

LC Paper No. CB(2) 1912 /03-04(01)

An Elaboration of the opinions and views of the Article 45 Concern Group

A. The proposed Interpretation by the Standing Committee of the National People's Congress

1. We view this proposal with dismay and concern no matter what the content of the interpretation. We have never questioned nor do we now question the power and authority of the Standing Committee of the National People's Congress to interpret laws under Article 67 of the Constitution; such laws must include the Basic Law. We also note that the Standing Committee (the SC) has the power to partially supplement and amend laws enacted by the National People's Congress (the NPC) provided that the basic principles of these laws are not contravened. Although this is not explicitly stated in connection with the power to interpret, the same must apply to the power of interpretation.

2. Development of constitutionalism requires that principles and rules govern when the powers conferred by the constitution are to be exercised in order to avoid power being exercised in an inconsistent fashion and in an arbitrary way. The power of interpretation has rarely been invoked in the context of other laws passed by the NPC. Yet in the case of the Basic Law, the power is resorted to with little or no explanation and without any prior warning or debate. This is incompatible with true constitutionalism and is a manifestation of rule by man or rule by law. It is totally inconsistent with the rule of law. This manner of exercising the power is an aspect of the socialist system which under the principle of 'one country, two systems' is not to be practised in Hong Kong. This basic principle is enshrined in both the Preamble to the Basic Law and in Article 5 of the Basic Law. It would

be disingenuous to suggest that when the effects of such practice are visited on the HKSAR, the principle is still being observed.

3. In the context of 'one country, two systems', principles and rules governing the exercise of the power of interpretation of the Basic Law ought to have been developed from the start. This was and remains essential in the context of two very different systems where the HKSAR is vested with independent judicial power including that of final adjudication and where the Hong Kong courts are authorised to interpret on their own provisions of the Basic Law which are within the limits of the autonomy of the HKSAR. An exercise of the power of interpretation by the SC where the SC has no understanding of the system of the HKSAR and without any regard to this system runs a very great risk of damaging the rule of law, the high degree of autonomy of the HKSAR and its prosperity and stability and of infringing the 'one country, two systems' principle. The Basic Law Committee, where those familiar with the legal system of the HKSAR are in a minority and whose procedures lack transparency and exclude public consultation provides no guarantee that this damage and infringement will not occur.
4. What the people of Hong Kong were told at the time when the Basic Law was being drafted, what the architect of the Basic Law, Deng Xiaoping, said at the time, what the Chairman of the Drafting Committee, Ji Pengfei said at the time — all of this and more are written in the memories of Hong Kong people. Interpretation may seek to change the law; it cannot rewrite history. Words once said may not have been meant. They were said in the interests of expediency. But if they are now retracted under the guise of interpretation, there is no basis for Hong Kong people to trust what they are told today, tomorrow or ever.

B. Paragraph 7 of Annex I and paragraph III of Annex II

5. There is no proposal to interpret Articles 45 and 68. It would be a travesty of the process if interpretation of these 2 articles were to be made under the guise of interpreting paragraph 7 of Annex I and paragraph III of Annex II. These paragraphs are absolutely clear in their content of the procedures which are to be followed if there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007 and to amend the method for forming the Legislative Council subsequent to the year 2007. These paragraphs say nothing about the circumstances in which there will or may be a need to amend either. The specification of the term and the year is no coincidence. On any proper and reasonable purposive construction, both paragraphs contemplate the possibility of amendment of the methods to enable a different method to be provided for the selection of the Chief Executive in the term beginning in 2007 and for forming the Legislative Council in 2008.

6. Both the methods for selecting the Chief Executive and for forming the Legislative Council are widely recognised to be in need of change. However, the purpose of this elaboration is not at the moment to debate these issues. It is sufficient to say that if the forthcoming interpretation fails to recognise the actual situation in Hong Kong, which is best known to Hong Kong people though not known to the Standing Committee, and has the effect of preventing any change to the methods for the above years, the interpretation will definitely damage the HKSAR. The message which will be sent to Hong Kong people is that not only are they not trusted to resolve what changes should be made, their judgment as to when changes are required is

irrelevant as these matters will all be decided by the Central Government. This undoubtedly is incompatible with the high degree of autonomy of the HKSAR.

C. 'One Country, Two Systems'

7. We interpret the Basic Law according to common law principles and we make no apologies for doing so. It is in our view fully consistent with Articles 2, 5, 8, 81, 84, 85, 87, 92, 94 and 158 of the Basic Law and the 'one country, two systems' principle. Those who accuse our judiciary of not being familiar with the Basic Law are obviously themselves unfamiliar with the contents of the Basic Law and in particular with these articles. If it were intended that the common law principles should no longer apply in the HKSAR, the Basic Law would have so provided explicitly.
8. This does not mean that there are no problems in implementing 'one country, two systems'. However, this principle will not be successfully implemented unless it is recognised that there are two differing systems and ways found to accommodate both. Even where the Standing Committee has the power and authority to override the HKSAR system, an assertion and exercise of that power does not guarantee the successful implementation of the principle. On the contrary, it is a manifestation that the principle is not being successfully implemented.
9. Those who lay emphasis on 'one country' routinely ignore the context in which the 'one country, two systems' principle is stated in the Preamble to the Basic Law. Thus, the 'one country' is protected and the required protection is formally expressed in the provisions of the Basic Law.

10. Nothing which has occurred in the HKSAR in any way threatens to infringe or risks infringement of Article 1 of the Basic Law. No-one has suggested independence or separation of the HKSAR, No-one has suggested that the HKSAR is not an inalienable part of the PRC. That the HKSAR has and is to continue to have a different system is also undeniable.
11. No-one has disputed that the source of the authority of the HKSAR to exercise a high degree of autonomy and enjoy the executive, legislative and independent judicial power including that of final adjudication is the NPC. However, withdrawal of the high degree of autonomy or the exercise of an NPC power in a way which is incompatible with the basic policies of the PRC as elaborated on in the Sino-British Joint Declaration would be a wrong exercise of the power.
12. Chapter II of the Basic Law defines which powers shall be exercised by the Central People's Government and which by the HKSAR. This is not power-sharing since the authority is from the NPC. However, it does express how the HKASAR enjoys the high degree of autonomy. Again, any limitation on those express powers or any attempt to curb the exercise of the high degree of autonomy expressly conferred on the HKSAR is incompatible with the provisions of the Basic Law. In accordance with Article 16, the HKSAR shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law. Therefore, in accordance with the relevant provisions of the Basic Law, a two-thirds majority of the Legislature could endorse a change to the method of selecting the Chief Executive and the Chief Executive could consent to the change. The formal expression of the

'one country' part of the principle lies in the reporting for approval to the SC. This fulfills the legal and formal requirements of the Basic Law. It is a totally separate issue and nothing to do with the legal requirements whether it would be wise for the HKSAR to proceed in this way without any prior discussion with the Central People's Government (the CPG). On the latter point, we have never advocated that it would be politically wise to proceed in this manner. However, no dialogue is possible where one side is interested only in the assertion of authority and power.

13. Nothing in Article 18 of the Basic Law suggests that it is outside the limits of the autonomy of the HKSAR to propose changing the method for selection of the Chief Executive or for forming the Legislative Council. Matters outside the limits of autonomy of the Region are as specified by the Basic Law.
14. Article 12 does not assist in defining what is within or outside the high degree of autonomy and mere repetition of the fact that the HKSAR comes directly under the CPG does not assist either.
15. In the end, resort to interpretation by the SC on the provisions of the Basic Law is futile and self-defeating. Denying that a problem exists and that change is required in the methods for selecting the CE and forming the Legislative Council for 2007/2008 respectively can only exacerbate the problem. Rule by law was what the Chief Executive sought to impose in attempting to push through the National Security (Legislative Provisions) Bill despite overwhelming public opposition. Any interpretation by the SC is inevitably imposed on the people of Hong Kong as they have no say. It

will arouse opposition and further damage relations between the people of Hong Kong and the CPG.

16. We urge the Standing Committee to refrain from interpreting the provisions of the Basic Law.

29 March 2004