立法會
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1999年6月12日上午9時正
政制事務委員會特別會議的逐字紀錄本
Panel on Constitutional Affairs
Verbatim Transcript of the Special Meeting
held on 12 June 1999 at 9:00 am

出席委員Members present:

黃宏發議員（主席)	Hon Andrew WONG Wang-fat, JP (Chairman)
劉慧卿議員	Hon Emily LAU Wai-hing, JP (Deputy Chairman)
李柱銘議員	Hon Martin LEE Chu-ming, SC, JP
張文光議員	Hon CHEUNG Man-kwong
張永森議員	Hon Ambrose CHEUNG Wing-sum, JP
楊孝華議員	Hon Howard YOUNG, JP

缺席委員Members absent:

李永達議員	Hon LEE Wing-tat
吳靄儀議員	Hon Margaret NG
夏佳理議員	Hon Ronald ARCULLI, JP
陸恭蕙議員	Hon Christine LOH
程介南議員	Hon Gary CHENG Kai-nam
曾鈺成議員	Hon Jasper TSANG Yok-sing, JP
楊森議員	Dr Hon YEUNG Sum
劉漢銓議員	Hon Ambrose LAU Hon-chuen, JP
司徒華議員	Hon SZETO Wah

出席議員Members attending :

何秀蘭議員	Hon Cyd HO Sau-lan
何俊仁議員	Hon Albert HO Chun-yan
李啟明議員	Hon LEE Kai-ming, JP
吳亮星議員	Hon NG Leung-sing

列席官員Public Officers Attending :

麥清雄先生 署理政制事務局局長	Mr Clement C H MAK Secretary for Constitutional Affairs (Ag.)
葉文娟女士 政制事務局首席助理局長	Ms Carol YIP Principal Assistant Secretary for Constitutional Affairs
歐義國先生 副律政專員 律政司	Mr R C ALLCOCK Deputy Law Officer Department of Justice
黃慶康先生 高級助理法律政策專員/基本法組 律政司	Mr Peter WONG Senior Assistant Solicitor General (Basic Law Unit) Department of Justice
朱曼鈴小姐 保安局首席助理局長	Miss Cathy CHU Principal Assistant Secretary (Security)

應邀出席人士 Attendance by Invitation :

史維理教授	Professor Peter WESLEY-SMITH
佳日思教授 法律學院 香港大學	Prof Yash GHAI Law Faculty University of Hong Kong
梁美芬教授 法律學院 香港城市大學	Professor Priscilla M F LEUNG School of Law City University of Hong Kong
林峰博士 法律學院 香港城市大學	Dr LIN Feng School of Law City University of Hong Kong
香港大律師公會 資深大律師湯家驊先生 資深大律師戴啟思先生	Hong Kong Bar Association Mr Ronny TONG, SC Mr Philip DYKES, SC

<u>香港律師會</u> | <u>The Law Society of Hong Kong</u>

<u>香港律師會</u>	<u>The Law Society of Hong Kong</u>
吳斌先生	Mr Roderick B WOO
何志強先生	Mr Raymond HO
穆士賢先生	Mr Patrick MOSS

列席秘書Clerk in attendance:

林鄭寶玲女士	Mrs Justina LAM
內務委員會秘書	Assistant Secretary General 2

列席職員Staff in attendance:

馬耀添先生	Mr Jimmy MA, JP
法律顧問	Legal Adviser
羅榮樂先生	Mr LAW Wing-lok
總主任(2)5	Chief Assistant Secretary (2)5

主席：

各位早晨，現在我們正式開始會議。首先歡迎各團體及各界人士今天向我們提供意見，以及歡迎政府代表到來和我們討論特區政府向國務院提請的報告。

本來我們安排首先和各界代表討論，但既然政府有報告，可能大家想先聽一聽，若有任何意見，便可在稍後發言時作出回應，所以我們將兩項議程的次序調轉。我們先請政府簡介政府向國務院提請的報告，再轉請人大常委解釋《基本法》。請局長。

署理政制事務局局長麥清雄先生：

好的，主席，我簡單介紹。行政長官的報告主要可以分為3個部分。報告的第一部分，回顧了香港特區制訂《1997年人民入境(修訂)(第2號)條例》和《1997年人民入境(修訂)(第3號)條例》的立法根據。首先報告指出，此兩條條例的立法根據，是《基本法》第二十二條和第二十四條的有關規定，而這些規定，作為中央政府對香港的基本方針政策，已載於《中英聯合聲明》附件一的第十四節。制訂這兩條條例時，特區政府亦參照了全國人民代表大會香港特別行政區籌備委員會於1996年8月通過的，『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』。

行政長官報告的第二部分說明了終審法院於1999年1月29日作出的判決的內容和所引起的廣泛關注及討論。這部分特別指出，香港特區政府將會採取適當措施，落實終審法院關於非婚生子女的判決。這部分亦扼要說明根據香港特區政府的調查統計和評估顯示，終審法院的判決所造成的壓力，是香港無法承受的。

報告的第三部分，說明特區政府請求中央政府協助。這部分指出，香港特區政府對有關條款的字句、宗旨和立法原意的理解，與終審法院對這些條款的理解不同。由於這事涉及應如何理解《基本法》的原則性的問題，香港特區內部無法自行解決。在面對非常特殊的情況下，行政長官按《基本法》第四十三條和第四十八條(二)項，就執行《基本法》有關條款所遇的問題，向中央政府提報告，並請求協助，建議國務院提請全國人大常委會對《基本法》第二十二條第四款和第二十四條第二款(三)項的立法原意作出解釋。

另外，正如我們在星期四的公布中所述，行政長官的報告提交給國務院時，特區政府亦向國務院港澳辦遞交了一套撮要，這套撮要羅列了社會各界人士就居留權事宜所表達的意見，供中央有關部門參閱。目前中央人民政府已經接納行政長官就居留權問題的報告，並將提請人大常委會，要求解釋《基本法》有關條款。據我們的理解，如果要求解釋的事項列於議程上，人大常委將會在下星期諮詢基本法委員會。人大常委

會將於1999年6月23日起舉行為期約一周的會議，如果它就要求解釋的請求作出決定，將於會後公布。多謝主席。

主席：

多謝你，麥局長。我不知道各位議員有甚麼意見，若大家想於現在先和政府討論，我建議只在短時間內詢問簡短問題，否則，便先行聽取各團體代表和學者的言論，然後再一併討論。若大家同意，我們先請學者和各團體代表發言。

第一位是Professor Peter WESLEY-SMITH。他已於今天提供了一份書面意見，相信大家已經收到。請Professor Peter WESLEY-SMITH.

史維理教授：

Thank you Mr Chairman. As you see I do have this two-page statement, is it necessary for me to read it? This is the submission which I've made.

主席 ：

If you would like to speak briefly on it and perhaps try to summarise it. We've received it just now.

史維理教授：

Yes, in relation to the question of whether there should be some method or mechanism of limiting the Government's resort to the Standing Committee. My view is that there is no objection in principle to that course and I refer to the question which has been suggested by some that "constitutional conventions" be developed to restrict the exercise of that power. I don't think it should be regarded as a constitutional convention but I think the Government could issue a set of guidelines which imposed restraint upon itself which would be perfectly legitimate and which would be a political obstacle to the frequent and ad hoc use of this procedure of going to the Standing Committee. I think that such a measure would be useful because, although as I have stated that in the present circumstances I do not think to go to the Standing Committee is unconstitutional, I think that if there were frequent use of the device that would give rise to a series of questions about the rule of law and constitutionality.

I then suggested in this paper that a better way of providing for restrictions would be by an ordinance passed by the Legislative Council. I realise that there may well be insuperable practicable or political objections to that, but nevertheless that is the approach I would favour. In regard to the contents of such an ordinance, I've not really been able to give that sufficient consideration to make any suggestion. I think it would be a very difficult task but nevertheless I don't think the practical difficulties in the way of that would be insurmountable. And the final point which I refer to in the last paragraph of my submission is that the other method would be to test the constitutionality of any proposed resort to the Standing Committee through judicial

review, and indeed I would hope that judicial review proceedings are being considered in relation to the present exercise. This is an alternative mechanism but it is an expensive one and it would depend too much on the good will and the deep pockets of private citizens. And so my recommendation is that legislation be considered as a means of restricting the exercise of this right.

主席 ：

Thank you very much Prof WESLEY-SMITH. May I now invite Prof Yash GHAI to make a presentation on his views on the mechanism for interpretation of the Basic Law.

香港大學法律學院佳日思教授 ：

Thank you Mr Chairman. I apologize that I don't have a paper, however I will speak slowly so that it would be easy for the interpreters to translate my comments. I like to begin, first of all, by commenting on certain aspects of the Basic Law, to try to put the question that you have asked us in the broad context. The first point I would like to make is the scheme of the Basic Law establishes a political and constitutional system in Hong Kong which is fundamentally different from the political constitutional system in any other part of China. There are various provisions of the Basic Law which demonstrate this. For example, Article 17, which is concerned with the legislative power of the Region, provides that while all laws passed by the Legislative Council have to be sent to the NPC Standing Committee for record, it is only in relation to laws which may cover areas of the Central Government responsibility that the NPC has a power to veto that legislation. And so I am aware this limitation on the power of the NPC does not apply to any other People's Congresses or legislative bodies. Also, of course, Article 18 sets out very restrictively the scope for the application of Mainland legislation. It sets up a procedure so there are both procedural and substantive limitation on the application of Mainland law, and this again does not apply in any part of the Mainland not even autonomous regions which are provided for directly in the Constitution of the PRC.

And of course, we have discussed in the previous section the role of the courts in Hong Kong, their power to adjudicate finally on their own questions of law, the powers of the courts to interpret the Basic Law. There are extraordinary provisions giving power to the courts which we do not have elsewhere in China, and the high degree of independence given to Hong Kong judiciary again has no parallel in the Mainland. And importantly Article 159 sets out the procedure for the amendment of the Basic Law, I remember this Panel discussed this matter about a month ago and it's very clear that the Article 159 imposes very strict restriction on the power of the NPC to amend the Basic Law. And then of course, the Basic Law has tried to establish or tried to continue the economic, political, social systems of Hong Kong which of course are very fundamentally different from, and indeed contradiction to, the system on the Mainland. I don't need to spell out to this audience.

So my general point, therefore, is that the Basic Law derives from Article 31 of the PRC Constitution, it authorizes the establishment of quite separate system and rule

on the Mainland, must have certain application, for example, the relationship of Basic Law to the PRC Constitution, the relationship of Basic Law and Hong Kong legislation to Mainland legislation. And it must in some sense qualify the overarching sovereignty of the NPC in relation to Hong Kong. I believe that unless you accept my argument, the Basic Law is a meaningless document. It's only on the assumption of this kind of restrictions which the NPC itself has imposed that the Basic Law makes any sense whatsoever. That is my first point. So I think we cannot say that just because on the Mainland the NPC of the Standing Committee of the Central People's Government can do particular things, it follows that they can do the same thing in Hong Kong. My view is what the NPC and other central institutions can do in Hong Kong is to be gathered from the four corners of the Basic Law.

Now, my second point would be that, continue with that analysis and focussing on the scheme of interpretation of the Basic Law under Article 158. There seems to be a kind of division of responsibilities between the Hong Kong courts and the Standing Committee. In short, if you also look at Article 17 which I have referred to earlier Article 18 dealing with the application of Mainland law and Article 158, then it seems to emerge a kind of pattern, and the pattern is a kind of boundary keeping. In so far as the institution of the system of government within Hong Kong is concerned, the responsibility of boundary keeping between different institutions and the SAR, between citizens and the Government, these are the responsibilities of the Hong Kong courts; and in so far as the boundary to be kept between SAR and the Mainland, that is the responsibility of the NPC.

I should have mentioned also that even in the second case, keeping boundary between the SAR and the Mainland of course has a very significant responsibility as well. It's only when a case reaches a court in Hong Kong for which no further appeal is possible that the mechanism for a reference to the NPC triggers it off. So very substantial responsibility is given to Hong Kong courts for overseeing the relationship of Hong Kong with the Central Authorities. Nevertheless, I think we have to accept that there is a certain kind of contradiction within Article 158 because Article 158 at one stage does give a general power of interpretation to the NPC but also in areas where it can, under Article 158(3), interpret. It does introduce this contradiction in strong terms but certain inconsistencies.

Now, I have argued that Article 158 contains two models of legality. It contains the model of legality that we associate with the common law and which we all I think value greatly. I don't again need to spell out what I mean by the common law notion of legality, but the ideas associated with that include supremacy of the law, independence of the judiciary, the responsibility of the judiciary to make the final determination of the law. It also implies a certain form of due process, proceedings in courts, open courts, legal representation, reasons given for interpretations and so on. And then of course there is, through perhaps a reference to the Standing Committee, another notion of legality which is what you may call it the Mainland or Maxist or Leninist model of legality, which places a very high value on a political approach to law, in which law is not supreme but politics are, and therefore inevitably from the point of view of common law lawyers there is a large degree of expediency in that process. Parties are often not heard as indeed in this case we saw yesterday, for example of the two Members of this august body trying to go to the Mainland to present their point of view and that was not

possible. So not only do we have I think a process which is not open to this kind of discourse, argumentation that we associate with the rule of law, but also and this is extremely disturbing, Mr Chairman, that it is a staged-managed process. I think which we really call a spade a spade, and to pretend that there is some highly reliable process of finding true legislative intention through the NPC is misleading.

I think many of us know that the NPC Standing Committee is very largely rubberstamp for decisions made elsewhere. And we have seen in the last few days intense discussion between the Hong Kong Government and the State Council on the question of what kind of issues could be presented, and indeed, I would say, perhaps out of line to some extent, that the decision that the NPC to be delivered has already been decided outside the NPC Standing Committee by two executive authorities. So, in other words, what we are talking here of is not some kind of an impartial process of a genuine attempt to find the intention of the law maker but we are really talking about an executive overruling a judicial decision, and it is the executive of Hong Kong who is doing this. And that seems to me to be a fundamental denial of the rule of the law. It's why I say Article 158 contains this fundamental contradiction.

What are the consequences of this for the question that you have put to us. Well, it seems to me that the Basic Law guarantees Hong Kong a particular kind of legal system, the common law is preserved, the common law methods of interpretation are preserved, the independence of the judiciary is preserved, the finality of decision of the highest court is preserved in the Basic Law. Now, if I'm glad in my analysis of what will go on in the Standing Committee, it seems to me that that process fundamentally undermines a principal purpose of the Basic Law, which is the maintenance of the common law. I do not believe that it is possible to sustain the common law in the face of the onslaught that the Government has exposed the Hong Kong legal system to.

And looking at the report by the Chief Executive, it is very clear that the Government intends to bring in the purpose of the materials which are to be used to interpret the Basic Law the whole recommendation of the Preparatory Committee and who knows what else, the Joint Liaison Group perhaps as well. And if we bring in this as the essential guide to the true legislative intention, then I think it is the end of the common law as a method of interpretation and its understanding of what is admissible, and also if the Government is going to ask a court to put themselves in the shoes of the NPC Standing Committee and discuss and adjudicate every single case as to how the Standing Committee would decide that problem as the Government has agreed this week in court, then it seems to me that it is really the end of the common law, and I don't think there should be any doubt whatsoever about the implications of the government position. I think many of us are quite worried by the government position because it is so unprincipled. The Government could achieve its objective in other ways which do not undermine the rule of law or the system of common law that has been entrenched in the Basic Law. It seems almost and I may be doing injustice to the Department that has set out to undermine the fundamental of our constitutional and common law system.

Now, if I could point to some other features of the Basic Law which have a bearing on your question. I like to come back to Article 159 which I have mentioned earlier and which deals with the question of the amendment of the Basic Law. I think

we have to read Article 158 and Article 159 together and I come back to my opening remarks that we have to look at the Basic Law at the kind of shrewd, generous instrument, it is not always dominated by the PRC Constitution. If it were, of course, a large part or most of the Basic Law will be unconstitutional. The Chinese Constitution sets out at great length the leadership from its party; it sets out at great length the economic, socialist system; it makes it counter-revolutionary to practise anything but socialism. And yet of course all these things are in the Basic Law. So if that were the position, if the PRC Constitution regulated every aspect of law and the legal system in Hong Kong including the Basic Law, then again I come to my earlier remark that the Basic Law does not exist as another document. So I think therefore when we look at Article 158 and Article 159, we have to recognize that the drafters of the Basic Law, and the NPC which enacted it, had intended to qualify the whole concept of interpretation. If interpretation is given the meaning that might be drawn from the NPC resolution of 1981 as clarifying, adding stipulations, amending the law, then I don't see how that interpretation can stand with Article 159 which tries to restrict the amendment powers of the NPC. So what we are saying in other words is that the Standing Committee can do indirectly to this rather dubious process what the NPC can openly do, the NPC's higher body of the Standing Committee cannot do. So unless Article 159 is to become a dead letter, I think we have to see what are the implications for Article 158 and I would say that Article 158 cannot be used in the broad legislative interpretation sense that might be the case in the Mainland for other purposes because that would be a negation of Article 158.

So all this I think lead me to what I might call the purposive approach that the CFA has laid down as the approach into the interpretation of the Basic Law. What is a purposive approach then? I would argue that all my points I've made may lead to the conclusion that the powers of the NPC under Article 158 should be very narrowly interpreted, so we should have very limited resort to the NPC under Article 158 and that it should be limited very much to Article 158(3) the specific role of the NPC in relation to the references from the courts of Hong Kong. Then at least the questions referred to the NPC will be referred with the assistance of Counsels from both sides and I presume there will be some agreement on what are the issues which need clarification form the NPC, not the tendentious kind of document that the Government had prepared and which was presented by the Government this morning. In many ways it is a highly misleading document and I think reference from a court would be fair in the context of this particular legislation, and hopefully the arguments of Counsels would be a part of the body of documents which would be forwarded to the Standing Committee, so it will have the benefit of quite intensive and extensive argument that is a practice of our legal system. So I would myself say that there should be very severe restriction on the reference to the NPC outside the framework of litigation.

I do not agree with the view of the Government that the Government has a right to seek an interpretation from the NPC. The question of interpretation from the NPC was, as all of you know and Mr Martin LEE has written in detail on this question from the historical prospective of the work of Drafting Committee, very contentious. I have read articles by people who are not supporting the reference to the NPC of the horror at the prospect that the NPC could become involved. Of course, people are entitled to change their views. I do this myself periodically. But it is interesting that the number of people who now support the government position have written articles published in

learned journals expressing great disquiet at the notion that the NPC could end up with the interpretation of the Basic Law. So I don't really believe myself that the Government has the right under the article mentioned. It would seem to me that if it was so, Article 158 would have expressly provided. Article 158 seems to me to provide exhaustively the circumstances in which a reference could be made to the NPC, and there's no provision for the Hong Kong Government to do so.

So I am then left with the question what should be the limits on the power of the Chief Executive to make a request. And I would like my colleague Professor Wesley-Smith, I don't have the blueprint on this, but I would like to connect Article 158 and Article 159. Now it seems to me whatever my view as to the restriction on the power of interpretation of the NPC, not broad legislative interpretation but its interpretation that we are used to trying to find very seriously, honestly the meaning of words, I probably had lost out from that. But it seems to me, therefore, we might then say what if it isn't the legislative interpretation, then what are the implications of that. And it seems to me that the implications of that are that Articles 158 and 159 were for similar purposes, i.e. to protect the Basic Law against certain form of amendment, so if Article 158 is to be used in a different kind of context as a way of amendment, which is clearly what the Government is doing, let's not be troubled by this true legislative intention. I have read the reports of the Priminary Working Committee and Preparatory Committee and this is not what these two Committees were doing. They were not interpreting the law, they were findings ways to getting round the law. So to talk of the true legislative intention is just an insult to the public of Hong Kong by the Government.

So it seems to me that if this is the case, then we should apply the same mechanism in Article 158 when the reference was made by the Chief Executive as we apply to Article 159. In other words, it has to have the approval of two-thirds of the Members of the Legislative Council, two-thirds of the deputies of the Region to the NPC and the Chief Executive. We discussed on the previous occasion how we might institutionalize or give effect to Article 159 mechanism to an ordinance or some other mechanism, and then may be the same kind of mechanism can be applied to Article 158. Because it seems to me that unless we apply the mechanism of Article 158, there is really no control, no limit on when the Chief Executive would go to the Standing Committee. And as my colleague Peter Wesley-Smith has said, if frequent use is made of that and the Government has indicated, whatever it says, it wants to use it often, when is it appropriate, when is it necessary, what would these terms mean? Then it seems to me that we have undermined the whole foundation of the Basic Law. At least applying the mechanism of Article 159 preserves to some extent the mechanism.

On the most substantive discussion, I would say that it would be inappropriate for the Chief Executive to request an interpretation of a provision which falls within the autonomy of Hong Kong. Even the Basic Law accepts the final powers of the Hong Kong courts to interpret those provisions, and to take those questions to the Standing Committee is not only an insult to the competence of our judiciary but indeed is designed to undermine their legitimacy and authority. Therefore, I would now like to close by saying that from a purposive point of view and from the point of view of preserving the integrity of the Basic Law, that implies in terms of right of residents of Hong Kong, the autonomy of Hong Kong, the maintenance of our economic system. And let us not forget that the whole emphasis on the rule of law and the common law in

the Basic Law was not only because some how these were valuable things to have, because they are intimately connected with the way of life of Hong Kong which are dignified in the promises we shall enjoy for 50 years. So these are not abshact questions that lawyers can discuss, they have deep implications for every aspect of the way of life in Hong Kong and I would therefore say that there is a very strong case for limitation on the power of the Chief Executive both procedurally and substantively to refer the matter of interpretation to the Standing Committee. Thank you, Mr Chairman.

主席：

"Thank you Professor GHAI. Can I invited Professor Priscilla LEUNG. 請梁美芬教授。

香港城市大學法律學院梁美芬教授：

多謝主席。剛才Professor GHAI已詳細說過一些關於《基本法》的理論和原則的問題，我想我會盡量就著一些比較針對性的問題，與大家分享意見。

我第一個想提的問題是為何我們花了5年時間制訂《基本法》？我相信在當時來說，無論中央和英國及香港，也希望《基本法》是一個制約性的條文。人們經常說《基本法》其實是一個政治爭論的結果，但無論它是一個在甚麼過程下爭論出來的結果，我相信中國其實非常重視其法律文本。據我瞭解，因為中國很想顯示它是有一個自我制約的精神來處理香港回歸的問題，所以我們可以在《基本法》內很多條文中看到中央希望告訴我們，它是有自我制約的權力。雖然《基本法》是全國性法律，但它亦是特區授權法，即是說它和其他全國性法律不同的地方是其地位，基本上其地位相對一般全國性法律來說是較高的。

為何要特別提出這事？剛才Professor GHAI亦曾約略提過，因為《基本法》第一百五十九條及第一百五十八條內提到的很多機制，是國內其他地方，包括自治區內是所沒有的。為何當時中國同意這樣做？我相信亦是為了香港的前途和信心問題，這是一個大原則。從這個大原則我們再看為何會有第一百五十九條和第一百五十八條，我們會看到其實第一百五十九條是訂得相當細微的，即是在修改的程序上是相當困難，任何一方不同意便不能作出修改。我相信當時從政治和法律的角度來看，也是想顯示《基本法》不是那麼容易修改的，因為中國一直知道自己給人的印象是其憲法或法律經常會修改，大家沒有信心，所以它希望《基本法》不會出現這種情況。但為何會保留第一百五十八條呢？我曾寫一些文章提過，其實第一百五十八條是為了顯示它仍然保留了最後的主權，為此它一定要加上第一百五十八條第一款，即是說這法律本身仍然是中國全國性法律的一種，所以它會用最後的理論和架構去說明全國人大常委有最後的解釋權。但第一百五十八條加上第二款、第三款，其實亦看到它想顯示"我不會隨便使用第一百五十八條的權力，我希望你們對我有信心"的意思，我覺得這是它願意自我約制的誠意顯示。在這情況

下，我們會看到第一百五十八條的內容，其實是賦予無論是解釋的一方，抑或甚至是申請解釋的一方，其程序是更為寬闊。你看到第一百五十九條是很嚴格的，第一百五十八條則寬鬆得多。

在座有些是草委，但在我一直跟進的過程中，當時應該有很多爭拗，甚至有人不同意有第一百五十八條的存在，所以它只可以寫得更為抽象，即是雙方同意了的一個妥協的結果。今時今日我們怎樣去看第一百五十八條和第一百五十九條的問題呢？除了第一百五十八條和第一百五十九條外，其實《基本法》也在不同的地方，第十七、十八條提到有一個委員會，就是基本法委員會的角色。你會看到基本法委員會其實是全國人大常委的一個工作委員會。甚麼為之工作委員會呢？因為它對當時的草委和諮委來說，是一個臨時委員會，即《基本法》通過後它便不可再存在。但我相信只要有"一國兩制"存在，基本法委員會便要存在，它要發揮一個中介的角色，而這亦是一個自我約制的程序之一。即是說它沒有必要加進這東西，它加進這東西，便是說若萬一它要修改和解釋，也要經過這樣的一個委員會，而其成員一半是中國的成員，一半是香港的成員。

如果現時回頭看，我希望基本法委員會能真正發揮其中介角色。因為若純粹從權力來說，第一百五十八條第一款已說得很清楚，但從程序來說，其實的確可以在程序上制訂一些特別的機制。我不覺得這是憲法性慣例或諸如此類，只是純粹在解釋上我們可否再有一些機制。我覺得若我們用一個比較充分合理的方式來表達意見和要求，其實可以爭取到要基本法委員會向香港市民或立法會交代其工作，在那方面我們制訂一些約制性的條文，我覺得可以是合理和希望有關方面能夠接納。這基本上可以達到一個對各方面也是好的效果，即是說不需要一定要負面去看，約制我們就是不想做事。為甚麼呢？因為在約制的過程，其實我們提出一些條件，例如曾經提過的條件可以提出來讓大家考慮，例如這次我們不希望政府肆意使用第一百五十八條的權力，那麼制訂一些條文對雙方也有好處，因為提出來的時候，可以令社會、法律界或有關人士能夠願意執行，而並不是用一個很負面的角度，令社會分化。

我曾想過一些指引，但這指引現時提出來純粹讓大家考慮。第一個是就著這居留權的問題，其實看到政府亦交代了它是在很無可奈何的情況下，它認為自己無法處理可能帶來的結果。我覺得大家一定要想的是，如果將來要提解釋，一個判決的結果應否作為指引。這是很富爭議性的，因為我知道在法律界內，亦有很多人不同意用結果，因為在我們法律上，過程比目的重要。但我覺得可以提出來，會否在很特別的情況下，能夠為較多人所接受？你提出來是可以讓人考慮、討論。

第二個我想是比較重要的，就是從法律上考慮，究竟有關的解釋對《基本法》是否真的違反了當時的立法原意？我覺得這純粹從法律的角度去考慮。若真的違反了立法原意，由誰人說它是違反了立法原意？會否需要提供一些文件讓大家在客觀上覺得原來當時是有這樣的立法原

意，但可能雙方的律師和法院在審訊的過程內是沒有考慮到的。若這情況帶來一個很嚴重的後果時，我們是否可以引用這解釋的方法呢？

第三是究竟誰人有權。究竟在訴訟內的其中一方是否有權提出這解釋權呢？政府是否可以在任何情況底下也引用這解釋權呢？我覺得應該將它約制，同時會減少大家的擔憂。

第四個當然就是過程了。我認為可以參考第一百五十九條，但第一百五十九條基本上有一個約制性的，即是說若一方不同意便不能提交。至於第一百五十八條，可能我看得比較悲觀，若用第一百五十九條的程序，可能很難被有關方面接受，但我覺得它可以是一個程序上的需要。第一，它經過立法會的討論，最低限度有簡單的多數議員去同意要提出；第二，我覺得在港區的全國人大代表亦應該有一個角色，因為他們相對來說是很瞭解中國大陸內的運作，若萬一真的需要解釋時，他們亦應該向香港市民公開他們的意見和增加討論。大家亦是在一個理性的討論過程中，令到最後提上去的方案可能是比較合理和大家也能接受的。因為我覺得現時所有這些爭論，無論是如何不同的意見，最後也真的是希望香港好。所以若能集合這些意見，大家最低限度會找到一個中間的方案，亦對結果是好的，我覺得這些程序可以發揮積極的作用。

而其實基本法委員會應該怎樣？我們可以做的程序，就是基本法委員會在表達意見之前，可以諮詢這些機構，即是由基本法委員會作主導。因為香港亦有6個成員，在內地亦有6個成員。內地的成員到香港會比較困難，但我們希望香港的成員可以發揮一些比較多的功用。即現時來說，我們會可以看到個別的成員表達些甚麼意見呢？他願意說的便說，不說的其實大家也不大清楚他會怎樣表達意見。但在《基本法》內可以比較清楚看到，基本法委員會其實是在所有關於修改和解釋的問題上，是發揮一個很重要的角色。所以我覺得大家可以從這角度想多一點，究竟我們可以和基本法委員會有一個怎樣的關係。

第四，我覺得現時從這個案中，我們可以看到有幾方面的關係要處理的。第一，是中央和地方。地方之間是政府、立法機構和法院的關係。例如最近曾有人提出，是否需要由全國人大一次過解釋《基本法》第二十三條不清晰的地方。我相信其原意是為避免日後有爭拗，但我認為若一遇到有不清晰的地方便要求全國人大常委會解釋是不適當的。雖然我同意《基本法》內難免有一些條文真的要反映中國法的傳統，例如第一百五十八條的原本運作也是有關中國法的。在中央與地方關係內，有些條文的內容無可避免地會看到有中國法的傳統在內，例如第十八條內提到的，我覺得我們也要面對此事。但問題是，應該以保持普通法的傳統為我們最基本的精神，這亦是我們有《基本法》的原因，而我覺得這是中國希望香港透過《基本法》去運作的一個主要原因。例如附件三和《基本法》第二十三條內，我會看到立法機關和法院、政府之間將來要注意的關係和地方，即大家其實也應該理性地去處理這問題。例如附件三，我覺得中國很清楚說明不需要香港跟隨其他法律，但它也說明需一是你要直接公布，一是你要在當地立法實施。當然，若直接公布，我們

特區法院解釋權的彈性會少很多，因為它等如是整個中國的法律，但若經過法律適應化，成為立法會內通過的本地法律，我認為這些經過適應化的法律的解釋權應該在特區的法院。若釐清了這關係，將來的爭拗會較少。

《基本法》第二十三條本身是屬於中央與地方關係，所以如何解釋這一條，可能將會牽涉中央如何立法，與及中央與地方關係的條文。但如果由第二十三條引伸至地方已經經過適應化的過程，由本地立法，因為它沒有說明要將中國有關的刑法或國家安全法，要在香港透過公布或立法實施，它只不過提出一些概念，所以當時我覺得內地的概念也是開放一點。它也知道要香港有一個國家的觀念，即不可鼓勵別人在香港叛國，所以香港應該正面處理此事，由自己立法，用普通法的傳統，或當地立法的傳統立法，正面發揮第二十三條可以給予特區的立法機構和特區法院的自治權力。我知道很多人提到第二十三條的時候會很抗拒或很害怕，但我自己的看法是，逃避可能會更加不好，因為第二十三條本身就是中央和地方關係，是《基本法》來的，而《基本法》是全國性法律。但如果經過特區的適應化，便變為地區法律，純粹應該由特區法院自己解釋。

從這例子，我想說的是，在本質上，我相信在法院和立法機構、政府之間應該就如何實施《基本法》有一個共識。這共識就是我覺得《基本法》本身是有三個原則，有些我們沒辦法逃避的原則，例如包含了主權在內，但它亦有大部分是自治的內容，其中一部分是維持現狀。因為我們是第一次面對這樣大的問題，即使將來法院審案時，或者它自己也將這些原則和精神考慮在內，可能會避免出現衝突。所以在這方面，我覺得大家應該盡快將那個圈劃得清楚一點，將問題減少。

我今天的發言大概到此，但我有一個補充是剛才遺漏了的，就是關於解釋和修改的。因為最近有些討論提到，如果在內地解釋法律，其實是可以做到修改法律的角色。但我自己會看到，這在中國大陸內可能的做法，是應該不適用於香港的，否則，便不會有第一百五十八條和第一百五十九條的分別。所以我覺得在界定第一百五十八條的解釋時，真的一旦要解釋時，便不應和《基本法》現時的條文抵觸，否則，便應該用修改的過程才可以將有關條文改變。我想我今天想說的內容到此為止。多謝主席。

主席：

多謝梁教授。請林峰博士。

香港城市大學法律學院林峰博士：

Thank you, Mr Chairman. I have three points to make in my submission. And the first point is with regard to whether and when the executive branch of the Government can seek interpretation from the Standing Committee of the NPC. And to

a certain extent I agree with Professor GHAI that the interpretion authority should only exercise in specific cases and if the Government sees there is a necessity to seek interpretation from the Standing Committee of the NPC, they should raise it in those specific cases. And if not, and having raised that kind of request then in my view the only legal ground on which they can seek interpretation from the Standing Committee of the NPC is the constitutional principle of necessity. That means they have to prove that it does exist the necessity that if we do not seek interpretation from the Standing Committee of the NPC, there may be chaos in Hong Kong. And also they need to prove that they have exhausted various possible alternatives before seeking interpretation from the Standing Committee of the NPC.

The second point is whether we in Hong Kong can impose or make some procedural requirements to restrict the Government's authority to seek interpretation. The Basic Law itself has no such provisions about the procedural requirements. I guess the drafters have not foreseen the necessity for the executive branch to seek interpretation from the Standing Committee of the NPC. But some scholars/colleagues here have said we can and I am also of the view that we Hong Kong can also impose such kind of procedural requirements. But I am not sure that the procedure as stipulated in Article 159 for the amendment of the Basic Law can also be used for the interpretation of the Basic Law because firstly, the Basic Law has no such provisions about the procedure. Secondly, if we try to impose such procedures, that means we are admitting that the executive branch has the authority to seek the interpretation from the Standing Committee of the NPC. And if you admit that, then if you impose such kind of procedural requirements which are basically restrictive in nature, and I will argue that such a restriction will be contradictory to the Basic Law. So I am not in favour of adopting the same procedure for interpretation as well as amendment.

And the third point I want like to make is that if we impose or make some procedural requirements in Hong Kong, whether such procedural requirements can achieve the objective, and my view is no. Because if you look at the legal ground which the Government has relied on to seek interpretation from the Standing Committee of the NPC, namely, Articles 43 and 48. Article 43 is talking about the establishment of the office of Chief Executive as well as his accountability to the Central Government, whereas Article 48(2) is basically talking about his responsibility for implementing the Basic Law. So I will argue that those two Articles are really talking about that the Chief Executive has the responsibility to report his work to the Central Government, that is the State Council. And now what they are doing is, they are merely submitting a sort of reporting work to the State Council. It is not the Chief Executive of executive branch in Hong Kong seeking the interpretation. The request is made actually by the State Council to seek interpretation from the Standing Committee of the NPC. So then, if we are trying to impose some procedural requirements or restrictions, we can only restrict our Government, that is the executive branch here, and I don't think such kind of restriction can actually restrict their ability or their opportunity to report their work to the State Council on anything, because again by reading Articles 43 and 48, there is no such restriction there. So after looking at those issues, I don't think even the LegCo or the Government itself can impose such kind of restrictions and achieve its purpose, because if the executive branch wants, it can easily avoid or try to get away from such procedures. They can do it informally, so I don't think any such procedural requirement can achieve its objective. Finally, I will say Articles 43 and 48 do not

really provide a sort of a grant for seeking interpretation and I am of the view that seeking interpretation should go back to the mechanism as stipulated in the Basic Law. Thanks, Mr Chairman.

主席：

Thank you for your presentation. Thank you Professor LIN. Next we have the Hong Kong Bar Association, Mr Ronny TONG, please."

香港大律師公會資深大律師湯家驊先生：

主席、各位議員和嘉賓。我們首先想強調的是，我們大律師公會對於質疑香港政府要求人大常委解釋《基本法》的合法性和合憲性的立場是不變的。我們今天到此提供意見，只為探討若政府堅決要做似乎是違反《基本法》的事，在這憲制上是否應該有約束的條件。假設在法律上，特區政府有權要求解釋《基本法》，我們覺得大前提是，這權力不應該僭越或抵觸特區司法機關或立法機關所具有的權力，以及當行使此權力時，不應削弱香港的法治和司法機關的獨立。在我們提出我們的意見之前，我們想回顧一下，究竟現時香港的憲制架構實際的情形是怎樣。

我們注意到，根據中國憲法第三十一條，在特別行政區內所實行的制度，應該依照具體情況，由全國人大以法律規定。在這方面，中央政府對香港特區的基本方針政策，亦在《中英聯合聲明》附件一說得很清楚。第一條有關憲制的規定是，"除外交和國防事務屬中央人民政府管理外，香港特別行政區享有行政管理權、立法權、獨立的司法權和終審權"。第二條有關法律制度的規定是，"香港原有法律(即普通法及衡平法、條例、附屬立法、習慣法)除與《基本法》相抵觸或香港特別行政區的立法機關作出修改者外，予以保留"。"在香港特別行政區實行的法律為《基本法》，以及上述香港原有法律和香港特別行政區立法機關制定的法律"。

第三條有關司法體制的規定是，"除因香港特別行政區享有終審權而產生的變化外，原在香港實行的司法體制予以保留"。"法院依照香港特別行政區的法律審判案件，其他普通法適用地區的司法判例可作參考"。

各位可以留意到，以上所說的有提及到應該用其他普通法，甚至其他地區的司法判例作為參考，而並無提及到香港的司法制度需要實行，或參考中國的法律或法律的原則。中國憲法第六十七條，賦予全國人大常委會有解釋所有法律的權力。這"所有法律"，是包括《基本法》和其他的法律。我們需要注意到，在中國憲法內，人民法院，或最高人民法院，是並無立法解釋的權力的。最高人民法院在審判中解釋法律的權力，這權力不同於立法解釋的權力，似乎是沿於1981年6月15日第5屆人大常委第19次會議所通過的決議授權的。儘管如此，相對於人大常委解釋法律的權力，這中國法院的權力是有限度的。我們可看到決議的第2段

訂明，凡屬於法院審判工作中具體應用的法律、法力的問題，是由最高人民法院進行解釋。凡屬於檢察院檢察工作中具體應用的法律、法力的問題，是由最高的人民檢察院進行解釋。若最高人民法院和最高人民檢察院的解釋是有原則性的分歧，就要報請人大常委作最後的解釋和決定。與此同時，決議的第4段亦授權地方性法規的省、自治區、直轄市的政府主管的部門，也有解釋地方性法規的權力。不過我們在此段可看到，並無一個好像以上第2段所說，類似由人大常委會作最終決定或解釋的條文。由此可見，香港法院的權力和地位，在中國憲制的架構內是十分不同的。全國人大制訂了《基本法》，其中第一百五十八條第二款授權香港法院在審理案件時，對於《基本法》關於香港特區自治範圍內的條款，可以自行解釋。第一百五十八條第三款亦訂明了基制，在終審法院審理案件時，可以要求人大常委解釋《基本法》關於中央政府管理的事務，或中央和特區政府有關的條款。

我們可以在以上的憲制文件和條例內看到，如果香港特區政府要求解釋《基本法》，是需要避免和特區現有擁有的司法和立法權產生直接衝突的話，一定要符合我們提出以下5點最低的憲制條件。這5點中第一點我們要強調的是，政府只可以就《基本法》的條文，而不是其他法律，尋求人大常委的解釋。我們剛才曾說過，人大常委解釋法律是全部法律，包括地方法律。但我們看過，因為香港的《基本法》，亦因為中央政府對香港的基本執行的意向，是香港應該保留自己的法律，所以第一個條件應該是政府不可以要求人大常委解釋除《基本法》之外的任何法律。

第二個條件是，政府不應該就《基本法》有關特區高度自治範圍內的條文，尋求人大常委解釋。否則，就會違反了《基本法》本身和附件一所說到的，中央對於香港基本的政策和方針，亦違反了第一百五十八條。

第三點是政府不應該在訴訟中或已經經過終審法院解釋的條文尋求解釋。因為《基本法》第一百五十八條清楚說明，對於《基本法》屬於自治範圍之內的，是應該由香港法庭自行解釋的。如果該案件已經是在法庭內審判中的時候，若政府要求人大常委解釋，即是剝削了法庭的權力。如果政府在終審法院已作出判決後、已對此條文作出解釋後，再尋求另一解釋，便是剝削了及推翻了終審法院終審的權力，與及它在《基本法》第一百五十八條所享有要求人大常委解釋的權力。

第四點是尋求解釋的時候，政府應該符合《基本法》第一百五十九條的要求。由於立法解釋是有修改或補充法律的效果，我們亦看到香港政府的報告內亦間接承認這問題。若有這權力的話，在行使此權力時，就一定要必須符合《基本法》內有關修改條文一事所設的保障，否則便會全無保障。有見及此，我們覺得第一百五十九條所列的程序，要求政府在尋求人大常委解釋時一定是適用，否則第一百五十九條便形同虛設。最重要的是，我們覺得香港釋法的要求必須要得到立法會三分之二的議員的支持，與及不可以抵觸中華人民共和國對香港特別行政區的基本

策略，否則特區的高度自治就會被一個香港人不可參與的閉門程序所削弱。

最後一點是，政府只是能夠在極其例外的情況下尋求解釋。我覺得此點是香港政府已間接承認了的，香港政府尋求釋法的權力，我們可以看到在《中英聯合聲明》附件一或者《基本法》內也沒有明文規定。中央政府和特區政府亦接受《基本法》的條文是不應隨意亂弄或改變。基於這些理由，特區政府若有權尋求解釋的話，它亦只應該在最特殊和例外的情況下才行使此權力。

以上5點，是我們香港大律師公會對立法會的意見。多謝主席。我要在11時離開，但本會的副主席Philip DYKES會在此回答問題，希望各位原諒。

主席：

多謝你，湯先生。我們接著請香港律師會吳斌先生。

香港律師會吳斌先生：

Mr Chairman. My colleagues and I have been directed by the President of the Law Society to come here on your invitation to give the Law Society's views on the need for setting up a formal mechanism for the Chief Executive to request the Central People's Government to approach the Standing Committee of the NPC for interpretation of the provisions of the Basic Law. The Law Society has formed certain preliminary views and we have submitted a very brief paper expressing those preliminary views. Very briefly, the Law Society's preliminary views are that: there is certainly a great desirability for the setting up of certain formal mechanism for the Chief Executive to initiate any request for an interpretation by the Standing Committee of the NPC of the provisions of the Basic Law. The reasons for the desirability are that we feel the circumstances should be defined under which decisions for referral should be made by the Chief Executive. This is important so that there is certainty and the setting up of the convention will help the Government to ensure the people of the HKSAR that an interpretation from the Standing Committee of the NPC will only be sought under defined circumstances. And the Law Society's views are that the Chief Executive should only seek interpretation in the following circumstances. That is, in extreme circumstances, in case of great urgency such that if no immediate action is taken, it would harm the HKSAR and any referral must be limited to the immediate issues and the rule of law must not be violated and the independence of judiciary should not be undermined. And the Law Society also forms the view that there should be transparency, wide consultation and that all arguments and views of the community at large as well as professional bodies and all organizations in Hong Kong be made available to the Standing Committee of the NPC for consideration before an interpretation of any provision of Basic Law is made. And I don't want to spend much more time as we have only, as I said, formed preliminary views on this. We are looking further into this issue and in due course will form a more concrete view on the need, as I just mentioned, to set up a formal mechanism. Thank you.

主席：

“Thank you Mr WOO.”

李柱銘議員：

請政府說一說機制的問題，因為政府現在沒有說機制的問題，只說了報告。

主席：

我想先請所有代表發言，我知道雖然現在最後一個團體已發言完畢，但我不知道何志強先生，and Mr Patrick MOSS, do you have anything to add to what Mr WOO has said?

香港律師會何志強先生：

主席，我沒有再進一步的補充。

主席：

或者我們先請政府就機制方面說說，不知政府有甚麼初步想法？

署理政制事務局局長：

主席。我想強調一點，行政長官已承諾我們只會在非常特殊的情況下才會向中央尋求這方面的協助。至於政府當局是否應該設立有關行政長官要求中央人民政府提請人大常委會解釋《基本法》條文的機制這方面的問題，一如律政司司長於5月26日在立法會的動議辯論中所說，特區政府會慎重考慮有關建議設立機制的問題。這是一個複雜的問題，特區政府目前未能就此作出任何承諾。多謝主席。

主席：

各位議員......“Yes, Mr ALLCOCK, please”.

律政司副律政專員：

Mr Chairman, may I say a few words in response before questions are raised by members?

主席 ：

Yes, please.

律政司副律政專員：

Thank you, Mr Chairman. The Administration clearly values the views given this morning and of course respect the views of the highly distinguished lawyers that we have here today. I would like, though, to correct some statements which did not represent the Government's position accurately. Both this morning and elsewhere it has been suggested that we would routinely seek an interpretation or could do so as the Secretary just said. That is not our position. Professor GHAI has drawn the attention to the two models of legality which we don't take issue with. But our position really is that there is an interface between the two systems. We are really trying to work out how that interface works. So far as Members are concerned, it seems there are two fundamental questions they have to consider. One is whether it's lawful or constitutional for the HKSAR Government or the Chief Executive to seek an interpretation and whether it's lawful or constitutional for the NPCSC to give one. And we have some views from lawyers to the effect that there is a doubt as to whether that is the case, and some people have gone further and said that it can't be done. And then the second issue is, assuming that it can be done, whether there should be any sort of restrictions. Now of course if it can't be done, then the discussion of mechanism and restrictions seems to be beside the point. So, the very fact that members are looking into restrictions and mechanism suggests that perhaps it is accepted that what is being done is lawful, but that there is a need to introduce either political restraints or legal restraints on what the Government is doing. So, as the Secretary has said, we are looking at the possibility of restraints and the suggestions made today are very helpful.

One representative has suggested that what is happening would mean the end of the common law. I think it is very important that everyone both here and elsewhere realizes that, within Hong Kong's domestic system, the common law is completely entrenched by the Basic Law. What we are dealing with is where there is an interface between the two systems, where of course the Basic Law itself sets down the mechanism. So we are dealing with a situation where the interpretation of the Basic Law is at issue where the Basic Law itself provides that the NPCSC has a power to interpret the Basic Law. The Bar Association has asked that there should never be an interpretation of Hong Kong ordinances by the NPCSC and the Government has never suggested that this would happen or could happen. So far as common law principles are concerned, so far as Hong Kong ordinances are concerned, they are solely within the power of the courts and the legislature to interpret and develop. We are only concerned with interpretation of the Basic Law. It has also been suggested that to go to the NPCSC would take away the final power of jurisdiction. I am sure members are aware of our position, which is that there is a difference between the power of adjudication in the sense of determining who wins the case, and the power of interpretation of the Basic Law. I think it's quite clear, or it is our view, that the power of interpretation, the ultimate power of interpretation, is in the NPCSC. So for that body to exercise its power is not taking away the power from anybody else. Finally, I would reply to the comment that by seeking an interpretation the Government is in effect seeking an amendment through the back door, and that it is somehow an insult to anyone who thinks otherwise. Our position is that the two Articles of the Basic Law which are in issue are capable of two different interpretations and of course the Court of

Appeal in the right of abode cases did come to a decision which was the opposite of that made by the Court of Final Appeal. This is not to say that the Court of Appeal is right and the Court of Final Appeal is wrong. But merely that there is a serious issue of interpretation here. It is the situation in which the Basic Law's meaning is not clear and, that being the case, we believe it is legitimate to seek an interpretation from the NPCSC which has that power of interpretation. We are certainly not suggesting that the NPCSC can exercise a power to interpret the Basic Law in a way which amends it. Clearly an amendment to the Basic Law can only be done under Article 159 subject to all the constraints. But we are not seeking an amendment, we are seeking an interpretation, and our view is it is lawful and constitutional. Thank you, Mr Chairman.

湯家驊先生:

Clarify one thing ....

主席：

湯先生，可否容許我先說一句。我最初以為歐先生只是想澄清一些大家對政府意見的誤解，但事實上，他剛才發言是反駁某些對政府的行動的言論，例如說已是普通法滅亡之日。這差不多變成了辯論，所以若大家有意見想回應歐先生，我很歡迎。請湯先生。

湯家驊先生：

I am not trying to respond but I think there is one thing which needs to be clarified. At the very outset of my submission to this Chamber, I have emphasized that the Bar Association does not accept the legality or the constitutionality of what the Government is doing. It is perhaps because I was speaking in Chinese, may be what I said at the very beginning of my speech was not properly translated to Mr ALLCOCK. But I think it should not be left on the record that by the very reason we are here that the Bar Association is accepting the legality or constitutionality of what the Government is doing. Thank you.

主席：

多謝湯先生。我也想指出一點，我覺得因為現時有很多不同的意見，有些甚至說不可以訂下機制，因為根本上不能訂，若訂了便等如承認。但事實上承認了也沒有用，因為根本沒有這種權力，只有國務院和人大常委才有此權力。這是很複雜的。我覺得剛才歐先生最具爭議性的說話可能是在第一點，該點說這不是兩個不同法制模式的問題，而是交接問題，因為現時沒有任何權威的界定、權威的解釋說明第一百五十八條本身如何解釋。我想這是問題所在。我們也承認在政治上，在這偉大的構思“一國兩制”底下，很明顯說交接。但如何交接？在沒有任何權威解釋第一百五十八條之前，根本大家也在說不同的法律意見。所以我覺得如果要大家坐下來達到共識的話，有很多說話不能說得太盡、太絕，否

則便不能討論出結果。這是我的一些看法，這令我當主席也容易一點，否則便會很難做，這會議變成大辯論，那便沒有意思了。李柱銘議員。

李柱銘議員：

Thank you, Mr Chairman. I think I should speak in English. I entirely agree with Mr Tong's last remarks that it mustn't be assumed by the Government because we are all here to talk about possible mechanism to restrict further attempt by the Government to seek an interpretation of the Basic Law by the NPCSC, therefore it must be assumed that we have accepted it and is a correct thing to do and then we are only talking about procedure. I, speaking on behalf of Democratic Party, will certainly not be here if that is your assumption. We'll just walk out. We say that attempt by the Chief Executive is totally wrong and should not have been done to begin with. But because we are not sure, because we have not been promised by the Government that this is one-off, for example, the Financial Secretary has said about the intervention in the stock market, he said one-off. So, therefore it will not be necessary for us to look at mechanism for future intervention. I wish the Government could at least say that. But because the Government will not say that and indeed when the Secretary for Justice was asked whether it was her intention to refer the question of interpretation of any Article in the Basic Law to the NPCSC in a forthcoming final appeal in the Court of Final Appeal involving the national flag, and when she was asked whether she would exclude, she said no, not her intention to refer. When she was asked whethers he would exclude that possibility, she said no, thereby giving the clearest impression that if the Court of Final Appeal should rule in favour of the Government, of course no interpretation will be sought. But if otherwise, she would not exclude that possibility, which I consider to be contempt of court actually, but this is a separate matter. So we are here because just in case the Government want to do it again. I suppose it may be better to restrict further attempts of this kind which we recognize to be totally wrong. Now I am very impressed by almost all the speakers here that although some certainly, that is not the Government of course, on this side, on the right side, I think although some of them recognize that it was perhaps constitutionally legal for an interpretation to be made by the Government, yet nevertheless, it would be undesirable in the circumstances, particularly after the Court of Final Appeal has interpreted these Articles of the Basic Law. It is very clever of the Government to say, well, there is a distinction between final adjudication and final interpretation. First of all, Article 158 does not say that the final right of interpretation, the word "final" is certainly not there in Article 158(1). It reserves the right but actually the Chinese text uses the word "belongs". In other words, the right to interpret the Basic Law "belongs" to the Standing Committee of the National People's Congress and the other Articles set out how it should be exercised. I spent years on the Drafting Committee trying to minimize the harm to the high degree of autonomy to the SAR in this Article as well as the one dealing with acts of state. My position has always been while I was a drafter, that whereas the legislature will enact laws, it is always up to the courts to interpret them. And therefore, there is no such thing as legislative interpretation under the common law system and in the event of course I was fighting against all the rest. So, I did my best to restrict the circumstances as to when an interpretation would be sought, so that the Standing Committee of the NPC wouldn't interpret any Article of the Basic Law. The Chinese drafters used the Treaty of Rome, and therefore you see very strict limitations are put in Article 158.

Certainly, any Article which falls within the autonomy of the SAR would be entirely out. So, that is why I am livid with the Government. I use the word "livid" with the Government when they are now seeking an interpretation of Article 24 which by the Government's own case before the Court of Final Appeal and indeed throughout was an Article which falls within the exclusive autonomy of the Region. I think this is utter dishonesty on the part of the Government because they have cheated the Court. They be made no submission to the Court at all levels. Now they do the opposite. I think this Government cannot be tolerated.

And I entirely agree with Professor Yash GHAI that there is a constant ouslaught on the common law by the Government. Now surely when I was a drafter, and I am sure everybody in Hong Kong at that time would think that it would fall on the part of the Justice Department to defend the rule of law and to defend the common law because what other laws are we talking about. From start to finish if you look at the Joint Declaration and every Article of the Basic Law, you find that the common law must be preserved. The common law is the only law we need to know and we ought to know if we want to function in the courts of Hong Kong whether as advocate or as judge. And suddenly we are told that, well, an interpretation of the laws you better not only look at documents which are admissable under the common law but you should also look at documents which the Standing Committee of the NPC may be looking at and will be looking at. So you better be smart, and in anticipation you must do what they would do. And they apply this principle even to the Court of the First Instance or to the Court of Appeal. But if you look at Article 158, it is only at the final stage when it was necessary for the Court of Final Appeal to interpret a certain Article of the Basic Law which falls outside the autonomy of the SAR that a referral is required. So, what is the Government doing to the rule of law and to the common law. It is making every attempt to kill it and then they still say that they are defending the rule of law. How on earth can the Government do this to Hong Kong. If you continue to do that, the rule of law is not dead yet but can there be any doubt that you are trying to kill the common law. Mr Chairman, there are a lot of other things I should be saying but I am so fed-up.

But perhaps, I should not forget to point out in this report it is entirely one-sided. I can tell you my experience of what my fellow drafters did when we were drafting the Basic Law. Of course in Hong Kong, there was a very august body, the Basic Law Consultative Committee of which some are members, they spent hours and days and weeks, particularly the legal sub-group, churning out a lot of documents, a lot of reports. And I can tell you the drafters would not look at them at all. And I had to bring them myself when I attended these meetings, the sub-group meetings. I had them photostated so that they won't be reading too many documents and I had to read them out. And when I was drafting and when it was time for us to put our thoughts together in the first draft of the Basic Law which was somewhat in this color. I had to fight, otherwise, Mr LU Ping wanted dissenting views to be printed in another document, in another volume. So there is the one single volume for the first draft of the Basic Law. There will be another volume for the dissenting views and I had to fight with them to the extent that I actually walked out from the meeting in Guangzhou. And then they changed their mind and had the other dissenting views included at the end of the first draft of the Basic Law. I wanted it to be put down at the stage, for example Article 18 the dissenting views. No. Then I said what about at the end of the chapter? No. End of the volume? No. That is why I walked out. But finally because I walked out

they included it at the end of the volume. So, I am telling the Government if you put dissenting views and other views in different volumes, 19 of them, they will not be read. I am sure that was the intention.

So, this report is totally one-sided, unfair and misleading to the would-be readers, namely the Standing Committee's members. For example, when you said towards the end, page 4 of the English text, request for assistance from the CPG. The third line says "Queries and arguments as to whether the CFA's interpretation is in line with the Basic Law have been raised in the community. Public opinion is overwhelmingly in favour of an early resolution of this issue." And then, the seventh line says "the HKSARG respects the judgments of Hong Kong's courts", I thought "rejects" should be a better word, "We have considered carefully and repeatedly the available options for resolving this issue." Now, pausing there for a moment, the picture seems to be painted on behalf of the Chief Executive that they are not saying the Court of Final Appeal was wrong. Indeed, Mr ALLCOCK's statement to this Panel was that they are not saying whether this is right or wrong, but there are different views and doubts and they should therefore seek a clarification, as it were. Well, the Government is famous for that, they also sought clarification from the Court of Final Appeal. Once they got it, they said this is rectification. It is cheating from the Court of Final Appeal again. But here, look at that, they talk about available options without saying what these options are. So, how do you expect the Standing Committee members to know what you are talking about. You say, oh, go to the 19 volumes. They will not, I tell you. You should help them at least, at least say well volume 5, isn't it? And then you see opinions that the Standing Committee should not interpret but should get the NPC itself to amend. All these things are not there.

What about respecting? If you say respect the judgment, why not carry it out, why don't you give that as an option. Of course there will be a lot of people, of course nobody believes that the figure of 1.67 million is near the mark, except the Government, perhaps. So, they should put the alternative options there and they should also say the danger of interpretation is to harm the common law system. These views as powerfully expressed by our experts again and again. Not a word is mentioned. And then the report says "Accordingly, the HKSARG has decided to request the State Council to ask the NPCSC to make a legislative interpretation of the relevant provisions of the Basic Law. This is a decision which we have been compelled to take in the face of exceptional circumstances." Not a word about following the judgment of the court, may be you say you can't, at least what about amendment. So, Mr Chairman, we are not talking about actually a judgment. We are not talking just about 1.67 million people who are our own children. We are not just talking about the rule of law. We are talking about "one-country-two-systems". Does our Government want it to work? Does the Government want the international community to believe that there is a future for Hong Kong under the "one-country-two-systems" policy. That is the question, Mr Chairman, I am completely flabbergasted by the attitude of our Government. Thank you!

主席：

還有沒有議員先作一般的回應？若沒有，既然李柱銘議員已作了詳細的論述，應先給機會政府及各位學者作一些回應。劉慧卿議員。

劉慧卿議員：

我希望詢問一些問題，因湯先生將要離開。

主席：

那麼我們看有甚麼具體的問題再作回應，劉慧卿議員。

劉慧卿議員：

多謝主席。我很反感Mr ALLCOCK表示了接受我們今天討論的這項議題。相信秘書向嘉賓提供文件時會清楚說明是聽取他們的意見，如湯先生的情況，他根本不支持，按Mr ALLCOCK的說法是，便可能會令別人對湯先生產生誤會。湯先生的意思是若政府強硬地進行這項工作，便需要跟隨這些程序。所以我希望政府不要產生誤會。

主席，我想問香港大律師公會和香港律師會。大律師公會說是違憲和違法，我們亦聽到在《基本法》內是沒有賦權予行政機關進行這項工作，我想詢問湯先生或Mr DYKES的解釋，如果《基本法》沒有寫明行政機關有這樣的權力，行政機關卻進行了這項工作，便是違法和違憲？你們的理解是怎樣？因現時政府提出以《基本法》第四十三條和第四十八條作為根據，但這些條文並不是賦予它有這項權力，在上星期會議時亦有討論不是賦予權力，只是履行職責時作這樣的處理。現時要詢問你們是否亦覺得因沒有寫上賦予權力，但卻進行有關工作便是違法和違憲。剛才林博士亦有講述，實際上只是國務院要求人大作解釋，特區行政機關只是提出意見，是否這種做法，亦是違法和違憲。各位律師均可講述，以助不是律師的我們理解為何是違法和違憲，是否要求解釋《基本法》的條文只能根據《基本法》第一百五十八條？這條是清楚說明由誰人有權進行這項工作。

我亦想問律師會。他們沒有提及有關工作是否正確，可能他們的大前提是全部接受，問題只是應怎樣實行。但我想問從法律基礎上，你們如何解釋你們接受了行政機關有權這樣做？你們是否接受了他們是根據《基本法》第四十三條和第四十八條行事？抑或你認為應根據第一百五十八條，若不是便不應該這樣做。謝謝主席。

主席：

Mr DYKES, first.

戴啟思先生：

I believe that the arguments about constitutionality have been canvassed beforehand in the past four or five weeks. In summary, it is a matter of construction. You look upon Article 158(1) as containing the first sentence as if a statement is the constitutional truth that Mr Martin LEE has said, the power of interpretation "belongs" to the SCNPC. But if you would look immediately to the next provision, then there is an authority given to the Region to interpret, and you set against that the path of amendment and you come to the construction that it is a self-contained mechanism providing for interpretation through the courts and very exceptionally an interpretation by the NPC in the circumstances described in Article 158, and likewise in Article 159. As I say that is a perfectly respectable constitutional argument. The problem of course is that it is happening and of course matters have not been tested in the courts. I wouldn't say any more and ask Professor Yash GHAI to supplement.

主席：

Professor Yash GHAI, please.

佳日思教授：

I agree with that. Again I object to Mr ALLCOCK's implication that because we are here we are reversing. I thought I made myself very clear, and I spoke in English so that there are no translation problems, that Articles 43 and 48(2) do not right any business for reference. I look at Article 158 as an exhaustive set of provisions for interpretation. So, I believe very strongly that the Government has no power to seek this. It upsets the entire balance of the Basic Law, it is as if the Government has not understood. It is the executive challenging the judiciary. It is going to the Standing Committee in a case where the highest court of this land has given its ruling with unanimous decision and then to say this is not an attack of the law or this is not the law. This is amazing. I am not sure we are getting anywhere. These arguments have been made repeatedly, the Government has its one-liners and they will come back to that. We are facing a stonewall but I can for record say very clearly that the Government has no constitutional power to seek an interpretation from the Standing Committee.

劉慧卿議員：

May I ask Professor GHAI whether he is saying that the Executive has no power to go to the NPC Standing Committee to seek an interpretation on any Article of the Basic Law. I can understand you are saying that now they want to overturn the verdict of the Court of Final Appeal, that is of course very repugnant and should be roundly condemned, but what about other Articles of the Basic Law which involve the Central Government or relationship between the SAR and the Central Government. So, you are saying that they have no right to go to the NPC either to seek an interpretation. So, I mean what you are saying is the Executive Authority in the SAR has no right to go to the NPC for an interpretation. Full stop.

主席：

But the Chief Executive has gone to the State Council, not the NPC.

劉慧卿議員：

That is also the another point, so they are not really doing it. They are just making a suggestion to the State Council. Is that also unconstitutional? So, two questions.

佳日思教授：

Well, I would need time to consider the second question. It seems to me that the scheme of the Basic Law as regards interpretation is that this is primary a matter of the courts, this is clear in Article 158. In certain circumstances, the matter may be referred to the Standing Committee by the court themselves. Outside of that, I don't see any provision whereby particular institutions can do that. Now, what is to prevent a defeated litigant in a case to go. If we admit that the Government has the power, then what about other bodies which also could benefit from a reinterpretation and rectification. What about their position? So, it seems to me that to say the Government can do that, others can't do that, it is inherently objectionable. And I don't see anything in any other part of the Basic Law which authorizes the Government to seek an interpretation from the Standing Committee.

As to your second question of reference to the State Council. Let me know once we have the acceptance that there is no power of the Chief Executive to go to the NPC Standing Committee, then why should are condone a system which is the indirect way of achieving the same result. The Government is saying very clearly in this document that it is wanting an interpretation of a particular kind. In my objection I've stated before and I am repeating now is that it is a very tendentious process. Mr Martin LEE has very effectively de-constructed the Government's report and show how irresponsible the document it is. And therefore the Government can do indirectly what it can't do directly and that cannot be right.

劉慧卿議員：

請律師會答覆我的問題。

主席：

Mr Roderick WOO, please.

吳斌先生：

Mr Chairman, my colleagues and I are here as representatives of the Law Society to give the views of the need for the setting up of a formal mechanism for the Chief Executive to request the Central Government to approach the Standing Committee for

interpretation. Now, the Law Society's position is that it is neither unconstitutional nor unlawful for the Chief Executive to initiate a request for an interpretation by the Standing Committee of the NPC. Of course, it is not possible for the Chief Executive simply to ask the Standing Committee of the NPC, because it is quite clearly set out in the Constitution of the People's Republic of China that only bodies such as the State Council can do that. I do not want to use this as a forum to argue on the question of whether it is constitutional or lawful or otherwise for the Chief Executive to initiate such a process, because we are not here to discuss that. Thank you.

劉慧卿議員：

是否弄錯了？除非秘書發出了錯誤的信件，因為吳先生這樣說。可能他誤會了。我們覺得是否同意該項工作，以及是否有機制。可能你的想法和政府相同，以為大家均已接受了那大前提，所以便討論那機制。即使有這樣的誤會亦不要緊，現時已作了澄清，剛才亦已澄清了幾次。我們想聽取你的法律意見，我們知道有幾位律師便可能有幾個意見......

主席：

劉慧卿議員，一個團體派出代表到來，早已決定了其想說的意見。若再想問多一點，也只是其個人意見，不能再說是團體的意見了。

劉慧卿議員：

主席，不是這樣，他是否誤會了？若是誤會了，不要緊，可能是發出的函件有誤。

主席：

他們可以選擇我們的問題作答的，他們只是協助我們。

劉慧卿議員：

我明白，但我最想他協助的事，他並沒有協助。

吳斌先生：

Mr Chairman, I do not know whether you have a copy of the letter from your Clerk to the Panel's letter to the President of Law Society dated the 4th of June. I don't think there is any question of misunderstanding if Ms Emily LAU is given a copy of the letter and that she reads through it very carefully, then I think anybody who misunderstands the contents of the letter, it would be Miss LAU.

劉慧卿議員：

主席，若他是這樣就... ....

吳斌先生：

If she hasn't seen the letter, I don't think it is appropriate for her to presume that the Law Society has misunderstood the invitation and the reason why we are here.

劉慧卿議員：

主席。若他是這樣說，便假設我們說錯了。但我們想說的法律根據，他也不可以說。

主席：

相信律師會的立場是十分明顯，他們認為並非違憲，並不是非法，若行政長官向國務院提請......，

劉慧卿議員：

那是為甚麼？剛才大律師公會亦說了那麼多原因。你要有原因的，不能單站出來說，我說你不是便不是，有沒有搞錯？甚麼是法治，主席？我不是律師亦知道，你要根據甚麼法律才可以說不是。

主席：

劉慧卿議員。他準備說多少你是可以回應的，你可以說是不能提出論據，無法令你滿意。你可以這樣指出的。他引述那項條文，你亦可以不同意，說是引述錯誤。

劉慧卿議員：

我在問他，但你卻不讓他回答，他尚未開始引述。

主席：

何俊仁議員。

何俊仁議員：

主席。我亦希望澄清與劉慧卿議員的問題有關的問題。我很多謝律師會列出了幾個原則，認為在甚麼情況下政府應該邀請國務院把問題提交人大解釋，其中有兩點我是非常同意，就是不得違反法治和不得損害司法獨立。我非常同意律師會這兩項原則，但這兩項原則應如何理解和應用，希望律師會吳先生再給予補充。剛才大律師公會和幾位教授均覺得政府這次的處理方法，是有違反法治和損害司法獨立，尤其是第一點，當終審法院作出判決，而政府不同意、不接受這結果，而要求人大常委解釋《基本法》，這樣是等於褫奪了終審法院的終審權。當然我亦相信今天出席的嘉賓不會同意解釋權和裁決權可以分開的，終審法院只是

裁決，解釋權並不重要，因解釋權是可以推翻的，不會推翻裁決權，而將這兩項權力分開。而亦有一點是政府現時亦要求解釋《基本法》第二十四條和第二十二條。我記憶中，政府的律師在法庭上亦多次講述《基本法》第二十四條是屬於香港的自治範圍，但最近又改變了立場，說是中央與地區有關係，但過往是說《基本法》第二十四條是自治範圍。相信很多法律界人士和學者均認為《基本法》第二十四條所講述的是居民的權利和定義，這沒有理由不是自治範圍，這不是說在《中國國籍法》之下中國公民的權利和定義，而是說香港永久居民的權利和定義，所以這一定是屬於自法範圍。單是基於這兩點，我的理解是，大律師公會或其他很多學者及社會人士均覺得這樣提請國務院要求人大解釋《基本法》，是損害了香港的法治，破壞了香港的高度自治，和影響了終審權。就不得違反法治和不應損害司法獨立這兩點來說，律師會是否同意剛才的見解？吳先生可否詳細解釋？

主席：

吳斌先生。

吳斌先生：

On the two issues. One, the Law Society's position is that the Standing Committee of the NPC has the power to give an interpretation of the provisions of the Basic Law under Article 158(1). And if that is so, then the giving of such interpretation cannot be an act which would be prejudicial to the rule of law because that would be in accordance with the Basic Law. And as far as judicial independence is concerned, the judges of the courts of Hong Kong are entitled to make rulings without fear or favour, and that would not be affected by a lawful interpretation by the Standing Committee of the NPC. Any interpretation given by the Standing Committee of the NPC could not affect any judgment that has been given by any of the courts in Hong Kong. To that extent, it is the Law Society's position that the judicial independence of the courts of Hong Kong is not undermined. Thank you.

主席：

律師會的立場已是十分清楚。何俊仁議員。

何俊仁議員：

Can I have a follow-up. Leaving aside the question of constitutionality and legality of interpretation by the NPCSC, okay? For the purpose of argument we accept that, you know, they can interpret the provisions in the Basic Law. But let's focus on when and how they can interpret it. Our primary concern is first whether or not it is appropriate for the Hong Kong Administration to seek an interpretation after the Court of Final Appeal has already adjudicated on the case. I think that is the focus. Let's focus on the current issue. The Court of Final Appeal has already held the full trial, it already had the benefit of listening to Counsel, it had already adjudicated on the case after interpreting the Basic Law. Is it appropriate for the Hong Kong Government led

by the Chief Executive to seek to overturn the interpretation of the CFA. Now, if that can be done, does it amount to implying that the Hong Kong Administration can always have the second bite of the cherry that whenever they are not satisfied with the decision of CFA they can always turn to the Standing Committee for assistance. Would the Law Society agree to this course of action?

And secondly of course I have to say that although you know the first provision, the first paragraph in Article 158 says in clear terms that the power belongs or vests in the Standing Committee, the power of interpretation. Then when we go through the whole text of the Basic Law of course we can see that, you know, the constitutional design is, you know, one can discern from the text of the Basic Law is that there is a clear functional division of power between the HKSAR Government and the Central Government. That is all born out in Articles 17, 18, 19 and 158. There is separate scope of power clearly set out in all these Articles I refer to, namely there are concepts of relationship between the Central Government and the SAR Government, scopes of responsibility of the Central Government and also the limits of high degree of autonomy. It appears to us that it is important why this functional division of power has to be spelt out, because we wish to maintain the integrity of the autonomy of Hong Kong, which is important because the integrity of the system is to ensure that you know that all the social systems, the life, the style of living, economic system are being protected.

So I think what is most important is that, and that is the second question, would it be right for the Hong Kong Government to seek intervention from the State Council, you know, requesting intervention from the State Council that they should seek interpretation from the Standing Committee on interpretation of provisions within the limits of autonomy of Hong Kong? Should we invite interpretation on this provision within the autonomy of Hong Kong. So, two separate questions. Would it be right to seek assistance when the Hong Kong Government has lost the case. Second issue, should they seek intervention from the Central Government on affairs relating to the autonomy of Hong Kong.

主席：

"Mr Roderick WOO, please".

吳斌先生：

Well, Mr Chairman, as I said if there was any misunderstanding as why we are here is very clearly sorted out by the letter from this body. So, all I can say is the Law Society's position has been canvassed on different fora and it was not our intention to come here and argue those. In fact, this august body had that motion discussed and passed a resolution endorsing the Chief Executive to initiate the process. So I do not understand why we are here again within the four walls of this august body to go over that motion which this body has endorsed.

主席：

很不幸，因為政府這樣捉弄我們，事實上我們今天原定是與政府進行討論。我們想學者和團體代表就某個問題提供意見給我們時，我們主要為要明白他們所提的意見，和若認為他們理據不夠充分時，便問清楚一點，以瞭解其真正的意思，而並非與他們辯論不同的觀點。若大家記著這點會比較好。

吳斌先生：

Mr Chairman, also I would like to mention that in our paper the Law Society express the view that any decision by the Chief Executive to initiate any request for interpretation of the Basic Law by the Standing Committee of the NPC should have the endorsement of this Legislative Council. And in this particular case, we are talking about retrospectively that this Council has endorsed that decision. Thank you.

李柱銘議員：

On this point, Mr Chairman. 我覺得律師會收到我們的邀請函到來，很明顯他們只是說有關的事情，即使我們要詢問多一些，他們亦沒有權力代表律師會作答。我覺得劉議員和何議員的問題是好的，我們可以再致函律師會主席查詢有關的問題。

主席：

實際上大律師公會亦只是答覆這個問題，今天只討論機制。我亦不很滿意剛才歐先生的說法。我們列出這項議程，並不表示我支持或反對，而是此事若實行後，大家要考慮是否有必要存有機制。這是值得研究的問題，不能說我提出討論便代表我支持，我感到這是不合理的。劉慧卿議員，剛才我打斷了你的問題，請稍候，我先讓未嘗發問的張永森議員提出問題。張永森議員。

劉慧卿議員：

很簡單的問題，我只想問吳先生，因他所說的與他提交的文件有不同。有關透明度方面，提到立法機關通過那裡。 In English, it says here “in order to achieve a high degree of the transparency, it would be desirable to have the decision debated.” But just that Mr WOO said it should have the endorsement which I think is quite different.

主席：

Now, it is “and endorsed by a majority of the Legislative Council.”

劉慧卿議員：

Desirable. So in some cases it may not be desirable or not possible then they won't do it and is that also acceptable to the Law Society? Is that a must, or is just desirable?

吳斌先生：

We are being asked about our views and our view is that it is desirable.

劉慧卿議員：

But just then he said it should. So, ...

吳斌先生：

"Should " is also an expression of desirability. "should" means that we feel that it would be desirable that the Legislative Council should endorse that decision of the proposal to seek, to initiate the request for interpretation.

主席：

That word "should" was used rather lossely. Mr Ambrose CHEUNG.

張永森議員 ：

Mr Chairman, in the context of considering the necessity of setting up a mechanism or not, I think it is fundamentally important to qualify the Government's position in terms of the interpretation of Article 158 (1). And in terms of how they either broadly or restrictively interpret that particular section in the power of the SAR and in the power of the Chief Executive in requesting or seeking to request to interpret. And I would like to take this opportunity to put this question to the Government and in the presence of our guests, so that I can actually get a response from the Government as well as from the guests.

Correct me if I am wrong. When we are talking about Article 158 (1), the Government did actually make a preliminary view on Article158(1) in a very broad sense, saying that, actually, the right to interpret and the timing for interpretation actually applies before a court case, during the court case, as well as after the court case. And I have put this question to the Government that Mr ALLCOCK has put it to yourself saying that. In the context of Article 2, it sets out very clearly that the SAR has the independent judicial power as well as the final adjudication power. And this is obviously elaborated in Article 19 in greater detail. But in the context of your position that in fact according to Article 158 (1), the power to interpret actually applies generally and broadly before a court case, even during a court case and after a court case. How would you put the Government's position in the context of maintaining judicial independence, in the context of maintaining the final adjudication power and in the context of maintaining the whole framework of "one-country-two-systems" and the high degree of autonomy. Thank you.

主席：

Mr ALLCOCK.

律政司副律政專員：

Mr Chairman, thank you for this opportunity to clarify our position. Firstly, can I say I am sorry for I have offended anyone by my previous comment. What I was trying to do, perhaps not very well, was to say that there are two quite separate questions that Members of this legislature must consider. One is whether what is happening is lawful or constitutional. Because our position is that it is. And then secondly, if that is the case, should there be some mechanism to restrict this sort of things happening again. I am just saying there are two issues and we shouldn't blur them. That is all I meant to say.

As to our position on Article 158, we said there is a difference between what can lawfully and constitutionally be done and what is desirable. Some Members have said it is very undesirable to seek an interpretation in certain circumstances. Our starting position is that as a matter of law, as a matter of constitutionality, the NPCSC has the power to interpret all provisions in the Basic Law whether they are within Hong Kong's autonomy or not. And that in theory, they can do this at any time.

The second question then is : Is it desirable for this to happen? And clearly the Government takes the position that it should only be in the most exceptional circumstances that this ever happens. So, we accept that there is an undesirable side to interpretation and that it should be very much a last resort. As to when it should be resorted to, I think that it is what Members are considering now, whether there can be criteria or mechanisms or even laws which restrict this. This is obviously a valid matter for discussion and something the Administration has said we will look into. So, we are making the distinction between what can be done lawfully and constitutionally and then what is or is not desirable. And on the first, our position is quite clear that the NPCSC can do this at any time. In theory, the Chief Executive can request the interpretation any time. But this does not mean that either body will do this frequently or will do it lightly, and so that leads on to: Should there be some sort of restrictions which ensure that this power is only used very sparingly?

主席：

Professor GHAI.

佳日思教授：

Are you suggesting that when there is before the courts of Hong Kong a case involving interpretation of the Basic Law, that even at that time the NPC can make an interpretation? If you think so, that seems to be on the face of it inconsistent with Article 158(3)..

主席 ：

Mr ALLCOCK, that was the original question Mr Ambrose CHEUNG was asking whether or not you agree that before a trial, during a trial or after a trial, in all three cases you can seek interpretation. That is legal and constitutional to do so, although not all that desirable.

律政司副律政專員：

Yes, our position is it can be done at any time.

佳日思教授 ：

Even when the cases are going on in the Hong Kong courts?

律政司副律政專員：

Yes, in theory. Can I make this distinction between theory and practice which I am sure the constitutional lawyers are familiar with. But there is the House of Lords' authority on this sort of point. When independence was given to various colonies, various powers were given to them through the statutes of Westminster. Various colonies were given a great deal of independence and the issue arose as to whether that independence could be taken away again by the British Parliament. And the House of Lords says as a matter of theory, it can be taken away. What Parliament did, Parliament could undo. So it could, as a matter of theory, take away the autonomy of these various regions. But the House of Lords says there's a great difference between what can be done in theory and the political realities. And they said in other words something can be done as a matter of law but as a matter of political reality, it won't be because it is undesirable. And this is what we are saying : there must be difference between what can be done and what will or should be done.

主席 ：

Mr Ambrose CHEUNG's original questions were on high degree of autonomy and judicial independence.

張永森議員 ：

Mr Chairman, can I have the opportunity to listen to the guests' reply first before I took my follow-up?

主席 ：

Mr DYKES, please.

戴啟思先生：

First, the first point and we really have to invite a response in whole from Mr ALLCOCK, is that he has suggested that the criteria could be devised and undesirable. But the question is, given such a momentous power and you are going to be talking in terms of a power to exercise "in exceptional circumstances" or only where there is "great necessity". Does he accept that that power would be amenable to judicial review by the courts in Hong Kong, so that the power of interpretation could be inhibited by a court order reviewing the exercise of discretion of such a broadly defined nature. I mean it is a kind of discretion that the court says it is not for me to say. What is a matter of great importance or urgency or necessity for the Chief Executive, so I am actually anticipating the answer, namely, that it would be quite difficult. And the second one is this relating also to criteria for reference. I note that it was Mr ALLCOCK who said that it is not that the decision of the Court of Final Appeal is wrong, it is just it has given rise to a matter which is obviously of great concern because the Court of Appeal went one way and the Court of Final Appeal went the other way. The fact is the diversity of opinion among judges seems to be a factor. So a very specific question is this: in a hierarchy of appeals from the Court of First Instance to the Court of Final Appeal, you end up with nine judges dealing with the matter, one of First Instance, three of Court of Appeal and five of Court of Final Appeal. Using an analogy in football score in this one, it was 5:4 for the applicants. They lost at the first two stages but won unanimously hands down in the Court of Final Appeal. If the decision has gone the other way, and overall there've been a diversity of opinion 6:3 in favour of the Government. Would the same degree of uncertainty prompt the Government, although it won the case, to seek a reference if that is a criterion for putting matters forward, diversity of views among respected and experienced judges. And of course, the composition of these courts changes from time to time, as you know. It is not, as it were, a pension-like Supreme Court of the United States. There will be guaranteed to be a turnover within the judges, within those bodies, within every six months. So those were the two points I put back, partly answering the learned Member's question.

主席 :

Do you like to say something, Peter? Professor Wesley-Smith.

史維理教授 :

Yes, very briefly. I think there are just two points I would like to make. First, in regard to the nature and scope of executive power, I think as a general principle the executive must have the power to do whatever it thinks is necessary in the interest of the good governance of Hong Kong. It cannot, of course, do that which is expressly forbidden by the Basic Law. Reference to the Standing Committee is not expressly forbidden. But it may be that it is impliedly forbidden and that, as I understand it, is Professor GHAI's argument that looking at the structure of the Basic Law, particularly comparing Article 158 with Article 159, one can find the implications that this power should not be exercised at all, or the more moderate position that it should not be exercised in certain circumstances.

The other point I want to make is to refer to levels of analysis. We've referred to narrowly lawful, broadly constitutional and then the third, the political category which Mr ALLCOCK has in effect referred to. In my own opinions on this whole question,

I've restricted myself to lawful and constitutional levels, but not what it seems to me is political. Obviously, the constitutional shades into the political and it is very difficult to draw a clear distinction between the two. But it seems to me that many of the arguments by the other party are more political than truly constitutional, but I don't wish to deny that what appear to be political arguments can be given a constitutional flavour and indeed might be sufficient for one to argue very strongly that there is a breach of the Basic Law in this broadly constitutional aspect.

主席 ：

But you have more or less suggested that you thought it is politically unwise for the Government to go down the interpretation route. In a certain sense, if there are other alternatives, that could still be explored.

史維理教授 ：

If there are, but previously I've only considered the first two levels of analysis and, not being a politician, I didn't think my political views would be relevant. But as I say it is difficult to distinguish sometimes between the constitutional and the political.

主席 ：

Professor GHAI.

佳日思教授 ：

I think I like to say a word or two about the question of interpretation. I like to say a word or two about the question of interpretation. I think to say about the constitution document that it is legal but undesirable, it is unsatisfactory particularly so in the present context. The Court of Final Appeal I think set out the framework for interpretation and it said very clearly that you must avoid rigid, narrow and linguistic kind of interpretations and that interpretation must be based on the broad purpose of the Basic Law and we must look at every provision in the context. And that is the guide to interpretation which I think even the Department of Justice is bound by it, I believe. So, I think to say that all because Article 158(1) says this at any given time the NPC can make a ruling even for cases being heard by the Hong Kong Courts, the same issue can be decided by NPC completely contrary to Article 158. I mean we have to see the context of it. This matter of legalistic position is unwarranted in a constitutional document. And the other thing you mustn't forget is that we cannot go to court for every ruling on this point. I think Peter has suggested a judicial review, but that is not realistic, we have to accept the fact that once the Government goes to the Standing Committee or to the State Council that is the end of the matter. Effectively you can't do anything about it, we have to accept that and that is a part of the structure of analysis or what that means and I don't like to distinguish between legal but not desirable, this is nonsense in a constitutional document. And I would suggest that we have to look at whether the court can, or whether the NPC, just take one example from Mr ALLCOCK' statement, whether the NPC can at anytime give a ruling, even when the case is before the CFA. It is nonsense, it goes against the very philosophy of the Basic Law. And

we just can't interpret in isolation and the Court of Final Appeal is very clear on this. And I do wish the Department of Justice would read the CFA decisions.

主席 ：

Can I pick your brain a bit, Professor GHAI. May I say that an act which is not unlawful, which is not illegal and hence in that sense lawful and legal, may not necessarily be proper in a constitutional sense for your purposive approach to the constitution. Would you agree with that?

佳日思教授 ：

Yes, I would, and nothing we have for a purposive approach. I mean Article 158(1) has to be read in the context not only of the rest of Article 158, but I think as Mr HO said, in Articles 17, 18, 19 so you have to see in the whole context, we have to see the historical context, we have to see in the context of "one-country two-systems".

主席 ：

Ambrose CHEUNG, please.

張永森議員 ：

Thank you, Chairman. I share the view of the learned guests here in terms of the Government's position on the board interpretation of Article 158(1). Actually, when I first heard about their position, I almost feel gravely disturbed and I made the request, and I made it again, that the Government please put their position in writing, so that it's clear and square, so that we can actually follow up on that. That is the first request.

The second thing why I am gravely concerned is because in that analysis extending the Central Government exercising Article158(1) broadly at any time, at any point in time. It also means that the Government is also taking a position by virtual of Article 43 and Article 48 that they can also at anytime report to the State Council and directly or indirectly seek the request of the interpretation, and in that sense I can't accept the Government's position being lawful and not desirable.

If you are saying that it is lawful for you to do, then thirdly, I will request you, the Government, to put it very clearly: "Have you actually sought an interpretation of Article 158(1)? Who is the authority of the interpretation of Article 158(1) in supporting your position?" I mean we are debating here the interfacing of the two systems and we are still at a loss and try to develop authorities and views and thoughts about it. You are so firm and so clear about your position on Article 158(1), I mean on what basis and on what authority that you interpret such a provision. That is the third question.

And the forth question is would Government please put it in paper what is the Government's intention and a Government's structure and purpose in protecting the

one-country-two-systems, in protecting the high degree of autonomy. I mean the position adopted to bind you can be argued that you can legally at anytime, even though undesirable, you're able to do it, to disturb it, to disrupt it, even to disrupt the fundamental framework of the whole Basic Law, designed for the one-country-two-systems and the high degree of autonomy. I mean I would challege the Government to put their position clear on paper, so that we can actually pursue that issue. Thank you, Mr Chairman.

主席：

Mr ALLCOCK, please.

律政司副律政專員：

Mr Chairman, we will certainly try to put our position in writing. I think I have said all I can this morning but we will try to reduce it to writing. Can I just answer some points where it has been suggested that one is wrong to draw distinction between law and desirability, between theory and practice and so on, that in the constitutional framework this is wrong. All I say is that the House of Lords did not agree with that position and did draw that precise distinction between what lawfully can be done and what is a matter of political reality and also of desirability whether it should or should not be done. So the Government is by no means out of line with common law thinking on this.

主席：

Mr Martin LEE, Please.

李柱銘議員：

Mr Chairman, I would like to take a couple of points on the interface between the two systems, the common law model and the Leninist model. Now Mr ALLCOCK does not disagree with that, but he said that there is an interface, but surely all the drafters knew throughout the time that the two systems are totally different. And what the drafters did was to emphasise that the common law shall continue and never said anything about the civil law system or the Leninist system or what ever. On the contrary, it says that if national laws have to be applied to Hong Kong, then you must go through the channel as included in Schedule III and all that. It is meant to be a self-contained document. If you say, well, there has to be an interface, don't suggest that it is not something we knew, we knew all the time. And we look at Article 158, it was carefully drafted, step by step, and I think members and people must remember the Chinese text of Article 158(1) is very important, the right to interpret the Basic Law belongs to the National People's Congress Standing Committee. And how is it to be exercised, and it is clearly spelt out. The courts could interpret on their own in the Articles which fall within the autonomy of the Region. If it is now suggested that as the Government has to, becase the Chief Executive has already invited the Standing Committee to interpret, and I say re-interpret, those Articles, then surely Article 158 would have been worded differently. You would have expected these words to

appear after the first paragraph. The first paragraph of Article 158 says the power of the interpretation of this Law shall be vested, or as I said, belongs to the Standing Committee of the National People's Congress and it may be execised anytime by the Standing Committee of the NPC as it shall think fit or notwithstanding the subsequent provisions. Words to that effect would justify, otherwise you're putting the whole Article on its head, you are standing on it.

Why do you need such elaborate provisions if you are right, then you don't need to say anything, just the power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress, full-stop and that's all. And then later on, then it is OK if we delegate such power to any court we will do so by executive means, we can do that that way. So why do we do it so elaborately? Why do we restrict the reference only to certain types in Article 158(3)? So if the Government is right that the interfacing has to be dealt with now, then I would suggest that, Professor GHAI is entirely correct, then you opt the method which will not hurt the common law system and would indeed preserve it. And you don't opt for a system which opens a big hole into the common law system, like opening a hole in my heart. And then we don't know when it will end. That's the way to look at it surely, and that is the duty, undoubted duty, of the Government so to behave. Otherwise, how do you make the "one-country-two-systems" works. I don't want to see the Joint Declaration being negotiatied after two years, and the Basic Law being drafted, finalized after somethings like four and half years and only to be completely destroyed at the most crucial areas by the Government, that is totally unacceptable.

Mr Chairman, and that I think it would be, of course, I can understand some of the visitors do not like to be involved in a political arguement but here we are not really engaged into a political argument as to whether the Liberals are right, or DAB are right, or the Deomcratic Party is right, we are here concerned with the rule of law. Now when it comes to the defence of the common law, then I would say every lawyer, every academic in the legal field has a duty. And I would say the Government, of course, has the undoubted duty, they should be taking the lead. And that would include the Law Soceity of course, and the Bar, we all must work together to perserve the common law, which the Basic Law and the Joint Declaration took pains to preserve. Thank you.

主席 :

Mr ALLCOCK, please.

律政司副律政專員 :

Thank you, Mr Chairman. Before Mr LEE's comments and questions, other members have drawn attention to the fact that many Articles in the Basic Law do restrict the power of the Central Government in relation to Hong Kong. For example, Article 17 only allows the Standing Committee of the NPC to return laws which relate to matters outside of Hong Kong autonomy. And national laws can only apply under Article 18 in a similar fashion. So there are, as has been pointed out, a number of express provisions which limit the Central Authorities' powers in relation to Hong Kong. Now under Article 158(1), that is not the case. So to the extent that people have been relying upon those Articles, in my view, this does not entirely help their case

because they are saying certain Articles expressly limit the powers but Article 158 does not. What Article 158(1) does is firstly state that the NPCSC has the authority to interpret, and then it delegates to the courts the power to interpret the Basic Law when it's handling cases. And, as we know, in certain cases the courts must seek an interpretation. But that delegation does not take away the NPCSC's own unrestricted power of interpretation. Those of you who argued that it is contrary to the spirit of the Basic Law to interpret that way, are arguing on the spirit and that is not always the strongest legal argument. On the wording, and everyone says one must rely upon the wording of the document, there is no restriction on the NPCSC's power of interpretation.

主席：

我想這沒有甚麼意義，因兩個講法各位已聽了很多次，兩方面均堅持著不同的理解。剛才我容許李柱銘議員作較詳細的提述，因為他將佳教授的某一個論點說了出來，否則我亦不會讓他作這樣詳細的敘述。但歐先生沒有答覆"英文"那一點，希望能作出答覆。"英文"並不是解釋為"原意"，而是根據憲法或憲法文件應有的目的而作出解釋，以那種方式理解有關事項。剛才我亦曾講述，若以法律用字來看，可能得到相反的結果。因這事不是非法，便是合法，可以完全不顧大局，可能得到這樣的結果。所以根據"應有的目的"以理解法律條文，就憲法文件而言是正確的方法。佳教授講述了很多，希望歐先生亦就此點作些簡述。

律政司副律政專員：

Thank you, Mr Chairman. I accept that one must adopt a purposive appraoch but as often occurs before the courts, people argue as to what the purposes of various provisions are. Now, as we know, the Basic Law has a number of themes running through it, some of which Professor GHAI has referred to. But another theme, one theme also is that it is one country, and that certain powers remain vested in the Central Government. So to say that one must look exclusively at the purposive approach which denies the Central Government powers, I think it is a very one-sided approach.

李柱銘議員：

....talking about one country without mentioning two systems?

律政司副律政專員：

Mr Chairman, I was referring to the fact that everyone here has been referring to the two systems all morning. I was trying to put the other side of the picture.

主席：

劉慧卿議員。

劉慧卿議員：

Mr Chairman, I want to ask Mr ALLCOCK for clarification about the question asked by Mr CHEUNG ealier about whether the excutive authories would go to the NPC for an interpretation before trial, during a trial and after a trial, and he said that he doesn't rule out anything. I mean all these are possible because if we look at Article 158(3), it gives very specific circumstances. And that is actually for the Court of Final Appeal to go and make the application. But I think what Mr ALLCOCK is saying is that it is outside Article 158. And again going back to the Chief Executive's power to initiate an interpretation, what I would like to know is what kind of effect is that going to have on our judicial system. If we know that there is a trial going on and is not as if you know the prosecution would ask the judge to go and apply for an interpretation, is that outside the judicial proceedings, the executive authorities will initiate an interpretation? So do you foresee any impact that could have on the trial, on the whole judicial system and on the independence of the judiciary, if the executive insists on having that power to intervene? And do you think it would not really affect quite adversely the judicial proceedings that are going on.

主席：

Mr Mak, please.

署理政制事務局局長：

Mr Chairman, after Mr ALLCOCK's response on the legal asepcts, I think it is worthwhile for me to repeat that the Chief Execuitve has pledged that we would seek assistance of this kind from the CPG only in exceptional circumstances.

主席 ：

Mr ALLCOCK.

律政司副律政專員 ：

Yes, Mr Chairman. To supplement what the Secretary has said, we go back to the difference which I have been trying to emphasize between what may lawfully and constitutionally be done and what is desirable to be done. And the Goverment has emphasized that only in highly exceptional cicumstances would the CE ever seek an interpretation. Members are here considering whether there are any other criteria or constraints which could be imposed. Presumably you could consider as one of the criteria that there are no proceedings pending on the issue. That's my view on the question of desirability, which by all means can be looked at in terms of criteria. In terms of what is lawful, our position is that it could in theory be done.

劉慧卿議員：

Mr Chairman, I would have thought this is a question of very fundamental principle that the executive authorities would not do anything to undermine the independence of the judiciary and the integrity of our legal and judicial system. But

what they are proposing is that they can intervene at anytime during a trial and then go to Beijing and ask for an interpretation. What do you expect the judge to do with that interpretation if and when it is received.

主席：

可以直接點說，現時政府只說在很例外的情況下才提請國務院要求人大常委作解釋《基本法》。但理論上據政府說，無論在審判前，即它估計將來有事情發生，所以可就某項條文需要尋求解釋《基本法》。當有案件在審訊期間，亦恐怕法院不會要求人大常委會作解釋《基本法》，要此亦進行and not rule out the possibility，有這樣的可能存在，政府是會這樣處理，那麼便變成例外的情況。或者法院已就涉及一些與中央有關條文的某案件，判定所說與中央有關的條文，或中央與地區事務有關條文，並不適合於有關案件，因此不尋求人大常委作解釋《基本法》，在這種情況下，政府亦會過問。因全部情況均是所說的例外情況和特殊情況。這是直接的說法。

劉慧卿議員：

主席，Mr ALLCOCK希望作答。

主席：

Mr ALLCOCK.

律政司副律政專員：

Mr Chairman, we emphasize endlessly that we're talking about highly exceptional circumstances. In the particular case we are now concerned with, we're talking about the serious problem of immigration which you all know about. It is not a question of if we may lose a case therefore we seek an interpretation. This is complete distortion of our position. There is a factual situation which everyone knows about in terms of immigration, plus there is legal ambiguity which everyone knows about. These are highly exceptional circumstances. To suggest that we will seek an interpretation because we think we may be losing any case relating to the Basic Law is a complete distortion of our position.

主席：

你會否尋求解釋《基本法》第七十四條？

劉慧卿議員：

Mr Chairman, he is not ruling it out. He is not ruling out going to seek an interpretation whenever, you may say exceptional circumstances, but I don't know what your definition of exceptional circumstances is, anyway. You don't rule it out.

律政司副律政專員：

Mr Chairman, I've been trying to draw the distinction between what can lawfully be done and what is desirable. We are here, I thought, to discuss what sort of criteria or mechanism could be thought out which would have an effect of restraining the exercise of these powers. Now people are suggesting that we'll be doing this everyday of the week, which is a distortion.

主席：

吳斌先生。

吳斌先生：

Mr Chairman, as I said, the Law Society has only formed some preliminary views but there're some areas that we would like to look at more closely. And one of the questions that will be discussed is that in Article 158(3) the courts of Hong Kong, when dealing with a case affecting matters which would have to involve certain aspects particularly provided there, the courts shall seek an interpretation, and I would imagine that means adjourning the proceedings while the interpretation is being requested, and the interpretation will then come in and then the courts in applying the provisions shall follow the interpretation of the Standing Committee. Now, to lawyers brought up in the common law system, this obviously is an interpretation from the Standing Committee while the matter is subjudice, is something we have been brought up to look at as contrary to the principle of the common law system. Yet, it is provided in the Basic Law. Now, nobody is above the law and the laws of Hong Kong are not above the Basic Law. And what if the court should fail in that duty to refer the matter to the Standing Committee for interpretation. Now, when that happens what would be the channel, what would be the steps to be taken, if any, by anyone for interpretation. Therefore, the question would be : "Is it proper, appropriate, lawful or otherwise for an interpretation to be sought and given before, or during, or after the final adjudication?" I mean, definitely, Article 158 envisages a situation where interpretation is to be given during a trial. Now this is a question that we would have to look at more carefully, before we can form any final view on it.

主席：

何俊仁議員，剛才你要追問一些事項。

何俊仁議員：

Yes Mr Chairman. The reason why we are so concerned about what the Government describes as exceptional circumstances is because it is to be defined by the Government. We have no power to define it as it is entirely up to the Government to find when it becomes the exceptional case and then they have to take action. Let's come back to a real situation. We all know that there is a case concerning the overstayers coming up for hearing before the CFA. Now there is a possibility, speaking hypothetically, that the Administration may invite or may apply to the Court to

refer the matter to the Standing Committee of the NPC. The question that I would like to ask is, suppose the Court were to decline to accept the application of the Government Counsel in the course of the hearing, now would the Government then, at that time, during the pendency of the hearing, or in the course of the hearing, take initiative to take the matter to the State Council. Would that be a possibility? Or would the Government rule it out, saying that they won't do it until and unless the case is concluded and then they look at the matter.

主席：

Mr ALLCOCK.

律政司副律政專員：

Mr Chairman, that is not a possibility which has occurred to me. But I think going back to the allegation that the Government defines what are the exceptional circumstances, I thought the whole purpose of us being here today is to see if we could discuss what sort of criteria would need to be satisfied, and possibly in what situations an interpretation should never be sought. So instead of this debate which seems to be going round in circles, I wonder if we could have some positive suggestions.

何俊仁議員：

The second part of my question. You know during pendency of the hearing before the CFA, will the Government rule out the possibility of taking the matter to the Standing Committee?

律政司副律政專員：

…..I regret that I have no authority to answer that because I doubt if it has ever even crossed anyone's mind.

主席：

Subjudice case cannot be discussed. Mr Martin LEE, please.

李柱銘議員：

What I suppose answering Mr ALLCOCK's question"if we want to put the limitations before the Government can apply for an interpretation because it is so exceptional" he said. I suppose we can stipulate in future the Government will not seek to refer unless it involves the interest of more than 1.5 million people of Hong Kong and that it will cost the Government more than $ 700 billion dollars. I mean that really makes it exceptional, I suppose 。不過我想用主席"打開天窗說亮話"的方法，直接說出來好了，不用繞圈子。其實是很簡單，現時政府在這宗案件上，我不知這是香港特區政府或是北京的中央政府，可能兩者也是，覺得終審法院"不識做"，明知他們的想法是怎樣，雖然條文的用字不是這樣，但是知道他們想法是怎樣，看看籌委會便可知道他們的想法，你還

是"不聽話"，這就是不尋常，這便要採用非常的方法處理。這即是當眾向你掌摑，讓你知這樣的處理是錯的，在下次時不要再這樣做。這便是真話。

主席：

張永森議員。

張永森議員：

主席，我提出的這個問題，最重要是想指出政府，不知是有意或無意，運用了第一，認為是合法"lawful"，這點我並不同意。第二，認為在特殊情況，你們不用擔憂，只是在特殊情況，但這特殊情況並沒有作解釋，亦是由政府作解釋。利用這所向無敵的機制，可以除了司法獨立、終審權和終決權外，現時說的三權分立均不存在。三權分立便是行政可以利用這個方式干擾司法，若用這個方式理解，便需要對整本《基本法》進行大檢閱，大檢閱的意思是政府怎樣可以"英文"，推翻整個制度。我覺得你們是有責任向香港市民清楚解釋，並不是我們擔心你會用那"power"，而是現時你說你有這項權力，我亦不同意。若你有這項權力，將來如何使用，並不由你們決定，將來的情況怎樣，亦不是由你們決定。在這種情況下，"一國兩制"如何實施下去？不如由你教導我如何實施下去，我們不想再繼續在這裏辯論下去，不如把你們的"英文"全部說出來，我們逐項檢討，看看你所持的理念可以帶至多遠，以推翻整個偉大的設計。

主席：

我們是記錄了你的意見，但實是難以要求以書面逐一回應不同的觀點，你說沒有三權分立，他說三權分立是......

張永森議員：

主席，不用的，只要回應了第一次的問題，我們便能從那裏逐一對比《基本法》便能知道，剛才劉慧卿議員所提問的，亦已是動搖三權分立的了。

主席：

"Mr Roderick B WOO, please".

吳斌先生：

Mr Chairman, we were invited to be here specifically between the hours of 9 and 11. Now it is 12 o'clock noon and we wonder whether we could have your permission to leave.

主席：

We reversed the order of business on the agenda and asked the Government to do it first. The Government was supposed to meet us between 11 am and 12 noon. If you still have time, I've one last question to ask myself。我希望特別詢問梁美芬教授，問題是與《基本法》第十七條、第二十三條及第一百五十八條有關。大家均承認第二十三條是在國家權力範圍下，但在國家權力範圍下，授權香港特區自行立法。根據第十七條，立法後很明顯要交給人大備案。備案後，沒有發現違反《基本法》，所以不會發還。在這情況下，至某案件進行訴訟，根據第一百五十八條，無論那一方向法院提出這是關乎中央的職權，並說明現有法律違反了《基本法》第二十三條，那時尋求人大常委作解釋，假設法院願意要求解釋，人大常委是否可以解釋？我的意見是可以，但可能是錯的。假若有關條文不是在第二十三條的範圍內，即法律條文不是根據第二十三條製定，而是根據第二十四條，第二十四條亦產生了爭拗，因不是自治範圍，有部分不是。假設在這裏完全沒有異議，不用交與人大備案，那已是差不多說明香港特區可以全權立法。若被指違反的並非中央職權或中央和特區關係，而只是違反特區自治範圍之內的條文，人大常委是否有權解釋？我想我的問題十分複雜。

梁美芬教授：

我嘗試理解你的問題。簡單來說，《基本法》內有些條文，我們覺得是牽涉中央和地區關係，例如第一百五十八條便可能牽涉到。在終審法院審訊前可能出現不同的爭拗，亦可能牽涉特區終審法院是否需要尋求人大常委作解釋。我一貫的立場是無論任何一條《基本法》的條文，已經過適應化的過程，包括了第二十三條，或第二十三條以後，很大部分是與自治有關的條文，如果已適應化成為特區的法律，當根據第十七條備案後，中央沒有提出反對，我覺得特區本土法律的解釋權便是屬於特區法院。其實無需要在這條地區的法律上通過全國人大作解釋。全國人大解釋些甚麼？《基本法》第一百五十八條只是說明解釋《基本法》內的條文，所以我是傾向《基本法》條文再引伸出來的本土法律，其實不應隨便要求全國人大作解釋，因為《基本法》是具有約制性。我對剛才政府的說法有一些補充，我覺得如第一百五十八條第一段，是象徵性講述了權力的問題，這是我們不能否定的，因已寫在條文內。若抽象來說，每個人在任何情況也可要求國務院協助解釋《基本法》，但因政府擁有很大的權力，所以每當行使這項權力時是應該有約制性。今天我得到的訊息，是政府亦有這樣的態度，希望討論如何約制這項權力，因可能引致很多人擔憂。但即使是劃分，也可作較清楚的劃分，就是分為《基本法》，和《基本法》以下經過適應化的過程的本土法律，若《基本法》是容許有這樣的空間讓本土立法，我覺得這個空間應留給特區的法院。包括第二十三條下所定立的法律。

主席：

我問有關《基本法》第二十三條的問題。人大常委是有權解釋，你說沒有。但事實上是有的，因在解釋《基本法》時，說只是在過去沒有說是違反《基本法》，因若違反了《基本法》便等於廢去已製定的條文。林峰博士。

林峰博士：

Thanks, Mr Chairman, I just want to make one point here. I think your question is really concerned with the issue of constitutional review, that is whether the Standing Committee of the NPC has the authority to review it. And my personal view is, if you look at the other countries' constitutional review mechanism, there exist two possibilities. One is sort of pre-review, that is before the legislation comes into effect it is submitted to a sort of scrutiny to see whether it is consistent with the constitution itself. And then the other possibility is the review after the law comes into effect and it has been noted that sometimes the pre-review may lose certain aspect, so there also exits a possibility for review after the law comes into effect. And the issue now is, in China, it does not have well established constitutional review mechanism. So according to the other countries' experience, I don't think its authority to have such kind of review after the law comes into effect is restricted.

主席：

若各位有興趣我在會議後可與各位繼續討論，我覺得林教授不是十分明白事情的歷史背景，以前是disallowance。雖然說兩者是有關係，因為《基本法》第一百五十八條亦是constitutional review，你可以這樣解釋。但過往若香港有任何的法例違反香港的皇室訓令，便定會到法庭作訴訟，不會作其他處理。Disallowance是另一回事。何俊仁議員。

何俊仁議員：

跟進你剛才所說，人大常委是否有權解釋香港本地立法的問題。剛才梁美芬教授和Dr LIN均沒有講述是否實際有這樣的權力作解釋。當然，我們可以看到如《基本法》第十七條，提供說它是有權解釋本地法律的權力，但說明是要牴觸中央事務，或中央與地區關係時，便會發回，若發回時便變成無效。這是我對條文的看法。請問對條文以外……

主席：

對不起，因為很多嘉賓需要趕著離開，我們星期二再繼續會議。

李柱銘議員：

主席。我想多說一句，因剛才我很強烈的批評政府寫這份報告……

主席：

會議已結束，但可以繼續對問題作討論。

李柱銘議員：

主席，我只是多說一句。我希望政府提供一份補充的報告。最低限度要說清楚在香港有一些很強烈的不同意見，最少加上幾段文字。我要求政府撰寫一份補充報告，提交人大常委。並不是那十九份報告，因那些報告是沒有人會看的。

主席：

麥先生。

署理政制事務局局長：

主席。如我們的公布已講述，我們已把各界不同的意見遞交港澳辦。剛才李議員提出恐怕沒有人會看那些報告，李議員當然可以有他的看法。但主席，若你容許，我想再澄清政府對這事件的看法，相信有助各位瞭解這件事。一方面我們作出了承諾，說明只會在非常特殊的情況下才會這樣處理；另一方面，我們亦曾講述政府會十分慎重考慮有關設立機制的問題。我要指出的是，這是十分複雜的問題，需要考慮的因素，如議員、學者和社會各界人士對這方面所表達的關注和意見，以及有關的法律問題。政府已說明會慎重考慮探討如何處理這些問題。但目前我們未能作出承諾，到我們完成研究工作，便會向委員會作出報告。

主席：

那是說你不會提供剛才李柱銘議員要求的補充報告。

李柱銘議員：

我要求的是政府撰寫一份補充報告提交人大常委會，因現時報告中說明是考慮了眾多的解決方案，但沒有說是甚麼方案，亦不提述有不同的意見。現時的強烈意見是正在侵犯、殺害本土法，但你一句也沒有提述，人大常委怎樣知道是這樣大的一件事。它在政府誤導下做了壞事，便會產生十分不良的影響。

主席：

相信政府是很難的，……

李柱銘議員：

他們並沒有困難，現時是刻意不這樣做。他們經常是誤導別人，那怕是人大，反正亦是橡皮圖章，他們是這樣的心態。

主席：

我設身處地為他們考慮這問題，可能有四、五個"option"，但寫了3個，便會被指責。撰寫一些不是他們"favour"的"option"，若撰寫得不完善時，亦會被指責成"偷工減料"，故意把別人的意見撰寫得不理想。那是十分困難的事。

李柱銘議員：

政府給我們的"briefing"亦有說其他的"option"，唯一這份便沒有。

署理政制事務局局長：

主席，我作簡單的回應。這份報告是行政長官向國務院提交的報告，這份報告除了這件事情的立法歷史的始末外，亦有反映特區政府在清楚考慮這問題後的決定，這決定便是尋求國務院的協助，提請人大常委解釋有關《基本法》的規定。至於其他各界的意見，我們亦已把這些意見彙集一併呈交中央。

李柱銘議員：

主席。那麼現時可否承諾我的這項要求，轉告行政長官？我特別這樣提出，是因為我們要求與行政司官會面，但答覆是無需要與我們會面。

署理政制事務局局長：

主席，我會考慮議員提出的意見。

李柱銘議員：

你只是考慮！那麼我考慮在街道上欄截行政長官了。

主席：

即要欄途告御狀了。

李柱銘議員：

對。在行政長官回家時的途中，我會欄截他。

主席：

下次會議是星期二，下午2時30分至4時30分。

劉慧卿議員：

主席。我是完全支持Professor GHAI的看法，便是整件事在事前已安排妥善，已完全是知會了的。所以李柱銘議員遞交甚麼意見亦是沒有作用，實際上是不用參考，Professor GHAI早已說穿了情況。若你要按程序提供文件給他們，只是浪費資源。

主席：

這些意見已聽了很多和說了很多，若沒有其他的問題與學者討論，今天的會議便結束。多謝各位今天抽空到來分享大家的意見。星期二是下午2時30分至4時30分。