立法會
Legislative Council

檔號 Ref: CB2/H/S/1/98

1999 年 5 月 14 日上午 8 時 30 分至 12 時 45 分
內務委員會特別會議的逐字紀錄本
Verbatim Transcript of the Special House Committee Meeting on 14 May 1999 from 8:30 am to 12:45 pm

出席議員 Members present:

梁智鴻議員 (內務委員會主席)	Dr Hon LEONG Che-hung, JP (Chairman)
楊森議員 (內務委員會副主席)	Dr Hon YEUNG Sum (Deputy Chairman)
田北俊議員	Hon James TIEN Pei-chun, JP
朱幼麟議員	Hon David CHU Yu-lin
何世柱議員	Hon HO Sai-chu, JP
何秀蘭議員	Hon Cyd HO Sau-lan
何承天議員	Hon Edward HO Sing-tin, JP
何俊仁議員	Hon Albert HO Chun-yan
李永達議員	Hon LEE Wing-tat
李卓人議員	Hon LEE Cheuk-yan
李柱銘議員	Hon Martin LEE Chu-ming, SC, JP
李啓明議員	Hon LEE Kai-ming, JP
呂明華議員	Dr Hon LUI Ming-wah, JP
吳亮星議員	Hon NG Leung-sing
吳靄儀議員	Hon Margaret NG
周梁淑怡議員	Hon Mrs Selina CHOW LIANG Shuk-yee, JP
夏佳理議員	Hon Ronald ARCULLI, JP
馬逢國議員	Hon MA Fung-kwok
涂謹申議員	Hon James TO Kun-sun
張文光議員	Hon CHEUNG Man-kwong
張永森議員	Hon Ambrose CHEUNG Wing-sum, JP
許長青議員	Hon HUI Cheung-ching
陸恭蕙議員	Hon Christine LOH
陳婉嫻議員	Hon CHAN Yuen-han
陳榮燦議員	Hon CHAN Wing-chan
陳鑑林議員	Hon CHAN Kam-lam
梁劉柔芬議員	Hon Mrs Sophie LEUNG LAU Yau-fun, JP

梁耀忠議員	Hon LEUNG Yiu-chung
黃宏發議員	Hon Andrew WONG Wang-fat, JP
黃宜弘議員	Dr Hon Philip WONG Yu-hong
曾鈺成議員	Hon Jasper TSANG Yok-sing, JP
楊孝華議員	Hon Howard YOUNG, JP
楊耀忠議員	Hon YEUNG Yiu-chung
劉千石議員	Hon LAU Chin-shek, JP
劉江華議員	Hon LAU Kong-wah
劉健儀議員	Hon Mrs Miriam LAU Kin-yee, JP
劉慧卿議員	Hon Emily LAU Wai-hing, JP
蔡素玉議員	Hon CHOY So-yuk
鄭家富議員	Hon Andrew CHENG Kar-foo
司徒華議員	Hon SZETO Wah
霍震霆議員	Hon Timothy FOK Tsun-ting, JP
譚耀宗議員	Hon TAM Yiu-chung, JP
鄧兆棠議員	Dr Hon TANG Siu-tong, JP

缺席議員 Members absent:

丁午壽議員	Hon Kenneth TING Woo-shou, JP
何敏嘉議員	Hon Michael HO Mun-ka
何鍾泰議員	Dr Hon Raymond HO Chung-tai, JP
李家祥議員	Hon Eric LI Ka-cheung, JP
李國寶議員	Dr Hon David LI Kwok-po, JP
李華明議員	Hon Fred LI Wah-ming
吳清輝議員	Prof Hon NG Ching-fai
陳國強議員	Hon CHAN Kwok-keung
陳智思議員	Hon Bernard CHAN
程介南議員	Hon Gary CHENG Kai-nam
單仲偕議員	Hon SIN Chung-kai
黃容根議員	Hon WONG Yung-kan
劉皇發議員	Hon LAU Wong-fat, GBS, JP
劉漢銓議員	Hon Ambrose LAU Hon-chuen, JP
羅致光議員	Hon LAW Chi-kwong, JP
馮志堅議員	Hon FUNG Chi-kin

應邀出席人士 Attendance by Invitation:

梁美芬教授	Professor Priscilla M F LEUNG
法律學院	School of Law
香港城市大學	City University of Hong Kong

佳日思教授 法律學院 香港大學	Professor Yash GHAI Law Faculty University of Hong Kong
資深大律師張健利先生	Dr Denis CHANG, SC
戴大爲教授 政治與行政學系 香港中文大學	Professor Michael DAVIES Government and Public Administration Department Chinese University of Hong Kong
羅沛然先生 國際司法組織香港分會	Mr P Y LO Hong Kong Section of the International Commission of Jurists (JUSTICE)
資深大律師馮華健先生	Mr Daniel FUNG, SC
劉兆佳教授 亞太研究所 香港中文大學	Professor LAU Siu-kai Hong Kong Institute of Asia Pacific Studies Chinese University of Hong Kong
史維理教授	Professor Peter WESLEY-SMITH

列席秘書 Clerk in attendance:

林鄭寶玲女士 內務委員會秘書	Mrs Justina LAM Clerk to the House Committee

列席職員 Staff in attendance:

馬耀添先生 法律顧問	Mr Jimmy MA, JP Legal Adviser
羅榮樂先生 總主任(2)5	Mr LAW Wing-lok Chief Assistant Secretary (2)5
蘇美利小姐 高級主任(2)8	Miss Mary SO Senior Assistant Secretary (2)8

Chairman :

Can I take this opportunity to welcome our guests this morning? This session will start from now and we hope to finish at about 10:30 so that we could have a break for the second session. Appearing in the first session today is Professor Priscilla LEUNG, from the School of Law, City University of Hong Kong; Mr Denis CHANG, Senior Counsel, I think everybody knows. Professor Michael DAVIES, Government and Public Administration Department, Chinese University of Hong Kong; Professor Yash GHAI, Law Faculty of University Hong Kong and Professor Peter WESLEY-SMITH, from the Law Faculty, University of Hong Kong. Perhaps I would like to invite our guests to say their pieces first. I'm sure there will be a lot of questions. So shall we say that perhaps all of you should try to limit whatever_ your speech is about ten minutes. So that'll give enough time for our members to ask questions. If it is OK with everybody, I'd like to start with Mr Denis CHANG.

Mr Denis CHANG:

Mr Chairman, I thank you for inviting me to appear before the Commission, the Committee I should say. I must first declare an interest. I was the leading counsel for the applicants in the NG Kar Ling case. These were the first batch of right of abode cases which led to the Court of Final Appeal judgment on 29 January 1999. As the Court of Final Appeal noted in its judgment, these were test cases. In order to save public funds and time, the Legal Aid authority did not want to flood the court with an unmanageable number of applications. They don't want to send in hundreds or thousands of applications for the court to adjudicate. Instead just a few cases were selected and an order from the court was obtained to have them tried as test cases. In other words, the court's adjudication was to be binding not only as between the applicants named and the Government but also intended to affect others similarly situated.

Now my clients, the applicants, were among those arrived in Hong Kong prior to 10th July 1997, the date when the Immigration (Amendment) (No.3) Ordinance 1997 was enacted. Among them were children born out of wedlock excluded from claiming the right of abode by the No. 2 Ordinance. The Court of Final Appeal struck down the retrospectivity provision in the No. 3 Ordinance on two separate and independent grounds. First, because the applicants had the right of abode protected by Article 24(3) of the Basic Law. And second, because the retrospective criminalisation contravened Article 15(1) of the ICCPR, the International Convenant as applied to Hong Kong via Article 39 of the Basic Law. In other words, there was a sufficient, independent ground for breach of the International Convenant for the retrospectivity provision to be struck down. But in addition to that ground, the Court of Final Appeal also held there was a constitutionally protected right under Article 24 which also rendered the retrospectivity provision null and void and that was part of its judgment.

The Court of Final Appeal also as part of its judgment excised, deleted,

expunged from the No. 3 Ordinance provisions which made the validity of the Certificate of the Entitlement dependent on their being affixed to it a valid travel document. Now this linkage was declared unconstitutional because it was wholly inconsistent with the Court of Final Appeal's construction of the effect of Article 24(3). The Court of Final Appeal in effect construed Article 24(3) in its context to mean that all those who qualify thereunder, subject to proof of status, acquire a right of abode no different from that given to you and I, those of us who are permanent residents of the HKSAR, no different from that given to other categories of permanent residents under the same article, irrespective of whether they are born on the Mainland or overseas. In other words, as part of its interpretation of Article 24(3), the Court of Final Appeal held that the right of abode carries with it, inherent with it, the right to enter the HKSAR without let or hindrance, of course subject to proof of status and to stay there without liable to be removed or deported. The court held that there was nothing in the context including Article 22(4) to qualify the right given under Article 24(3) which must be accorded in accordance with the principles of interpretation familiar to our courts, a generous interpretation as a fundamental right upon which hinges many other rights in Chapter III of our Basic Law. The court further ruled as part of its judgment that persons born out of wedlock were not by reason of that fact alone excluded from entitlement under Article 24(3) and it made appropriate declarations and it has struck down the relevant offending provision in the No. 2 Ordinance.

Now, why is it important for us to know that these were test cases? The fact that these were test cases is of particular importance to the final adjudication point, as it's clear from the concept of final adjudication, final means final. And from Article 158 itself, no interpretation by the Standing Committee, even when it is referred in accordance with the proper mechanism, shall affect the judgments previously rendered by the court. Take for example, the out of wedlock test case. The test case of CHEUNG Lai Wah. That delightful little girl that all of you must have seen on television. If she were the only person affected by the judgment, the Government might seek to argue that if the Standing Committee gave an interpretation of Article 24(3) which contradicted that of the CFA, then only she, that girl, that single little girl, could get the benefit of the judgment, and all the others similarly situated will be denied of the right because of the reinterpretation unless that right had already been accepted by the Government, for example, by the issue of permanent ID cards or Certificate of Entitlement. If, however, this is a test case, which it was, there will be many, many others who would be claiming the benefit of final adjudication and insisting that the judgment must stand in all its constituent parts according to their tenor, according to the intended effect, unaffected by any subsequent interpretation or reinterpretation by the Standing Committee.

Now take another example, the CHAN Kam Ngar and 81 others. There should be 81 others, not eight others in my note, and the Director of Immigration. This was the judgment on the time of birth issue delivered by the Court of Final Appeal on the same day as the judgment in the other test cases. I was not involved in the case but I understand it was also a test case intended to affect far more than 81

persons who were born at the time when neither of their parents was a permanent resident. The question was whether they could acquire a permanent resident status under Article 24(3) if either of their parents subsequently acquired that status under Article 24(2). The Honourable Mr Justice BOKHARY, with whose judgment the rest of the court occurred, said "how this question is answered will affect not only these 81 appellants but many other persons now and in the future". The CFA answered the question in the positive, granted the necessary declaratory judgment and excised the offending time of birth limitation in the No. 2 Ordinance as being in contravention of Article 24 of the Basic Law. Now to what extent has the Government implemented the judgments as test cases? The Director of Immigration was a party to the proceedings and was bound by the results thereof. So far as it is known, it appears that the department is implementing the NG Kar Ling judgment for all who arrived Hong Kong on or before 10th July 1997 and who have remained continuously here since. I have reason to believe that these people numbered about 800. They include children born out of wedlock such as CHEUNG Lai Wah, one of the test cases, and at least four others who are not among the test cases. The Director of Immigration, as far as I know, has also apparently recognized the rights of the majority of the 81 persons but only those of them who arrived prior to 10th July 1997 that should be, not 1999.

I have reason to believe, and will ask Honourable members to check whether my information is correct, namely that the Immigration Department is not, repeat, is not now, verifying right of abode claims by at least the following 6 categories of persons :

(1) Those who arrived on or before 10th July 1997 but who subsequently left Hong Kong and have now returned;

(2) Tthose who arrived after 10th July 1997;

(3) Those born before either parents had right of abode who arrived after 10th July 1997;

(4) Those now on the Mainland who are born before either parent had right of abode in Hong Kong;

(5) Those now in the Mainland born out of wedlock who claimed to qualify under Article 24(3); and

(6) Those now on the Mainland and who had applied direct to the Director of Immigration in Hong Kong.

Six categories are listed. The Director of Immigration would not doubt say that categories (2),(3) and (6) are all subject to the Certificate of Entitlement scheme upheld as modified in a modified form by the Court of Final Appeal and thus therefore the people concerned must prove their entitlement under the scheme first.

But what about the other categories?

Now, you may say, you may ask me, are you saying that reinterpretation is problematic because these were test cases? Or is there a more fundamental objection? But my answer is this, that even if these were not test cases, I have no doubt that asking the Standing Committee to reinterpret any of the relevant provisions of the Basic Law so as to impinge on the fundamental rights of people who qualify for the status of permanent resident under Article 24(3), as finally adjudicated upon by the CFA, is fundamentally objectionable. I'd like to repeat what I have said because it is important to appreciate that my objection to reinterpretation extends to any relevant provisions of the Basic Law, such as to impinge on the fundamental right of people who have been held to qualify for the status of permanent resident under Article 24(3) as finally adjudicated upon by the Court of Final Appeal. That, I respectfully submit, is fundamentally objectionable. Why is that so? Honourable members may have heard from various bodies and individuals as to why reinterpretation is not a constitutionally acceptable option. I would not rehearse all these reasons but I must underline a few points in answer to the contrary argument which often begins with this question. "Does not Article 158, Mr CHANG, start off by saying the power of interpretation of the Basic Law is vested in the NPC Standing Committee. What do you say to that, Mr CHANG?" My answer begins with yes, it does. But Article 158 goes on to say that the courts of the region are authorised by the Standing Committee to interpret on their own in adjudicating cases the provisions of its law which are within the region's autonomy and may also interpret other provisions subject only to this. Now subject only to this, I should have added there the limitations which are set out in Article 158 for reference.

Now it must be emphasized that because the People's Republic of China is a unitary state, when the high degree of autonomy is given to the HKSAR under Article 2 of the Basic Law, it was an "authorised autonomy". And therefore, the question to ask is not whether a particular power is vested in the NPC or the Standing Committee but what powers have already been given to the region to exercise. That is the crucial question in the scheme of autonomy. Now the Government here never ever disputed that the Court of Final Appeal in adjudicating cases was fully authorized to interpret Article 24(3) in relation to the issue as to whether a child born out of wedlock or a child born at the time when neither its parents is a permanent resident could ever acquire the status of permanent resident. Furthermore, the Government also never disputed, but expressly accepted in argument, that the Court of Final Appeal in applying Article 158 had and still has jurisdiction to decide whether the conditions for reference to the Standing Committee were or were not satisfied. The Government reminded the court of its duty to consider whether Article 22(3) must be referred to the Standing Committee for interpretation but fully accepted that once the Court of Final Appeal had decided on its own that the conditions for reference to the NPC Standing Committee were not fulfilled, as it did in the present case, the CFA was authorised to interpret ALL the relevant provisions of the Basic Law. That was expressly accepted by the

Government. And that was what the Court of Final Appeal did. As part of the high degree of autonomy granted to the region under Article 2, in exercise of the power of interpretation which the NPC Standing Committee had authorized the CFA to exercise under Article 158, the Court of Final Appeal made an adjudication of the test cases in exercise of the final power of adjudication given to it under Article 82. Being final, the judgment stands even in cases whether there has been a different interpretation made by the Standing Committee following reference by the CFA is the only mechanism for reference provided in Article 158. Of course, the law as applicable to HKSAR may change. But so long as it does not, the HKSAR will have to face up to the consequences of the CFA's final adjudication and seek solutions which are constitutionally acceptable.

I repeat, the crucial question to ask is not "Is this a power vested in the Standing Committee?" but the question "Are you asking, are you Chief Executive Mr TUNG Chee Hwa, or are you the Government, or are you the Director of Immigration, are you asking the Standing Committee to exercise a power which has been authorised to you, given to you, which you have been authorized to exercise under the autonomy scheme of the Basic Law?". A solution in my view is not constitutionally acceptable if it undermines the autonomy granted to the region or the power of final adjudication or the rule of the law. We must look for solutions which further the overall interests, I add the word "overall", and I emphasize the word "overall", interests of HKSAR without undermining this key element of Hong Kong's success. Because if you will do that, it cannot be in the overall interests of the HKSAR. Thank you very much.

Chairman:

Thank you very much. Mr. CHANG. Incidentally, we have invited the Government but they have not responded up to this point in time. Can I next ask Professor Priscilla LEUNG? 張文光議員。

張文光議員 ：

對不起，主席，我很抱歉，剛才我想請教你究竟有否請官員來聽，因為今日很多法律界學者和朋友來講，你說政府當局根本沒回應，不過我們有邀請過。我很希望他們能夠來聽，現在是 9 時正，他們應該已開始辦公。

主席 ：

我們仍正聯絡他們。

張文光議員 ：

否則是很可惜的事，這當中有些觀點是需要爭論的。

主席：

不錯。

吳靄儀議員：

主席…

主席：

我們只通知律政署的人。

吳靄儀議員：

律政署?

劉慧卿議員：

主席，我剛才給了秘書一張紙，我相信你和政務司司長請我們召開這個特別會議時，是否已告訴他們，叫他們派人來出席答問題和聽講者的意見？他們是否已作承諾？

主席：

我們已告訴政府當局，叫他們盡量派人來。

劉慧卿議員：

我覺得很離奇，尤其是今日有幾位講者中央政策組說不請他們去參加昨日的研討會。我們邀請政府官員他們都不肯來聽，我希望現在是否正打電話去查詢？

主席：

已經做了。

劉慧卿議員：

有什麼回覆，盡快告訴我們。

主席：

我們現正向政府當局查詢。我們也別浪費今日時間，我們接下來先做這件

事。

張文光議員 :

主席，我提出一個動議，我要求立法會現在所有同事同意我們再次邀請政府官員來聽，因為今日涉及很多基本法解釋的觀點，對將來爭論點很有決定性，我請同事同意這一點，不論同意觀點與否，是一定要回應。

主席 :

不錯，我們現在正打電話，我相信大家一定不會反對叫政府再來這一點。

張文光議員 :

主席，我動議這一點。

主席 :

好，有人和議嗎？有人反對嗎？我們有幾多人支持？

譚耀宗議員 :

主席都講了要進行這項工作，何必浪費時間在這問題上？

張文光議員 :

我不是浪費時間，因為實際上如果本委員會作出動議，如果當局真的不派官員來，這個動議會起作用，我是準備如果他不來時，我的動議是有用。

主席 :

既然有同事提出動議亦有和議，一定要大家裁決，我再講一次，有多少人同意這個動議？10 個，多少人反對？有人棄權嗎？讀出來。

秘書:

10 位贊成，5 位反對，3 位棄權。

主席 :

陳鑑林議員。

陳鑑林議員 :

我投反對票，主要原因是我們毋須要動議。

楊孝華議員:

18 是否不夠法定人數？

主席 :

我和副主席仍在，不如我們決定了要做應做的事，期間我們繼續邀請政府來，Mr CHANG。

張健利先生:

我想當政府官員來時，我很樂意再重覆解釋。

主席:

梁教授。

梁美芬教授 :

多謝主席先生，各位議員。

主席:

會否需要多給 50 萬呢？

張健利先生:

不需要，今次是免費的。

主席:

不好意思，梁教授。

香港城市大學法律學院梁美芬教授 :

主席先生，各位議員、各位朋友，很高興我今日有機會向各位講終審庭和修改解釋基本法的一些意見。剛才張健利大律師已經很詳細將有關案件陳詞和精要講得非常清楚，所以我毋須要再就案件內容再有任何補充。我想就我自己

專業和對基本法的看法，可能對大家對這問題上有幫助，該用什麼角度去看這問題。我想提出一些看法，現時終審庭判決後引來的爭論都是牽涉到基本法實施的將來，我們不是單單針對現在和過去的問題，相信現時大家最希望能夠在不同方案中找到一個解決方案。其中比較熱門的兩個選擇，暫時來說，如果再想不到更熱門的，我們先暫時討論這兩個選擇。一個是修改基本法，另一個是由全國人大去解釋有關基本法條文。就這兩個選擇，我強調我們可能還會找到新的解決方案。我想陳述一下兩個方案的利與弊，大眾或者各位議員可以作為參考。

如果我們首先看修改基本法，現時大部份法律人士希望透過修改基本法來長遠解決無證兒童入境問題，因為計算出來的人口太多。在修改基本法問題上，我自己有些看法，修改基本法是可接受的方案，因為這是基本法中規定的法律程序，我想各方面的意見已表達了它的好處，相對來講，它的好處在於香港法律界較容易接受，以及在修改.... 現時我仍聽到有兩個做法，我嘗從這兩個看法去講講，因為就修改基本法，有人提到基本上不該有溯及力。應該是修改後才生效。另一種看法亦有部份學者提過，是認為修改基本法一樣可以有溯及力。就基本法是否該有溯及力這問題，我是不同意修改基本法是應該有溯及力的，因為已修改的條文與原本條文有很大出入或者有很大不同。如果根據普通法傳統，基本上我們修改法律是不該有溯及力的，所以在修改問題上，我們提出的解決方案應該衡量，在沒有溯及力情況下，我們將會可以容許多少有資格的內地人士來香港？這點需要大量數字，且到目前仍有爭論性。

但在修改問題上，我相信大部份支持的朋友或者人士，都可能認為修改，在基本上或比較上，完全是特區的事，所以可以防止中央的干預，中央可以「參與」但不可以「干預」，但我看到修改這方案是無可避免會牽涉人大的參與。因為我們如果詳細看第一百五十九條，最後一個修改的提案，如果選擇由特區提出的話，始終要經過全國人大通過，即使是特區，我們是有 3 個不同組織，有香港本地人大的三分之二，加上三分之二立法會的議員，以及特首的同意，才可以作出一個提案，並非香港特區自己可以修改，所以難度的確相當高。

我相信當時希望修改基本法特別困難亦是雙方意願，大家希望保障香港特區自治的範圍，亦不希望隨便修改，因為在第一百五十九條中央亦保留它提案的權利是不需要經過特區的，即是提案權可以由人大自己可以獨立提案，或者由國務院提案，但中間有一個程序，就是大家都要諮詢基本法委員會，所以可看到修改權上，基本法委員會是扮演相當重要的角色，就算中央自己主動提出修改，或者特區主動提出修改，都要經過這個中介點。我們應該賦予委員會有更多要求，如果修改的話，我們都希望有廣泛諮詢香港各界人士，尤其是法律界意見。但我自己，不在今天，從基本法通過到生效後，其實我自己比較不傾向修改基本法，因為修改基本法本身是一個先例，它亦一樣會帶來...... 如果我們擔心，缺口也是一樣。因為今日由特區提案，可能下次中央可對某些已給特區的權利作提案，當然中間我們仍然可以透過基本法委員會，來反映我們不同的意見，或者提案不應與香港的一國兩制的基本政策有違背，但所謂基本政

策其實相對來說是闊的。我們應該怎保障一國兩制其實始終需要透過具體條文，如果現時來講基本法，我相信雙方不是百分百勝利，即是當時通過基本法時，大家有部份勝利，但有部份輸掉，這部份上我看到如果現時修改基本法，如果能順利提案和被中央通過都是可行辦法，不過大家都可想到它亦可帶來以後的影響：即是今天香港不想收容那麼多內地人，所以我們修改基本法，到了下次，中央亦可以用政治看法覺得不喜歡某些條文而提出修正，因為雙方是平等的，在這法律中大家雙方都提出一個同樣的權利。

如果由全國人大解釋法律，我想現時反對聲音相當多，我相信主要原因是香港人，尤其是法律界人士，對於所謂立法解釋是相當不熟悉，亦有一種抗拒的感覺。我或者說，就第一百五十八條，我看法是，第一百五十八條本身的存在並不是普通法，因為普通法制度的法律解釋權在法院，所以有第一百五十八條存在，其實第一百五十八條的內容基本上充份反映很多中國法律制度的特色。但是否第一百五十八條第一段講了全國人大享有最終解釋權便要經常行使呢？這點亦不一定。在我們認識中國建國以後到現在，用全國人大方式解釋法例其實是相當少，基本上，由最高人民法院用司法解釋的權力在國內相當高，很少由全國人大立法解釋與司法的解釋有抵觸，這情況下，現時我們要考慮香港是否屬於一個沒其他選擇而要用這個立法解釋權？我想大家一起看第一百五十八條，如果它真的需要解釋，而大家可以就現時這個解釋方法去解決問題時，大家希望的機制是怎樣？因為現時第一百五十八條提出的機制是，即使有最新解釋它對現時張麗華個案的判決是沒有影響力的，所以無追溯力這點在基本法講得很清楚。但就全國人大解釋的追溯力其實現時又有兩種看法，一個是除了不影響張麗華這案件的判決的當事人外，可能可以影響到...... 如覺得終審法院無考慮到 1996 年的籌委會的解釋，如果無錯誤解釋基本法的話，則生效日期解釋應該與基本法同於 7 月 1 日生效。

但就判決本身，因為終審法院有終審權，所以不可以推翻這個判決，但可能影響因這個判決而擁有來香港權利的人士。現時亦有相當大部份的人有這看法，如果用第一百五十八條解釋，另一看法亦有不少，包括中國法律專家是同樣看法，即是如果真的要由人大解釋，解釋前的階段不該受影響，溯及力應該只從解釋當日開始，所以有人提到希望解釋越快越好，因為越快，可以減少很多前來的人數。我相信這點該提出來討論，因為這絕對是一個核心問題，尤其在追溯力問題上，我相信法律界是比較敏感的，就一條法律在修改時，或者再解釋時，它是否有追溯力這點，我希望提出來讓大家考慮。

最後我希望提出一個觀點：無論是解釋或者修改，我本人認為都是符合基本法的，因為都是第一百五十八及第一百五十九條規定的程序，不過第一百五十八條現時無清楚說明在判決之後人大才實施的解釋權的機制是怎樣，因為它只寫了判決之前終審法院應請人大常委作出解釋，但沒有說明在目前已有了判決及隔了相當長的時間後，人大要實施這個第一段的解釋權，是應該怎做。我相信大家可以積極討論，多謝主席。

主席：

多謝梁教授。Can I now invite Professor Michael DAVIES to give us his views?

Professor Michael DAVIES, Government and Public Administration Department, Chinese University of Hong Kong:

OK. Well, I think Denis CHANG has set forth the key legal arguments, so I won't try to address those. I think the thing that troubles me most about what the Government's proposing to do is : there is real danger that it will succeed in doing what it wants to do. And we have to ask whether this is good for Hong Kong. It seems clear that the NPC has expressed "a willingness to help the Government" and we've already been told the result of what a Basic Law committee deliberation will likely reach because Basic Law Committee members have not been reticent about their views. They've certainly not been very judicious in this regard. So if the result is known of the Government's request, then what we practically have in Hong Kong is that the Government is overturning the Court of Final Appeal. And I have a hard time believing that, for Hong Kong to have the Government with the power to overturn the highest court in Hong Kong is good for our reputation and the confidence that our own people will have in the rule of law here, and the confidence that people around the world will have in the rule of law. So the Government will probably get what it wants from the NPC.

Denis CHANG has raised the question about the next step in the process : what will happen with that troublesome provision in Article 158 that says the NPC ruling does not affect the existing judgment? What does 'affect a judgment' mean? And I think Denis has debated that better than I can because he's familiar with the case. But I think he has highlighted the issue. The Government will claim that 'affect the judgment' means only as to the parties actually present in the case, and will say that we actually concede to them. They'll all get what they ask for and the government will say that's the end of it. So then the big question becomes : how will the court view this? And Denis again has pointed out the issue : is the parties to the case all that this provision covers, or does it cover people who were sort of represented by the parties to the case and in effect all the people with the right of abode? And there's no answer that we were going to be able to give up front. So we have to accept that this raises the problems that have to be resolved and ultimately will be resolved by the courts. It certainly doesn't make a lot of sense to say it affects the judgment only in a common law system and only applies to the parties of the case, especially when the parties are there in a test case. So, possibility is that the NPC interpretation will have no effect.

But quite frankly, I'm fearful that, after the way the court has been intimidated over the past few months in regard to this matter, that a court in Hong Kong is going to have a hard time saying "no" to an NPC interpretation. So the thing that scares me most is that the government will probably get everything it wants, and then we will have to live with the consequences as will the Government. I don't know, is it good

for Hong Kong? I think, clearly, the image of the legal system in Hong Kong will be tarnished as a result of this. We all see cases like the one recently in Malaysia involving Anwar IBRAHAM. And we all sort of shake our heads and realize that while Malaysia has some semblance of the judicial system in the rule of law, but that is clearly tarnished by the image that the Government somehow pulls the strings behind the scenes. So, I think here we have to realize that if the Government is likely to get what it wants, then the real battle is here and now and it's a political battle. And it depends on how effective political actors are, in particular Members of this Council, in persuading the Government not to take this step. All the legality aside, that seems to be obvious in this case.

Now we know that cases will come up abroad as well that will leave Hong Kong's legal reputation at stake. We've seen them already. There were cases involving extradition. We'll see more and there'll be problems in the civil cases. People like myself and Yash GHAI will probably be asked to testify as experts someday as to whether Hong Kong truly has autonomous legal system. Trust me, we do hear these requests. And if you are on the side of the case, where you want to say Hong Kong system is not independent, it is not going to be hard to do after the NPC has messed with the final judgment. It's going to be easy as an expert to say that Hong Kong's legal system is not independent. And so in civil cases, there will even be people saying that Hong Kong is not an adequate venue. Therefore, matters involving Hong Kong have to be litigated abroad. So when people say, "This is a constitutional case. Don't worry about it. In real cases involving contracts, torts, and so on, Hong Kong's legal system will be trusted." I'm not sure of that. And I encourage you in this political battle to worry about that.

Now, is referral of this matter consistent with the Basic Law? I think not. Does the Basic Law constrain the NPC is the first question. I'm sure you're going to hear later in the morning because I've seen the speakers list. You're going to hear someone saying that the NPC ultimately is the sovereign and it can do what it wants. Now this is an interesting political question and in political science department we can debate this endlessly. Does a sovereign have the ability to tie its own hands? Generally, the answer seems to be "yes". It's done in constitutions. But someone will say there is sort of hovering behind this is the ability of the sovereign to override everything. I don't think we need to trouble ourselves with this philosophical point this morning. Because I don't think that's the issue. The issue is whether the NPC can do this within the Basic Law. The Court of Final Appeal correctly judged that it was the Basic Law that it had to apply and it presumes in that judgment that the NPC intends to follow the Basic Law. So I don't want to trouble with this philosophical question.

And then in the Basic Law, we would also have to ask the further question "Does the NPC have the power to interpret the Basic Law any time it wants because of Article 158?" And I think Denis has made it clear that already in looking at Article 158 and it doesn't seem to contemplate that. It violates the notion of autonomy that the Basic Law seeks to preserve for the NPC to jump in at any time

seems to me that the parties that favoured reinterpretation have to be arguing that the NPC can jump in any time it wants. And I can't get that from the Basic Law. It says very specifically that in cases, courts will decide when matters are referred. And I don't think we can overlook that. The Basic Law says more. It says the courts are independent and final. So I don't believe the Basic Law if we presume the sovereign and want to follow it that the Basic Law permits it to jump in whenever it can.

Is it constitutionally appropriate for the Chief Executive to seek to overturn a final judgment in a manner that it is apparently going to do? There is no provision in the Basic Law for the Chief Executive to make a referral to the NPC. So if you were using the Basic Law as a guide then we have the question then. Now we're told that the Chief Executive will tell the Central Government to do so and then the effect will be achieved. But again if you are looking at the purposive interpretation of the Basic Law that seeks to preserve Hong Kong's autonomy, I don't think it contemplates the Chief Executive simply going to the NPC every time it doesn't like a judgment. Moreover, the Basic Law makes clear that Chief Executive is bound to implement the laws of Hong Kong including judgments. In fact it goes so far to say the Chief Executive can be impeached for a serious breach of the law or dereliction of these duties. So I don't even know, independent of philosophical and more tightly recent Basic Law questions about the NPC's power, I don't know what to make of the Chief Executive taking these actions. And I think it's for this body to consider whether these actions are appropriate.

Does referral to the NPC for interpretation in this case aim to overturn a final judgment? We're going to get this argument. No we're not overturning a final judgment, and we're just going and getting an interpretation perhaps of Article 22, perhaps of some Preparatory Committee report. I don't think they can hide behind this. Article 22 was addressed by the Court of Final Appeal in the right of abode case. It made very clear that those persons from other parts of China did not include Hong Kong residents, people with the right of abode in Hong Kong. So the NPC does something, no matter how magical, to say that China will ultimately control their right to be in Hong Kong, then it is clearly in conflict with the Court of Final Appeal judgment. And I don't think interpreting a working report gets them around that.

Will all of this cost a constitutional crisis? Well, Denis has again highlighted some other ways that it is very obvious this thing is going to be tied up in litigation. Is it a test case? Does it affect only the parties to the case? He is pointing directly at the issue that the Government has to be using. And so I won't go further into that. What if the ruling will deem effective somehow as to Hong Kong? Will parties be entitled to procedural rights before the NPC? In effect if the Government can overturn the case in Hong Kong no matter what it says it's doing, what other procedural rights of parties vis-a-vis these cases that are now affectively appealed to the NPC or perhaps simply overturned by the Government? Will non-parties whose interests are affected have continuing right under the judgment? What are the proper courses of action? All of this legal argument about who can do what. And then

social argument about what is the effect, how Hong Kong is tarnished by all of these. What should be going on here? What happens normally? This is nothing new.

Constitutional courts overturn ordinances, statues all the time. In America, they overturn laws on the death penalty. They overturn laws on abortion. They overturn laws that they didn't provide equal justice. They even order busing of school children all over the country. A lot of these human rights do not always come cost-free. There are more important values at stake. As a constitutional scholar who studies the transition from authoritarianism to democracy, I can tell you the expediency argument in this case is very, very familiar. What is an appropriate response? One thing we haven't seen is government usually enact new laws. For some reasons Americans care about their death penalty. So the court throws it out. They enact a new one. The court said there's something wrong with the death penalty, they find a new way to do it.

What is the Government exploring in all this? It actually studies the way citizenship is handled in different countries. Is there procedural requirements for proving that someone who's born out of marriage has a right, is in fact the child of someone? What kind of proof would be required? What about the fact in most countries there is the principle of citizenship. It says that people acquire the citizenship that their parents have at the time of birth. But usually most countries do not give children the citizenship their parents subsequently acquire. This is usually not done automatically. Is there any attempt by the Government to enact an ordinance to try to deal with this? If they did so, they can even do it rather tightly to try to achieve their objective. What would happen? Somebody who was affected would go to the Court of Final Appeal again and this is the proper route for the court to address the issue again. I'll say no more.

Chairman:

Thank you, Professor DAVIES. Can I now call upon Professor WESLEY-SMITH?

Professor Peter WESLEY-SMITH:

Thank you, Mr Chairman. I just want to give briefly the essence of the paper I gave yesterday at the Central Policy Unit forum in the Convention Centre. And I will try to put forward the view which seems to be located in the middle of the two extremes in relation to interpretation or amendment. And by looking at the judgment as consisting of six different propositions, I divided those between those which were regarded or could be regarded as correct statements of the law and those which can be challenged. Those in that category of correct decisions were the retrospectivity point, the born out of wedlock point, and the constitutional question of the status of the NPC legislation.

Now on the first one, retrospectivity, the arguments seem clearly persuasive and

retrospective legislation is objectionable generally. And I don't think it would be appropriate in that situation to challenge by interpretation. The point of this distinction is that if the decision is regarded as correct, then it would not be appropriate I think for the Government or for the Standing Committee on its own to seek to interpret that provision. It would be appropriate to go for amendment. But where there's reason to suppose the court has got it wrong, then I think interpretation is the appropriate way to go. Retrospectivity, it seems to me, was clearly correctly decided; the birth out of wedlock point was clearly correctly decided, and I say correctly decided because the court's reasoning was overwhelming, I think. And also I think it's disreputable for the Government, for the legislature to make discrimination, make distinctions between people on the basis of their legitimacy. And the third question about the status of NPC legislation, that is not an issue anyway.

Now of the other three points, the first one is whether the Court of Final Appeal was correct in its predominant provision test for referring a matter to the Standing Committee. And there seems to be fairly general agreement that the court got that wrong. No doubt there will be lawyers to dispute that but, just on the plain wording of Article 158, they needed to interpret Article 22(4) and that should have gone to the Standing Committee, and therefore I don't think there can be any complaint if the Standing Committee takes up that question, the interpretation of Article 22. And no complaint if the Government were to request that interpretation. And so I don't think there's difficulty in that situation. The last one is the time of birth question in Article 24. I think there is an argument. I don't want to be dogmatic on this. And I certainly feel somewhat tentative about this point, but there's an argument which suggests that the Standing Committee would take the view that the addition of the time of birth limitation was proper. It was part of the intention of the legislature. And in that circumstance, it seems to me that it would not be inappropriate for the Government to refer this matter or request the Standing Committee to make an interpretation. The fact that there's no express provision in the Basic Law for the Government to make such a request seems to me neither here nor there. Certainly, in a narrow legal sense. I know that we're talking generally in broad constitutional terms whether it's proper. But I don't think it would be improper in that sense either.

Does a reference to the Standing Committee undermine autonomy? Not in regard to Article 22(2) because that's not a provision within Hong Kong's autonomy, and so the only question is the interpretation of time of birth issue. And I think it's legitimate to look at the Basic Law as a compromise between two different traditions, between sovereignty and autonomy, between "one country and two systems". And that we cannot simply apply the views of the Hong Kong common law system. We have to recognize that the Basic Law itself has a hybrid character and that it has provided for this compromise by the Standing Committee interpretation. And therefore I think that it's very difficult to say that it would be improper in all circumstances, even in relation to Article 24 which is within Hong Kong's autonomy, that the Standing Committee should not make an interpretation, cannot make an interpretation, or the Government should not have the ability to invite the Standing

Committee's consideration over that question.

Does it undermine the power of final adjudication? I cannot understand the argument that it does, because the court has still retained that power and will not be affected in the slightest by the Standing Committee's intervention. Does it undermine the rule of law? The rule of law, of course, is a very large concept and means many things. But in its perhaps core or essence, it is a question of obeying the law. The Government of course must obey the law as it has been stated by the Court of Final Appeal. But I don't think that the rule of law prevents the Government from seeking an interpretation of what the law actually is. And that is what it would be doing if it went to the Standing Committee for an interpretation. The Standing Committee under the Basic Law does have the power of interpretation. And the Basic Law states clearly that the courts must follow any interpretation laid down by the Standing Committee. So at least in that narrow sense it doesn't seem to me that the rule of law would be infringed if the Government took the action of interpretation. But I do want to repeat that I think it would be quite wrong to seek interpretation on the questions about retrospectivity and birth out of wedlock if it were thought appropriate to try to overcome the decisions of the Court of Final Appeal on those matters. And I hope that they would not because I don't think it's appropriate to take a different view. Then amendment would be the appropriate route. Thank you, Mr Chairman.

Chairman:

Thank you Professor WESLEY-SMITH. Can I call upon Professor Yash GHAI.

Professor Yash GHAI:

Chairman, thank you for inviting me. I don't have a prepared text that I've just returned to Hong Kong three days ago having been away for three weeks. So I'm a little bit out of touch with the most recent developments. I agree very substantially with what Denis CHANG had said and Michael DAVIES had said. I disagree profoundly with my colleague Professor WESLEY-SMITH on his position if it is the fundamental question as to how are we going to decide whether the Court of Final Appeal is right or wrong. His whole approach is based on the premise that we can, through some magical process, determine that the Court of Final Appeal was wrong on this point and correct on those points. Where it was wrong we get reinterpretation, where it was right we get amendment, and it just baffles me how one is going to decide. Is a professor of constitutional law at the University of Hong Kong who is going to seek the judgment of the Court of Final Appeal is a perplexing issue for me.

I want to express some general comments. I think many of the points of details have been tackled by Denis and Michael and as I said, I agree entirely with their points of view. I want to emphasize a point that Michael made that the whole question of integrity of the legal system of Hong Kong is at stake. He mentioned this in the context of how the authority of overseas governments and their judicial

authorities overseas will view the legal system of Hong Kong if the government were to proceed with reinterpretation? And I assure you the real problem we may find is that all our extradition treaties for example, will become completely worthless if the words go round that what applies in Hong Kong is not what the law says, what the court says the law says, but what the Government decides it should be done. And that is a very serious question but I think the Government should give much thought to.

I want to talk about the whole question of the interface between the legal system of Hong Kong and the legal system of the PRC. Professor WESLEY-SMITH said that the Basic Law is a high bred instrument, creation and of course in a way it is true that it is a law passed by the National People's Congress and in that sense is Chinese law. But I think to get a true perspective of the Basic Law we need to look at a number of factors, importantly that the Basic Law is an instrument to give effect to the Joint Declaration decisions by two sovereign bodies as to the future governance of Hong Kong. So it's not purely a matter for the PRC, a kind of system that is established here on the statute of the Basic Law.

I would also like to draw your attention to the fact, and here I rely very much on my Chinese law colleagues at the university, that the Basic Law is the only law of the PRC, apart from the constitutions itself, which provides for a specific method for its amendment. Article 159 is extremely important and it might be overlooked in our present discussions or not enough emphasis has been laid on Article 159. Articles 158 and 159 come next to each other and to some extent I think we have to look at Article 158 in the context of Article 159. And the argument that I would make is that the word 'interpretation' in Article 158 has to be read subject to Article 159. Now if we accept the argument that because the Basic Law is Chinese law and therefore Chinese rule of interpretation would apply to it, and we further accept that interpretation in Chinese law means something different from what it means in the common law. In other words, it doesn't mean just trying the best method you have and the best intentions. What is the meaning of the expression? On the contrary, it can mean changing the expression. That it seems to me that the view of reinterpretation cannot be sustained in view of Article 159, it provides a very specific method for the amendment of the Basic Law. If you accept that NPC can do anything because of the sovereign, or because the Chinese law can do anything through interpretation, then I think we negate Article 159.

Article 159 is not only concerned about the amendment of the Basic Law but it also limits the power of the NPC, not the Standing Committee, to change basic policies regarding Hong Kong. Are we then going to say that if we allow the Standing Committee to reinterpret, to derogate from the basic policies under Article 159. Can it be that the NPC has intended that what the NPC itself cannot do directly through the amendment process, its Standing Committee can do through a magical act of interpretation? It cann't have been the intention. And it seems to me, my basic point really is, that we are talking about the autonomy of Hong Kong. I have done some study on a comparative basis of the autonomy system. I have not come across a

single instance where the autonomy has survived the demise of legality. So what is at stake, I think, is the whole autonomy of Hong Kong. And once you depart from the path of legality, then I think our whole autonomy and our rights are in jeopardy. And this for me is a lesson from the CFA itself. Its decision I think is on legal basis, it emphasizes the legality for autonomy and for rights. So I think what is at stake is a very fundamental question.

And I think myself that the Basic Law is a very self-contained instrument. Michael said we shouldn't get into a philosophical question of sovereignty, but I think we should, because sovereignty has often been used as an argument for the NPC to do what it wants to do. And I have been studying quite closely the speeches by Chinese leaders over the years as we were discussing 'one country two systems', the explanations given to the National People's Congress when the Basic Law proposals were presented to the NPC. And the message I get, or the impression I gathered from these statements is that sovereignty of China is reflected in the Basic Law itself. It doesn't exist outside it. There are many mechanisms in the Basic Law for the exercise of Chinese authority, control or supervision. These constitute the sovereignty if you have to use that word. It doesn't exist outside the frame of the Basic Law. So I would like therefore to conclude by saying that we have to look at Article 158 and specifically the question of interpretation in the context of the Basic Law, but particularly Article 159.

There is a commitment on the part of the PRC, the United Kingdom, to the UN to honour the Joint Declaration. So the Basic Law is a very special kind of law and I think it does require special rule of interpretation and approach to interpretation. I think if you accept that we have a bit of Chinese law here, a bit of Common Law here. I think it would be schizophrenic, we can lose all coherence. So we need to find some method and some rule which will produce coherence in the Basic Law. And I have suggested that under Article 158 we are basically committed to a Common Law approach because that provides coherence, it narrows interpretation to the honest exercise of finding the meaning, not adding to the meaning. And I am also very struck by Michael's point that what we're now doing if we go to the Standing Committee is that we are giving the executive of Hong Kong the power to override the CFA. I'm really impressed by that point. I think it's a very valuable point. Some of you may have read Justice GODFREY's letter in the South China Morning Post. He had this quotation from the judgment of Bertha Wilson, a very distinguished judge of the Supreme Court of Canada. And I think that describes beautifully the process that goes on. Our Secretary for Justice goes to Beijing, meetings are held in private. I'm sure the draft to that will be endorsed by the Standing Committee and is agreed upon, that is then taken to the NPC and it is rubber stamped.

What about the rights of the litigants? Article 35 of the Basic Law says that when any interest of any residents of Hong Kong is concerned, they have the right to legal representation, access to courts, confidentiality of legal advice. All these become meaningless and there is no procedure which has been set out even for

interpretation or for amendment. I think we are really showing great contempt for the rule of law. And I don't believe that Professor WESLEY-SMITH, with due respect to him, the rule of law is as narrow as meaningless as he would reduce it to. I think therefore a great deal is at stake and I think we have to proceed extremely carefully.

The final point I would make is people say amendment will set a bad precedent. I would say reinterpretation will set infinitely worse a precedent. We have to worry much more about reinterpretation as precedent than amendment as precedent. Thank you Chairman.

Chairman :

Thank you, Professor Yash GHAI. Incidentally, could I ask Professor WESLEY-SMITH whether you can provide us with a copy of your speech to the CPU yesterday?

Professor WESLEY-SMITH:

Yes, maybe tomorrow.

Chairman :

Thank you. We have eight people waiting to ask questions and I'm sure there'll be more. And we're supposed to stop at 10:30 for a break but I presume if members do not want to go to the loo or do not want a cup of coffee, we can go up to 10:45 if our guests are OK with that. Howard YOUNG.

秘書:

不在。

主席:

Sorry。張文光議員。

張文光議員 :

主席，非常感謝各位到來，解決我很多法律疑難。本來我想請各位回應馮華健先生和一些朋友提出的觀點，第一個觀點，馮華健先生提出香港雖然是獨立管轄權，但它不是獨立主權國，而是中國一個部份，基本法是全國性法律，因此根據中國憲法，全國人大常委會擁有全國法律最終解釋權，這個說法是馮華健先生所講的，不過剛才佳日思教授的駁斥已是非常有力，所以我希望其他朋友補充，但我亦想 Professor WESLEY-SMITH 回應佳日思教授的觀點，但在這情況下，我想問第二個問題，馮華健先生昨日提出關於特區終審法院自行糾

正的說法，他說根據普通法制度由當地最高司法機構就同類案件作出新法律解釋是有先例的，例如英國最高司法機構的上議院的司法委員有權在適當時候改變自己的判決，而美國最高法院更在有關條例寫明他們有權改變主意，同時多次引用過這個權力而成為普遍做法，馮華健更舉例說難道最高司法機構在 19 世紀的判決案例竟然可以套用在 20 世紀的運作而不更改？這點很荒謬，我想請幾位法律專家回應馮華健先生的兩個觀點，第一是中國全國人大有一切的法律最高解釋權，當然包括基本法，第二法院自行糾正在英美有先例而且是普遍做法，這是否屬實？多謝。

Chairman :

Does anyone of our guests like to tackle that, the views of Mr Daniel FUNG? Professor WESLEY-SMITH.

Professor Peter WESLEY-SMITH:

I could certainly say something about self-correction. It is true that the House of Lords used to say that they made the law and once they've made it they can't change their mind. But they have abandoned that approach since the 1960s. I think it's generally recognized by courts of final appeal that they can always see the law as having been incorrectly stated on an earlier occasion. And that was always the view of the Judicial Committee of the Privy Council. I would expect that that view would be taken by the Court of Final Appeal, but as far as I know it hasn't expressed any view on that question. That's it.

Chairman :

Mr CHANG.

Mr Denis CHANG:

What is misleading about the statement that you can self correct is that you give the impression that the court is correcting and affecting its previous judgment. What I think Professor WESLEY-SMITH is really saying is that in a subsequent case, when there are good grounds it could be decided that the previous case was decided "per incuriam", for example. This is not the sort of self-correction that is sometimes given to the public. The impression given to the public is that the judgment that was rendered previously is then set aside. Professor, am I right?

Professor Peter WESLEY-SMITH:

I'm not sure what the distinction is between 'correction' and 'setting aside'. The view I take and in fact I put in the paper is that the law is not necessarily what the Court of Final Appeal says it is. The common law has always maintained this notion, although it is ridiculed by modern theorists. But I think the legal system has always retained this notion for some purposes at least. There is the law which is separate

from the court's understanding and declaration of what it is. And therefore I don't think, that's one reason for saying, I don't think that it is necessarily showing disrespect to the Court of Final Appeal or not obeying the law or something, if the Government were to say that they got it wrong and that the Standing Committee which has the power of interpretation might be asked to consider whether it was correct or not.

主席 :

梁教授。

梁美芬教授 :

我想可以對第一個問題作出回應，基本法是全國性法律來的，通過基本法時在中國地方都看到，第一由全國人大透過簡單多數通過，第二它其實很清楚，特別是在第一百五十八條講最後的解釋權在全國人大常委，這也是全國性法律的特徵，這點在通過就基本法的地位已經討論很久，它的界分在全國性法律中是一種特區授權法，高於其他的全國性法律，香港本身法律是第四層次，因為香港本土法律不可與基本法有抵觸，第八條亦已把這個特色體現出來。我不知能否解答到張議員的問題，以及我想對 Professor Yash GHAI 剛才提到修改及解釋在大陸做法我有補充，其實對於中國法，對中國來講修改及解釋法律並非完全一樣，如果是修改，譬如 1998 年憲法中修改土地使用權可以轉讓，幾乎與以前一向運作很不同，便特別要用修改，因為條文可以相當不同，但如果是解釋，譬如寫上"你在香港以外出生便可以擁有永久居留權"，你不可以講不可以擁有，不可以改變，但修改便可以，所以解釋基本上都有一定限制，不可將原本的東西變作另一種東西。

主席 :

多謝。Professor DAVIES.

Professor Michael DAVIES:

Yes, I've just addressed the question of how the court may revisit the issue. I think it's important to bear in mind that certainly from my experience in the US example is kind of instructive in this regard. Recently, we know that Bill Clinton wasn't very happy with the court's decision that he had to defend himself in the civil case. The result of that ultimately led to his impeachment. Can you imagine anything more extreme as a result that the President of the United States went through full impeachment exercise as a result of that decision. But he could not go back to the court and tell them to revise it. But there are occasions to revisit a decision in the immediate case when the parties don't know what's required of them. That's the usual occasion to do so. And in United States, a good example where the court overturned the previous judgment was the famous case of BROWN vs. the Board of

Education where separate but equal schooling for black and white children was overturned and then the United States went through some extreme political crisis over this very important protection of equal rights before the law and school busing was required.

Sometimes in the cases that flow from BROWN vs. the Board, parties and Government would find themselves asking the court to tell them exactly what is it they were supposed to do, and in some cases the court even took over the school systems. But the way you get there is not in the same case. In the same case you suffer like Bill Clinton. But in a subsequent case, if this Government wants to come forth with an ordinance then parties that are affected by that ordinance can go back to the court if they feel their rights are denied. In other regard you can overturn a High Court, Court of Final Appeal by amendment. And those are the ways there and I agree with Yash. This is actually much more fundamental to Hong Kong system than the government would lead us to believe.

張文光議員 ：

主席，我想梁美芬教授回應剛才沒有提到的觀點，或者佳日思教授回應梁美芬教授的一個觀點，剛才梁美芬教授提到，如果中國的法律概念，要大幅改變會用修改方式，如果小幅改變便會用解釋，我想問是否中國法律不容許小幅改變都用修改呢？

主席 ：

梁教授。

梁美芬教授 ：

也不是，很多時如果講慣例為什麼用解釋，是因為急不及待，因為全國人大常委解釋，通常兩個月可以解釋一次，通常社會政策很迫需時便會先解釋，通常會有兩種做法，有時會由全國人大常委或者全國人大大會時會再確認，如果它覺得有必要不用解釋都會在大會重新再確認，小幅度都可修改，不是不可以，一樣可以，要看當時情況怎樣。

主席 ：

夏佳理議員。

Hon Ronald ARCULLI:

Thank you Chairman. I just want to clear several points in my own mind. From what I heard from our distinguished visitors here today, it seems to me that whether you look at interpretation or whether you look at amendment, these are simply

methodologies for perhaps a government or a parliament achieving certain objectives. But in terms of the Basic Law itself, the points that Mr Denis CHANG made that even if you were to interpret you are unable to take away rights that are declared in a case by a court. I don't want to enter into the discussion as to how extensive the test cases and what the result of that is. But if you were to use the amendment route, for example, as I understand it, you can basically take away those rights even retrospectively. Consequences would be extreme and dire but technically it can be done. I think Professor DAVIES may not agree with that. What he is saying is that government should not do that as opposed to parliament cannot do that.

So really my question is this, in terms of the legislative intent under Article 24, you know we've heard certain positions stated by members of the Preparatory Committee, and we also heard Chinese legal experts and some of the legal experts in Hong Kong say to us that other than the retrospective point in the Immigration Amendment Ordinance in 1997, the position regarding a child's right of permanent abode was linked to or in fact depended on the status of either parent at the time of birth. The issue of legitimate as opposed to illegitimate children, again illegitimate children would not enjoy that right. Now if and I'll ask you to take that assumption. If that was the clear legislative intent and somehow or other we got it wrong in terms of either the local ordinance or the Basic Law and I know there's a lot of dispute about that. But if we did get it wrong, how do you right it? Is amendment the safe way to right it? Is interpretation another acceptable way to correct that wrong?

Chairman :

Professor DAVIES, please.

Professor Michael DAVIES:

As I understand the Preparatory Committee's report would not be legislative history in any event because the Basic Law was already drafted and in existence when the Preparatory Committee was created. So it's a kind of subsequent attempt to bind the body with no legal basis to do so and in some sense to interpret something. So I'm not sure what status to give that Preparatory Committee report, I would not treat it as legislative history. So I think that's one problem, of course legislative history itself is not binding usually on the court.

And I think Yash and I and Denis have all emphasized that there is a route to do it and it is amendment, but I also try to emphasize that legislative action is also an element of this, because while amendment takes a direct and total approach, usually governments will have a difficult time amending constitutions. So that they tend to nip at the heels of the constitutions, if you will, by advancing things that the public wants in regard to laws, and so I would certainly be here and advocating against cutting back on people's right because that's what I do for a living to defend rights. But nonetheless the government inevitably do try to define rights over time through the legislative acts and there's some room for the court to revisit the issue and give

further definition to things, for example, the government might come up with procedural requirements in regard to proving parentage that some people would feel cut back on the right of children born out of wedlock and that it was too burdensome. And this would probably wind up back to the court if somebody felt they were affected by that. So there're both the amendment way of doing this and legislative way of doing this but those are the proper ways.

Chairman :

Mr CHANG.

Mr Denis CHANG:

The point is that in court it was accepted by the Government and considered carefully by the court as to whether the right of abode enshrined in the Basic Law was a common law right. Whether it was a Chinese sort of concept that you can have the right of abode but at the same time you can postpone the enjoyment of the right indefinitely. Now it was accepted by the Government, we're not in any dispute at all, that the right of abode (as it was also accepted by the Chinese experts whose opinions were produced in evidence) that the right of abode enshrined in Article 24 is nothing more, nothing less than the common law right. And it is because of the interpretation of this common law right in Article 24 that the court says that is the core right, the source of the right and that includes the right to enter without any let or hindrance once you prove your status. And therefore it is wholly inconsistent with the idea that you could indefinitely postpone the right, and because of that, the court interpreted Article 24 as has been authorised to do so under the Basic Law. It was Article 24 that was being interpreted when they were looking at the context which included Article 22(3). That is as simple as that.

Chairman :

Professor Yash GHAI.

Professor Yash GHAI:

I think in most countries, if you want to overturn a decision of the highest court then the amendment process is the one that you normally use. And here of course, we have the additional factor that there is some suggestion that the same result can be achieved through interpretation I would not say that really interpretation and amendment are kinds of techniques you can use them interchangeably. I think they have very clear implications. I think if you are reinterpreting, you are saying that the court was wrong. If you're amending, you think that the Court of Appeal was right. But the Basic Law had been drafted with sufficient foresight and so on. I think there's no loss of face in the amendment of the constitution. Life changes, unexpected events happen, and it goes on to say well, may be Article 24 was not drafted with sufficient care. I mean if you look at the Macau Basic Law, their Acticle

24 is quite differently drafted, more carefully drafted. So you could say well you are learning as time goes on and we acknowledge Article 24 does give this wide definition of the right of abode. It's too wide perhaps for convenience, for other reasons and then amendment would be done. I mean, to me the reinterpretation is a slap in the face of the CFA. I think it's a great blow to the prestige of the judiciary. But amendment wouldn't necessarily be that. In fact if you acknowledge the correctness of the CFA but then say nevertheless the consequences of such that we have to do something about that, I think.

The second point I will make on amendment is the provision in Article 159 doesn't allow you to amend any part of the Basic Law. The last paragraph of Article 159 says "no amendment of this law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong". This phraseology is taken from the Joint Declaration which as we all know sets out the basic policies. The question is and this was discussed briefly at the meeting of the Central Policy Unit yesterday as to what parts of the Basic Law can therefore be amended, and what cannot be amended? There's one view of course that most of the Basic Law is an implementation of the Joint Declaration. The Joint Declaration has Annex I which is very detailed. Is all of that basic policies or is it the section in the substantive treaty Article 3 which is basic policies. But it seems to me that if you look at the stipulation of the undertaking that China took in the Joint Declaration, their basic policy seems to refer both to Article 3 of the treaty as well as Annex I, because it is basic policies and as elaborated in Annex I shall be provided for in the Basic Law and shall remain unchanged for fifty years. So it could be on one interpretation, a very large part of the Basic Law can't be amended. And another view you could say, well the very core right of autonomy and freedom are protected and the rest can be. So I would say that if you go along the amendment route, there may still be need to consider very carefully which part of the Basic Law can or cannot be amended.

Chairman:

Thank you. In the interest of time and there are still eight members who want to ask questions. I would not entertain any follow-up. 曾鈺成議員。

曾鈺成議員:

主席，我剛才聽幾位教授講，我有些疑問，因為幾位教授的說法似乎給人一個印象，如果人大常委會行使基本法條文解釋權，便一定會濫用。剛才譬如 Professor DAVIES 說"Standing Committee can jump in any time"，即任何時候都可以出來解釋和 Professor GHAI 說"can do anything"，即人大常委會對解釋可以為所欲為，做人大做不到的事，為什麼我們一定要這樣認為呢?我相信解釋法律受一定約制，不能將白解釋成黑，將有解作無。

張健利先生在演詞中，有一段說話我覺得很難明。在你的第 26 段，你說 '

叫人大常委會解釋，是否叫人大常委會行使一個權力，而這權力已經給了你？張先生講時離開了講稿，加了幾個人的名字進去，包括董建華先生，基本法是否將解釋權給了董建華先生？你這個“are you”的“you”是否有些換來換去的感覺，與這成鮮明對比的似乎是終審法院的裁決我們無權去說他是對或錯。我這幾日聽多次都有這感覺，一講終審法院的裁決，做錯這事是不可接受的，即是沒有錯，法院當然會錯，否則不會有人到終審法院上訴，但去到終審法院不能上訴，所以你說它錯也沒意思，是否這樣解釋？

但現在牽涉基本法某些條文的解釋，這些條文受中英聯合聲明的約束，條文怎解釋呢？大家一直以來，現在不是講要怎去彌補曲解條文，條文很清楚，譬如基本法第二十四條第三款，他出生時父母是否已經是香港永久性居民，我覺得對這問題的議論是對或錯我認為已有客觀標準，幾位教授講，如果找人大常委會解釋便叫推翻終審院裁決，是不可接受的，唯一引述很多外國經驗，如果最終，即終判，終審法院判決，政府認為不能接受，便修改法律，我覺得大家似乎未曾找到類似情況是香港可以照搬的，換句話講，美國英國並沒有一國兩制，如果終審法院他解釋的法律只牽涉香港本地的法律，剛才大家講的完全可以適用，政府可以重新立例，或到終審法院修改法律，但現在牽涉基本法，香港無權改基本法，基本法牽涉到的條文，剛才有學者指出基本法是全國性法律，其實受中國憲法管，按中國憲法有修改，亦有解釋機制，我們一定為何要排除解釋機制呢?

同時我質疑如果按照幾位教授講法，就算人大同意我們香港特別行政區修改基本法，但修改後依然要靠香港法律去解釋，對嗎？剛才 Professor GHAI 提到他有個懷疑基本法有些條文是否可以修改，譬如修改基本法第二十四條第三款，去到終審法院依然可以說對不起，這個修改違反聯合聲明，因為聯合聲明不是這樣寫的，你加上去，是違反中國對香港的基本方針政策，所以不能接受，有否可能是這樣做？以及這個補救機制是否有效？

主席 :

張健利先生。

張健利先生 :

我不是教授，只是一名律師。我想指出人大常務委員會授權香港的終審法院自行解釋基本法，這是最重要的。我不相信人大常務委員會濫用，我沒有這樣講過。我只擔心香港人走去人大常務委員會，走去北京跟中央講，雖然你給予特區有基本法解釋權，但我現在要麻煩你再用這個權力重覆解釋推翻終審庭的解釋，這是我的擔心。因為這幾件案是很重要的和有代表性的，即所謂測試案件，是立竿見影的案件。它們對以後法治發展，憲法，尤其是對基本法的解釋有很大影響，對高度自治有很大影響。我們的高度自治，是人大根據基本法第二條授權給我們享有的。是人大授權證明人大仍有權，可能在中方也是這樣

看，教授怎樣看是另一回事。你即使接受這個看法，也要有機制、方式和基本原則來授權香港特區實行高度自治，包括終審庭權。在第二條寫得很清楚，授權我們，但我們也要去北京要求人大常務委員會使用解釋權，我覺得基本上與高度自治原則有違背。

Chairman :

Professor DAVIES, and Professor GHAI both of your names are mentioned. Would you like to respond? Professor DAVIES.

Professor Michael DAVIES:

I think to put it succinctly the question is how the NPC might act in conformity with the Basic Law and the Joint Declaration to the commitment to the independence and finality of the courts and the preservation of judgments. That's the issue. It's not anything more than that. I take the view that the NPC considers itself bound by the procedures and guidelines in the Basic Law. If they were willing to throw that document away then we'll have to reconsider. And I agree with your statement that yes, amendment is not permitted in breach of the Joint Declaration.

Chairman:

Professor GHAI.

Professor Yash GHAI:

Yes, I agree basically with what Michael has said, I was quoting Article 159 which restricts the power of the NPC to amend. It is not something I have put in the Basic Law. It has been there all the time. So I'm merely quoting the provision of the Basic Law.

主席 ：

李柱銘議員。

李柱銘議員 ：

我相信解決問題要看兩件事，即解釋方法好，還是用修改方法好。我自己在報章看到有人指解釋方法怎樣不好，大家都知道，有人說修改方法都不好，我最重要聽到一個時間要慢，我覺得如果解釋會太快，因為報章報導行政會議可能下星期二拍板，因為要人大解釋，人大常委要在六月解釋，便要早一個月前交方案上去。這情況下，我想知道多等九個月，照我看不會太多人因為這而得益，現在我們所關注的是已在香港居留 6 年零 3 個月的人士，但未夠 7 年，所以他們依然未曾可以享受居港權，如果等到明年 3 月，這些人可以，他的兒女亦可以，其實這批人我相信少之又少，雖然梁教授講不知多少人，我看不會

太多，所以我們撇開不理這點，我想問在座各位，用修改方法，很多法律界同意，這裡沒有一個人說不可以，個個都說可以，很多人說應該用這方法，可能梁教授不同意，我想問除了這個時間問題之外，用這個修改方法有什麼不好之處？謝謝。

Chairman :

Professor Priscilla LEUNG. Would you like to tackle this?

梁美芬教授 :

我剛才講過在中國法制下，修改基本法是涉及大幅度的改動，基本上雖然我們被一個兩制的基本政策可以保護到，在這基礎下，但有的事情不是黑白，但仍然可以有大幅度的修改。就這方面，我剛才亦講過解釋有很多負面，很多人不喜歡，但如果解釋與修改兩方法，解釋的空間應該要細，及不應與原文有所抵觸，不應解釋到與原有原文有抵觸。由於修改幅度可以更大，我不是擔心今天修改，這個 issue 我可以接受到修改，不過若開了先例，將來有問題便有人提出修改。

張文光議員 :

我有問題澄清。剛才梁教授才指出大幅修改是一種修改，那麼小幅修改是否可以修改？

梁美芬教授 :

這是兩個不同問題來的，小幅度又是修改，是一個方式來的，大幅度又是修改，但剛才我講解釋是不可以與原本的條文有抵觸。

Chairman :

Professor DAVIES and then Mr Denis CHANG.

Professor Michael DAVIES:

I think Professor LEUNG’s argument is essentially a slippery slope argument. We start amending then they can amend anything. But I think we should bear in mind that amendment can be done in public. We can discuss. There are very important issues here. We have got to remember that we’re talking about the children of Hong Kong people. We are not talking about Haitian immigrants or something. We are talking about Hong Kong people’s own children. And the process of thinking about what to do here ought to be a public one. And amendment offers that opportunity. Mr Martin LEE brings up the point about delay. I think the proper response to that is legislation. The Government should be coming up with a plan to

solve this and procedures. In fact I think it is bound to do so by the Court of Final Appeal judgment. That's the quick response and a sensible one. But amendment is something that is more profound and ought to be public.

Chairman :

Mr Denis CHANG.

張健利先生 :

我想回應梁教授，你剛才好像提到第六十七條第二款，講人大休會時常委有個所謂小的修訂，不可違背基本原則，但是中國法律據我理解是有個基本不同概念，解釋有時是進一步澄清或者劃清界定的意思，或者是所謂補充，但基本從修改_ 大改也好，小改也好，基本上都是不同，你同意我這樣講？

梁美芬教授 :

即是與修改基本上是不同？方式不同？

張健利先生 :

是。我想回答張文光的問題，除了時間問題，有其他分別嗎？我們夠時間嗎？其實我看不到時間的問題。還有別的困難是不可以克服的，我們別忘記終審庭在判詞中確認了一個所謂嚴格證明書的計劃，他們必須取得 Certificate of Entitlement 證明書，才有權享有居留權，這是很嚴格的。我可以講，在普通法國家中，我看不到有比終審庭所訂更嚴格的證明制度。所以我可以這樣講，在香港已經有一個閘，就是證明書 verification scheme，Certificate of Entitlement。國內還有另一個閘，因為終審庭講得很清楚，國內出入的條例仍一樣生效的。所以在時間上可能仍可以給香港一個空間，可能有很多案件上法庭。發展一國兩制是新的概念，大家都要共同努力使這概念真正成功。我們不要批評起草基本時好像不小心，有漏洞，不用這樣，一個人可以很小心寫，但都會有漏洞的，因為你看不到很多東西，尤其是基本法有中國概念以及有普通法概念，但又要維持及保持普通法概念以及中國概念，有時有些地方會較含糊，不需要講面子，不是誰對誰錯，最重要是最後得到的解決對香港長遠利益有利。特首也這樣講 "高瞻遠矚，按部就班，千萬千萬別政治化"，如果你要真的用政治途徑來推翻司法獨立所得到終審的結果，這是否政治化的司法制度呢？

主席 :

劉慧卿議員。

Miss Emily LAU :

Thank you, Chairman. I was quite taken aback by some of the views of Professor WESLEY-SMITH, that's why I would like to ask him a few very straightforward questions and I hope I can get some straightforward answers. First of all, he said that the Court of Final Appeal was found to be wrong on some issues. And I hope he can very clearly state on what issue was the Court of Final Appeal wrong and whether it was in interpreting Article 22 or 24 of the Basic Law or what. And who is it that determines that the Court was wrong. Professor GHAI said that. Is it a constitutional expert like Professor GHAI or your good self? Do you determine it? Do we have it within our constitution or in a Hong Kong law which says who has the authority to declare that the CFA is wrong? And then if so, they said "open the door for the authorities, mainly the executive authorities, to go and seek a way of overturning the judgment of the CFA." Is that what you're advocating because your logic, I guess is quite simple, is that they made a mistake. I don't know who determined that. And then because of that mistake, its judgment should be overturned. And are you also arguing that the overturning and all that should have retrospective effect, meaning whatever rights of the court conferred on the people on 29 January this year would be taken away. And Chairman, I also want to ask whether we have heard from the Administration about why they haven't sent any representative over here.

Chairman :

I'll address it afterwards. Let our guest answer the question first. Professor WESLEY-SMITH.

Professor Peter WESLEY-SMITH:

Four questions. Is the Court of Final Appeal wrong? I think on Article 22 I think there seems to be general agreement as I said before. I think Professor GHAI has said that he thought the Court had erred on that question on Article 22.

Professor Yash GHAI:

No, I never said that.

Chairman:

Let Professor WESLEY-SMITH speak first.

Professor Peter WESLEY-SMITH:

Sorry, it's Article 158, whether the court should have referred the question of Article 24 to the Standing Committee. Now if you accept that the court should have so referred the matter, then it seems to me that one can't complain if the Standing Committee were to exercise its jurisdiction, which it has, and which the court should

have provided for, by referring the matter. And if that is the case, then_ since there is the consideration of Article 22, one can't complain that the Standing Committee then considers Article 22. As far as Article 24 is concerned, I did say that my opinion was a bit more tentative. But there is this argument about the background of the Preparatory Committee's statement and the NPC's approval of their report and so on. And the views have certainly been put forward elsewhere that under Chinese law that there would be no doubt that the Standing Committee would take the view that the time of birth limitation is an inherent part of the law. And in that circumstance, I don't say in my paper that the Court of Final Appeal is wrong but there is this strong view that the Standing Committee would take a different view. As a question of law, not as a question of politics or expediency but as a question of law.

The second question was "Who determines it?". Well, we're making political judgments, if you like, we're discussing it in a broad constitutional context and everyone makes their opinions known about what is right and what is wrong. I think it is legitimate for anyone to say in the circumstances what is the right course of action. I'm not saying that I have any constitutional authority to sit in judgment on the Court of Final Appeal but academics always do that. Everyone is entitled to say whether the Court is right and wrong in their opinion. And I'm saying in my view they were wrong on the question of reference to the Standing Committee. And other people can disagree with that but that affects my judgment on the more general constitutional question as to whether it is legitimate for the Standing Committee to issue an interpretation or for the Government to request them to do so.

Thirdly, is the executive entitled to overturn the judgment. I think that language is not very useful. It's not overturning the judgment, it would be seeking an interpretation which it would hope of course would be different from that of the Court of Final Appeal but the judgment stands and the right of the people under that judgment is not to be affected. Then fourthly, the question of retrospective effect. As I understand it, certainly under the common law, a reinterpretation or interpretation states what the law is back to the date of enactment. That is not necessarily the effect with amendment; amendment is normally prospective unless it is deliberately stated to be retrospective. But common law interpretation is by necessary characteristics a retrospective process.

Chairman:

Professor GHAI, I think your name is being mentioned. And I think you got some problems. Would you like to state that?

Professor Yash GHAI:

No. I think what Emily LAU said was that I have raised some objections. Of course I would defend with Professor WESLEY-SMITH right to his views. I thought he was actually doing more than that. He was setting a method of dealing

with it. That was my problem with him, not opposed to his views. If you suggest that as a method of proceeding forward, then I think it is legitimate to ask, as Emily has asked, who decides when and on what points CFA was wrong and what was correct? It's the method I was concerned with.

Professor Peter WESLEY-SMITH:

I'm not proposing any formal method at all. I'm saying in my judgment, in these whole circumstances, it is not broadly unconstitutional for the government to seek an interpretation.

Chairman:

Mr CHANG.

Mr Denis CHANG:

I was about to intervene because when Professor WESLEY-SMITH mentioned academics it seems that he has forgotten that practitioners also have a voice. And there are lawyers of course, there are practitioners and others who have some familiarity with this particular subject who have expressed different views from his.

劉慧卿議員 ：

主席你未答我關於政府的問題。

主席 ：

我們待嘉賓離開後才討論。

Miss Margaret NG:

Thank you, Mr Chairman. I like to ask Mr CHANG whether it is true that the NPC's Standing Committee has in fact interpreted Article 24. And also there is a suggestion for the Standing Committee now to confer or confirm the legal effect of the Preparatory Committee's advice as the true intent of the NPC. If that happens, what will be the effect of this confirmation, or recognition, or interpretation or whatever you call it.

Chairman:

Mr CHANG.

Mr Denis CHANG:

I'd like to answer the first part of the question. Has the NPC ever exercised its power to interpret Article 24 of the Basic Law on its own? The answer is they did but they were very careful, extremely careful in that interpretation to restrict the interpretation to the nationality requirement of Article 24. Now if there was ever a dispute in Hong Kong as to who is a Chinese national, and that we have to interpret Article 24 for that purpose, then of course that is an aspect which the Standing Committee of the NPC would have the power, and not just the power, but in that respect the Standing Committee would say it has not authorized the HKSAR to interpret. This is a very good example of an exercise done, not in this sort of heat and battle of litigation and in the hysteria of some panic reaction to figures and guestimates and so on as you now see. It was done in a way which was very careful, restricted very carefully only to that part of Article 24 that deals with nationality.

And at the same time, those of you who have been following the progress of the setting up of the SAR, we also remember that at one point there were some disputes as to whether the Preparatory Committee should go further in, as it were, telling the SAR Government which has yet to be born what the Government should be doing in respect of what requirement they should be setting in relation to the status of permanent resident, apart from the nationality requirement. You will recall they were very careful, very careful to say these were just proposals, in Chinese "建議", "proposals". And that is the sort of sensitivity that is demonstrated by Beijing, by the Standing Committee. They are very sensitive, very sensitive to the powers that were given to HKSAR to exercise, and do not think that they would want us to actually to ask them to exercise the powers which they have authorized us to exercise. And in relation to the second part of the question, I think that the Professors have in fact already answered as to the doubtful status of the particular document you referred to.

主席 :

楊森議員。

楊森議員 :

主席，聽了幾位講者，我估計政府最後在這件事上可能得到市民支持，即是叫人大解釋，因為直至現在，其實留心聽講者說話，譬如史密夫教授講，叫人大解釋並不違憲章，你怎講違憲，因為基本法是中國憲法一部份，第一百五十八條都講人大有最終解釋權，所以憲制部份不可以講違憲，你不可以講是違法，因為梁愛詩司長講政府所做的都是合法，如果叫人大解釋又不可以講不合法，因為第一百五十八條都提到這點，所以最後政府講這樣做是合法合憲，市民怎會反對？政府做的沒有違法，亦沒有違憲，不過最大問題是張健利先生問到人大既然授權給你，為什麼要將權力給他讓他解釋，我想這點其實是高度自治中最重要的基礎，我擔心不是很多人會看到這點，政府講他做的 lawful, constitutional，你講不行，張健利有個 point 很好，既然別人已給你高度自治，已給你解釋權，為什麼你無端在法庭輸了，又用一個方法叫麻煩你再解釋，推

翻終審庭判決，政府不會這樣講，他講我做的事 lawful, 我做的事 constitutional，人們看報紙覺得政府做的既然合法又合憲，那有什麼問題呢？

我的問題是張健利或者史密夫或者其他講者會否有這個擔心？最後政府會勝利，因為市民不覺得高度自治的基礎原來是要來行使，不是走後門叫人大再解釋，因為政府會強調 lawful and constitutional, that worries me very much at the moment.

Chairman :

Perhaps I ask Professor WESLEY-SMITH for his views on that.

Professor Peter WESLEY-SMITH:

Yes, I'd just like to make a general semantic clarification. The distinction between what is lawful, legal in a narrower sense, and constitutional also meaning just in accordance with the specific provisions of the constitution. And in my view, it is very difficult to maintain an argument that interpretation is illegal or unconstitutional in that sense. And in a much broader sense, and I think that it is the sense being used by others on this Committee that it is unconstitutional because it's in conflict with the rule of law or judicial independence or the general notion of autonomy, or general provisions in the constitution which are not spelt out narrowly perhaps but are implications from the constitution. And I think that's the difference between us primarily, that I would like to see a much more detailed account of why interpretation is contrary to the rule of law or judicial independence, etc. And I don't think, at least in the documents that I have seen, and I think I've read most of them, those from the Bar Association and others who have criticized the interpretation route, I have seen this kind of detailed explanation as to why this is in conflict with these broader general principles, which is why I generally support the view that it is not unconstitutional in that broad sense as well.

Chairman:

Mr Denis CHANG, do you want to say something on that?

張健利先生 :

剛才有問題是我們法律界或我自己會否擔心，違背了全個高度自治計劃，可以講這是中國給香港的高度自治，以前我記得有句說話，有人講："高度自治是主權最美麗的表現"，他講過這個我們要珍惜高度自治。

Chairman:

Professor DAVIES.

Professor Michael DAVIES:

I don't really accept Professor WESLEY-SMITH's distinction between strictly legally constitutional and constitutional. It seems it's either constitutional or it's not. And the court even made clear that you have to take a purposeful interpretation for certain things in the constitution. And independence and finality is to be very important and a legal requirement, autonomy is as well. And I do not agree that the Government's action, which I believe effectively is just overturning a judgment they don't like, is constitutional. It is simply not.

主席 ：

還有 3 位同事要問問題，我希望他們先問題目，然後才叫朋友答，好嗎？張永森議員、陳鑑林議員、楊孝華議員，希望是短題目，別先講一番演詞。

張永森議員：

主席，我相信解釋和修訂都是合法的，我亦相信政府和社會對建議什麼方案給北京都差不多有共識，問題是選擇怎做，要看兩個不同方式去到最後的影響怎樣。有一個可能影響少很多，有一個可能影響高度自治，法治甚至法庭終審權力。我想問專家教授學者，解釋和修訂，大家都看到從解釋一路移向，到某地步會變成修訂。如果我們將第二十四條於中國出生子女如果要有香港居留權，一定要他的父母或其中一個已經有永久性居民這個地位加進去第二十四條第三款，舉例非婚生子女已介定無或者有，究竟含意在學者角度來看是解釋還是修改？如果要人大講到這兩點出來，意思是已經去到修改基本法，無論是叫他解釋也好，根本是已經是叫他修改基本法，還是仍然企在解釋界定補充的角度呢？

主席 ：

陳鑑林議員。

陳鑑林議員 ：

主席，我想剛才雙方律師，兩個解釋都有說服力地方，也有不說服力的地方，感覺反對人大常委會那方似乎覺得是一個重新解釋，可能是對法例基本法重新演繹，與原本立法原意是不同的，我覺得這種顧慮是不必要，以及可能是他們對基本法立法的原意誤解，而事實上我們要求人大常委會解釋，只是針對條文法律意義作出詳盡解釋，不是對政策作出解釋，而且解釋只是遲早問題，即使要去進行修改基本法，人大常委會都會就法律條文徵詢基本法委員會以及作出解釋，否則人大常委會怎能判決你的修改是否符合基本法，另外張健利大律師講，人大既已授權給你去做，為什麼你又要去問它，其實我覺得這觀點有謬誤，人大授權是有規範的，人大不是全部整個基本法由香港特別行政區去履

行，執行是自治範圍，以及第一百五十八條的第三段講得很清楚，如果涉及中央事務，一定要在作出終審前請人大常委作出解釋，如果提到兩道閘的問題，即是你都承認那道閘是屬於中央政府管理範圍的事務，為什麼不邀請人大常委會作出解釋呢？這點我覺得講到剝奪權力問題，我覺得這是一種法律上的誤解，實際上在基本法中，終審法院給這班人的權根本是沒有的，現在由於終審法院對基本法的錯誤解釋而給他們這個權，所以我希望大家就這點都可以有所回應。

主席 :

楊孝華議員。

Mr Howard YOUNG :

My questions are very simple and some can be simply answered yes or no. Firstly, why do Mr Denis CHANG and some people keep on using the phrase reinterpretation? My understanding is that "re" is something done before and they want to do it again, it's not the first time. If you say reinterpretation, it implies it had been interpreted once already and we were asked for a second one. But I'm not aware of any time where the Basic Law has been interpreted once unless you're referring to the part which I took part in, that was the Preparatory Committee. If you take that as the interpretation, then I would say it's OK. This could be called reinterpretation. I think it is pulling wool over people's eyes by calling reinterpretation. It is interpretation, just that.

Second thing is, can Mr CHANG confirm that all those people in this case, the appellants who benefited from the CFA judgment, were people who actually arrived in Hong Kong either before 10 July or before the judgment. I think that's very simple. So we are talking about taking away rights. I agree those before the judgment should not.

Thirdly is the test case. I am not a lawyer so where in legal terms or dictionary spells out exactly what is a test case? Who has the say whether this is the only test case. And I thought test case is_ yes, you can have one test case but it does not bar having test cases in future as there are new points arising, and of course there will be further cases down the line, and if they differ from the original one, then the second one would take precedence. I must add that.......現時有人指責，指解釋又違憲又不合法，我們打官司時，如果一方指責一方要提出證據證明別人是錯。我真的聽來聽去部份法律界人士認為解釋不對，但我沒有聽過解釋是違反憲法哪一條，違反基本法哪一條？

Chairman:

Mr Denis CHANG.

Mr Denis CHANG:

First I'll deal with the term reinterpretation. I thought it was clear to everybody what we're talking about is that the Court of Final Appeal has interpreted the provisions, which by the Basic Law the Standing Committee has authorized it to interpret, in particular Article 24 as to whether or not children born out of wedlock can in fact get the entitlement under the Article. And there's no dispute, in answer to a previous question, there's no dispute by anybody at all that the power to interpret, to decide whether or not a child born out of wedlock comes within the provision. That belongs to a provision that the CFA has been authorized to interpret. So that's really basically very simple. And you've asked four questions I think. What is your second question? Could you just quickly_

Mr Howard YOUNG:

A particular case, the child actually arrived in Hong Kong…

Mr Denis CHANG:

Ah, the arrival. As far as my clients are concerned, they are among people who arrived before 10 July, but this is important, one of the issues in that case concerned the threshold question as to whether a child born out of wedlock can ever be entitled and that question is not restricted to time of arrival.

Chairman:

The test case.

Mr Denis CHANG:

And the test case I think I have explained in the previous cases. It's on the paper…

Chairman:

And the last one is reinterpretation. Is it unconstitutional?

Mr Denis CHANG:

If you interpret a provision to which the Region has been authorized by the Standing Committee, then you are going against the autonomy scheme of the Basic law and that's the distinction that Professor WESLEY-SMITH made between broad constitutional grounds and narrow legality.

Chairman:

Would you like to tackle the other questions, Mr CHANG while you're here? The question put up by Mr YOUNG about you know where_ it's the whole spectrum_ when is it reinterpretation_ and when is it amendment?

Mr Denis CHANG:

Can I answer the question. The Chinese constitution itself distinguishes between interpretation and amendment and the 1981 decision of the Standing Committee which explains the distinction between interpretation and amendment. So it's a judgment in each case as to what constitutes an amendment and what constitutes, "補充" "interpretation". But it is the distinction accepted under the Chinese constitution. Now if you ask the question of the Court of Final Appeal whether or not the additional words similar to the Macau constitution is an amendment, the Court of Final Appeal would say we have interpreted according to proper principles and the meaning of the phrase, therefore we consider the additional words as amendment. If you ask the Standing Committee, they may take a different view. But at the end of the day the important thing is the process. And the process has been very much actually emphasized by the professors.

Chairman:

Anyone would like to add to all this? Professor DAVIES.

Professor Michael DAVIES:

Just briefly, there is a suggestion that somehow one would go to the NPC to ask them about how to deal with children across the border or something of this nature. I think it's important to bear in mind that the Government will also be called upon to interpret the Court of Final Appeal judgment. Everyone ordered in a court case has to try to make sense out of it. And so the Government can do this either in its policies or proposing new laws to carry out the intent of the Court of Final Appeal.You don't really need to go to the NPC for that.

主席：

梁教授。

梁美芬教授：

我想補充一點，剛才討論過 1996 年籌委會報告的法律效力問題，其實這問題與臨立會當時的問題相當類似，同樣用報告形式然後在全國人大確認。在中國法律架構中，可能用很多不同形容詞，譬如決定和通知，可能由其他部門通

過，如果提到全國人大再確認，它的地位便提升了，變成全國人大決議的一部份，不過現時問題其實是香港要討論的問題，有很多全國人大的決議，特別是講香港問題，但沒有放在附件三，現時產生很大爭論，就算 90 年 6 月 8 日可能通過一個決議，中英版有抵觸時以中文版為準，但這些沒有放進附件三，是頗類似情況，但報告本身我認為別用地位來講，都反映立法原意，但報告中沒有處理非婚生和婚生，如我沒有記錯，它只提到父母已經是永久性居民，所以如果我們理解，如果人大要再解釋便應該針對這問題，即是終審法院未考慮到對立法原意第第二十四條第三款加上出生時的界定，我對這點看法是，不用與澳門比較，其實第二十四條第三款和第四款已看到它考慮的問題有不同，第二十四條第四款說明外籍人士須持有有效旅行證件才能進入香港，他加進去，當時討論有這個考慮，但第二十四條第三款當時的確無這個考慮，但 96 年已經知道有這考慮便補充上去，這個屬於解釋還是修改？我覺得可以屬於兩方面的範圍，因為如果用解釋都不是違背了第二十四條第三款的界定，因為凡是解釋都不可與原意有不同，如果不同了便必須用修訂方式，我覺得這取決於大家想用哪個方式，現時情況是這樣。

主席：

對不起，我想第一節到此完畢，首先代表各位多謝今日出席的嘉賓，第二節將會再開始，假如各位嘉賓想留在這，我們絕對歡迎你，亦希望你們在此可能到最後再給意見也說不定，請第二隊嘉賓進來前，我想先攪內部事情，家事，我想向大家提出兩點，第一點，我們剛收到律政司長說今日不會派人出席會議，明日會否有人來，在乎他們談過會否派 designated officers 到來，他們知道我們剛才通過一個動議，我再查關於…

劉慧卿：

解釋為什麼不會？

主席：

可否先給主席機會講完好嗎？我們再查過昨日已詳細寫過一封信給行政署長，關於今日開會，亦告訴她今日出席的朋友，所以他們知道今日發生什麼事，他們沒有解釋為什麼今日不出席，第二點，再向大家講我剛收到行政署長的信，大家知道律政司司長和保安局局長剛從北京回來，我們邀請她們上來向我們作一個簡報，她們一直說會盡量抽時間來，直至昨晚我告訴律政司司長希望她可以星期六到來，但剛收到的信她們星期六都不會來向我們做簡報，先向大家作這個報告。接下來我們該怎做，是否該盡快談完第二節，然後考慮做什麼，還是現在先做少許討論？張文光議員，然後劉慧卿議員。

張文光議員：

主席，首先我想邀請幾位法律界朋友留下，因為馮華健先生稍會能陳述他

的觀點。

主席：

我也請了他們留下。

張文光議員：

第二點，我對於政府不派官員來的做法，表示強烈不滿。因為我們很清楚邀請她來。現在討論的是很重要的法律觀點，而這法律觀點可能在下星期二政府已有決定，究竟會否邀請人大常委解釋，這時候也不來聽，這並非藐視立法會討論重大法律問題的問題，而是作出重大政治決定前完全不聆聽清楚一些法律爭論，我對這點極為不滿，所以我動議現在立法會內務委員會對於政府不派人來聽取各方面陳述的做法，在此表達一個立法會決議表示極度不滿。

主席：

有人提議一個動議，是否有人和議？有人反對？

劉慧卿議員：

主席，我支持張文光議員，我覺得政府真的很離譜，為什麼呢？剛才我問你是否有向政務司司長說在我們會召開一連串會議時，她是否會派人來出席，你當時說她沒有承諾但會盡力做。我們以前開幾次都有官員來，照我記憶今次應該是第一次沒有官員來。所以我支持張文光議員的動議。不過主席，別浪費時間討論這動議，因為有人在等待，我們留待下午在內務會議委員會上才討論吧。

主席：

同事是否同意我們繼續聽取嘉賓的意見？

張文光議員：

我已經提了動議。

主席：

我知你提了動議，若果同意，我們別再討論，先表態張文光議員這個動議，因為他已提出了，亦已獲得和議，我們不能收回，除非有人為想澄清這點。張永森議員，然後吳靄儀議員和陳鑑林議員。

張永森議員：

如果我沒有聽錯，律政司司長已拒絕星期六來，但有沒有承諾下星期會來？

主席：

我想先談今日沒有政府官員出席的問題。現在張文光議員的動議是今日無官員出席，今日政府清晰答了不會有人出席，吳靄儀議員。

吳靄儀議員：

主席我只想講，昨日政府自己舉行的座會中，除了 Professor WESLEY-SMITH 外，是很缺乏關於憲制上專長的律師，立法會的做法是今日特別邀請在憲制法律有專長的律師，在這重要場合律政司也不派官員出來聆聽，我真的覺得很失望，顯示政府一意孤行，不願意聽取別人的意見，所以主席我很支持張文光議員的意見。

主席：

陳鑑林議員。

陳鑑林議員：

我認為有些事情該弄清楚，不然混餚了便不好，我們邀請學者專家給意見是協助我們分析問題，不是提供渠道讓政府聆聽某些意見。事實上政府作出任何決定時是透過很多渠道接觸聽取意見。根據我們的議事規則是沒有規定政府必須出席立法會的會議，所以我覺得這個動議根本是沒有必要的。

主席：

既然有人提出動議，亦有人和議，又有人提出問題，我想我們現在應表決。黃宏發議員。

黃宏發議員：

有問題提出大家必定有不同意見，想作出辯論，我想我們最好將表決押後到下午。

主席：

張文光議員是否會考慮收回？

張文光議員：

我堅持不收回。

主席：

誰贊成張文光的動議請舉手。

黃宏發議員：

主席，規程問題，讓人就某個議案辯論是權利來的。

張文光議員：

他已講完。

黃宏發議員：

如果有別的人想辯論呢？

張文光議員：

主席，任何人都可以辯論。

主席：

剛才我講過誰想澄清便舉手，已有人舉手，我已給了想講…

劉慧卿議員：

主席。規程問題，我相信如果有動議，必定可以辯論的，當然你問了澄清，但如果有人要辯論我們怎可以不讓他們辯論，當然張議員不收回不成問題，應該繼續辯論，所以我剛才提出內務委員會要決定是否辯論，如果要辯論便叫外面的人先走，我們可以辯論，否則下午處理吧，因為問題是有人坐在外面，但我亦不覺得提出問題不准辯論便去決定，如果無人要講便可以決定。

陳鑑林議員：

如果你想辯論我便繼續。

主席：

請大家考慮我們是否想正在外面等待的嘉賓待我們辯論完才請他們表達意見，繼續等或者請他們現在先回去，稍後再邀請他們來？

張文光議員：

主席，我已提出了我的動議，我亦得到和議，議員要辯論，這是他們的權力，最後決定怎樣，請主席繼續主持。

主席：

有很多人舉手，是否你們各位都想要求辯論這件事？

田北俊議員：

我認為應在下午談。

主席：

你是否提議押後辯論？

田北俊議員：

我想先見客人。

主席：

是否有人和議這點？是否有人想在這方面辯論？若果沒有，我們先投票押後辯論到下午，贊成的舉手，反對的舉手，棄權的舉手，我宣佈押後的票數較多，押後到下午才討論這件事，現在請下…

李永達議員：

可否將票數讀出來？

主席：

贊成押後到下午有 11 票，反對有 10 票，沒有人棄權。This is more like a court of final appeal. 好了，我們現在開始第二段，首先代表立法會同事向各位第二段的朋友道歉，我們遲了數 10 分鐘，藉這機會歡迎今日出席的朋友，第一個是羅沛然先生，來自國際司法組織香港分會，接下來是馮華健資深大律師，以及劉兆佳教授，來自中文大學亞太研究所，時間我們直至 12 點 45 分，所以時間不是太多，我亦相信我的同事會有問題問，一開始希望各位可以用 10 分鐘講一下自己的意見，然後我們的同事問題目，首先請羅沛然先生。

羅沛然先生，國際司法組織香港分會：

昨日我給主席一份英文本的聲明，我昨晚已翻譯做中文，遲些會給主席。現時我先提一下聲明的內容，各位知道國際司法組織香港分會以及另外三個非政府組織，包括香港人權聯委會，香港人權監察以及社區組織協會在 1999 年 5

月 3 日向香港特別行政區政府發出一個呼籲，其中要求政府不尋求任何損害終審法院權威，公信力及管轄權的措施去解決現在政府認為的移民問題，以及不邀請全國人大常委解釋及修改基本法，利用這些手段來撤銷終審法院的裁決，同一時候，我們以及另外三個政府組織要求會見行政長官但被拒絕，好了，我們知道現在政府的行動正繼續，政務司司長，律政司司長以及保安局局長去過北京，談過有關所謂對策的問題，現在看起來香港特別行政區政府準備要求人大常委對基本法的條文，包括關於特別行政區自治範圍的條文作出解釋，理據看起來是利用基本法的第一百五十八條。國際司法組織香港分會覺得現在特別行政區政府準備採取的行動，即請求解釋在根本上是錯誤的，我們英文用的字眼與剛才張健利先生剛才用的差不多，都是 fundamentally objectionable ，我覺得這樣做是破壞法治，我覺得這樣做是藐視終審法院，香港特別行政區政府最高級別的法院以及它的司法程序，因為法院在它的權力內經過全面辯論之後作出的決定是終審判決，現在不符合政府心意，要求再解釋，推翻它。

昨日在高等法院，袁家玲法官審理一宗藐視法庭的案件，她當時說這些違反法庭的命令如果不受到制裁，法治是會危如累卵，報紙這般譯，英文用是“as thin as paper”，好像紙般薄，現在政府對終審法院的決定不去落實，反而要去推翻，到時香港的法律便會薄過紙“thinner than paper”。好了，現在終審法院的裁決不是單指某部份人的權利，因為終審法院的裁決帶出基本法解釋的原則，保護香港人的權利是怎去保護，這是關乎全港居民的權利，亦解釋香港自治範圍內基本法的條文，法理上現在可能需要人大再解釋的可能是香港自治範圍內基本法的條文，會否是香港特別行政區法院獲授權的解釋權被奪回？這是值得深思的問題。

最後，是剝奪既得權力的問題 accrued right，這些人的居留權經過終審法院的裁決而獲得確認，因為他們的資格已經解釋得很清楚，他們的資格在 1997 年 7 月 1 日已經有，現在這樣做我覺得是剝奪他們既得的權利，亦構成很嚴重的壞的先例，特別行政區政府如果覺得履行基本法時，對一些個人的權利或者給不到的話，倒不如叫中央政府剝奪。現在香港特別行政區政府因為貪方便，有可能使香港法治蕩然無存。我剛才來之前亦在電視上見到之前幾位學者和張健利資深大律師講過這些問題，我同意現在香港的法治和法制的完整性及誠信是核心問題。現在來講，一個很大可能是香港政府要求再解釋便會斷送法治。斷送法理，便會斷送自治，現在我覺得這群住在大陸的香港人，他們需要的是“大家的接納和支持”。這個字眼出自我來立法會途中在一架巴士上看到一句口號：“大家的接納和支持令我生活更有意義”，當我看清楚後，這個巴士廣告不是講這群住在中國大陸的香港人，而是講精神病患者，我覺得這是一件很悲哀的事，我想講的暫時是這些。

主席：

多謝你羅先生，接著第二位是馮華健資深大律師，馮先生。

馮華健資深大律師：

多謝主席給我機會發言，我其實今日來沒有準備任何陳詞，但我可以很簡單用五分鐘講一講我的立場，其實我的立場在星期三早上劉兆佳所主持的電台節目已講過，處理我們現在面對極大挑戰的問題，其實有 3 個合法的渠道。第一，由香港法庭或者終審法院在類似案件作出解釋，第二是由人大常委解釋基本法，第三是修改基本法，其實很簡單，3 個渠道都是合法和合憲的，3 個行動採取哪個是最佳，其實可以講是一個政治因素來解決問題，首先，法庭或終審庭再解釋的話，我相信這個渠道其實不是太理想，亦不太實際，為什麼呢？因為第一，你要找類似案件去到終審庭作出解釋，同時，亦需要一段時間，我相信就算有類似案件出現,亦需要不少於 18 個月時間才去到終審庭再作出解釋，同時，香港法庭或終審法院不一定會作出不同的解釋，相反來說，其實作為香港法律界人士，我們根本出發點是希望法庭或者法院將來的判詞會與過往判詞的論點是一致的，這是符合邏輯或理性的立場，所以你說倚賴這渠道其實我覺得不太實際，同時沒有保障會解決到這問題，我相信如果等到 18 個月才有解決渠道亦不實際。

第二個渠道是人大常委解釋，我亦知道香港法律界人士中，或者法律界外亦有不同意見，對解決方式有保留，甚至有些人表示這會破壞香港法治精神，或者損害香港司法機構和法院的獨立性，我相信這個看法有少許井底之蛙的角度，為什麼呢？因為這看法表露出我們對基本法運作和對一國兩制的構思缺乏認識，因為以前香港作為單一管轄區的時期，其實我們認為我們是普通法管轄區，由法院解釋法律，由法院表達法律意見，今時今日我們亦保留這制度，但涉及憲法問題有點複雜，為什麼呢？因為香港不是獨立國家，不是獨立立權國，相反是另一個主權國的一個特別行政區，所以我們的憲法，香港的基本法，不單作為香港特別憲法，亦作為全國性法律的一部份，這情況下我們亦知道基本法受到人大常委解釋管的管轄，基本法第一百五十八條亦寫得很清楚，基本法解釋是由人大常委所擁有，但人大常委在訴訟當中，將這個權授予香港特區法院，讓香港特區法院可以運作，但人大常委始終保留解釋權，只是他們的解釋無可能影響以往法庭的判詞，這情況下我們亦知道全國憲法亦寫明全國性法律解釋權是由人大或人大常委所擁有，在法律眼光中，我作為律師我認為行使這個權力是絕對合法和合憲，亦可以這樣做，當然這個渠道並非完全無牽涉任何代價或任何冒險之處，當然有人認為破壞香港司法獨立等，同時似乎與香港法律制度或香港法律的傳統有些出入，但如果想深一層，我們知道人大常委對我們憲法的解釋，即對香港基本法的解釋，亦是香港法律的一部份，因為根本我們的憲法寫明是這情形，即是第一百五十八條，所以無人可以說這是違法，長處當然是快速解決，即時一兩個月內希望可以有清楚立場走出來。

第三個渠道修改基本法，這當然亦是合法合憲的渠道，因為基本法亦有條款寫明怎去進行修改基本法，但採取這渠道並非完全沒有代價，這渠道不是迅速解決的渠道，因為最快修改都要明年 3 月，我們面對這麼嚴重的問題，我相信沒有一個香港人覺得問題是輕微或不嚴重，面對這樣的問題，我們是否可以等候 10 個月才處理，這是第一個問題。第二個問題是，修改基本法需要港方人

大代表的三份之二的票數支持這個動議，亦需要香港特區立法局三分之二的票數及特首的認可，可能這點是最簡單，需要特首的認可。但最終都要得到全國人大三分之二的支持，照我理解，任何一個因素，三分之二票數港方人大，三分之二票數的香港立法會，三分之二全國人大票數，都不可以保證一定有。相反來說，其實照我所理解，在不同方面有很大意見，可能我們達不到三分之二票數。

但回講我剛才講那點，就算達到都要拖長時間，拖長時間其實對香港治安，社會運作，運輸，教育，醫療，住屋方面有很大壓力，我相信這個問題莫講香港，沒有一個社會面對一個問題會等候 10 個月才處理，所以這也是代價之一，面對一個問題，如果你講排除了法庭再次解釋這個渠道，剩下人大常委解釋或者修改基本法這兩個渠道來採取，我覺得如果我們面對這問題，不如我們別用解釋渠道，我們只用修改渠道，似乎我們面對問題一雙手被綁著，考慮一個渠道，如果接受兩個解決方式都是合法或者合憲，我認為香港人或者香港社會值得考慮兩方面作一個衡量，我今日不是慫恿推薦一定要解釋而不要作出修改，我只是作出個人意見，提出兩個渠道讓大家考慮，但我最終結論是，從法論觀點，我認為兩個都是合法合憲的，至於採取哪方面行動是一個政治因素以及社會因素，多謝。

主席：

多謝馮先生，接下來到劉教授。

劉兆佳教授，中文大學亞太研究所：

多謝主席，我其實就這個問題斷斷續續發表過意見，不過今次藉這個機會希望有系統地講，我可能要用超過 15 分鐘也說不定。各位，1999 年 1 月終審法院就港人子女居留權判決，產生了頗為嚴重的法律混亂局面，這判決的後果之所以嚴重，因為他實質上推翻中英聯合聲明對香港人作出的一些承諾，偏離基本法的立法原意，以及牴觸全國人民代表大會在香港居留權問題上的立場，這個判決所造成的法律混亂，不單在香港出現，亦造成香港與內地在香港居留權定義上的分歧，形成內地對某些人士重門深鎖，香港則對他們大開中門的局面，這情況的存在不單使香港與內地難以合作，安排港人在內地所生子女有秩序來港定居，亦容易引發內地人士來港偷渡潮。可以講，終審法院判決所引伸出來的問題已經不再局限在香港，這些問題已成為全國性問題，因此我們必須從整個國家的角度來面對問題，堅持以香港本位的角度來看這問題是行不通的。

就香港來講，終審法院的判決在相當程度上削弱了香港居民對法治的信心，以及對終審法院的權威。作為一個新生的事物，終審法院的權威尚未確立，因此這判決使它在樹立權威的過程中遭遇重大挫折。你可以想像如果全面執行

終審法院的判決，在未來相當長的日子中，由執行這判決所引發出來的種種負面社會經濟和政治後果，很有可能使香港人長期對終審法院抱怨，長遠地不利於終審法院威信的確立，從而亦損害香港居民對法律的尊重。因此快速處理好由終審法院判決所引發的各種實際問題，對維護香港法治的根基是有必要的。

終審法院何以會作出一個如此出人意表的判決？我想原因是多方面的，根據個人觀察，這件事情反映香港法庭對處理憲法性問題經驗尚淺，他仍處於學習及摸索的過程中，在終審法院裁決之中，基本法的歷史背境、基本法的立法意圖、中國憲法的原則和精神、中國政府對香港的政策、香港的社會狀況、及判決所引發的種種後果，顯然在判決中並未受到充份的重視。換句話講，終審法院沒有充份了解基本法的複雜性，即是說它既是中國法律又是香港法律，既是法律文件又是政策文件，既帶有大陸法系的性質又有普通法系的性質。我發覺在其他具有成文憲法的普通法地區，類似的複雜考慮在法庭的審訊過程中佔有重要地位，雖然終審法院的判詞具有嚴密及自成體系的法律推理邏輯，很可惜它的結論造成與基本法立法原意背離的後果，如果這個處理方式繼續下去，我擔憂類似事件將會陸續有來。

既然終審法院判決與基本法立法原意不符合，顯示它無正確解釋基本法條文，所以要改變因為這個判決所產生的全國性法律混亂狀況，消除這個判決所引發的各種負面後果，以及重新挽回各方面對香港法治以及終審法院的信心，其實辦法只得兩個，一個是由終審法院自我糾正，一個是由全國人大常委會對基本法進行解釋。我的看法是，要求終審法院自我糾正這個辦法並不可取，即使它願意自行成立機制作自我糾正之用，這樣做無可避免都會嚴重損害它的權威，而且這樣做都需時甚久，而他的最終結果亦難以確定，再者即使他願意這樣做，而且它的自行糾正亦缺乏追溯力，因此對於解決問題實際作用不大。因此由人大常委會對基本法作出解釋，並重新確認香港特別行政區籌備委員會在 1996 年 8 月 10 日所通過關於實施中華人民共和國香港特別行政區基本法第二十四條第二款的意見是唯一合理的、可行的、快速及徹底的解決辦法。

我注意到有部份人，特別是法律界人士，非常抗拒由人大常委會解釋基本法，認為這會嚴重削弱終審法院的終審權，甚至引發憲制危機。這種意見我不敢苟同，因為它有很大的誇張成份，但我卻充份理解反對者對維護終審法院權威的意向，以及欣賞他們對法治的重視。我曾經仔細研究反對者的論據，他們大抵上都沒有否定根據中國憲法和基本法，人大常委會有權對基本法任何條文主動地及被動地作出解釋，所以反對人大常委會解釋基本法的原因，其實主要是政治性原因，只是認為國內法治程度偏低，對人大常委會缺乏信任，以及將這機構視為政治機構，而不是一個兼具法律權力的最高權力機構的常務委員會。

另一方面，反對者其實是從香港本位角度看問題，而忽視人大常委會所負有確保基本法在香港的切實實施的最後責任和權力。如果以人大常委會對基本法進行解釋來解決問題是合法的話，即是反對者的憂慮是否有根據呢？在現時

政治氣氛下，人大常委會對基本法進行解釋，的確會招惹一些批評，認為這樣做反映中方損害香港的高度自治，但我看反對者的憂慮其實是過份的，理由之一是終審法院判決現在備受質疑，而各方面對他的判決的支持度有限；第二，各方面大抵同情香港所面對的人口壓力，以及由此衍生出來的問題，因此不會對這個做法深加責難；第三，全國人民代表大會對香港居留權問題早有立場，人大常委會解釋基本法其實只不過是重申全國人大原有立場，因此不可以視這個做法為中方隨意解釋基本法以達到不可告人的目標；第四，這個做法會得到香港人普遍支持，因此各方面亦不會視這做法為中方做了一件違反港人意願的事情；最後，回歸以來中方未有做過損害香港自治的事，各方面都明白到人大常委會是在極不願意情況下才採取行動，可以講終審法院判決使中方亦無辜成為受害者。

最後我想指出一點，終審法院判決所引發出來的憲制和法律爭論，對一國兩制方針的實踐其實有建設性作用，這些爭論使人更明白到只有在內地和香港相互尊重和信任情況下，一國兩制才有可能成功，終審法院判決事件無論用哪個方法解決，短期內肯定沒有贏家，肯定全部都是輸家，但由於這個判決所產生的問題只有在內地和香港，以及中央和特區共同努力下才可得以解決，香港居民對一國的向心力肯定會有所提高，可以說是這件不幸事件中一件可以聊以自慰的事，我發言完畢。

主席：

多謝劉教授。有 14 位同事舉手發問，我在此劃條線，每個人只准問一條題目，然後別問跟進，如果有時間跟進當第二輪，我相信今日在座第一隊嘉賓可能到最後都想講話，我會留到最後的時間看他們有什麼東西講，楊耀忠議員。

楊耀忠議員：

多謝主席，我想問關於基本法中審查違憲權應該在於人大常委，換句話講如果特區政府或者任何機構，假使他違反基本法，人大常委會可以做事嗎？可做什麼？譬如就今次終審庭如果真的違反基本法，人大常委會可否做些事情？

主席：

哪一位答？馮華健先生。

馮華健先生：

我認為這樣，第一百五十八條講得很清楚，基本法解釋權，最權威性的解釋權其實放在人大常委，如果你說特區法院在某方面違反基本法，我相信人大常委有權糾正。我給你一個例子，香港法庭或者終審庭也好，它處理涉及基本法訴訟問題中，它第一個要考慮的問題，是這個問題是否放在香港特區高度自

治範圍之內，如果不是，它需要終審法庭未作出最後判詞前，邀請人大常委作出解釋，但考慮這個問題是否放在高度自治範圍之內，最初由終審庭自己決定，有 3 方面問題放在我們高度自治範圍之外：國防、外交，以及中央地方關係這三點，是香港特區無權自己處理，假設有個問題涉及中央地方關係，但終審庭認為這問題其實我們認為是我們高度自治範圍之內，所以它不邀請人大常委作出解釋，而自己作出解釋，如果它這決定是不是涉及中央及地區關係，而這決定是錯誤的話，人大常委可以用它的解釋權去糾正，同時我們亦知道根據中國憲法和中國法律規定，人大常委作出解釋是毋須有一個人，或者有一個機構，或者一個政府申請才可以作出解釋，人大常委可以自行解釋，所以這方面它保留最終權威性的解釋權，當然大家亦不希望假設香港法院或者終審庭在這問題中作出錯誤，人大常委立刻會採取任何行動，但如果你問一個技術上法律問題，人大常委是否有權這樣做，我意見中我覺得它有，根據基本法規定，根據中國憲法規定。

楊森議員：

劉教授。

劉兆佳教授：

其實我覺得整件事法律和政治糾纏不清，為什麼呢？剛才楊耀忠議員所提的，如果根據中國憲法全國人大是全國最高權力機構，它的常委會負起這個解釋，即負起確保法律得以實施以及澄清法律疑點的重大作用時，再加上它基本法內並沒有放棄自己解釋基本法的權力，只是授權特區終審法院和其他法庭可以解釋基本法。因此如果它覺得有需要它可以出來解釋，只不過政治上它可能覺得會有問題，事實上因為政治有問題，我覺得它才遲遲不採取行動。嚴格來講，如果從各方面跡象看來，我看它的立場是它認為終審法院判決不符合基本法，嚴格來講它應該在 1 月份判決出了之後馬上走出來解釋，履行它維護法治的責任，很顯然它又從政治角度考慮問題，因此它不會走出來，甚至去到今時今日可能要應香港特區政府或者香港人的邀請它才願意，實際上當然反對它這樣做的人又相當程度是看政治問題，到現在整個問題在法理上我覺得它可以出來解釋，但政治上它又有顧忌，香港各方面又有顧忌才造成現在目前局面。

楊森議員：

羅先生有否補充？

羅沛然先生：

今日我受國際司法組織香港分會代表，我獲授權規限並不包括一概而論，我自己主要講對於國際司法組織香港分會的立場和聲明內容，在這一般性問題下，我在授權所限，不作回答。

楊森議員：

張健利先生，你要最後待我們完畢後，因為今日基本時間是他們 3 位，到最後我會給你少許時間回應，好嗎？這會較好。何俊仁議員。

何俊仁議員：

謝謝主席。其實本來的問題我想問馮華健先生，不過聽了劉兆佳教授，我忍不住想將問題問劉教授。我剛才聽到劉教授覺得終審法庭對憲法的訴訟處理經驗不足，所以認識有些膚淺，其實我很少聽到社會學者這樣批評一個法庭，不要緊，每個人都有批評的權利，但劉教授提到終審庭去解釋基本法時不了解中國憲法，又不了解基本法作為中國法律的特質，中國對香港政策不了解，整個政策後果不理解，我想問劉教授，以他的理解，一個法庭解釋法律時它採取的方法是否應該有些法律原則呢？這點非常重要，因為我們法庭良久以來解釋法律時有很多方法學，其實每個律師第一件事要學這點，我想講完這點，如果看完這些，是否意味法庭應該是政府的工具？因為政府最清楚它的政策目標要達到什麼，它是最有利了解政策後果是什麼？法庭是否要做這種工具？

楊森議員：

夠了，我不想你發表演詞，因為我們要利用時間，劉教授。

劉兆佳教授：

我了解何議員意思，雖然我自己讀社會學，但在整個基本法起草過程中我都被迫要讀所謂憲法的書，被迫參考其他地方憲制，因此，我看來看去，對西方憲制法庭又好，對美國最高法院又好，以至日本憲法法庭都好，當你處理憲制性問題，我現在不是講普通法律，普通法律我不敢與何議員拗，但憲制是什麼東西呢？實際上是社會中各種力量互相互動之下產出的一種共同社會政治、經濟、文化綱領來的，實際上是一種社會意志的體驗，為什麼我這樣講呢？因為我看過終審法院判詞，亦引伸到其他法院的憲法法庭怎樣處理憲制性事情，他們的確在法律原則容許下去考慮各方面因素，特別包括立法意圖，這些是我個人得到的處理憲法的經驗。但問題是這種經驗如我剛才所提到終審法院並非完全沒有理會，我只是說他似乎考慮得不太足夠，我不是說他沒有理會，但問題是現在情況是先前廣義屬於香港憲制架構一部份所謂中英聯合聲明，人大對居留權的立場，諸如此類，這些如果從廣義政治憲制架構來講不可以完全不給予應有地位，我純粹是講個人對處理憲法慣常做法的觀感。

楊森議員：

張文光議員。

張文光議員：

主席，我想問馮華健先生，馮華健先生說香港是中國一部份，請人大常委解釋基本法無人說他會違反基本法，而且這是政治決定，我想問馮先生，基本法最重要一個基礎，寫在總則第二條，就是全國人大授權香港有高度自治，包括獨立司法權。如果我們今日可以將中央已經授權給香港的司法獨立權，包括終審法院解釋自治範圍條款的權力送回中央人大，用這個邏輯，日後是否可以將中央授權給香港的高度自治權力亦送回中央？或者中央可以收回香港高度自治的權力？如果馮先生說這是政治決定，你認為這政治決定是否明智並且符合香港長遠利益？以及你叫香港人別做井底之蛙，你會否將香港人掉進一個更深的中國管治的大井？

楊森議員：

馮先生。

馮華健先生：

我相信未考慮到政治因素之前，我們要先弄清楚法律基礎，剛才講過，法律基礎中我們看到基本法第一百五十八條寫明解釋基本法的最權威性權益放在人大常委，這點沒有人會否認，首先這是基本出發點，所以如果我們今日主張送回這個解釋權給人大常委，這講法可能有些錯誤，因為其實不是我們送回給人大常委，根本這個解釋權人大常委一向擁有的，以及至到今日亦是這立場及原則，不是我們送回給人大常委，是人大常委一向擁有，可以隨時行使，這個是我們法律一部份，即是香港基本法一部份，亦是全國憲法一部份。我剛才說政治因素是什麼？你有兩個解決難題的渠道，兩個都是合法，兩個都是合憲，現在考慮因素不是法律因素，在我理解中，因為現在不是一個渠道合法一個非法，用法律分析去決定採取哪個行動。相反來講，如果兩個渠道合法合憲，用不是涉及法律因素去考慮是最佳，我的意思這樣。所以我剛才講香港人不該把自己當成井底之蛙，我用這角度來看，我的意思是因為基本法只實施 22 個月，香港特區亦只實施這個時間，之前 156 年我們是英國殖民地，如果你說香港人或者香港司法人士是否真正熟悉基本法運作或者熟悉特區運作亦不出奇，亦需要一段適應時間，回看其他國家或者司法管轄區，新成立後的經驗大家都看到，沒有一個社會是一成立之後便大家很清楚制度的運作，亦是學習中或摸索中，這需要一段時間，在學習或摸索中，我覺得我們要考慮到香港這個司法管轄區不是單獨自己運作，亦在憲法問題中，是絕對涉及國家的運作。

主席：

鄭家富議員。

鄭家富議員：

主席，我的問題亦想問馮華健先生和劉教授。我主要希望大家兩位表達看法，第一百五十八條第三款，因為我理解在字眼上，如果請中國人民代表大會常委會解釋時兩個最重要句子，就是"本法"，即是基本法，"關於中央人民政府管理的事務"，或"中央和香港特別行政區關係的條款進行解釋"，這兩個重要句子。回看基本法，如果你說中央特別行政區關係的條款在第二章，而中央人民政府管理的事務在第二章包含了好幾條，特別是第十三條的外交，第十四條的防務，第十八條的緊急狀態等，於是在我們現在主要問題，居留權問題在第三章，居民的基本權利與義務，為什麼你們兩位覺得第一百五十八條第三款要求人大常委解釋的事務？我們現在最爭議的問題是在人大常委有權這樣做？因為我所提的是第二章中主要講我們與中央政府關係，以及中央人民政府管理的事務，如果你們都覺得我們現在爭議的問題都可以拿去人大常委解釋的話，請你給我們意見究竟現時基本法內容下還有什麼你認為人大常委可以有這個權利？多謝主席。

主席：

馮先生，然後劉教授。

馮華健先生：

我想第一百五十八條第三款是講特區法院訴訟中如果涉及中央地方關係，或者涉及國防外交問題，終審法庭或香港法院未作出最終判決前，它要邀請人大常委作出解釋，但這只是一個解釋的渠道，可以這樣講，因為除了香港特區法院訴訟中，還有很多非涉及訴訟問題，人大常委是擁有最終或最權威性的解釋權，所以你回看第一百五十八條第一款說，解釋基本法是人大常委所擁有的，第二款說人大常委授權特區法院在訴訟中解釋基本法，所以在非訴訟中，人大常委擁有這個解釋權是一個基本原則，所以我們不應想第一百五十八條第三款已講完解釋或者引用解釋權的渠道。所以今時今日，大家考慮的問題，不是現在考慮終審法院或香港法庭是否需要邀請人大常委作出解釋，現在是考慮人大常委是否應該作出解釋或者我們應該修改基本法，今時今日的論點完全不涉及第一百五十八條第三款的渠道。第二點我相信，我亦想回應內地與特區之間的移民問題，很多人認為是一個涉及中央地方關係的問題，這不單是香港人的意見，我可以講有不少國際有聲譽的憲法專家，包括美國的憲法專家，同樣有這意見。我今時今日這樣講不是要批評終審法院的判詞，亦不需要我們這樣做。相反來講，我們作為香港人，我們在法治社會生存，我們應該尊敬和尊重終審法院判詞，但現在講是怎樣克服面對難題，我相信我們現在不是回看終審法院判得對或錯，或回看今時今日我們是否不可以用解釋的渠道來克服這個問題，我相信用解釋渠道是絕對合法和合憲的。

主席：

劉教授。

劉兆佳教授：

聽完他講這麼多，我只能補充少許。我自己看第一百五十八條最重要是第一款，“本法的解釋權屬於全國人民代表大會常務委員會”，即是說整個基本法解釋權屬於全國人大常委會，但同時它又給予授權香港終審法院解釋涉及香港高度自治的條文，但這授權正如我剛才提過，並非授權終審法院後，它便放棄自己解釋權力，也不一定要終審法院提醒它解釋時它才有權作出解釋，事實上說到底現時我們出現憲制混亂和問題，它是否有這個責任，有否需要出來作出解釋及予以澄清？所以基本上整件事情來看，至低限度我希望，我們面對一件歷史上罕有的事情，別因為這些事情出現得越來越多便老是要他出來解釋便會令人覺得基本法與原先設想有出入，但我其實由頭至尾希望這件是極奇罕有的事情，既然這情況下只能用具體態度處理具體問題，說到底在合法情況下，怎樣可以解決這問題而恢復各方面對香港法治以及終審法院權威的信心。

主席：

陳婉嫻議員。

陳婉嫻議員：

當我們講“一國兩制，港人治港，高度自治”，我覺得我們大家真的要互相尊重，所以我對剛才張文光議員講如果這樣便會掉入中國大井，我覺得這不好，不好的原因是我覺得實在中央政府過去一段很長時間很尊重香港人，它亦很克制自己處理，不過我對馮先生剛才講的井底之蛙有不同看法，其實我們大家都算在摸索一國兩制港人治港，包括法律界人士，我覺得現在我們的困難點是什麼呢？主席，我的問題是，我們的困難點正如劉教授講，因為現在我們有兩個法區，我都想對張先生講，我們有兩個法區，如果按照中國來講他覺得無問題，他後來發覺二十四條的問題亦通過籌委作出處理，不過當終審庭判決時沒有看這些，當然我們沒有苛求終審庭要看，但客觀是這樣，如果出現問題，我想對張先生講，我們完全可以好像立法會有關人體器官的問題，我們當時發覺審議上主要 focus 看什麼呢？是有關活人人體器官買賣，所以整個審議都看這個問題，我們疏忽了當一個人昏迷時怎樣？我們沒有看到，我們自己後來知道出問題後，我們自己通過政策修訂我們的法例，由我們香港的立法會來做修訂，我想對張先生講，這個容易得多，但如果問題牽涉另一個法區⋯

主席：

不如問問題吧。

陳婉嫻議員：

因為複雜在於人大覺得它沒有事，它現在告訴我們它沒有事，你怎做是閣下的事，它可以不理我們，所以我想有問題問劉先生或馮先生，面對這兩難，我很擔心如果要修改基本法，因為人大或中國人大，他們覺得毋須要修改，我們動議了修改的話，便需要牽涉三分之二，怎辦呢？時間可以一拖再拖，剛才馮先生比較樂觀，我則有擔心，當我們站在我們普通法角度解釋，我們力爭時，你同樣要看中國怎想我們？都不關它事，你現在要它做修改，我覺得這是一個問題，我想問劉先生，到底在這問題上如果再解釋在中國法律上有否一個法律效果？另外我亦想問，剛才劉先生講人大只解釋人大原有的立場，我不太明白是什麼意思，你是否指人大原來已經解釋了，還要解釋什麼？你是否意味人大連解釋也不做呢？這都是我的擔心來的，因為我們建立兩制，你別只想我們，也別只想對方，這才公道。

主席：

或者劉教授兩個問題可以由你解答。

劉兆佳教授：

我不知可否解答得到，不過試一下，首先後面問題即是說解釋都是實際重新確認他原來對居留權的立場，我考慮到 1997 年 3 月全國人民代表大會通過接納籌委會就有關第二十四條第二款的一些建議，這個接納從我角度看表示人大認為這建議已符合基本法，否則很難想像人大會通過接納一些違反基本法的建議，如果這樣，它的立場已經表明出來，所謂要它解釋實際上是重申立場，令大家比較容易覺得香港終審法院認為違反基本法的入境條例繼續有法律效力，你可以見到我剛才全篇演詞完全無提及修改基本法這問題，我當然無認為不是它不行，而是我覺得法理上及實際上我覺得都不是太行，法理上，我剛才由頭至尾都講，我本身覺得終審法院裁決在法理上很有問題，既然很有問題時即反映出判決對基本法的理解有問題，最簡單做法是由人大常委解釋，不是修改基本法來遷就，更嚴重問題，更實際問題，根據我做的政治分析，我根本覺得無可能香港會提一個修改基本法的提案出來，我想要在三分之二立法會議員，三分之二全國人大港區代表，以及特區政府湊足一個足夠法定人數來提案，而這提案涉及大家同意有修改基本法需要，同意修改基本法內容，同意修改基本法字眼，如果要這些全部符合得到，即香港才能有提案提出來，這點我覺得無可能出現這情況，此其一。第二，照我分析，中方雖然無表明他的立場，但他的立場通過各方渠道已相當表達清楚，肯定不會接受修改基本法這點，原因很多，第一他認為基本法沒問題，第二他可能覺得這樣做即是對基本法不尊重，動不動就修改，尤其是中國自 1949 年以來已換過幾部憲法，如果動來動去會令人

覺得憲法性的東西完全沒有尊嚴，這當中可能有個情意結。更重要的一點由現在到明年 3 月就算讓你修改得到，這中間階段由於這個修改所引發的社會爭論和社會矛盾對立，除了令到香港人內部產生嚴重分化外，更會挑起香港人以及內地新移民的矛盾，這樣做對香港穩定又是否有好處呢？我是從不同角度去考慮。

主席：

劉慧卿議員，李柱銘議員。

李柱銘議員：

主席，有鑑於一，由美國深造回來的馮華健資深大律師，提過用井底之蛙來形容可能不同意見的人，包括小弟在內，有鑑於可能他認為自己是雲頂之蛙，但雲頂是一個著名的賭場，有鑑於在這麼嚴肅的憲制問題上，我們不想在政治賭場上賭一局，我亦想提出一個問題，不知馮先生會否認為，就算我們認為接受人大常委在基本法第一百五十八條第一款的解釋權是無限制的，但當終審庭在一個特區自治範圍內的條文已經作出終審判決，如果現在再由人大常委會就同一條條文重新解釋，是否會傷害到我們終審權以及司法獨立權以及一國兩制？

主席：

馮先生。

馮華健先生：

我想這樣看，其實很多時在一些單一司法管轄區之中，或者單一國家體系的司法範圍內，如果法院作出的判詞引致社會動盪或社會面對很大問題，通常來講，處理克服這問題是用修改法律方式，修改法律亦是針對這個法庭判詞，可以講絕對是推翻，我們亦知道有個基本原則，通常修改法例的後果不會影響原先的判詞，舉例，如果刑事訴訟中某些被告人透過他們的律師代表或大狀利用法律罅來爭取利益，然而他們勝訴，但稍後政府透過立法機構通過法律來修改，即收回法律罅這個渠道，這亦是一個很正常合理合法合憲的行為。你說我們修改基本法，如果單用這渠道，假設我們考慮修改基本法的渠道來克服這問題，亦是針對法庭判詞。解釋基本法是一個大家都知道是一個特殊渠道，怎樣特殊？因為在其他普通法管轄區沒有這樣一個渠道，為什麼香港有呢？因為香港司法管轄區不是單一，而是我們自己獨立運作的司法管轄區，同時，我們亦知道除了香港是中國一部份，一國兩制的構思是歷來無先例的，所以在這情況下，我們去處理問題，肯定有兩個渠道，就是解釋和修改，而不單只是一個解決渠道，而解釋渠道在基本法第一百五十八條講得很清楚，所有人大常委的解釋，假設它真的作出解釋是絕對不會影響以往判詞，即是用我剛才例子來分析

，刑事訴訟勝者克服法律問題，稍後立法機構收回法律罅，亦不可以講這樣做是破壞司法獨立，相反來講，如果面對這種問題，政府或者任何立法局議員不動議修改，可以講這是違反社會或者選民授權給他的責任。

主席：

劉教授。

劉兆佳教授：

我剛才提過我很欣賞法律界人士對法治的執著和對終審法院權威的重視，這點我已經有言在先，不過從我角度看，現時我們面對情況是我提過的不幸事件，無論怎樣處理，包括完全不處理，我們全部是輸家，包括終審法院在內，剛才我提過如果完全不處理，這判決所引發出來的實際效果仍然會令香港人對終審法院不滿，如果處理的話，其實講來講去都是修改和解釋，無論修改和解釋也好，如果最終後果，實際上都是不想執行終審法院的判決，仍然是對終審法院權威造成重大影響，所以實際對我來講，不同方法的選擇其實只是程度上分別，而不是本質上的分歧。

主席：

李永達議員。

李永達議員：

劉教授講過他覺得國內有些人看法，修改基本法不是太嚴肅，對基本法不是太尊重，不過好在劉教授都補充其實憲法都修改過很多次，我們不可以這樣用兩種標準講。我想問的問題主要有關解釋基本法，即第一百五十八條，人大常委會做時，最「衰」我不是太知道程序怎做，我不想用意願或者估計問題，我想用法律角度問兩位，馮先生和劉先生，我想問人大常委會解釋在憲法或人大組織法有否任何限制？限制到哪？我擔心如果這限制是很少的話，其實解釋和修改沒有甚分別，可以做到很大幅度的解釋其實和修改沒有分別，以及我想多問一點，關於人大常委會進行解釋權時，它有否在法律規定上，無論憲法或組織法要它一定要有諮詢程序？有無？如果沒有，它怎樣做到它修訂本身與社會或國內的人的看法有反映在過程中？

主席：

不知哪位想先答這題目，馮先生抑或劉教授？馮先生。

馮華健議員：

我想這樣講，我不是中國法律專家，但似乎梁美芬教授在場，我相信她可以稍後協助我們回答技術性問題，指人大常委解釋基本有否限制或者有否其他保障等。照我理解，人大是全國的權力中心，可以這樣講，人大亦是最有權威性解釋法律，這些法律包括基本法，我們的基本法亦容納這個大原則，在一百五十八條第一款是這樣做，所以這渠道採取的話便可以行使，但你說它未解釋前有否明文法律規定它要諮詢任何一方，我回答不到這問題。

主席：

劉教授有否補充？

劉兆佳教授：

我這樣講，因為我更加不是中國法律專家，但我以前亦看過有關材料，有過這例子，如果我攪錯了，梁美芬可以糾正。當然涉及憲制性條文，人大常委會解釋當然有受限制，因為當涉及這麼關鍵的東西一定要全國人大處理，但回看第一百五十八條基本法，反而看不到有這限制，因為基本法在全國法律體系中只是一條普通法律來的，只不過對香港來講，被人認為是小憲法，當然小憲法這個字在國內有些法律專家相當反感，憲法是憲法，不是憲法便不是憲法，何來大小之分？所以這個看法，我自己看，如果它落實具體人大常委會對基本法的條文解釋有否限制？我看應該法理上無，但仍然有，因為基本法從何而來？基本法其實貫徹中英聯合聲明中中國政府對香港的政策，即是說就算人大常委會怎解釋基本法也好，也不可能不理會中英聯合聲明中中國對港政策的原則和精神，從我角度看它的限制在此，並非它對基本法條文解釋的限制會受到相當大的約束。

主席：

或者這裡請梁教授向我們提供技術性的意見，你現在變了終審庭，個個都問你。

梁美芬教授：

別客氣，兩位專家太客氣，我想在講基本法解釋問題，如果全國人大要解釋基本法，自我界定反為在第一百五十八條第四段找到，它要程序上徵詢基本法委員會。但如果不是基本法，一般中國大陸全國人大如果要解釋法律，它沒有一個規定，要程序上一定要做廣泛諮詢或怎樣，但基本法因為是全國性法律，但由於基本法有很多條文，譬如剛才指出，修改條文或解釋的條文都有特別程序限制，所以基本法在國內其實是一個全國性法律中的特別法，這些特別法中央都會跟隨，在基本法程序中中央都會遵守，所以這個程序，所以剛才講基本法委員會其實有很大角色，因為它在背後都有個全國人大的決議，提到逢牽

涉第十七、第十八條及第一百五十八、第一百五十九條的意見表達，其實是由基本法委員會，它是屬於全國人大常委的一個工作委員會，即反映上去，所以我們香港人的意見很重要，是逼它幫我們反映上去。

主席：

吳亮星議員。

吳亮星議員：

多謝，剛才幾位專家都有很多很好的意見，我亦留意，如果修改時間是否好多時提及的九個月，即多用 9 個或 10 個月的情況？看起來好像不是，不知在座專家是否相同？好像不是一定太有把握，因為就算本立法會議員是否到時討論修改時便很順利？花多少時間審議？甚至要多少會議才能解決呢？同時公眾到時會給多少意見？太多不肯定，所以可行性亦出現懷疑，是否到時一定可以修改的？以及按照我們的想法修改？這點是一個問題，但這是很簡單的問題，剛才好像冷落了羅先生，我想讓羅先生回答我的問題，剛才聽到羅先生很擔心，差不多國際間認為終審庭判決最後用第三者出來，不是他自我更正，而是第三者將他更正，不論用哪方式都好，但被第三者更正，這會產生損害法治，或者無視終審庭判決，我始終覺得法理理據何在？以及是否終審庭永不能被第三者或其他機構用合法渠道加以更正它的判決？

主席：

兩條題目，第一條題目是修改基本法是否最短時間是 9 個月？第二問羅先生的問題，終審法院是否一定沒有第三個機制監管？第一個是否最短 9 個月時間，哪位可以答？梁教授。

梁美芬教授：

在修改基本法程序上，相對來講，比其他全國人大的修正案可能會較難，你會掉過來想，只要有三個部份，如果由特區提出修正案，我們共有三個機構有權提出，如果由特區提出，隨便三分一的人反對便不能提出，譬如全國人大港區代表有三分一人反對，立法會有三分一的人反對，便不能提出，就是這點。

主席：

羅先生。

羅沛然先生：

多謝吳議員的問題，我想現在我們的會議擔心的是，這個解釋的申請是由政府提出。它是這件案中與訟的一方。我們的印象變成是政府輸了案件，它有責任要落實裁決，它接下來要推翻裁決的話，這個是否守法的政府？我有很大的疑問在這點。

主席：

楊森議員。

楊森議員：

主席，我有問題想問馮華健先生，你覺得人大解釋比較快，修改基本法比較慢，但人大解釋後，是否要在本地立法才有法律效力？總不能人大站出來講幾句話開記者會或怎的，是否要香港在本地立法？如果要在香港本立法時間不一定短，因為我看你剛才的講詞說修改基本法比較慢，人大解釋比較快，但如果要本地立法亦需時，我看 97 年你在臨時立法會推薦居留權證時，你說解決小孩問題最徹底辦法是修改基本法，文件是這樣講，但需時，人大解釋亦需時，最快方法是居權證，現在終審庭否決這個，所以我現在問你時間問題，人大解釋是否需要本地立法？如果需要本地立法，其實都需要一段時間。

主席：

馮先生。

馮華健先生：

從一個法律技術性角度來看，我意見是如果人大常委作出基本法解釋，毋須另外在本港特區另外立法支持這個做法，因為第一百五十八條亦解釋清楚基本法的最終權力是人大常委所擁有，所以除非⋯

楊森議員：

但馮先生，當時你在臨時立法會你不是這樣提的？如果向人大尋求解釋需要本地法例支持，這兩個辦法都需時，即包括修改基本法。

主席：

這是當日給我們的 LegCo brief。

楊森議員：

我很記得這個，我當時想你不可以幾個人講過便算，你要放進香港法例，你當時代表政府都講要立法。

馮華健先生：

這個你提到，我忘記當時是什麼情況下我這樣發言。

主席：

當時是 1997 年入境修訂第五號條例草案，給臨時立法會的參考資料摘要的第六段這樣寫上："向人大委員會尋求釋義則要有本地法例支持，這兩個辦法都需時"。

楊森議員：

當時你是律政專員。

馮華健先生：

我想這樣看，可能如果你成立一個習慣，一個立法或者政治的習慣是所有人大的解釋，你亦有本地立法來配合或者支持，這是一個更好的做法，這點無可否認，今次我亦堅持這個立場，但如果你說技術性是否一定要這樣做？如果香港特區不立法，人大常委的解釋是否無法律效力？我相信這樣講是錯的，所以你說技術性人大常委是否可以單獨這樣做，我相信可以，回看第一百五十八條第一款是可以這樣做，同時，如果你回看第一百五十八條訴訟中，假設在一個訴訟中，終審法院面對一個問題是涉及香港特區高度自治範圍以外的問題，國防外交或中央地區關係的問題，終審法院決定要求人大常委作出解釋，人大常委徵詢基本法委員會後作出解釋，這解釋是否無效呢？是否需要等到另外立法局立法後才有效呢？我相信這是不對的，這看法是錯誤的，我不妨想回應一點，頗重要的，剛才羅先生提出如果特區政府今次在終審法院訴訟中敗訴，而它邀請人大常委作出解釋，似乎藐視法庭判詞，應該執行法庭判詞，我剛才已經提過兩點，如果司法機構，法院作出的判詞引致嚴重社會問題，立法機構透過政府或者其他議員可以提出動議去修改這個法律，第二點，人大常委作出解釋不一定需要特區政府去申請，似乎有人以為今次如果真的採取解釋渠道，特區政府便要申請，但照我理解毋須要一定採取這個渠道，第一，人大常委可以自己作出解釋，毋須向任何人申請，第二，香港人，任何一個人如果他的利益受到終審法院判詞有影響，亦可以申請，所以立法局可以申請，議員可以申請，港方人大代表都可以申請，而毋須一定是特區政府申請。

主席：

陳鑑林議員。

陳鑑林議員：

主席，其實我們對法律認識，不管專家又好，執業律師都好，其實都是井底之蛙，這點我很同意，不然怎有得拗呢？當大家在飲不同的井水時，便要飲水思源，有不同解釋。主席，我想了解一下，因為馮華健先生講修改基本法及解釋都是合憲合法，從我個人去看，如果修改基本法，針對條文來講，好像劉兆佳教授所講，如果基本法沒有錯，你叫它修改是一個問題，即使你認為合法這都有問題，所以我想了解，因為馮先生曾經就臨時立法會曾經有過法律辯證，在法庭上有法律驗證，所以我想了解現在經常討論所謂人大常委會給籌委會決定及意見的權力和效力,到底是否有效呢？因為我回看文件除了 96 年 3 月的意見外，其後錢其琛主任在第五次會議作出的報告講得很清楚，就第二十四條第三款都有一個很清楚的解釋，籌委會作出的意見比特區將來落實基本法作為依據，就這點可否解釋一下？

主席：

馮先生。

馮華健先生：

我想如果你說今時今日我們重新解釋基本法第二十四條，假設你說法庭訴訟中有類似案件去到終審法院，由終審法院再解釋第二十四條，如果某方面律師代表提出這個錢其琛的講詞，或取出籌委會的判決，籌委會的表達，提出來呈堂，我相信有渠道可以取得資料讓法庭考慮，並不表示這些判詞或資料是絕對作為法庭結論，不是這意思，但肯定它有權考慮這些資料，反映剛才有人講法庭解釋法律要依照法律原則，這點我同意，要看法律的文字這點絕對同意，但是否法庭絕對不可以考慮起草資料背境資料，我相信這樣看是錯誤，以前我們看一般性法律，以前香港作為英國殖民地無一個民主上的憲法，因為英國亦是獨一無二突出唯一的主權國，是無民主憲法，所以香港作為一個典型英國殖民地，156 年來都無這些概念，所以我們亦無這些經驗，所以以前看法律很簡單地看文字上的意思，但今時今日我回看一般性法律都是這樣，但看憲法文件要用另一個技巧，這技巧需要考慮到背境文件或涉及憲法條文，涉及社會運作這些點，因為一般性憲法文件寫得很抗拒，並不細節，亦無可能寫得細節，回看其他普通法國家或普通法管轄區的憲法文件亦一樣，你回看歐洲大陸司法體系管轄區的憲法亦這樣寫，如果你說法庭單純看文字，絕對不可以考慮背境或有關資料的看法，我覺得這看法是錯誤的。

主席：

多謝馮先生，還有 6 位同事想問，陳榮燦議員、吳靄儀議員、李卓人議員、張永森議員、梁耀忠議員和劉慧卿議員，羅先生還有三、四分鐘便要離開，因為他還有另一個約會，這幾位有否特別想問羅先生呢？如果有我讓他們先問，不准再多人問。沒有，繼續下去，陳榮燦議員。

陳榮燦議員：

多謝主席，本來我的問題想問人大解釋基本法影響法治精神，井底之蛙，引起大家興趣，很多位議員問過我改問其他問題。終審庭判決對重大案件，例如今次內地子女來港案件，是否要徵詢人大常委意見？以及看基本法立法意圖較為穩妥？即是這樣做會否損害終審庭的權威呢？之前有大律師極力反對或建議別徵詢人大常委意見，那麼，立法意圖，譬如終審法庭判決重大案件時，涉及內地與香港關係時，特別是立法意圖，終審法院有無責任去看基本法立法過程？之前又說政府律師無給立法意圖給終審法院，終審法院有否責任自己去看一下然後才判案呢？謝謝。

主席：

馮先生。

馮華健先生：

我想要這樣看，終審法庭或者任何一個法院解釋憲制文件中，是絕對有權去回看立法意圖，但是否有責任是另一回事，為什麼有少許分別呢？因為香港是一個普通法司法管轄區，我們是一個抗辯制度，即是通常雙方訴訟中的代表或發言人或陳詞者，有責任提出資料讓法庭去審核考慮，法庭毋須自己作出調查，因為我們不是歐洲大陸調查制度。大家可能都清楚，全世界所有成熟的司法制度是分為兩類，兩大傳統，一個是普通法抗辯制度，即英美法制度，英國、美國、加拿大、澳洲、新西蘭等，另一個大傳統就是歐洲大陸法調查制，法國、德國、瑞典等國家的制度，所以在他們的制度中，就算當事人不提出問題，他們有權、有責任去作出調查。我們的制度中，如果當事人不作出，法庭不是一定需要考慮，但今時今日的運作是很多時法庭都作出自己的調查，例如美國最高法院的經驗中，他們很多時自己作出調查，因為傳統是一回事，真正運作憲法中，真正運作或解釋憲法中大家都有責任，我這樣說並非批評終審法院或批評香港任何法庭，大家都知道，基本法在我們而言是一個新的經驗，我們正在學習摸索中，大家都希望日後如果碰到這種問題，當事人或者代表律師以及法庭都可以考慮研究這些立法意圖和背境資料的問題。

主席：

吳靄儀議員。

吳靄儀議員：

多謝主席，無可否認在反對特區政府要求人大解釋這件事，大律師公會的聲音是最強烈的，馮華健資深大律師認為這樣做是“井蛙之見”，我想一會或者馮先生可以澄清，究竟他是有意侮辱大律師公會，還是對這成語的輕重有所誤解？劉兆佳教授說大律師公會這樣做是基於政治理由，我不知道兩位有否考慮其實大律師公會代表執業的大律師的出發點，是想維持特區在高度自治一國兩制下的原有法律制度，有否考慮過有這個可能？同時，人大常委會解釋第二十四條時，為什麼它故意避開自治範圍內解釋得到有自行解釋權的範圍？是否想保留原有法律制度？如果大律師公會想這樣做，究竟有什麼地方是違反基本法？是基於自己的政治理由或者井底之蛙的“井蛙之見”？多謝主席。

主席：

第一條是關於馮先生的講的井底之蛙是否侮辱大律師公會，不在此辯論。馮先生是否回答是他自己與大律師公會的問題。第二個問題　馮先生是否想答第一個問題？

馮華健先生：

我想我很簡單，我想沒什麼人會懷疑我現在侮辱大律師公會，所以才發出意見，我只想提醒大家考慮問題中，香港司法制度不是一個單一獨立運作的司法制度，就是這麼簡單，我相信如果有人講，你這樣講是侮辱大律師公會，完全是混淆我的意見。

主席：

劉教授，第二條問題。

劉兆佳教授：

我剛才沒有提到大律師公會這個字，我剛才講有些人反對人大解釋基本法作為解決問題的方法，但同時他們認為這樣做都是合乎中國憲法和基本法，我惴測反對的重要理由可能是政治理由，不信任人大或者認為中國沒有法治，或者認為這樣做會引起外界對香港的批評，這些憂慮我全部認同，有這些憂慮存在。只不過我現在把這件事看成非常獨特罕有的事件，因為牽涉法律混亂以及

整個司法系統權威問題，而又引起社會不同階層的人質疑這個判決是否合法合理，我才認為這情況下，才值得運用基本法和中國憲法中所提供的處理辦法來處理。

主席：

李卓人議員。

李卓人議員：

多謝主席，我想問馮華健先生，我聽完你講後，我很替我這班井底之蛙擔心，因為我們最擔心是地方在於我們身處井底，如果法治蕩然無存的話，老虎隨時可以食我們，老虎指什麼呢？老虎不是指中央政府，是指香港特區政府，就是說如果我們任何市民、"蛙蛙"被侵犯權利時，政府是違法地侵犯我們權利，終審法院判政府輸，然後政府找人大常委去解釋，那麼第三章下所有居民的權利是否蕩然無存呢？尤其我的擔心亦被劉教授加強了，很像你的意思，劉教授講第一百五十八條第二款"授權不代表放棄"，即變成就算人大授權終審法院，並不代表人大放棄解釋權，即是沒有界線，那麼終審法院變成不是終審，是中期的 "中"，隨時人大常委可以插手，如果隨時人大常委可以插手，特區政府犯法時便無人可保護我們，因為兩個都是行政機關，當然你說中央是特區的，人大是一個立法機關,但沒有一個司法機關保護香港任何一個 "蛙蛙"的權利，我希望你可以告訴我們，有什麼保障我們"蛙蛙"的權利，是否全無呢？

主席：

馮先生。

馮華健先生：

我想基本法第一百五十八條絕對不是無界限去分析哪些權利是哪個機構行使，相反來說，那條線劃得很清楚，即是所有訴訟中碰到的基本法問題，是由香港司法機構即是香港法院解釋，這個寫得絕對清楚，例如如果在訴訟中，任何一方提出一個涉及基本法的問題，當時當日人大常委是否立即插手解釋這問題？絕對不是，由法院來做，放在香港法院高度自治範圍內的所有基本法問題，香港法院絕對有權解釋，只是涉及高度自治範圍之外的問題，外交國防以及中央地方關係的問題，香港法院亦有權解釋，直至去到終審法院未發出最後判詞之前需要要求人大常委作出解釋，人大常委當時亦要徵詢基本法委員會的意見，這個界限，我作為一個法律界人士，我覺得基本法第一百五十八條寫得頗清楚。

李卓人議員：

是否無界限？訴訟後是否無界限？因為你說訴訟中有界限，訴訟後是否全無界限？

馮華健先生：

訴訟後的解釋權是人大常委所擁有，這在第一百五十八條寫得很清楚，因為我們制度中，法院的解釋只在訴訟中可以，法院不可以自己主張今日有法律想澄清便解釋，它沒有這個權利，所以在我們的制度中，即普通法抗辯制度中，法庭是較為被動，它需要有訴訟才擁有這權利去運作，第一百五十八條亦寫得很清楚，分界在此。

主席：

張永森議員？不在，梁耀忠議員。

梁耀忠議員：

主席，我剛才聽馮華健先生解釋楊森議員提問的問題，我聽起來聽不到答案，看不到怎能夠自圓其說得到，所以我想再多問一次馮先生，你可否再清楚告訴我們？因為現在最大的論點在哪？很多人說我們不能進行解釋基本法，因為時間太長，無可能，所以找人大最快，不如你告訴我們兩者時間怎樣？如果是人大解釋後要多長時間才可運作？用基本法解釋時時間是多少？大家相差多久？這是第一個問題想問。第二個問題想問，即具體地說，第二個問題想問劉博士，現在你從來沒有提過修改基本法，主要是你覺得是政治問題，而你覺得修改基本法有很大困難，三分之二立法會議員，三分之二人大各方面，你說做不到，其實你是否覺得修改基本法的機制是自綁手腳自食其果呢？造成這個問題是基本法這樣難修改，其實不單今次，將來有問題，修改也有困難，是否從政治上說，基本法需要修改整個機制呢？要全面更改呢？否則以後無用，一有問題便是人大解釋，變成人大解釋來解決問題？是否這樣？

主席：

馮先生，有否一個實質你估計的數字，要人大解釋要多久？修改基本法要多久？

馮華健先生：

我想這問題較為簡單，因為人大常委每兩個月開一次會，全國人大只是一年開一次會，全國人大下次會議是明年 3 月，即 2000 年 3 月，要 10 個月才達到會議開始，至於會議結論如何大家亦無保障，至於人大常委下個月亦有人大常委的會議。我剛才解釋過人大常委解釋在技術上毋須香港立法會立法才生效

，它一解釋便已有法律效力，根據第一百五十八條的條款，所以時間差別是頗明顯的，你說下個月和明年 3 月，差別是 9 個月時間。

主席：

劉教授，修改基本法是否有很大問題？

劉兆佳教授：

梁議員問的問題問得好，剛巧反映基本法本身的吊詭在哪裏，當時基本法希望爭取香港人對香港前途的信心，所以故意令到修改基本法難乎其難，讓你覺得很難修改，我要修改也不行，所以你要相信香港前途，但當時無人預計會出現終審法院判決這件事，所以結果吊詭變成越不想中央插手，結果最後可能都要找它出來幫手，我覺得這問題最可悲可笑。但反過來，我剛才提到不是因為政治原因，我覺得修改基本法不行，我的最基本原因是我認為終審法院判決涉及無正確理解基本法的問題，所以最合乎邏輯的解決辦法是人大常委會解釋，而不是修改基本法，至於政治問題不是完全沒有，事實上根據我的觀察和各方人士的意見，我剛才提出的一點是，我根本不可能想像香港這方面會提得到一個修改基本法的提案，這是我的看法。

主席：

劉慧卿議員，最後。

劉慧卿議員：

謝謝主席，我都想問井底之蛙的問題，我相信馮先生都知道並非單是大律師公會有意見，我相信你指並不單指大律師公會，因為今個星期初好像香港大學有 23 位法律系講師出了意見，現在馮先生給我們的印象，是否如果不贊成修改基本法或不贊成再去找解釋呢？你剛才講他們漠視香港不是單一獨立運作，即是是否不同意見你的意見便叫做井底之蛙呢？你那個字，好似是吳議員講，是很貶低別人，大家有不同意見是無問題的，但你用到那個字明顯看輕別人，覺得你認識的很淺很差，你是否想用這形容詞形容與你意見不同的？以及主席，我想問馮先生，因為他今日不在政府，但我聽聞政府最近頻頻找你問你意見，我想問你現在是否幫政府做事，還是免費提供法律意見給政府？

主席：

馮先生，兩個問題易不易答？

馮華健先生：

我想第一個問題我已答了，我想無人會真正認為我用井底之蛙的字眼是貶低不同意見的人，或貶低大律師公會或其他機構，相反來講，我只想提醒大家，今時今日我們考慮要解決這個難題，是有兩個渠道，不應忽略一個渠道，因為我們以前經驗中，或以前傳統中，我們無碰到這些解決方式。第二點，我今時今日大家清楚我在表達個人意見，完全沒有代表性，我又不是代表任何一個工會，又不是代表政府，政府絕有能力有權自己發表意見，同時照我所知，政府暫時未作出任何結論去怎解決這問題，你說今時日政府找我給法律意見，我亦不知有這些事，照我所知，今時今日我上來是表達我個人所謂專家意見，不是幫任何一方辯論，我前日在電台所講的，今天所議的，不是慫恿大家去走任何一條路，我只是指出兩條路是可行可取的，同時，應採取哪條路是政治因素，不是法律因素，所以法律技術上如果想走任何一條路是無困難的。

劉慧卿議員：

主席，馮先生無答我的問題，答得清楚一點，我不是說你代表政府，當然不是，我是問是否這幾個星期，政府頻頻找你問你意見？這是事實，有便有無便無，現在是政府聘用你，還是你免費提供意見給政府？

主席：

馮先生，這點當然你有權答或有權不答。

馮華健先生：

我相信我應該答這問題，政府無要求我給法律意見，今時今日我又不是受政府委任來發言，照我所知，政府沒有給過我錢，政府有沒有給我錢今日來講話呢？我可以講絕對不是，如果這樣做也很古怪，我亦毋須別人給我錢才表達我的專家或個人意見。

主席：

我都要多謝馮先生和各位給免費意見予委員會。或者這一節未完前，我想給機會頭一節的朋友，看他們有否簡短回應，但時間關係，我希望大家兩三分鐘可以講完。張先生你有話要講？

張健利先生：

是，主席。劉教授用一個字眼，就是"人大只是授權特區"，或者"只是授權終審庭有解釋權"，我很反對用「只是」這個字眼，因為我們全個高度自治制度都是用授權方式，大家都提過第二條，全個高度自治都用授權方式，但仍有一

點，就是第四十八條，行政長官又是人大授權讓他去處理所謂外事務，譬如他明日講. . . . . 因為"只是"授權給我，所以現在便要向中央匯報，或叫人大行使權利呢？以及我聽得很清楚，馮先生講常委可使用立法解釋權，終審庭判案後可以使用，而理論上可以案前可以使用，現在使用這個權利，還有很多接下來的案，我們知道 20 日還有一件案，這案中這份建議都納入文件中，都會提到法庭考慮，所以這點頗重要。

Chairman：

Professor DAVIES. You have three minutes, please.

Professor Michael DAVIES:

OK, just take up some points. I have to be careful because Daniel is an old friend and Professor LAU is my senior colleague at the university. So I will be very cautious here. But Daniel made a point that it only takes 18 months for a reinterpretation to occur in another case. I think out of his list of three, he left out the possibility that the Government would itself enact or propose laws to deal with various problems. These laws will take effect immediately. Presumably the Government will put forth laws to violate the CFA's judgment but there is some liberty under that judgment. The other point Daniel_ I think he said he's merely saying that the final part of interpretation is vested in the NPC. Does this mean that the NPC can interpret in any area at once without regard to autonomy or other Basic Law limits? Can the NPC violate the same limits in the Joint Declaration? I would argue that if so, this makes much out of Article 159 and amendment of the Basic Law. We don't need it. NPC can get on its white horse and come to town when it likes.

We must ask does giving the Government the power to overturn the CFA final judgment conform with the Basic Law? Does such a result for the Hong Kong legal system conform and of course there is the question of the prudence of the government taking such a position? We're going to Professor LAU's comments. He points out how tragic the CFA decision has been, how it's_ really, really bad. And that the public is all concerned. We have to look at why is the public concerned? Why are all these people frightened? And some said we have to blame the government, not the Court of Final Appeal for this. I think this is precisely what's at stake in this regard if we have the NPC and the government overturn CFA judgment. And the people of Hong Kong will have no respect for the courts. And I think we are seeing evidence for this already.

Professor LAU also mentions this original intent doctrine. I'd like to say the original intent doctrine is usually very much a minority view today. In fact, a point is, the US Supreme Court has been rejected because they supported the original intent doctrine. In Hong Kong, it almost tooks as if we want to reel in Basic Law drafters every time we have an issue. Maybe, we should have a special location in

the court for Basic Law drafters to come and give their testimonials every time something comes up. This is not the way it's done. On Mainland China sometimes I understand the NPC or People's Congresses have the power to supervise the courts. But that's not what occurs here in Hong Kong. So I think we have to be very careful about this original intent doctrine.

主席：

梁教授，你有否補充？

梁美芬教授：

基本上沒有。

劉兆佳教授：

可能我剛才講得不清楚，當然我同意從一個整體角度看，全個一國兩制高度自治，即香港獲授權行使高度自治，這是很肯定的，我剛才不是答這麼闊的問題，剛才有個問題由一位議員提出，基本法第一百五十八條的問題，我的理解是，全國人民代表大會常務委員會擁有最後及全面解釋基本法的權力，但它同時授權特區法院可以解釋涉及高度自治的條文，我是這意思。剛才 Michael 的提法是，立法意圖是否少數人所認同而不是多數人所認同？這點我不知為什麼他會有這個結論，根據我由基本法起草過程到聯合聲明製作過程我一直跟進，一直以來立法意圖都相當清楚，目前來說就算不清楚，中英聯合聯絡小組所發表的聲明，以至人大所通過籌委會的建議，實際上將意圖說得很清楚，這肯定不會是代表少數意見，問題是就算在一般憲法理解過程中，亦很著重立憲者意圖，香港情況是我們很多立憲者仍在生，而他們的意見似乎相當一致，他們的意見即使是少數意見，但這些少數意見仍然是值得重視的意見。

主席：

多謝。梁教授，讓你講最後。

梁美芬教授：

因為剛才我忘記哪位議員再問解釋會否有約制，我剛才提到在程序上，其實在內容上，大陸的確司法解釋有少許約制，不可將原有條文全部「變樣」。

主席：

司法？

梁美芬教授：

司法解釋和立法解釋都是，不可以解釋到將原有條文「不同樣」。修改權限較大，修改可以更改條文，始終有少許不同。

主席：

我相信今日特別內務會議到此為止，再一次代表大家多謝今日出席的學者教授專家。Thank you, Professor DAVIES, we'll call this meeting to a close now.

李柱銘議員：

主席，我想問我們會否自己討論？因為…

主席：

先讓主席講完可以嗎？我們今日下午內務委員會時，在“其他事項”我會提出三點，第一點，剛才張文光的動議有人和議，我們繼續辯論，第二點，關於梁愛詩司長，是否到來出席講解上北京後的事，第三，我們有否決定以後怎做，多謝。