

(English Translation)

3 April 2004

Lingnan University Students' Union,
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Dear Chairman and Members,

Thank you for your letter of 29 March 2004. I have passed a copy of the letter to the representatives of the National People's Congress (NPC) Council of Chairman: Mr Qiao Xiaoyang, Deputy Secretary General of the Standing Committee of the National People's Congress (NPCSC), Mr Li Fei, Vice Chairman of the Legislative Affairs Commission of the NPC, and Mr Xu Ze, Deputy Director of the Hong Kong and Macao Affairs Office of the State Council, during their meeting with the Task Force on Constitutional Development at Shenzhen on 30 March 2004. Your views have therefore been fully reflected to the NPCSC.

We note from your letter that you agreed that the NPCSC does have the ultimate power to interpret the *Basic Law*. But you are of the views that it is not the appropriate time for the NPCSC to exercise such power. This shows that you do have pretty good grasp of the issue. I would venture to say that your understanding of the issue might even surpass that of some of our friends of great learning.

The power of interpretation of the law by the NPCSC

The NPCSC's power to interpret the laws derives from Article 67(4) of the Constitution of the People's Republic of China. Article 158(1) of the Basic Law expressly provided that: "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress".

The Chief Justice of the Court of Final Appeal had ruled on this¹ and affirmed that the exercise of such power by the NPCSC was not affected by the second paragraph of the same Article (the NPCSC shall authorize the courts of the Special Administrative Region to interpret the provisions of the *Basic Law* in adjudicating cases) or the third paragraph of the same Article (the Court of Final Appeal shall seek an interpretation of the provisions concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Hong Kong Special Administrative Region (HKSAR)). It is therefore a misconception for one to claim that the NPCSC could make an interpretation of the *Basic Law* only when the courts of the HKSAR seek an interpretation.

The interpretation will not damage Hong Kong's "high degree of autonomy"

You said in your letter that you are of the view that the NPCSC's initiative to interpret the *Basic Law* would seriously damage the "high degree of autonomy" of Hong Kong, undermine the "Two Systems" under the principle of "One Country, Two Systems", and adversely affect the international image of Hong Kong. I would like to clarify that the NPC is the highest organ of the state power. It establishes the HKSAR and decides the system to be instituted therein². The NPCSC is the NPC's permanent body³. It is entirely lawful for

¹ In *Lau Kong Yung v the Director of Immigration* [1999] 3 HKLRD 778, the Court of Final Appeal ruled that (in pages 798-9 of the judgment) : "Article 67(4) of the *Chinese Constitution* confers on the Standing Committee the function and power to interpret laws. This power includes the *Basic Law* which is a national law. The *Basic Law* itself provides in Article 158(1) that the power of interpretation of this Law shall be vested in the Standing Committee.....[The Court of Final Appeal rejected the representative counsel's argument that the Standing Committee cannot interpret the Basic Law except upon a judicial reference by the Court which would relate only to the excluded provisions outside the limits of the autonomy of the HKSAR.] [The Court of Final Appeal is of the view that] this argument cannot be accepted. It is clear that the Standing Committee has the power to make the Interpretation. This power originates from Article 67(4) of the *Chinese Constitution* and is contained in Article 158 of the *Basic Law* itself. The power of interpretation of the *Basic Law* conferred by Article 158(1) is in general and unqualified terms. That power and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3) [concerning the interpretation of the *Basic Law* by the courts of the HKSAR]."

² Article 62(13) of the *Constitution*.

the NPCSC to exercise its power to interpret the *Basic Law* in accordance with the provisions of the *Basic Law* and the procedures therein. The Court of Final Appeal cannot question that authority, and the courts of the HKSAR shall follow the NPCSC's interpretation of the Law⁴. Rulings made by the courts of the HKSAR form part of the Common Law. The NPCSC's interpretation is therefore consistent with the *Constitution*, the *Basic Law* and the court rulings of the HKSAR. It cannot be "contrary to the original intent of the Common Law" as you have said.

As you have pointed out, the HKSAR exercises a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication under Article 2 of the *Basic Law*. Such powers, however, shall be exercised **in accordance with the provisions of the *Basic Law***. We cannot accept the provisions of the *Basic Law* selectively. Given that the power of interpretation is vested in the NPCSC under Article 158 of the *Basic Law*, we must accept that the NPCSC's power of interpretation of the Law is part of the system of the HKSAR and part of the system of "high degree of autonomy". How can it be inconsistent with the principle of "high degree of autonomy"!

The interpretation will not undermine the "Two Systems" under the "One Country, Two Systems" principle

Firstly, I would like to discuss with you the definition of "One Country, Two Systems". It appears that we all agree that our country is the People's Republic of China. Article 1 of the *Basic Law* states: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China." There is no dispute to this statement. What you are concerned with is that the "Two Systems" would be undermined by the interpretation. The "Two Systems" as stated in Article 5 of the *Basic Law* mean: "socialist system and policies shall be practised in the Mainland while capitalist system and policies shall be practised in Hong Kong." The capitalist system and policies practised in Hong Kong, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant

³ Article 57 of the *Constitution*.

⁴ See *Ng Ka Ling and others v Director of Immigration* (1999) FACV 14/1998

policies, shall all be governed by the provisions of the *Basic Law*⁵. The Preamble of the *Basic Law* explicitly states that the *Law* was enacted by the National People's Congress in accordance with the *Constitution*, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of our country regarding Hong Kong. In other words, the principles of "One Country, Two Systems" and "high degree of autonomy" are all based on the *Basic Law*. The power of interpretation stipulated in Article 158 of the *Basic Law* is part of the system under the "One Country, Two Systems" principle as prescribed by the *Basic Law*. It is therefore impossible that the "One Country, Two Systems" principle would be damaged by the interpretation.

I would also like to talk about the legal status of Hong Kong. Hong Kong is not a state, but part of a state. Under the principle of "Hong Kong people ruling Hong Kong", the Central Government authorizes the HKSAR to exercise a high degree of autonomy. Our country practises the unitary system, under which all the powers are centrally vested in the Central Authorities and the powers of local governments are conferred by the state. All major decisions are to be made by the Central Government while the powers of local governments are only limited to execution and making proposals. Local governments must accept the unified leadership of the Central Government. The former have limited powers. They neither have the power to set up their own systems nor have they the power of self-determination. They cannot break away from the Central Government and declare independence; otherwise our nation will fall apart if each of the 56 ethnic groups in China demands self-determination. The HKSAR is not the same as a local government of the United States. The United States practises the federal system, under which each state has its own constitution and the power to amend its constitution. Each state retains its executive power. It only gives the federal government the powers of sovereignty, defence, etc. and retains "the residue powers". That is to say, those powers not given to the federal government belong to the state governments. The duties of the federal government are to safeguard the unity and the overall interest of the country, and to balance the interests among the individual states. The powers of the federal government are limited to those vested in it by the states. Hence, the HKSAR cannot be compared with the local governments of the United States. All the powers of the HKSAR are

⁵Article 11 of the *Basic Law*

vested in it by the *Basic Law* and shall be exercised according to the *Basic Law*. The system of Hong Kong under the “Two Systems” is that stipulated in the *Basic Law* and bound by every article of the *Basic Law*. To resist the NPCSC’s interpretation of the *Basic Law* is therefore an act which defies the system of Hong Kong and not in support of “One Country, Two Systems” and the *Basic Law*.

Interpretation of the Law will not affect the general public’s confidence in the rule of law

To put it simply, the rule of law means the power of the government derives from the law and the exercise of its power by the government should be in accordance with the provisions of the law. As the power to interpret the Law by the NPCSC derives from the *Constitution of the People’s Republic of China* and the *Basic Law* and it should be exercised in accordance with Article 158 of the *Basic Law*, how could one say that it undermines the rule of law? Some people say that it is against the spirit of the rule of law. In fact, the standard of the rule of law should not be dictated by one’s likes or dislikes. In respecting the rule of law, one of the things which we ought to do is to accept the final rulings of the courts. The Court of Final Appeal has recognized the power of the NPCSC to interpret the Law. As long as the NPCSC exercises its power in accordance with the necessary legal procedures, the rule of law will not be undermined and the confidence of the general public in the rule of law should not be affected.

Interpretation the Law does not mean amending the *Basic Law*

A possible reason behind your concern is that you might have doubts about the contents of the interpretation of the Law before they are promulgated. But interpretation can only make clear the specific meaning of a provision which needs to be further defined and it cannot amend the Law⁶. Any amendments to the *Basic Law* shall be made in accordance with the procedure as stipulated in Article 159 of the *Basic Law* and none of them shall be

⁶ see “Resolution of the Standing Committee of the National People’s Congress on the strengthening of the work of interpretation of laws” (1981) and refer to the Section 4 (of Chapter 2) of the *Legislation Law of the People’s Republic of China*. That law is not applicable to the HKSAR.

inconsistent with the People's Republic of China's established basic policies regarding Hong Kong. For instance, the NPCSC took the initiative to make an interpretation on certain questions concerning the implementation of the *Nationality Law of the People's Republic of China (Nationality Law)* in the HKSAR on 15 May 1996, giving Hong Kong residents more flexibility in respect of the Chinese nationality issue. Hong Kong residents are allowed to use documents issued by foreign governments to travel to other countries or regions. Before the Reunification, Hong Kong residents were allowed to hold dual nationality. If the 1996 interpretation had allowed Hong Kong residents to hold dual nationality, it would have directly contravened Article 3 of the *Nationality Law*; and if the *Nationality Law* were not amended, dual nationality could not have been given to Hong Kong residents. The 1996 interpretation has neither contravened Article 3 of the *Nationality Law* nor amended the *Nationality Law*. Similarly, the proposed interpretation of Article 7 of Annex I and Article 3 of Annex II of the *Basic Law* by the NPCSC shall not contravene the original provisions or the established basic policies of the People's Republic of China regarding Hong Kong. As a result, the interpretation of the Law can not amend the Law and will not undermine the rights and freedoms enjoyed by Hong Kong people.

Should the NPCSC interpret the Law regarding constitutional development

You are of the opinion that the NPCSC should not choose to interpret the Law at this juncture because "interpretation of the Law" is a sensitive issue. You believe that as Hong Kong is deliberating on its constitutional development, the interpretation may lead to speculation that such action would be used as a political means to restrict the discussions on constitutional reform. Since the Task Force on Constitutional Development was established on 7 January this year, we have widely consulted the public on the principles as well as the legal issues involved. We had met with 82 organizations and individuals and received more than 600 letters, faxes and e-mails from the public. In view of the Central Government's concern over the issue of constitutional development, we have also provided explanations and facilitated discussions on the matter. On 30 March this year, the Task Force released its first report to the public and made known its views as well as the public's views on the relevant legal and procedural matters. The said report, together with written submissions from the public, were also delivered to the NPCSC on the same day. The Task Force had, furthermore, fully reflected to the delegation of the NPCSC the

public's views on constitutional development and the issue of interpretation of the Law. Mr Qiao Xiaoyang, Deputy Secretary General of the NPCSC confirmed this subsequently and stated that the Task Force had thoroughly reflected the views of various sectors and different parties of Hong Kong. He also pointed out that the views expressed were of great help to the interpretation of the Law.

The issues of principle and law form an important basis for the discussion on constitutional development. If we mis-understand these issues, any proposals made on such basis cannot stand firm. The interpretation of the NPCSC is the most authoritative; the courts must follow the interpretation if it is given in accordance with the provisions of the *Basic Law*. Though the Task Force has reached a conclusion on the issues of law and procedure, the views of the members of the public, including those of the legal professionals and some Mainland scholars, differ in certain areas. Take the interpretation over the term "subsequent to the year 2007" as an example. If we have managed to reach a consensus over the method for the selection of the Chief Executive, but litigation is brought after the election on the grounds that Annex I of the *Basic Law* cannot be amended in the year 2007, it will cast a doubt on the legality of the government. We do not want this to happen. Let's look at another example. Some people are of the view that the amendment to the formation of the Legislative Council shall become effective with the endorsement of a two-thirds majority of all its members and the consent of the Chief Executive, and the NPCSC can have no alternative but to put on record. But other people held the view that for the NPCSC to put on record any amendments involves a substantive power. The amendment shall not become effective if one of the three steps is incomplete. While conclusion of the Task Force is made after detailed deliberation and is considered to be well-founded, it will take at least 12 to 18 months for a court case to proceed from the Court of First Instance to the Court of Final Appeal, if someone brought legal challenges against the Task Force's interpretation. This will delay our legislative timetable and we will not be able to complete the legislative process to amend Annexes I and II, the *Chief Executive Election Ordinance* or the *Legislative Council Ordinance* by 2007. Without a ruling from the court, there will definitely be different interpretations over the provisions of the *Basic Law*. Ultimately, the courts of HKSAR, in adjudicating cases, would need to seek the interpretation of the NPCSC over the provisions of the *Basic Law* concerning the relationship between the Central Authorities and the HKSAR or concerning affairs which

are the responsibility of the Central People's Government (as I have mentioned above, the Central Government has powers and responsibilities over the constitutional development of Hong Kong). An authoritative interpretation at an early stage will bring certainty instead of chaos that affect the prosperity and stability of Hong Kong.

After the interpretation of the NPCSC, we can have a clearer understanding of Article 7 of Annex I and Article 3 of Annex II. Then we can pool our wisdom in exploring ways to amend the two election methods and to gradually introduce a democratic system that suits Hong Kong's situation.

When discussing constitutional development, we should be level-headed and rational throughout the whole process. When faced with opposing views and opinions, mutual respect and tolerance are needed in order to reach a consensus on mutually beneficial proposal. Although the debates might become heated at times during the past two months, they offered us a good opportunity to re-examine the meaning of being a Chinese national and to study the *Basic Law* conscientiously. I hope you will continue to pay close attention to the issue of constitutional development and give your opinions to the Task Force on Constitutional Development. We would be pleased to continue with our dialogue with you and to work together for the democratic development of Hong Kong.

With best regards.

Elsie Leung
Secretary for Justice