

## **Submission on the Amendment of the Immigration Ordinance**

The first point I would like to make is that the legitimacy of having such amendment. That depends on the legitimacy of the interpretation made by the SCNPC. If it is accepted that the interpretation of the SCNPC on 26 June is lawful and appropriate, then the amendment of the Immigration Ordinance is necessary.

The second point is concerned with the appropriateness of the contents of the proposed amendment. Though I don't think "original legislative intent" approach is the appropriate approach to be adopted to interpret the Basic Law, that is the approach adopted by the SCNPC in its interpretation of Arts. 22(4) and 24(2). The SCNPC states in its interpretation that the "Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" ("Opinions") adopted by the Preparatory Committee (which was later approved by the SCNPC in 1997) reflect the legislative intent of Art. 24(2). According to the Opinions, Chinese citizens referred to in paragraph one of Art. 24(2) are those Chinese citizens whose parents lawfully reside in Hong Kong at the time they are born in Hong Kong. Certain categories of people are excluded by the Opinions. If the Government truly wants to implement the so-called "original legislative intent" as recognized by the SCNPC and reflected in the Opinions, then the proposed amendment to 2(a) of Schedule 1 does not seem to be consistent with the Opinions. I understand that it is inappropriate to use the term of "right of abode" in 2(a) of Schedule 1. But the term of "right of abode" can be replaced by some other terms rather than the formulation as proposed by the Government.

It has been argued that the practice of the Hong Kong Government at that time should be taken into account in understanding and construing the "original legislative intent" of the Basic Law. With due respect, that argument does not seem to be consistent with the interpretation of the SCNPC, which states clearly that the Opinions of the Preparatory Committee represents the original legislative intent. If the "original legislative intent" approach is not binding on the HKSAR, then the formulation proposed by the HKSAR is understandable given that the concept of "right of abode" only came into existence in 1987. The proposed argument also raises an important issue, that is how the original legislative intent of the Basic Law should be identified. The legal system in the HKSAR faces great uncertainty in this aspect and further clarification is needed.

Another theoretical issue which needs to be considered is whether or not the interpretation approach as adopted by the SCNPC in its interpretation should be binding on the HKSAR. I have argued at other occasions that the HKSAR, particularly the judiciary, should continue to adopt the broad and purposive approach in statutory interpretation. With regard to the interpretation of the SCNPC, only the substance of the interpretation is binding on the HKSAR, not its interpretation approach, i.e., the "original legislative intent" approach.

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