

(Translation)

**LEGCO QUESTION NO. 10**

(Written Reply)

Asked by : Hon Frederick Fung      Date of meeting : 4 May 2005  
Replied by                              : Secretary for Justice

Question :

In her statement on the term of the new Chief Executive on 12 March this year, the Secretary for Justice pointed out that the Basic Law was the interface between two systems under one country, and it was unavoidable that the Mainland organs and legal sectors and the local institutions and legal sectors would sometimes have different interpretations of the provisions of the Basic Law. Given the common goal of preserving the stability and prosperity of Hong Kong, there should not be any difference that could not be resolved through mutual understanding, empathetic accommodation and frank communication. Moreover, continuing dialogue and communication were the best means by which a consensus on the implementation of the Basic Law by legal professionals of the two jurisdictions could be cultivated. The Government of the Hong Kong Special Administrative Region would endeavour to achieve this. In this connection, will the Government inform this Council whether it has studied if:

- (a) the authorities' current interpretation of the provisions of the Basic Law, other than those relating to the term of office of the Chief Executive, is different from their previous interpretation, and if the literal meaning of such provisions contradicts the legislative intent;
- (b) the authorities' interpretation of such provisions of the Basic Law is different from that of the Central People's Government; and
- (c) in implementing such provisions of the Basic Law, some circumstances have arisen which had not been envisaged at the time these provisions were drafted;

if it has studied the above and the results indicate the existence of the situations described in (a) to (c), of the provisions concerned and the

authorities' measures to address the situations; if it has not, the reasons for that and, given that the authorities have to conduct the above study before engaging in communication and dialogue with the Mainland on those provisions which are interpreted differently in Hong Kong and in the Mainland, whether the absence of such study is consistent with the authorities' endeavour to cultivate, through communication, a consensus between the two jurisdictions on the implementation of the Basic Law?

Reply :

Madam President,

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('the Basic Law') was promulgated by the National People's Congress on 4 April 1990 after 4 years and 8 months of effort made by the Drafting Committee, and two extensive consultations conducted through the Hong Kong Basic Law Consultative Committee formed of people from all walks of life in Hong Kong. During the period of more than 4 years, the Drafting Committee held 9 plenary sessions, there were 25 meetings of the Chairman and Vice-Chairman and two enlarged meetings of the Chairman and Vice-Chairmen, the General Working Group held 3 meetings, and the Special Groups met 73 times before the draft was presented to the National People's Congress on 28 March, 1990. Approximately one third of the members of the Drafting Committee members were Hong Kong residents. One of the purposes of the Basic Law was to ensure the implementation of the basic policies of the People's Republic of China ('PRC') regarding Hong Kong, and such policies had been elaborated by the Chinese Government in the Sino-British Joint Declaration. It was therefore a piece of legislation passed in accordance with the Constitution of the PRC, based on the Sino-British Joint Declaration and with the participation of Hong Kong people.

Like all constitutional instruments, it could only set out the broad principles, leaving details to be implemented through domestic laws. In the course of drafting, views were expressed over the brevity of certain articles, but it was decided that policies rather than details should be adopted.

The dispute over Article 53(2) of the Basic Law illustrates how one may not be able to identify any differences in understanding of the Basic Law until the question comes up in a real situation. The recent discrepancy only became apparent when a vacancy in the office of Chief Executive arose from the resignation of the former Chief Executive. It is not possible to scrutinize the Basic Law clause by clause and seek the opinions of Mainland experts on abstract issues. A real life situation which gives rise to a dispute may throw up factors which could not be foreseen during an abstract consideration. Since the Reunification, more than one third of the Basic Law articles have been interpreted by the courts of Hong Kong and three Interpretations have been issued by the NPCSC. All these help to enrich our understanding of the Basic Law and, when more precedents are accumulated, we will be better able to master the meaning of the Basic Law.

In answer to the specific questions of the Hon Frederick Fung:

- (a) The Government is not aware of any other article in the Basic Law in respect of which our current understanding differs from our original understanding, or in respect of which the literal meaning contradicts the original legislative intent;
- (b) The Government is not aware of any article in the Basic Law in respect of which its interpretation differs from the interpretation by the Central Authorities;
- (c) In the implementation of the Basic Law, there is one set of circumstances that does not appear to have been envisaged at the drafting stage. The election of the second term Legislative Council preceded the election of the second term Chief Executive. However, Annex II of the Basic Law provides (in effect) that the Election Committee for the second term Legislative Council should be that for the second term Chief Executive. This gave rise to some concerns as to how these provisions should be implemented. The Legislative Council (Amendment) Ordinance 1999 and the Chief Executive Election Ordinance were enacted in the years 1999 and 2001 respectively to enable the Election Committee to be formed for the election of 6 Members of the Legislative Council and for that Election Committee to be continued and regarded as having

been constituted as the first Election Committee under the Chief Executive Election Ordinance. Insofar as the Legislative Council Ordinance is concerned, the Election Committee is no longer relevant, since no further Members were returned by the Election Committee in the third term Legislative Council election in 2004. Regarding the Chief Executive Election Ordinance, Members were fully aware that there might be a vacuum of approximately 18 months during which no Election Committee would exist. If any need for another election of the Chief Executive arises in the 18 months period from 13 July 2005, we could consider forming another Election Committee. But we would not take such a decision lightly, as we do not wish to hinder the review of the method for selecting the Chief Executive in 2007. If no such need occurs, there will be convergence of the term of the Election Committee and of the third term Chief Executive in the year 2007. This also shows how an anomaly in the Basic Law may be resolved without seeking an interpretation of the Basic Law by the NPCSC.