

Background Material on the Drafting of Article 53 of the Basic Law

1. “Collection of Documents of the 6th Plenary Session of the Basic Law Drafting Committee” (December 1987) (Page 38-39) (in Chinese)
2. “Brief Report of the 6th Plenary Session of the Basic Law Drafting Committee” (Third Volume) (Page 7) (in Chinese)
3. “The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (For Solicitation of Opinions)” (April 1988) (Page 25) (in Chinese)
4. “The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (For Solicitation of Opinions): Consultation Report, Volume 1 – Report on the Consultation of the Draft Basic Law for Solicitation of Opinions, Collection of Views of the Special Groups of the Consultative Committee for the Basic Law Regarding the Draft Basic Law for Solicitation of Opinions” (October 1988) (Page 107)
5. “The Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (For Solicitation of Opinions): Consultation Report, Volume 5 – General Report on the Articles” (October 1988) (Page 484)
6. “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” (February 1989) (Pages 9-10) (in Chinese)
7. Letter of 7 March 2005 from Professor Xu Chongde
8. Letter of 8 March 2005 from Professor Lian Xisheng
9. Letter of 10 March 2005 from Professor Lian Xisheng

中华人民共和国
香港特别行政区基本法起草委员会
第六次全体会议

文 件 汇 编

中华人民共和国香港特别行政区
基本法起草委员会秘书处

题，留待研究。

第四十九条 香港特别行政区行政长官在下列情况下必须辞职：

(一) 因严重病患或其他原因而长期不能履行职务；
或

(二) 因两次拒绝签署立法机关通过之法案而解散立法机关，重选之立法机关仍以全体成员三分之二多数通过所争议之原案；或

(三) 因立法机关拒绝通过财政预算法案或其他重要法案而解散立法机关，重选之立法机关继续拒绝通过所争议之原案。

〔说明〕有的委员认为，第（一）项应写成“无力”履行职责；有的委员认为，应写成“不适合”履行职责。

有的委员主张本条增写第（四）项，即“立法机关全体成员以三分之二多数通过对行政长官的不信任票”；有的委员主张，如要这样写，必须是立法机关投不信任票后，行政长官可解散立法机关，如重新选出的立法机关再次投不信任票，行政长官才必须辞职。

第五十条 香港特别行政区行政长官短期不能履行职务时，依次由政务厅厅长、财政厅厅长、律政厅厅长临时代理其职务。

香港特别行政区行政长官缺位时，应在六个月内选出新的行政长官。在新的行政长官选出前，依照上款规定办理。

第五十一条 香港特别行政区行政会议（暂定名）是协助行政长官决策的机构。

〔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。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。

第五十二条 香港特别行政区行政会议的成员由行政长官从行政机关的主要官员、立法机关成员和社会人士中委任，其任期或任期未满时终止委任，由行政长官决定。行政会议成员的任期应不超过委任他的行政长官的任期。

香港特别行政区行政会议成员由香港特别行政区永久性居民中的中国公民担任，宣誓效忠于香港特别行政区。

行政长官认为必要时可邀请有关人士列席会议。

〔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各部份成员是否需要一个比例等问题，有的委员主张，行政会议成员全部由主要官员组成；有的委员主张，行政会议

附件二:

《中华人民共和国香港特别行政区基本法起草委员会
第二次全体会会议纪要》《时报》第3期 第7页

十四、第五十条

有的委员建议，将本条“选出”改为“产生”。有的委员提出，根据本条规定所产生的行政长官，是否算一届，应有法律规定。

中華人民共和國香港特別行政區
基本法(草案)徵求意見稿

附引言及簡介

一九八八年四月

- (六) 依照法定程序任免各級法院法官；
- (七) 依照法定程序任免公職人員；
- (八) 執行中央人民政府就本法規定的有關事務發出的指令；
- (九) 代表香港特別行政區政府處理中央授權的對外事務和其他事務；
- (十) 批准向立法會議提出有關財政收入或支出的動議；
- (十一) 根據安全和公共利益的考慮，決定政府官員或其他負責政府公務的人員是否向立法會議作證和提供證據；
- (十二) 赦免或減輕刑事罪犯的刑罰；
- (十三) 處理請願、申訴事項。

第四十九條 香港特別行政區行政長官如認為立法會議通過的法案不符合香港特別行政區的整體利益，可在三個月內將該法案發回立法會議重議。立法會議如以不少於全體成員三分之二多數再次通過原案，行政長官必須在一個月內簽署公佈或按本法第五十條的規定處理。

第五十條 如行政長官拒絕簽署立法會議再次通過的法案或立法會議拒絕通過政府提出的財政預算法案或其他重要法案，經協商仍不能取得一致意見，行政長官可解散立法會議。

行政長官在解散立法會議前，須徵詢行政會議的意見。行政長官在其一屆任期內只能解散立法會議一次。

第五十一條 如立法會議拒絕批准政府提出的財政預算法案，或由於立法會議已被解散而不能批准撥款，行政長官可在選出新的立法會議前的一段時期內，按上一財政年度的開支標準，批准臨時短期撥款。

第五十二條 香港特別行政區行政長官如有下列情況之一者必須辭職：

- (一) 因嚴重疾病或其他原因無力履行職務；
- (二) 因兩次拒絕簽署立法會議通過的法案而解散立法會議，重選的立法會議仍以全體成員三分之二多數通過所爭議的原案；
- (三) 因立法會議拒絕通過財政預算法案或其他重要法案而解散立法會議，重選的立法會議繼續拒絕通過所爭議的原案。

第五十三條 香港特別行政區行政長官短期不能履行職務時，依次由政務司長、財政司長、律政司長臨時代理其職務。

行政長官缺位時，應在六個月內產生新的一屆行政長官。行政長官缺位期間的職務代理，依照上款規定辦理。

第五十四條 香港特別行政區行政會議是協助行政長官決策的機構。

THE DRAFT BASIC LAW
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA
(FOR SOLICITATION OF OPINIONS)

CONSULTATION REPORT

Volume 1

REPORT ON THE CONSULTATION
ON THE *DRAFT BASIC LAW FOR SOLICITATION OF OPINIONS*

COLLECTIONS OF VIEWS OF THE SPECIAL GROUPS
OF THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW
REGARDING THE *DRAFT BASIC LAW FOR SOLICITATION OF OPINIONS*

THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA

October 1988

provide for the declaration of assets in the Basic Law because public servants at all levels (including the Chief Executive) should abide by a more detailed set of codes for public servants or the Chief Executive.

A member pointed out that the term of office of the Chief Executive should depend on which alternative in the Annex was adopted: the term of office should match the method of selection.

A member held that in Article 53 the term of the new Chief Executive was not clear. It should be stated whether the Chief Executive would start a new term of office or complete the current term of office.

Powers

A member held that the removal of the stated officials on the proposal by the Chief Executive to the Central People's Government for as prescribed in Article 48 (5) seemed over-simplified. He therefore proposed amending the provision to read: "and to propose to the Central People's Government the removal of the above-mentioned officials through a set procedure".

A member held that Article 48 (11) should define under what circumstances and within what limits the Chief Executive could require government officials to testify or give evidence before the Legislative Council.

A member held that if according to Article 48 (11) the Chief Executive could decide, in the light of security and public interest, a certain official should not testify, then the Legislative Council's questioning power and its power to investigate important cases would be affected.

A member noted that Article 48 (12) did not specify whether the decision to pardon persons convicted of criminal offences or commute their penalties should be made by the Chief Executive alone or by the Chief Executive in Council.

A member held that the provision on the "appointment, removal and disciplining of officers and the adoption of measures in emergencies" should be more specific lest it should be possible for the Chief Executive to abuse his/her powers in the future.

Appointment and removal of principal officials

A member questioned whether the Chief Executive should have the power to remove principal officials during his/her term of office.

If the Chief Executive has such power, the principal officials will lose their independence.

If the Chief Executive does not have such power, the principal officials should be divided into two categories:

(1) Policy-making officials -- Their terms of office should coincide with that of the Chief Executive.

(2) Executive officials -- Life appointment; they should not be removed from office unless they violated the law.

The executive authorities

A member held that it should be stated whether the Executive Council is part of the executive authorities.

THE DRAFT BASIC LAW
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA
(FOR SOLICITATION OF OPINIONS)

CONSULTATION REPORT
Volume 5

— General Report on the Articles —

THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA

October 1988

Article 53

1. Original text

If the Chief Executive of the Hong Kong Special Administrative Region is not able to discharge his/her duties for a brief period, such duties shall temporarily be assumed by Administrative Secretary, Financial Secretary, Secretary of Justice in this order of precedence.

In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months, and during the period of vacancy, his/her duties shall be assumed according to the provisions of the preceding Paragraph.

2. Views

- The benefit of laying down firm stipulations for the order of precedence officials will have in acting on behalf of the Chief Executive is that the relevant Secretaries will be mentally prepared and the public will have a good idea which Secretary will be their acting Chief Executive when the Chief Executive is not able to discharge his/her duties for a brief period.

- Objection is expressed to this article.

Reasons: - Whoever assumes the duties of the Chief Executive should be elected by the people of Hong Kong, but none of the officials mentioned in this article will be elected.

- There should not be any rigid arrangements as to who should temporarily assume the duties of the Chief Executive.
- The powers and functions of these officials will be very different from those of the Chief Executive.
- These Secretaries will not be familiar with the work of the Chief Executive.
- These Secretaries may not have the ability required.
- A limit should be set on the period for which the post of Chief Executive may remain vacant.
- A new Chief Executive should be selected if the office of Chief Executive remains vacant for six months.

- If the Chief Executive will not be able to discharge his/her duties for the remainder of his/her term of office, a new Chief Executive should be selected.

3. Suggestions

3.1 Amendments

- Paragraph 1 should be amended to read: "When the Chief Executive is not able to discharge his/her duties, his/her powers and duties should be taken on by the President of the Legislative Council, who shall be elected."
- Paragraph 1 should be amended to read: "When the Chief Executive is not able to discharge his/her duties for a brief period, such duties shall temporarily be assumed by the President of the Legislative Council, the Administrative Secretary, the Financial Secretary, or the Secretary of Justice in this order of precedence."
- The words "within six months" in Paragraph 2 should be amended to read "within three months". The circumstances under which the office of Chief Executive may become vacant include: (1) The Chief Executive resigns in accordance with the provisions of Article 52. (2) The Chief Executive is relieved of his/her duties by the Central People's Government in accordance with the provisions of Paragraph (9) of Article 72.
- The titles for heads of government departments should be made uniform.

3.2 Additions

- The following provision should be added at the end of Paragraph 1: "The Chief Executive shall appoint one of these officials to assume such duties."
- The following provision should be added to Paragraph 1: "The Chief Executive may not concurrently serve any political body or engage in the activities of any political body."
- The following provision should be added to Paragraph 1: "The Chief Executive may not purchase public land in his/her own name."

4. Issues to be clarified

- The specific meaning of "the office of Chief Executive becomes vacant" in Paragraph 2 needs clarification.
- Will the "new Chief Executive" referred to in Paragraph 2 start a new term of office or will he/she serve the remainder of the term of office of his/her predecessor?

中華人民共和國香港特別行政區

基本法(草案)

一九八九年二月

- (六) 依照法定程序任免各級法院法官；
- (七) 依照法定程序任免公職人員；
- (八) 執行中央人民政府就本法規定的有關事務發出的指令；
- (九) 代表香港特別行政區政府處理中央授權的對外事務和其他事務；
- (十) 批准向立法會提出有關財政收入或支出的動議；
- (十一) 根據安全和重大公共利益的考慮，決定政府官員或其他負責政府公務的人員是否向立法會或其屬下的委員會作證和提供證據；
- (十二) 赦免或減輕刑事罪犯的刑罰；
- (十三) 處理請願、申訴事項。

第四十九條 香港特別行政區行政長官如認為立法會通過的法案不符合香港特別行政區的整體利益，可在三個月內將法案發回立法會重議，立法會如以不少於全體議員三分之二多數再次通過原案，行政長官必須在一個月內簽署公佈或按本法第五十條的規定處理。

第五十條 如行政長官拒絕簽署立法會再次通過的法案或立法會拒絕通過政府提出的財政預算案或其他重要法案，經協商仍不能取得一致意見，行政長官可解散立法會。

行政長官在解散立法會前，須徵詢行政會議的意見。行政長官在其一任任期內只能解散立法會一次。

第五十一條 如果立法會拒絕批准政府提出的財政預算案，可由行政長官向立法會申請臨時撥款。如果由於立法會已被解散而不能批准撥款，行政長官可在選出新的立法會前的一段時期內，按上一財政年度的開支標準，批准臨時短期撥款。

第五十二條 香港特別行政區行政長官如有下列情況之一者必須辭職：

- (一) 因嚴重疾病或其他原因無力履行職務；
- (二) 因兩次拒絕簽署立法會通過的法案而解散立法會，重選的立法會仍以全體議員三分之二多數通過所爭議的原案，而行政長官仍拒絕簽署；
- (三) 因立法會拒絕通過財政預算案或其他重要法案而解散立法會，重選的立法會繼續拒絕通過所爭議的原案。

* **第五十三條** 香港特別行政區行政長官短期不能履行職務時，由政務司長、財政司長、律政司長依上述順序臨時代理其職務。

行政長官缺位時，應在六個月內依本法第四十五條的規定產生新的行政長官。行政長官缺位期間的職務代理，依照上款規定辦理。

第五十四條 香港特別行政區行政會議是協助行政長官決策的機構。

第五十五條 香港特別行政區行政會議的成員由行政長官從行政機關的主要官員、立法會議員和社會人士中委任，其任免由行政長官決定。行政會議成員的任期應不超過委任他的行政長官的任期。

香港特別行政區行政會議成員由香港特別行政區永久性居民中的中國公民擔任。

行政長官認為必要時可邀請有關人士列席會議。

第五十六條 香港特別行政區行政會議由行政長官主持。

行政長官在作出重要決策、向立法會提交法案、制定附屬法規和解散立法會前，須徵詢行政會議的意見，但人事任免、紀律制裁和緊急情況下採取的措施除外。

行政長官如不採納行政會議多數成員的意見，應將具體理由記錄在案。

第五十七條 香港特別行政區設立廉政公署，獨立工作，對行政長官負責。

第五十八條 香港特別行政區設立審計署，獨立工作，對行政長官負責。

第二節 行政機關

第五十九條 香港特別行政區政府是香港特別行政區行政機關。

第六十條 香港特別行政區政府的首長是香港特別行政區行政長官。香港特別行政區政府設政務司、財政司、律政司和各局、處、署。

第六十一條 香港特別行政區的主要官員由在香港通常居住連續滿十五年的香港永久性居民中的中國公民擔任。

第六十二條 香港特別行政區政府行使下列職權：

- (一) 制定並執行政策；
- (二) 管理各項行政事務；
- (三) 辦理本法規定的中央人民政府授權的對外事務；

(Translation)

Ms Elsie Leung
Secretary for Justice
Hong Kong Special Administrative Region

Dear Ms Leung,

I refer to your call on 7 March in which you inquired about the legislative process and the legislative intent of the provisions related to the term of the Chief Executive in the *Basic Law* of the Hong Kong Special Administrative Region (HKSAR). My recollection of the relevant events are set out below.

Between 1985 and 1990, I was a member of the group on the political structure and participated in drafting the *Basic Law* of Hong Kong. I recall that in the course of drafting Article 53 of the *Basic Law* which provides that “In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law”, there were changes back and forth in respect of the wording of “新的行政長官” (“the new Chief Executive”). Initially it was written in the form of the current provision. However, it was changed into “新的一屆行政長官” (“the Chief Executive of the new term”) in the course of drafting. Later, the words “一屆” (term) were deleted. The above changes were made mainly because members had different understanding towards the term of the new Chief Executive when the office of the Chief Executive was left vacant. Some members considered that it should be the residue of the unexpired term while some others thought that it should be a new term. Why were the words “一屆” eventually deleted? I remember that at that time it was mainly based on the following understanding -

(1) The Chief Executive could certainly mean an individual holding that office. However, in the *Basic Law*, the Chief Executive is primarily a state organ and an integral part of the political structure of the SAR. The Chief

Executive, the executive authorities, the legislature and the judiciary together form the political structure of the HKSAR. Therefore, “the term of office of the Chief Executive shall be five years” as referred to by us means, to a very great extent, that each term of office of that organ is five years. In practice, the same Chief Executive would normally serve throughout the five-year term of office of the Chief Executive. However, the possibility that two or more persons holding the office in succession within the same term could not be ruled out. And the five-year term of office of the Chief Executive as a state organ would not be affected.

(2) If we were to look at the practice in the Mainland, it will show that irrespective of whether it is the National People’s Congress, its Standing Committee, the President of the People’s Republic of China, the State Council, a local People’s Congress or a local government, the term of office of these organs is not determined by the appointment or departure of a particular individual but rather by the term of office of the respective organs as provided for in the Constitution. For instance, the governors of provinces and the mayors of municipalities in the Mainland change frequently but this does not mean that the respective governments have to be changed as well. Instead the new governors and the new mayors will continue to serve out the unexpired term of their predecessors. The People’s Congress system is not practised in the HKSAR. Nevertheless, it is specified that the Chief Executive shall be elected by an Election Committee and that the term of office of the Election Committee shall be five years. This was drawn up with reference to the practice adopted in the Mainland regarding the term of office.

(3) The situation of the United States was also taken into account at that time. A president of the United States shall hold office for four years in each term. When President Kennedy was assassinated after assuming the presidency for two years and ten months, Vice President Johnson succeeded as president for the remaining unexpired term of his predecessor. After one year and six and a half months on his second term of presidency, Nixon resigned from office as a result of the Watergate incident. His unexpired term was served by his successor, Vice President Ford. The practice adopted by the United States to elect both president and vice president at the same time is to resolve the issue of serving the remainder of the unexpired term of a president in case the office fell vacant prematurely. In the course of drafting the *Basic Law*, it was suggested by some members that a deputy post be created so that in

the event the office of Chief Executive became vacant, the deputy could fill the vacancy for the remainder of the term. This view, however, was not adopted. Instead, it was decided that the issue of filling the Chief Executive's vacancy in the event that his office became vacant be resolved by providing that the term of the Election Committee shall be five years. This means that in the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be returned in a by-election of the Election Committee to serve the remainder of the unexpired term. I recall that in the course of drafting Annex I to the *Basic Law*, there was a provision stating that "the Election Committee shall be dissolved after the appointment of the Chief Executive by the Central People's Government", but it was subsequently amended as "the term of office of the Election Committee shall be five years". The amendment was made to resolve the issue of remaining term and it is clear that it is not for the Election Committee of the current term to elect a Chief Executive of a new term. This also serves to confirm that the purpose of deleting the words "一屆" (term) in "新的一屆行政長官" (the Chief Executive of the new term) mentioned earlier was to underline the fact that where a Chief Executive is returned in a by-election of the five-year-term Election Committee, he shall only be the new Chief Executive instead of the Chief Executive of a new term.

The above account is just some of my personal recollection for your reference.

Yours sincerely,

(signed)

Xu Chongde

Professor of the Law School of
the Renmin University and
Member of the Hong Kong Basic Law
Drafting Committee

7 March, 2005

(Translation)

Ms Elsie Leung
Secretary for Justice

Dear Ms Leung,

With regard to the questions you raised in our telephone conversation, apart from my comments made on the phone, I have checked the information on hand as requested. At the time in question, I was a member of the Basic Law Drafting Committee Secretariat and participated throughout the drafting process of the *Basic Law* in the capacity of the Committee's legal expert. I participated in the work of the Special Group Concerned with the Political Structure which was one of the special working groups. My recollections of what happened during the drafting process of the *Basic Law* in relation to the issue of the term of a Chief Executive returned in a by-election after his predecessor had vacated office were roughly as follows -

1. This issue was not discussed as a very key issue at the meetings of the Special Group Concerned with the Political Structure and the Plenary Session of the Basic Law Drafting Committee. It was only discussed in general terms at the secretariat meetings. It was because this question, though raised by someone during the process, the viewpoint of members from the Mainland and Hong Kong did not diverge widely and the divergence was not substantive. According to the legal concept of Mainland members, the new Chief Executive returned in a by-election by an Election Committee with a term of office, should be the successor of the original Chief Executive. Hence, his term of office should be the residue of his predecessor's term. This was very clear cut in the political and legal systems of the Mainland and it seemed that discussion was not necessary.

I remember that some members from Hong Kong also shared the same understanding regarding this issue. There were some other members from Hong Kong who expressed different opinions and views during the

discussion process. For instance, some suggested that there should be a post of Deputy Chief Executive to act as the Chief Executive when the office fell vacant and some suggested that the practice of common law countries, making reference to the stipulations of Amendment XXII of the United States Constitution, should be adopted, etc. However, as these were not mainstream views, they were unable to draw sufficient attention and hence were not adopted.

2. The legislative intent of this issue was already manifested in the related provisions of the *Basic Law*. In this regard, we should note that in order to manifest clearly the legislative intent of the related issue, the wording of the provisions had been adjusted.

Example 1: At the Eighth Plenary Session of the Basic Law Drafting Committee held on 11 January 1989, the Chairman's Committee amended Article 53(2) of the *Draft Basic Law (for Solicitation of Opinions)* which stipulated that "in the event that the office of Chief Executive becomes vacant, a Chief Executive of the new term (新的一屆行政長官) shall be selected within six months" to "in the event that the office of Chief Executive becomes vacant, a new Chief Executive (新的行政長官) shall be selected within six months in accordance with the provisions of Article 45 of this Law." Although this amendment only involved a change in the wording, it indicated on one hand that the provision was tightened and became more complete while it manifested on the other hand that the Chief Executive returned in a by-election would only be a new Chief Executive. It would not mark the beginning of a new term of the Chief Executive.

Example 2: Article 1 of Annex I to the *Draft Basic Law* released by the NPCSC on 21 February 1989 provided that "The Chief Executive shall be elected by a broadly representative Election Committee and appointed by the Central People's Government", while Article 7 provided that "The Election Committee shall be dissolved after the appointment of the Chief Executive by the Central People's Government." It was later considered that the office of the Chief Executive might fall vacant during his term of office for whatever reasons and that as a result, a by-election might be required and specific provisions were made in the *Basic Law*. In order to provide a safeguard in the mechanism for the by-election arrangements that might become necessary subsequent to the vacation of the office of the Chief Executive and to give effect

to the connection between the provisions, the provision was amended to read as “the term of office of the Election Committee shall be five years” in the final draft endorsed for submission to the NPCSC by the Drafting Committee at its 9th meeting on 16 February 1990. The fact that the term of the Election Committee is the same as that of the Chief Executive proves that the office of the Chief Executive is designed on a term basis. While the Chief Executive is an individual, he is also an important part of the political structure of Hong Kong and is provided for in the first part of the Chapter on Political Structure in the *Basic Law*. Each and every organ in the political structure is subject to a term of office as a general rule. While there may be some differences in the wording, their nature and meaning remain the same.

Furthermore, in accordance with Article 7 of Annex I to the *Basic Law*, the Chief Executive for the third term is to be selected in 2007. Similarly, this illustrates the fact that the term of the Chief Executive is designed as a five-year one. Therefore, if the term of the substitute Chief Executive is to run afresh for a full term of five years, this will no doubt be in contravention of the existing provisions in Annex I to the *Basic law*.

The above is some of my recollection of the related issues for your reference.

Yours sincerely,

Lian Xisheng
Professor
China University of Politics and Law
8 March 2005

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(Translation)

Ms Elsie Leung,
Secretary for Justice

Dear Ms Leung,

On the question of why a legal provision has to be read in conjunction with related legal provisions in understanding or construing the meaning of that legal provision, I would like to present my views for your reference.

- (1) From the perspective of legal theory, it is necessary to have a clear grasp of the relationship between “legal norms” and “legal provisions” in order to ensure that a piece of legislation is in harmony and consistent within itself, and is coherent, cohesive and complete. In terms of legislative theory, legal norms refer to the content of legal provisions, while legal provisions are the textual expression of such norms. These two concepts are connected and yet should be differentiated. In actual legislative practice, generally speaking, a legal norm may be expressed with the use of one legal provision, but there are many cases in which a legal norm can only be given full expression through a number of legal provisions. There are even instances where various component parts of one legal norm are found scattered among several legal documents. The connection and differences between these two concepts must be duly noted and properly handled in the legislative process so that a coherent logical relationship is accurately expressed in the text through a number of related legal provisions which are used to express a particular legal norm. Only in this way can we guarantee that the enacted legislation will be fault-proof and easily enforceable.
- (2) It is precisely for this reason that there is a key concept underlying the rule of understanding and construing a law in the Mainland, namely that consideration has to be given to the overall structure of the legislation, the internal connection among provisions and the logical

relationship in the arrangement of content. This is a point of great importance in statutory interpretation, for it is the basis on which the legislative intent may be correctly revealed and the meaning of certain provisions determined. Under this rule, ascertaining the meaning of a provision from the full text of the law in which it is found is a prerequisite for achieving a correct understanding and interpretation of the provision in question. The full text of a law refers to all the constituents of that piece of legislation. It does not only include its legal provisions, but also encompasses such other contents as its preamble and annexes that are closely associated with those provisions.

- (3) In the legislative practice in the Mainland, sometimes the legislators, based on the consideration of structural arrangement, after taking into account the legislative intent, may use another provision to further define the meaning of a provision that seems to be clear on its face with a view to filling a gap in the latter provision. Under such circumstances, there is a need to make reference to the relevant provisions so as to define the meaning of a provision that seems to be clear on its face. Theories about legal interpretation in the Mainland consider that if the literal meaning of the law is narrower than its legislative intent, an interpretation broader than its literal meaning can be made by making reference to other relevant provisions. Thus, it is absolutely necessary to understand and interpret a legal term from the full text of the law even though the term seems clear and unmistakable and its meaning can be interpreted literally without the need to make reference to other provisions.
- (4) In interpreting the law, the court follows the rule of interpretation with reference to the full text and reconciles the relevant provisions so as to accurately confirm the correct meaning of a provision that may give rise to ambiguity and to reveal the relevance of other legal provisions. By doing so, the courts are not retrained by the literal meaning of the wording, so as to avoid making an interpretation out of context or arriving at a partial understanding that may lead to a wrong judgment. This may also be the underlying principle of legal interpretation adopted in the common law jurisdictions. It is because even under the “golden rule” of statutory interpretation in the

common law (the judges may vary the literal meaning of a legal term by reading in some implied meaning or omitting part of the literal meaning of the wording), the legislative intent and purpose as contained in the full text of the law should be ascertained.

My views are stated above for your reference.

Yours sincerely,

Lian Xisheng
10 March 2005

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