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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 28 May 2013**

Procedure for seeking an interpretation of the Basic Law

Purpose

This paper gives an account of the past discussions by Members on the procedure for seeking an interpretation of the Basic Law.

Background

2. According to Article 158 of the Basic Law ("BL"), the power of interpretation of the BL is vested in the Standing Committee of the National People's Congress ("NPCSC"). Such power is also derived from Article 67(4) of the Constitution of the People's Republic of China, which empowers the NPCSC to interpret statutes. Since the reunification in 1997, the NPCSC has interpreted the provisions of the BL in four instances. The first three were initiated by either the Chief Executive ("CE") of the Hong Kong Special Administrative Region ("HKSAR") or the NPCSC itself in exercise of the power stipulated in BL158(1)¹, while the fourth one was initiated by the Court of Final Appeal ("CFA") in accordance with BL158(3)².

The four interpretations by the NPCSC

Interpretation of the right of abode issue in 1999

¹ Article 158(1) provides that the power of interpretation of the Basic Law shall be vested in NPCSC.

² Article 158(3) provides that the courts of HKSAR may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts need to interpret the provisions concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and HKSAR, and if such interpretation will affect the judgments on the cases, the courts shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from NPCSC through CFA.

3. The ruling of the CFA on the issue of right of abode on 29 January 1999³ had given rise to the concern in some quarters that there would be an influx of Mainland people to Hong Kong. The HKSAR Government considered that the CFA's interpretation of the relevant provisions of the BL was not consistent with the legislative intent.

4. On 18 May 1999, the CE reported to the State Council the problems he had encountered in the implementation of the BL, and sought for its assistance to seek an interpretation from the NPCSC on the legislative intent of BL 22(4)⁴ and 24(2)(3)⁵. At the special meeting of the House Committee held on the same day, the Chief Secretary for Administration ("CS") and the Secretary for Justice ("SJ") explained to members the circumstances in which the request for interpretation had been made.

5. On 26 June 1999, the NPCSC issued its interpretation which stated that children born outside Hong Kong would be eligible for the right of abode only if at least one of their parents had already acquired permanent residence status at the time of their birth. Moreover, those eligible for the right of abode needed to apply for the necessary approval from the relevant Mainland authorities before their entry into Hong Kong.

Interpretation of the universal suffrage issue in 2004

6. On 7 January 2004, the CE announced in his Policy Address the establishment of the Constitutional Development Task Force ("Task Force") led by the CS. The Task Force was entrusted with examining in depth the relevant issues of principle and legislative process in the BL relating to constitutional development, consulting the relevant departments of the Central Authorities, and gathering the views of the public on the relevant issues. On 30 March 2004, the Task Force published its First Report on constitutional development. At the special meeting of the Panel on Constitutional Affairs ("CA Panel") held on 31 March 2004, the CS briefed members on the First Report and the meeting of the Task Force with the representatives of the NPCSC on 30 March 2004.

³ CFA ruled that the children of persons with the right of abode in Hong Kong also have the right of abode, irrespective of whether their parents were permanent residents at the time of their birth.

⁴ According to Article 22(4), "[f]or entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region".

⁵ Article 24(2)(3) of the Basic Law confers the status of permanent resident and the right of abode on persons of Chinese nationality born outside Hong Kong of those permanent residents who are Chinese citizens born in Hong Kong, or have ordinarily resided in Hong Kong for a continuous period of not less than seven years, before or after the establishment of HKSAR.

7. On 26 March 2004, the HKSAR Government was notified formally by the Central Authorities that interpretation of Article 7 of Annex I⁶ and Article III of Annex II⁷ to the BL would be considered at the meeting of the NPCSC between 2 April and 6 April 2004.

8. On 6 April 2004, the NPCSC made an interpretation of Article 7 of Annex I and Article III of Annex II to the BL. The interpretation stated that the CE should make a report to the NPCSC as regards whether there was a need to amend the method for selecting the CE and the method for forming the Legislative Council ("two methods"), and the NPCSC should make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress.

9. On 15 April 2004, the Task Force published its Second Report which recommended the CE to submit a report to the NPCSC recommending that the two methods be amended and requesting the NPCSC to make a determination to that effect. On the same day, the CE submitted a report to the NPCSC. At the special meeting of the CA Panel held on 16 April 2004, the CS briefed members on the CE's report and the Task Force's Second Report. The NPCSC examined the CE's report, and adopted a decision on 26 April 2004 to rule out the election of the CE and all Members of the Legislative Council ("LegCo") by universal suffrage in 2007 and 2008 respectively in Hong Kong.

Interpretation of the term of office of the new CE in 2005

10. On 10 March 2005, Mr TUNG Chee-hwa tendered to the Central People's Government his resignation from the office of the CE. On 12 March 2005, a press conference was held by the Acting CE to announce the approval of Mr TUNG's resignation. The Acting CE also announced that the election of a new CE would be conducted on 10 July 2005.

11. At the Council meeting of 6 April 2005, the CS gave a statement concerning the term of office of the new CE. The CS advised Members that the HKSAR Government had decided to submit a report to the State Council,

⁶ According to Article 7 of Annex I, "[i]f there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval."

⁷ According to Article III of Annex II, "[w]ith regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record."

proposing the State Council to make a request to the NPCSC to interpret, at their meeting to be held at the end of April 2005, BL53⁸ concerning the term of office of the new CE. The said report was submitted to the State Council on the same day. The Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill⁹ was also introduced into LegCo on that day.

12. On 27 April 2005, the NPCSC made an interpretation of BL53(2). According to the interpretation, a new CE selected in accordance with BL53(2) shall serve the remainder term of the preceding CE. The Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill was passed by LegCo on 25 May 2005.

Interpretation of the state immunity issue in 2011

13. In handing down its provisional judgment ("the June judgment") in the case of *Democratic Republic of Congo & Ors v FG Hemisphere Associates LLC* ("the Congo case") on 8 June 2011, the CFA decided, by a majority, to refer to the NPCSC under BL158(3) four questions on the interpretation of BL13(1)¹⁰ and BL19¹¹ in relation to the issue of state immunity. The CFA took the view that the four questions were to be referred by SJ through the Office of the Commissioner of the Ministry of Foreign Affairs to the NPCSC, subject to any submissions which any party to the proceedings might wish to make on the above procedure within seven days of the delivery of the June judgment.

14. In light of the above decision by CFA, the SJ, as the Intervener in the Congo case, lodged written submissions with the CFA, stating that he stood ready to assist in the transmission of the letter for judicial reference under BL158(3) from the CFA to the NPCSC through the usual and proper channel for transmitting official documents by the Government of the HKSAR to state bodies in the Mainland, provided that the letter was to be issued by the CFA and

⁸ Article 53 of the Basic Law stipulates that, in the event that the office of the Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of the Basic Law.

⁹ The purpose of the Bill was to add new section 3(1A) to the Chief Executive Election Ordinance (Cap. 569) to provide that a Chief Executive who filled a vacancy that arose should serve the remainder of the term of his or her predecessor.

¹⁰ Article 13(1) of the Basic Law stipulates that, the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.

¹¹ Article 19 of the Basic Law stipulates that, the Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs.

addressed to the NPCSC. SJ also submitted that in assisting the CFA in this regard he would be acting as no more than a conduit of official communication for passing on the letter of referral through the proper channel to the NPCSC for interpretation of the provisions concerned under BL158(3).

15. The letter of referral and the supporting documents were delivered to the SJ on 30 June 2011 and subsequently forwarded to the Hong Kong and Macao Affairs Office of the State Council on 5 July 2011 for transmission to the NPCSC. The parties to the proceedings did not oppose to such arrangement.

16. On 26 August 2011, upon the motion of the Council of Chairmen that the draft interpretation be examined by the NPCSC pursuant to the CFA's request, the NPCSC issued the Interpretation of BL13(1) and BL19 by the NPCSC ("the Interpretation").

17. On 30 August 2011, the SJ transmitted the Interpretation to the CFA through the Registrar. Upon receipt of the Interpretation, the CFA forwarded the Interpretation to the parties to the proceedings and proceeded to consider its judgment in the light of the Interpretation.

18. On 8 September 2011, the CFA handed down its final judgment in the Congo case. The CFA considered that the June judgment was consistent with the Interpretation, and accordingly declared the judgment final. On 16 September 2011, the Interpretation was published in the Gazette as L.N. 136 of 2011. While the CFA saw it fit to transmit its letter of referral to the NPCSC in the Congo case in the manner mentioned above, it was open to CFA to adopt a different transmission procedure in a future case, if it considered appropriate.

Deliberations at the Legislative Council and Members' concerns

19. The four afore-mentioned NPCSC interpretations had been discussed by Members on a number of occasions, including meetings of the Panel on Administration of Justice and Legal Services ("AJLS Panel"), the CA Panel, the Panel on Home Affairs, the Bills Committee on Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill, the House Committee, and Council meetings. Major views expressed by Members are set out in the ensuing paragraphs.

Legal basis for the CE to request for interpretation of the BL

20. Some Members considered that the Government had not followed the proper procedure for seeking an NPCSC interpretation. They pointed out that

BL158(3) only provided for the courts of HKSAR to request for an interpretation from the NPCSC, and there was no provision in BL158 for the CE to make such a request.

21. The Administration pointed out that the CE was responsible for the implementation of the BL under BL48(2). Such constitutional powers and functions imposed the duty on the CE to make a report to the Central People's Government in the event of encountering difficulties in the course of exercising such powers and functions.

22. The Administration further pointed out that the NPCSC could interpret the BL not only upon the request of the courts. In *Lau Kong Yung v Director of Immigration*¹², the CFA had pointed out that the power of NPCSC to interpret the BL conferred by BL158(1) was "in general and unqualified terms".

Assurance for not seeking the interpretation from the NPCSC in future

23. At the AJLS Panel meeting held on 18 April 2000, some members demanded the Government to give an unequivocal assurance that it would not seek an interpretation from the NPCSC again in order to restore confidence in Hong Kong's legal system.

24. The Administration responded that it was impossible for the Government to guarantee that it would not request the NPCSC to interpret certain provisions of the BL again, as one could not foresee what would happen in the future. It could only state that an interpretation would only be sought in highly exceptional circumstances and when it was considered to be imperative in the public interest to do so.

Impacts of the interpretations by the NPCSC on legal proceedings

25. Some Members queried the appropriateness for the Government to seek an interpretation from the NPCSC after the CFA had already adjudicated on the right

¹² *Lau Kong Yung v Director of Immigration* was a 1999 right of abode case in CFA. It was the first case in which CFA had to take into account an NPCSC interpretation in applying the Basic Law. Lau Kong Yung and the other 16 plaintiffs of the case were Mainland-born children of Hong Kong permanent residents and on that basis claimed to be entitled to the right of abode. The Director of Immigration made removal orders against them on the grounds that they had arrived in Hong Kong on two-way permits. The 17 mainlanders challenged their removal on the grounds that they had qualified for the right of abode as interpreted by CFA. They sued the Director of Immigration in the Court of First Instance to quash the removal orders. The Court of First Instance ruled for the Director of Immigration on 30 March 1999. The plaintiffs appealed to the Court of Appeal. Before NPCSC issued its interpretation of Articles 22(4) and 24(2)(3) on 26 June 1999, the Court of Appeal overturned the ruling of the Court of First Instance on 11 June 1999. The Director of Immigration then appealed the decision of the Court of Appeal to CFA. The CFA ruled that Lau and the other 16 plaintiffs were not entitled to the right of abode in Hong Kong. Besides, it ruled that the NPCSC's exercise of interpretation power was not dependent upon referral by the courts.

of abode case. They considered that the CE's decision to seek an interpretation after the CFA had delivered its judgment was tantamount to seeking to overturn the CFA judgment and would undermine the CFA's power of final adjudication.

26. The Administration responded that it was a misconception that the Government, as a losing party to proceedings before the CFA, had sought to overturn the decision of the CFA by seeking an NPCSC interpretation. The NPCSC interpretation given in June 1999 did not undo the CFA judgment made in January 1999 on the right of abode case. The CFA judgment in favour of certain persons remained unchanged despite the interpretation. It was only that the courts would be bound by the interpretation in adjudicating future cases.

27. The Administration reiterated that the CE would seek an NPCSC interpretation only in the most exceptional circumstances and that the CE would not approach the State Council to request an interpretation from NPCSC every time the Government lost in the CFA. The Government accepted that interpretation should only be used as a last resort in view of the undesirable side effect to the interpretation.

Judicial independence and the rule of law

28. Concern was raised that the CE's request for the State Council to seek an interpretation of the BL by the NPCSC would undermine judicial independence and the rule of law in Hong Kong. According to BL158(2), the NPCSC had authorized the courts of HKSAR to interpret on their own, in adjudicating cases, the provisions of the BL which were within the limits of the autonomy of HKSAR. In addition, under the common law system being practised in Hong Kong, the power to interpret laws was vested in the courts.

29. The Administration advised that the power of the NPCSC to interpret the BL was part of Hong Kong's constitutional system. Such power originated from Article 67(4) of the Constitution of the People's Republic of China and BL158(1). The power of interpretation conferred by BL158(1) was in general and unqualified terms, and its exercise was not restricted or qualified in any way by BL158(2) and (3). The NPCSC's exercise of power to interpret the BL therefore did not and would not compromise the independence of the Judiciary or the rule of law in Hong Kong.

30. The Administration further advised that there was a difference between the CFA's power of final adjudication and the NPCSC's power of final interpretation. The power of final adjudication was vested with the courts in Hong Kong so that all cases should be concluded in Hong Kong. The Central Authorities also authorized the courts in Hong Kong to interpret the BL on their own, but this had

not undermined the power of NPCSC to give interpretation. The NPCSC's power of interpretation conferred by BL158(1) was not restricted or qualified in any way by BL158(2) and (3). As such, any interpretation from the NPCSC would not diminish the status of CFA. It would simply reflect the respective roles given to the CFA and the NPCSC as clearly spelt out in the BL. Hong Kong did not have the power of final interpretation, so its power was not there to be taken away.

Seeking interpretation rather than amending the BL

31. Some Members were of the view that it would be better to amend the BL under BL159 than to seek an interpretation from the NPCSC in dealing with the cases of the right of abode and the term of office of the CE.

32. The Administration stressed the need for the NPCSC interpretations to address the urgency for dealing with the right of abode case and the election of the second-term CE to fill the vacant office. Under BL159, before submitting a bill to the National People's Congress ("NPC") for amendment to the BL the consent of two-thirds of the NPC deputies of HKSAR, two-thirds of all LegCo Members and the CE should be obtained. Moreover, the meeting of NPC would only be held annually. In contrast, no prior consent would be needed for seeking an interpretation from the NPCSC and NPCSC would hold its meeting bi-monthly. As such, the Administration did not have to wait long if it opted for seeking an interpretation from the NPCSC.

33. The Administration also advised that constitutional document should not be amended lightly. It would take time to see how the BL worked before the Administration would consider proposing bills for amendments to the BL. If it was deemed absolutely necessary, the Administration would proceed with drafting of the bills for amendment.

34. Some Members considered that the 2004 interpretation set out two additional conditions for amending the methods for selecting the CE and forming LegCo¹³. These two conditions were not found in the Annexes to the BL, and the 2004 interpretation could be considered as an amendment to the BL in practice.

Due process

35. Some Members expressed dissatisfaction that the Government failed to consult the public, before seeking interpretation from the NPCSC on the right of abode case in 1999 and the term of the office of the CE in 2005.

¹³ See paragraph 8 for details.

36. For the 1999 interpretation on the right of abode case, the Administration advised that a total of 19 volumes of public views on the right of abode issue, together with the CE's report, were submitted to the State Council. For the 2005 interpretation on the term of the office of the CE in 2005, the Acting CE had submitted the views received from different sectors of the community on the term of office of the new CE.

Establishing a formal mechanism to govern the CE in seeking interpretation of the BL

37. Some members of the AJLS Panel shared the concerns of the Bar Association of Hong Kong that the procedure for seeking an interpretation from the NPCSC should be made more transparent, including consulting the views of the public beforehand. In view of diverse views as to how and when the CE should seek NPCSC interpretation of the BL, the Administration was requested to establish a formal mechanism to govern the CE in seeking interpretation of the BL.

38. The Administration advised that there were views in the community that to set up a formal mechanism and procedure for seeking interpretation from NPCSC might rationalize the making of such requests. It pointed out that on each of the previous occasions of the NPCSC's interpretations, discussions were held in LegCo and its relevant committees both before and after the interpretation. The Administration further advised that in view of the complexity of the issues involved, it needed to consider the request carefully before deciding on the way forward.

Recent development

39. The Administration will brief the Panel on 28 May 2013 on the procedure for seeking an interpretation from NPCSC of the BL.

Relevant papers

40. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
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Appendix

Relevant papers on Procedure for seeking an interpretation of the Basic Law

Committee	Date of meeting	Paper
House Committee	8 May 1999	Agenda Minutes
	10 May 1999	Verbatim Transcript
	18 May 1999	Verbatim Transcript
	19 May 1999	Verbatim Transcript
Legislative Council	19 May 1999	Official Record of Proceeding Pages 34 - 61 (Motion)
	26 May 1999	Official Record of Proceeding Pages 33 - 51 (Motion)
	2 June 1999	Official Record of Proceedings of an oral question raised by Hon YEUNG Sum on "The Administration requesting the Standing Committee of the National People's Congress to interpret the legislative intention and objective of the articles of the Basic Law"
Panel on Constitutional Affairs ("CA Panel")	3 June 1999	Agenda Minutes
	12 June 1999	Verbatim Transcript
	15 June 1999	Verbatim Transcript
	25 June 1999	Agenda Minutes

Committee	Date of meeting	Paper
Legislative Council	8 March 2000	Official Record of Proceedings of a written question raised by Hon Emily LAU Wai-hing on "Publishing the views of the Committee for the Basic Law of the HKSAR "
Panel on Administration of Justice and Legal Services ("AJLS Panel")	18 April 2000	Agenda Minutes
	20 June 2000	Agenda Minutes CB(2)2359/99-00(04)
CA Panel	31 March 2004	Agenda Minutes
	16 April 2004	Agenda Minutes
Legislative Council	22 April 2004	Official Record of Proceeding Pages 127 - 223 (Motion)
	5 May 2004	Official Record of Proceeding Pages 133 - 211 (Motion)
	19 May 2004	Official Record of Proceeding Pages 161 - 274 (Motion)
	2 June 2004	Official Record of Proceedings of a written question raised by Hon Martin LEE Chu-ming on "Interpretation of the Basic Law and decision on issues relating to the methods for selecting CE in 2007 and for forming LegCo in 2008 by the Standing Committee of the National People's Congress"

Committee	Date of meeting	Paper
CA Panel	21 March 2005	Agenda Minutes
Legislative Council	6 April 2005	Official Record of Proceeding Pages 103 - 292 (Motion)
Bills Committee on Chief Executive Election (Amendment) (Term of Office of the Chief Executive)	21 April 2005	Agenda Minutes
Legislative Council	4 May 2005	Official Record of Proceedings of a written question raised by Hon Frederick FUNG Kin-kee on "Provisions of the Basic Law which may have different interpretations "
	11 May 2005	Official Record of Proceeding Pages 140 - 217 (Motion)
Panel on Home Affairs	10 March 2006	Agenda Minutes
AJLS Panel	27 February 2012	Agenda Minutes
	28 May 2012	Agenda Minutes

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