against public interest could be referred back to the legislature by the Chief Executive for reconsideration. Some members proposed that the Chief Executive should sign the bill within one year or refer it back to the

legislature within six months; the bill would not take effect if it was not signed within the one-year period. Some members maintained that any bill which was not signed by the Chief Executive within the one-year period should take effect automatically.

Article 9: Members of the legislature shall not be legally liable for speeches made at meetings of the legislature.

Article 10: Members of the legislature shall not be subject to arrest during or on their way to meetings of the legislature.

[Note] A member noted that at present any Legislative Councillor of Hong Kong who was guilty of a criminal offence was not liable to arrest only during meetings of the legislature.

Article 11: Members of the HKSAR legislature shall abide by law and take an oath of allegiance to the HKSAR.

[Note] In addition a member suggested that the accessibility to meetings and minutes of the legislature, and the honoraria for legislators should be provided for under this Section. But some members held that these contents should be covered by the standing orders of the legislature instead.

Some members proposed that provisions should be made in this Law to deal with members of the legislature guilty of breach of law or dereliction of duty.

Section 4 The Judicial Organs

Article 1: The judicial organs of the HKSAR shall be the HKSAR courts at various levels which exercise the judicial power of the HKSAR.

Article 2: The court of final appeal, a supreme court, regional courts, magistrate's courts and other special courts shall be established in the HKSAR. The supreme court shall comprise the court of appeal and the high court.

The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the court of final appeal of the HKSAR.

Article 3: The power of final adjudication of the HKSAR shall be vested in the court of final appeal in the HKSAR, which may as required invite Judges from other common law jurisdictions to sit on the court of final appeal.

[Note] A member noted that this Article could be referred to in the note of Article 6 of Chapter 2.

Article 4: The terms of reference of the courts of the HKSAR at various levels shall be prescribed by the laws of the HKSAR.

[Note] A member held that the terms of reference of the HKSAR courts would be prescribed by this Law and other laws. This Article should be further deliberated after the provision on jurisdiction was laid down.

Article 5: The jurisdiction of the HKSAR courts (has yet to be drafted).

[Note] The eight legal experts from the Subgroup on the Relationship between the Central Government and the SAR and the Subgroup on Political Structure produced a draft of this Article after their study. The joint conference of the two subgroups endorsed the draft in principle but considered that its wording had yet to be refined:

"Except for cases relating to defence and foreign affairs and the executive acts of the Central Government over which the HKSAR courts, in accordance with the previous legal system in Hong Kong, do not have jurisdiction, the courts of the HKSAR shall enjoy the power of adjudication for all other cases in the HKSAR.

"Where a question relating to defence and foreign affairs, or the executive acts of the CPG is raised in any proceedings before the courts of the HKSAR, the Chief Executive shall be consulted, and a certificate by the Chief Executive regarding such a question shall be binding on the courts."

"Prior to the issue of the above-mentioned certificate, the Chief Executive shall obtain a certificate from the Standing Committee of the National People's Congress or the State Council".

With regard to the foregoing provision, a member was not satisfied with the expression "executive acts of the Central Government". A member held that study should be carried out at a later date as to how to deal with cases of treason or what would happen when the HKSAR courts went beyond the jurisdiction provided by this Law.

Article 6: The courts of the HKSAR shall decide cases in accordance with the laws of the HKSAR and may refer to precedents in other common law jurisdictions.

[Note] A member suggested that "the laws of the HKSAR" should read "the laws applicable to the HKSAR."

Article 7: Judges of the HKSAR courts shall be appointed by the Chief Executive of the HKSAR acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.

[Note] Judges of the HKSAR courts refer to district court judges or above. Other judicial officers include magistrates and presiding officers at other special tribunals. Other personnel working in the judiciary are considered public servants.

Article 8: The Chief Executive of the HKSAR may, acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges, remove a judge of the HKSAR courts for inability to discharge the functions of his office or for misbehaviour.

Article 9: In addition to the procedures prescribed by Articles 7 and 8, the appointment or removal of chief judges of the court of final appeal and of the supreme court of the HKSAR shall be made by the Chief Executive with the consent of the HKSAR legislature and reported to the Standing Committee of the National People's Congress for the record.

Article 10: The previous system of appointment and removal of judicial officers other than judges of the HKSAR shall be maintained.

Article 11: Judges and other judicial officers of the HKSAR shall be chosen by reference to their judicial and professional qualities and may be recruited from other common law jurisdictions.

Article 12: Judges and other judicial officers serving in Hong Kong before the establishment of the HKSAR may remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 13: The HKSAR Government shall pay to judges and other judicial officers who retire or leave the service in compliance with regulations, as well as those who have retired or left the service before the establishment of the HKSAR, or to their dependants, all pensions, gratuities, allowances, and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.

Article 14: The courts of the HKSAR shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions.

Article 15: The principle of the jury system previously practised in Hong Kong shall be maintained.

Article 16: In respect of the conduct of criminal or civil proceedings in the HKSAR, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to the proceedings shall be maintained.

[Note] Some members introduced the principles applicable to criminal proceedings in Hong Kong and the rights enjoyed by defendants at present. See appendix.

Article 17: The HKSAR may, through consultation, maintain judicial links with and, in accordance with law, render co-operation to the judicial organs in other parts of the country.

[Note] Some members maintained that the words "in accordance with law" should be deleted.

Article 18: Under the assistance or authorisation of the Central People's Government, the HKSAR Government may make appropriate arrangements for reciprocal juridical assistance with foreign states.

[Note] In addition, a member noted that the present notary system was both a juridical issue and an issue which involved external affairs. After the establishment of the HKSAR, the appointment of notary publics should be made by the Central Government. It was hoped that the Central-SAR Relationship Subgroup, and this Subgroup would study how this issue should be resolved.

A member proposed that the financial independence of the judiciary should be laid down as a separate article. This proposal has yet to be discussed.

Section 5 Regional Organisations

Article 1: Regional organisations which are not of the nature of local organs of political power may be established in the HKSAR, to be consulted by the HKSAR Government on district administration and other matters, or to be responsible for the provision of services in the fields of culture, recreation, environmental health, etc.

[Note] Members held that if the present three-tier structure was retained, district boards should still be district consultative bodies.

Article 2: The specific powers and functions of the regional organisations and their composition shall be prescribed by law.

Section 6 Public Service

Article 1: Public servants serving in all government departments of the HKSAR shall be permanent inhabitants of the HKSAR except otherwise provided in Article 4 of this Section and those below a certain salary point as prescribed by law.

Public servants shall perform their duties conscientiously and be responsible to the HKSAR Government.

[Note] This Subgroup has discussed for a number of times the definition of "public servants" but no appropriate conclusion has been reached yet.

Article 2: The HKSAR Government may on its own employ public servants at all level within government departments except for those principal officials specified in this Law.

[Note] A member suggested that if this Article repeated the provisions under other Chapters or Sections, it should be omitted here.

Article 3: Public servants serving in all government departments before the establishment of the HKSAR, including the police department, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 4: The HKSAR Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the HKSAR to serve as public servants at all levels, except as heads of major government

departments (corresponding to branches or departments at Secretary level) including the police department, and as deputy heads of some of those departments.

The HKSAR Government may also employ British and other foreign nationals as advisers to government departments and, when there is a need, may recruit qualified candidates from outside the HKSAR to professional and technical posts in government departments. The above foreign nationals shall be employed only in their individual capacities and, like other public servants, shall perform their duties conscientiously and be responsible to the HKSAR Government.

[Note] Members held that the "heads of some major governments" and "deputy heads of some of those departments" should be clearly defined.

Article 5: The HKSAR Government shall pay to the public servants who retire or leave the service in compliance with regulations, as well as those who have retired or left the service in compliance with regulations before the establishment of the HKSAR, or to their dependants, all pensions, gratuities, allowances, and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.

Article 6: The appointment and promotion of public servants shall be on the basis of qualifications, experience, and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training, and management for the public

service (including special bodies for appointment, pay, and conditions of service) shall, save for any provisions providing privileged treatment for foreign nationals, be maintained.

[Note] A member maintained the following should be added at the end of this Article: "The HKSAR Government may develop and improve the above system in the light of actual conditions in order to promote the efficiency of work and the qualities of public servants."

APPENDIX:

Note on Article 16 of Section 4
(The Judicial Organs) of Chapter 4

According to some members, the principles applied in criminal proceedings and the rights enjoyed by defendants at present in Hong Kong include the following:

1. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law;
2. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice;
3. Any judgments rendered in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children;
4. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;
5. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (1) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (2) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- (3) To be tried without undue delay;
 - (4) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right;
 - (5) To have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (6) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (7) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; and
 - (8) Not to be compelled to testify against himself or to confess guilt.
6. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 7. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 8. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 9. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

PROGRESS REPORT OF
THE SUBGROUP ON ECONOMY

22 August 1987

Mr Chairman, Messrs Vice-Chairmen, and Members,

The sixth meeting of the Subgroup on Economy was held on 12-14 June 1987 in Guangzhou (and three members from Hong Kong and the mainland were absent with apologies). Members present unanimously agreed that the draft of Chapter 5 of the Basic Law: "The Economy of the Hong Kong Special Administrative Region (HKSAR)" should fully embody the basic policies expressed by the government of the People's Republic of China in order to maintain the prosperity and stability of the HKSAR. Taking into account the overall structure of the Basic Law, we propose the following:

- (1) Since the provision that Hong Kong's previous capitalist social and economic systems shall remain unchanged for fifty years upon the PRC's resumption of the exercise of sovereignty over Hong Kong is already included in the "Preamble" and "General Provisions" of the Basic Law, it will not be repeated in this Chapter.
- (2) Article 6 of Chapter 2 of the Basic Law (draft) already provides that "the HKSAR shall be vested with executive power. It shall, in accordance with the relevant provisions of this Law, conduct its own finance, monetary affairs,

economy..... and other executive affairs." Hence, when drafting this Chapter, we have adhered to the principle of stipulating the important basic policies regarding finance, monetary affairs and trade in the economic field. The stipulation of certain details may not be appropriate.

- (3) Since the external economic relations and trade of the HKSAR will be systematically written in Chapter 7 of the Basic Law: "The External Affairs of the HKSAR," they will not be covered by this Chapter.

After our members' heated discussions, it is proposed that this Chapter be rearranged, amended and supplemented as follows: Section 1 -- Public Finance and Taxation; Section 2 -- Finance and Monetary Affairs; Section 3 -- External Trade; Section 4 -- The Various Industries and Commerce; Section 5 -- Land Leases; Section 6 -- Shipping Management; and Section 7 -- Civil Aviation Management. There are altogether 48 articles.

These drafted sections, articles, and paragraphs are submitted to the plenary session for examination so that they may be further improved. In accordance with the third paragraph in the explanatory note under the Structure of the Basic Law (Draft), we request the session's approval of our proposed amendment to the structure and headings of this Chapter as mentioned above.

The preliminary provisions under Chapter 5: "The Economy of the HKSAR" are as follows:

**Chapter 5 The Economy of the Hong Kong Special
Administrative Region (HKSAR)
(Draft)**

Section 1 Public Finance and Taxation

Article 1: The HKSAR shall be financially independent.

The HKSAR shall use its financial revenue exclusively for its own purposes and they shall not be handed over to the Central People's Government.

Article 2: The HKSAR shall maintain a basically balanced budget.

The growth rate of the HKSAR budget shall not exceed the growth rate of the Gross Domestic Product.

[Note] A member proposed to delete the word "rate" which appeared twice in the second paragraph. Some members considered that it was unnecessary to include the second paragraph in the Basic Law.

Article 3: The HKSAR shall adopt an independent taxation system.

Article 4: The HKSAR shall continue to maintain a policy of low tax rate.

Article 5: The type, rate, and exemption of tax of the HKSAR shall be stipulated by the HKSAR in law.

[Note] Some members held that the following provision should be added as the second paragraph: "The HKSAR shall not impose tax on Hong Kong inhabitants on their extra-territorial income." Some members opposed to the inclusion of such specific provision in the Basic Law.

Article 6: The Central People's Government shall not levy taxes on the HKSAR.

[Note] Some members proposed to amend the wording to "The HKSAR shall not have the duty to pay tax to the Central People's Government."

Article 7: The budgets of the HKSAR shall be drawn up by the SAR executive authorities, examined and approved by the SAR legislature, and reported to the Central People's Government for the record.

Article 8: The expenditure of the HKSAR Government shall be in accordance with the budget.

Any expenditure which exceeds the budget shall be submitted to the legislature for examination and approval or subsequent endorsement.

Article 9: Public accounts of the HKSAR shall be verified by the SAR auditing authorities.

The SAR auditing authorities shall report to the SAR legislature annually.

Article 10: The final accounts of the HKSAR shall be drawn up and audited by the SAR executive authorities, examined by the SAR legislature, and reported to the Central People's Government for the record.

Section 2 Finance and Monetary Affairs

Article 11: The HKSAR Government shall provide the necessary conditions and take appropriate measures to maintain the status of the HKSAR as an international financial centre.

Article 12: The HKSAR shall decide its monetary and financial systems on its own.

Article 13: The HKSAR shall maintain a free and open policy regarding finance and monetary affairs.

Article 14: The HKSAR Government shall safeguard the free operation of financial businesses and financial markets, and regulate and supervise such businesses and markets in accordance with law.

Article 15: The HKSAR Government shall safeguard the free flow of capital within, into and out of the HKSAR.

Article 16: No exchange control policy shall be applied in the HKSAR.

Article 17: Markets for foreign exchange, foreign currencies, gold, securities, and futures shall continue to open in the HKSAR.

[Note] Some members considered that as foreign exchange already included foreign currencies, the mention of the latter was unnecessary.

Article 18: The Hong Kong dollar, as the legal tender of the HKSAR, shall continue to circulate and remain freely convertible.

Article 19: The authority to issue Hong Kong currency shall be vested in the HKSAR Government.

The issue of Hong Kong currency shall have sufficient currency reserve.

The HKSAR Government may authorise designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency

will be soundly based and that the arrangements for such issue are consistent with the maintenance of the stability of the currency.

Article 20: The Exchange Fund of the HKSAR shall be managed and controlled by the HKSAR Government, primarily for regulating the exchange rate of the Hong Kong dollar.

Section 3 External Trade

Article 21: The HKSAR shall adopt a free external trade system.

The HKSAR shall protect the freedom of external trade and the free movement of goods, intangible property and capital.

Article 22: The HKSAR shall decide its external trade policy on its own.

The HKSAR may on its own maintain and develop economic and trade relations with all states and regions.

Article 23: The HKSAR shall be a free port.

The HKSAR shall not impose any tariff unless otherwise stipulated by law.

Article 24: The HKSAR shall be a separate customs territory.

Article 25: The HKSAR may, using the name "Hong Kong, China", participate in relevant international organisations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.

Article 26: Export quotas, tariff preferences and other similar arrangements which are obtained by the HKSAR under international agreements or which were obtained in the past but still remain effective shall be enjoyed exclusively by the HKSAR.

Article 27: The HKSAR may issue its own certificates of origin for local products in accordance with prevailing rules of origin.

Section 4 The Various Industries and Commerce

Article 28: The HKSAR shall implement a free and open policy regarding industry and commerce.

Article 29: The HKSAR shall encourage industrial investment and technological advancement, and open up new industries in order to strengthen its competitiveness in the international arena.

Article 30: The HKSAR Government shall actively create the necessary environment and conditions to facilitate industrial development.

Article 31: The HKSAR shall actively adopt appropriate policies to promote the development of commerce, tourism, real estate industry, transport industry, public utilities, service industries, agriculture and fishery, etc.

Section 5 Land Leases

Article 32: The HKSAR may on its own decide policies regarding the development, management and use of land.

Article 33: All leases of land granted, decided upon or renewed before the establishment of the HKSAR, which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognised and protected under the law of the HKSAR.

Article 34: From 1 July 1997, all leases of land granted or renewed (though previously not having a right of renewal) within the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire not later than 30 June 2047, shall not require payment of an additional premium but an annual rent equivalent to three per cent of the rateable value of the property at that date, adjusted in step with changes in the rateable value thereafter, shall be charged.

Article 35: In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, the property is granted to, a person descended through the male line from a person who was in 1998 a resident of an established village in Hong Kong, the previous rent shall remain unchanged so long as the property is held by that person or by one of his lawful successors in the male line.

Article 36: Where leases of land not having a right of renewal expire after the establishment of the HKSAR, they shall be dealt with in accordance with the laws and policies decided by the HKSAR on its own.

[Note] Some members considered that the specific issues on land leases should not be dealt with in detail by the Basic law. It was proposed that the relevant provisions under Annex III to the Joint Declaration be summarised into a single article and included in Section 4 of this Chapter.

Section 6 Shipping Management

Article 37: The HKSAR shall maintain Hong Kong's previous systems of shipping management and shipping regulation. The specific functions and responsibilities of the HKSAR Government in the field of shipping shall be defined by the HKSAR Government on its own.

Article 38: The HKSAR shall be authorised by the Central People's Government to continue to maintain a shipping register and issue related certificates under its own legislation in the name of "Hong Kong, China".

Article 39: All ships for civil use shall enjoy access to the ports of the HKSAR in accordance with the laws of the HKSAR.

Access of foreign warships to the HKSAR shall require the permission of the Central People's Government.

Article 40: Private shipping businesses and shipping-related businesses and private container terminals in Hong Kong may continue to operate freely.

Section 7 Civil Aviation Management

Article 41: The HKSAR Government shall provide necessary conditions and take appropriate measures to maintain the status of Hong Kong as a centre of international and regional aviation.

Article 42: The HKSAR shall maintain the previous system of civil aviation management in Hong Kong, and keep its own aircraft register in accordance with provisions laid down by the Central People's Government concerning nationality marks and registration marks of aircraft.

Access of foreign military aircraft to the HKSAR shall require permission of the Central People's Government.

Article 43: The HKSAR shall be responsible on its own for matters of routine business and technical management of civil aviation, and the management of airports.

The HKSAR shall be responsible for the provision of air services within the flight information region of the HKSAR, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organisation.

Article 44: The HKSAR Government shall, in consultation with the HKSAR, make arrangement providing for air services between the HKSAR and other parts of the People's Republic of China for airlines incorporated and having their principal place of business in the HKSAR and other airlines of the People's Republic of China.

Article 45: All Air Service Agreements providing for air services between other parts of the People's Republic of China and other states and regions with stops at the HKSAR and air services

between the HKSAR and other states and regions with stops at other parts of the People's Republic of China shall be concluded by the Central People's Government.

In concluding the Air Service Agreements mentioned in the first paragraph of this Article, the Central People's Government shall take account of the special conditions and economic interests of the HKSAR and consult the HKSAR Government.

Representatives of the HKSAR Government may participate as members of delegations of the Government of the People's Republic of China in air service consultations with foreign governments concerning arrangements for such services mentioned in the first paragraph of this Article.

Article 46: Acting under specific authorisations from the Central People's Government, the HKSAR Government may:

- (1) renew or amend Air Service Agreements and arrangements previously in force (in principle, all such Agreements and arrangements may be renewed or amended with the rights contained in such previous Agreements and arrangements being as far as possible maintained);
- (2) conclude new Air Service Agreements providing routes for airlines incorporated and having their principal place of business in the HKSAR and rights for overflights and technical stops; and
- (3) conclude provisional arrangements where no Air Service Agreement with a foreign state or other region is in force.

All scheduled air services to, from, or through the HKSAR which do not operate to, from, or through the mainland of China shall be regulated by Air Service Agreements or provisional arrangements referred to in this Article.

Article 47: The Central People's Government shall give the HKSAR Government the authority to:

- (1) negotiate and conclude with other authorities all arrangements concerning the implementation of the Air Service Agreements and provisional arrangements mentioned in Article 46 of this Law;
- (2) issue licences to airlines incorporated and having their principal place of business in the HKSAR;
- (3) designate such airlines under the Air Service Agreements and provisional arrangements mentioned in Article 46 of this Law; and
- (4) issue permits to foreign airlines for services other than those to, from, or through the mainland of China.

Article 48: Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses may continue to operate.

[Note] Some members proposed Article 46 and 47 be combined as follows: "Acting under specific authorisations from the Central People's Government, the HKSAR Government may negotiate, amend, renew or conclude Air Service Agreements, arrangements, or provisional arrangements concerning the HKSAR Government, and make arrangements in accordance with law, and shall report to the Central People's Government for approval or record."

PROGRESS REPORT OF
THE SUBGROUP ON EDUCATION, SCIENCE, TECHNOLOGY,
CULTURE, SPORTS, AND RELIGION

22 August 1987

Mr Chairman, Messrs Vice-Chairmen, and Members,

The Subgroup on Education, Science, Technology, Culture, Sports, and Religion has held four meetings (being its fourth, fifth, sixth, and seventh meetings) since it conducted its survey in Hong Kong in September 1986. Its fourth meeting was held in Beijing on 3 December 1986; its fifth meeting, in Kunming on 16 and 17 February 1987; its sixth meeting in Beijing on 17 April 1987; and its seventh meeting in Guangzhou on 3 and 4 June 1987.

After the fourth meeting, Mr Qian Weichang prepared the draft provisions of Chapter 6 in accordance with the views of members of this Subgroup and the "Structure of the Basic Law (Draft)" and with reference to the opinions of members of the Consultative Committee (CCBL) in Hong Kong. At the fifth meeting held in Kunming, members went over the draft provisions one by one and came up with the second draft of Chapter 6. On 3 March 1987, Mr Qian Weichang and Mr Ma Lin, co-convenors of the Subgroup jointly forwarded the second draft to some Hong Kong drafters, members of the Special Group on Culture, Education, Technology, and Religion of the CCBL in Hong Kong and other persons concerned, totalling 85 persons, and in the covering letter, their comments were

invited. At the seventh meeting in Guangzhou members of the Subgroup conscientiously studied the comments and proposals thus collected, as well as the final reports of the corresponding Special Group of the CCBL. The provisions were further revised and a discussion draft was prepared. The discussion draft of Chapter 6 of the Basic Law on education, science, technology, culture, sports, and religion of the HKSAR preliminarily passed by the Subgroup (and the notes appended to it) is now submitted to the fifth plenary session of the Drafting Committee for discussion.

Subgroup on Education, Science, Technology,
Culture, Sports, and Religion

Chapter 6 Education, Science, Technology, Culture, Sports,
and Religion in the HKSAR
(Discussion Draft)

Article 1: The HKSAR shall maintain the educational system previously practised in Hong Kong.

The development and improvement of educational undertakings in the HKSAR shall be decided by the HKSAR Government on its own.

Article 2: The HKSAR Government shall on its own decide policies of this SAR in the fields of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications.

Community organisations and individuals may run different kinds of educational undertakings in the HKSAR in accordance with law.

Article 3: Educational institutions of all kinds may retain their autonomy and have academic freedom. They may continue to recruit staff and use teaching material from outside the HKSAR. Educational institutions run by religious organisations may continue to offer courses on religious education.

Students shall enjoy freedom of choice of education and freedom to pursue their education outside the HKSAR.

Article 4: The HKSAR Government shall develop medical and health services, develop modern medicine and traditional Chinese medicine, encourage and support community and private organisations to set up medical and health facilities of all kinds.

Article 5: The HKSAR Government shall promote the development of scientific and technological undertakings. It shall reward and protect achievements, inventions and discoveries in scientific and technological researches, and scientific and technological innovations.

The HKSAR Government shall decide on its own standards and specifications relating to science and technology.

Article 6: The HKSAR Government shall promote the development of cultural undertakings. It shall reward and protect achievements, honours and legitimate rights and interests acquired by authors in cultural creation.

Article 7: The HKSAR Government shall not interfere with or restrict religious activities or internal affairs of religious organisations. Religious activities shall not contravene the laws of the HKSAR.

Religious organisations shall, in accordance with law, enjoy rights concerning the acquisition, use, disposal, and inheritance

of property and the right to receive financial assistance. The previous rights and interests in respect of property shall be maintained and protected.

Religious educational institutions and other educational institutions, hospitals, welfare institutions, and other social services run by religious organisations may be continued and developed in accordance with previous practice.

[Note] Some members proposed that the following clause be added to this Article: "The HKSAR Government shall list as public holidays religious commemoration days and folk festivals such as Buddhist festival, Christmas, and Easter." On the other hand, some members held that if the Basic Law specifically provided for religious holidays, other sectors might demand the provision for the holidays relevant to their sectors as well. Hence, it would not be appropriate to have any specific provision on this issue.

A member proposed that the following provision be added: "The HKSAR Government shall protect the existing rights of religious and charitable organisations in accordance with law, for example, those relating to the allocation of land, renewal of land leases, exemption from tax and rates payment, etc., shall be retained." Some members held that the foregoing proposal was within the scope of economy and should be dealt with by the Subgroup on Economy.

Article 8: Religious organisations and believers may maintain their previous relations with religious organisations and believers elsewhere.

Article 9: The HKSAR Government shall on its own decide the way to accredit and confer qualifications for professional practice.

Those who have obtained qualifications for professional practice before the establishment of the HKSAR may maintain their previous qualifications.

The HKSAR shall maintain the professions and professional organisations which have been recognised before the establishment of the HKSAR, and shall recognise new professions and professional organisations in accordance with the needs in social development.

[Note] A member suggested that the provision should also state that professional organisations may on their own decide professional qualifications, determine the standards of their respective professions, and decide and implement the codes of practice of their respective professions. The majority of members considered that such questions were internal affairs of professional organisations and should not be written in the Basic Law.

Article 10: The HKSAR Government shall support and develop sporting activities. Previous non-governmental sports organisations may continue to exist and develop in accordance with law.

Article 11: The HKSAR shall maintain the policy previously practised in Hong Kong regarding the provision of subventions to organisations in all fields, including education, medicine, culture, arts, recreation, sports, social welfare, and social work. After the establishment of the HKSAR, personnel previously serving in subvented organisations in Hong Kong may remain in employment in accordance with the previous system.

Article 12: The HKSAR Government shall maintain the previous social welfare in Hong Kong and decide on its own the development and improvement of social welfare in accordance with economic conditions and social needs.

Article 13: Voluntary organisations engaged in social service in the HKSAR may on their own decide their forms of service.

Article 14: The HKSAR shall on its own formulate laws and policies regarding labour in the light of economic development, social needs, and the actual circumstances of labour-management consultations.

Article 15: The relationship between non-governmental organisations of all fields, including education, science, technology, culture, sports, the professions, and social welfare, in the HKSAR as well as religious organisations in the HKSAR, and their counterparts in the mainland shall abide by the principles of non-subordination, non-interference, and mutual respect.

Article 16: Organisations in all fields, including education, science, technology, culture, sports, health, the professions, social welfare and religion, in the HKSAR may, using the name "Hong Kong, China", maintain and develop relations with states, regions and relevant international organisations.

[Note] If the above contents regarding organisations in all fields, including education, science, technology, sports, health, the professions, social welfare and religion were added to a relevant provision in Chapter 7 on External Affairs of the HKSAR, this Article could be deleted.

26 August 1987

**Mr Ji Pengfei's Closing Speech at the Fifth Plenary Session
of the Drafting Committee for the Basic Law**

Members,

The fifth plenary session of the Drafting Committee will be adjourned today.

This session has received the progress reports of the five subgroups and discussed the draft provisions of the Preamble and Chapters 1-7 and 9 of the Basic Law. During the serious and detailed discussions on the reports and draft provisions, members have raised plenty of opinions and proposals for amendment. It is hoped that the subgroups will further refine their drafts by incorporating, as far as possible, the views of members after thorough study.

This plenary session has been a success. Since we have a long agenda probably there has not been enough time to allow full discussion of all of the draft provisions. If you have further opinions or proposals, please submit them in writing to the Secretariat of the Drafting Committee. The Secretariat will forward your written submissions to the relevant subgroups.

The Consultative Committee for the Basic Law has been providing support to the Drafting Committee by collecting the views and suggestions on the Basic Law from different sectors in

Hong Kong and reflect them to the Drafting Committee. Such consultation has been very helpful to the drafting of the Basic Law. At its meeting yesterday, the Chairmen's Committee suggested that the subgroups seriously study the final reports recently sent from the CCBL, and seek advice from the CCBL on problems encountered in the drafting process.

Members, I mentioned at the last plenary session that 1987 was a crucial year as far as drafting of the Basic Law was concerned, and the subgroups would expect a heavy workload. The Chairmen's Committee, when discussing the work for the next six months at its meeting yesterday, noted that work had to be speeded up if the first draft of the Basic Law was to be ready early next year as scheduled i.e. to be published following the seventh plenary session. The subgroups are advised to submit their respective revised drafts (which are amended according to the views expressed at this session) to the Secretariat of the Drafting Committee by 15 November 1987. The Secretariat will then make a compilation of all of the revised draft chapters, to be discussed by the sixth plenary session of the Drafting Committee. Apart from further deliberating the draft provisions of Chapters 4, 5, and 6 prepared by subgroups such as that on Political Structure, the sixth plenary session is to preliminarily discuss the complete draftwork of the Basic Law as a whole so that rearrangement of chapters or sections may be proposed.

26 August 1987

The Chairmen's Committee resolved to set up a co-ordinating group for integrating the Basic Law clauses and revising the overall draft. Their work will be submitted to the seventh plenary session of the Drafting Committee early next year for examination and approval. The co-ordinating group -- headed by two vice-chairmen, Sir Yue-kong Pao and Mr Hu Sheng -- includes the secretary-general, the two deputy secretaries-general, and the 10 co-convenors from the five subgroups.

Members, since the establishment of the Drafting Committee, all of us have made concerted efforts to reach unanimity on a number of issues in the the spirit of mutual trust, mutual respect and mutual accomodation. Now that the preliminary drafts of the various chapters have been prepared, the hard work and contribution of members are surely to be acknowledged. I hope that we shall make persistent efforts for the publication of the draft of Basic Law in early 1988.

Thank you.

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Communique of the Fifth Plenary Session of
the Drafting Committee for the Basic Law

The fifth plenary session of the Drafting Committee for the Basic Law was held from 22 to 28 August 1987 in Beijing. Fifty-three members attended the session and five members were absent with apologies.

The session received the progress reports of the five subgroups and continued to discuss the draft articles of the Preamble, Chapter 1 on general provisions, Chapter 2 on the relationship between the Central Government and the SAR, Chapter 3 on fundamental rights and duties of HKSAR inhabitants, Chapter 7 on external affairs, and Chapter 9 on the interpretation and amendment of the Basic Law. The session also preliminarily discussed the draft articles of Chapter 4 on the political structure of the HKSAR, Chapter 5 on the economy of the HKSAR, and Chapter 6 on education, science, technology, culture, sports and religion in the HKSAR. Members were pleased with the work of the various subgroups and proposed amendment to some of the articles. The session requested the subgroups to further amend the draft articles after close examination of the members' opinions and the proposals in the final reports of the Consultative Committee for the Basic Law. The Secretariat would then put the articles of the various chapters in order and submit a complete draftwork to the sixth plenary session for discussion.

The session resolved that the sixth plenary session of the Drafting Committee be held from 12 to 16 December this year with the following agenda: (1) To further discuss the drafts of Chapters 4, 5, and 6 prepared by the subgroups such as that on political structure. (2) To discuss the compilation of the drafts of the various chapters as a whole, and to propose amendment and modification.

The Chairmen's Committee resolved to set up a co-ordinating group headed by two vice-chairmen, Sir Yue-Kong Pao and Mr Hu Sheng, and comprising the co-convenors of the five subgroups, the secretary-general and the deputy secretaries-general. The co-ordinating group would be responsible for overall revision of the draft of the Basic Law. Their work would be submitted to the seventh plenary session of the Drafting Committee next year for examination and approval.

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

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