律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong Special Administrative Region

# 《基本法》頒布三十周年法律高峰論壇匯編

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# 前 言

全國人民代表大會於 1990 年 4 月 4 日根據《中華人民共和國憲法》(《憲法》) 第三十一條及第六十二條第 ( 十四 ) 款通過並正式頒布《中華人民共和國香港特別行政區基本法》(《基本法》)。《憲法》和《基本法》共同構成香港特別行政區 (“香港特區”) 的憲制基礎。

《基本法》確保國家對香港的基本方針政策順利落實，即“一國兩制”和高度自治，為香港繁榮穩定提供了根本保障。

2020 年適逢《基本法》頒布三十周年，律政司首次就頒布《基本法》舉辦法律高峰論壇，藉此與大家一起“追本溯源”，分享《基本法》在香港特區回歸後落實執行的正面發展情況，探索《基本法》的根源及提高社會大眾正確認識“一國兩制”的初衷。

法律高峰論壇成功舉辦，我衷心感謝中央政府和兩地著名法律專家和學者的鼎力支持，並分享交流他們的真知灼見。為讓社會大眾可以正確和深入認識《基本法》及仔細思考了解嘉賓的精闢見解，律政司將所有嘉賓的致辭，演講及討論彙編成書。法律高峰論壇的舉行和匯編的發行見證《基本法》在香港特區的成功落實和發展，並讓全社會準確認識《基本法》的初心，讓“一國兩制”行穩致遠。

最後，我在此特別感謝律政司同事的支持和悉心籌備，尤其是憲制及政策事務科基本法組，在疫情下仍然能成功舉辦法律高峰論壇。我亦感謝中國法律服務（香港）有限公司在短時間內提供專業的編輯服務和建議，配合律政司順利出版這本別具意義的匯編。

鄭若驊

香港特別行政區律政司司長
鄭若驊, GBS, SC, JP

# 目錄

# 開幕式致辭

林鄭月娥 中華人民共和國香港特別行政區行政長官


梁振英副主席、喬曉陽主任、馬道立首席法官、梁君彥主席、陳冬副主任、謝鋒特派員、李江舟副署長、各位嘉賓、各位同事、各位朋友：

大家早上好。歡迎大家出席或在網上參與今天由香港特別行政區政府律政司舉辦的《基本法》頒布三十周年法律高峰論壇。論壇將有助提升社會大眾對《中華人民共和國憲法》(《憲法》)和《基本法》的認識，以及體會《基本法》在落實過程中值得思考的經驗和大家應更深入探討的議題。

要達到我剛才說的論壇目的，出席演講和參與座談的嘉賓的分量非常重要。我們很榮幸邀得多位重量級的本地和內地嘉賓分享他們的精闢意見和實踐經驗，包括原全國人民代表大會常務委員會香港特別行政區基本法委員會主任喬曉陽，和原國務院港澳事務辦公室副主任馮巍專程由北京來到香港出席，而通過網上發言的有國務院港澳事務辦公室常務副主任張曉明、香港特別行政區基本法委員會副主任張勇和國際法院副院長薛捍勤法官；本地主講嘉賓則有前律政司司

長、原香港特別行政區基本法委員會副主任梁愛詩，和現任副主任譚惠珠和委員陳弘毅教授。各位都是《基本法》的權威專家，或兼備有落實《基本法》的經驗，能夠在這個值得慶祝的時刻和我們交流分享經驗，從不同角度講解《基本法》以及“一國兩制”的關係，肯定能讓大家獲益良多。我對他們每一位的參與和支持表示衷心的感謝。

這次高峰論壇的主題是“追本溯源”，我認為此時此刻用“追本溯源”的態度回顧《基本法》的制定和實施，既有重大的歷史意義，也非常貼合時勢。如果讓我為“追本溯源”配上下一句，我會選用“毋忘初心”。

正如我在今年六月特區政府主辦的《基本法》頒布三十周年網上論壇中說，要認識《基本法》，必須回到“一國兩制”的初心。當年鄧小平先生提出“一國兩制”的構想，是在維護國家的統一和領土完整、保持香港繁榮和穩定的前提下，考慮到香港的歷史和現實情況，最大程度地保留香港的特色和優勢，讓香港市民的原有生活方式維持不變。這個初心從來沒有改變，也是中央一直以來對香港特區各項方針政策的根本宗旨。

按照這個不變的初心，顯而易見，主權問題不容討論、“港獨”主張不能容忍。在具體落實《基本法》時，我們必須堅守“一國”原則，正確處理特別行政區和中央的關係，維護中央權力，同時保障香港特別行政區的高度自治權。

我們在應用《基本法》時，也要同時認識《中華人民共和國憲法》，因為《憲法》及《基本法》共同構成香港特別行政區的憲制秩序。根據國家《憲法》第三十一條，國家在必要時得設立特別行政區，在特別行政區內實行的制度按照具體情況由全國人民代表大會以法律規定。全國人民代表大會有權決定特別行政區的設立及其制度，在此憲法基礎上，全國人民代表大會於 1990 年 4 月 4 日根據《憲法》第六十二條第十四項的規定通過並正式頒布《中華人民共和國香港特別行政區基本法》，於 1997 年 7 月 1 日香港特別行政區成立當天生效。《憲法》第六十二條第二項也列明全國人民代表大

會有監督《憲法》實施的職權，全國人大今年 5 月通過《決定》授權全國人大常委會制定香港特別行政區維護國家安全的法律制度和執行機制的法律，正正是行使《憲法》賦予全國人大的職責，其合憲、合法的基礎是不容置疑的。

全國人民代表大會常委會是全國人大的常設機關，擁有解釋《基本法》和監督《基本法》實施的權力，也有權處理在《基本法》落實過程中出現的憲制性問題。過去數月，香港就出現了兩個特區不能自行解決的憲制性問題：一個是特區政府因疫情的關係把立法會換屆選舉押後一年而出現立法會真空期的問題，另外一個是經全國人大常委會決定繼續履行職責的第六屆立法會，四位經選舉主任早前裁定不擁護《基本法》、不效忠中華人民共和國香港特別行政區的議員延任資格的問題。為履行行政長官依照《基本法》的規定對中央人民政府和香港特別行政區負責的責任，我先後兩次請求中央人民政府提請全國人大常委會從憲制層面解決問題。做法符合《憲法》和《基本法》規定，有理有據，不容外國政府或政治組織抹黑詆毀。

最近我在反駁針對香港國安法和立法會議員宣誓問題的謬論時，分別引述了“一國兩制”總設計師鄧小平先生的兩段講話，足證中央在“一國兩制”政策下的治港方針始終如一，從未動搖。鄧小平先生在 1987 年會見香港特別行政區基本法起草委員會委員時說：“切不要以為香港的事情全由香港人來管，中央一點都不管，就萬事大吉了。這是不行的，這種想法不實際。中央確實是不干預特別行政區的具體事務的，也不需要干預。但是，特別行政區是不是也會發生危害國家根本利益的事情呢？難道就不會出現嗎？那個時候，北京過問不過問？難道香港就不會出現損害香港根本利益的事情？……如果中央把甚麼權力都放棄了，就可能會出現一些混亂，損害香港的利益。所以，保持中央的某些權力，對香港有利無害。”鄧小平先生當時就請委員草擬《基本法》時，要考慮及照顧這些方面。經歷了接近一年的暴力亂港，香港國安法的制定實施，就是中央必

須行使的權力。

另外，鄧小平先生在 1984 年明確指出：“港人治港有個界限及標準，就是必須以愛國者為主體的港人來治理香港……愛國者的標準是，尊重自己的民族，誠心誠意擁護祖國恢復行使對香港的主權，不損害香港的繁榮和穩定。”全國人大常委會本月十一日的決定，就是要為立法會議員資格和違反誓言後承擔的法律責任定下明確的規定，以符合《基本法》對立法會議員的要求。所以，只要認真的學習這兩段話，任何近日批評人大常委會決定的理據都會不攻自破。

各位朋友，國家主席習近平在 2017 年 7 月視察香港時發表的重要講話中提到，“一國兩制”需要在實踐中不斷探索；他說今後更好在香港落實“一國兩制”，始終要準確把握“一國”和“兩制”的關係，始終要依照《憲法》和《基本法》辦事。過去一年，作為特區行政長官，我經歷了嚴峻的政治考驗，深刻體會到只有堅持這兩個“始終”，才能讓“一國兩制”行穩致遠。

最後，我再次感謝各位嘉賓講者的支持和稍後發表的寶貴意見，並和我們一起分享《基本法》的點點滴滴。我希望能藉此難得的機會，和大家一同上下求索，追本溯源。謝謝大家。

# 開幕式致辭

張曉明 中華人民共和國國務院港澳事務辦公室常務副主任

尊敬的林鄭月娥行政長官，各位嘉賓、各位朋友：

大家上午好！

由於新冠肺炎疫情的原因，這場紀念香港《基本法》頒布三十周年的法律高峰論壇幾經推遲，今天終於舉行，實屬難得。我謹代表國務院港澳辦表示祝賀，並對為論壇籌辦做了大量工作的律政司等特區政府部門、中央有關部門和出席論壇的各位嘉賓、專家學者表示衷心感謝！

以香港國安法出台為標誌，香港開啓了由亂及治的新局面。近期中央和特區政府又接連採取了包括取消四名反對派議員任職資格在內的多項重要舉措。不同的人們基於不同的考慮，更加關注香港的前景。我想結合這次研討會的主題，與大家分享三點看法：

**第一、全面準確貫徹“一國兩制”方針是關鍵。**這是習近平主席反覆闡述的一個重要思想觀點，是“一國兩制”行穩致遠的“不二法門”。全面準確理解和貫徹“一國兩制”方針，要講“兩點論”，還要講“重點論”。既要講“兩制”，也要講“一國”，要看到“一

國”是實行“兩制”的前提和基礎；既要講尊重香港實行的資本主義制度，也要講尊重國家主體實行的社會主義制度，要看到中國共產黨領導下的中國特色社會主義制度是香港資本主義制度長期不變的依託和保障；既要講保持香港長期繁榮穩定，也要講維護國家主權、安全和發展利益，要看到維護國家主權、安全和發展利益是“一國兩制”的首要宗旨；既要講尊重香港特別行政區的高度自治權，也要講尊重中央的全面管治權，要看到中央的全面管治權是高度自治權的本源；既要講維護香港法治，又要講維護國家憲制秩序，要看到香港回歸後包括普通法制度在內的法律制度，已納入以國家《憲法》和《基本法》為基礎建立的憲制秩序之中；既要講香港自身擁有許多國際化競爭優勢，又要講祖國內地發揮着堅強後盾作用，要看到香港的發展越來越離不開內地，越來越得益於內地；既要講愛港，又要講愛國，要看到祖國好香港才更好，在香港社會崇尚的民主、自由、人權等核心價值之前，應當加上“愛國”一詞；既要講求同存異，又要講堅守底線，要看到底線守得越牢，政治包容空間越大。反思香港回歸以來出現的許多問題，說到底都與對“一國兩制”方針理解和貫徹不全面不準確有關。特別是以逼迫全國人大常委會收回“8·31”決定為主要訴求的非法“佔中”事件和以反對向內地移交逃犯為發端的“修例風波”，都是以毫無底線的行為方式搞對抗，並演變成社會動亂，對“一國兩制”造成了嚴重傷害，不僅危及國家安全，也使香港全社會付出了沉重代價。殷鑒不遠，來者可追。中央政府、香港特區政府和傳媒界、教育界等社會各界都要深入總結過往經驗教訓，加強對“一國兩制”方針的全面準確宣介，加強實踐問題研究和理論闡述，共同守護好“一國兩制”。

**第二、完善“一國兩制”制度體系是現實需要。**大家都知道，香港《基本法》是“一國兩制”方針的法律化、制度化。作為一部憲制性法律，《基本法》需要保持相對穩定。但社會情況不斷變化，“一國兩制”實踐不斷豐富和發展，在

《基本法》實施過程中怎麼不斷適應新情況、有效解決新問題呢？我想，這首先要求我們把《基本法》當作一部“活的法律”，通過立法解釋等辦法，放大《基本法》的適應性。其次，我們也需要在《基本法》之外，通過多種方式，不斷完善與《基本法》實施相關的制度體系。中共十九屆四中全會從推進國家治理體系和治理能力現代化的高度，對健全中央依照《憲法》和《基本法》對特別行政區行使全面管治權的制度作了總體部署，為我們下一步推進有關工作指明了方向。我們高興地看到，特區政府有關部門正在致力於完善公務員宣誓制度、國民教育制度、立法會議員資格審查制度等相關制度。我還注意到，最近香港社會圍繞司法改革問題出現了熱烈討論，德高望重的前終審法院大法官烈顯倫先生（Mr. Henry Denis Litton）呼籲“是時候進行司法改革了！”這樣的“局中人”的理性聲音值得全社會特別是司法法律界重視。即使在西方國家，司法制度也在與時俱進不斷改革，這並不影響司法獨立。總之，“一國兩制”實踐已進入“五十年不變”的中期階段，許多問題已充分暴露，加之實踐經驗已有所積累，我們對“一國兩制”實踐的規律性認識也有所深化，在這種情況下，着眼於確保未來二十六年乃至更長時期內香港的長治久安和長期繁榮穩定，系統謀劃“一國兩制”制度體系完善工作，不僅有現實必要，而且條件也基本具備。

**第三、從思想觀念上正本清源、撥亂反正是當務之急。**任何時代的撥亂反正往往都是以思想觀念上的正本清源為先導。在香港的輿論場中，一些說法已流傳很久，比如：“全國人大常委會釋法和決定是干預香港高度自治、破壞司法獨立”，“憲法在香港不適用”，“香港實行‘三權分立’的政治體制”，“只要有篩選就是假普選”，“公務員宣誓有違政治中立”，“國民教育是洗腦”，“粵港澳大灣區建設會使香港‘內地化’”，以及“公民抗命”、“違法達義”等等，不一而足。這些說法都是對“一國兩制”缺乏全面準確認識的表現，有些甚至是故意混淆是非、誤導公眾。現在已經到了正本清源、

把一些習非成是的東西改過來的時候了。思想觀念上的撥亂反正不僅要“破”，還要“立”。從這個角度說，當下關於治港者標準問題的討論就顯得更有必要，並具有全域性、根本性意義。我們能夠設想讓內心不認同國家、蓄意與中央對抗，甚至意圖顛覆國家政權、勾結外部勢力危害國家安全的人來管治香港嗎？這符合“一國兩制”的初心、符合“港人治港”的標準嗎？香港特別行政區是中華人民共和國不可分離的部分，要求治港者必須是愛國者，天經地義。香港特別行政區政權機構的 人員必須真誠擁護《基本法》，效忠中華人民共和國及其香港特別行政區，不做損害國家利益和香港繁榮穩定的事情。11 月 11 日全國人大常委會剛作出的關於香港特別行政區立法會議員資格問題的決定，不僅為特區政府即時取消四名反對派議員資格提供了堅實的法律基礎，也是為今後處理此類問題立規明矩。愛國愛港者治港，反中亂港者出局，這是“一國兩制”下的一項政治規矩，現在也已經成為一項法律規範。

各位嘉賓、各位朋友！當今世界正面臨百年未有之大變局。這個大變局的最大變量之一是中國走向強盛。我們國家即將實現全面建成小康社會的目標，並邁向建設社會主義現代化國家的新征程，中華民族偉大復興勢不可擋。世界在變，中國在變，香港也在變。香港之變既有被動的變，也有主動的變，包括政治上撥亂反正，在經濟民生領域以改革的勇氣破解難題。在這個變的過程中，難免有“陣痛”，但總趨勢必將是越來越好。試想一下，如果香港不再有街頭暴力的橫行肆虐，不再有立法會無休止的“拉布”和動粗，不再有“攪炒”的政治綁架，市民在走進食肆的時候不用再為是走進“黃店”或“藍店”而擔驚受怕，人人可以享有免於恐懼的自由，某些不懷好意的外部勢力也不能在香港興風作浪、恣意妄為，隨意把香港當槍使，有了這些轉變，憑香港同胞的智慧、勤奮、靈活，加上中央政府和祖國內地的鼎力支持，大家齊心協力謀發展，何愁經濟復蘇無期、民生改善無望、香港地位不保？何愁困擾許多市民的住

房問題解決不了？至於這幾天又重彈的一些陳詞濫調，什麼“最黑暗的一天”啦，“‘一國兩制’已死”啦，“法治已死”啦，等等，我們已聽得很多了，就讓這些詛咒成為香港和國際上一些人自我打臉的歷史記錄吧，讓這些噪音成為香港在變局中開新局的背景音樂吧！事實將證明，香港必將治理得更好，“一國兩制”必定取得更大的成功！

預祝論壇成果豐碩！謝謝大家！

# 開幕式致辭

陳 冬　中央人民政府駐香港特別行政區聯絡辦公室副主任


尊敬的林鄭月娥行政長官、梁振英副主席，各位嘉賓，女士們、先生們、朋友們：

很高興出席特區政府律政司舉辦的基本法頒布三十周年法律高峰論壇。受駱惠寧主任委託，我謹代表中央政府駐港聯絡辦，對論壇的舉辦表示熱烈祝賀！並向克服疫情困難專程來港的喬曉陽先生、馮巍先生表示熱烈歡迎！

《中華人民共和國香港特別行政區基本法》三十年前由第七屆全國人民代表大會第三次會議通過，於 1997 年 7 月 1 日開始實施。回顧二十三年來，在《基本法》的有力保障下，香港充分發揮“一國兩制”的制度優勢，各項事業取得了長足發展。香港法治指數的全球排名，從回歸前的六十多位，大幅躍升至十六位。可以肯定地說，回歸以來香港法治的進步，是中央全面準確貫徹“一國兩制”方針的結果，也是歷屆特區政府和司法法律界不懈努力的結果。

當今世界正經歷百年未有之大變局，我國正處於實現中華民族偉大復興的關鍵時期，香港“一國兩制”實踐也進入

了新階段。作為一項前無古人的偉大創舉，“一國兩制”不可避免會遇到新情況、新問題、新挑戰，關鍵在於堅守初心、保持定力，全面準確貫徹落實《基本法》，確保“一國兩制”在香港的實踐不走樣、不變形，始終沿着正確方向前進。借今天這個機會，我有三點認識與大家分享。

**第一，尊崇《憲法》和《基本法》權威，維護“一國兩制”憲制秩序。**《憲法》與《基本法》確定了香港“一國兩制”的憲制秩序。維護香港的法治，首先要尊重《憲法》和《基本法》在香港法治體系中的至上地位和最高權威。我國是單一制國家，中央對包括特別行政區在內的所有地方行政區域擁有全面管治權。全國人民代表大會作為最高國家權力機關，根據《憲法》規定，決定設立香港特別行政區，制定《香港特別行政區基本法》，並通過《基本法》授權香港特別行政區依法實行高度自治。香港是中國的香港，香港的任何政治、法律實踐都不能違背這一根本憲制原則。任何對中央全面管治權的挑戰，都是對“一國兩制”憲制秩序的衝擊，都將最終損害特區高度自治權的根基。

維護“一國兩制”憲制秩序，關鍵要落實“愛國者治港”，具體而言就是要求治港者真誠擁護《中華人民共和國香港特別行政區基本法》，效忠中華人民共和國香港特別行政區。這既是特區行政、立法、司法機關公職人員必須遵從的政治倫理，也是《基本法》的明確規定。只有始終堅持“愛國者治港”的界線和標準，國家的主權、安全、發展利益才能得到切實維護，香港的繁榮穩定和港人福祉才能得到有效保障，“一國兩制”實踐才能不斷向前發展。

**第二，準確把握《基本法》立法原意，維護特區行政主導體制。**鄧小平先生 1987 年在會見香港《基本法》起草委員會委員時，就強調香港不能照搬西方的一套，不適宜搞“三權分立”。根據這一重要思想，《基本法》從香港特別行政區的法律地位和實際情況出發，確立了以行政長官為核心的行政主導體制。在“一國兩制”下，行政長官在特區政權機構中處於核心地位，是特別行政區和特區政府的“雙首長”，對中央政府和香港特別行政區“雙負

責”。當前，在香港尚未走出新冠疫情困局，經濟民生亟待恢復和改善的情況下，我們更要堅定維護行政主導體制，支持行政長官和特區政府依法有效施政，避免無謂的爭拗和掣肘，導致空轉內耗、錯失良機。

**第三，完善“一國兩制”制度體系，推動“一國兩制”行穩致遠。**回歸 23 年來，中央堅定不移貫徹“一國兩制”、“港人治港”、高度自治方針，及時處理《基本法》實施過程中的重大問題。全國人大及其常委會就涉港事務作出了一系列立法、釋法和決定，使“一國兩制”實踐適應了香港社會發展變化的需要，始終保持了實事求是、與時俱進的品格。面對“修例風波”造成的嚴峻局面，今年以來，中央主動出手，全國人大及其常委會連續作出涉港重要決定，推動香港局勢由亂轉治。6 月 30 日，全國人大常委會根據全國人大有關決定，通過香港國安法，堵塞了香港特區維護國家安全的法律漏洞；8 月 11 日，全國人大常委會決定香港第六屆立法會繼續履行職責不少於一年，避免了因第七屆立法會選舉延期而出現立法機關空缺；上週三，全國人大常委會又就香港立法會議員資格問題作出決定，為確保立法會議員履行“擁護”與“效忠”的憲制責任，進一步從制度上劃定了底線、立下了規矩。這些重要舉措，都是以《憲法》、《基本法》為依據，都是對“一國兩制”下特別行政區制度的健全和完善。全國人大及其常委會的有關決定和解釋，以及列入《基本法》附件三的全國性法律，與《憲法》、《基本法》一道，構成了“一國兩制”制度體系的重要組成部分，將有力保障香港“一國兩制”事業行穩致遠。

各位嘉賓，各位朋友，前不久，中共十九屆五中全會通過的“十四五規劃”和 2035 年遠景目標建議，為國家發展繪製了美好藍圖，也為香港未來指明了方向。我們相信，在林鄭月娥行政長官和特區政府帶領下，在包括司法法律界在內的社會各界齊心協力下，香港一定能夠戰勝困難，繼續發揮獨特優勢，更好融入國家發展大局，更好實現自身發展，譜寫“一國兩制”實踐的嶄新篇章。

謝謝大家！

# 主題演講：憲法和《基本法》——特別行政區的憲制基礎

張勇

全國人大常委會香港特別行政區基本法委員會副主任

尊敬的梁振英副主席，尊敬的林鄭月娥行政長官，陳冬副主任，各位嘉賓，大家好。

首先我感謝香港特區政府邀請我擔任《基本法》頒布三十周年法律高峰論壇演講嘉賓。我今天演講的題目是《憲法》和《基本法》：特別行政區的憲制基礎。對這個題目早在三十多年前，香港《基本法》起草階段就有過深入的討論，也有過廣泛的共識。我們大家今天在這裡是追本溯源，溫故知新。這個題目從本質上來說了，講的是國家治理，進一步來說，它講的是香港特別行政區在國家治理當中的憲制地位，對這個問題，習近平主席有過經典論述：回歸完成了香港憲制秩序的巨大轉變。作為直轄於中央人民政府的一個特別行政區，香港從回歸之日起，重新納入中國的國家治理體系。要全面正確深刻地理解香港回歸後新的憲制秩序，我想，把握住兩點至關重要。一是《憲法》和《基本法》共同構成特別行政區的憲制基礎。

二是中央的全面管治權和特區的高度自治權要有機的結合。第一點講的是新的憲制秩序的法律基礎。第二點講的是新的憲制秩序如何有效運作。今天，我想從四個層面來談談我的個人體會。第一，什麼是《憲法》？《憲法》在國家治理當中的地位是什麼？中國的《憲法》是如何來的？第二，“一國兩制”的初衷與實踐。通常一個國家實行一種制度，中國為什麼有“一國兩制”？它的初衷是什麼？它的實踐又有哪些特點？第三，《基本法》與《憲法》的關係。大家都知道，《基本法》是“一國兩制”的法律化，那麼它與《憲法》又是什麼關係呢？最後，我們談一談全面管治權與高度自治權，怎麼才能夠有機地結合在一起。

## 一、什麼是憲法

憲法，可以用三句話加以概括。第一句話，它是現代國家的立國基礎。每一個現代國家都有一部憲法，立國先立憲。第二句話，憲法是國家穩定和發展的根本保障。第三句話，憲法是各個國家歷史、文化、經濟、社會的政治體現。全世界一共有一百九十多部憲法，每一部憲法都不盡相同，每一部憲法都深深的打上了本國、本民族的歷史文化和社會的烙印。比如說大家比較熟悉的這兩個國家，英國憲法是不成文憲法，美國的憲法是成文憲法；英國的憲法確立了君主立憲制國家，美國的憲法確立了共和制國家；英國的國家結構形式是單一制，美國的國家結構形式是聯邦制。在政治體制上，英國實行議會至上，美國實行三權制衡。

中國的憲法又是基於什麼樣的國情呢？中國憲法是近代中國一百年歷史的產物。近代中國一百年是從鴉片戰爭 1840 年香港島開始的，它一直持續到 1949 年中華人民共和國建立，這就是一部中國近代史。這部中國近代史也是一部戰爭史，每場戰爭的結局都是中國政府被迫割地賠款，中國人民生靈塗炭。這一百年也是中國社會從封建社會向現代社會轉變的一百年。近代中國一百年，中華民族有兩大歷史任務，第一項是救亡圖存，實現民族獨立。第二項是變法立憲，成為現代國家，實現國富民强。但

是，略看過中國歷史的朋友都很清楚，中國歷史上變法立憲的過程並不順利，可以說是一波三折，充滿艱辛。兩場鴉片戰爭迫使中國人睜眼看世界，搞洋務運動，中學為體，西學為用。甲午海戰的失敗使中國人認識到，只是船堅炮利，挽救不了國家，於是搞托古改制，君主立憲。戊戌變法失敗後，八國聯軍打進了北京城，清政府為了挽救滅亡的命運，匆匆忙忙搞預備立憲。很快，辛亥革命推翻了清政府，民國時期幾十年，大大小小制定了十餘部憲法。但是，這整整一百年的所有變法立憲的努力都沒有使中國成為真正的現代國家，沒有實現民族獨立，更沒有實現國富民强。這說明了什麼？這說明這些變法立憲的努力，沒有真正反映中國的真實國情，沒有真正的代表最廣大中國人民的根本利益。

1949 年中國共產黨建立了中華人民共和國，1954 年制定了中華人民共和國憲法，這部《憲法》是中國歷史的選擇，也是中國人民的選擇。它是一部最適合中國國情的《憲法》。1949 年中國實現了民族獨立，走上了現代國家之後，中華民族的歷史任務也隨之發生了轉變。這部《憲法》我們稱它為治國安邦總章程，或者說是國家的根本法。

## 二、“一國兩制”的初衷與實踐

1949 年中國實現了民族獨

立，走上了現代國家之後，中華民族的歷史任務也隨之發生了轉變。當代中國有三大歷史任務，直到今天也是如此。第一項，現代化建設，實現民族復興；第二項，完成祖國統一大業；第三項，維護世界和平，促進共同發展。我們今天所討論的“一國兩制”方針，它的政策定位就是實現第二項歷史任務的。政策的內涵就是努力以和平的方式解決歷史遺留的香港、澳門和台灣問題，完成祖國統一大業。“一國兩制”實際上有七十多年的實踐。它不僅僅是從 20 世纪 80 年代香港問題提出來才開始的，早在建國初期，中國政府實際上已經開始了“一國兩制”的實踐歷程。

這個方針七十年來一脈相承，一以貫之。這個實踐有兩個最突出的特點，第一個特點是始終著眼於祖國統一大業，尊重歷史和現實情況。比如 20 世纪 50 年代，中國政府在宣布廢除所有的不平等條約包括涉及香港、澳門的不平等條約的同時，聲明要以和平的方式解決香港、澳門問題。到了 60 年代，周恩來總理代表中國政府提出“一綱四目”，以這個政治主張來和平解放台灣。“一綱”是台灣必須統一於中國。“四目”的內容十分豐富，已經蘊含了“一國兩制”的一些重要主張。到了 70 年代，中國政府要求聯合國把香港、澳門剔出殖民地名單，同時也聲明中國政府將通過談判，以和平的方式來解決香港、澳門問題。到了80年代，為了解決香港問題，中國政府提出了十二條基本方針政策，這些基本方針政策現在都充分體現在《基本法》裡。

七十年的“一國兩制”實踐第二個特點，就是始終堅持兩大宗旨：一是維護國家主權統一和領土完整；二是保持香港，當然也包括澳門，長期的繁榮穩定。比如在 20 世纪 80 年代，當英國人剛剛提出香港問題的時候，中國政府就表明主權問題不容討論。90 年代，彭定康提出“三違反”的政改方案。中國政府堅持原則，寧可另起爐灶。到了回歸後，明確提出了三條底綫不容觸碰。另外一方面，早在 50、60 年代，內地在十分困難的情況下，每天輸往香港的三趟列車從來沒有間斷過。回歸後，中央政

府在金融貿易等等方面給了香港巨大的支持。直到今天，粵港澳大灣區的建設在很大程度上，也是為了香港、澳門有更廣闊的發展空間。這些措施政策都充分的表明“一國兩制”這兩大宗旨，它就猶如車子兩輪、鳥之雙翼，始終保持着平衡，始終同樣重要。“一國兩制”在法律上的體現，就是我們今天要紀念的這部偉大的法律，香港《基本法》。這是一部具有歷史意義和國際意義的法律，是一個具有創造性的偉大的傑作，的確是值得我們大家格外地珍惜。

## 三、《基本法》和國家《憲法》的關係

《憲法》是一國的根本體現。可以用三句話來理解《憲法》:《憲法》在全中國領土範圍內具有最高法律地位和效力;《憲法》作為一個整體在特別行政區有效;《憲法》的效力是不可分割的，不能說這個條款有效，那個條款無效，因為《憲法》是一個國家統一完整的象徵和保障。《基本法》則是“兩制”的具體體現，也可以用三句話來：一是《基本法》是根據《憲法》制定的，它規定特別行政區的制度；二是特別行政區實行的各種制度以《基本法》為依據；三是《憲法》當中有關社會主義的政策和制度不在香港實行。

香港《基本法》的起草經歷了長達 4 年 8 個月的時間，幾上幾下，它對特別行政區的制度做了全面系統的設計。那麼《基本法》在設計特別行政區制度的時候，它遵循了什麼樣的基本原則呢？我們大家經常說“一國兩制”，“港人治港”，“高度自治”，耳熟能詳。那麼這幾句話到底有哪些內涵呢？《基本法》在構建特別行政區制度的時候，它實際上是遵循了兩大原則。第一項原則是要構建一個以愛國者為主體的“港人治港”，不是什麼人都可以成為治港者，當然，更不是外國人治港。“愛國者”的標準早在三十多年前小平先生就說的很清楚：第一，真心誠意的擁護香港回歸祖國；第二，不做損害香港利益的事；第三，不做損害國家民族利益的事。第二項原則就是實行中央授權下的高度自治。香港不是實行完全自治，它是依照法定授權而自治。

那麼如何理解這種授權

關係呢？首先，需要了解一下國家結構形式。當今世界將近200個國家，國家結構形式就分兩類：第一類是單一制國家，如中國、英國、法國、日本等等。第二類是聯邦制國家，如俄羅斯、美國、德國、巴西等等。在這兩類國家結構形式之下，中央和地方的權力來源和權力關係是不一樣的。在單一制國家，中央政府通過憲法和法律授權地方政府，地方政府在授權範圍內行使社會管理權，未授予的權力在中央。在聯邦制國家，地方政府通過一個聯邦憲法授權聯邦政府，聯邦政府在聯邦憲法內行使國家管理權，未授予的權力仍歸地方。所以說《基本法》設計的特別行政區制度在中央與特區關係上，在高度自治的概念上它確定了一個授權與被授權關係。這一點在《基本法》當中是有明文規定的。《基本法》第二條規定，全國人民代表大會授權香港特別行政區實行高度自治。同時第二十條還進一步規定，香港特區可享有全國人民代表大會、全國人民代表大會常務委員會以及中央人民政府也就是國務院授予的其他權利。

## 四、全面管治權與高度自治權的有機結合

《憲法》和《基本法》對中央的全面管治權和特區的高度自治權做了十分具體的規定。那麼這兩項權利怎麼才能夠有效的結合或者有機的結合呢？我認為要通過負責與監督機制來實現。具體來說，中央的全面管治權也可以分成兩類，第一類是不可以轉讓的憲制性權力，這類權力中央也不可以轉讓給地方。第二類是其他權利，中央是可以授權給地方的。有哪些憲制權力呢？一是設立特別行政區。《憲法》、《基本法》都有規定。二是制定《基本法》。三是確定特別行政區居民的範圍，哪些人是特別行政區居民。四是劃定特別行政區的管轄範圍。五是原有法律採用為特別行政區法律。在《基本法》裡面，香港原有法律和香港特區立法機關制定的法律是分開表述的，是不同的。原有法律是一個特定概念，它是指回歸前英國管治時期制定的法律，這些法律的憲制基礎是英國的憲法，憲制性文件，《英皇制誥》，《皇室訓令》等等。這些法律從1997年6月30日24時起，

它的憲制基礎沒有了，統統失效。為了保持香港的繁榮穩定，為了平穩過渡，在“一國兩制”方針下，中國政府通過《基本法》一百六十條規定了一個特別的機制：香港原有法律可以採用為特別行政區法律，但是要經過一個審查認定的機制，即由全國人大常委要做出一個決定，賦予原有法律新的憲制基礎。我注意到香港有的朋友說，中國政府在 97 年以前沒有審查過香港原有法律，因為太多了。這說明他對中國政府籌備香港回歸的工作不太了解。今天我可以告訴大家，早在 1991 年，中國政府就組成了一個幾十人的專門工作班子，很多人是學習普通法的，對所有的香港原有法律，一條一條的進行審查，每一部香港原有的條例、附屬立法都有一份專門的報告。而且對適用於香港的習慣法、衡平法、普通法也做了專題的研究，這項工作持續了整整五年。正是基於這些大量的工作，全國人大常委會在 1997 年 2 月 23 日做出過一個非常長的決定，就是香港原有法律如何採用為香港特區法律的決定，這份決定裡面廢除了一部分香港原有法律，同時又廢除了一部分香港原有法律裡面的部分條款，因為這些法律和條款不符合《基本法》，不符合中國恢復行使主權以後香港的憲制地位。同時又規定了香港原有法律採用為特區法律之後，必須遵循的各項原則，適用化原則。所以說，香港原有法律是基於《基本法》和全國人大常委會的決定，賦予它新的憲制基礎而有效的。中國政府的這個行為是基於國家主權原則的主權行為。六是外交、國防事務。七是組織香港中國公民參與國家事務管理。八是宣布戰爭狀態和緊急狀態，等等。這些都是憲制性權力，是中央獨有的權力。

對於特區的高度自治權，《基本法》有一般性的授權，內容很多，涉及的條款也很多，包括行政管理權、立法權、獨立的司法權和終審權。還有依法授予的其他權利，同時還有一些很特別的專門點出來的授權，我們稱它為特別授權，比如進行船舶登記，簽訂民用航空協定，簽發特區護照，還有授權特區法院在審理案件時可以解釋《基本法》，同時也有

設定了條件，對兩類條款不能自行解釋。在作出終局判決之前，需要提請全國人大常委會作出解釋。還有指定授權，授予特別行政區處理對外事務的權利，這方面的權力是授予行政長官和特區政府的，他們可以根據授權處理對外事務，其他機構不可以。1990 年香港《基本法》頒布之後，實際上中央又有新的授權。比如，1996 年全國人大常委會關於《國籍法》的解釋，裡面就有很多新的授權，授權特區指定它的機構來頒發特區護照，授權香港特區的入境處來處理國籍變更事宜等等。還有深圳灣港方口岸區實施管轄權，也是授權決定，“一地兩檢”合作安排批准本身就是一種授權。剛剛通過的國安法當中有大量的授權性規定。最近的香港第六屆立法會繼續履職的決定，也是來源於憲制性的授權。

從《憲法》和《基本法》看，中央的全面管治權與特區的高度自治權都是很清楚的。那麼如何將兩者有機地結合在一起呢？剛才我說了，需要通過一個負責和監督機制。負責，概括來講有三個方面，第一，根據《基本法》規定，行政長官負責執行《基本法》，代表特區向中央人民政府負責。這部《基本法》在香港實施的準確不準確，全面不全面，中央要問責，只問行政長官，不是問責其他的機構或者其他的人。這就是為什麼要行政主導，為什麼行政長官要有實權，她要能承擔起這份責任。第二，特區的各個政權機關要在授權的範圍內行使高度自治權，這其中既不能越權履職，也不能不履職。第三，中央擁有監督權。

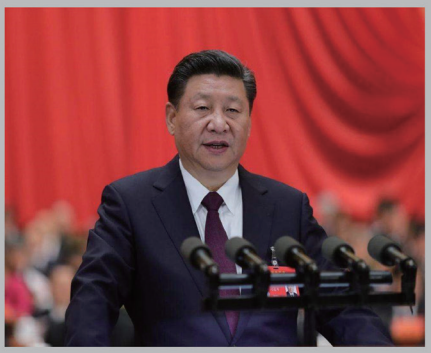
可能有朋友會問，中央擁有監督權，依據是什麼？依據在哪裡？中央如何行使這些監督權？全世界憲法監督制度大致可以分成四類，第一類，中央監督由普通法院行使憲法監督權。如美國、加拿大、澳大利亞等國家，美國由聯邦最高法院九名大法官行使憲法監督權。第二類，設立獨立的憲法法院體系。如德國、西班牙、意大利等五十多個國家，韓國也是實行憲法法院制度。第三類，由各方不同人士組成一個憲法委員會，來行使憲法監督權。以法國為首，也有幾十個國家。第四類，由最高的立法

機關行使憲法監督權。如中國、英國、荷蘭等，也有幾十個國家。誰制定的法律誰來監督，由最高的立法機關來行使這項權利。所以說一百九十多個國家都有憲法監督制度。

中國的憲法監督制度是《憲法》規定的，由全國人大及其常委會監督《憲法》和法律的實施。憲法監督制度在全世界來說主要有兩大作用：一是保證國家的法律體系上下統一，左右協調。二是保證國家的主權統一完整。因為憲法是立國的基礎，憲法監督權不可能授予地方政府，所以說中央的監督權源於《憲法》。那麼中央通過什麼方式來監督《憲法》和法律的實施呢？其實有很多種方式，比如：1. 日常的工作溝通，表達關切。港澳辦、香港中聯辦經常表達關切，我們全國人大法工委偶爾也表達一下關切。2. 作出決定，決議。1990 年《基本法》頒布之後，全國人大及其常委會做出過涉及香港問題的決定決議三十多項，這些決定決議都是最高國家權力機關作出的，具有不可質疑的法律效力。3. 制定法律、基本法、駐軍法，維護國家安全法。4. 適用全國性法律。目前在香港特區適用的全國性法律有十四部。5. 解釋法律，回歸以來全國人大常委會五次解釋香港《基本法》。6. 修改法律。《基本法》也規定了如何修改的程序，目前還沒有修改過。所以說只有通過這種特別行政區認真負責的執行《基本法》，與中央有效的行使憲法監督權，才能夠把全面管治權和高度自治權有機的結合在一起，共同維護“一國兩制”這個偉大的事業，行得穩，走得遠。

最後，我想用習近平主席的這句話與大家共勉：“‘一國兩制’作為一個新生事物，有着複雜的歷史根源、現實情況和國際背景，前進的道路不會平坦的，實踐的探索也不會一帆風順。有問題不可怕，關鍵是想辦法解決問題；困難克服了，問題解決了，‘一國兩制’的實踐就前進了”。

謝謝大家。



回歸完成了香港憲制秩序的巨大轉變。作為直轄於中央人民政府的一個特別行政區，香港從回歸之日起，**重新納入國家治理體系**。

——習近平

# 憲法和基本法
# 特別行政區的憲制基礎

全國人大常委會
法制工作委員會　副主任
香港澳門基本法委員會　副主任
張　勇

憲制秩序

憲法和基本法共同構成特區的憲制基礎

全面管治權與高度自治權有機結合

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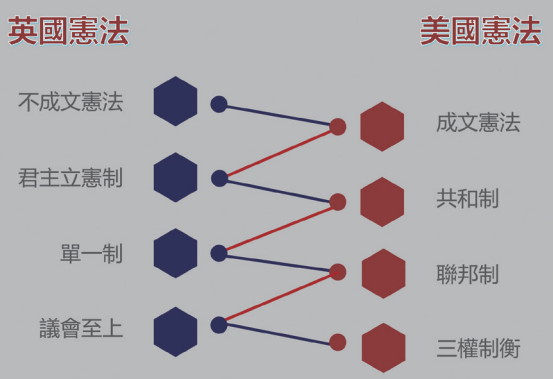
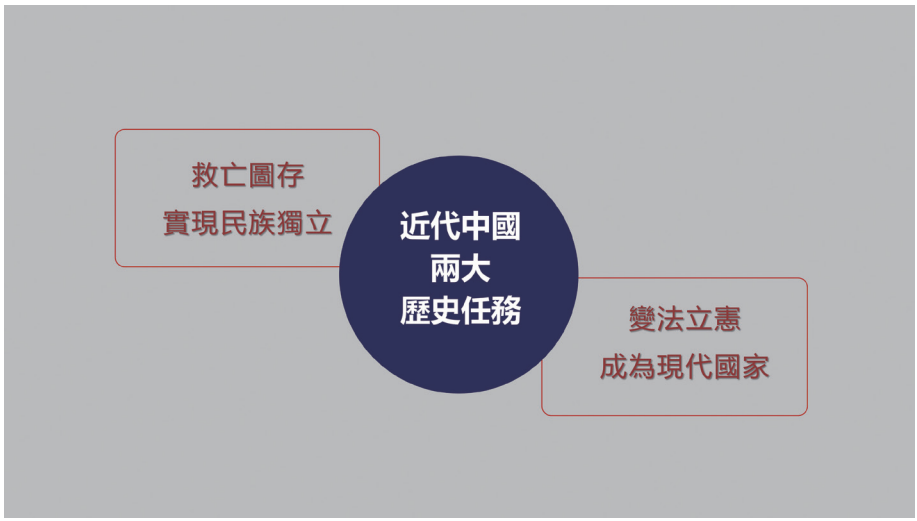
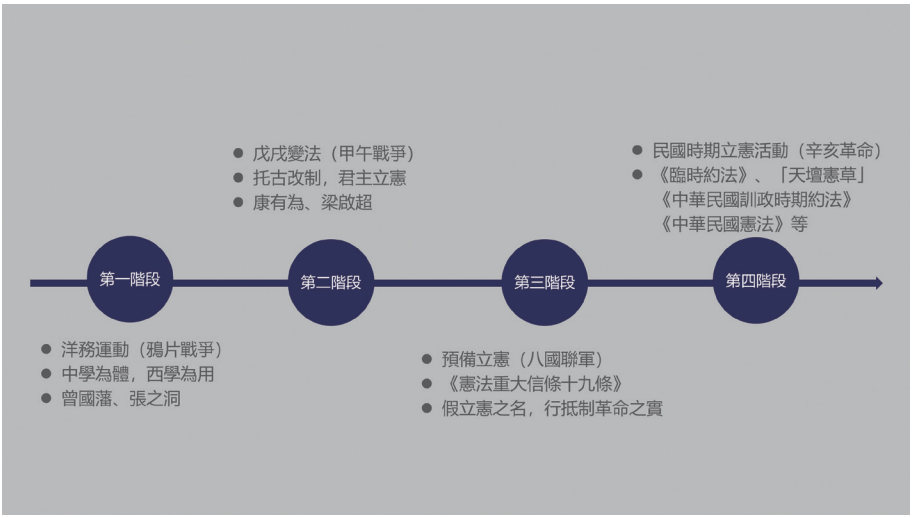


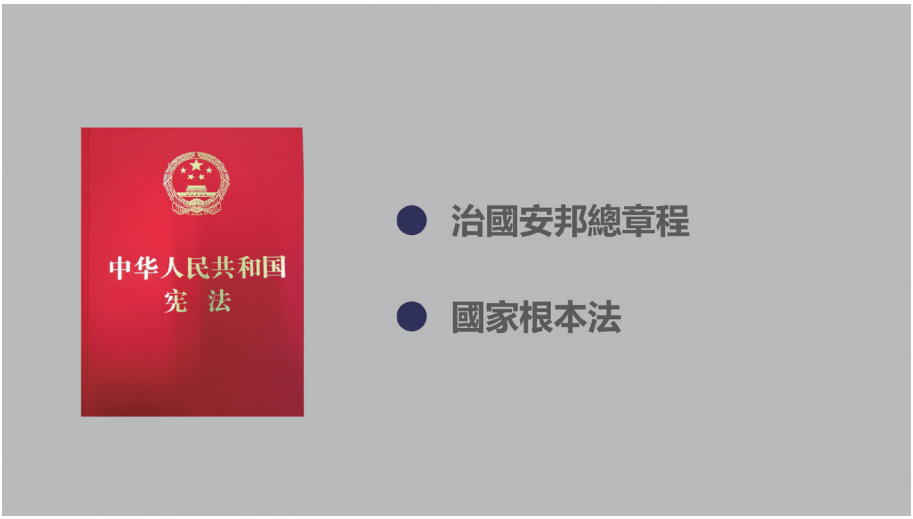
## 一百年中國近代史

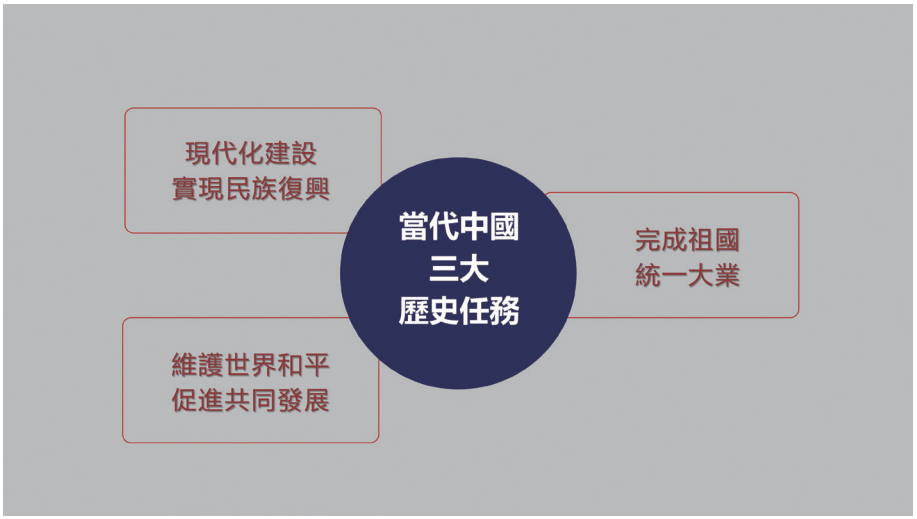
| 時間 | 事件 | 結果 |
|---|---|---|
| 1840 - 1842 | 中英第一次鴉片戰爭 | 《南京條約》 |
| 1856 - 1860 | 中英第二次鴉片戰爭 | 《天津條約》《北京條約》 |
| 1883 - 1885 | 中法戰爭 | 《中法新約》 |
| 1894 - 1895 | 中日甲午戰爭 | 《馬關條約》 |
| 1900 - 1901 | 八國聯軍侵華戰爭 | 《辛丑合約》 |
| 1904 - 1905 | 日俄戰爭 | 《會議東三省正約》 |
| 1931 - 1945 | 日本侵華戰爭 | 中國傷亡約3500萬人 |

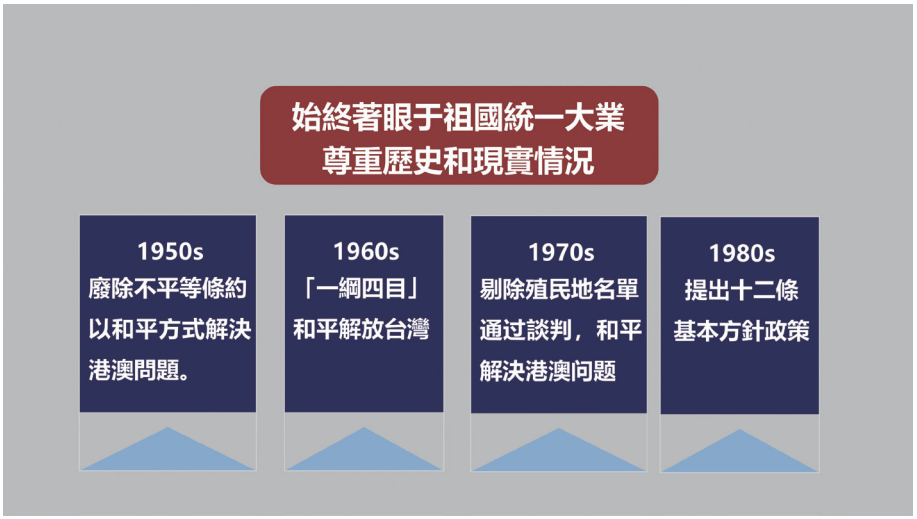
割地、賠款、生靈塗炭

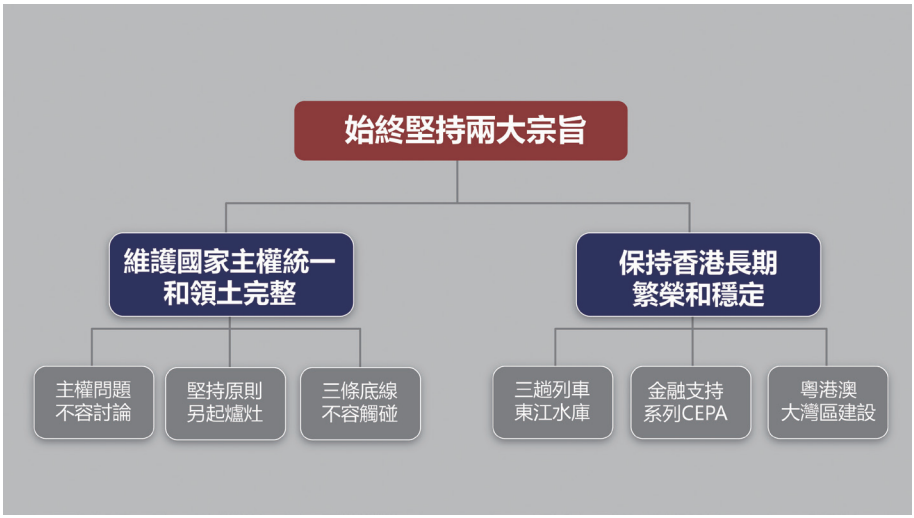



第一階段
洋務運動（鴉片戰爭）
中學為體，西學為用
曾國藩、張之洞
第二階段
戊戌變法（甲午戰爭）
托古改制，君主立憲
康有為、梁啟超
第三階段
預備立憲（八國聯軍）
《憲法重大信條十九條》
假立憲之名，行抵制革命之實
第四階段
民國時期立憲活動（辛亥革命）
《臨時約法》、「天壇憲草」
《中華民國訓政時期約法》
《中華民國憲法》等


中华人民共和国
宪 法
治國安邦總章程
國家根本法


現代化建設
實現民族復興
當代中國
三大
歷史任務
完成祖國
統一大業
維護世界和平
促進共同發展


始終著眼于祖國統一大業
尊重歷史和現實情況
1950s
廢除不平等條約
以和平方式解決
港澳問題。
1960s
「一綱四目」
和平解放台灣
1970s
剔除殖民地名單
通过談判，和平
解決港澳问題
1980s
提出十二條
基本方針政策




## 基本法：「一國兩制」的法律化

「經過將近五年的辛勤勞動，寫出了一部具有歷史意義和國際意義的法律。說它具有歷史意義，不只對過去、現在，而且包括將來；說國際意義，不只對第三世界，而且對全人類都具有長遠意義。這是一個具有創造性的傑作。」

——鄧小平

## 憲法：「一國」的根本體現

★ 憲法在全中國領土範圍內
具有最高法律地位和效力。

01

02

★ 憲法作為一個整體
在特別行政區有效。

03

★ 憲法效力不可分割。

## 基本法：「兩制」的具體體現

★基本法根據憲法制定，
規定特別行政區制度。

01

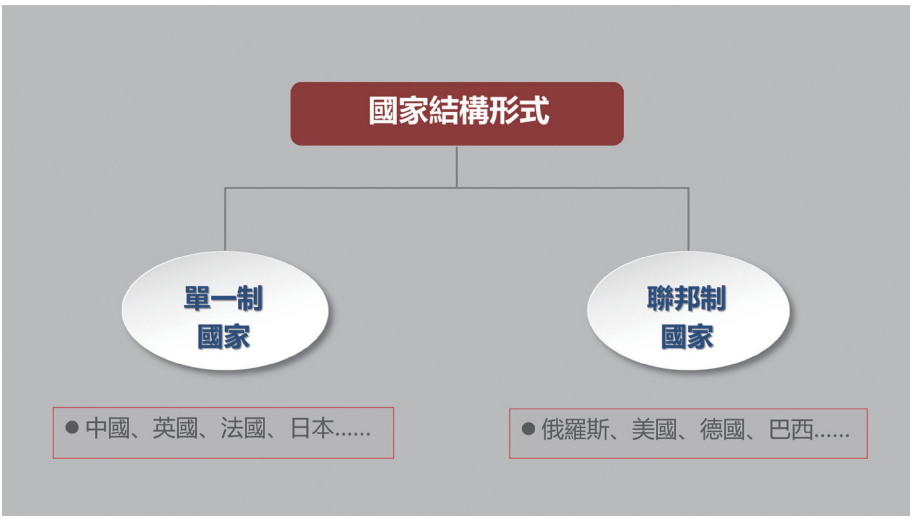
02

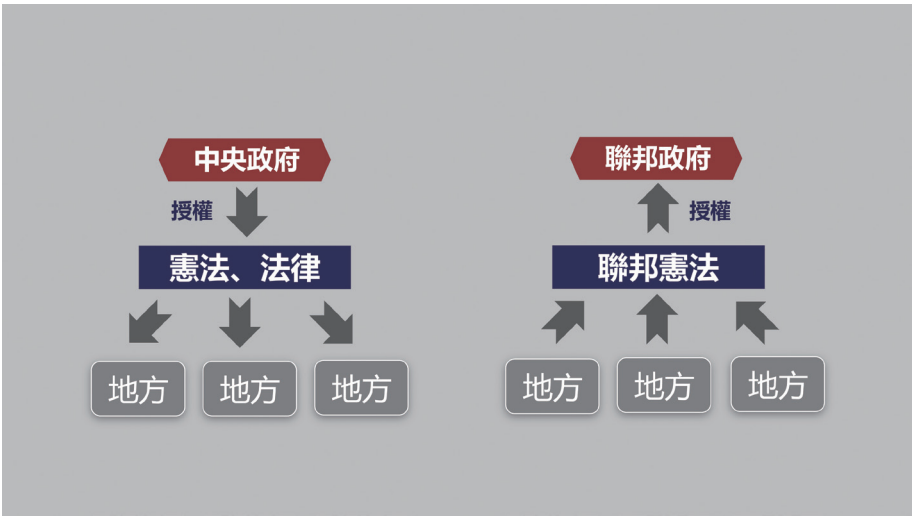
★特別行政區實行的制度
以基本法為依據。

03

★憲法有關社會主義制度
和政策不在香港實行。


基本法：构建特别行政区制度
基本原则
以愛國者為主體的「港人治港」
中央授權下的高度自治

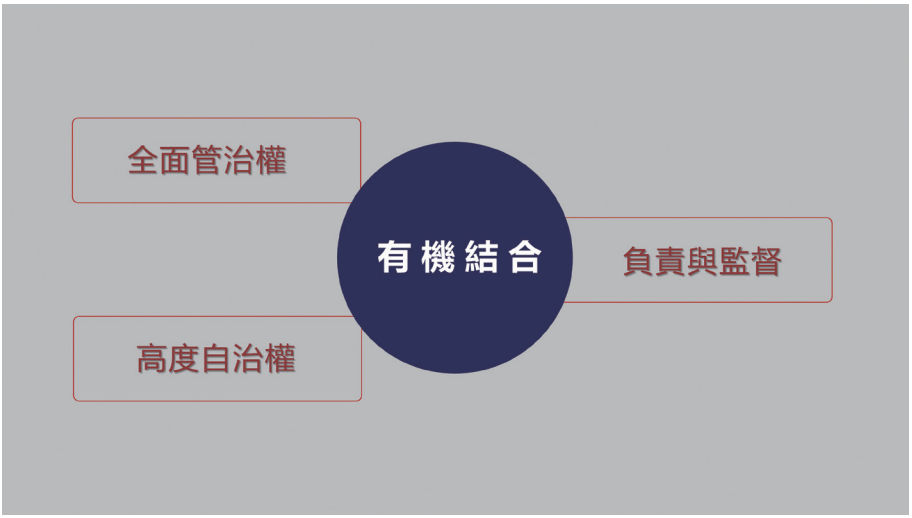

國家結構形式
單一制國家
聯邦制國家
● 中國、英國、法國、日本.....
● 俄羅斯、美國、德國、巴西.....

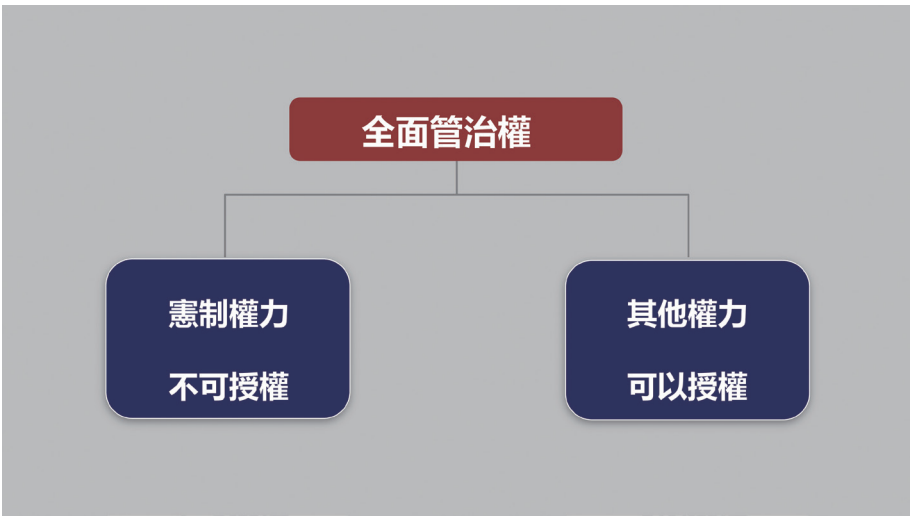


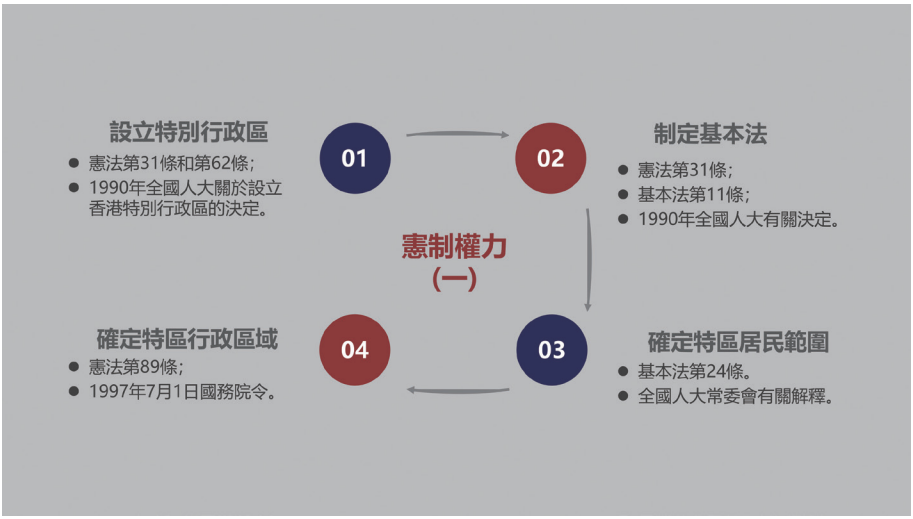

## 基本法：授權與被授權關係

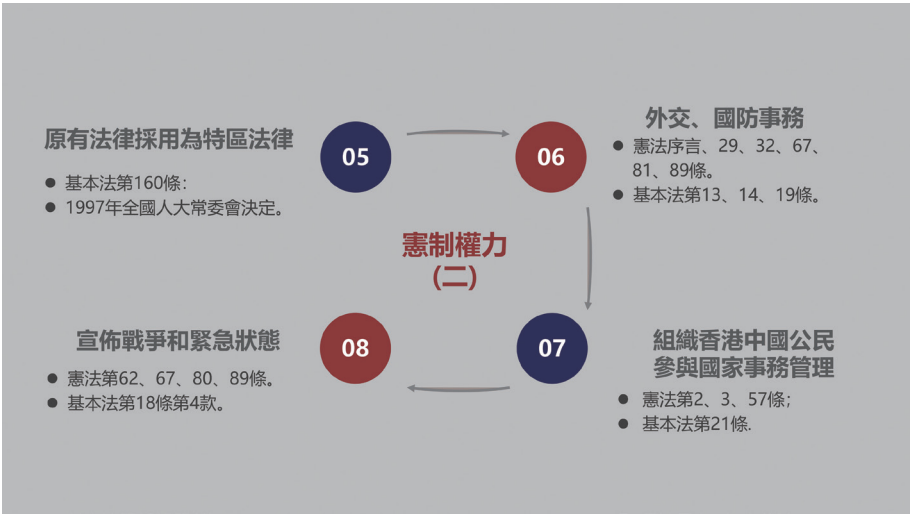
★**第2條**：全國人大授權香港特區實行高度自治。

★**第20條**：香港特區可享有全國人大、全國人大常委會及中央政府授予的其他權力。


全面管治權
有機結合
負責與監督
高度自治權


全面管治權
憲制權力
不可授權
其他權力
可以授權


設立特別行政區
憲法第31條和第62條;
1990年全國人大關於設立香港特別行政區的決定。
01
02
制定基本法
憲法第31條;
基本法第11條;
1990年全國人大有關決定。
憲制權力
(一)
確定特區行政區域
憲法第89條;
1997年7月1日國務院令。
04
03
確定特區居民範圍
基本法第24條。
全國人大常委會有關解釋。


原有法律採用為特區法律
基本法第160條:
1997年全國人大常委會決定。
05
06
外交、國防事務
憲法序言、29、32、67、81、89條。
基本法第13、14、19條。
憲制權力
(二)
宣佈戰爭和緊急狀態
憲法第62、67、80、89條。
基本法第18條第4款。
08
07
組織香港中國公民參與國家事務管理
憲法第2、3、57條;
基本法第21條.

## 高度自治權

- 行政管理權
- 獨立的司法權和終審權
- 立法權
- 依法授予的其他權力

**一般授權**

★**第125條**：授權香港特區繼續進行船舶登記。

★**第133條、第134條**：授權特區政府簽訂民用航空協定。

★**第154條**：授權特區政府簽發中華人民共和國香港特區護照。

★**第158條**：授權特區法院審理案件時可解釋基本法。

**特別授權**

★**第13條**：授權香港特區依據基本法自行處理的對外事務。

★**第48條**：**行政長官**代表特區政府處理中央授權的對外事務和其他事務。

★**第62條**：**特區政府**辦理中央政府授權的對外事務。

**指定授權**

**進一步授權**

- 1.有關國籍法的解釋中的授權規定
- 2. 對深圳灣港方口岸實施管轄授權規定
- 3.對「一地兩檢」合作安排的批准
- 4.香港國安法中的有關規定
- 5.香港第六屆立法會繼續履職的決定

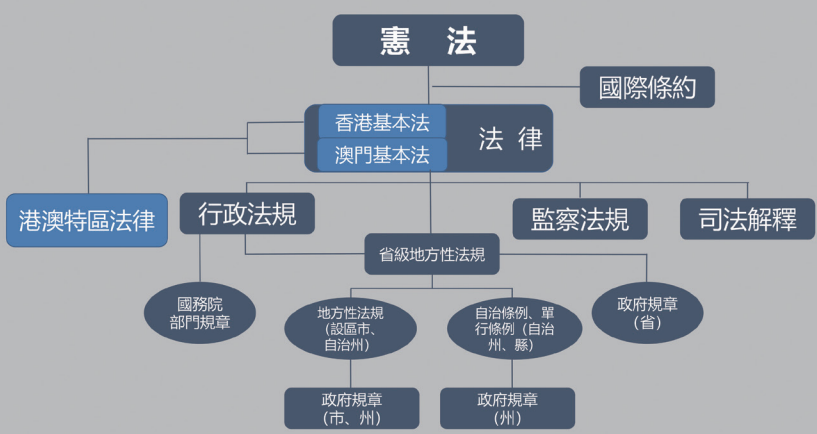
## 負責與監督

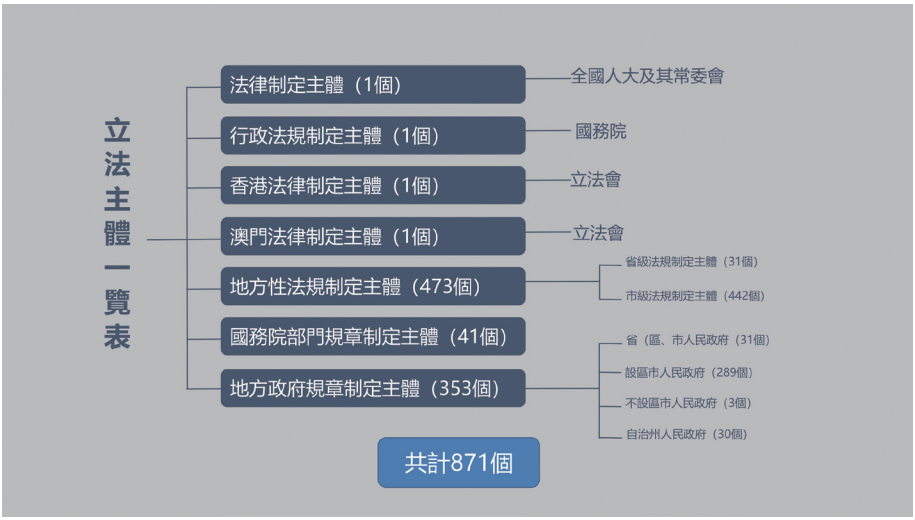
★行政長官負責執行基本法，
代表特區向中央人民政府負責。

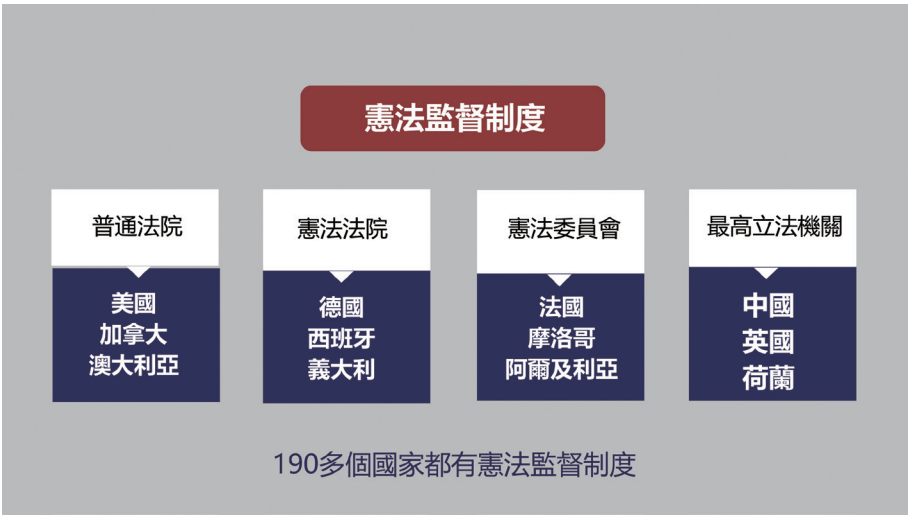
★特區各政權機關在授權範圍內
行使高度自治權。

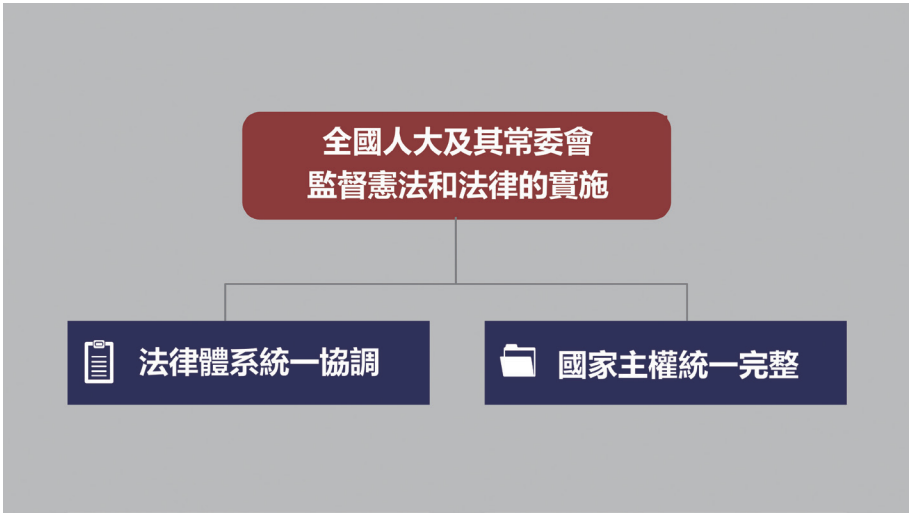
★中央擁有監督權。

## 法律位階圖




立法主體一覽表
法律制定主體（1個）
全國人大及其常委會
行政法規制定主體（1個）
國務院
香港法律制定主體（1個）
立法會
澳門法律制定主體（1個）
立法會
地方性法規制定主體（473個）
省級法規制定主體（31個）
市級法規制定主體（442個）
國務院部門規章制定主體（41個）
地方政府規章制定主體（353個）
省（區、市人民政府（31個）
設區市人民政府（289個）
不設區市人民政府（3個）
自治州人民政府（30個）
共計871個


憲法監督制度
普通法院
美國
加拿大
澳大利亞
憲法法院
德國
西班牙
義大利
憲法委員會
法國
摩洛哥
阿爾及利亞
最高立法機關
中國
英國
荷蘭
190多個國家都有憲法監督制度


全國人大及其常委會
監督憲法和法律的實施
法律體系統一協調
國家主權統一完整


監督方式
1.工作溝通，表達關切
2.作出決定、決議
3.制定法律
4.適用全國性法律
5.解釋法律
6.修改法律

## 結 語

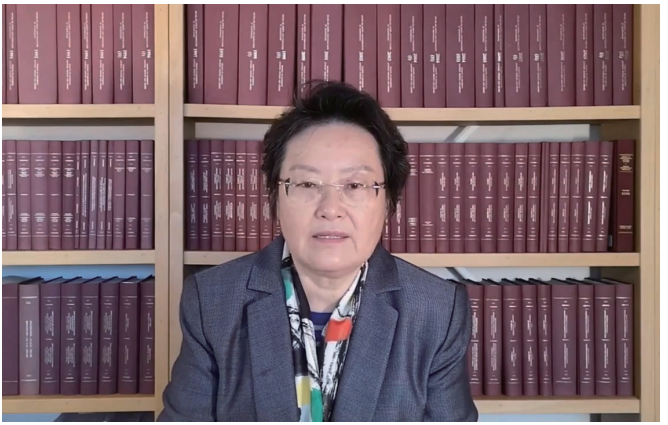
★ 「一國兩制」作為一個新生事物，有著複雜的歷史根源、現實情況和國際背景，前進的道路不會平坦，實踐的探索不會一帆風順。

★ 有問題不可怕，關鍵是想辦法解決問題；困難克服了、問題解決了，「一國兩制」的實踐就前進了。

——習近平

# THANKS 謝 謝

# 主題演講：“一國兩制”對國際法的貢獻



薛捍勤

法官
國際法院副院長

尊敬的林鄭月娥特首、尊敬的鄭若驊司長、尊敬的各位嘉賓、女士們、先生們、朋友們：

首先，請允許我對香港《基本法》頒布三十周年法律高峰論壇的召開，表示衷心的祝賀，對特區政府向我發出的邀請，表示誠摯的感謝。

鄭若驊司長希望我就“一國兩制”對國際法的貢獻，在大會上做個發言，我深感榮幸。這是一個很大的題目。我本人參加了香港回歸的條約法律工作，我就根據自己的學習和實踐，談點個人的看法，僅供大家參考。

1990 年 4 月 4 日，全國人民代表大會通過了《香港特別行政區基本法》，規定在香港成立特別行政區，實行“一國兩制”。同日，經國家主席簽署公布自 1997 年 7 月 1 日起正式生效。根據《基本法》，香港特區享有行政權、立法權和司法權，包括終審權。原來的經濟、社會制度和生活方式基本保持不變。內地的社會主義制度不在香港實行。除外交、國防事務之外，香港特區享有高度自治。“一國兩制”方針不僅在國家統一大業上具有重要意義，而且在國際法上也富有很多的創新

意義。經過二十多年的實踐檢驗，這一方針不斷顯示出設計者的政治智慧和遠見卓識，為國家的統一大業提供了很多寶貴的經驗。從國際層面看，香港回歸和“一國兩制”實踐也是一個非常值得研究的案例。

今天，我主要從兩個方面強調香港回歸和國際法的關係。

一，香港平穩順利回歸是中英兩國政府通過和平方式解決國際爭端的一個範例。有人可能會問，香港回歸是個歷史遺留問題，怎麼可以稱為爭端呢？國際法上的爭端有狹義和廣義之分。前者 dispute 指一個具體的糾紛和爭端，後者則可以包括紛繁複雜的情勢，以及某種事態和問題。比如根據《聯合國憲章》的宗旨和原則，對威脅到國際和平與安全的爭端和情勢，英文上譯為 disputes or situations，都應該通過和平的方式，根據國際法加以解決。

在香港問題上，中英雙方對舊條約的立場是截然不同的。中國失去對香港的管轄是兩次鴉片戰爭的結果，清政府銷毀鴉片、禁止鴉片貿易，英帝國以危害其貿易利益為由，對中國發動了侵略戰爭。清政府在第一次鴉片戰爭中戰敗，在英國的軍艦上，被迫與英國政府簽訂了 1842 年的《南京條約》，由此割讓香港島。第二次鴉片戰爭後，通過 1860 年的《北京條約》，英國又從中國割走了九龍半島的一部分。中日甲午戰爭失敗後，中國徹底淪為一個半封建半殖民地的國家，喪失了一個完整主權國家應有的地位和尊嚴，更加積貧積弱，西方列強則進一步加大了對中國的瓜分和掠奪，逼迫清政府簽訂了更多的不平等條約，在中國取得了更多的利益和特權。其中，1898 年的《拓展香港界址專條》，將整個九龍半島，英國人稱為新界 New Territories，租借給英國九十九年。對於涉港的這三個條約，清政府被推翻之後，歷屆中國政府都堅持認為這些條約是不平等條約，應當廢除，試圖把香港從英國那裡要回，但都遭到了英政府的斷然拒絕。當然，在殖民主義時代，國際法都是由西方國家制定的，反映了西方列強的立場，維護着它們海外擴張的利益。在它們看來，不平等條約的概念是不成立的。

二戰後，為了建立戰後新的國際秩序，1945 年成立了聯合國。為了解決殖民地的問題，聯合國六大主要機構，包括了托管理事會，英文就叫 The Trusteeship Council， 專門負責監督和審查尚未獨立的殖民地國家的管理情況和實行民族自決的進程。這些未獨立的國家被統稱為非自治領土，英文就叫 Non-Self-Governing Territories。1946 年，英國將香港列入非自治領土名單，根據《聯合國憲章》第七十三條的規定，行政主管當局 , 其實也就是指的宗主國或者外國佔領者，它們向聯大下面的專門委員會定期提交非自治領土的信息。非自治領土不包括那些具有主權歸屬的領土，即使這些領土仍然處於外國統治之下。例如，美國曾經把巴拿馬運河地區列入非自治領土名單，但是巴拿馬政府提出交涉，指出巴拿馬運河地區雖然不在其管轄之下，但該地區的領土主權歸屬巴拿馬。所以，經其要求，聯大就將該地區從清單上撤下。國民政府得知此事後，也曾向有關機關提出過交涉，試圖把香港從非自治領土名單撤下，但是沒有取得任何結果。

1960 年，聯大通過了《給予殖民地國家和人民獨立宣言》，也就是我們常講的聯大第 1514 號決議，也稱為《非殖民化宣言》。該宣言莊嚴地宣布，需要迅速和無條件地結束一切形式和表現的殖民主義。為此，聯大成立了非殖民化特別委員會，英文稱為 The Special Committee on Decolonization，負責落實第 1514 號決議。1963 年，聯大通過了更新的非自治領土的清單，其中包括了香港和澳門。

中華人民共和國成立以後，我們根據 1949 年《中國人民政治協商會議共同綱領》第五十五條所確立的原則，對舊條約逐一審查，然後決定對這些條約或予以承認、或廢除、或修改、或重新談判。對於涉港的三個條約，中國政府堅持認為這些條約是非法無效的，因為它們是侵略戰爭的結果，根據現代國際法原則，侵略戰爭產生的後果不予以承認。

1971 年底，中華人民共和國政府恢復在聯合國的合法席位，隨即便着手處理香港和澳門的問題。1972 年 3 月 8 日，中國常駐聯合國代表黃華大使


正式照會聯合國非殖民化特別委員會主席，重申香港和澳門問題屬於帝國主義強加於中國的不平等條約而產生的歷史遺留問題。英葡佔領下的香港和澳門是中國領土的一部分。如何解決港澳問題完全是中國主權範圍內的事情，而不是一般性的殖民地問題。因此，他們不應當列入非自治領土清單。中國政府將在條件成熟的時候，以適當的方式解決香港和澳門問題，聯合國無權處理。因此，要求將香港和澳門從非自治領土清單上撤下。並將港澳問題從聯合國和特委會的所有文件上刪除。特委會經審議，接受了中國代表團的請求，並向聯大提出建議。1972 年，第二十七屆聯大通過第 2908 號決議，正式將香港和澳門從殖民地名單上刪除。

我之所以如此詳細的介紹這段歷史，是要說明幾個與國際法有關的問題。

第一，中國政府關於香港問題的原則立場是始終一貫和堅定不移的。同時我們也應當看到，在國際法上，中國和英國的立場是有分歧的，這主要表現在雙方對三個條約的定性不同。我們將香港從聯合國的非自治領土清單上刪除，顯示了我們對香港的主權。聯大第 2908 決議進一步確認了中國的立場，這是有國際法意義的。

第二，我們不接受將香港列入聯合國的非自治領土清單，是因為我們始終堅持香港是中國領土的一部分。如何解決香港問題，完全是中國主權範圍內事務，這一原則立場並不否認英國對香港實行了長達一百多年的殖民統治，並不否認我們在這段時間裡失去了對香港的管轄，所以我們要收回香港。在國際法上，中英雙方要通過談判來解決這個歷史問題。

第三，香港問題的解決離不開世界發展的大趨勢。二戰後蓬勃興起的非殖民化運動，即英文的 Decolonization Movement 和民族自決權在國際法上的確立構成了香港回歸的國際背景。不管英國是否承認，這三個條約是非法無效的不平等條約，將香港全部歸還給中國，這既是中國的主權，也是歷史潮流所決定的。二戰結束後，國民政府也曾經向英國要求歸還香港，最終無果。這不光是因為中國的國力尚弱，更重要的還是因為殖民主義制度當時在政治和法律上還沒有受到根本性的動搖。隨着上世紀五十年代很多殖民地國家獲得獨立，特別是聯大第 1514 號決議的通過，極大地推動了非殖民化運動的發展，很多亞非拉國家紛紛宣告獨立，擺脫了殖民統治，走上了國際舞台，加入了聯合國。這是我們在聯合國能夠順利處理香港和澳門問題的政治基礎和國際背景。今天我們在研究“一國兩制”方針的時候，首先要明確香港問題的性質和歷史。

新中國成立以後所面臨的複雜的國際形勢，使解決港澳問題的時機一再後推。隨着中國改革開放的開啓，英國租借香港新界的時限也將很快到期，香港問題就被正式提上日程。雖然中英兩國政府在解決香港問題上都表現出了極大的政治誠意和合作的願望，雙方的分歧和爭議卻始終伴隨着整個談判的進程。在一些重大原則問題上，談判數度陷入僵局。坦率地說，如果沒有雙方領導人的高瞻遠矚和果斷決策，談判難以取得最終的圓滿結果。

我們都知道，英國代表團起初提出要求以主權換治權，即中國收回對香港的主權，而英國繼續治理香港。英方給的理由是中國人治理不好香港，香港人要求英國人繼續治理。

英方這個割裂主權概念和帶有殖民主義色彩的觀點，在國際法上是完全站不住腳的。這是因為主權和治權不可分割，殖民統治不可延續。而且歸還香港是包括港人在內的全體中國人民的共同意志。所以，英國的主張當然要遭到中方的反對。中方一再強調中國對香港的主權從來都沒有喪失，這個原則立場不能改變，也不可以妥協。所以，最後《中英聯合聲明》達成的協議是中國對香港恢復行使主權，英文就叫 resume the exercise of sovereignty over Hong Kong，而英方是將香港交還給中國，restore Hong Kong to China，這其中的法律含義就是主權自始未變的意思。

香港的回歸實現了國家統一的一步，這是一國的大前提。但是在實現這個原則問題上，中國政府對香港回歸後的安排採取了非常務實和靈活的態度。從國家統一大業和長遠發展考慮，特別是考慮到香港的特殊情況和需要，全國人民代表大會通過決議，決定在香港設立特別行政區，實行高度自治，五十年保持不變。“一國兩制”方針是一個創舉，雖然這個方針寫入了《中英聯合聲明》，但這是中方主動寫入的單方政策立場，目的是為了確保香港的平穩過渡和長期繁榮。香港回歸不是一般的政權交接，對香港的經濟、社會以及人心都將產生重大的影響。大家可能都還記得，上世紀 80 年代初，隨着中英香港回歸談判的啓動，香港社會經歷了一段大的波動。但是隨着《中英聯合聲明》的正式簽署，香港社會很快恢復了平靜，進入了新的高速發展階段。

從國際法的角度講，“一國兩制”解決了很多殖民地國家獨立以後普遍面臨的挑戰。這就是如何在新的國家政權建立之後，繼續保持社會的穩定和經濟發展，如何在堅持國家主權和獨立的同時，擴大同世界各國，包括與發達國家的經濟合作和平等交往。這個問題其實直到今天仍然在挑戰着很多的發展中國家。

香港是世界貿易和金融中心，享有自由港和獨立關稅區的地位，長期適用普通法，實行資本主義生活方式，經濟發展水平相對較高，與內地的社會經濟情況有着很大的區別。

一個國家兩種制度的構想就是着眼於這個基本的現實，最大限度地從港人的利益出發，從香港的長遠利益出發，而作出的制度性安排。如果我們機械地理解收回主權，就是將香港與內地簡單地合併在一起，實現統一，那必然會嚴重影響到香港的世界金融貿易中心的地位和社會的穩定，於國家、於香港都是不利的。

當然，“一國兩制”方針的最初提出，並不是沒有受到過外界的懷疑。很多人對於香港能否真正保持高度自治持觀望的態度。而如何在實踐中具體落實這一構想，對我們也提出了很多國際法上的挑戰。比如保持香港法律基本不變，就必然涉及到國際條約在港適用的問題。按照國際法的一般原則，香港回歸後，理論上就應該適用國家對外簽訂的條約，而不再享有單獨的對外締約權，這是主權原則決定的。而香港對外簽訂的大量的經貿、民航協定，這些國際協議對香港十分重要，不能簡單地去照搬內地的做法。所以，這些都是要做出具體的規定和安排。

根據國際法，和平解決國際爭端的方式有很多種，由爭端當事雙方自己直接解決的方式是談判。由第三方參與幫助解決的，有斡旋、調查、調解、和解等方式。由第三方出面強制解決的，有仲裁和司法判決。具體採取什麼方式，完全由當事國自己選擇，這也是國際法的一項重要原則。即自由選擇爭端解決方式原則 The Principle of Free Choice of Means of Settlement，這是國家主權原則所引申出來的國際法原則。大家都知道，中國在國際實踐中，對於涉及國家主權和重大利益的問題，通常都是採取談判的方式加以解決，而不接受第三方強制性的爭端解決方式。例如通過談判和協商，我們和周邊絕大部分鄰國解決了陸地邊界問題，與越南解決了北部灣海洋劃界。對於我們堅持通過談判解決爭端的立場，外界很多人不了解，也不理解，甚至將其解釋為我們對法治原則，所謂 rule of the law 有保留，這完全是一種誤解。香港順利回歸就是一個很好的回答。

香港問題有着複雜的歷史淵源。對於兩次鴉片戰爭的性質和之後所簽訂的一系列不平

等條約，我們認為是不能用當時的國際法來判斷的，因為那是逆歷史潮流而動的。更重要的是，香港的回歸應着眼於香港的現實和未來，着眼於中英兩國的長遠關係，而這不是任何第三方可以處理的，只能由當事雙方通過直接談判加以解決。雖然談判的過程漫長而艱難，但一經達成協議就非常有利於執行和落實。對於香港回歸後的安排，尤其是像“一國兩制”方針這樣的構想，只能由香港所屬的主權國家自己提出來，才可能成為現實。因為香港回歸後，採取什麼制度，如何實現國家的統一，從國際法上講，屬於中國主權範圍內的事務。但是，在過渡期內，從《中英聯合聲明》簽署到香港 1997 年 7 月 1 日回歸，在這近十三年的時間裡，還需要中英雙方的合作，對各項事務做出安排，這樣才能保證香港的平穩過渡。這不僅符合中方的利益，當然也符合英方的利益。所以，雙方為此建立了聯合聯絡小組，這些具體的細節安排，都需要在談判桌上雙方商訂。

從國際層面講，中英兩國政府採取了對香港負責任的態度，以和平談判的方式結束了中英兩國之間這段痛苦的歷史，將兩國關係推進到一個新階段。而回歸後的香港 在《基本法》的引導、指引下，作為中國一個特別行政區，繼續保持着繁榮，繼續穩定地發展。這個和平解決國際爭端的成功實踐，得到了國際社會的廣泛讚譽和大力支持，也為我們解決澳門問題，打下了良好的基礎，這是我要講的第一點。香港回歸是和平解決國際爭端的一個範例。

第二點，“一國兩制”方針下的條約安排，是對國際條約法的創新實踐。前面我談到，根據《基本法》的規定，香港現行的法律基本不變。而要實現這個目標，國際條約在香港如何適用的問題就顯得格外重要。國際法上，領土變更導致條約關係的變動，通常是用領土繼承的原則。顯而易見，香港回歸既不是中英之間的領土繼承，也不是主權更替。我們的指導原則是“一國兩制”方針，同時參考國際法的原則和國際實踐，最大限度地保留，甚至擴大了香港的國際活動空間，為香港特區的發展提供了良好

的法律基礎和國際環境。這是一個全新的領域，沒有國際先例可循。我們的實踐既體現了原則性，又展示了務實性。歸納起來，涉港條約遵循了以下幾項原則。

第一，根據《基本法》和“一國”的原則，中央政府負責管理與香港有關的外交事務和防務，因此中國締結的外交國防類多邊或雙邊條約，以及中國對這些條約所做的保留和聲明，全部適用於香港特區。而英國所參加的這類條約，不再適用於香港。這是“一國”的原則。

第二，基於“兩制”的安排，對於一些體現主權性質的重要領域，如司法互助、民航協定、豁免簽證、投資保護、稅收信息交換等，《基本法》規定，經中央政府具體授權，授權就是每一項條約都要具體授權，香港特區政府可以對外簽訂條約，除此而外，中央政府授權香港特區政府在自治領域範圍內，享有對外締約權。而中央政府在這些領域對外所簽訂的雙邊條約，原則上不適用於香港特區，這是它“兩制“的特點。

第三，在處理多邊公約的過程中，有二十七項多邊公約涉及國際組織，中央政府做出特殊安排以中國香港的名義，保留了香港在一些非主權實體也可以參加的國際組織的成員資格，如國際海事組織、世界貿易組織等，這就擴大了香港的國際活動空間。

第四，中央政府參加的多邊公約，包括做出的聲明和保留，原則上都要就公約是否適用於香港特區而徵詢特區政府的意見。對於涉及外交和國防類的公約，雖然它們自動適用於香港，但是中央政府一般也要就如何適用香港徵詢特區政府的意見。

這些重要的原則，在很大程度上體現了“一國兩制”方針的特點。顯而易見，涉港條約最複雜的問題是過渡期的條約清理，即中英雙方對香港回歸後哪些條約繼續適用，哪些條約應當終止、哪些條約要做出重新安排、雙方各自都參加了哪些條約、英方已將哪些條約適用於香港、中方在香港回歸後將把哪些條約延伸適用於香港等等。這些法律問題都需要中英雙方的法律專家坐下來逐項的一一核對、審查，並就有關安排達成協議。這是一件

非常艱巨而費時的工程，需要中英雙方的密切合作，對保持香港的平穩過渡非常重要。所以，雙方決定在過渡期內解決國際條約適港問題。

在過渡期內，中英聯合聯絡小組逐個清理了三百多項多邊國際條約，其中有八十多項條約，雙方認為香港回歸後不應再適用於香港。因為這些條約或者是涉及到國防與外交，而中方不是締約方，或者已被新條約所取代，或者屬於歐洲區域性條約，當然這些都不能適用於香港特區。

對於剩餘的二百三十多項多邊條約，自 1991 年 8 月起，中英聯合聯絡小組召開了大量的法律專家會議，討論這些條約是否繼續適用，最終分不同類別就條約適用的問題達成了一致。經過多年的討論和磋商，中英雙方最終同意將二百一十四項多邊條約繼續適用於香港特區，包括中國已經參加的一百二十七項條約和八十七項中國尚未參加的條約。這裡我要特別強調，這個做法是全新的國際實踐，在國際上是很難找到先例的。而且在這個過程中，外交部條法司一直是積極參與，做了大量的工作。

對於 1984 年《中英聯合聲明》簽署前，英國與其他外國締結並適用於香港的二十二類三百二十一項雙邊條約和協定，香港回歸後不再適用於香港。但是為了保證香港對外貿易、航運、司法協助等領域的關係，不會在政權交接時出現法律真空和斷檔，中英聯合聯絡小組商定，在過渡期內，經中國政府同意，由英國政府授權港英政府與外國簽署和談判有關的雙邊協定，並在回歸後繼續適用。回歸之前，港英政府與外國政府簽訂了這類的條約一共是六十一項。

在中英就國際條約在港適用問題達成全面協議之後，根據國際條約法的實踐，我們雙方還要採取必要的外交行動，來保證國際上對這些條約安排是給予承認的。1997 年的 6 月 20 日，中國常駐聯合國代表秦華孫大使正式照會聯合國秘書長，就有關的條約安排通知聯合國，並且要求秘書長將照會的內容記錄在案，並轉交聯合國其他成員和專門機構。照會附有自 1997 年 7 月 1 日起，適

用於香港特別行政區的多邊條約清單。在中方發出照會後，英方也照會聯合國秘書長，對中國政府有關行動表示歡迎和支持，並附 1997 年 7 月 1 日前香港隨英國適用的條約清單，正式宣布這些條約不再適用於香港。除此之外，中國政府還逐個地通知了所有其他公約的保存機關，履行了有關的法律程序。同時英國也照會這些條約保存機關，宣布英國將終止承擔有關的國際義務。對於港英政府在過渡期內簽訂的雙邊協定，香港回歸前後，中國政府都向有關國家發出照會，確認這些協定在 1997 年之後繼續適用於香港。

我們所採取的外交和法律行動在國際上沒有受到任何的阻力。國際社會普遍表示理解和支持，順利的接受了我們的安排。個別國家和國際組織對於中國的一些新做法，例如中國本身不是締約方，但條約繼續適用於香港，也提出過法律上的疑問，表示不理解。經過我們的詳細解釋，介紹一國兩制方針的內涵和具體的制度設計，對方也就消除了疑慮，接受了我們的做法。

在對外外交條約談判中，有一些國家也提出，香港既然已經回歸中國，有關的雙邊條約就當然的應當自動適用於香港。例如在中俄雙邊投資保護協定談判中，俄方就認為協定的適用範圍應該包括香港。我們根據《基本法》的有關規定說明情況，不僅消除了對方的疑慮，而且還在國際層面讓更多的國家具體了解了“一國兩制”方針的內涵和實際操作。香港回歸後，中央政府嚴格執行《基本法》有關規定，在與特區政府協商的基礎上，逐步形成了一套具體操作的原則和程序。這套操作原則和程序充分體現了“一國兩制”的方針，有以下幾個特點。

第一，在堅持“一國”原則的前提下，充分尊重特區政府的知情權和參與權。對於中國將要參加的每一項國際公約，中央政府都要就條約是否適用於香港問題來徵詢特區政府的意見。即使是自動適用於香港的外交、國防類的條約，中央政府也會就如何適用的問題徵詢特區政府的意見。據了解，至今中央政府已就三百五十多項多邊條約徵詢過

特區政府的意見，其中有二百多項適用於香港。

第二，在“兩制”的安排下，中央政府對特區政府在高度自治領域所享有的締約權不加任何干涉。對需要專門授權的領域，也充分考慮特區政府的請求和香港的實際需要，促進香港的繁榮和穩定。 在這裡，我想講一個我自己經歷的例子。我還記得香港回歸之初，我們就遇到了特區民航協定秘密備忘錄的審查問題。按照規定，香港特區對外簽訂的民航協定應當交中央政府備案和審查。按照我們的理解，這當然包括作為協定附件的秘密備忘錄。而特區政府則表示這會涉及到商業秘密，對交出來感到困難。這是我第一次與特區政府的官員打交道，他們的敬業精神和專業能力給我留下了深刻的印象。經過友好協商，我們最終妥善的解決了這個難題。這個經歷也讓我對中央“港人治港”，“一國兩制”的政策有了更深的理解。就是這樣通過辦理一件件具體的案件，內地和特區之間的互信和了解不斷加深，合作愈加順暢。中央政府對特區在高度自治範圍內所享有的締約權予以充分的尊重。

第三，就是給予特區盡可能大的國際活動空間和舞台，促進香港的繁榮發展。我們都知道一些人權、環境保護和文化保護條約，都規定了履約機制，定期審查各締約方的履約報告。香港回歸之前，香港執行條約的情況都是由英國政府來負責的。港英政府不參加報告的審查和對外活動。回歸後香港特區政府自行準備履約報告，與國家報告一併交給有關公約專家委員會審查，而且，香港的官員作為中國代表團的一部分，直接參加香港履約報告的審查，並回答委員們的提問。此外特區政府代表還參與中央政府代表團，參加一些國際條約的談判和國際會議。在這方面，我多次和特區政府的法律官員參加一些國際會議，有過非常密切的合作。

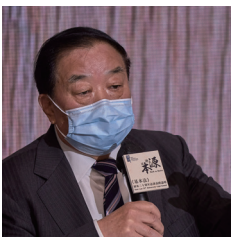
第四，中央政府和特區政府的主管部門，通過外交部駐香港特區特派員公署，在條約事務上始終保持着密切的聯繫和良好的工作關係，形成了“一國兩制”下一種獨特的工作機制，既維護着國家的統一，又保障了特區的高度自治。總而

言之，實踐證明基本法規定的適港條約安排，對於落實“一國兩制”方針，維護香港特區長期繁榮穩定發展發揮了重要的作用，是創新的國際實踐。

回顧總結我們所走過的道路，“一國兩制”方針之所以在香港能夠取得成功，取決於很多重要的因素和條件，包括國際的大環境。但是其中起決定性作用的，還是在於我們自己對“一國兩制”方針的堅定信心和努力實踐。在國際法上其重要意義在於它提供了一個全新的和平解決歷史遺留問題的有效途徑和國際條約的新實踐。多年來，我們在落實“一國兩制”方針的過程中，積累了很多寶貴的經驗和做法。這不僅是中國的國際法實踐，而且具有現實的國際法意義，非常值得認真總結。在此我衷心的感謝特區政府為此所作出的積極努力。在《基本法》頒布三十周年之際，召開這次重要的法律高峰論壇交流經驗。最後我預祝高峰論壇取得圓滿成功，謝謝大家。

# 座談會1：
# 暢談《基本法》的草擬過程及立法原意

**主持人：**



喬曉陽

原全國人大常委會香港特別行政區基本法委員會主任

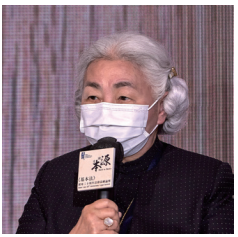
**與談人：**

馮　巍

原國務院港澳事務辦公室副主任

譚惠珠

全國人大常委會香港特別行政區基本法委員會副主任



梁愛詩

原全國人大常委會香港特別行政區基本法委員會副主任

**喬曉陽：**各位嘉賓大家上午好。按照論壇的安排，這一場座談會由我來主持，他們三位主講。我們四位大家都很熟悉了。我們的共同特點就是多年研究《基本法》、實施《基本法》，長期和《基本法》打交道。當然，我們這裡面程度也有不同，資格最老的是譚惠珠女士。她是《基本法》起草委員會的委員，等於從一開始就浸淫在這部法律裡面，也付出了很多的心血。愛詩實際上也很早，雖然她不是起草委員會委員，但是在香港特區接觸《基本法》也是很早的。馮巍也很早，他是蕭蔚雲教授的高徒。蕭教授大家都知道的，香港封他為“四大護法”之首，也是起草《基本法》政治體制這一章的召集人。我是 1995 年特區籌委會成立作為籌委會的委員，才開始研究《基本法》，因此比他們的時間都晚。但是我們都是跟《基本法》打交道，就跟人打交道一樣的，打交道時間長了就有感情，我們都對《基本法》充滿着感情。所以去年 12 月 20 號，鄭若驊司長在澳門回歸二十周年晚宴上跟我講她有一個想法，就是今年適當的時候，舉辦一個紀念《基本法》頒布三十周年的座談會。我一聽就覺得特別好，因為我們對《基本法》都是有很特殊的一種感情，今年又是《基本法》頒布三十周年，《基本法》也實施了二十三年，所以當時就表示支持。當然，《基本法》經過了一些風雨的考驗但已經證明、而且會繼續證明，它是行得通、辦得到、得人心的。“一國兩制”所以能取得成功，關鍵的關鍵就在於我們有《基本法》這樣一部偉大的法律文件作為根本的法律保障。因此，我們怎麼紀念它都不為過。這次的論壇題目也很好，叫“追本溯源”，就是追求《基本法》的初心和本意。這一場我們的主題叫“暢談《基本法》的草擬過程和立法原意”。

論壇主辦方希望在我們暢談當中，能夠講講三權分立、中央和特區的關係、對外事務和外交的關係等問題內容。下面我們有請馮巍先生先講一講有關立法原意的內容。

**馮巍：**謝謝喬主任的介紹。我是 2018 年年底退休，兩年之後能夠回到香港，在一個很特殊的時期來回顧《基本法》的

立法原意，真的是很高興。尤其是和譚惠珠大律師，還有梁愛詩女士。實際上，我們在座的下邊還有梁振英政協副主席，他當時是《基本法》諮詢委員會的秘書長。在座的各位，都是法律界、政界的高層人士。所以在這樣的一個場合，來談這樣的一個問題，實際上我還是有一些壓力的。

我首先談一點感受，我們"追本溯源"這個題目是非常好的。在第一節，我覺得林鄭月娥行政長官做了一個非常好的致辭，她實際上就是在追本溯源，講清楚了《基本法》裡面非常重要的問題。透過行政長官的演講，我也感覺到她是在做一個很深刻的反思，實際上也代表了整個香港社會在做反思。

我們為什麼是要"追本溯源"，為什麼要反思呢？就是說現在出問題了。不管是一個人也好，還是一個社會也好，如果整個的工作都是順利有序的向前發展，按照一個既定的目標發展，可能就沒有必要再回過頭來看一看最初的初心是什麼。社會是這樣，人也是這樣。張曉明副主任上午在他的致辭裡面，也點出了香港社會回歸以來，尤其是最近幾年出現的一系列問題。我想應該是這樣，就是經過最近一年以來的政治亂局和暴力恐怖事件，香港社會現在正在逐步的恢復平靜，整個社會和市民都在回顧過去、觀察現在，也在思考未來。在這樣的一個背景下，我們來思考《基本法》的立法原意，來找回初心，來明確未來的發展方向，排除各種各樣的干擾，使"一國兩制"能夠行穩致遠。這個對香港、對國家都有非常重要的意義，這是我的一個感受。

**首先，我想簡單的談一下"追本溯源"。**找《基本法》的立法原意，從什麼地方去找？我們讀過政治學和法律學的人都知道，如果我們要理解英國的《大憲章》等非常重要的憲制性法律文件，一定要讀孟德斯鳩、盧梭、霍布斯的著作。如果我們要了解美國的憲法，我們一定要讀聯邦黨人文集。我們學習《基本法》、了解《基本法》、探求《基本法》的立法原意，我們要從什麼地方去找？我個人的感覺，就是要從鄧小平先生在上個世紀 80 年代後期，一直到《基本法》頒布的過程當中以及香港在過渡時期涉及到香港問題和"一國

兩制”所發表的一系列談話和論述中探尋。 今天上午，行政長官在她的致辭裡面，大段的引用了鄧小平先生的兩段談話，張曉明副主任也引用了鄧小平先生的兩段談話。所以我覺得，在香港回歸二十三年，《基本法》實施二十三年的當今，我們回過頭來認真地閱讀、學習、領會鄧小平先生關於香港問題和“一國兩制”的系列論述，對於我們探求、把握《基本法》的立法原意，具有非常重要的指導意義。這些有關的論述都是公開的。香港中聯辦編了一套“一國兩制”系列文件，其中的第一集就是黨和國家領導人關於“一國兩制”的重要論述。我知道，在香港是學術自由、言論自由，大家都不希望把某一個人很神聖化。但是我在這想引用美國第三十二任的總統羅斯福講過的一段話，這裡我讀給大家聽。羅斯福說“真正具有永恆價值的是那些向我們揭示事物本質和全部意義的生動的瞬間的光華。一個人經歷多年的社會政治生活，會變得明智起來。當人們讚許的光華降臨到他頭上時，並不意味着他自己有多麼重要，而是在人類變遷進步的漫長過程中，在這短短的瞬間，人類的某種共同意志，在他身上令人滿意的體現出來。”我覺得，鄧小平先生就是這樣的一個偉大的政治家。他關於香港問題和“一國兩制”的談話，揭示了香港問題和“一國兩制”的本來面目和全部內容，也代表了包括香港同胞在內的全國人民的共同意志，它也體現了我們中華民族悠久歷史政治文化當中的政治智慧，也展示了執政的中國共產黨在香港問題上這種包容和寬廣的胸懷。因此在《基本法》頒布三十年之後的今天，我們重新回過頭來認真地學習鄧小平先生的有關論述，確實有利於我們找回初心，保證“一國兩制”在香港的實踐能夠行穩致遠。

**第二，我簡單地談一談關於中央權力的問題，或者中央和特區關係的問題。**這個問題對於我們中央政府長期從事港澳工作的人來講，我覺得是一個非常簡單的問題。但是這個世界就是這樣，往往越是簡單的問題，一些常理性的問題，人們反而不會重視。今天上午，聽了薛捍勤法官的致辭，她也


回顧了中英就香港問題談判的過程。香港問題我們國家是叫恢復行使主權。恢復行使主權不管是從政治學的意義上講，還是從法學的意義上講，它都是一種國家行為。國家行為最主要的就是體現在中央有關權力機構的行為上。所以說恢復行使主權，必然意味着國家或者中央人民政府對香港特別行政區的管治，不管通過什麼樣的方式管治。如果中央人民政府對香港特別行政區沒有直接的管治權力，香港它就不是一個特別行政區，它就是一個獨立的政治實體了。所以我們在討論這個問題的時候，一定要認真地看《基本法》的序言，看《基本法》設立的第一章，也就是中央與特別行政區的關係。實際上在《基本法》的序言和中央和特別行政區的關係裡邊，對於中央的權力、對於中央和特別行政區的關係，講得是非常清楚的。所以這種主權的行使、中央的權力在《基本法》當中都轉化為了具體的法律條文，因此我們才說《基本法》是“一國兩制”的法律化和具體化。

香港社會的不少人對中央的全面管治權有質疑。實際上我覺得中央對香港的全面管治權是非常好理解的。中央對香港特別行政區的全面管治權包含着兩層意思。

一是中央直接行使的權力。比方說中央要負責香港的

外交和防務；中央要任命行政長官，要根據行政長官的提名任命特區政府的主要官員；全國人大常委會要解釋《基本法》。像這一類的權力都是中央的直接的權力。還有全國人大常委會要備案審查，經過香港特別行政區立法會通過，行政長官簽署的香港特別行政區的法律，這些都是中央的直接權力。在上一節裡邊，張勇副主任講了很多領域裡面的權力，這是直接的權力。

二是中央通過《基本法》設立了香港特別行政區本地的政權機構。《基本法》設立了行政長官、設立了行政機構、設立了立法會、設立了香港的法院，尤其是設立了香港的終審法院。同時，中央通過《基本法》也授予了特別行政區這些政權機構特定的職責，這個是一種授權。這些機構按照中央和《基本法》的授權，來具體地實行中央對香港特別行政區的管治。所以中央的直接管治和授權的管治結合在一起就形成了中央對香港特別行政區的全面管治，這是非常清楚的。張勇副主任還談到了中央有對特別行政區貫徹落實《基本法》的監督權，這也是我們國家《憲法》規定的全國人大常委會的一項專門的職權。所以我覺得關於中央和特別行政區之間的關係是非常清楚的。回歸以後，在什麼地方出問題了呢？我個人覺得問題最主要的是出在中央的權力和中央與特別行政區關係這些領域。我們現在回過頭來可以看一下，2003 年，因為二十三條立法出現了大遊行；2012 年“反國教事件”；2014 年，因為政治發展問題出現了“佔中”；還有去年特區政府修訂移交逃犯條例引起來的政治亂局和社會暴力事件。所有這些比較大規模的社會政治爭議和群體性的抗爭，它針對的都是中央的權力和中央與特別行政區的關係這個領域。所以我個人感覺到，香港社會或者是香港社會的一部分人對於中央的權力，對中央和特別行政區的關係沒有非常清晰的認識。這樣就導致了一個什麼問題呢？這個新的憲政體制的實際運行和香港社會對這個新的憲政體制的認識、了解和認同之間，存在着比較大的差距。這個就是需要我們要做長遠工作。產生這個問題的原因，我

個人認為實際上有兩個。第一個就是香港回歸以後，中央政府和特別行政區政府出於穩定香港社會、照顧香港人心裡不安的考慮，對於中央的權力，對中央和特別行政區關係這個領域裡面的問題講的比較少，對《基本法》相關的規定，宣傳也比較少。我們總是講不變，“一國兩制”五十年不變。我們講的不變，主要是指的具體的社會管理制度、生活方式不變，但是憲政體制它發生了根本的變化。而我們回歸以後，對根本的變化我們講的確實比較少，這是一個方面的原因。我覺得行政長官上午講的非常好。從現在開始，有很多的觀點應該向社會進一步的做解讀，能夠形成社會的共識。這是一個長期的任務。第二個原因，我個人也覺得從世界各國的憲政發展史來看，一個新的憲政體制從法律上的條文規定到實際運作的體制機制，它一定要經過一個過程。三年、五年、十年八年的時間還是很短。像不管是英國也好，美國也好，它們的憲政體制有效的運行都是經過了超過五十年以至上百年的實際運行。所以孫中山先生談到中國憲政的發展時，他叫做軍政階段、訓政階段、憲政階段。一開始憲政的推行，它一定要通過國家的強制手段必須要這樣做，不這樣做就要承擔法律後果。它是強制手段，必須要落實憲政。第二個階段叫訓政階段，要把憲政讓社會的全體市民都知道、都接受。在這個基礎之上才能夠達到一種憲制階段。所以我想香港現在應該是處於一個訓政階段。所以未來香港“一國兩制”的路確實很漫長。在這個過程當中，我想香港特別行政區的各個部門、行政長官、行政機關、立法機關、司法機關都有共同的責任來貫徹落實《基本法》，使《基本法》規定的這套憲政體制能夠有效地運行。

在這裡我還想談最後一點體會。我從事港澳工作二十八年，我在香港、在北京、在軍隊、在中央國家機關都工作過。這二十八年的工作經歷給我一個很深的感受，中央政府從來都沒有低估過貫徹“一國兩制”的難度，它的確有很大的難度。中央政府也從來沒有動搖過貫徹“一國兩制”的信心，這個問題習總書記三番五次的講，

要“堅定不移、不動搖”。另外，我也想讓在座的各位並通過在座的各位使香港市民也知道，中央政府也從來沒有失去過對香港社會的耐心，中央政府一直是有耐心的。所以我覺得只要我們大家齊心協力，找回“一國兩制”的初心，“一國兩制”一定能夠在香港行穩致遠，香港也會保持長久的繁榮和穩定。

**喬曉陽：**有請惠珠談一談。

**譚惠珠：**謝謝喬主任。我早些時候大概三十九歲就參加了《基本法》的起草，同時參加了政治體制小組和中央地方關係小組。可以說經過四年零八個月，我的感覺，我是九十三歲而不是三十九歲。當時有很多爭議，我負責的是有關三權分立、政治體制的問題，還有是否要司法獨大和司法獨立。香港特別行政區的政治體制從來沒有用過外國任何一個三權分立的模式，或者是內地人民代表大會的模式作為一個藍本。而是正如姬鵬飛主任說的，從香港的法律地位和實際情況出發，以保證香港的繁榮穩定為目的。為此必須兼顧社會各階層的利益，有利於資本主義經濟的發展，既要保全原政治體系裡面行之有效的部分，又要循序漸進的逐步發展適合香港情況的民主之路。所以我們不可以把三權分立的帽子套在香港的政治架構上。香港的政治架構就是《憲法》和《基本法》構成的。正如李飛主任曾經說過，除了在行政、立法、司法權以外，還有一個主權。有本書把我們當時在起草討論《基本法》的背景、細節、爭議都記得很清楚。這本書（基本法導論）是 1990 年 10 月第一版。我們是 1990 年 4 月通過《基本法》的，王叔文跟吳建璠兩位委員把我們所有的爭議、討論、結論都寫在這本書裡面。他們在書裡面是這樣寫，關於行政機關與立法機關，在起草過程中有兩種不同的意見。一種是仍主張沿用香港現行的行政主導的制度；另一個意見是反對原有行政主導，主張立法主導。認為行政機關對立法機關負責，意思就是以立法主導。但是立法主導的意見被否決了。因為我們小組認定，香港原有的港督制是一種行政主導的政治體制。在《基本法》具體的條文裡面也實現了行政主導，寫在行政長官的職權裡面，第

四十三條寫明是行政長官負責制。此外，梁君彥主席在立法會的議程裡面優先處理政府的提案，也是行政主導。再有就是在附件二有個分組算票。當時的諮詢委員有“兩羅”“大羅”羅德丞和“小羅”羅康瑞。羅德丞提出一個方案，就是所有在立法會裡面通過的議案都要功能組別和地方組的過半數才可以。包括政府的提案不單只是私人的提案。羅康瑞就提出了政府的提案要簡單多數通過，不可以分組算票。最後羅康瑞贏了一戰。所以現在寫在附件二了，就是私人的提案要分組都過半數，政府的提案簡單多數可以通過。另外，就是《基本法》第七十四條裡面涉及到議員私人的提案。起草的時候，有兩個“珠”：一個是“東珠”，即廖瑤珠；一個是“西珠”，譚惠珠。就第七十四條，我們就考慮，議員的私人提案可以提什麼案呢？大家一致覺得財政方面的案不可以提。廖瑤珠就說，有關政治體制和政府運作的私人提案不可以提，行政主導嘛。我就說，假如私人的提案涉及政策上的問題，要經行政長官出一個證書，書面批准才可以提。目的是什麼？就是保持行政主導。

剛才提到有人主張應該是一個立法主導的體制，因為在《基本法》第六十四條說要對立法機關負責。原文是這樣的，“香港政府遵守法律向立法機關負責：”，有一個冒號，我們有一個冒號的故事，冒號後面寫的是什麼呢？是執行立法會已經通過並已經生效的法律，定期向立法會做施政報告，答覆立法會議員的諮詢。徵稅和公共的開支須經立法會批准。有人就說要加一個，就是立法機關可以監督行政機關。為此吵得很厲害。有一些人的嗓子已經到了“高音C”了。怎麼樣解決呢？最後周南主任出來說：討論《聯合聲明》的時候，是有關行政機關向立法機關負責的，那個時候，我就立刻問了，是什麼意思？對方是英國派來的香港政治顧問，按我的推斷，可能是前英國外交官麥若彬（Robin McLaren），麥就回覆周南主任說：“就像現在香港一樣的一、二、三、四的四件事。”，所以“行政機關向立法機關負責”，不是等於我們可以立法主導，而是行政機關在這

四方面是負責的。我們拒絕了多加一條，就是立法機關監督行政機關。我們極力地在分權的條文裡面，在行政長官的職權、政府的職權和立法會的職權裡面，體現行政主導。

我就三權分立和司法獨大的問題講下我自己的看法。特區成立之後，我們司法覆核的案件增加了很多，也有一些很特殊的人士經常的司法覆核香港政府。但是我個人不認為香港是司法獨大。司法獨立所指的是審判的獨立絕對不受動搖，沒有動搖，也不可以動搖。我們經常聽到某一些法律界的人士不停地說，法官已經說了香港是三權分立，Separation of Power。我覺得他們是斷章取義的。香港的政治體制就是行政主導，行政和立法互相配合、互相制衡。目前我們面對的問題，比如說我們在蓋洛普治安指數 (Gallup Law and Order Index) 的排名，什麼情況大家都很清楚。所以希望法官方面、司法方面對大局的利益有更多的發揮。總之，我們不是司法獨大。我認為法官講的三權分立 separation of power 是普通法裡面審判的一個原則，叫 judicial deference 即“司法謙抑”。就是法官審案的時候，對行政機關的權力和立法機關的權力尊重，不予以裁決。我們的政治架構，三權的關係是互相分置的，由不同的機構行使的，沒有一個機構可以替代另外一個機構。在普通法 Secretary of State for the Home Department v Rehman [2003] 1 AC 153 案中，英國最高大法院的法官霍夫曼（Lord Hoffmann）就討論了 司法機關尊重行政機關的問題並做出了判斷。他有兩個理由，第一，這是憲法分權制度的要求，無論法庭的管轄權有多寬，司法、行政、立法的權力是分開的。所以我們應該說香港沒有三權分立作為一個政治架構的內涵，而是三權分置。比如說對國家安全是什麼定義？什麼對國家安全有利，不是一個法律問題，是一個政策的判斷，policy decision。在英國以及其他很多國家的憲法規定之下，政策的判斷不是法院做的，是交給行政機關去做的。第二，從實踐的角度來講，正常的判斷也應該是行政機關去做，這是行政長官的特殊責任和權限。按照歐洲人權法院

所承認的原則，司法機關不能夠在純粹行政問題、便利問題上，question of pure expediency，代替決策部門做一個決定。需要注意，在國家安全的事務上，失敗的成本很高。司法機關要考慮支持尊重行政機關的判斷，這不僅是因為行政機關可以接觸特別的情報以及在整個事上有專長，也是因為這個決定潛在的後果是整個社會承擔的。 我個人認為憲制上我們不是三權分立，是《憲法》跟《基本法》的結合。李飛主任曾說，除了三權還有個主權。我們尊重法院傳統上對 separation of power 原則的實施和落實。但我希望法律界的人不要把它提升作為我們的憲制結構。

有關司法至上的問題，在香港高度自治範圍裡面的案件由終審法院說了算。可是司法在有關中央與地方關係和中央事權方面，《基本法》第一百五十八條第 ( 三 ) 款有相應的規定。因此我覺得，司法至上是指在香港高度自治範圍裡面的審判權，是沒有人可以超越終審法院。但是，在有關中央與地方關係上人大有解釋權，有決定權。剛才張勇副主任就此已經作了詳細說明。我國的《憲法》第六十二條第 ( 二 ) 款和第六十七條第 ( 一 ) 款分別授予全國人大和全國人大常委會的職權，就是監督《憲法》的實施。在這一方面，它的權力是最大的。還有就是釋法的效力，也要對香港有約束力，我們每個人都要遵守的，不能逾越，不能挑戰。特區法院在裁判裡面認同這一點，比如說在“梁麗幗挑戰 831 決定的司法覆核案”，法官在判詞中認為，香港法院對“831 的決定”是沒有司法管轄權的，“The court simply has no jurisdiction to do so”。在對全國人大批准“一地兩檢決定的司法覆核案”，法官接納了政府專家的證供包括全國人大決定對香港具備約束力的說法，法官認為在香港法律之下，香港法院沒有權力去裁判人大的決定是否有效。

總的來說，第一，我們由始至終就沒有按任何人的三權分立的模式去設計香港的政治體制。第二，我們的政治體制是行政主導，行政、立法互相制衡也互相協調。第三，司法享有的就是獨立的審判權。

最後，我覺得《基本法》

已經實施二十三年，前面還有很長的時間。希望大家可以真正地根據我們原來的設想，面對需要解決的現實問題，充分運用我們的智慧，繼續地把“一國兩制”搞的更好。

**馮巍：**關於政治體制我稍微補充幾句。政治體制確實是一個挺大的問題。我看了一些歷史文件，在《基本法》起草的過程當中，對政治體制有多種討論，多種方案。其中就有議會內閣制，像英國的制度；也有三權分立，像美國的制度。最終根據我們單一制國家的這種形式和香港的實際情況，考慮到政治體制的路徑依賴，確立了《基本法》規定的現行的政治體制。香港回歸以後，政治體制實際上隔一段時間就吵一次。最近又在討論這個問題，行政長官也談了意見，國務院港澳辦和香港中聯辦也都第一次公開就香港的政治體制問題發表了意見。因為今天的主題是“追本溯源”，又帶有論壇的形式，所以我想從理論上簡單的分析一下。從方法論上講，對於一種政治體制去怎麼樣分析有兩種方法。一種方法就叫做規範解釋法，規範解釋法就是把設立政治體制的有些法律規範的內涵及規範和規範之間的邏輯關係把它分析透，結合立法時候的歷史背景和立法原意，對政治體制來做一個界定。今天我們是“追本溯源”，如果我們追到《基本法》，用規範解釋的方法來分析，再結合鄧小平先生的講話，那顯然不是三權分立。所以我個人認為，國務院港澳辦的表述應該是比較準確的，這是規範解釋方法。還有一個方法叫做法律實證法，所謂法律實證法，我可以看規範，但是我更主要的要看政治體制它實際運行的情況和結果以及社會效果。如果說用法律實證的方法來對香港現行的政治體制來做一個評判，很多人可能認為它是三權分立。因為香港回歸以來，政治體制的運行總體上應該還是有效的，但是實際上問題還是很多的，它不是很順暢。這裡面原因有很多，比方說我們經常講的立法擴權，剛才譚惠珠副主任講的司法獨大或者是司法至上。但是我對這個問題沒有很深的研究，我認為香港回歸以後，香港的司法系統實際上是採用了一種司法能動主義的方

法。這實際上對特別行政區政府的施政形成了一種約束。我就曾跟特區政府的官員講：這個事你們應該這樣做。他們說：這個不敢。到時候到了法院，政府要敗訴的。因為很多事情還沒有做，他就想到法院我要敗訴，這個顯然也是一個問題。所以我說“追本溯源”，香港的政治體制不是三權分立。但是為什麼現在形成了這樣的一種狀態呢？我覺得可能跟意識形態有關係。就是我們立法機關、行政機關、司法機關這些掌握政權的人，在實際運作的過程當中，他是按照三權分立的理念來操作這套制度的，所以導致現在香港的政治體制就出現了一些問題。因此，我覺得現在我們要回過頭來認真的看鄧小平的講話，他講得很清楚。我建議我們特別行政區的立法行政司法機構，還是要回到規範解釋的方法論上來看待香港的政治體制。

**喬曉陽：**我接着說一點香港的政治體制。你說它不是三權分立，它到底是個什麼制？蕭蔚雲老師在一本書上寫得非常明確，他說香港特區就是行政長官制（意思即行政主導），它就是模仿的什麼總統制、內閣制來講的，我說這就是追本溯源。有請梁愛詩女士。

**梁愛詩：**首先從立法原意來講，我們的材料其實是很豐富的。我看過諮詢委基本法起草委員會開會的記錄，李浩然有一個匯編記載得很詳細。但我們也不能完全以此作為立法原意，因為這個只是起草的過程。記錄上是有些人這麼說，許多人那麼說，這個都不是最終的意思。所以我認為，立法原意最清楚的應該是 1990 年 3 月 28 日姬鵬飛主任提交草案時的說明。他說的很清楚，他說香港的政治體制是什麼？它要按照“一國兩制”的概念以及香港的法律地位，有利於資本主義經濟的發展，兼顧各階層的利益，行之有效的部分要把它保留下來。然後按照香港的實際情況，循序漸進的發展的一個民主制度。這個制度是行政、立法相互配合，相互制衡。我認為就三權分立來講其實是有很多不同的理解。英國的三權分立跟美國的三權分立也不一樣，所以不同的人是講不同的理念。我覺得最重要還是要回到《基本法》的條文。《基本

法》第四十八條很清楚地說明，行政長官的責任就是領導特區制定政策。這也是行政機關的權力。在《基本法》第六十二條有關行政機關的權力中，第一個就是為特區制定政策，所以制定政策的權力是在行政機關。行政機關要推行它的政策時需要法律和財政的撥備，但這兩個權力都是在立法會的手裡。立法會按照《基本法》第七十三條通過法律、批准財政的支出，所以不同的權是在不同的機構裡面，既然政策是由行政機關去制定，所以它是主導的。草擬法律是為了推動它的政策，但立法會的議員提出私人草案時草案內容不能涉及公共開支、政治體制、政府運作及政策而且議員提出前必須得到行政長官書面同意。行政機關不同意，立法會議員也不能制定政策，但他們有很大的說服力。立法會議員是市民選出來的，如果他們倡議的事情可以得到市民的支持的話，他們也可以推動政策，但草擬法律跟制定政策的權力主要還是在行政機關。這個是很清楚的。剛才大家所講的三權分配，行政的權力、立法的權力都已在《基本法》中清清楚楚的寫出來了。至於法院的責任則是主持司法，審理案件的權力不受任何的干預，所以三權分置是很清楚的。有些人說法院不是政府的一部分，這個說法是不對的。因為是誰的三權？是政府的三權。政府的三權包括司法即行政、立法和司法，如果司法機關不是政府的一部分，它的權哪裡來？所以我覺得三權分立總的來說，是不能充分的表達這三個權力的關係。

另外，談到行政主導的時候，好多人說《基本法》沒有這幾個字，雖然《基本法》中沒有行政主導這四個字，但是在條文裡面充分的體現了行政主導。三權分立也是《基本法》沒有寫的，但是有些人就說我們的應該是三權分立。我覺得還是應該看《基本法》的條文。講到怎麼去找立法原意，我覺得剛才說到的《基本法》草案的說明是很重要。剛才馮巍副主任也講到，我們要看鄧小平先生和其他領導人的講話，鄧小平先生的講話是在《基本法》通過以前發表的，所以對立法原意有更大的表達。剛才行政長官講的關於中央行使它的權

力管治香港，就引用了鄧小平先生的講話。我上周接受報刊訪問的時候也引用了這段話，來說明人大常委會在 11 月 11 日為什麼要行使這個權力。關於中央跟特區的關係，其實也是落實《基本法》最困難的一條，因為這是一個新的憲制上的關係，而且在我們轉化上是有點困難的。因為內地和香港是兩個不同制度，我們受的是原來殖民地的教育，在內地的人從小就接受社會主義教育，有些事情對他們來講是必然之事。但是對我們沒有受社會主義教育的人來講，我們根本不明白，好多時候是中央也沒有清清楚楚的分析說明，加以在文化上的差異，我們在理解上是有一點困難。但是剛才我聽薛捍勤大法官講話的時候，令我想到在回歸不久的一個晚上，我和薛捍勤大法官談了好幾個小時，她就告訴我回歸的意義就是我們是回到國家的體制裡面。她那時在中英聯絡小組作為中方的代表之一。錢其琛副總理就曾跟他們說，你們現在是中方的代表，回歸以後香港的官員就跟我們是同一方面的，您要有思想的改變，不能以港方的官員作為你的敵對對手。所以這個就是我們是不是真的回到國家管治的體系，這就需要一個思想的轉變，我們不能把中央作為我們的對手。其實我們回歸了以後就是國家的一部分，所以我覺得中央跟地區的關係也是經過這麼多年《基本法》在落實的過程慢慢建立起來的，最重要的是要有互信。

在 1999 年 1 月 29 日，香港終審法院在“吳嘉玲案”判決回答了“馬維騏案”帶出了一個當時在香港引起爭議的問題，判詞指香港特區法院具有司法管轄權去審查全國人民代表大會或其常務委員會的立法行為是否符合《香港基本法》，以及在發現有抵觸《香港基本法》時，香港特區法院可宣布此等行為無效。這個判詞在內地跟香港引起很大的爭議，好多法律學者出來講這個立場不對。結果特區政府就向終審法院去申請做一個澄清。特區終審法院為此做了一個決定，在 1999 年 2 月 26 日頒發一份聲明：“特區法院的司法管轄權來自《基本法》。《基本法》第 158(1) 條說明《基本法》的解

釋權屬於人大常委會。法院在審理案件時，所行使解釋《基本法》的權力來自人大常委會根據第 158(2) 及 158(3) 條的授權。我等在 1999 年 1 月 29 日的判詞中說過：“法院執行和解釋《基本法》的權力來自《基本法》並受《基本法》的條文（包括上述條文）所約束。我等在 1999 年 1 月 29 日的判詞中，並沒有質疑人大常委會根據第 158 條所具有解釋《基本法》的權力，及如果人大常委會對《基本法》作出解釋時，特區法院必須要以此為依歸。我等接受這個解釋權是不能質疑的。我等在判詞中，也沒有質疑全國人大及人大常委會依據《基本法》的條文和《基本法》所規定的程序行使任何權力。我等亦接受這個權力是不能質疑的”。這就是把中央跟特區的關係放在一個正確的位置，儘管終審法院是香港最高的司法機關，但是在全國來講，它還是在全國人民代表大會之下。全國人民代表大會是中國國家最高的權力機關，一個地方的司法機關不能質疑最高的權力機關的決定，這也是很多國家普遍都用的國會至上原則，這是一個很重要的里程碑。中央跟特區的關係從此擺在一個很正確的位置。

關於外交事務這個問題，外交事務跟外事事務有什麼不同？我覺得外交的事務是國家管的，是主權的權力，一個地方政府沒有這個權力。但是外事事務是香港對外的事務，香港一直作為一個國際的商業城市，一個經貿城市，我們的外事對我們很重要。一個很清楚的例子就是領館，只有國家能夠在外設立領館，但是特區政府可以設立經貿辦事處，是為了特區的對外事務，也可以照顧到香港商業等等事務。這就是有主權跟沒有主權的區別問題。就此《基本法》也說的很清楚，如果是以國家為單位的會議或者是組織，特區則可以用國家代表團的一個成員的身份去參加。但如果是用地區作為單位的，比方 WTO 國際貿易組織裡面有四個成員，一個是中國大陸，一個是香港，一個是澳門，一個是台灣。在這種情況下，在一個地區裡面可以有更緊密經貿關係的安排，所以有 CEPA，有 EFTA，這個就是承認香港有一個獨得的地

位，但還只是在地區的單位的情況下我們可以參加。香港不能在外面設立領館，也不能用香港的身份去參加一些以國家為單位的國際的組織或會議。所以在外交上我覺得我們沒有什麼爭議，在“剛果金的案件”中，人大常委會作出的法律解釋說的很清楚，一個國家不能有兩個外交政策。所以無論普通法在關於主權方面的事是怎麼樣的決定，我們還是要按照國家的政策。因此，我覺得在外交方面落實《基本法》的過程還是蠻順利的。

**喬曉陽：**惠珠和愛詩都談到了行政主導，《基本法》裡面沒有行政主導四個字，但很多條文都支撐着行政主導。我覺得特別重要的是行政長官的地位問題，他不僅僅是政府的首長，他還是整個特別行政區的首長，代表整個特別行政區。三權都在裡面來向中央負責，給了這麼大的責任給行政長官，他不主導怎麼完成這個任務。所以很多《基本法》的條文它是互相聯繫的，是可以得出這個結論來的。像剛才愛詩講的那一段，剛回歸初期的跟終審法院的短兵相接，勾起了我的回憶。那是 1999 年 1 月 29 號，終審法院的判決裡面有幾個錯誤的地方，為此全國人大常委會在 6 月 26 號做了一個釋法。當時終審法院判決一出來，確實大家非常吃驚，沒有想到，這就是憲制危機。當時因為剛剛回歸一年多，大家都不摸底，這麼大的憲制危機怎麼辦？中央非常的謹慎。首先四大護法就這麼來的，讓他們四位老人家出馬，從理論上，從《基本法》的規定上 從《憲法》的規定上，講清終審法院和全國人大常委會的關係，你錯在什麼地方？然後律政司跟上，希望終審法院做一個澄清。終審法院馬上就做了一個澄清，表明沒有質疑全國人大常委會的意思，要以人大釋法為依歸。然後我們法工委發言人講了一句話，意思就是終審法院作出此等澄清是必要的。這一場很大的一個憲制危機這麼就把它化解了。當然更深層次的問題還有。

我最後做一個總結。本次論壇的主題是“追本溯源”，所謂“追本溯源”，我的理解就是追求把握《基本法》的初心和本意。因為我們無論是要確

保“一國兩制”方針不會變不動搖，還是確保“一國兩制”實踐不變形不走樣，我們都不能忘記《基本法》的初心和本意。那麼怎麼來把握基本法的初心和本意呢？我有這麼幾點體會，談出來和大家來分享。

**第一，要始終堅持站在國家的立場上來看待《基本法》**

我們要全面準確的理解和貫徹《基本法》，首先還是要講立場問題，也就是你站在什麼樣的立場來看這個《基本法》。對這個問題我想答案也是十分明確的，我們必須要站在國家的立場上來看待《基本法》，既不能站在外國的立場，也不能只站在香港的立場，而只能是站在我們自己國家的立場。因為“一國兩制”方針政策是國家的基本國策，基本法是國家的法律，回歸祖國以後，香港已經重新納入到了國家治理的體系。所以只有以中國人的身份，站在自己國家的立場上，我們才能真正的理解“一國兩制”和《基本法》，才能全面準確的貫徹和落實“一國兩制”和《基本法》。

**第二，要始終堅持《基本法》的憲制性地位是《憲法》賦予的來認識基本法**

《憲法》作為國家的根本法，在包括香港特區在內的中華人民共和國領土內具有最高的法律效力和最高的法律地位。因此香港基本法的憲制性的地位必然是國家的《憲法》賦予的，而且受到《憲法》層面的保障。有些人到今天還在質疑《憲法》在香港特區的效力，從回歸以來一直有這種質疑。1990 年 4 月 4 號，全國人大在通過香港《基本法》的時候，專門做了一個決定，這個決定就是全國人大關於香港特區《基本法》的決定，這個決定裡面宣布香港《基本法》是根據《憲法》並按照香港的具體情況制定的，是符合《憲法》的。這個決定關鍵是“符合《憲法》的”這句話。那麼我想做這個決定的前提，就是《憲法》在特別行政區具有效力。因為如果《憲法》在特區不具有效力，那就不存在《基本法》需要符合《憲法》這樣一個問題，所以專門做出這樣一個決定。因此構成香港特區憲制基礎的法律，就必然同時包括《憲法》和《基本法》，兩者具有內在的不可分割性。從《基本法》實

施的角度來講，《憲法》的地位處於法律體系的頂端。我們講法治首先必須講《憲法》，任何法律規定追根溯源，都會涉及到《憲法》。所以我體會就是把《基本法》是作為一個完全獨立的法律文件，還是把《基本法》作為《憲法》之下的法律文件。在某些情況下，這兩種思想認識對《基本法》的規定的理解可能會有天壤之別。所以堅持《憲法》和《基本法》共同構成香港特區的憲制基礎這樣一個觀念，有助於為《基本法》的實踐奠定豐富的《憲法》基礎。因此在香港特區的《基本法》教育當中，我建議更加突出《憲法》教育，強調《憲法》是香港特區的根本憲制基礎。

**第三，要始終堅持《基本法》是一部授權法來把握《基本法》**

我國政府對香港恢復行使主權以後，中央對香港具有全面管治權，同時按照“一國兩制”方針政策，又要使香港特區享有高度自治權。那麼怎麼能做到這一點呢？在《基本法》關於香港特區制度設計當中，建造了一座法律橋梁，這樣就把中央對香港具有全面管治權和香港特區的高度自治權把它連起來了。這個法律橋梁有個名字就叫授權。所以說我們可以這樣講，整部《基本法》關於特別行政區高度自治權的規定，都是全國人大對香港特別行政區的授權。香港特區的高度自治權它不是本身固有的，而是中央授予的，這個道理都很清楚了。所以從這個角度我們經常講《基本法》是一部授權法，就從這裡來的。那麼《基本法》授權香港特區實行高度自治，是建立在授權理論基礎上的。在政治學和法學理論上，無論是聯邦制國家的聯邦以及成員邦的關係，還是單一制國家的中央與地方行政區域的關係，本質上都是權力關係，但是這種權利關係的性質是不同的。普遍的觀點認為，在聯邦制國家當中，聯邦與其成員幫之間是分權的關係，單一制國家中中央與地方行政區域是授權的關係，分權和授權這兩個概念雖然只有一個字的差別，但是卻有着本質上的不同。其中最主要的是兩點，第一點就是分權它是平等主體之間的，而授權是上下級主體之間的。講到這裡我還想指出一下，就

有的人認為中央與特區之間是分權的關係，這個觀點可能有的是不太了解分權的含義，但是也有一些人他是有政治目的的，就是主張特區與中央是平等的主體，實質上就是把特區變成獨立的或者半獨立的這樣一個政治實體。第二點，分權制度下的權力之間具有對抗性，一方的權力可以對抗另一方的權力，而授權制度下的權力它是非對抗性的。因為中央全面管治權是特區權力的母體，特區的權力它不能對抗中央的權力。所以明白了這樣一個區別，就能夠明白為什麼我們要強調是授權而不是分權。中央對香港的全面管治權與香港特區的高度自治權之間的法律橋梁，只能是授權而不能是分權。對於《基本法》創設的這一套授權制度的重大政治和法律意義，我們可以這樣的理解，如果沒有授權就沒有“一國兩制”。

**第四,要始終堅持《基本法》的所有規定是有機聯繫的整體來理解基本法**

我們在基本法委員會研討的時候，我過去打過比方。我說《香港基本法》有一個序言、一百六十個條文、三個附件和區旗、區徽圖案，這麼多東西在一起，它不是把互相沒有聯繫的一個一個蘋果放在《基本法》框子裡面的。可以比喻為是一串葡萄，它是個有機的整體。而把葡萄串在一起的是那一根葡萄藤就是特別行政區制度。所以我們正確理解《基本法》，必須認識到整部《基本法》都是有機聯繫的，每個條文都要放到整部《基本法》當中加以理解，不能割裂的、機械的去理解。從特別行政區制度的設計來看，《基本法》的每個條文都同等的重要，不能做選擇搞變通，每個條文都要貫徹落實到位。

**第五，要始終堅持從“一國兩制”的根本宗旨來實施《基本法》**

《基本法》序言把中央制定《基本法》的根本宗旨講清楚了，就是維護國家統一和領土完整。實際上就是維護國家主權安全發展利益，維護香港的長期繁榮穩定。 所以，維護還是破壞“一國兩制”和《基本法》，正確還是錯誤理解“一國兩制”和《基本法》，這個根本宗旨始終是最重要的判斷和衡量標準。我們強調中央對香港具有全面管治權，實際上也是強調中央對

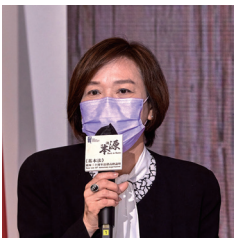
保持香港長期繁榮穩定的責任。因為香港特區是直轄於中央政府的地方行政區域，中央制定了對香港的基本方針政策和《基本法》，那麼對香港的繁榮穩定就負有責任。為什麼全國人大今年5月要做出維護香港國家安全的決定，進而由全國人大常委會制定有關法律在香港實施。大家都很清楚，那就是因為香港的內外敵對勢力已經造成香港長時間的亂局了。特別是去年6月“修例”風波發生以後，這種情況是愈演愈烈，已經嚴重危害到國家安全，嚴重危害到香港的經濟繁榮和社會的安定，更重要的是它已經突破了“一國兩制”底線了。可以說我們是一忍再忍、忍無可忍，不能再忍了，再忍下去就要犯歷史性的錯誤。所以面對這樣的情況，作為對香港繁榮穩定負有責任的中央政府的出手正是其責任所在，是為了維護“一國兩制”和《基本法》的根本宗旨，同時也是中央全面管治權的應有之意。最近全國人大常委會又做出相關的決定，實際上也是出於同樣的道理。

**第六，要始終堅持以人民為中心的發展思想來落實《基本法》**

中央提出“一國兩制”方針政策，解決台灣、香港、澳門問題，實現國家和平統一，都是以人民為中心的。鄧小平先生在領導制定“一國兩制”方針政策過程中一再強調要確保台灣、香港、澳門居民的利益不受到損害。在恢復行使主權的過程當中，中央政府也是真正的兌現了承諾，應當講是十分不容易的，也是史無前例的。香港回歸以後，中央一再強調香港特區要發展經濟，改善民生，而且把這個放在首要的位置。它體現了中央對香港居民的關懷，同時也體現了“一國兩制”和《基本法》的初心和本意。這就是“一國兩制”和《基本法》的初心和本意。中央在香港實行特殊政策，《基本法》賦予香港特區高度自治權，其中一個重要的目的就是讓香港居民在回歸祖國以後生活越來越好，而不是相反。因此我們正確地貫徹落實“一國兩制”和《基本法》，必須堅持以人民為中心的發展思想，讓香港的繁榮穩定惠及所有香港居民，讓《基本法》的所有規定轉化為香港居民實實在在的利益。

# 座談會2：
# 《基本法》釋法實踐回顧
## ——居港權案和宣誓案

**主持人：**



梁美芬

全國人大常委會香港特別行政區基本法委員會委員

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鄒平學

深圳大學教授、港澳基本法研究中心主任

**梁美芬：**我們這一節的主題是《基本法》的釋法實踐與回顧。聽到上午精彩的演講後，令我回想起自己 1987 年到北京跟另外一位起草委員許崇德教授學習基本法。當時曾經很近距離地與他討論過三權分立、行政主導和為什麼會有全國人大常委會對《基本法》的釋法權等問題。早在 1990 年 4 月 4 日《基本法》通過的時候，在香港已經就此有出廣泛的討論。實際上這些問題都不是新問題。今天這些問題之所以又成為熱門問題，就是因為我們在行政、立法和司法的關係上沒有取得一個平衡，這些關於本源初心的問題又要拿出來再講。關於《基本法》釋法的問題，也令我想起 1999 年我做大律師學徒時（Pupillage），我及我的團隊因為“居留權案”連續在這座大樓工作五天。結果這宗案件導致釋法，這也是回歸以來人大的第一次釋法。在這個釋法裡面，有一段提到《基本法》第二十四條的立法原意，寫得很清楚。我還記得在以後的“莊豐源案”，當時全國人大常委會，好像應該就是喬老爺（編者註：喬曉陽），站出來說不同意香港法院對於“莊豐源案”就二十四條的解釋。喬主任認為 1999 年的人大釋法應該適用於“莊豐源案”。我還記得當時的律政司司長梁愛詩女士也不贊成再釋法，因為她認為 1999 年的釋法已經對二十四條解釋得很清楚了。我還記得 1999 年“吳嘉玲案”審結後在討論是否就基本法第二十四條進行釋法時，歷盡周折，最後全國人大常委會才行使了這個釋法權。雖然喬主任等不同意香港法院就第二十四條的解釋，但並沒因“莊豐源案”再釋法。這說明了中央對於行使第一百五十八條的釋法權是非常克制的。如果不是牽涉到香港重大公衆利益的最關鍵問題，人大不會輕易釋法。同樣，2016 年在宣誓的問題上，當時梁頌恒和游蕙楨宣誓的時候說了冒犯中華人民共和國和中華民族的語言，我當時已經是前綫的立法會議員，就坐在譚耀宗先生這個位置，聽得很清楚，簡直不能相信。所以我們八個立法會議員一起要求梁君彥主席不應該讓這兩位人士再宣誓。當時沒有想到會有司法覆核，最後政府下了大決心


並在香港的司法層面贏了這個案件。國家也為此頒布了另一個釋法。大家可以看到，如果不是到最關鍵的時候，實際上國家是不會輕易釋法的。並非像有些人所說，香港若不實施美國和英國的三權分立，香港就沒有法治了。這個其實剛好是相反的。在“一國兩制”下，我們的行政、立法和司法有非常有效的權力制約，這個在高度自治範圍內是非常有效，絕對已包含了西方所說的三權分立的精神。但我們是單一制國家，所以中央與地方關係下，我們不實行三權分立，而是三權互相制衡的。今天我很高興，請到香港大學法學院教授陳弘毅教授。當年我要去北京讀書的時候就曾請教過這位中學師兄我是否應該去北京求學，他那時候已經是年輕的法律系的老師了。還有就是王磊教授，他是北京大學法學院的教授、博士生導師並且是我們中國憲法學會的副會長。另一位鄒平學教授在過去十幾年不斷耕耘，寫了很多有關《基本法》的文章，編著了很多的書，也是深圳大學港澳基本法研究中心的主任。現在有請陳弘毅教授。

**陳弘毅：**我很榮幸有機會參加這個紀念《基本法》頒布三十周年的研討會。我發言的題目是《1999 年關於居港權訴訟的案件及相關的人大常委會的第一次釋法》。我將幾個主要

的問題做一個介紹及評論。

1999 年終審法院就“吳嘉玲案”和“陳錦雅案”的判決，可以說是香港回歸之後第一件重大的憲法性訴訟案例。它衍生兩個問題，其中一個問題就是香港法院就中央的行為，也就是全國人大及其常委會的行為，究竟有沒有一種審查權？這個問題就是今天上午曾介紹過的，終審法院應特區政府的申請，就這一個問題作出對其原有判詞的一個“澄清”後就處理了。中央也接受了這個澄清。這個案件衍生的第二個問題，就是港人內地子女移居香港，究竟哪些人有資格移居香港及移居香港的程序的問題，也就是手續的問題。這個問題最終導致當時的行政長官董建華先生通過國務院提請人大常委會去就《基本法》的第二十二條和第二十四條作出一個解釋。為什麼需要有這次的提請？主要就是因為特區政府認為，終審法院對於《基本法》的有關條文的理解不符合《基本法》的立法原意，有所偏差。還有這個判決對於香港的社會將造成很深遠的重大影響。因為根據香港政府當時的估計，如果終審法院的判決是對的並要將它落實的話，未來十年將會有一百六十多萬的內地人士有權根據這個案例移居香港，香港要承受很大的人口壓力。人大釋法後，特區法院最後根據人大的釋法對《基本法》作出新的解釋。

我先談《基本法》第一百五十八條在這件案件裡面的角色或者重要性。《基本法》第一百五十八條是一個很重要的條文。它規定了《基本法》的最終解釋權是屬於全國人大常委會的。它規定香港法院在某些情況之下，如果涉及到《基本法》的兩種條文，終審法院判決一件涉及到《基本法》的這些條文的案件之前，需要提請全國人大常委會去解釋有關條文。這是《基本法》第一百五十八條第 ( 三 ) 款的規定。這樣的有關條文有兩種：一種是涉及到中央和特區關係的《基本法》條文，第二種是涉及到中央有權管理的事務的《基本法》條文。這個案件裡面涉及到的兩個條文就是第二十二和第二十四條。尤其是第二十二條第 ( 四 ) 款，它涉及到中央管理的事務和中央和

特區的關係。因為第二十二條第(四)款規定，中國其他地區的人進入香港特別行政區須辦理批准手續。當時在居港權訴訟的時候，被原告質疑的一個立法條文是《入境條例》裡面的一項規定，就是要求即使有人符合了作為港人內地子女移居香港的條件，也需要根據《基本法》第二十二條向內地的有關部門申請單程通行證。之後，他還要向香港的入境處申請居留權證明書，有了這兩份文件，才可以移居香港。但是終審法院的判決認為，港人內地的子女是不需要取得內地機關發出的單程通行證的，他只需要取得香港入境當局發出的居留權證明書，就可以移居香港了。這就涉及到第二十二條的解釋，即是第二十二條規定中國其他地區的人進入香港須要申請批准手續。這個批准手續明顯是指中國內地機關的批准手續。這個條文是不是適用於港人在內地的子女？這就涉及到對《基本法》第二十二條的解釋，第二十二條是《基本法》第一百五十八條所講的關於中央和特區的關係或者中央有權管理的事務的條文。但終審法院沒有將這個條文提請人大常委會去解釋，後來人大常委會在1999年6月作出的解釋，認為終審法院本來是應該將此類的條文提請人大常委會解釋的。所以1999年的釋法，其實是源於《基本法》第二十二條，是屬於中央有權管理的事務或者是中央和特區的關係的，本應由終審法院提請人大常委會去解釋。因此人大常委會便解釋有關條文，即是特區行政長官後來提請人大常委會解釋的條文。

除了第二十二條，還有第二十四條，因為第二十四條就港人內地子女的居港權規定得不清晰。子女在內地出生的時候，他的父親或者母親是否已經是香港永久性居民？任何人在內地出生的時候，即使他的父母都不是香港永久性居民，但是他的父或者母後來移居香港並在港居住了七年，成為了香港永久性居民之後，是否就可以申請他內地的子女來香港居留並且享有居港權？這就是第二十四條不清晰的地方，後來都通過人大釋法解釋清楚了。

但是我們要留意的是，人

大的解釋並沒有採納一個和普通法不兼容或者有抵觸的解釋方法。因為人大常委會 1999 年 6 月對於《基本法》第二十二條和第二十四條的解釋，其實它和香港的上訴庭（即高等法院的上訴庭）對於這兩條的解釋是一樣的，只不過上訴庭的解釋到終審階段就被終審庭推翻了。人大常委會 1999 年 6 月的解釋其實只是否定了終審法院的解釋，而肯定了上訴法庭的解釋。所以即使是普通法的法院就有關的問題，其實也是可以有不同的理解的。

我還想特別提到的就是，人大常委會的解釋並沒有推翻終審法院對“吳嘉玲案”或者“陳錦雅案”的判決。也就是說吳嘉玲和陳錦雅兩位人士以及案中其他訴訟當事人因其在終審法院勝訴而取得的居港權並沒有受到人大常委會釋法的影響。因為《基本法》第一百五十八條明文規定，人大常委會的解釋是不會影響到已經作出了的判決的。所以並不是說人大常委會的釋法推翻了終審法院的判決，只不過是否定了終審法院的判決裡面對於《基本法》第二十二條和第二十四條的解釋，因而導致到以後法院如果要解釋這兩條的時候，就不可以跟從終審法院以前的判決，而是必須跟從人大常委會的解釋。

另外，我想同大家討論的就是行政長官究竟有沒有權提請人大常委會解釋？這在當時是很有爭議性的。《基本法》第一百五十八條沒有明文規定行政長官可以提請人大常委會解釋《基本法》。它只是說到終審法院在先前講的兩類情況下，是需要、必須提請人大常委會釋法的。那麼行政長官在 1999 年的角色是什麼？他並不可以直接提請人大常委會釋法，他只能以行政長官的身份向中央人民政府即國務院提交一份報告。最後提請人大釋法的是國務院，即中央人民政府，而不是行政長官。對於行政長官提交報告的法理依據是什麼？當時的報告有明文提到，實際就是《基本法》第四十三條和第四十八條第 ( 二 ) 款。就是說行政長官是香港特別行政區的首長，他同時向中央和特別行政區負責，所以特別行政區的行政長官向中央提交報告是他向中央負責的其中

一方面的表現或者行為。為什麼他要在 1999 年的案件之後向中央提交報告？因為《基本法》第四十八條第 ( 二 ) 款就說到，行政長官的職能之一就是負責執行《基本法》和其他的香港法律，所以這個報告在 1999 年提請釋法的一個法律依據，便是說行政長官在執行《基本法》時，在《基本法》第二十二條和第二十四條的適用過程之中，遇到一些法律解釋的問題，由於終審法院的判決被認為是對於有關的條文有所誤解，並對香港社會造成嚴重的影響，所以就向中央報告這個情況。中央政府收到報告之後，就決定提請人大常委會去解釋有關的條文。這個就是 1999 年人大釋法的法律程序和法律依據。

至於 1999 年的人大釋法在香港法律上的地位究竟是怎麼樣的？ 1999 年 12 月，終審法院在“劉港榕案”的判決裡面就有很清楚地解釋。人大常委會根據《基本法》第一百五十八條和中國《憲法》有解釋《基本法》的權力。根據終審法院的理解，這個權力是隨時可以行使的，並不限於終審法院提請人大釋法的情況。人大常委會如果覺得有需要，在任何情況之下它都可以頒布對於《基本法》的條文的解釋。人大常委會對於《基本法》的條文的解釋亦不限於《基本法》中關於中央和特區關係的條文或者中央有權管理的事務的條文。根據《基本法》第一百五十八條和中國《憲法》，人大常委會可以解釋《基本法》的任何條文。另外，終審法院也澄清，人大常委會這次解釋的效力是可以追溯到《基本法》1997 年 7 月 1 日生效的時候，就是說人大常委會對於《基本法》中居港權的範圍的解釋並不是只適用於它頒布這個解釋之後所出現的情況。意思是其實在 1997 年 7 月 1 日《基本法》生效的時候，其第二十二條和第二十四條就是應這樣解釋的。終審法院在“劉港榕案”的這個理解，其實是基於普通法的法律解釋的一般原則。因為在普通法的傳統裡面，當一個法院做出一個新的判決，宣布法院以前的判決中對於某項法律的解釋有錯誤，那麼這個新的判決中對於有關法律的解釋，便可以追溯到以往發生的情況。以上就是我們香港法

律制度對於人大釋法的理解。1999 年在“劉港榕案”就已經確立了，此後終審法院和其他法院也都多次引用這個案例。

**梁美芬：**下面有請北京大學的王磊教授和我們分享。

**王磊：**聽過梁議員對於《基本法》的講解和陳弘毅教授對於居港權案例的釋法分析，很受啓發。關於居港權的問題，涉及到全國人大常委會的解釋權和香港法院的解釋權之間的關係。為此我想講四點。

**第一，全國人大常委會的解釋權和香港法院的解釋權之間的關係是授權和被授權的關係。**全國人大常委會享有對法律的解釋權，也享有對《基本法》的解釋權。它對《基本法》的所有條文都是可以解釋的，它又授予給特區法院有權解釋《基本法》。所以兩者之間的關係就是授權與被授權的關係。全國人大常委會的這個解釋是代表着中央，是代表着全國人大常設機關，代表的是一種國家的意志，它有中央的角色。而香港法院對於《基本法》的解釋權，是一個地方的法院或是一個特區法院的解釋。

**第二，香港法院的解釋和全國人大常委會的解釋在範圍方面有很重要的區別。**根據《基本法》第一百五十八條，全國人大常委會的解釋權是全面的。從回歸以來，香港法院的解釋是分情況而定的。如果香港法院的判決不是終局判決，香港的法院對於《基本法》的條文都是可以解釋的。也就是不僅僅對於自治範圍內的條文可以解釋，而且對於其他的條文都可以解釋。但是有一個限制，如果是涉及到中央人民政府管理的事務或者涉及到中央和特區關係的條文，又是不可以上訴的終局裁決，就必須要由特區的終審法院提請全國人大常委會作出解釋。這兩者之間在範圍上面是有區別的。當然，儘管全國人大常委會對於整個《基本法》都享有解釋權，但是它的行使是很謹慎的，而且次數也不多。

**第三，就是全國人大常委會解釋的法律約束力。**因為全國人大常委會是最高國家權力機關的常設機關，它代表着國家的意志，所以全國人大常委會的解釋跟法律具有同等的效力。它和《基本法》具有同等的效力，一旦這個解釋做出來

之後，對香港的法院以及其他的機關都是具有普遍的約束力，必須要遵守。也就是說在法律的約束力方面，全國人大常委會的解釋和《基本法》具有相同的法律效力，儘管它是對《基本法》的解釋。

**第四，是全國人大常委會的解釋和香港法院的解釋還是存在區別的。**比如說，香港法院對《基本法》的解釋往往是具體的、個案的、被動的。香港法院的解釋是在個案當中對於《基本法》的條文進行解釋。全國人大常委會對於《基本法》的解釋往往是跟個案有關的，但是它的解釋是抽象的，普遍的，對於未來都具有適用性。全國人大常委會既可以主動地進行解釋，也可以被動地進行解釋。按照《基本法》第一百五十八條，由特區的終審法院提請全國人大常委會解釋，這時全國人大常委會的解釋就是被動的。但全國人大常委會也可以根據委員長會議提出的議案，然後提交全國人大常委會，全國人大常委會也可以做出解釋。當然也有國務院提請的，也有行政長官向國務院提請，國務院再向全國人大常委會提出解釋的請求。

**梁美芬：**謝謝王磊教授。有請下一位嘉賓鄒平學教授。

**鄒平學：**非常高興能夠參加《基本法》頒布三十周年的法律高峰論壇。剛才，陳老師和王磊教授圍繞居港權案件發表了高見，我打算圍繞着“梁游宣誓案”討論相關的法律問題。我會結合全國人大常委會對《基本法》第一百零四條的解釋和香港法院的相關判決進行簡要的分析。然後就 2020 年 11 月 11 日全國人大常委會關於香港特區立法會議員資格問題的決定，談談決定對宣誓案的有關法理的充實和發展。

**一、宣誓案的簡要回顧**

我們知道在 2016 年香港立法會選舉的時候，代表本土和港獨思潮的部分政治人物，由街頭運動走進了立法會的選舉，在選舉的前後發生了參選資格風波，以及當選的候任議員梁頌恒、游蕙禎辱華宣誓風波這些事件。這兩場風波以及由此而引發的訴訟，都與港獨的言行有密切的關係。在梁頌恒、游蕙禎宣誓案中，特區高等法院原訟庭和上訴法庭裁定兩位候任的議員，因拒絕做出

法律要求的宣誓而喪失其議員資格。梁游二人繼續向終審法院申請上訴許可，後被終院駁回。在宣誓爭議的司法覆核案件的審理期間，全國人大常委會針對《基本法》第一百零四條，也就是專門規定宣誓的規定做出了一個解釋。這個解釋頒布以後，香港特區政府對另外四位已在立法會通過宣誓的議員劉小麗、羅冠聰、梁國雄和姚松炎提起了司法覆核。高等法院 2017 年 7 月 14 號裁定四人的宣誓無效，被撤銷立法會的議員資格，並於宣誓日生效。

## 二、人大釋法和相關司法裁判涉及的三個法律問題

我們知道，“梁游案”在一審判決宣布之前，人大常委會對《基本法》第一百零四條的解釋主要有三個方面的內容。一是列明“擁護中華人民共和國香港特別行政區基本法，效忠中華人民共和國特別行政區”是宣誓的法定內容，也是參選或者出任公職的法定要求和條件。二是對包括立法會議員在內的公職人員宣誓就職時必須依法宣誓的具體含義作出了四項規定。而這四項規定既有形式上的要求，也有實質上的要求。三是列明了《基本法》第一百零四條的法定宣誓要求的法律約束力。規定宣誓人必須真誠地信奉並嚴格遵守法定誓言。宣誓人做虛假宣誓，或者在宣誓之後從事違反誓言行為的，依法承擔法律責任。那麼“梁游案”原訟庭的判決法官也表示，就算人大常委會之前不釋法，也不影響法官作出判決，法官是源於本地法律《宣誓及聲明條例》第二十一條，指兩人因拒絕和忽略宣誓而喪失了議員資格。因此，立法會主席允許梁游再次宣誓的決定是錯誤的。梁游也因為沒有完成宣誓而失去議員資格。這個判決也符合 2004 年梁國雄訴立法秘書一案夏正民法官的判詞，即改動誓言的行為已經是明顯抵觸《宣誓及聲明條例》第十六條、第十九條和第二十一條。當然我們也知道本地法律規定，議員也要按照規定的格式來宣誓。如果議員要更改宣誓內容，是需要經過立法程序確認才行的。

回顧上述的判決並結合 2016 年以後有關《基本法》的爭議問題，我覺得有三個問題

值得注意。

1，“梁游宣誓案”以及劉小麗、梁國雄、羅冠聰和姚松炎四位議員資格的案件判決，其實從司法判決的角度已經明確澄清了人大常委會釋法的效力。可以看到人大常委會釋法對法院的審理案件也發揮了拘束力。這實際上就涉及到人大常委會就《基本法》第一百零四條釋法的效力問題，而且法院也援引了 2001 年“莊豐源案”。人大常委會的釋法權不局限於《基本法》第一百五十八條第 ( 三 ) 款關於法院提請人大常委會釋法的範圍，而是涵蓋《基本法》的所有條款。同時，法院還指出不應以香港普通法的慣例和視角來質疑基於內地實行的人大常委會的釋法機制。而且上訴庭還進一步闡發了這個問題，指出“梁游”作為上訴方沒有證明在內地法律體系上，人大常委會的釋法是否超出其法定的權限。單憑香港本地法律和普通法的視角，不足以判斷人大常委會解釋《基本法》第一百零四條是否越權。上訴法庭也援引“吳嘉玲案”並指出，《基本法》沒有授權香港法院對人大常委會是否修改《基本法》或者人大常委會的解釋是否無效作出判斷。那麼“梁游案”關於人大常委會就《基本法》第一百零四條解釋對香港所有法院具有約束力，在稍後的四議員案中再次被強調。同樣在宣誓中存在“加料”的另外四位議員被特區政府於 2016 年 12 月 3 日入稟高等法院，要求取消四位議員的資格。高等法院原訟庭 2017 年頒布判決，裁定四人的宣誓無效。這個案件中，特別是梁國雄不滿上訴，上訴庭駁回他的上訴維持原判。“梁國雄案”在上訴判決之後，上訴庭還強調，根據“劉港榕案”和“莊豐源案”，當人大釋法，香港就有責任跟隨。所以人大常委會對《基本法》的釋法權是得到完全承認和尊重的，這是“一國兩制”在法律上的實踐。上訴庭再次強調，人大常委會釋法有約束力，是香港法律制度的一個組成部分。

2，我們要看到就“梁游宣誓案”，人大常委會對《基本法》第一百零四條的解釋，以及人大常委會法制工作委員會對《基本法》第一百零四條解釋草案提交的說明，為選舉主

任執行確認書制度提供了法律依據。而香港法院正是在關於確認書的選舉呈請案中，裁定《基本法》自起草以來一直對候選人和議員都有真誠地擁護《基本法》及效忠特別行政區這一實質性的要求。我們可以看到，被裁定提名無效的候選人提起的多個選舉呈請案，法庭全部裁定候選人和議員必須真誠的擁護《基本法》和效忠特別行政區，且選舉主任可就此作出判斷。更為重要的是，法庭通過回顧《基本法》起草中，全國人大常委會和臨時立法會對立法會議員、臨時立法會議員候選人的要求，全國人大常委會法制工作委員會對《基本法》第一百零四條解釋草案提交的說明，以及立法會條例等文件强調，自《基本法》實施以來，一直對候選人和議員都有忠誠擁護《基本法》及效忠特區政府的實質性要求。因此，擁護《基本法》，認可香港是中國不可分離的一部分，效忠屬於中國的香港特別行政區，是對立法會議員和有關公職參選人員最本質的要求。

3，就“梁游宣誓案”，人大常委會對《基本法》第一百零四條的解釋，為議員的資格問題提供了法律依據。議員資格問題在2020年11月11日發布的全國人大常委會關於香港特區立法會議員資格問題的決定裡面，有更全面和清晰的表述。人大常委會對《基本法》第一百零四條的解釋明確提及，宣誓人如果在宣誓之後從事違反誓言的行為，要依法承擔法律責任。《宣誓及聲明條例》第二十一（a）條同樣規定，如宣誓後拒絕服從該誓言，如未就任，則取消就任資格，如已就任，則必須離任。但是在“梁游宣誓案”和人大對《基本法》第一百零四條解釋之後，本地法律沒有得到嚴格的執行，部分原因是因為沒有相關的實施機制。而這一次人大常委會有關議員資格的決定，以人大常委會決定的方式，進一步闡釋和明確了《基本法》第一百零四條中，宣誓人如果從事違反誓言行爲的，依法承擔法律責任。責任是什麼？也就是已經當選的議員，如果他的行為不符合擁護《基本法》和效忠特別行政區的法定要求和條件，一經依法認定，即時喪失立法會議員資格。這和香

港本地的有關判決也是完全一致的。法院的判決就梁游二人是否即時喪失議員資格給予了肯定的答案。法院認為，《宣誓及聲明條例》第二十一（a）條非常清楚地解釋，議員如拒絕和服從宣誓，則不需要任何進一步的程序，議員資格就會自動喪失。當然，我們知道人大常委會的決定和《基本法》第七十九條的關係，我也知道香港本地的法律界就此有一些不同的看法。我認為值得進一步研究的是，《基本法》第四章“政治體制”第三節“立法機關”部分的第七十九條的內容，主要是針對立法會主席宣布喪失議員資格的情形以及程序，它沒有窮盡其他的主體宣布喪失議員資格的情形，法理上也不排除其他議員資格喪失的有關情形。就法理上而言，《基本法》第七十九條規定的“由立法會主席宣告立法會議員喪失其資格”的情況，顯然也不包括拒絕或者忽略做出宣誓的情形。我們從《港區國家安全法》第三十五條的規定可以看到，任何人經法院判決犯危害國家安全罪行的，即喪失作為候選人參加立法會區域會選舉，或者出任特區任何公職或者行政長官選舉委員會委員的資格，曾經宣誓或者聲明擁護《基本法》、效忠特別行政區的立法會議員、政府官員和公務人員、行政會議成員、法官和其他司法人員、區議員，即時喪失該等職務，並喪失參選或者出任上述職務的資格。我們可以看到，人大常委會對《基本法》第一百零四條解釋中的“依法承擔法律責任”，這裡的依法和責任為何意？毫無疑問，這裡的依法既包括已存在的有效法律和判例，也包括未來人大常委會制定的必要的法律、人大和常委會作出的有關法律問題的決定、人大常委會對原有法律的解釋以及香港本地制定修改的法律。而有關的責任則要看具體法律是如何規定的。回顧一下整個案件，我們可以看到，《基本法》從一開始就封殺了港獨主張者進入建制，即議會和政府的任何可能性。《港區國家安全法》明確規定，關於香港特區法律地位的《基本法》第一條和第十二條規定是《基本法》的根本性條款。香港特區任何機構、組織和個人行使權利和自由，不得違背《基本

法》第一條和第十二條的規定。

**三、關於正確認識人大常委會釋法**

這部分相關的內容和王磊教授的演講是有重叠的，我這裡就不展開。我們知道，特區立法會的議員會不會做出與忠誠擁護《基本法》和效忠特區相違背的行為，涉及到《基本法》的制度建設的核心和根本。一方面，該行為涉及到選舉和被選舉權的問題。《基本法》第二十六條對選舉權和被選舉權的規定用了“依法”兩個字，也就是特區永久性居民“依法”享有選舉權和被選舉權，因此該權利可以受到法律的合理限制。《基本法》第一百零四條及人大常委會對第一百零四條的解釋，要求官員、議員和法官必須在實質上真誠擁護《基本法》以及效忠特區。另一方面，《港區國家安全法》就分裂國家，顛覆國家政權等行為的立法，也對包括議員在內的個人的言論和表達自由進行了限制。當然，在《港區國家安全法》立法之前，議員因為其宣誓的內容也不能有港獨的言行，但《港區國家安全法》對個人的言論和表達自由做出這樣的合理限制，也確認了這樣的行為可能會構成刑事犯罪。綜合以上的法律、法規和判例，沒有擁護《基本法》和效忠特區政府的人，就不能獲得參選資格，也不能擔任立法會議員。這本已經在“宣誓案”和人大常委會對《基本法》第一百零四條解釋後就明確的。但是以往有一些言論誤導了香港社會的一部分人，讓人以為議員可以在當選後在議會擁有言論和行為的特權，或者是因為所謂的民意授權，可以去挑戰《基本法》的權威，挑戰中央政府和特區政府的權威，這種不切實際的期望和言論在今天看來需要得到糾正。也就是說在今天看來，如果在當選議員以後，還有一些違反誓言的行為是必須要依法承擔法律後果的。

**現場提問：**我是律政司的律師陳思凱。我有一個問題：過去全國人大常委會解釋香港《基本法》都曾經引起香港社會部分人士擔憂對法治和司法獨立的影響。請問嘉賓覺得這種擔憂是否成立呢？謝謝。

**鄒平學：**我回答一下剛才這位聽眾的提問。人大常委會的釋法是香港法治的一個組成

部分，它不存在破壞香港法治的問題。首先，人大常委會釋法是中國的《憲法》以及《基本法》都有規定的。《基本法》是香港法治的核心和基礎，《憲法》和《基本法》共同構成特別行政區的憲制基礎，我們不能得出所謂的人大常委會釋法會破壞香港法治這樣一個結論。其次，人大常委會釋法在香港的憲制架構中享有的凌駕地位，也得到了香港一系列法院判決的肯定。我們可以說人大常委會對《基本法》的解釋權是香港法治的組成部分，人大常委會依法行使解釋權，也正是為了維護《基本法》的權威，維護香港法治。不能把人大常委會釋法和香港法治對立起來，認為人大釋法會影響香港法治和司法獨立，這種看法我認為是錯誤的。第三，我認為人大常委會釋法不損害香港的司法獨立。因為從過往的時間看，人大常委會釋法從來沒有干預過香港的司法獨立，香港高等法院原訟庭的判決也顯示，人大常委會釋法並沒有干預法院的審理。而且這麼多年以來，香港法院解釋《基本法》的情況是非常多的。但是全國人大常委會解釋《基本法》比較審慎，每一次解釋都是回應性的，都是涉及到一些重大的、憲制層面的關鍵問題，目的是為了定分止爭，維護香港法治。即使人大常委會的釋法與法院審理的案件有關，也不存在人大常委會介入和干預法院審理個案的問題，司法獨立沒有受到任何的損害，這是我的一個結論。

**梁美芬：**我也利用剛才那位律師的問題講一講。實際上我在香港教授《基本法》也有二十多年了，我相信香港的法律界很多時候只是會用普通法去看“一國兩制”及《基本法》的問題。大家也知道《基本法》的通過單位是全國人民代表大會，實際上它的“基因”早就說明它本身在《憲法》裡面已經享有釋法權。但是由於香港是“一國兩制”，所以我們的《基本法》在成長的過程中有着普通法的特徵，它的營養在很多時候透過香港法院判案，帶進很多普通法的精神。我舉個例子，早於 2004 年，梁國雄告立法會秘書處，希望偏離宣誓內容。結果審案的法官是 Justice Hartmann，他在判案中的判詞顯示了普通法對宣誓

的要求不比全國人大常委會的寬鬆。他直接在他的法庭的判詞中說了很多遍：《基本法》第一百零四條是不能被冒犯，任何議員的宣誓每一句都要經過另外所有立法會議員一致理解為符合立法會的宣誓內容，並且說宣誓是一個嚴肅的法律聲明（declaration），就是有法律的責任與後果的。如果從 2004 年這個普通法案例，再看人大對第一百零四條解釋的內容，就不難看出兩者不謀而合。特別是說宣誓是代表一個法律的承諾，很多普通法對冒犯宣誓的行為一樣會帶來非常嚴重的法律後果。

有部分香港的法律界人士認為，人大釋法以後香港好像就沒有法治了，我認為這個當然是不對的。因為《基本法》一百五十八條本身就規定了我們的全國人大常委會擁有對《基本法》的最終解釋權，所以這裡我要做一個補充。實際上回歸以後，根據《基本法》一百五十八條第（三）款，全國人大只有五次釋法。剛才陳弘毅教授說到，“劉港榕案”終審法院早就承認也接受我們全國人大常委會任何時候都可以釋法。我必須得這樣說，我通過自己觀察，在過去的二十三年，實際上我們的國家是很有決心保護香港的司法制度的，從而也是非常克制地行使全國人大常委會的釋法權的。而釋法權是香港法治社會的一部分，不能說行使釋法權就違反了法治和違反了香港的法律，這個絕對是不正確的。這個就是我的一個補充。

**陳弘毅：**我補充一下。司法獨立在香港是有制度性的保障的，例如法官不可以隨便被罷免，還有法官作出判決的過程之中不會受到任何外來的干預，政府官員也不可以在法官處理案件過程之中去和法官有所接觸。司法獨立的傳統在香港已經是非常穩固，人大解釋《基本法》不會對於司法獨立有影響。因為法院還是很獨立的，法官還是很獨立的判案，他們是根據法律和法律的正確解釋來判案。

人大常委會對法律的解釋是屬於立法解釋。在中國的法律制度裡面有立法解釋，有司法解釋，甚至有行政解釋。立法解釋是立法行為，人大常委會通過一個解釋的時候等於它

在通過一部法律。是根據立法同樣的程序，先由有關部門起草《基本法》解釋的草案，然後根據《基本法》諮詢基本法委員會的意見，再拿到人大常委會去討論。通常分組討論，最後就表決通過。人大常委會是中國的立法機關，所以它進行《基本法》解釋的時候是一個立法行為。當香港法院應用人大常委會的解釋來判一件案的時候，就等於它運用任何其它法律來判案一樣。法院的角色是根據法律來判案，但是法律是什麼？還是由立法機關來制定。在香港則是由立法會來制定，在內地人大、人大常委會都是立法機關。所以我覺得人大常委會行使立法解釋的權力並不影響香港的司法獨立，尤其是法官獨立判決案件的權力。正如我剛才說，如果法院已經判了一些案件，已經終審了，人大常委會事後也不可以通過解釋《基本法》來推翻法院的判決。“吳嘉玲案”、“陳錦雅案”這些案件的當事人，他們的權益完全沒有受到後來人大釋法的影響，他們的權益，也就是終審法院的判決給他們的權益，他們在人大釋法後仍保留這些權益。

另外，我想講一講當時“梁游宣誓案”為什麼導致人大釋法。因為《基本法》有不明確的地方。大家都知道，“梁游”在作出第一次所謂宣誓，即其實是違反法律的宣誓行為之後，當時立法會主席就諮詢過資深大律師的意見，然後決定安排這兩位議員再一次宣誓。正是因為當時的法律不清楚，才導致資深大律師說應該還是給他們再宣誓的機會。如果法律寫得很清楚，資深大律師就會給立法會主席一個意見，“根據法律很清楚啊，他們第一次宣誓沒有依法宣誓，他們已經喪失議員資格了，他們就不可以再宣誓了。”由於《基本法》在這方面寫的不清楚，人大常委才頒布這個解釋。當然法院在人大的解釋頒布之後，必須根據這個解釋作出判決。如果人大常委會沒有解釋，由於法律有灰色地帶，而如果法院最後判決說“梁游”可以作第二次宣誓，那麼他們就可以第二次宣誓當上議員了，人大常委會事後的解釋也不可以推翻法院的判決。就像“吳嘉玲案”，人大釋法不會剝奪吳嘉玲根據

法院的判決得到的權益。所以我覺得宣誓案是有特殊的背景，人大常委會的這個解釋也是在迫不得已的情況之下做出的。就像王磊教授剛才所說，人大常委會很謹慎地行使解釋權，除非迫不得已，沒有其他方法來處理問題。否則的話，它不會輕易行使解釋《基本法》的權力。

**王磊：**我想對“宣誓案”補充一點。有關“宣誓案”裡面的那個要求，實際上《憲法》裡就有這樣的要求。《憲法》裡面對中華人民共和國公民就要求維護國家安全、祖國統一。另外《基本法》對這些相關的公職人員，包括對立法會議員也有這個要求。誓詞裡面的擁護《基本法》，效忠特別行政區，它實際上就是對國家的忠誠，是對國家和特別行政區的一個法律上的承諾，不能夠簡單的來看宣誓行為，它是對一個國家的一個承諾，裡面就含有“一國”的意思了，也是對特區的一個法律承諾。它不僅僅是一個形式、程序，而且是擔任行政長官、行政會議的成員、法官、司法人員、立法會的議員的一個任職的條件。為此法律已經清楚規定，如果你拒絕宣誓，或者有虛假的宣誓，那你就喪失了議員的資格。所以說宣誓是有非常重要的法律後果的，如果確實違反了《基本法》第一百零四條，以及違反了立法會的《宣誓及聲明條例》，因為《宣誓及聲明條例》規定的也很清楚，如果你拒絕宣誓，或者是虛假的宣誓，你的議員資格就喪失了。當然你不能再來一次，因為你的行為已經既成事實，是違反法律的行為。梁游兩個人違反法律的行為已經是一個事實了，所以不可能再重新來宣誓。當然在法院的判決書裡面，也有一些辯論。比方說涉及到是不是屬議會的立法會內部的事務，這個說法是不能夠成立的。因為《基本法》第一百零四條，《宣誓及聲明條例》裡面有明確的要求，它已經是制定法層面上的一個法定明確要求。所以說他如果違反的話就要承擔後果。還有，它也不屬於議員的言論免責權，因為他們宣誓時還沒有成為議員。議員的言論免責主要指的是在立法機關就立法、討論法案、預算等等很多時候的發言和表決。


一、宣誓案的簡要回顧

二、人大釋法及相關司法裁判涉及的三個法律問題

三、正確認識人大釋法

# 壹 宣誓案的簡要回顧

- 2016年9月香港立法會選舉，代表本土及港獨思潮的部分政治人物由街頭運動走進立法會選舉。在選舉前後，發生了參選資格風波及當選候任議員梁松恒、遊蕙禎辱華宣誓風波等事件。這兩場風波以及由此引發的訴訟都與「港獨」言行有密切關係。在梁頌恒、遊蕙禎宣誓案（以下簡稱梁遊宣誓案）中，香港特別行政區高等法院原訟法庭和上訴法庭裁定兩位議員因拒絕作出法律要求的宣誓而喪失其議員資格。梁遊二人繼續向終審法院申請上訴許可，被終院駁回。

- 在宣誓爭議的司法復核案審理期間，全國人民代表大會常務委員會（簡稱全國人大常委會）針對《香港特別行政區基本法》（簡稱香港《基本法》）有關宣誓規定的第104條專門作出解釋。該釋法頒佈後，香港特區政府再次對另外四位已在立法會通過宣誓的議員劉小麗、羅冠聰、梁國雄及姚松炎提起司法復核，高等法院2017年7月14日裁定四人宣誓無效，被撤銷立法會議員資格，並由宣誓日起生效。

# 貳 人大釋法及相關司法裁判涉及的三個法律問題

01

梁遊宣誓案（以及劉小麗、梁國雄、羅冠聰和姚松炎四位議員資格的案件判決）從司法判決角度明確和澄清了人大釋法的效力問題

02

該案以及人大常委會104條解釋為之後的「確認書」效力問題提供了法律依據，明確了《基本法》自起草以來一直對候選人和議員都有「真誠擁護《基本法》及效忠特區政府」的實質性要求

03

議員當選後，如行為不擁護《基本法》，不效忠特區，應承擔相應法律責任，這是104條和《宣誓及聲明條例》已經明確的內容。但香港過往未有嚴格執行也未有建立相應實施機制，11月11日全國人大常委會就立法會議員資格問題作出的決定則明確了議員應承擔的法律責任，即如違反誓言，「一經依法認定，即時喪失立法會議員的資格」。

# 叁 正確認識人大釋法

## 正確認識人大釋法

01 人大釋法是香港法治的組成部分，不存在破壞香港法治的问题

02 人大釋法不損害香港的司法獨立

03 人大釋法不受香港司法權的限制

04 人大依法有權主動釋法

## 正確認識人大釋法

05 人大常委會對104條的解釋不是修法

06 人大釋法不是基本法的僭建，也不代替香港立法

07 人大釋法對釋法之前的行為有拘束力

# 感謝聆聽！

# 座談會3：
# 在“一國原則”下履行維護國家安全的責任

**主持人：**

李浩然

《基本法》推廣督導委員會委員

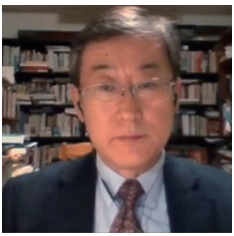
**與談人：**

張　勇

全國人大常委會香港特別行政區基本法委員會副主任

王振民

清華大學法學院教授



韓大元

中國人民大學法學院教授

**李浩然：**第三場的座談會主題是“在‘一國兩制’下履行維護國家安全的責任”。今天，我們有三位嘉賓一起討論，包括今天上午給我們做了主題發言的張勇副主任，另外還有清華大學法學院王振民教授以及中國人民大學法學院韓大元教授。

關於國家安全的問題，實際上在我們國家有總體國家安全觀作為整個國家安全法律系統的一個支柱以及理論的基礎。在我們國家內地的整個國家安全法律系統裡面，應該說在《憲法》第二十八條、二十九條以及五十二條到五十五條等法條的基礎上，我們訂立了《中華人民共和國國家安全法》(《國家安全法》)。《國家安全法》作為一個總覽的法律條文以下，也針對特定的一些問題以及國家安全領域制定了相關的包括《反間諜法》、《反恐怖主義法》以及《反分裂國家法》等專門法律。同時，在整個國家的法律體系裡面也以《刑法》、《刑訴法》以及《民法典》的一些內容，架構起整個關於國家安全的法律系統。在這個方面，有關內地的整個國家安全的立法情況，我們請到王振民教授給我們介紹一下內地國家安全法律系統的狀況以及組成。2020年6月份的時候，《中華人民共和國香港特別行政區維護國家安全法》(《港區國家安全法》)在香港就已經生效了。在這個過程裡面也反映出我們香港特別行政區跟中央政府是共同承擔起國家安全法律的責任。實際上在全世界各個國家，國家安全立法主要是中央事權。我們在這個立法過程裡面把這個責任也界定得非常清楚，包括中央政府和特區政府均有保護國家安全的責任，中央政府負有的是根本責任，而特區政府負有憲制和主要責任。《基本法》第十八條、《基本法》附件三以及《基本法》原來要求香港特別行政區國家安全進行立法的第二十三條，實際上應該是一個相輔相成的關係。因為退一步來講，從法律條文的背後理論來看，國家安全實際上是面向一個國家，排除他國安全威脅的一個整體概念，影響涉及到全國每一個國民。對於影響整個國家的安全，如果香港因為有了第二十三條的安排，就變成香港擁有一種排他性的界定範圍的話，並把中央政府

排除在外，這對於香港以外的全國其他地方以及其他地方的國民來說都是不合理不公平的。在關於國家安全的責任問題，我們請到韓大元教授從國家的角度以及技術的層面上來探討香港作為國家特區在維護國家安全所該負有的責任。

這一場座談跟我們前面的有一些不一樣，前面那兩場座談主要是回顧。從這一場開始，我們主要是面向未來，所以我們在這裡也初步做了簡單的一些分析研究作為討論的基礎。《港區國家安全法》在香港通過後，實際上會對香港一直以來在運作的整個司法體系會帶來一些新的課題。特別是因為《港區國家安全法》是全國人大授權全國人大常委會訂立的法律，所以它具有成文法的特質，這個問題應該被重視。我們不可能單純地、很簡單地用一個普通法的方法去處理或者去解釋《港區國家安全法》。面對這個問題的時候，香港有一些的聲音曾經提到說，“會不會香港的普通法的法院沒有辦法處理？”其實這是一個偽命題。因為普通法的法院實際上是一套機制、一個平台、一個架構，可以處理不同的法律問題。我們在香港去處理其他國家成文法的一些案件的時候，我們也有既定的機制，但是這裡面也有一些新的挑戰。例如根據香港司法機制，香港法院處理成文法的案件時，會邀請成文法國家的專家證人到法庭就相關法律問題出具專家意見。以後香港法院在審理涉及《港區國家安全法》的案件時，遇到不明白的問題也可能請內地法律專家到法庭介紹《港區國家安全法》，但是內地也沒有審理過這類案件，很難給香港法院作參考。這種情況下就需要有創新的解釋法律機制，讓《港區國家安全法》在香港法院的運用更加順暢。

我們先有請張勇副主任，他會從大的框架角度來給我們介紹整個《港區國家安全法》的背景情況。

**張勇：**各位朋友大家好。我就《港區國家安全法》嘗試介紹幾個概念，希望對大家有所幫助。

## 一、維護國家安全是中央事權

如果把維護國家安全的責任完全放到地方政府身上，那

也是地方政府不能承受之重。所以說國家安全是一個國家頭等大事，它也是一個國家存在和發展的前提條件。從中央和地方政府的關係上來說，在國家安全這個問題上，中央政府承擔着根本責任，這個根本責任有幾點。一是中央政府要明確統一的國家安全標準。北京、上海、廣州、香港在維護國家安全問題上標準是統一的，不能有兩個標準。不可以有的標準高，有的標準低。二是維護國家安全要防患於未然，不能夠讓危害國家安全的行為成功。所以說維護國家安全要防範、制止、懲治。三是維護國家安全中央政府要動態地評估風險，及時、有效地化解風險。相安無事，沒有風險，那是好事，但是有了風險要及時地去化解。對於地方政府來講，它有憲制責任。這個憲制就是它在憲制上是個地方性，它不是一個國家。在目標上，維護國家安全地方要和中央保持統一性。在義務方面，不同的地方在維護國家安全方面，責任有所差異。比如說，在新疆維護國家安全和在廣東維護國家安全，兩個地方的政府所承擔的責任肯定是不同的。

## 二、在香港維護國家安全是整體國家安全體系的組成部分

沒有所謂的香港國家安全問題，只有在香港維護國家安全問題。對於在香港維護國家安全，《基本法》做了系統的制度性的設計。總體國家安全體系，它是一個比較廣泛的概念。首先，有傳統安全。這個大家很好理解，它包括政治安全、國土安全、軍事安全。但是當今世界還有很多非傳統的國家安全，如金融安全、生物安全、網絡安全、糧食安全。糧食安全也是國家安全，對於我們十四億人口的大國，糧食安全是國家安全的重要組成部分。為了維護國家安全，在國家層面制定了很多的相關的法律。我這裡舉一些大家比較容易了解的國家安全法、國家情報法、反間諜法、反分裂國家法、國防法、反恐怖主義法、戒嚴法、網絡安全法、生物安全法以及香港澳門特區駐軍法。在香港維護國家安全，它具有它的地方的特點和特殊性。在香港維護國家安全的政策基礎就是三條底綫不容觸碰。第一條底綫，危害國家主權安全。第二條底

線，挑戰中央權力和香港《基本法》權威。第三條底線，利用香港對內地進行滲透破壞。這三條底綫是針對香港存在的特定的國家安全風險提出來的。其實這三條底線三十多年來，從 80 年代開始，中央就反復強調，不斷地重申。但是有個別的人充耳不聞，甚至在行動上背道而馳、越行越遠。

香港《基本法》在國家安全的設計上有一個總體的設計。它在三個層面上進行設計：第一個層面是憲制層面，第二個層面是國家層面，第三個層面是特區層面。

憲制層面涉及到《基本法》當中的兩個條款。一是第一條，開宗明義，香港是中華人民共和國不可分離的部分。它確定了香港特區的憲制地位，它不是一個獨立的實體。二是第十二條，香港是直轄於中央政府的地方行政區域，它是一個地方政府屬性。

在國家層面和法律制度上，首先，《基本法》第十三條、十四條，把國家安全最顯性的兩個領域，也就是外交、國防收歸中央明確規定下來。其次，在第十八條第 ( 三 ) 款規定，全國人大常委會可以將有關的全國性法律列入《基本法》附件三，在香港實施。有哪些法律呢？第一類是國防外交，第二類就是其他不屬於特區自治範圍內的事務的法律，包括前面說到的維護國家安全的法律。第三類就是《基本法》第十八條第 ( 四 ) 款進一步規定，在兩種情況下中央政府也就是國務院，直接可以將任何全國性法律到香港去實施。第一種情況，全國人大常委會決定進入戰爭狀態。第二種情況，香港特區發生了特區不能控制、又危及到國家統一或者安全的動亂，全國人大常委會可以宣布緊急狀態。這兩種情況下，是中央在香港維護國家安全的最終手段。

特區層面在法律制度上也有兩個方面。第一個方面，是原有法律當中維護國家安全的規定繼續保留。在《基本法》當中，原有法律和特區立法機關的制定的法律是分開表述的。原有法律是一個特定概念，它特指回歸以前港英時期制定的法律，它的憲制基礎是英國的憲制性文件，比如英皇制誥，皇室訓令等等。這些法律在中國對香港恢復行使主權之時，

統統失效。它如果有效力，是由於中國政府行使主權，通過法律給予它新的憲制地位，這就是《基本法》第一百六十條的規定。我聽有人說，中國政府在 1997 年以前，對香港原有法律沒有做過審查。錯了！在今天我可以告訴大家，中國政府為了香港回歸，早在 1991 年的時候，就成立了一個專門的工作班子，專門審查香港原有法律，對香港所有的原有法律逐條進行了審查，每一項法律都有一個單獨的審查報告。而且對適用於香港的習慣法、衡平法、普通法做了專門的研究。在這些工作的基礎上，全國人大常委會在 1997 年 2 月 23 日做出一項很長的決定，就是香港的原有法律怎麼才能夠成為特區的法律，裡面廢除了一部分法律，廢除了一部分法律當中的部分的條款，同時規定了很詳細的適用的原則。1997 年回歸前的這項工作持續了整整五年。所以說香港原有法律當中維護國家安全的法律，在 1997 年後，要服務於維護中國的國家安全。另一部分是第二十三條立法，大家都很熟悉。第二十三條立法當中規定的七種犯罪行為，它只是國家安全當中的政治安全當中的一部分而已。

**三、回歸以後的實際情況**

回歸以後，一是香港未能履行憲制責任。二是國家安全風險日益凸顯。為什麼沒有履行？香港在維護國家安全方面的法律制度是空白，前面說的原有法律沒有適用化。在今天，香港《刑事罪行條例》裡面，英女王陛下仍然赫然在目，第二十三條立法被妖魔化，沒有完成。維護國家安全的執行機制沒有。特區沒有成立專門的機構，中央政府也沒有派駐專門的機構。法院二十三年來沒有審理過危害中國國家安全的案件。而實際情況是危害國家安全的風險成為了現實。

**四、在地方政府無法承擔或者履行維護國家安全的責任的時候，中央政府必須承擔起它的根本責任，要建立起維護國家安全的法律制度和執行機制**

作為一個主權國家，有很多的手段建立維護國家安全的機制。這一次在香港維護國家安全，中央決定用決定加立法的方式來建立制度，完善機制。

就此有很多選項：第一，全國人大及其常委會可以作出決定。第二，全國人大常委會可以將維護國家安全的全國性法律適用到香港來。第三，全國人大常委會還可以宣布緊急狀態，如果香港特區自己控制不了，就宣布緊急狀態。第四，制定新的法律解釋或者修改現有的法律。第五，根據香港《基本法》第四十八條第(八)款，中央人民政府可以向行政長官發布指令，行政長官必須執行。最終中央決定採用決定加立法的方式。這兩者有什麼不同呢？決定是宣示立場、確立原則、決定事項、明確授權。而法律是構建一套制度，設定權力、明確義務，同時訂立罰則。兩者配合起來構建制度機制。

**五、在起草《港區國家安全法》的過程當中，始終遵循兩個原則**

第一項原則就是保障個人權利與維護國家安全相平衡。第二項原則就是中央的根本責任與特區的憲制責任相結合，要發揮兩者的作用。《港區國家安全法》的立法依據規定的很清楚，有三個：《憲法》、《基本法》和全國人大的決定。《憲法》的效力在整體上是適用於香港特區的，只是其中有關社會主義的制度和政策不在這裡實行，效力是不可分割的。比如說涉及到國家安全，《憲法》第五十二條就規定，中華人民共和國公民，這裡面包括香港的中國公民，有維護國家統一和全國各民族團結的義務。第五十四條規定，中華人民共和國公民有維護祖國的安全、利益、榮譽的義務，不得有危害祖國的安全、榮譽、利益的行為。這些規定都是適用的。

《港區國家安全法》在具體內容上最主要的有這麼幾點。

第一，防範制止和懲治四類犯罪行為。一是分裂國家。二是顛覆政府，其中包括中央政府和特區政府。三是恐怖活動，這裡的恐怖活動和一般的暴力犯罪不同在於，恐怖活動是以實現政治主張為目的的暴力活動。四是勾結外國和境外勢力。

第二，確立了各種刑事原則，這些刑事原則都是人類文明的共同成果。在內地的刑法、刑訴法裡面也都有同樣的規定：罪刑法定、無罪推定、各種訴訟權利、一事不再理原則，另

外不溯及既往。《港區國家安全法》是 2020 年 6 月 30 日通過的，以前的犯罪不能夠適用這部法律，只適用於那天以後觸犯這些犯罪的行為。

第三，尊重和保障人權。《港區國家安全法》再一次明確規定，在處理有關案件時，必須遵循《基本法》和兩個國際人權公約當中有關人權保障的規定，這說明這部國安法立法的目的，它是防範制止和懲治極少數人從事危害國家安全的犯罪行為，這恰恰是為了保障絕大多數人能夠在香港安居樂業，能夠生活在一個有序安寧的社會。

第四，《港區國家安全法》規定了一個協調機制。前面說了，中央的根本責任和特區的憲制責任要共同發揮作用，要相互配合。所以說設立了中央派駐香港有國安公署，香港本地成立以行政長官為首的國家安全委員會，在國家安全委員會裡面，中央委派一位國家安全事務顧問，使兩者能夠結合起來。

第五，在執行機制方面充分體現了“一國兩制”的特色，就是要推動特區來承擔起在香港維護國家安全的日常的主要的責任， 設立專責的警務部門，律政司裡面成立專責的檢控部門，由行政長官指定專門審理涉及國家安全問題的案件的法官。

第六，中央派駐的國安公署審理的案件。國安公署只受理三類案件：第一類是涉及外國或者境外勢力介入的複雜情況，特區管轄有困難，一定會存在這種情況的。作為一個地方政府，有時候有些事情上它是無能為力的。第二類是出現了特區政府無法有效執行本法的嚴重情況，特區政府履行不了職責。第三類是出現了國家安全面臨着重大現實的威脅的情況。威脅就在眼前，中央政府不能坐視不理。

國安公署如果要管轄這些案件，《港區國家安全法》規定了一個非常嚴格的程序，就是由特區政府向國務院提出，或者由駐港國安公署向國務院提出，國務院批准了以後才能夠管轄。一旦國務院批准了，由駐港國安公署管轄某個案件，偵查由國安公署負責，檢控由最高人民檢察院指定檢察機關，審判由最高人民法院指定審判

機關，法律適用全國性的刑事訴訟法。

第七，《港區國家安全法》對公職人員提出了特別要求。有兩個條款：一是第六條，香港居民在參選或者就任公職的時候，應當依法簽署文件，確認或者宣誓擁護中華人民共和國香港特別行政區，效忠中華人民共和國香港特別行政區。二是第三十五條，經過香港法院判決，或者在國安公署受理的案件的執行情況下，由最高人民法院指定的法院判決犯有危害國家安全罪，即時喪失參選立法會、區議會以及出任各種公職的資格。如果曾經宣誓和聲明過的，也就即時喪失職務及參選和出任資格。這一制度的目的就是在維護國家安全領域要進一步地落實以愛國者為主體的“港人治港”的原則。

在香港維護國家安全，《港區國家安全法》的制定只是一個重要的起步，還有很多工作需要我們大家共同努力。法律制定了，但是法律的生命在於實施，法律的權威也在於實施，實施更重要。對香港特區而言，本地的立法應當盡早完成。全國人民代表大會 5 月 28 日的決定，對香港特別行政區已經提出了明確的要求，要盡早完成有關立法。同時，原有法律當中維護國家安全的有關規定，要有效地啓動。總的來看，我認為在香港維護國家安全，一是任重道遠，二是充滿信心。

**李浩然：**非常感謝張勇副主任給我們帶來關於國家安全以及《港區國家安全法》的總體一些原則以及概念。關於內地整個國安法律體系的詳細情況，有請王教授給我們做這方面的一些介紹。

**王振民：**非常高興跟大家交流。根據會議組織者的安排，讓我介紹一下國家層面開展國家安全立法的情況。大家都很熟悉、很了解香港維護國家安全的法律及狀況，但對國家的有關情況可能不是太了解。

## 一、國家和國家安全

根據國際法的相關理論和實踐，構成一個國家有四個重要的元素：第一個是國民（人民），第二個是國土（領土），第三個是主權（也可以稱為“國權”），第四個是政權，這四個元素缺一不可。“國家安全”就是維護國家這四個核心要素的安全，即維護本國國民、國土、

主權和政權的安全，這就是“國家安全”的概念。國家安全在任何國家、任何時候都是國家的頭等大事。而且，在任何國家，國家安全都是中央事權，不屬任何自治的範疇，沒有一個國家由地方來獨立承擔維護國家安全的責任，都是通過全國性的立法、行政、執法和司法來維護國家安全。在國家安全問題上，這是國際通例。制定國家安全方面法律最多的是英國和美國等國。這些國家維護國家安全的法律都有幾十部甚至更多。還有很多涉及國家安全的法律是分散在其他法律當中關於國家安全的條款。這些國家維護自己國家安全的法律多如牛毛，而且都是全國性的，看不到地方的立法，因為這本來就是中央事權。

**二、中國國家安全立法的整體的情況**

我們國家的國家安全立法，包括《憲法》、《刑法》和專門立法。專門立法是以《國家安全法》（2015）為中心，正在構建一套完整的國家安全法律體系。

（一）《憲法》

《憲法》是一個國家主權的最高的法律體現，是維護國家主權、安全和發展利益的根本大法。也就是說，《憲法》也是維護國家安全的根本大法。我國《憲法》除了在序言裡規定了涉及國家政治安全和整體利益的內容之外，還特別在一些條款裡面規定了國家安全的事項。《憲法》第二十八條規定了國家維護社會秩序、鎮壓叛國和其他危害國家安全的犯罪活動；第二十九條規定國家的武裝力量屬人民，其最重要的使命就是維護國家安全，即鞏固國防，抵抗侵略，保衛祖國，保衛人民的和平勞動；第五十二條規定了公民維護國家統一和民族團結的義務；第五十四條規定公民有維護祖國的安全、榮譽和利益的義務，不得有危害國家安全、榮譽和利益的行為；第五十五條規定了服兵役的義務。這些都是涉及國家安全的憲法條款。憲法還有關於緊急狀態的規定，也是關於國家安全的重要內容。可見，憲法關於國家安全的規定，對於特別行政區當然是適用的。

（二）《刑法》

我國《刑法》是 1979 年制

定的，1997 年進行了全面修訂。《刑法》第二編分則第一章專門規定了危害國家安全罪，即危害國家主權、領土完整和安全，分裂國家、顛覆人民民主專政的政權，推翻社會主義制度的行為，都是危害國家安全的行為。《刑法》規定了背叛祖國罪、分裂國家罪、武裝叛亂、暴亂罪、顛覆國家政權罪、與境外勾結的一些犯罪，還有資助危害國家安全犯罪活動罪、投敵叛變罪、叛逃罪、間諜罪、為境外竊取、刺探、收買、非法提供國家秘密情報罪、資敵罪等。《刑法》還規定了相應的刑罰。古今中外，危害國家安全都屬重罪，重罪自然要重罰。由於《刑法》沒有被列入香港《基本法》附件三，所以這些規定不在香港特別行政區適用。

（三）《反分裂國家法》

《反分裂國家法》是一部維護國家安全的特別法律，於 2005 年制定，是專門為了反對和遏制台獨分裂活動，促進祖國的和平統一制定的一部專門法律。這部法律為什麼不能適用到香港呢？因為這部法律本來就是為台灣量身訂做的。

（四）《國家安全法》

我國 2015 年制定的《國家安全法》是世界上最年輕的綜合性的、全域性、基礎性的維護國家安全的法律。它針對我國面臨的國家安全的現實威脅，確定了我國關於國家安全的定義。有人說中國國家安全的定義不明確，實際上《國家安全法》對此規定得非常明確，它是指國家的政權、主權、統一和領土完整，人民的福祉，經濟社會可持續發展和國家其它重大利益，相對處於沒有危險和不受內外威脅的狀態，以及保障實現安全狀態的能力。這就是我國《國家安全法》對國家安全明確的定義。《國家安全法》是按照習近平主席的總體國家安全觀制定的，一共七章八十四條，規定了十多個領域的維護國家安全的任務，以及國家維護國家安全的制度體制機制，還有公民和組織的義務和責任。這包括香港、澳門兩個特別行政區維護國家安全的責任以及特別行政區中國公民維護國家安全的義務和權利。這是對基本法有關規定和原則精神的重申。

（五）我國其它維護國家安全的相關立法

我國還制定了維護國家安全的其他相關法律。這些法律包括 2014 年制定的《反間諜法》，2015 年制定的《反恐怖主義法》，2016 年制定的《網絡安全法》、《境外非政府組織境內活動管理法》，2017 年制定的《國家情報法》、《核安全法》，2019 年制定的《密碼法》，還有 2020 年制定的《出口管制法》、《生物安全法》，還有《突發事件應對法》、《戒嚴法》、《國防法》等等。關於國家安全立法，我們在《憲法》之下，以《國家安全法》為中心，正在形成一套完善的維護國家安全的法律體系。維護國家安全不是一部法律的問題，而是一個法律體系的問題。這也是各國共同的特徵。

以上就是我國關於國家安全立法的情況。需要說明的是，上述這些法律沒有列入《基本法》附件三，所以不在港澳地區適用。港澳地區維護國家安全需要由中央主導、特區配合根據“一國兩制”方針，在《基本法》的軌道上構建另外一套維護國家安全的法律體系。也就是說，維護國家安全的責任是相同的，但是適用的法律可以不一樣。港澳地區應當根據“一國兩制”原則，由中央主導，以《基本法》為基礎和核心，構建另外一套維護國家安全的法律制度體系。澳門特區已完成了對基本法第二十三條的本地立法，正在形成維護國家安全的法律制度體系，執行機制也在逐漸健全。香港《基本法》和澳門基本法第二十三條規定的內容是一樣的，不同的是香港沒有完成對第二十三條的本地立法。2020 年中央不得不從國家層面制定香港地區維護國家安全的法律。這套新構建的法律制度和執行機制在香港剛剛實施幾個月，相信這套法律制度一定能夠產生預期的效果。

**李浩然：**謝謝王振民教授。王教授在他剛才的介紹裡面，實際上帶出了一個非常核心的問題，為什麼要維護國家安全？我相信如果要說維護大家的安全，沒有人會反對。實際上所有法律的立法目的都是為了保障老百姓的生活安全。為什麼要維護國家安全呢？這是因為國家是當今國際交往當中的一個基本單位，如果沒有這個基本單位，沒有國家作為基礎，不可能談到任何國際合作。比如說在資源方面的安全，我們

先通過國家安全，然後才構建包括巴黎協議等對於氣候的一些國際之間的合作。國家是國際交往的基本單位，因此我們首先要保證國家的安全，才有其他的合作，同時國家也是人們生活以及對社會管理的一個最基本的單位，因此首先要解決的是國家層面的安全。正如王教授所說，關於香港的國安法，雖然張主任的發言已經做了一個簡單的介紹，但是如果從國家以及憲制層面上，香港在這方面所負的責任應該是如何呢？有請韓大元教授給我們從這個方面做發言。

**韓大元：**我想結合本單元的主題和主持人給我的任務談三個問題。

第一，我們要履行好特別行政區維護國家安全的憲制責任，首先要回歸到《基本法》制定的初心，始終要堅持《基本法》的初心。在我看來，在制定《基本法》的時候，香港特別行政區作為地方政府它應該履行的國家的安全的義務，應該講的都寫進了《基本法》。因為我們今天的主題是《基本法》的追本溯源，這個話題讓我們共同感受了《基本法》制定三十年的歷史的進程，讓我們更加的珍惜這部來之不易的創造性的傑作。大家都知道過去的三十年，中國和世界都發生了巨大的變化，“一國兩制”雖然在實踐當中面臨着一些新的挑戰、新的問題，但是在香港我們取得了舉世矚目的成就，這是一個客觀的事實。如果要問為什麼“一國兩制”能夠取得成就，在我看來它主要的原因是我們構建了以《憲法》和《基本法》為基礎的新的憲制秩序，確立了國家主權和領土完整的核心的價值，明確了中央和特區的關係，並始終把保持香港的長期繁榮穩定作為一個國家的目標，這也是國家的一項任務。這一點鄧小平先生在 1982 年會見撒切爾夫人的時候已經說得很清楚。對香港問題的基本的立場，當時提出了三個問題，特別是有關國家主權的論述，對我們落實中央的全面管治權仍然具有重要的現實意義。但是這種既有明確的歷史的正當性，明確的法律依據的命題，比如維護國家主權的這樣命題，近年來也受到了一些人的挑戰，甚至出現了公然挑戰國家主權的這樣一種現象。實際上在三十

年以前制定《基本法》的時候，有些問題是已經預見到的，而不是一個新的問題。比如剛才兩位嘉賓所談到的，《基本法》第二十三條規定了特區維護國家主權安全的憲制義務，這是一個中央對特區的一種義務性的條款。因為在當今世界維護國家主權統一和安全，是“一國兩制”的初心，也是國家的首要任務。所以我們今天要回顧《基本法》三十年，就不能迴避《基本法》實踐中存在的問題，要根據香港的實際，堅持“愛國者治港”的這樣一個《憲法》和《基本法》的原則，不斷完善《基本法》相關的一些制度。隨着“一國兩制”實踐的發展，香港《基本法》如何在穩定和社會變遷中尋求一個合理的平衡，也是我們大家共同關注的一個新的命題。

第二，特區要履行好維護國家安全的憲制責任，必須要尊重《憲法》權威，維護國家的憲制秩序。也就是說我們要履行的憲制責任，首先它是一個《憲法》的義務，因為兩位嘉賓也談到《憲法》是最高的法律，也是在中華人民共和國的法律體系內的一個根本法。所有的法律，所有的國家制度，包括“一國兩制”的制度性安排，它的效力都來源於《憲法》。所以根據《憲法》，《基本法》開宗明義的第一句話就是，香港自古以來就是中國的領土，明確了香港屬於中國領土的一種歷史的正當性。第一條也規定，香港特別行政區是中華人民共和國不可分離的部分。第十二條規定，特別行政區是中華人民共和國的地方行政區直轄於中央人民政府。這些條款是整個《基本法》的最核心的一些條款，體現了“一國兩制”的前提和基本要求，體現了國家的主權。因此在這些根本性問題上，我們是絕對不能動搖的。6 月 30 號通過的《港區國家安全法》第二條不僅重申了香港特區法律地位和《基本法》的第一條和第十二條的重要性，同時進一步闡明了這兩個條款是《基本法》的一個根本性條款。從法律文本的表述來看，根本性條款指的是支撐整個規範體系的前提性、基礎性和根本性的規範，也是最具有核心價值的一種本質性的規範。2020 年 11 月 11 日第十三屆全國人大常務委員會第

二十三次會議通過了有關香港特區立法會議員資格問題的決定，在決定當中同時明確了三個《憲法》的依據：第一個依據是第五十二條，中國公民有維護國家統一的義務；第二個《憲法》依據是第五十四條，中華人民共和國公民有維護祖國的安全榮譽和利益的義務，不得有危害祖國的安全，榮譽和利益的行為；同時也明確了第六十七條的第 ( 一 ) 款，全國人大常務委員會監督《憲法》實施的條款，也就是說作為最高權力機關的常設機關，全國人大常務委員會應該履行在特別行政區監督《憲法》實施的憲制責任。這三個《憲法》的條款，同時明確了中華人民共和國的《憲法》在特別行政區的效力。在中國的《憲法》體制下，維護國家安全和統一是所有國家機關的責任，也是所有中國公民，包括香港的所有中國公民應該履行的一個明確的《憲法》義務，包括“一國兩制”在內的政治體制的設計，都是以主權、安全和領土完整作為一個國家的生存和存在的哲學和優先的利益的考量。所以我們經常講“一國兩制”的前提是“一國”，即主權統一和領土的完整性，沒有國家的統一和領土完整，所謂的“兩制”就無從談起。從《憲法》與《基本法》關係來看，無論《基本法》規定的特別行政區享有多麼高度的自治權，但在任何時候，在任何問題上都不能突破、挑戰和違反“一國”這一根本性的《憲法》前提。通過《基本法》凝聚共識，它的所有的意義在於從內心裡邊真誠的認同“一國”，明確公民對於國家身份的歸屬，這些道理在任何一個法治社會應該是一個常識。但在香港這些常識有的時候變成了有些人引發爭議的話題，同時也導致了部分年輕人在國民身份認同上的一個混亂。在這個意義上，全國人大 11 月 11 號的決定，為公職人員的國家忠誠，明確了一個法律的規矩，劃清了界限，其目的就是維護國家的主權和尊嚴。因此在未來《基本法》實施當中，如果我們不能在這一根本性、前提性問題上取得一個高度的共識，我們將無法順利的推進“一國兩制”的偉大實踐。國家認同不是一個抽象的原則，也不是一個抽象的學

術命題，更不是僅僅寫在法律文本的一個規定，它應該成為我們的價值共識和我們的共同生活方式。基於法治而形成的社會共識中，人們享有充分的權利和自由，缺乏這種共識的社會是無法尊重法治的，因為《基本法》凝聚了包括香港同胞在內的全體中國人民的共識，為維護人的尊嚴和法制的價值提供了一個充滿着智慧、靈活和開放的規範體系。

第三，要强化國家意識、培育愛國精神。特區政府要履行維護國家安全的憲制責任，必須要以《憲法》為基礎，做好國安法的教育，强化國民國家的意識。因為黨的十九屆五中全會明確提出了要增强港澳同胞的國家意識和愛國精神。我認為，這一要求是具有針對性的。不僅總結了二十三年回歸的經驗 特別是總結了“修例”風波以來的經驗的教訓，值得我們高度關注，認真的對待。在“一國”和“兩制”關係上，對“一國”仍然存在着不少認識上的偏差、誤解，甚至個別的立法會的議員拒絕承認國家對香港擁有的主權，不願意效忠國家，不願意效忠特別行政區，更不願意擁護《基本法》，甚至宣揚和支持港獨，這是在任何一個主權國家都不允許的。我們說，反對派或者反對派的議員們可以有自己的政治信仰，可以對政府的時政提出一些尖銳的批評，監督政府的權力，但前提是要尊重國家主權和憲制秩序。這不僅是作為一個公民的基本義務，也是一個作為公職人員的基本政治倫理。所以在培育國家意識中，特別行政區已經開始了有關的《憲法》的教育、《基本法》的教育與國安法的教育以及各個條例的教育。我們要通過國安法的教育和《憲法》的教育，來尋求一個廣泛的社會共識。我們在對各級學校的學生的國家安全法的教育時，要建立這種與“一國兩制”的制度體系相適應的教育體系，特別是要針對學生們關注的這種安全、人權、自由和價值的秩序之間，如何尋求一個平衡的問題上，應該從《憲法》、《基本法》和國家安全法的角度，給予他們有說服力的教育，尊重和保障人權，使自由和秩序保持平衡，這也是《港區國家安全法》的核心理念。維護國家安全的根本目的是保

障人權，而人權的保障以國家安全為基礎，兩者並不存在衝突，是可以形成平衡的。同時，我們也要提高公務員、教師和社會公眾對國安法的認識。目前，全球仍然面臨着“新冠疫情”的嚴峻挑戰，國際秩序也充滿着一些不確定性。越是這個時候，我們越要堅守“一國兩制”的初心，更加珍惜“一國兩制”所取得的成就，客觀地正視“一國兩制”面臨的挑戰和問題，使“一國兩制”這一承載着中國人民智慧和歷史使命的偉大制度創新，繼續保持它的旺盛的生命力，為人類政治文明的發展繼續做出中國人的貢獻。

**李浩然：**謝謝韓教授。韓教授的發言其實把一個很核心的內容帶出來了。實際上，國家安全教育以及大家對國安法和國家安全的認識，更多的應該提升到國民意識上面。我簡單總結一下韓教授的發言。實際上因為我們明白了國家安全意識與社會每一人的生活唇齒相依，是利益的共同構建，所以更加要去認識國家安全法，更重要的是去明白為什麼我們要國家安全，為什麼我們要有國家安全法，其實是為了自己及社會的利益及福祉，到最後更重要的是顯出一份國民意識，是一份價值觀，亦是一種道德情操，這亦解釋了《港區國家安全法》第十條強調國家安全教育所說的守法的意識亦都是一個國家安全的意識的原因。

我們做一個簡單的總結。這一節我們談到了很多國家安全的責任問題，實際上我們可以看到國家安全問題應該從整個國家的角度、國民的角度去思考。就像我在昨天一個講座發言講國家安全問題時，有一些人就批評我說：“你講國家安全為什麼要講到整體的國家安全觀呢？其他領域不應該講。”我覺得這種批評是一種非常狹窄的批評。為什麼這樣說？其實國家安全自然是需要了解不同領域，就如我們今天所面對的要強制戴口罩的規定，實際上也是社會安全裡面一個公共衛生的問題。我希望這一節能讓大家更加明白到國家安全的重要性。非常感謝律政司司長及律政司同事邀請我參加本次論壇，也非常高興《基本法》頒布三十周年法律高峰論壇在很特殊的時刻能成功舉辦。最後希望我們的“溯本清源”能夠一直持續下去。謝謝各位。

# 維護國家安全的制度機制

全國人大常委會
法制工作委員會　副主任
香港澳門基本法委員會　副主任
張　勇

## 一 國家安全 中央事權

- 國家頭等大事
- 國家存在和發展前提條件

## 維護國家安全

### 中央政府 根本責任

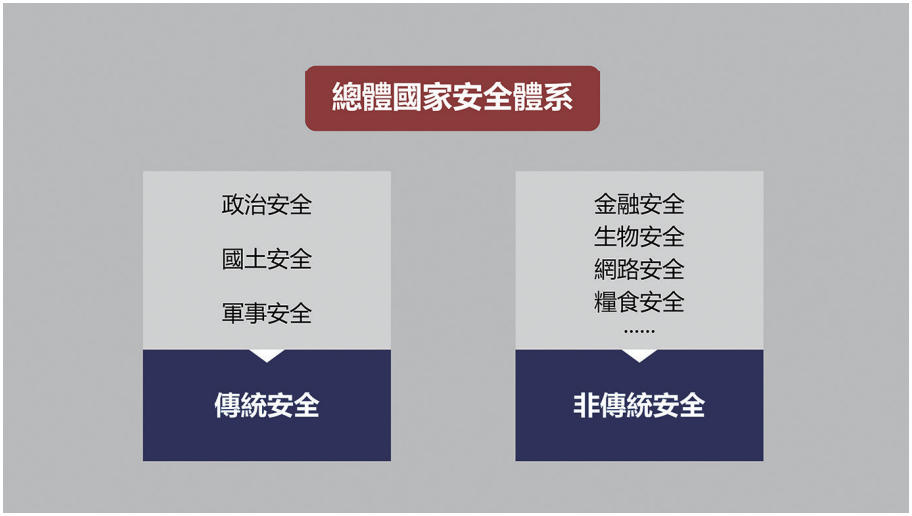
- 明確統一國家安全標準
- 防患於未然，防範制止懲治
- 動態評估風險，及時有效化解

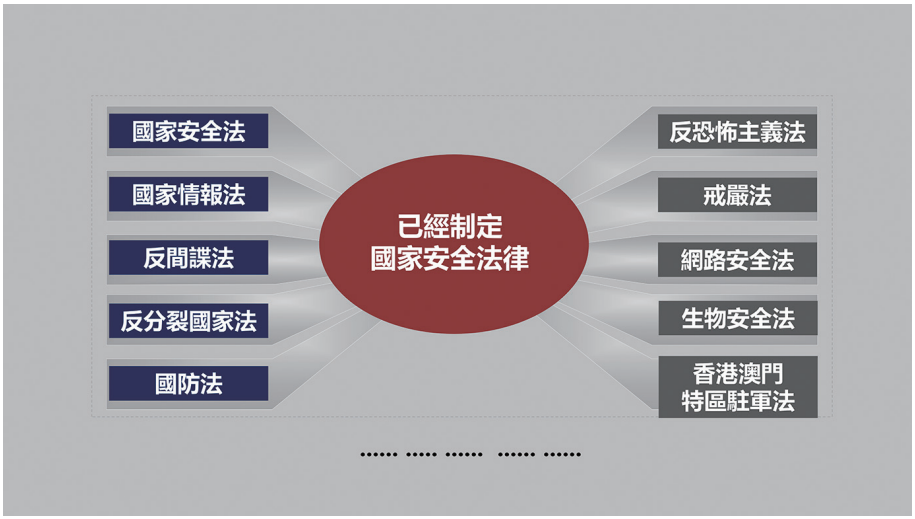
### 地方政府 憲制責任

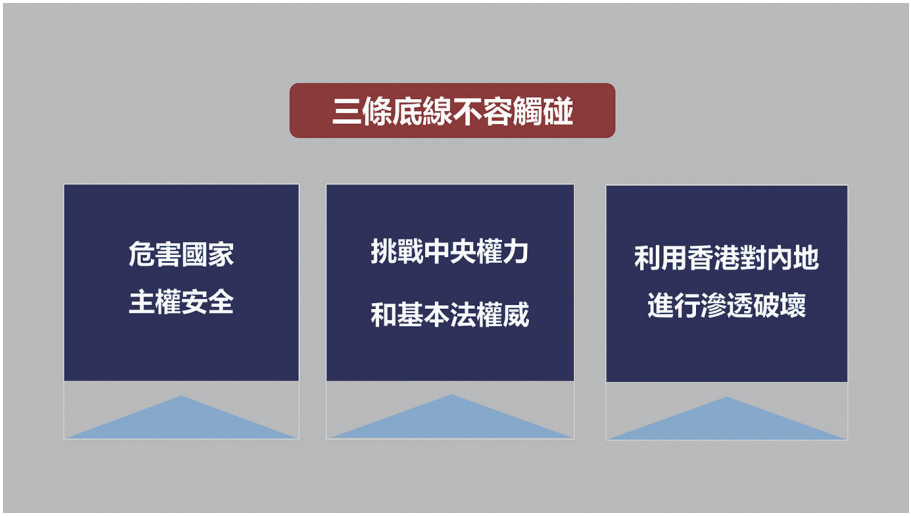
- 憲制：地方性
- 目標：統一性
- 義務：差異性

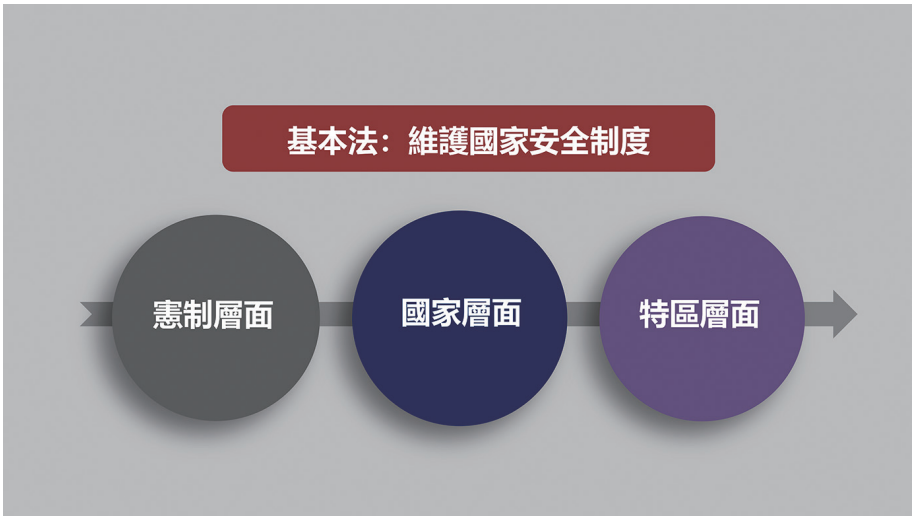
## 二 在香港維護國家安全

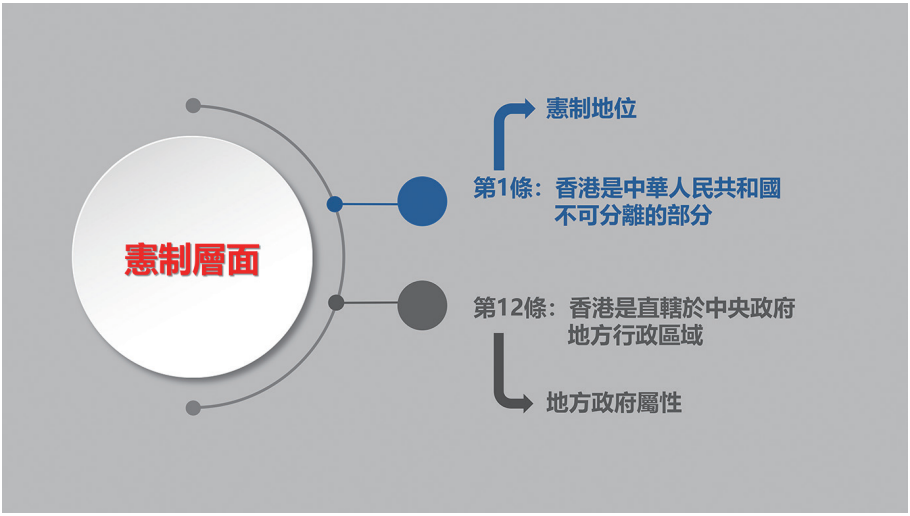
- 國家安全體系的組成部分
- 基本法作了系統的制度設計

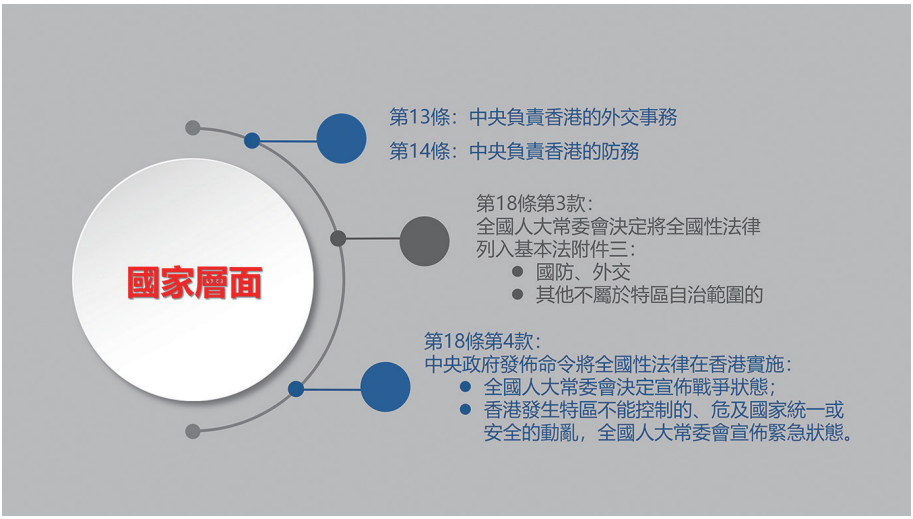

總體國家安全體系
政治安全
國土安全
軍事安全
傳統安全
金融安全
生物安全
網路安全
糧食安全
.....
非傳統安全


國家安全法
國家情報法
反間諜法
反分裂國家法
國防法
已經制定
國家安全法律
反恐怖主義法
戒嚴法
網路安全法
生物安全法
香港澳門
特區駐軍法
..... ..... ..... ..... .....


三條底線不容觸碰
危害國家
主權安全
挑戰中央權力
和基本法權威
利用香港對內地
進行滲透破壞


基本法：維護國家安全制度
憲制層面
國家層面
特區層面


憲制層面
憲制地位
第1條：香港是中華人民共和國
不可分離的部分
第12條：香港是直轄於中央政府
地方行政區域
地方政府屬性


國家層面
第13條：中央負責香港的外交事務
第14條：中央負責香港的防務
第18條第3款：
全國人大常委會決定將全國性法律
列入基本法附件三：
國防、外交
其他不屬於特區自治範圍的
第18條第4款：
中央政府發佈命令將全國性法律在香港實施：
全國人大常委會決定宣佈戰爭狀態；
香港發生特區不能控制的、危及國家統一或
安全的動亂，全國人大常委會宣佈緊急狀態。


特區層面
原有法律中維護國家安全的規定
繼續保留（經適應化）
第23條：「應自行立法禁止」
七類危害國家安全的行為和活動


三
回歸以來
現實情況.....
香港未能履行憲制責任
國家安全風險日益凸顯

**法律制度空白**

- 原有法律：未適應化
- 23條立法：未能完成

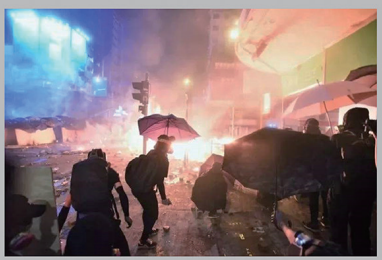
**執行機制缺失**

- 特區未成立專門機構
- 中央未派駐專門機構

23年來，香港法院沒有審理過危害國家安全的案件

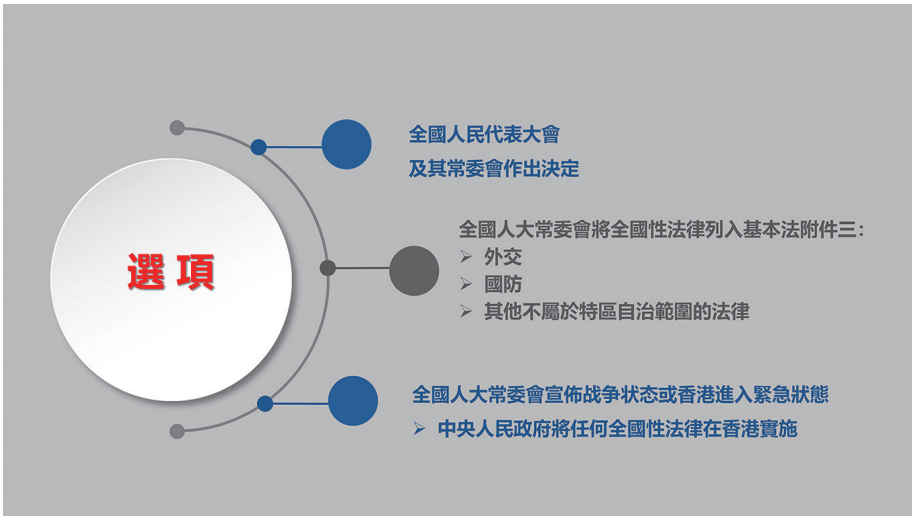
## 國家安全風險日益凸顯

非法「占中」

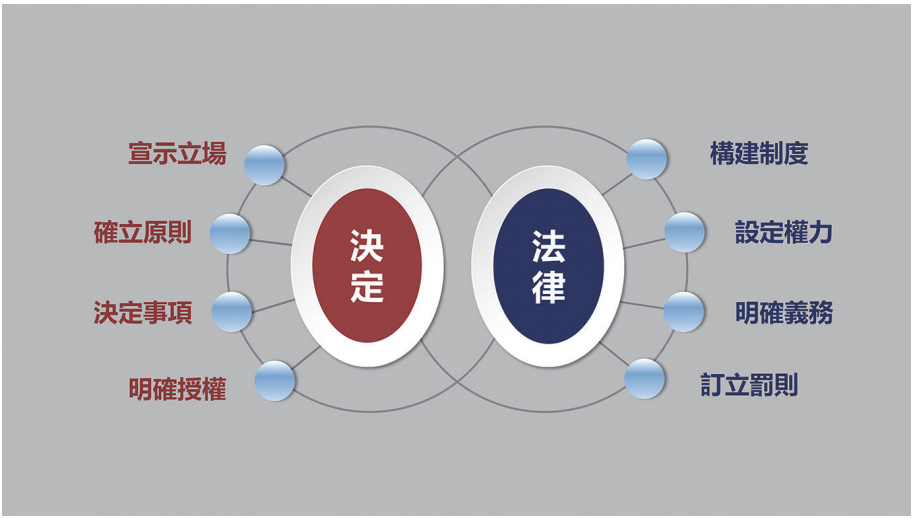


「修例」風波

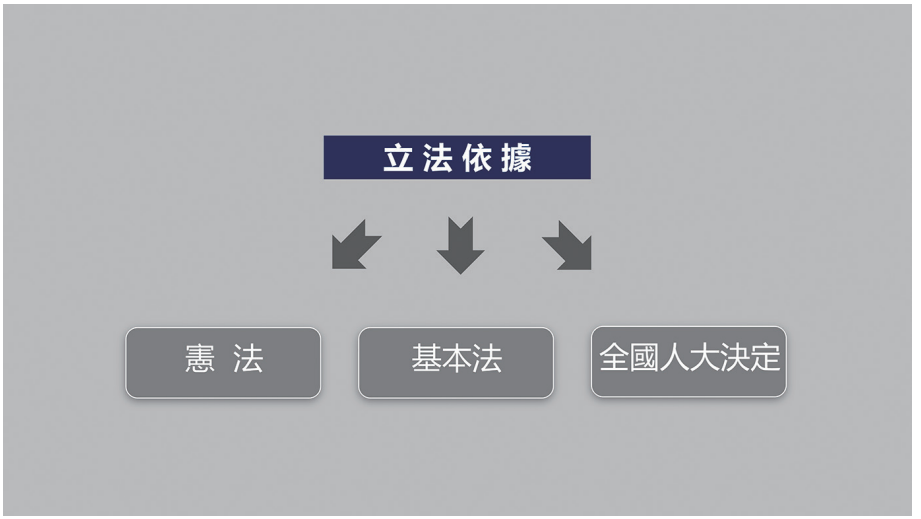

四
中央承擔
根本責任
建立法律制度和執行機制
決定 + 立法


選項
全國人民代表大會
及其常委會作出決定
全國人大常委會將全國性法律列入基本法附件三:
外交
國防
其他不屬於特區自治範圍的法律
全國人大常委會宣佈战争状态或香港進入緊急狀態
中央人民政府將任何全國性法律在香港實施


選項
制定法律
中央負責事務
中央與地方關係事務
解釋或者修改法律
基本法
適用於香港的全國性法律
中央政府向行政長官發佈指令


決定
宣示立場
確立原則
決定事項
明確授權
法律
構建制度
設定權力
明確義務
訂立罰則


五
立法原則
平衡與配合
保障個人權利與維護國家安全相平衡
中央根本責任與特區憲制責任相配合


立法依據
憲 法
基本法
全國人大決定

**第52條**

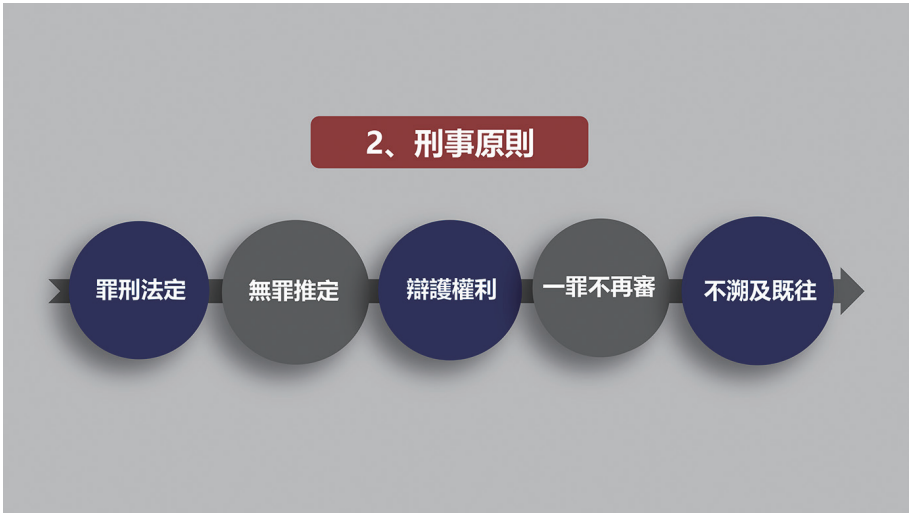
- 中華人民共和國公民有維護國家統一和全國各民族團結的義務。

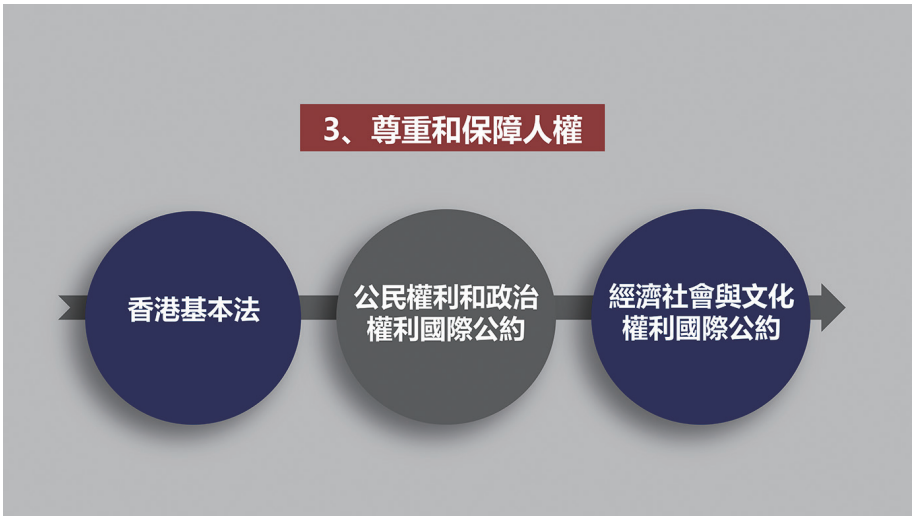
**第54條**

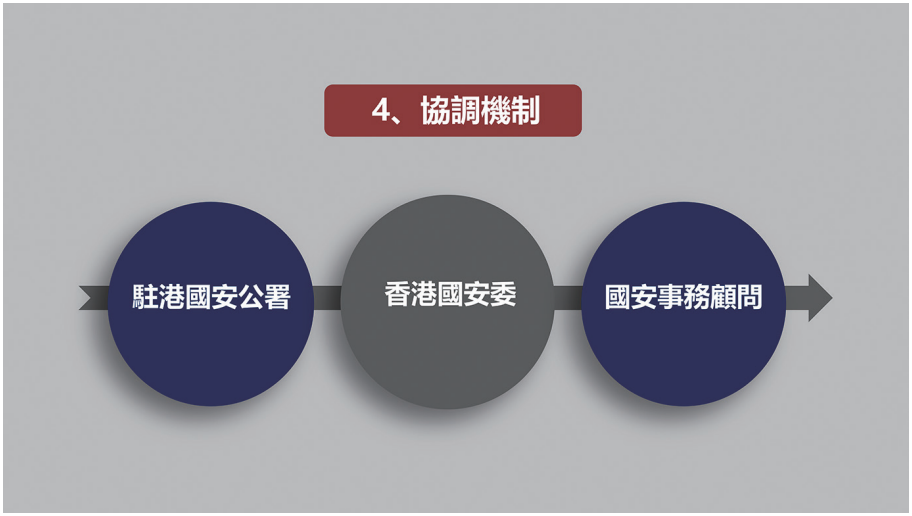
- 中華人民共和國公民有維護祖國的安全、榮譽和利益的義務，不得有危害祖國的安全、榮譽和利益的行為。

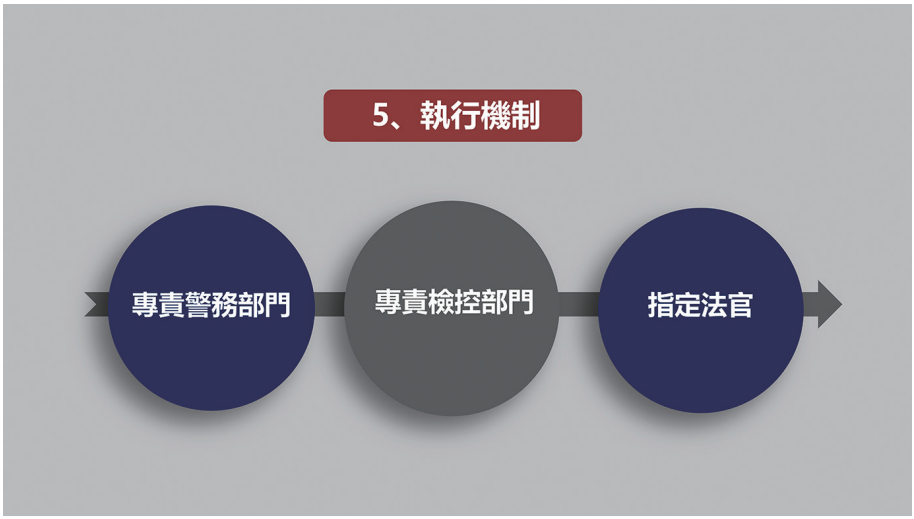
**1、防範、制止和懲治四類犯罪行為**

分裂國家 → 顛覆政府 → 恐怖活動 → 勾結外國


2、刑事原則
罪刑法定
無罪推定
辯護權利
一罪不再審
不溯及既往


3、尊重和保障人權
香港基本法
公民權利和政治權利國際公約
經濟社會與文化權利國際公約


4、協調機制
駐港國安公署
香港國安委
國安事務顧問


5、執行機制
專責警務部門
專責檢控部門
指定法官

## 6、國安公署管轄的案件

**管轄範圍**

- 涉及外國或境外勢力介入的複雜情況，特區管轄確有困難
- 出現特區政府無法有效執行本法的嚴重情況
- 出現國家安全面臨重大現實威脅的情況

**審理程序**

- 特區政府或者駐港國安公署提出，報中央政府批准
- 國安公署立案偵查
  最高檢指定檢察機關
  最高法指定審判機關
- 適用內地刑事訴訟法等法律。

## 7、對公職人員的特別要求

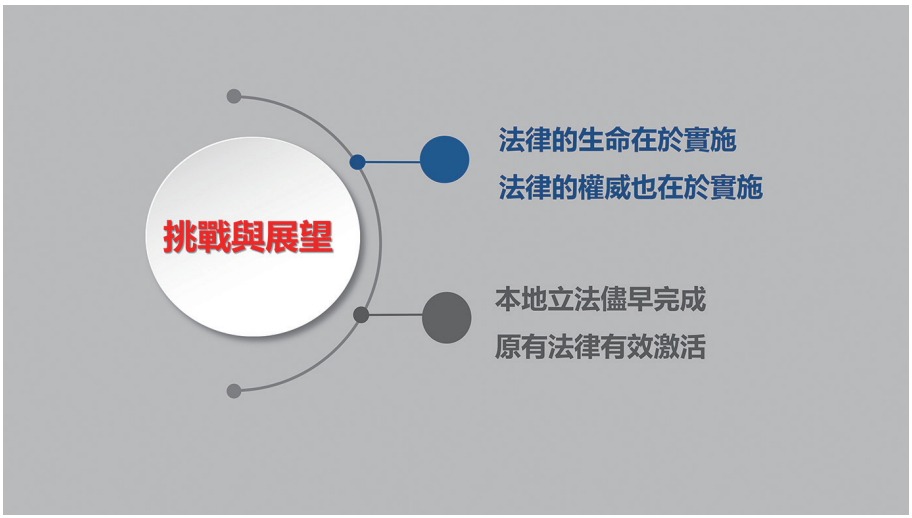
**第6條**

- 香港居民在參選或者就任公職時，應當依法簽署文件，確認或者宣誓擁護基本法，效忠香港特區。

**第35條**

經法院判決犯危害國家安全罪——

- 喪失參選立法會區議會及出任公職或行政長官選委會的資格
- 曾宣誓或聲明的，即時喪失職務及參選或出任資格。


挑戰與展望
法律的生命在於實施
法律的權威也在於實施
本地立法儘早完成
原有法律有效激活


THANKS
謝　謝

# 中國國家安全立法簡介

清華大學法學院教授

王振民

## 一、國家和國家安全

**國家**：國際法上，構成國家有四個核心元素：人民、領土、主權、政權。

**國家安全：**國家安全就是維護國土、國民、主權和政權等核心要素的安全。維護國家安全是頭等大事。

在任何國家，維護國家安全都是中央事權，都通過全國性立法維護國家安全。制定法律最多是英國和美國等國，專門維護國家安全的法律都有幾十部，還有很多分散在其他法律中的國安條款。

## 二、中國國家安全立法

我國的國家安全立法包括憲法、刑法和專門立法。專門立法以《國家安全法》為核心，正在形成一套完整的國家安全法律體系。

### （一）《憲法》（1982年）

**憲法是國家主權的最高法律體現，是維護國家主權、安全和發展利益的根本大法。**

**第二十八條** 國家維護社會秩序，鎮壓叛國和其他危害國家安全的犯罪活動，制裁危害社會治安、破壞社會主義經濟和其他犯罪的活動，懲辦和改造犯罪分子。

**第二十九條** 中華人民共和國的武裝力量屬人民。它的任務是鞏固國防，抵抗侵略，保衛祖國，保衛人民的和平勞動，參加國家建設事業，努力為人民服務。

國家加強武裝力量的革命化、現代化、正規化的建設，增強國防力量。

**第五十二條** 中華人民共和國公民有維護國家統一和全國各民族團結的義務。

**第五十四條** 中華人民共和國公民有維護祖國的安全、榮譽和利益的義務，不得有危害祖國的安全、榮譽和利益的行為。

**第五十五條** 保衛祖國、抵抗侵略是中華人民共和國每一個公民的神聖職責。

依照法律服兵役和參加民兵組織是中華人民共和國公民的光榮義務。

憲法關於緊急狀態的宣佈也作出了規定。

### （二）《刑法》（1979年制定、1997年修訂）

《刑法》第二編分則第一章規定了危害國家安全罪，即危害國家主權、領土完整和安全，分裂國家、顛覆人民民主專政的政權和推翻社會主義制度的行為。具體罪名分別規定在刑法分則第一章第一百零二條至第一百一十三條共12個條文裡，11個罪名。

危害中華人民共和國國家安全的犯罪行為，是中國刑法危害性最大的犯罪，最高刑罰可以判處死刑。這也是很多國家的慣例。

第一百零二條 背叛國家罪

第一百零三條 分裂國家罪

第一百零四條 武裝叛亂、暴亂罪

第一百零五條 顛覆國家政權罪

第一百零六條 與境外勾結的處罰規定

第一百零七條 資助危害國家安全犯罪活動罪

第一百零八條 投敵叛變罪

第一百零九條 叛逃罪

第一百一十條 間諜罪

第一百一十一條 為境外竊取、刺探、收買、非法提供國家秘密、情報罪

第一百一十二條 資敵罪

第一百一十三條 危害國家安全罪適用死刑、沒收財產的規定

**（三）《反分裂國家法》（2005年）**

《反分裂國家法》是為了反對和遏制「台獨」分裂活動，促進祖國和平統一，維護台灣海峽地區和平穩定，維護國家主權和領土完整，維護中華民族的根本利益，根據憲法制定的維護國家安全的法律。該法共10條，僅適用於台灣問題，主要內容是鼓勵兩岸交流合作，表述了和平統一的方針、政策以及實現和平統一的可能途徑和策略。同時首次明確授權在三種情況下國家可用「**非和平手段**」實現國家統一這一重大原則底線。

《反分裂國家法》把國家多年來制定的一系列對台方針政策法律化，利用法律反分裂，捍衛國家主權和領土完整，實現統一，符合國際通例。

**（四）《國家安全法》（2015年）**

作為世界上最年輕的國家安全法，我國《國家安全法》體現了21世紀的時代特徵，特別是根據中國面臨的內外安全環境和國情，明確我國的「國家安全」是指**國家政權、主權、統一和領土完整、人民福祉、經濟社會可持續發展和國家其他重大利益相對處於沒有危險和不受內外威脅的狀態，以及保障持續安全狀態的能力。**

根據總體國家安全觀和相應的國家安全的定義，《國家安全法》共7章84條，規定了13個領域維護國家安全的具體任務，既包括軍事、國土傳統安全，也包括政治、經濟、文化、社會、科技、信息、生態、資源、核安全這些非傳統安全，還包括外層空間、國際海底區域和極地這些新型領域的安全，以及中國海外利益的安全。

《國家安全法》對中央和地方各機關的職責分工和權限範圍也做了較為詳細的科學分工，明確了包括香港和澳門特別特別行政區在內的全國各地方都有維護國家安全的責任。

《國家安全法》也規定了公民、組織在維護國家安全方面的義務和相應的權利，明確維護國家主權、統一和領土完整是包括港澳同胞和台灣同胞在內的全體中國人民的共同義務。

**（五）其他相關立法：**

《反間諜法》（2014年）；《反恐怖主義法》（2015年）；《網絡安全法》（2016年）；《境外非政府組織境內活動管理法》（2016年）；《國家情報法》（2017年）；《核安全法》（2017年）；《密碼法》（2019年）；《出口管制法》（2020年）《生物安全法》（2020年）《突發事件應對法》（2007年）等涉及國家安全領域的綜合性或專門性法律。

總之要在憲法之下，**構建以《國家安全法》為中心的完善的維護國家安全法律體系。**

但是上述這些法律沒有列入基本法附件三，不在港澳實施。**港澳特區維護國家安全需要由中央主導、特區配合搭建另外一套國安法律體系來維護。**

**（六）港澳特區維護國家安全的立法**

**1、澳門特區：**

《澳門基本法》（1993）以及第23條立法（2009年）《澳門特別行政區維護國家安全法》

《澳門基本法》第二十三條：澳門特別行政區應自行立法禁止任何叛國、分裂國家、煽動叛亂、顛覆中央人民政府及竊取國家機密的行為，禁止外國的政治性組織或團體在澳門特別行政區進行政治活動，禁止澳門特別行政區的政治性組織或團體與外國的政治性組織或團體建立聯繫。

《澳門特別行政區維護國家安全法》是澳門特別行政區立法會根據《澳門基本法》第七十一條（一）項和第二十三條的規定，為禁止危害國家安全的犯罪，制定的澳門地區法律，該法共有15條，規定了叛國、分裂國家等7種危害國家安全的犯罪行為及其相應的處罰。

澳門特區順利完成了《澳門特別行政區維護國家安全法》的立法工作，這標誌著澳門特區全面貫徹落實基本法，認真履行基本法賦予的憲制責任，填補了澳門回歸以來存在的維護國家安全法律的空白，對於維護國家安全，依法保障澳門居民的權利和自由，保持澳門社會的長期繁榮穩定具有重要意義。

**2、香港特區：**

（1）《香港基本法》（1990）及其第23條以及香港本地有關法律；

（2）回歸以來，香港既沒有完成《香港基本法》第23條本地立法，也沒有很好貫徹實施本地維護國家安全的有關法律，導致香港在國家安全方面長期處於「不設防」的狀態。為此，2020年5月28日第十三屆全國人大三次會議通過《關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定》，6月30日全國人大常委會制定《中華人民共和國香港特別行政區維護國家安全法》，簡稱「香港國安法」。

香港國安法的任務是根據《憲法》、《香港基本法》和全國人大的「決定」，按照「一國兩制」方針和香港的實際情況，為防範、制止和懲治與香港特別行政區有關的分裂國家、顛覆國家政權、組織實施恐怖活動和勾結外國和境外勢力危害國家安全等犯罪，用國家立法的形式將這四種嚴重危害國家安全的行為入罪定刑，從國家和香港特別行政區兩個層面完善維護國家安全的法律制度和相關執行機制，細化中央與特區在維護國家安全上的職權、職責劃分，解決中央與特區關於國家安全案件的管轄分工以及對相關行為的規管問題，並為今後進一步完善香港維護國家安全的法律制度和執行機制提供指導。

香港國安法共有6章66條，章節分別為：總則，香港特別行政區維護國家安全的職責和機構，罪行和處罰，案件管轄、法律適用和程序，中央人民政府駐香港特別行政區維護國家安全機構，附則。這是一部兼具實體法、程序法和組織法內容的綜合性法律。

# 座談會4：
# 按《基本法》全面實施“一國兩制”對香港特區的益處

**主持人：**

廖長江

香港特別行政區立法會議員

**與談人：**

趙　雲

香港大學法律學系主任、教授

司艷麗

最高人民法院研究室副主任、法官

劉　洋

希德律師行法務總監

**廖長江：**今天座談會的主題是“按《基本法》全面實施‘一國兩制’對香港特區的益處”。我們請來了幾位份量很重的嘉賓和講者作為與談人，首先發言的是香港大學法律學系系主任趙雲教授。趙教授是荷蘭 Erasmus University Rotterdam 的法學博士、荷蘭 Leiden University 的法學碩士和中國政法大學的法學碩士和法學學士、香港大學鄭家純基金國際法教授、厦門大學國際法講座教授。他的研究領域非常廣泛。他曾經於 2013 年和 2017 年擔任中國法研究中心總監，現任中國法學會理事、中國國際法學會常務理事。他還是多個國際仲裁委員會的認可仲裁員。趙教授今天所談的議題是《內地與香港關於建立更緊密經貿關係的安排》。有請趙教授。

**趙雲：**非常感謝律政司的邀請。我覺得隨着“一國兩制”在香港的成功實施，給香港的發展帶來了很多機遇。今天我想專門針對 CEPA 也就是《內地與香港關於建立更緊密經貿關係的安排》來談一談我的看法。

在“一國兩制”的安排之下，香港屬於一個獨立的關稅區，在世界貿易組織作為一個獨立的成員而存在。按照 WTO 的規則規定，允許世貿成員成立自由貿易區。在自由貿易區內實行的一些制度、待遇都會更加優惠。我們覺得在“一國兩制”的一個框架之內，我們香港可以得到很多的優惠待遇。也正是在這樣的一個背景之下，內地與香港就簽訂了 CEPA。2003 年 7 月 1 日，CEPA 正式生效。這個協議涵蓋了四個領域的內容：貨物貿易、服務貿易、關於經濟技術合作領域以及投資領域。在這四個領域的規定當中，我們可以看到，它給香港提供了很多的優惠。相對於其他的世貿成員，都更早的得到了更廣的、更優惠的待遇。

從貨物貿易來說，內地在世貿項下承諾，在加入世貿的數年內降低關稅以及開放市場。在 CEPA 裡面有相關的規定，它規定了在 2004 年 1 月 1 日，對於二百七十三項內地稅涵蓋的香港產品，只要符合 CEPA 原產地規則，都享受零關稅的待遇。2006 年 1 月 1 日開始，對其他的香港產品都享受零關稅待遇。到現在為止，我們會發現，在

世貿框架之下其他成員國的很多產品的關稅還是在 15% 左右，但是對香港的產品就享受了零關稅的優惠。

在服務貿易方面，港商在 CEPA 的安排之下可以提早進入內地市場。CEPA 開放了十八個服務行業，包括電訊行業和會展等等。此外，在這些行業當中，取消或者減少了資本或營業額的要求。如果是以銀行業作為一個例子，我們可以看到對資本的要求和營業額的要求，從二百億美元降到了六十億美元。它還把設分行的最低的開業年限從兩年降為零，經營人民幣的業務，最低的內地開業年限從三年降為兩年，這是很明顯的一個例子。由此可見，我們香港的服務提供者確實得到很大的一個優惠。

從投資領域來看，在 CEPA 框架下可以更快的允許港商獨資經營，部分行業超出了內地對加入 WTO 的承諾。在這一方面，今年《外商投資法》已經正式生效。按照《外商投資法》的規定，香港獲得的待遇還是更加的優惠。我們如果看一下負面清單的規定，會發現兩者的負面清單是不一樣。這裡看兩個方面的規定，我以法律服務作為一個例子來說明，我在幾年前寫過一篇文章，專門比較了 CEPA 框架下跟 WTO 項下，到底有什麼區別的待遇。我們可以很清楚的看到，香港的法律服務提供者享有很多的優惠，其中就包括可以在廣州、深圳、珠海與內地律師事務所聯營，以及在內地律師事務所派駐港澳律師擔任法律顧問等等。大家可能也注意到前幾天就香港的律師到大灣區執業方面，國家又有了新的一些舉措。由此我們可以看見確實有很多新的發展，而且對港商一直是提供了很多的優惠待遇。CEPA 的規定確實給國際的實踐提供了非常有意義的典範。

我主要講一下 2017 年達成的投資協議。這份協議不僅僅涵蓋了一般的投資協議當中關於公平、合理待遇，禁止非法徵收等方面一般的規定，協議還集中體現在關於 CEPA 投資爭議解決機制的構建方面。一般的投資爭議解決機制用的更多的是關於投資仲裁，這一點我覺得是非常重要的。就是按照 CEPA 的規定，投資者依據有關的規定向投資所在地一方調


解機構提出調解申請，而調解機制失敗的話，當事方可以提起訴訟。除了一般的談判和協商之外，它規定了一個投資調解的機制，我覺得是非常好的。它規定調解是按照各自受理的原則來施行，而且在這個協議當中也規定了雙方共同認可的調解機構和調解員名單。比較一般的投資協議跟 CEPA 投資協議，它確實給當事方一定自由度，由當事方來自己決定是否願意參與調解，以及什麼時候可以終止調解。其中一個在程序性方面的顯著特點，就是設立了由三個調解員組成的調解委員會。調解員當然要獲得相應的調解資格，並且有跨境的貿易或投資方面的經驗。這個安排我覺得其實非常好。它能夠確保不同背景的調解員參與到案件的調解工作當中，確保在調解過程中當事人權利的一種平衡，有效平衡當事人的權利。通過具有不同背景的調解員參與，能夠產生更多有創造性的解決方案，有利於雙方當事人順利的解決有關的投資爭議。在確保調解的保密性和相關程序的透明度方面，保密性也並不延伸到有關當事人同意調解，以及雙方通過調解達成協議這兩個方面的事實。這些規定對於投資爭議的解決是非常重要的。結合以上對有關內容的探討，可以看出 CEPA 是在“一國兩制”的框架下，內地與香港按照世貿規則做出的特殊的經貿安排，充分體現了中央對香港經濟發展和長期

繁榮穩定的支持。從長遠來看，我相信如果我們繼續堅持“一國”和“兩制”的雙重優勢，一定會取得更進一步的成功。

**廖長江：**我總結一下。自從 2003 年 CEPA 第一次簽訂以來，我們可以看到，它的內容在不斷的豐富，在今天已經涵蓋了貨品貿易、服務貿易跟投資協議。我覺得它一直以來都是“一國兩制”新的實踐。現在我們國家有一個重大的發展戰略，就是粵港澳大灣區的建設，現在正在全速前進。CEPA 和大灣區是你中有我，我中有你的一種關係。CEPA 擴大開放的優惠政策，在大灣區會先行先試並推動大灣區全面實現服務貿易的自由化。由此也為香港的法律職業者帶來一個難得的發展機遇。

我們下一個題目是“關於內地和香港特別行政區的民商事司法協助安排”。我們有請一位重量級的講者，最高人民法院研究室副主任的司艷麗法官。司法官是中國政法大學民商法博士，2006 年入職最高人民法院，2015 年擔任最高人民法院研究室港澳辦主任，2020 年擔任最高人民法院研究室副主任。近年來，司法官代表最高人民法院與香港特區商討了民商事案件判決相互認可和執行、婚姻家庭民事案件相互認可和執行、就仲裁程序相互協助保全等數項司法協助安排，在法律、司法和港澳事務方面有非常深厚的背景和豐富的經驗。

**司艷麗：**非常高興與大家相聚雲端，來共同紀念《基本法》頒布三十周年。我想今天和大家分享一下兩地的民商事司法協助情況。兩地開展民商事司法協助的法律依據正是《基本法》第九十五條的規定。可以說，兩地開展的民商事司法協助，是“一國兩制”方針和《基本法》在司法領域的貫徹落實。在現實中，它的需求是什麼情況呢？下面讓我們來看幾組數據。首先，我們來看一下兩地人員往來的情況。近幾年，往來內地的香港居民每年均在一億五千萬人次以上。第二，我們來看一下經貿往來的情況。近五年來，每年香港在內地的投資均佔全部外資的 60% 以上。大家可以看到，無論是人員的往來，還是經貿的往來，都在不斷的增加，這就決定了我們跨境的糾紛也在不斷的增加，

由此，對跨境的民商事的司法協助提出了更大的需求。為了更好適應實踐中的需求，自香港回歸祖國以來，最高人民法院與香港特區共簽署了七項司法協助安排。這七項安排可以分為三個階段，三大類別。第一個階段是從 1997 年到 2006 年的初步發展期，第二個階段是從 2006 年到 2016 年的探索積累期，第三個階段是從 2016 年至今的快速發展期。同時，這七項安排可以分為三大類別，分別是就程序事項的協助，就仲裁程序的協助和就法院判決的協助。這七項安排從無到有，由點及面，循序漸進，基本實現了兩地民商事司法協助的全面覆蓋，構建起了中國特色的區際司法協助體系。下面，我重點介紹幾個安排。

**一,《關於內地與香港特別行政區相互執行仲裁裁決的安排》**

該項安排目前已經實施二十年了，總體執行情況非常好。下一步，為了適應實踐的新需求，兩地將進一步的修改完善。主要是針對以下幾個問題：第一，認可和執行的關係，需要明確認可是否為執行的前置程序。第二，法院在受理認可和執行仲裁裁決申請之前或者之後，可否依當事人的申請對被申請人的財產採取保全措施。第三，被申請人在內地和香港均有可供執行財產的，申請人可否向兩地法院提出申請。第四，確定相互協助的範圍，是按照仲裁機構的標準，還是按照仲裁地的標準。這幾個問題都是業界非常關心的重大問題。

**二,《關於內地與香港特別行政區法院就仲裁程序相互協助保全的安排》**

這項安排簽署於 2019 年，它是就仲裁保全措施或者臨時措施相互協助。它的基本思路，是將香港仲裁程序與內地仲裁程序同等對待，涵蓋仲裁前和仲裁中，包括財產保全、證據保全和行為保全。這項安排，是內地和其他法域簽署的第一份也是唯一一份有關仲裁保全的協助文件。它是中央支持香港發展法律服務業，建設亞太區國際法律及爭議解決服務中心的務實舉措，是“一國”原則下開展更加緊密的區際司法協助的具體體現。目前，這項安排已經實施一周年。依據該

安排，截止到2020年10月19日，內地法院已經受理了香港三十二宗仲裁保全申請，涉及的金額是十五億美元。

**三，《關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排》**

這項安排是關於兩地法院民商事案件判決的相互認可和執行，2006年簽署，2008年生效。它的適用範圍限於民商事案件中的給付金錢的判決，並且要求當事人以書面形式明確約定香港法院或者內地法院具有唯一管轄權。可見，適用範圍非常窄，而且適用條件也非常嚴苛。因此，自2016年以來，兩地的法律人一直想方設法擴大協助的範圍，以更大程度增進兩地民眾的福祉。

**四，《關於內地與香港特別行政區法院相互認可和執行婚姻家庭民事案件判決的安排》**

2017年，香港回歸祖國二十周年之際，經過兩地人的共同努力，簽署了相互認可和執行婚姻家庭民事案件判決的安排。這項安排有以下幾個特點：第一，將兩地婚姻家事案件類型的最大公約數納入協助的範圍。第二，吸收兩地家事改革最新的成果，將香港各界十分關心的未成年子女返還等案件全部納入，也貫徹了兒童利益最大化的價值理念。第三，創新條文的表述技術，將涉及到財產分割的判項也納入了協助範圍，有效實現了兩地法律制度的對接。

**五，《關於相互認可和執行民商事案件判決的安排》**

這項安排簽署於2019年，它有三個特點：第一，標誌着兩地民商事領域司法協助已基本全面覆蓋，實現最大範圍的互認，協助程度遠超於外國之間的協助。第二，在知識產權問題上，該安排也採取了比國際公約更加開放和積極的立場，以多個條文對知識產權案件判決的認可和執行做出了前瞻性的規定，這也是為了更好地服務粵港澳大灣區的創新驅動發展。第三，是將金錢判項和非金錢判項全部納入到相互協助的範圍，實現了更加緊密的協助。上述安排的簽署充分證明，只要兩地秉持“一國兩制”方針，相互理解，相互尊重，法律制度的差異不會構成兩地協作的障礙，而且可以在“一國”

前提下，充分利用“兩制”的優勢，實現更加緊密的協助。在此，我也向大家透露一下，目前，最高人民法院和香港特區政府律政司正在積極研究推動業界關心的跨境破產協助，希望能夠盡快地實現突破。

總之，只要有利於香港長期繁榮穩定，只要有利於香港民眾福祉，只要有利於香港融入國家發展大局，最高人民法院將一如既往全力以赴地支持。下一步，最高人民法院將繼續全面準確理解和貫徹“一國兩制”方針，不斷拓展兩地司法協助的廣度和深度，進一步提升相互協助的水平和效果。

**廖長江：**下一位就同一個議題發言的是劉洋先生。劉洋先生是希德律師行的法務總監。劉律師擁有英格蘭、威爾斯和中國的律師執業資格，他主要的法律專業領域是上市和航運訴訟及仲裁的業務，並且在處理國際商業爭議方面具有豐富的經驗，主要包括國際貨物買賣和貿易，以及大宗商品、能源和離岸工程，股東及股權相關的糾紛，國際投資特別是涉及“一帶一路”的項目，欺詐、執行國際判決和仲裁裁決等。劉先生也在香港政府的很多諮詢機構擔任委員，包括仲裁推廣資深委員會、調解督導委員會、航空發展及機場三跑道系統諮詢委員會。有請劉先生。

**劉洋：**非常榮幸能夠作為嘉賓，來跟大家分享一下經驗和一些想法，特別是剛才司艷麗法官對於整個從回歸以來，我們兩地簽署的一系列的司法互助的安排做了非常詳細的介紹。當然司艷麗法官剛才是從內地的最高人民法院的法官的角度，向大家介紹分享的。我相信大家從我的口音也能聽出來，我是內地背景的，但是現在我已經是一個香港人了，我來香港十年了。另外，我的職業是英國和中國的兩地的律師，我在香港進行執業，可能是因為我這樣一個比較複雜的背景，所以鄭司長和律政司的同事就選擇了我來做這個分享。我想從我自己的一個執業的角度來分享兩點。

第一，對於我們這種商事執業律師，除了那個婚姻家事安排，至少我自己不處理這方面業務，所以可能認知不深之

外，剛才司艷麗法官提到的那些其他的安排，大家在日常的工作當中或多或少都會接觸到的。但是當我們跟客戶介紹的時候，當我們自己在學習這些安排的時候，一般都不會聯想到《基本法》。今天可以說可能是我們作為一個律師來講，或者是一個法學教授來講，提到這些安排的時候，第一次從《基本法》的領域和《基本法》的高度去談這些安排。剛才司艷麗法官在介紹的時候我就在想，特別是在民商事判決這方面，如果香港不是中國的一部分，如果不是擁有“一國兩制”，一個外國的民商事判決的承認與執行是非常困難的。除非雙方有一個雙邊的協定，或者是經過互惠的條件才可以去進行執行。也正是因為香港是中國的一部分，香港在“一國兩制”下有這樣得天獨厚的優勢，才使得我們香港的判決，當然也包括內地的判決，互相能夠得到非常順暢地承認和執行，這對於我們香港本身來講是一個非常大的優勢。另外，我們業界非常期待去年簽署的全面的民商事判決的安排能夠盡快地通過。現在我們也有一個比較順暢的立法會了，所以希望能夠盡快通過，我相信對於我們法律界，無論是什麼樣立場的人，這樣的一個安排的通過都是只有好沒有壞，只有贊沒有彈的。在去年保全措施安排剛剛生效之後，我非常榮幸的成為全香港第一個通過安排取得保全措施的律師。10 月 1 日安排得以通過，但是由於當時內地是黃金周假期到 10 月 7 日，10 月 8 日我就從上海海事法院拿到了相關的凍結令。所以我是真的獲益人，包括我們所有的香港律師都是獲益人。當時在簽署這樣一個保全措施安排的時候，我的新加坡的律師朋友就跟我講：羨慕你們，羨慕香港，憑什麼中國就對你們香港這麼好。我說因為香港是中國的一部分，新加坡就不是中國的一部分，除非你願意加入我們中國。所以他沒有話說，其實這就是因為“一國兩制”的原因。

第二，我認為，1997 年回歸之後，香港的普通法有了進步和發展。包括《憲法》、《基本法》、人大釋法、人大的決定以及這些一系列的安排，其實都已經成為了香港普通法的

一部分。但是從我自己的領域，自己的接觸看，大家對這方面其實是沒有一個特別大的認知的。當談到普通法，當談到香港的法律制度的時候，更多的還是會從傳統的回歸之前的普通法去介紹和思考。今後，我覺得我們每一個法律人在這方面都應該有這樣的一個意識，就是我們今天之所以能有這樣一系列的互惠安排，都是因為有《基本法》和“一國兩制”的保障。

最後，我記得 2019 年 12 月份在北京，律政司主辦了一場主題為“香港是否還是不可被替代”的會議。當時我也是作為其中一個分享嘉賓。今年就同樣的這個問題，我依舊相信我們香港是不可替代的，至少從法律這個角度是不可替代的。另外，我作為一個具有內地背景在香港執業的律師，一個新香港人，是受益於香港這個身份，受益於“一國兩制”的身份的。當我回到內地的時候，當我接觸到我內地那些客戶的時候，雖然他們都知道我的背景是內地人的背景，但是都會更尊重我。因為他們認為我是香港的律師，所以相信我的專業技能，不需要我做專業以外的事情。這些都說明，我們香港的這些律師和法律執業的人員享受了《基本法》和“一國兩制”帶給我們的獨特優勢，也是值得我們去珍惜和重視的。

**廖長江：**謝謝劉律師。我們剛才說到的民商事案件法律的判決應相互認可執行和婚姻法跟家庭法律這方面的安排，我相信在香港會很快落實這方面的司法相互協作。這也體現到兩個不同的制度是可以有一個司法互助的安排。我覺得這對於減少重複訴訟，增加兩地司法互信都具有很重大的意義。我覺得凡此種種，對於把香港建設為亞太區國際法律及解決爭議服務中心，對於健全大灣區的國際法律服務和糾紛解決機制，以至構建“一帶一路”的國際爭議解決機制都是大有裨益的。隨着香港特別行政區與內地的深度融合，將會踏上一個全新的台階。在當前中國新時代全面開放的新格局中，在“一國兩制”下，我們會有更好地機制對接和制度創新，來進一步增進兩地廣大人民的福祉。

# 內地與香港
# 民商事司法協助情況介紹

最高人民法院研究室副主任　司豔麗

2020年12月

●法律依據——《香港基本法》第95條規定

香港特別行政區可與全國其他地區的司法機關通過協商依法進行司法方面的聯繫和相互提供協助。

●「一國兩制」方針在司法領域的貫徹落實

●現實需求

（1）人員交往頻繁密切

2014年至2019年間，香港居民往來內地人次每年均在1.5億人次以上。

**內地與香港居民往來情況**

| | 2014年 | 2015年 | 2016年 | 2017年 | 2018年 | 2019年 |
|---|---|---|---|---|---|---|
| 香港居民往來內地人次 | 1.53億 | 1.59億 | 1.62億 | 1.60億 | 1.60億 | 1.60億 |
| 涉外涉港澳台登記結婚數 | 4.7萬對 | 4.1萬對 | 4.2萬對 | 4.1萬對 | 4.8萬對 | 4.9萬對 |

註：數據來源：公安部出入境管理局、國家移民管理局歷年出入境人員數量情況和民政部歷年《社會服務發展統計公報》

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（2）經貿往來拓展深化

2014年至2018年間，香港在內地的投資每年均占全部外資的60%以上。

**2014-2018年外商在內地直接投資情況**

（單位：億美元）

| | 2014年 | 2015年 | 2016年 | 2017年 | 2018年 |
|---|---|---|---|---|---|
| 當年外商直接投資總額 | 1195.60 | 1262.70 | 1260.00 | 1310.40 | 1383.05 |
| 港商直接投資金額 | 857.40 | 926.70 | 871.80 | 989.20 | 899.17 |
| 港資在外資中占比 | 71.71 % | 73.39 % | 69.19 % | 75.49% | 65.01% |

註：數據來源於商務部網站

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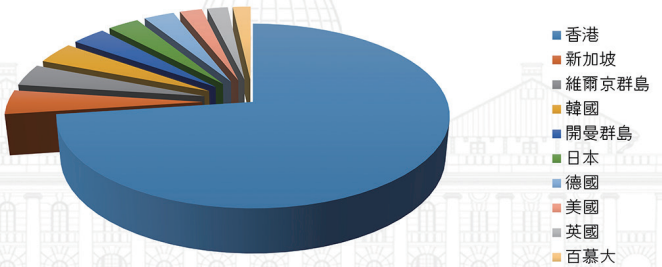
**2018年對內地投資前十位國家/地區**
**（以實際投入外資金額計）**

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## 七項安排 三個階段 三大類別

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## ●三大類別

*** 程序事項協助**

《相互委託送達民商事司法文書的安排》（1998年）

《就民商事案件相互委託提取證據的安排》（2016年）

*** 就仲裁程序協助**

《相互執行仲裁裁決的安排》（1999年）

《就仲裁程 序相互協助保全的安排》（2019年）

*** 就法院判決相互協助**

《相互認可和執行當事人協議管轄的民商事案件判決的安排》（2006年）

《相互認可和執行婚姻家庭民事案件判決的安排》（2017年，待生效）

《相互認可和執行民商事案件判決的安排》（2019年，待生效）

**從無到有，由點及面，循序漸進，基本實現了兩地民商事司法協助全面覆蓋，構建起有中國特色的區際司法協助體系。**

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• 一、《仲裁裁決相互執行的安排》

總體執行情況很好。下步將進一步修改完善，主要針對以下問題：

1.認可與執行的關係。

2.法院在受理認可和執行仲裁裁決申請之前或者之後，可否依當事人的申請，對被申請人的財產採取保全措施？

3.被申請人在內地和香港特別行政區均有可供執行財產的，申請人可否同時向兩地法院提出申請？

4.相互協助的範圍。仲裁機構標準？仲裁地標準？

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• 二、《就仲裁程序相互協助保全的安排》

**基本思路：**在保全方面將香港仲裁程序與內地仲裁程序同等對待。

涵蓋仲裁前、仲裁中；包括財產保全、證據保全、行為保全

**這是內地與其他法域簽署的第一份也是唯一一份仲裁保全協助文件，是中央支持香港發展法律服務業、建設亞太區國際法律及爭議解決服務中心的務實舉措，是「一國」原則下開展更加緊密的區際司法協助的具體體現。**

**自2019年10月1日《安排》生效以來，截止至2020年10月19日，內地人民法院已受理32宗仲裁保全申請。上述申請分別由內地12個城市的17家中級人民法院受理。**申請總金額達104億人民幣（15億美元）。其中，至少有17宗財產保全申請獲得法院裁定批准，保全總金額約為人民幣87億（13億美元）。

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• 三、《相互認可和執行當事人協議管轄的民商事案件判決的安排》

* 當事人以書面形式明確約定香港法院或者內地人民法院具有唯一管轄權。

* 僅適用于民商事合約案件中所作出的給付金錢的判決，不包括確認權益或者要求履行某種行為等的其他判決。

* 不適用於婚姻、繼承、侵權、勞動爭議、破產等其他民商事案件。

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• 四、《相互認可和執行婚姻家庭民事案件判決的安排》

＊ 將兩地婚姻家事案件的最大公約數納入適用範圍。

＊ 吸收兩地家事改革最新成果，將香港各界十分關心的未成年子女返還等案件類型悉數納入，貫徹兒童利益最大化等價值理念。

＊ 創新條文表述技術，有效實現兩地法律制度的對接，將大量涉及財產分割的判決納入協助範圍。

業界評價，該安排是近年來兩地司法協助領域最聚焦民意、最貼近民生、最合乎民心的一項創舉，是以法律文件形式落實和豐富「一國兩制」方針的又一重大舉措。充分證明了兩地法律人以家國利益為重、以理解合作為念、以民眾福祉為要的使命擔當意識和開拓進取精神。

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- 五、《相互認可和執行民商事案件判決的安排》

  * 涵蓋兩地90%以上的民商事案件，標誌著兩地民商事領域司法協助已基本全面覆蓋。實現兩地最大範圍互認、最大程度協助，遠超與外國之間的協助。

  * 在知識產權問題上，本安排採取了比國際公約更加開放和積極的立場，以多個條文對知識產權案件判決的認可與執行問題做出了前瞻性規定，將更好服務粵港澳大灣區的創新驅動發展。

  * 將金錢判項和非金錢判項全部納入相互協助的範圍。

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上述安排的簽署，充分證明，只要兩地秉持「一國兩制」精神，相互理解、相互尊重，法律制度的差異不僅不會構成共同協作的障礙，而且可以在「一國」前提下，充分利用「兩制」 優勢，實現更加緊密的協助。

下一步，兩地法律人將繼續全面準確理解和貫徹「一國兩制」方針，把堅持「一國」原則和尊重「兩制」差異有機結合起來；將以更加開放的心態、更加開闊的思路，解放思想、探索創新，不斷擴大合作共識，不斷拓展兩地司法協助的廣度和深度，提升相互協助水平和效果。

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# 閉幕式致辭

鄭若驊 資深大律師 中華人民共和國香港特別行政區律政司司長


尊敬的喬主任、馮主任、各位嘉賓、各位朋友：

大家好。我在此致閉幕辭，必須要說回為甚麼我們會舉辦這個活動。如喬主任今天早上提到，一年前我們有了這個概念，但是我們還須知道將會有重量級的嘉賓參與、就像我們今天所有的講者，我才敢舉辦這次活動。所以要感謝各位與我們分享經驗的專家們。

接着我想分享為甚麼我們要用“追本溯源”這個概念？因為我們發覺有很多對《基本法》不完整的了解，有的是忘了《憲法》，有的說《憲法》在香港不適用，有的忘記“一國兩制”的前提就是“一國”的重要性，所以我們決定用“追本溯源”這個原則來主辦這次《基本法》頒布三十周年法律高峰論壇。

我們談到“追本溯源”，當然要提及今天早上張主任說過的“溫故知新”，行政長官講到的“毋忘初心”，我覺得這三句話是完全一致。如果我們要“追本溯源”的話，就像薛大法官所闡述，張主任亦提到，要從簽訂不平等條約的歷史背景下開始。中國一直對香港的立場

沒有改變，由始至終都不承認香港是一個殖民地，而且好像史久鏞大法官在 2017 年香港一個活動上提到，聯合國 2908 號決議在 1972 年通過時，其實就是確認了中國對香港和對三個不平等條約的一貫立場。這是非常重要的轉捩點。

我們今天聽到很多嘉賓提及鄧小平先生關於“一國兩制”的講話，我在這裡也補充一點。在 1970 年代時，鄧小平先生跟當時的港督 MacLehose（麥理浩爵士）明確說明一定會恢復行使主權，同時亦會保持香港的資本主義制度。在 1982 年，我們都記得當時的英國首相 Margaret Thatcher（戴卓爾夫人）來到中國與鄧小平先生談話，也記得他很明確說到主權這事是不能談判的。但是，有時候大家忽略了另外一個很重要的事情，對香港特別有關係的，就是國家在 1982 年修改了《憲法》，增加了第三十一條。《憲法》當然是在 1954 年已經訂立，然後作不斷修改。1982 年 12 月的那次修改對香港有重大的意義，因為第三十一條說明“國家在必要時得設立特別行政區。在特別行政區內實行的制度按照具體情況由全國人民代表大會以法律規定”。這是香港特區能夠成立、制定《基本法》的一個非常關鍵的修訂。

在此，我們重點回顧今天早上張勇主任提到的兩點。第一，是國家的體制。中國屬單一體制，權力完全來自中央。因此香港特別行政區是中央行使其權力所設立，特區的一切權力皆由中央授權。第二，是今天早上在張勇主任的視頻中看到的法律位階圖。這張圖內位處法律體系頂端的是《憲法》，《憲法》下才是《基本法》，還有香港的法律，當然還有內地其他立法機關，共八百七十一個立法主體所制定的法律。所以在這樣整個背景下，我們才可以好好的去了解到如何去“追本溯源”。當時中國修改《憲法》，加入了第三十一條後，在 1983 年 7 月 12 日，中央人民政府就向英國提出了十二項原則，也就是後來加進了《中英聯合聲明》中第三條，現在變成了《基本法》的十二項原則。我們要注意，《中英聯合聲明》第三條其實是中國自己表述會如何處理香港事宜，不像有些人說，是答應

英國而擬寫。就像剛才薛大法官也提到，在過渡的安排，當然中英雙方都有其要處理的工作，但在過渡後，就完全屬於中國自己行使主權的事務。

從今天早上薛大法官提到的事件，令我也想到兩個體現。第一，她明確用了香港回歸作為國家與國家之間和平解決爭議的一個模範。中英雙方縱有爭端是因為對條約的定性有不同看法，香港可以成功和平地回歸，對國際慣例、國際法的創新實踐起了很重要的作用，亦為國際社會提供一個全新務實的例子。第二，是薛大法官今天的憶述，我們可能沒注意到在過渡期間，中央曾經為香港做了那麼多的事情，那麼多的國際條約、國際組織，他們都用心地為香港的穩定、和平過渡，做了大量的工作。如張勇主任提到，《基本法》一百六十條，他們工作了五年去審查原有的法律，也逐一審查幾百條國際條約，這表現了中央對香港的重視和全力支持。

儘管如此，鄧小平先生的“一國兩制”政策要落實，第一步就是要通過法律程序。1985年4月，第六屆全國人大第三次會議議決成立《基本法》起草委員會。草委會在成立後舉行第一次全體會議，籌組諮詢委員會。諮詢委員會被譽為香港史上最大型、最具代表性的諮詢組織。起草《基本法》耗時四年八個月，得力於大量熱心的人士群策群力，起草過程有熱烈的爭論。我們今天知道有“東西珠”、“大小羅”之分。但是，因為他們都有着同樣的目標，希望香港可以和平回歸祖國，所以自然也就達成共識，有了我們現在的《基本法》。

《基本法》究竟應該怎麼樣去理解？為甚麼我們在二十三年後，現在要“追本溯源”？我在這裡要感謝馮主任，他分享了他的經驗，也說了肺腑之言。他分析出現某些問題，是不是對政治體制不理解等。他的解釋是可能我們用了一個心態，用了一個法律實證法的方法來理解香港《基本法》的制度，或許因此導致我們的理解出現了問題。正是這樣，我們更需要“追本溯源”。他也明確說明，應該用規範解釋法去正確理解《基本法》。這樣，我們就不會出現甚麼“三權分立”，

並能完全理解到香港實行是三權分置、互相配合、各司其職的一個制度。關於香港的政治體制，除了研究《基本法》條文，我們可以從今天早上探討立法原意的座談會，譚惠珠的分享中，理解到起草過程時經過多輪討論考慮後，仍然堅持實現行政主導的制度。其後，喬曉陽主任引述香港特區就是行政長官制的概念，也是以此得出結論。

容許我引用喬主任分享對理解《基本法》的六點體會。他強調：第一，必須要從國家立場上去看待《基本法》。第二，《基本法》和香港的憲制性地位是《憲法》賦予的，《憲法》在特區具有效力，要堅持《憲法》加《基本法》共同構建香港特區的憲制秩序的觀念。第三，《基本法》是一部授權法，是剛才我提到單一制國家的特質。香港特區的高度自治權不是本身固有，而是中央授予的。因此，《基本法》建造了一座名叫授權的法律橋樑，連接中央全面管治權和香港高度自治權。第四，《基本法》是一個有機聯繫的整體。喬主任把整部《基本法》的所有規定比喻為一串葡萄，它是個有機的整體，以一根葡萄藤把葡萄串在一起，互相聯繫，不可以單看某一個條款。我覺得他打的比方特別貼切，也帶出了如何去理解《基本法》的重點。舉例說，在釋法的問題上，有人說香港的法院可以解釋，當然根據第一百五十八條第（二）款和第（三）款，香港的法院在規定的情況下是可以對《基本法》的條文作出解釋。但整體看第一百五十八條的時候，我們便清楚了解《基本法》的最終解釋權是屬於全國人大常委會，香港法院的解釋是有限制的，其行使的解釋權也是來自全國人大常委會授權。第五，“一國兩制”和《基本法》的根本宗旨在《基本法》序言。我們都知道《基本法》的序言中，有兩點格外重要：就是維護國家統一和領土完整，保持香港的長期繁榮穩定。這兩點展示了中央對香港具有全面管治權，同時對香港的繁榮穩定負有憲制責任。譬如近日國安法立法，中央在維護國家安全和香港社會安定有其憲制責任，亦必須維護“一國兩制”和《基本法》的根本宗旨。由此，我們便能

確實明白全國人大做出維護香港國家安全的決定和由全國人大常委會制定在香港實施的相關法律內容。第六，以人民為中心的發展思想。與其他國家一樣，我們國家的初心一直都放人民的生活和利益在首要位置。細味這句話，我們可以理解“一國兩制”和《基本法》的初心和本意，就是從人民生活角度去發展，確保香港居民能安居樂業，社會繁榮穩定。

我們下午的題目也是特別有意義的。我們定的第一個題目是討論第一百五十八條釋法相關的事情和案例。當大家正確理解《基本法》，明白怎樣去看待當中條文，自然就會清楚第一百五十八條的整個規定和機制其實是十分周全，既保證司法獨立不受條文影響，也確保全國有一致性的解釋。《基本法》是一個憲制性的文件，解釋權當然是在最高權力機關全國人大下面的一個常設機關，即全國人大常委。不論你是用中國法學家的概念也好，用英國 Lord Bingham（首席大法官兵咸勳爵）的概念也好，司法獨立的意思都是很簡單，就是法官可以自由獨立地看證據和法律來作出一個裁決。這個司法獨立的定義，在每一個地方、每一個司法管轄區都是一致的。第一百五十八條釋法是立法的解釋，所以當香港法院運用全國人大常委會的解釋判案，是等於運用任何其他法律判案。因此，第一百五十八條釋法不會影響到司法獨立，尤其是法官自由獨立判案的權力，這點是很重要。

我們下午另外兩場座談會，完全返回我們說的初心，即是維護國家統一和領土完整，保持香港長期的繁榮穩定。首先，國家安全的討論其實就是初心的第一步。國家安全涵蓋的內容領域眾多。其中，我特別留意到很多人都以為在《基本法》裡面只有第二十三條是談到國家安全，張勇主任清楚指出這絕對是個錯誤的理解。國家安全其實在《基本法》裡面也分了三層：憲制層面，國家層面，特區層面，就是特區層面在法律制度裡也分了兩個方面，一個是原有法律，另外一個才是《基本法》第二十三條的立法。所以我們必須要全面準確的理解《基本法》，才能明白我們在國家安全

上應負有的相關責任。我也借此機會分享一下我對《港區國家安全法》中提到的兩個詞的理解。第一個是在《港區國家安全法》中提到的“本法”,“本法”即是《港區國家安全法》。第二個是《港區國家安全法》中“危害國家安全犯罪”或“危害國家安全的行為”。由此可見,《港區國家安全法》只是約束四類危害國家安全的行為和活動,而國家安全的範圍廣泛,遠遠超過《港區國家安全法》所涵蓋的,這也證明了剛才我引用張勇主任的解說,特區層面方面香港原有法律當中維護國家安全的規定繼續保留,例如原有法律《刑事罪行條例》第二條已包括叛逆,還有其他關於危害國家安全罪行的條文。所以我們去了解整個國家安全法制度的時候,除了《港區國家安全法》內具體訂明的犯罪行為,也必須參考現有的法律。

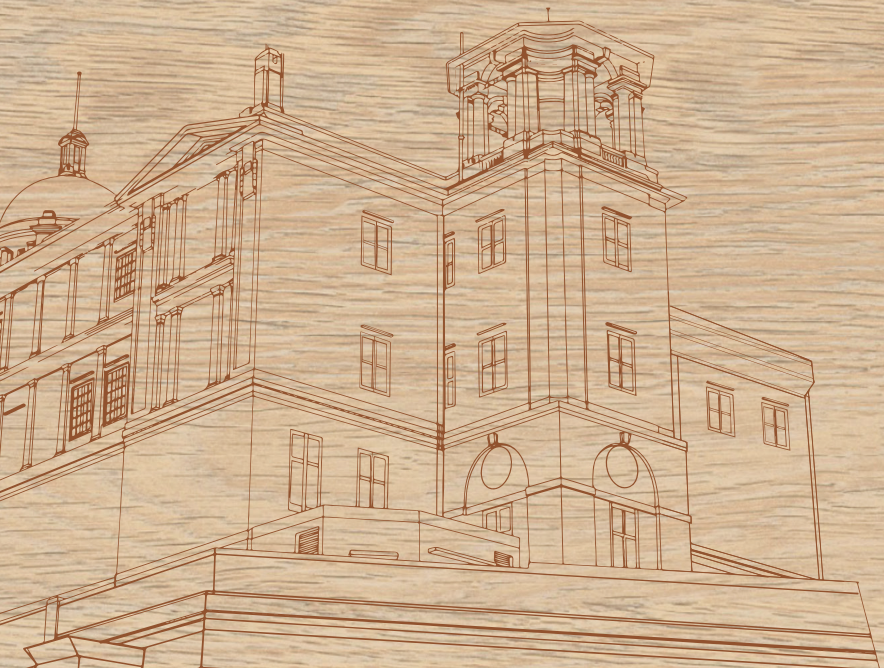
最後的一場座談會就是討論《基本法》對香港帶來的好處。其實大家很清楚知道,如果沒有“一國兩制”,如果我們不是中國的一部分,CEPA根本不會存在,我們也完全不會享受到安排下的優惠。所以不論是法律界還是商界,都因為我們的“兩制”同在“一國”之內而得以享有相關的優惠待遇。剛才司艷麗法官也提到多項司法協助安排,香港能成功爭取這些突破性的安排,全因我們是國家的一部分,其他地方即使望眼欲穿也不會得到。剛才劉洋律師提到的民商事判決相互執行的安排,看似是很普通,但這安排讓內地與香港可以相互認可和執行某一些知識產權判決的安排,超越了《海牙判決公約》的現有規定。這凸顯出“一國兩制”下,香港非常獨特的地位和優勢。在仲裁保全措施安排下,香港不僅是第一個,也是唯一一個在內地司法管轄區以外進行仲裁程序的當事人可以向內地法院申請保全措施。

所以我們藉着是次法律高峰論壇,從法律層面去探討“一國兩制”,進而從法律層面去探討在“一國”這個大前提之下,如何可以展現“兩制”的優勢,充分發揮香港的長處和特質。今日之後,我們知道很多議題都可以再深入研究和繼續講解。我在這裡跟大

家分享兩件已正式敲定的事項。第一，律政司現正密鑼緊鼓地準備把《基本法》相關的實際案例，還有一些材料彙編成書，爭取在香港回歸二十五周年，就是 2022 年時，發行此書作為紀念，同事都很努力的工作，希望大家能夠支持我們。第二，也是跟《基本法》有密切關係，就是勵進教育中心明日開始會就《憲法》《基本法》、《港區國家安全法》等相關的題目進行一系列的老師培訓活動，律政司完全支持並會盡力配合。另外，我們內部也在跟一些 private practitioners（私人執業者）和單位合作準備電子材料，希望能夠提供比較全面準確的資料協助推進《憲法》、《基本法》、《港區國家安全法》等，讓大家能夠有正確的認識和理解。

我在此再一次感謝喬主任、馮主任，他們從北京特別過來，謝謝你們。也衷心感謝香港和線上的各位專家講者抽時間跟我們交流分享。當然，我也要感謝律政司的同事，我們雖然是構思了一年，因為很多不同的原因，經過數次改期押後，到我們決定正式舉辦的時候，時間很倉促，所以我們同事的工作量是超乎想像的巨大。容許我在這裡點名兩位特別要感謝的同事，一位 Llewellyn Mui 梅基發，另一位是 Grace Wu 胡嘉恩。

最後，今日我們“追本溯源”、“毋忘初心”、“溫故知新”，我希望往後大家可以固本培元，讓“一國兩制”行穩致遠。謝謝各位。

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中座
Main Wing
西座
West Wing


律政司
DEPARTMENT OF JUSTICE

# Basic Law 30th Anniversary Legal Summit – Back to Basics

# Proceedings

# Foreword

The Basic Law of the Hong Kong Special Administrative Region (the Basic Law) was adopted and promulgated on April 4 1990 by the National People's Congress in accordance with Article 31 and Article 62(14) of the Constitution of the People's Republic of China (the Constitution). The Constitution and the Basic Law form the constitutional basis of the Hong Kong Special Administrative Region (HKSAR).

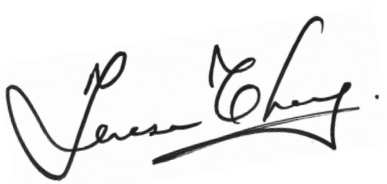
The Basic Law ensures the implementation of the basic policies of the People's Republic of China regarding Hong Kong, i.e. "one country, two systems" and a high degree of autonomy, and safeguards Hong Kong's prosperity and stability.

Year 2020 marks the 30th anniversary of the promulgation of the Basic Law. The Department of Justice organized our first Legal Summit on the promulgation of the Basic Law which aims at sharing the experience of successful implementation of the Basic Law, allowing us to go "back to the basics" and promoting public understanding of the original intent and purpose of "one country, two systems".

I am greatly indebted to the Central People's Government and the renowned legal experts and academics in the Mainland and Hong Kong for their immense support and inspirational sharing in making this Legal Summit a success. To allow the public to properly and better understand the Basic Law and to reflect on the insightful comments, the Department of Justice has prepared a proceedings comprising of the speeches and discussions of the eminent speakers. The

holding of the event and the publication witness the successful implementation and development of the Basic Law in the HKSAR. It enables the community to develop a solid understanding of the original intent of the Basic Law and ensures the steady and long-term success of "one country, two systems".

Lastly, I would like to extend my heartfelt appreciation to my fellow colleagues in the Department of Justice for their support and attentive arrangement, in particular the Basic Law Unit of the Constitutional and Policy Affairs Division, to successfully host the Legal Summit notwithstanding the pandemic. I would also like to express my gratitude to the China Legal Services (H.K.) Ltd. for providing professional editing service and suggestions within a short space of time to collaborate with the Department of Justice in the production of this meaningful and commemorative proceedings.



Ms Teresa Cheng, GBS, SC, JP
Secretary for Justice
Hong Kong Special Administrative Region

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# Welcome Remarks

The Honourable Mrs. Carrie Lam Cheng Yuet-ngor, GBM, GBS, The Chief Executive of the Hong Kong Special Administrative Region, the People's Republic of China


Vice-Chairperson Leung Chun-ying, Chairperson Qiao Xiaoyang, Chief Justice Geoffrey Ma Tao-li, President Andrew Leung Kwan-yuen, Deputy Director Chen Dong, Commissioner Xie Feng and Deputy Director Li Jiangzhou, distinguished guests, colleagues and friends,

Good morning. Whether you are attending in-person or online, I would like to welcome everyone to today's Basic Law 30th Anniversary Legal Summit, organised by the Department of Justice of the Hong Kong Special Administrative Region (HKSAR) Government.

The Summit will help promote public understanding of the Constitution of the People's Republic of China and the Basic

Law and enable us to reflect on the experience and issues involved in the implementation of the Basic Law.

Achieving the Summit's goals requires speakers and panelists of considerable standing. It is a great honour for us to have a number of eminent guests from Hong Kong and the Mainland to share their insights and practical experience. Among them are Mr. Qiao Xiaoyang, former Chairperson of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress (NPCSC) and Mr. Feng Wei, former Deputy Director of the Hong Kong and Macao Affairs Office of the State Council. Both of them have travelled all the way from Beijing to Hong Kong to attend this Summit. Mr. Zhang Xiaoming, Deputy Director of the Hong Kong and Macao Affairs Office of the State Council, Mr. Zhang Yong, Vice-Chairperson of the HKSAR Basic Law Committee of the NPCSC and Judge Xue Hanqin, Vice-President of the International Court of Justice will deliver their speeches online.

Our speakers from Hong Kong include Ms. Elsie Leung Oi-sie, former Secretary for Justice and former Vice-Chairperson of the HKSAR Basic Law Committee of the NPCSC, Ms. Maria Tam Wai-chu, Vice-Chairperson of the HKSAR Basic Law Committee of the NPCSC, and Professor Albert Chen Hung-yee, a member of the HKSAR Basic Law Committee of the NPCSC. Each of them are renowned experts on the Basic Law and some of them have experience related to its implementation. I am delighted that they are all able to join us on this celebratory occasion, sharing their experience and discussing the Basic Law and its relationship with "One Country, Two Systems" from various perspectives. I am sure that we will

benefit from their sharing and I express my heartfelt appreciation to each and every one of them for their participation and support.

The theme of this Summit is "Back to Basics". To me, reviewing the formulation and implementation of the Basic Law by going "back to basics" at this very moment is not only of great historical significance, but also highly relevant to our time. If I was asked to select an appropriate phrase to match the theme of "Back to Basics" for a Chinese couplet, I would choose "staying true to the original intention".

As I pointed out in June this year during the webinar held by the HKSAR Government to commemorate the 30th anniversary of the Basic Law's promulgation, we must revisit the original intent of "One Country, Two Systems" in order to understand the Basic Law. The concept of "One Country, Two Systems" proposed by Mr. Deng Xiaoping back then was to preserve the characteristics and strengths of Hong Kong to the greatest extent. It was based on the premise of upholding national unity and territorial integrity as well as maintaining Hong Kong's prosperity and stability, while taking the city's history and realities into account, so as to maintain Hong Kong citizens' way of life. We have never deviated from this original intent. This is also the core principle underpinning the various policies adopted by the Central Authorities in relation to the HKSAR.

Given this invariant original intent, it goes without saying that sovereignty is not up for negotiation, and any talk of "Hong Kong independence" will not be tolerated. When implementing the Basic Law, we must stick to the "One Country" principle, properly handle the relationship between the HKSAR and the

Central Authorities, respect the authority of the Central Authorities, and also safeguard the high degree of autonomy of the HKSAR.

When applying the Basic Law, we need to also understand the Constitution of the People's Republic of China, because the Constitution and the Basic Law jointly constitute the constitutional order of the HKSAR. According to Article 31 of the Constitution, the State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress (NPC) in light of specific circumstances. The NPC has the right to determine the establishment of special administrative regions and their systems.

Based on the Constitution, the NPC adopted and promulgated the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on April 4, 1990, in accordance with the provision of Paragraph 14 of Article 62 of the Constitution. And the Basic Law took effect on July 1, 1997 when the HKSAR was established. Paragraph 2 of Article 62 of the Constitution also provides that the NPC shall exercise the power and function to supervise the enforcement of the Constitution. In May this year, the NPC, by exercising the very power invested in it by the Constitution, passed a decision which authorised the NPCSC to enact the law on the legal systems and enforcement mechanisms to safeguard national security in the HKSAR. In doing so, it is indisputable that the NPC conformed with the Constitution and the law.

The NPCSC is the permanent body of the NPC. It has the power to interpret the Basic Law and supervise the enforcement of

the Basic Law. It is also empowered to deal with constitutional issues arising from the implementation of the Basic Law. In the past few months, there were two constitutional issues arising in Hong Kong that could not be solved by the HKSAR alone. One of them was a lacuna in the legislature resulting from the HKSAR Government's postponement of the Legislative Council (LegCo) General Election for one year, due to the epidemic. Another issue concerned whether four LegCo members, who had been found by the returning officers as not upholding the Basic Law and not pledging allegiance to the HKSAR of the People's Republic of China, could retain their seats in light of the NPCSC's decision for the sixth-term LegCo to continue to discharge its duties.

Given that the Chief Executive shall be accountable to the Central People's Government and the HKSAR, I asked the Central People's Government twice to submit the matters to the NPCSC to resolve the issues at the constitutional level. The way these issues were handled complied with provisions of the Constitution and the Basic Law and was fully justified. There is no room for any foreign government or political organisation to question or criticise it.

Recently, I have cited two statements by Mr. Deng Xiaoping, the architect of "One Country, Two Systems", to refute some absurd criticisms about the Law of the People's Republic of China on Safeguarding National Security in the HKSAR and the oath-taking of some LegCo members. Those statements clearly show that the Central Authorities have always acted conscientiously in upholding policies towards Hong Kong under "One Country, Two Systems". When Mr. Deng met with

the members of the Drafting Committee for the Basic Law of the HKSAR in 1987, he said, and I quote: "[d]on't ever think that everything would be alright if Hong Kong's affairs were administered solely by Hong Kong people while the Central Authorities had nothing to do with the matter. That simply wouldn't work — it's not a realistic idea. The Central Authorities certainly will not intervene in the day-to-day affairs of the Special Administrative Region, nor is that necessary. But isn't it possible that something could happen in the Special Administrative Region that might jeopardise the fundamental interests of the country? Couldn't such a situation arise? If that happened, should Beijing intervene or not? Isn't it possible that something could happen there that would jeopardise the fundamental interests of Hong Kong itself? If the Central Authorities were to abandon all its power, there might be turmoil that would damage Hong Kong's interests. Therefore, it is to Hong Kong's advantage, not its disadvantage, for the Central Authorities to retain some power". At that time, Mr. Deng asked the members to consider and cover these aspects when drafting the Basic Law. In view of the violence and turmoil which has traumatised Hong Kong for nearly a year, the Central Authorities must exercise its power by formulating and enacting the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.

What's more, Mr. Deng pointed out in 1984, "[t]he idea of 'Hong Kong people administering Hong Kong' has its scope and criteria, that is to say Hong Kong must be managed by Hong Kong people, with patriots forming the mainstay… The criteria for a patriot are to respect one's

own nation, sincerely support the resumption of the exercise of sovereignty over Hong Kong by the Motherland, and not to impair Hong Kong's prosperity and stability". On the 11th of this month, the NPCSC made a decision that unambiguously stipulates the qualification of LegCo members and the legal liability for breaking their oath, in accordance with relevant requirements of the Basic Law. So, if you carefully examine these two statements from Mr. Deng, you will realise that all the recent criticisms of the Decisions of the NPCSC are groundless.

Ladies and gentlemen, in a keynote speech during his visit to Hong Kong in July 2017, President Xi Jinping reiterated that the implementation of "One Country, Two Systems" requires constant evolution. He observed that going forward, to better implement "One Country, Two Systems" in Hong Kong, we should always have an accurate understanding of the relationship between "One Country" and "Two Systems", and we should always act in accordance with the Constitution and the Basic Law. During the past year, as the Chief Executive of the HKSAR, I experienced a tough political ordeal, through which I realised that only when both aspects "always" can be upheld, would the implementation of "One Country, Two Systems" be steadfast and successful.

In closing, I would like to express my gratitude once again to each and every guest and speaker for your support and the invaluable insight you are about to bring, and for sharing with us your understanding and knowledge of the Basic Law during this Summit. By taking this rare opportunity, let's go "Back to Basics" so that we can jointly and unswervingly forge ahead. Thank you.

# Welcome Remarks

Zhang Xiaoming, Executive Deputy Director of the Hong Kong and Macao Affairs Office of the State Council, the People's Republic of China

Dear Chief Executive Carrie Lam Cheng Yuet-ngor, distinguished guests and friends,

Good morning!

Due to the COVID-19 epidemic, this legal summit that commemorates the 30th anniversary of the promulgation of Hong Kong's Basic Law has been postponed several times. It is finally held today, which is not easy at all. On behalf of the Hong Kong and Macao Affairs Office of the State Council, I would like to express my congratulations, and my sincere gratitude to the Department of Justice and other departments of the Hong Kong SAR Government as well as the relevant departments of the Central Government for doing lots of work to organize this summit and to all the distinguished guests, experts and scholars for attending

this summit.

Marked by the promulgation of the Hong Kong National Security Law, Hong Kong has made a new advance by turning chaos to order. Recently, the Central Government and the SAR Government have taken a number of important measures one after another, including the disqualification of four Legislative Council (LegCo)members. People with differing points of views are more concerned about the future of Hong Kong than ever. Today, I would like to share three points with you in the light of the theme of this seminar.

**First, it is key that the policy of "one country, two systems" be implemented fully and accurately.** This is an important viewpoint repeatedly expounded by President Xi Jinping, and it is the only way to ensure the sound and sustained implementation of "one country, two systems". To fully and accurately understand and implement the policy of "one country, two systems", we should note the two sides of the same coin and also the key point in every matter. We should emphasize that there are both "two systems" and "one country"; and should understand that the "one country" is the premise and basis for the implementation of "two systems". We should respect not only the capitalist system practiced in Hong Kong, but also the socialist system practiced by the main body of the country; and should know that the socialist system with Chinese characteristics under the leadership of the Communist Party of China is the support and guarantee for Hong Kong's capitalist system to remain unchanged on a long-term basis. We should not only maintain Hong Kong's long-term prosperity and stability, but also safeguard the country's sovereignty, security and development interests; and should understand that the latter safeguard is the primary

purpose of "one country, two systems". We should respect not only the high degree of autonomy of the HKSAR, but also the overall jurisdiction of the Central Government; and should understand that the overall jurisdiction of the Central Government is the origin of the high degree of autonomy. We should safeguard not only the rule of law in Hong Kong, but also the constitutional order of the country; and should know that Hong Kong's legal system, including the common law system, has been incorporated into the constitutional order established on the basis of the Constitution and the Basic Law after Hong Kong's return. We should boast not only Hong Kong's many international competitive advantages, but also the Mainland's strong supporting role; and should understand that the development of Hong Kong is increasingly inseparable from the Mainland and benefits more and more from it. We should not only love Hong Kong, but also love the country; and should understand that Hong Kong will only prosper well if the Motherland is prospering well, and therefore patriotism must come before such core values as democracy, freedom and human rights that are cherished in Hong Kong. We should not only seek common ground while reserving differences, but also stick to the bottom line; and should realize that the more firmly we stick to the bottom line, the greater room there will be for political tolerance. Reflecting on the many problems that have arisen since Hong Kong's return to the Motherland, they are after all related to the incomplete and inaccurate understanding and implementation of the policy of "one country, two systems". This is especially true of both the illegal "Occupy Central" event which had the main purpose of forcing the Standing Committee of the National People's Congress to withdraw its 8·31

Decision, and the "Turbulence over the Amendment Bill" that pursued the cause of opposing the surrender of fugitive offenders to the Mainland. They were confrontational involving unrestrained behavior and finally turned into social unrest, causing serious harm to "one country, two systems". These events not only endangered national security, but also made the whole society of Hong Kong suffer severely. What's done cannot be undone, but we can learn a lesson and work towards a better future. The Central Government, the HKSAR Government, the media, the education sector and other sectors in society should thoroughly review and learn from past experience, enhance the comprehensive and accurate promotion of the policy of "one country, two systems", strengthen research on practical issues and theoretical exposition, and jointly safeguard "one country, two systems".

**Second, it is practically necessary to improve the institution of "one country, two systems".** As we all know, the Basic Law of the HKSAR is the legalization and institutionalization of the policy of "one country, two systems". As a piece of constitutional law, the Basic Law needs to be kept relatively stable. But since the situation in society is constantly changing and the implementation of "one country, two systems" is constantly being enriched and developed, how can we constantly adapt to the new situation and effectively solve new problems during the process of implementing the Basic Law? In my opinion, first of all, we are required to treat the Basic Law as a piece of "living instrument" and enhance the adaptability of the Basic Law through methods such as legislative interpretation. Secondly, we also need to continuously improve the institution related to the implementation of the Basic Law in different ways other than via the

Basic Law. From the perspective of promoting the modernization of the national governance system and governance capacity, the Fourth Plenary Session of the 19th CPC Central Committee made an overall plan for improving the system for the Central Government to exercise overall jurisdiction over the SAR in accordance with the Constitution and the Basic Law. This has provided a direction for us to take the relevant aspects of work forward in the next step. We are pleased to see that the relevant departments of the SAR Government are making an effort to improve the oath-taking system for civil servants, the national education system, the qualification review system for LegCo members and other relevant systems. I am also aware that there has been some heated discussion on the issue of judicial reform in Hong Kong society recently. Mr. Henry Denis Litton, an honorable former Permanent Judge of the Hong Kong Court of Final Appeal, has also made an appeal: "It's time for a judicial reform!" Such a rational voice from an "insider" deserves the attention of the whole society, especially the judiciary and the legal profession. Even in western countries, their judicial systems also keep abreast of the times and constantly undergo reforms, without affecting judicial independence. In short, the practice of "one country, two systems", which shall remain unchanged for 50 years, has entered a mid-term stage. Many problems have been fully revealed, and practical experience has been accumulated. Our understanding of the patterns of the implementation of "one country, two systems" has also deepened. Under such circumstances, with a view to ensuring Hong Kong's long-term peace, stability and prosperity in the next 26 years or beyond, not only is it practically necessary to systematically plan to improve the institution of

"one country, two systems", the favorable conditions for this end are basically ready as well.

**Third, it is a top priority to clear up the confusions and bring order out of chaos in terms of ideas and views.** Bringing order out of chaos in any era starts from clearing up the confusions of ideas and views. Some popular sayings have dominated Hong Kong's public opinion for a long time now. For example, "the interpretations of the Basic Law and the decisions made by the Standing Committee of the NPC interfere with Hong Kong's high degree of autonomy and undermine judicial independence"; "the Constitution does not apply in Hong Kong"; "Hong Kong implements a political system that exercises separation of powers"; "universal suffrage with screening is a fake"; "civil servants' oath-taking goes against political neutrality"; "national education is brainwashing"; "the development of the Guangdong-Hong Kong-Macao Greater Bay Area will 'mainlandize' Hong Kong"; "civil disobedience"; "justice through lawbreaking" and so on. These sayings have shown a lack of a comprehensive and accurate understanding of "one country, two systems". Some of them even bear the intention of confusing the right and the wrong and misleading the public. It's now the time to carry out a radical reform and correct the old wrongs. To bring order out of chaos in terms of ideas and views, we should not only abandon the wrong concepts, but also set them right. From this point of view, the current discussion on the criteria for those who administer Hong Kong has become even more necessary and is of universal and fundamental significance. Could we imagine a Hong Kong being governed by people who do not identify with the country, who intentionally confront the Central Govern-

ment, or even intend to subvert the state power and collude with foreign forces to endanger national security? Is this in line with the original intention of "one country, two systems" and the criterion of "Hong Kong people administering Hong Kong"? The HKSAR is an inseparable part of the People's Republic of China. It is perfectly justified to require that those who govern Hong Kong must be patriots. Personnel of the political organs of the HKSAR must sincerely uphold the Basic Law, pledge allegiance to the People's Republic of China and the HKSAR, and never do anything harmful to the national interests and Hong Kong's prosperity and stability. The decision just made by the Standing Committee of the NPC regarding the qualifications of LegCo members of the HKSAR on November 11 not only provides a solid legal basis for the SAR Government to immediately disqualify four LegCo members, but also establishes clear rules for dealing with this type of problem in future. It is a political rule under "one country, two systems" that those who are patriotic and love Hong Kong should govern Hong Kong, and those who are against China and do harm to Hong Kong should be struck out. This has also become a legal norm now.

Distinguished guests and friends, the world is now facing a great change unprecedented in the past century. One of the largest variables in this great change is that China is becoming strong and prosperous. Our country is about to achieve the goal of establishing a moderately prosperous society in all respects and move towards a new course of building a modern socialist country. The great rejuvenation of the Chinese nation is bound to take place. The world is changing. China is changing. And so is Hong Kong. The changes in Hong Kong take both passive and

active forms, including bringing order out of chaos politically and solving difficult problems in economy and people's livelihood with the courage to carry out reforms. During this period of change, hardships must be inevitable, but the general trend must be going from strength to strength. Just imagine, if there is no more widespread street violence in Hong Kong, no more endless "filibustering" or violence in LegCo and no more political blackmail of "mutual destruction", and citizens no longer have to worry about visiting a "Yellow Shop" or a "Blue Shop" as they walk into a restaurant and everyone is enjoying freedom from fear, then those ill-intentioned foreign forces will no longer be able to stir up trouble and act recklessly in Hong Kong, or treat Hong Kong as their weapon arbitrarily. If we can effect these changes, with the wisdom, diligence and resilience of Hong Kong compatriots, coupled with the full support of the Central Government and the Mainland in jointly advancing development, surely economic recovery will come soon, people's livelihood will improve, the status of Hong Kong will remain unchanged, and the housing problem bothering many citizens will be solved. Recently, we have heard a lot of shopworn claptrap such as: it is the darkest day; "one country, two systems" is dead; the rule of law is dead, and so on. Let these noise become the historical record which discredit those who spread the sheer bunk in Hong Kong and in the international community. Let the furphies become the background music amid Hong Kong's changes and advancement for a better future. Facts will definitely prove that Hong Kong will be governed better. "One country, two systems" is bound to achieve greater success.

I wish this summit every success! Thank you.

# Welcome Remarks

Chen Dong, Deputy Director of the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region


The Honorable Chief Executive Carrie Lam Cheng Yuet-ngor, Vice-Chairperson Leung Chun-ying, distinguished guests and friends, ladies and gentlemen,

It is a great pleasure for me to participate in the Basic Law 30th Anniversary Legal Summit organized by the Department of Justice of the Hong Kong Special Administrative Region (HKSAR). Director Luo Huining entrusted me to extend warmest congratulations to the hosting of the Summit on behalf of the Liaison Office of the Central People's Government in the HKSAR and express cordial welcome to Mr. Qiao Xiaoyang and Mr. Feng Wei for attending the Summit in Hong Kong by overcoming the challenges arising from the pandemic.

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was adopted at the Third Session of the Seventh National People's Congress 30 years ago and came into force on July 1, 1997. With the strongest safeguard provided by the Basic Law, Hong Kong has fully utilized the unique advantages of "one country, two systems" and various sectors continue to do well over the past 23 years. In the World Justice Project Rule of Law Index, Hong Kong made a great leap in the global ranking from below 60th before its return of sovereignty to the current 16th. We can be sure that the progress in the rule of law in Hong Kong since the return of sovereignty marks an accomplishment made by the Central Government through its comprehensive and accurate implementation of the "one country, two systems" policy as well as an achievement made by the successive SAR governments and the judicial and legal community of the HKSAR through their unremitting efforts.

The world is undergoing profound changes unseen in a century, and China is now at a critical stage of the great rejuvenation of the Chinese nation. Hong Kong has also entered a new stage for the implementation of the "one country, two systems" policy. As an unprecedented and groundbreaking initiative, "one country, two systems" might inevitably encounter new situations, problems and challenges. The key lies in staying true to our original intention, maintaining our focus, implementing the Basic Law fully and faithfully, and ensuring the principle of "one country, two systems" is implemented in Hong Kong without any distortion and that it is accurately followed. I would like to take this opportunity to share three points with you.

First, we should respect the

authority of the Constitution and the Basic Law, safeguard "one country, two systems" and the constitutional order. The Constitution and the Basic Law have determined the constitutional order of "one country, two systems" in Hong Kong. To uphold the rule of law in Hong Kong, the supremacy and authority of the Constitution and the Basic Law in the Hong Kong legal system must be respected. With a unitary state system, our Central Government exercises overall jurisdiction over all local administrative regions, including the SARs. The National People's Congress (NPC) as the highest organ of state power decided, in accordance with the Constitution, to establish the HKSAR and enact the Basic Law of the HKSAR, and authorized the HKSAR to exercise a high degree of autonomy through the Basic Law. Hong Kong is an integral part of China. No political and legal practice in Hong Kong can violate this fundamental principle of the constitutional system. Any attempt to challenge the overall jurisdiction exercised by the Central Government will impact the "one country, two systems" policy and the constitutional order, and will eventually undermine the foundation of the high degree of autonomy enjoyed by the HKSAR.

It is vital to implement the principle of "patriots administering Hong Kong" to maintain the constitutional order of "one country, two systems". In particular, those who administrate Hong Kong must sincerely uphold the Basic Law of the HKSAR and swear allegiance to the HKSAR of the PRC. This is not only a political ethic for the public officers of the administrative, legislative and judiciary to observe, but is also clearly stipulated in the Basic Law. Only through adhering to the bound-

ary and criteria of the principle of patriots administering Hong Kong, can we truly preserve national sovereignty, security and development interests, effectively safeguard the prosperity and stability of Hong Kong and the well-being of Hong Kong people and continuously implement the "one country, two systems" policy.

Second, we need to accurately appreciate the original legislative intent of the Basic Law and maintain the executive-led political system of the HKSAR. During his meeting with members of the Basic Law Drafting Committee of the HKSAR in 1987, Mr. Deng Xiaoping noted that Hong Kong should not indiscriminately copy the Western system and that it would not be appropriate to implement the "separation of powers". Guided by this important thinking of Mr. Deng, the Basic Law is in line with the legal status and actual situation of the HKSAR and establishes an executive-led political system with the Chief Executive at its core. Under "one country, two systems", the Chief Executive, at the core of the executive authorities of the HKSAR, is vested with the dual role as head of both the HKSAR and its government and has "dual responsibility" to the Central Government and the HKSAR. At present, Hong Kong has not emerged from the pandemic, and its economy and people's livelihood are yet to recover and improve. We must firmly safeguard the executive-led system, support the Chief Executive and the HKSAR Government to effectively govern Hong Kong according to the law, and avoid unnecessary arguments and impediment which lead to turmoil and missing of epochal opportunities.

Third, we should improve the institutional system of "one

country, two systems", as well as promoting its sound and steady development. Since the return of sovereignty 23 years ago, the Central Government has unswervingly implemented the policy of "one country, two systems", "Hong Kong people administering Hong Kong" and a high degree of autonomy for the HKSAR and has dealt with major issues arising from the implementation process of the Basic Law in a timely manner. The NPC and its Standing Committee have made a series of legislation, interpretation of the Basic Law and decisions on Hong Kong-related matters. This allows the implementation of "one country two systems" to adapt to the development and changes of the society of Hong Kong, to continue to seek truth from facts and advance with times. In light of the turmoil arising from the legislative exercise of the Fugitive Offenders Bill, the Central Government has taken the initiative, and the NPC and its Standing Committee have made several important decisions concerning Hong Kong since the beginning of 2020, to assist Hong Kong to end chaos and restore order. On June 30, the Standing Committee of the NPC, in accordance with relevant decisions of the NPC, passed the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region to plug the loophole in national security in Hong Kong. On 11 August, the Standing Committee of the NPC decided that the sixth-term Legislative Council (LegCo) of the HKSAR should continue to discharge its duties for no less than one year to avoid the legislative vacuum caused by the postponement of the seventh-term LegCo election. Last Wednesday, the Standing Committee of the NPC made a decision on the qualifica-

tion of members of the LegCo of the HKSAR, to further delineate the institutional threshold and rules in order to ensure that the LegCo members fulfil the constitutional duty of "upholding" and "bearing allegiance" to the constitutional system. Based on the Constitution and the Basic Law, these important measures are intended to improve the system of the SAR under "one country, two systems". Relevant decisions and interpretations made by the NPC and its Standing Committee, and Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region in the Basic Law, along with the Constitution and the Basic Law, jointly constitute an important part of "one country, two systems". They will ensure the sound and steady development of the cause of "one country, two systems" in Hong Kong.

Distinguished guests and friends, the outline of the "14th Five-Year Plan (2021-2025) for National Economic and Social Development and the Long-Range Objectives Through the Year 2035" recently adopted at the fifth plenary session of the 19th Central Committee of the Communist Party of China provides a promising blueprint for the nation's development and sets the scene for the future development of Hong Kong. We believe that, under the leadership of the Chief Executive Carrie Lam Cheng Yuet-ngor and the HKSAR Government, and with the concerted efforts of all walks of life, including the judicial and legal community, Hong Kong will be able to overcome difficulties and continue to leverage its unique advantages to further integrate into the big picture of national development, take forward its own development and write a new chapter for the implementation of "one country, two systems". Thank you.

# KEYNOTE SPEECH:
# The Constitution of the People's Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region

**Zhang Yong**

Vice-chairperson of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress

The Honorable Vice-Chairperson Leung Chun-ying, Chief Executive Mrs Carrie Lam Cheng Yuet-ngor, Deputy Director Chen Dong, distinguished guests, good morning.

First of all, I would like to express my gratitude to the Hong Kong Special Administrative Region (HKSAR) Government for inviting me to be a guest speaker at this Basic Law 30th Anniversary Legal Summit. The topic of my speech today is "The Constitution of the People's Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region". More than 30 years ago, during the drafting of the Basic Law, the topic had already undergone in-depth deliberations with broad consensus reached. We are here today to go "back to the basics"

to review our knowledge of the Basic Law. In essence, this topic is about state governance. To elaborate, it is about the constitutional status of the HKSAR within the state governance. On this question, President Xi Jinping made the insightful remark that, with the Reunification, the major transformation of Hong Kong's constitutional order was accomplished. As a special administrative region directly under the Central People's Government, Hong Kong has since its Reunification been included again into China's national governance structure. To have a comprehensive, accurate, and in-depth understanding of the new constitutional order following the Reunification, I wish to highlight two key points. First, the Constitution and the Basic Law together form the constitutional basis of the HKSAR. Second, the overall jurisdiction of the Central Government over the HKSAR and the high degree of autonomy of the HKSAR must integrate in an organic way. The first point concerns the legal basis of the new constitutional order. The second point concerns how the new constitutional order is to function effectively. I will share my views from four different perspectives. First, what is a constitution? What is its status in the state governance? How did the Chinese Constitution come about? Second, the original intent of the "one country, two systems" principle and its implementation. Usually, a single system is practiced within one country. Why does China practice "one country, two systems"? What was its original intent? What are the characteristics of its implementation? Third, the relationship between the Basic Law and the Constitution. We all know that the Basic Law is "one country, two systems" in legal form. So, what is its relationship

with the Constitution? Lastly, I will talk about how the overall jurisdiction of the Central Government and the high degree of autonomy of the SAR can be organically integrated.

## I. What is a constitution?

A constitution can be summarized by three statements. First, it is the foundation of a modern state. Every modern state has a constitution; the establishment of a constitution precedes the establishment of a state. Second, a constitution provides fundamental safeguards to a country's stability and development. Third, a constitution is the political manifestation of a country's history, culture, economy and society. There are altogether over 190 constitutions in the world, differing from one another. Embedded in each constitution is the history, cultural and social values of its country and people. Take the example of two countries we are familiar with, the United Kingdom has an unwritten constitution, whereas the United States has a written constitution. The constitution of the UK establishes the state as a constitutional monarchy, while the constitution of the US establishes a republic.

In terms of state structure, the UK is a unitary state and the US is a federation. In respect of political system, the UK practices parliamentary supremacy, while the US practices checks and balances among the three powers.

On what national conditions is the Chinese Constitution based? The Constitution of the People's Republic of China is the product of the past 100 years of modern Chinese history. The 100 years of modern China began with the Hong Kong Island in the 1840 Opium War and continued up to 1949 when the People's Republic of China was found. That is the modern history of China. Modern Chinese history is a history of wars, with every war ended in ceding of territories and payment of reparations, and infliction of pain and sufferings to the Chinese people. These 100 years also marked the transformation of China from a feudal society to a modern one. In these 100 years of China's modern history, the Chinese nation had two main historical missions. The first was to save the country and achieve national independence. The second was to make China a modern state and prosperous country through reform and constitutionalism. However, anyone who has briefly read Chinese history would know that the road of reform and constitutionalism in the history of China was far from smooth. It was bumpy and full of difficulties. The two Opium Wars forced Chinese to open their eyes to see the world. The "Self-Strengthening Movement" was launched with "Chinese learning for the essence, western learning for practical use" as its motto. As a consequence of the War of Jiawu in the First Sino-Japanese War, it was realized that the country could not be saved by military modernization alone. Therefore, another political reform was launched in the

name of ancient teaching, and there were calls for a constitutional monarchy. After the failure of the "Hundred Days' Reform", the Eight-Nation Alliance invaded Beijing. In a bid to prevent its downfall, the Qing government hastily launched a constitutional reform movement. It was in the end overthrown by the 1911 Revolution. In the following decades under the rule of the Republic of China, more than ten constitutions of various forms were adopted. The entire century of reform and constitutionalism did not make China a true modern state. What does this illustrate? It illustrates that these efforts failed to reflect the true national conditions in China, nor did they truly represent the interests of the Chinese people in the broadest sense. In 1949, the People's Republic of China was founded by the Communist Party of China. In 1954, the Constitution of the People's Republic of China was promulgated. The Constitution is the choice of the Chinese history and also the choice of the Chinese people. It is a constitution most suited to the Chinese national conditions. China attained national independence in 1949. With China set on the path of a modern state, the historical missions of the Chinese nation also undergo changes. The Constitution is described as a general charter for governing the country and for peace and stability, or it can be called the fundamental law of the country.

## II.Original intent and implementation of "one country, two systems"

In 1949, once China attained national independence and started its journey to become a modern state, its historical missions also underwent changes. Contemporary China has three main historical missions, which remain valid today. First, to real-

ize national rejuvenation through modernization initiatives. Second, to achieve unification of the country. Third, to maintain world peace and promote mutual cooperation on development. The "one country, two systems" policy we are discussing today was set to achieve the second historical mission. The essence of the policy is to resolve the historical issues of Hong Kong, Macao and Taiwan through peaceful means, to achieve the unification of the country. "One country, two systems" has been in practice for over 70 years. Its implementation can be considered to have started in the early days of the PRC, not just starting from the 1980s when the issue of Hong Kong was raised.

Over the past 70 years, this policy has been carried on in a continuous and consistent way. Its practice has two most prominent features. The first feature is the unwavering focus on the unification of the country, respecting history and reality. For example, in the 1950s when the Chinese government announced the abolition of all unequal treaties, including those concerning Hong Kong and Macao, it also declared that the Hong Kong and Macao issues would be resolved through peaceful means. In the 1960s, Premier Zhou Enlai, on behalf of the Chinese government, advocated the "one principle, four areas" for the peaceful liberation of Taiwan. "One principle" means Taiwan must reunite with China. "Four areas" had extensive coverage and already embodied some of the propositions of the "one country, two systems" principle. In the 1970s, the Chinese government demanded the United Nations to remove Hong Kong and Macao from the list of Non-Self-Governing Territories, and declared at the same time that the Chinese government would, through

negotiations, resolve the issue of Hong Kong and Macao by peaceful means. In the 1980s, in order to resolve the Hong Kong issue, the Chinese government proposed 12 basic principles and policies, all of which are now fully reflected in the Basic Law.

The second feature of the realization of "one country, two systems" in the past 70 years is the unswerving adherence to two main objectives: one is to safeguard national sovereignty, unity and territorial integrity; second is to maintain long-term prosperity and stability of Hong Kong and Macao. For instance, in the 1980s when the British first raised the question of Hong Kong, the Chinese government made it clear that sovereignty is not negotiable. In the 1990s, Christopher Patten put forward a political reform package that amounted to "triple violations". The Chinese government held fast to its principles and set up a new system. After the Reunification, it was further made clear that the three bottom lines were not to be tampered with. On the other hand, as early as the 1950s and 1960s despite the difficult conditions in the Mainland, freight trains to Hong Kong continued to run three times daily non-stop. Since the Reunification, the Central Government has provided enormous support to Hong Kong in various aspects, like finance and trade. Even the recent development of the Guangdong-Hong Kong-Macao Greater Bay Area is, to a large extent, to provide greater development opportunities for Hong Kong and Macao. All these measures and policies fully demonstrate the two major objectives of "one country, two systems". Like wheels to a vehicle and wings of a bird, they maintain the balance and assume equal importance all the time. The manifestation of "one country, two systems" in le-

gal terms is the great law that we are here today to commemorate, that is the Basic Law of Hong Kong. It is an enactment that carries historic and international significance, a grand creative masterpiece that we all should particularly cherish.

### III. Relationship between the Basic Law and the Constitution

The Constitution is the manifestation of one country. Three statements suffice for understanding the Constitution. The Constitution assumes the highest legal hierarchy and greatest legal effect within the entire territory of China. The Constitution as a whole has effect in the HKSAR. Its effect is inseparable; it cannot be said that a certain provision has effect but another does not. This is because the Constitution is the symbol and protection of the unity and integrity of a country. The Basic Law is the manifestation of "two systems", which can also be explained in three statements: first, the Basic Law was formulated in accordance with the Constitution and stipulates the system of the HKSAR; second, all the systems practiced in the HKSAR shall be based on the Basic Law; third, the policies and systems in the Constitution relating to socialism shall not be practiced in Hong Kong.

The drafting of the Basic Law lasted four years and eight months, involving many rounds of revisions before arriving at a set of comprehensive and systematic design of the HKSAR's system. So, what sort of fundamental principles were observed in devising the system of the HKSAR? What are the connotations of some familiar sayings like "one country, two systems", "Hong Kong people administering Hong Kong" and "a high degree of autonomy"? The Basic

Law followed two main principles in constructing the HKSAR's systems. The first principle was to construct a system of "Hong Kong people administering Hong Kong" with patriots as the mainstay. Not anyone can administer the HKSAR. Needless to say, the HKSAR is not to be administered by foreign people. As early as over 30 years ago, Mr. Deng Xiaoping had already made it clear that "patriots" are those who: (1) sincerely and honestly support the return of Hong Kong to the Motherland; (2) would not act to jeopardize the interests of Hong Kong; and (3) would not act to undermine the interests of our nation and our people. The second principle was to exercise high degree of autonomy authorized by the Central Government. Hong Kong does not practice full autonomy. Its autonomy is authorized by law.

So how is this authorization and the relationship to be understood? First of all, we need to understand the state structure of a country. There are currently some 200 countries in the world, which basically fall into two categories. The first is unitary states, including China, United Kingdom, France, Japan etc. The second is federal states like Russia, the United States, Germany and Brazil and so on. Under these two categories of state structure, the sources of power of the central and local governments, and the relationship between their powers are different. In a unitary state, the central government delegates its powers to local governments through the constitution and laws, and the local government exercises the power of administration within the scope of authorization, with the residual powers lying with the central government. In a federal state, the local governments confer powers on the federal government through a federal

constitution; the federal government exercises powers that are conferred by the federal constitution, with the residual powers belonging to local governments. The design of the HKSAR system under the Basic Law is that, on top of the concept of high degree of autonomy, it established a relationship of authorizing and being authorized. This is expressly stipulated in the Basic Law. Article 2 of the Basic Law stipulates that the National People's Congress (NPC) authorizes the HKSAR to exercise high degree of autonomy. Article 20 further provides that the HKSAR may enjoy other powers granted to it by the NPC, the Standing Committee of the NPC (NPCSC) and the Central People's Government, i.e. the State Council.

## IV. Organic integration of the overall jurisdiction and the high degree of autonomy

The Basic Law and Constitution have made specific provisions on the overall jurisdiction of the Central Government and the high degree of autonomy of the HKSAR. How can these two be effectively integrated or organically integrated? In my view, it is to be achieved through accountability and supervision. Specifically, the overall jurisdiction of the Central Government can also be classified into two types. The first type is the constitutional powers that cannot be assigned, even the Central Government cannot transfer this type of powers to the local governments. The second type is other powers that can be authorized to local governments. What are the constitutional powers? First, the establishment of the HKSAR, which is provided in both the Constitution and the Basic Law. Second, the formulation of the Basic Law. Third, the definition of the scope of HKSAR residents, namely who are HKSAR

residents. Fourth, the delineation of the scope of the jurisdiction of the HKSAR. Fifth, the adaptation of the laws previously in force to become the laws of the HKSAR. Under the Basic Law, the laws previously in force in Hong Kong and the laws enacted by the legislature of the HKSAR are separately provided for, they are different. The "laws previously in force" is a specific concept, which refers to the laws enacted during the period of UK governance before the Reunification. The constitutional basis of these laws was the constitution of the UK, constitutional documents, The Letters Patent and The Royal Instructions etc. These laws all ceased to have effect at 2400 hours on June 30, 1997 when their constitutional basis fell away. To maintain the prosperity, stability and smooth transition of Hong Kong, the Chinese government, under the principle of "one country, two systems", through Article 160 of the Basic Law enabled the laws previously in force in Hong Kong to be adopted as laws of the HKSAR. But they had to go through a review and determination mechanism, namely the NPCSC was requested to make a decision conferring on the laws previously in force a new constitutional basis. I note that some people in Hong Kong said that the Chinese government had not reviewed the laws previously in force in Hong Kong before 1997 due to the great amount. This shows their lack of understanding of the Chinese government's preparations for the Reunification of Hong Kong. Today, I can share with you that as early as 1991, the Chinese government had already formed a special working group comprising dozens of members, many of whom studied common law. They examined all the laws previously in force in Hong Kong one by

one. Each and every ordinance and subsidiary legislation previously in force in Hong Kong had a special report. In addition, thematic studies were conducted on the customary law, equity law and common law applicable in Hong Kong. The above exercise took a total of 5 full years. It was on the basis of such voluminous work that the NPCSC made a decision of great length on February 23, 1997, that is the Decision on the adaptation of the laws previously in force in Hong Kong as laws of the HKSAR. The Decision repealed some laws and provisions previously in force in Hong Kong as they are not in conformity with the Basic Law and not compatible with the constitutional status of Hong Kong after China resuming the exercise of sovereignty. At the same time, it laid down various principles, the adaptation principles, governing the laws previously in force in Hong Kong upon their adoption as laws of the HKSAR. Therefore, the validity of the laws previously in force in Hong Kong are based on the new constitutional basis granted by the Basic Law and the Decision of the NPCSC. This was an act of sovereignty of the Chinese government based on the principle of national sovereignty. Sixth, the foreign affairs and defence. Seventh, the organization of Chinese citizens in Hong Kong to participate in the administration of national affairs. Eighth, the declaration of a state of war and a state of emergency. All these are constitutional powers exclusive to the Central Government.

As regards the high degree of autonomy, the Basic Law has a general authorization which covers a wide range of content and involves various provisions, including executive power, legislative power, independent judicial power and final adjudi-

cation. Furthermore, there are other powers granted in accordance with the law and some specific authorization which we call special authorization, such as maintaining a shipping register, concluding civil aviation agreements, issuing HKSAR passports and authorizing the HKSAR courts to interpret the Basic Law when adjudicating cases, subject to restrictions. There are two types of provisions which the courts cannot interpret on their own. They shall, before making their final judgments, seek an interpretation from the NPCSC. There is also specific authorization granting the HKSAR the power to handle external affairs. The Basic Law authorizes the Chief Executive and the HKSAR Government, but not other institutions, the power to handle external affairs in accordance with the authorization. After the promulgation of the Basic Law in 1990, the Central Government had made new authorizations. For example, the 1996 Explanation on the Nationality Law by the NPCSC contained many new authorizations, including authorizing the HKSAR to designate its own institution to issue HKSAR passports, and authorizing the HKSAR's Immigration Department to handle matters relating to changes of nationality etc. In addition, the exercise of jurisdiction over the Shenzhen Bay Port Hong Kong Port Area is also a decision of authorization. The approval of the Co-operation Arrangement for Co-location Arrangement is itself a form of authorization. The newly passed National Security Law of the HKSAR contains a large number of authorizing provisions. The recent Decision on the continuing discharge of duties by the sixth term of the Legislative Council of Hong Kong also originated from a constitutional

authorization.

The overall jurisdiction of the Central Government and the high degree of autonomy of the SAR are clear. How can the two integrate with each other? As I said earlier, it has to be achieved through a relationship of accountability and supervision. On accountability, it can be summarized by three aspects. First, pursuant to the Basic Law, the Chief Executive is responsible for its implementation and is accountable to the Central People's Government on behalf of the HKSAR. On whether the Basic Law had been accurately and fully implemented in Hong Kong, the Central Government only holds the Chief Executive accountable, rather than any other organizations or people. This is the reason why Hong Kong has to be executive-led and why the Chief Executive should have the real power so that she can take on such responsibility. Second, all organs of political power in the HKSAR should exercise a high degree of autonomy within the scope of the authorization, where they should neither exceed their authority nor fail to perform their duties. Third, the Central Government has the power of supervision.

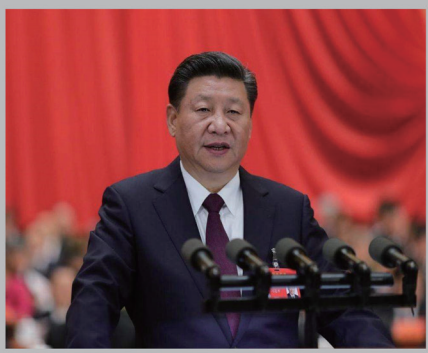
Perhaps some may ask, what is and where is the basis for the supervisory powers of the Central Government? How does the Central Government exercise these supervisory powers? The constitutional supervision systems in the world can be broadly divided into four categories. Under the first category, the constitutional supervisory power is exercised by general courts. This is practiced in the US, Canada and Australia, for example the nine Justices of the Supreme Court of the US exercise the power of constitutional supervision. The second category establishes an independent system of consti-

tutional courts. Germany, Spain, Italy and more than 50 other countries, including our neighbor, the Republic of Korea, have set up constitutional courts. The third category has a constitutional council constituted by people of various background that exercises the power of constitutional supervision. With France as the forerunner, dozens of countries have adopted this mode. For the fourth category, the constitutional supervisory power is exercised by a supreme legislative body. In China, UK, the Netherlands and dozens of other countries, the supervisory power is being exercised by the supreme legislative body. Therefore, there are more than 190 countries that have a constitutional supervision system.

China's constitutional supervision system is prescribed by the Constitution, in which the NPC and its Standing Committee supervise the implementation of the Constitution and the laws. Across the world, the constitutional supervision system serves two major functions. The first is to ensure the unity and harmony of a nation's legal system. The second is to uphold the unity and integrity of national sovereignty. As the constitution is the foundation of a country, the power of constitutional supervision cannot be delegated to local governments. That is why the supervisory power of the Central Government originates from the Constitution. Then what are the means by which the Central Government supervises the implementation of the Constitution and the laws? There are numerous means: 1. Daily work communications and expressions of concern. The Hong Kong and Macao Affairs Office of the State Council and the Liaison Office of the Central People's Government in the HKSAR often show their concerns. We, the Legislative Affairs Commission

of NPCSC also occasionally express our concern. 2. Make decisions or resolutions. Since the promulgation of the Basic Law in 1990, the NPC and its Standing Committee have passed more than 30 decisions and resolutions concerning the issue of Hong Kong. These decisions and resolutions were made by the highest organ of state power, thus their legal effect is indisputable. 3. Enact laws, the Basic Law, the Law of the PRC on Garrisoning the HKSAR and the National Security Law of the HKSAR. 4. Apply national laws. At present, there are 14 national laws that are applicable in the HKSAR. 5. Interpretation of laws. Since the Reunification, the NPCSC has on five occasions interpreted the Basic Law of Hong Kong. 6. Amend the laws. The Basic Law has prescribed the procedures for making amendments, and thus far no amendments have been made. It is only through the conscientious implementation of the Basic Law by the HKSAR and the effective exercise of the constitutional supervisory power by the Central Government can the overall jurisdiction of the Central Government and the high degree of autonomy be organically integrated. They jointly safeguard the great cause of "one country, two systems" to move further ahead with a more solid foundation.

Finally, I would like to quote the words of President Xi Jinping to encourage everyone: "'One country, two systems' is a novel concept with complex historical origin, practical situation and international context. Neither the road ahead nor the process of implementation will be smooth. We should not be afraid of problems. The key is to find solutions to the problems. When the difficulties are overcome and the problems solved, the practice of 'one country, two systems' will move forward." Thank you all.

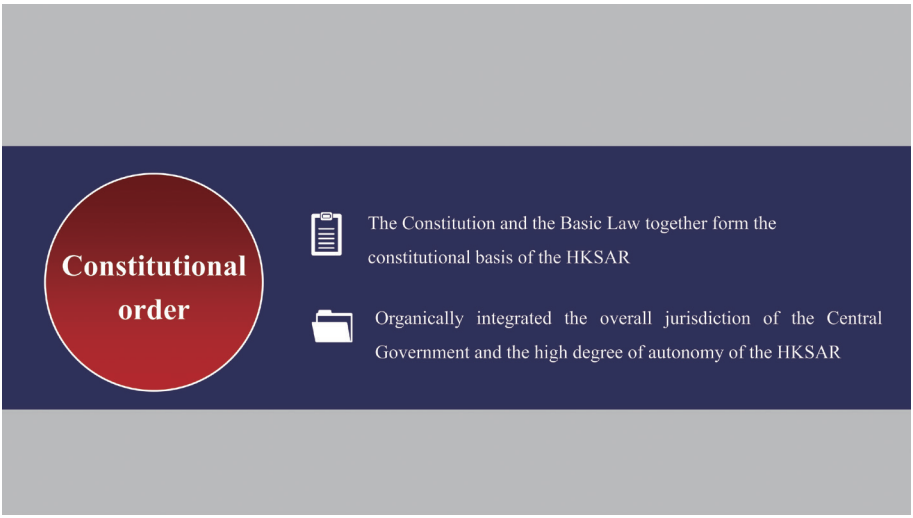


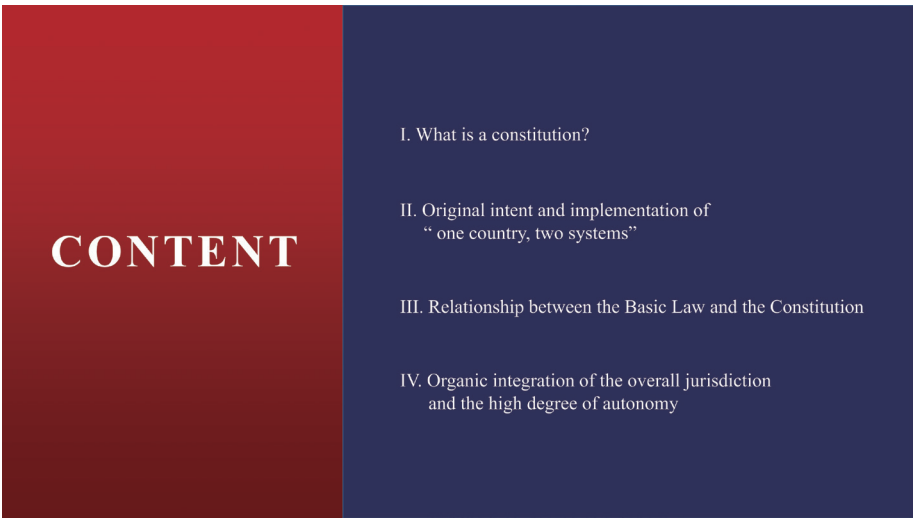
With the Reunification, the major transformation of Hong Kong's constitutional order was accomplished. As a special administrative region directly under the Central People's Government, Hong Kong has since its Reunification been included again into China's national governance structure.

--by Xi Jinping

# The Constitution of the People's Republic of China and the Basic Law: the Constitutional Basis of the Special Administrative Region

Zhang Yong
Deputy Head of the Legislative Affairs Commission
&
Vice-Chairperson of the HKSAR and Macao Basic Law Committees
of the Standing Committee of the National People's Congress


Constitutional order
The Constitution and the Basic Law together form the constitutional basis of the HKSAR
Organically integrated the overall jurisdiction of the Central Government and the high degree of autonomy of the HKSAR


CONTENT
I. What is a constitution?
II. Original intent and implementation of " one country, two systems"
III. Relationship between the Basic Law and the Constitution
IV. Organic integration of the overall jurisdiction and the high degree of autonomy

## Constitution

- Foundation of a modern state
- Fundamental safeguards to a country's stability and development
- Political manifestation of the history, culture, economy and society of every country

## UK Constitution

- Unwritten constitution
- Constitutional monarchy
- Unitary system
- Parliamentary supremacy

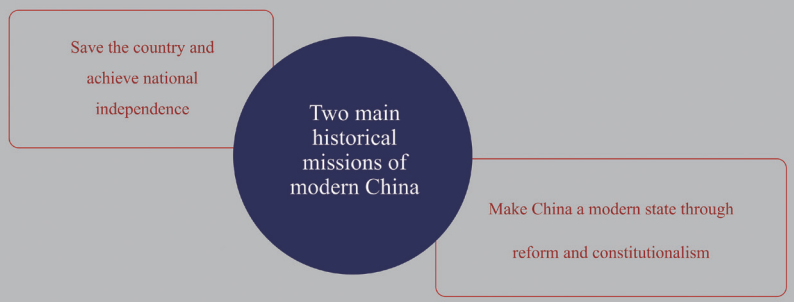
## US Constitution

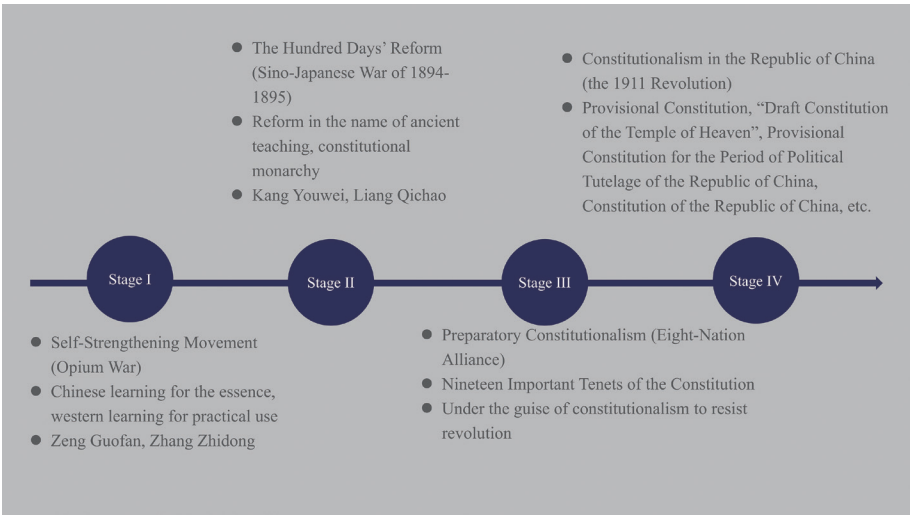
- Written constitution
- Republicanism
- Federalism
- Checks and balances among the three powers

## Modern history of China in a Century

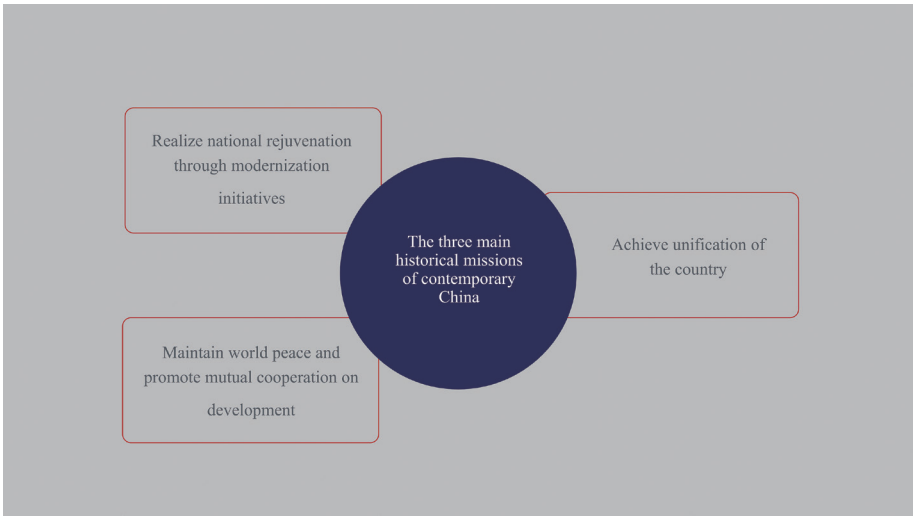
| Time | Events | Results |
|---|---|---|
| 1840 - 1842 | The First Sino-British Opium War | Treaty of Nanking |
| 1856 - 1860 | The Second Sino-British Opium War | Treaty of Tientsin, Convention of Peking |
| 1883 - 1885 | Sino-French War | Treaty of Tientsin (1885) |
| 1894 - 1895 | Sino-Japanese War of 1894-1895 | Treaty of Shimonoseki |
| 1900 - 1901 | War of Invasion of China by the Eight-Nation Alliance | Boxer Protocol |
| 1904 - 1905 | Russo-Japanese War | Formal Convention of the Conference on the Three Northeast Provinces |
| 1931 - 1945 | Japan's War of Invasion of China | China suffered casualties of about 35 million |

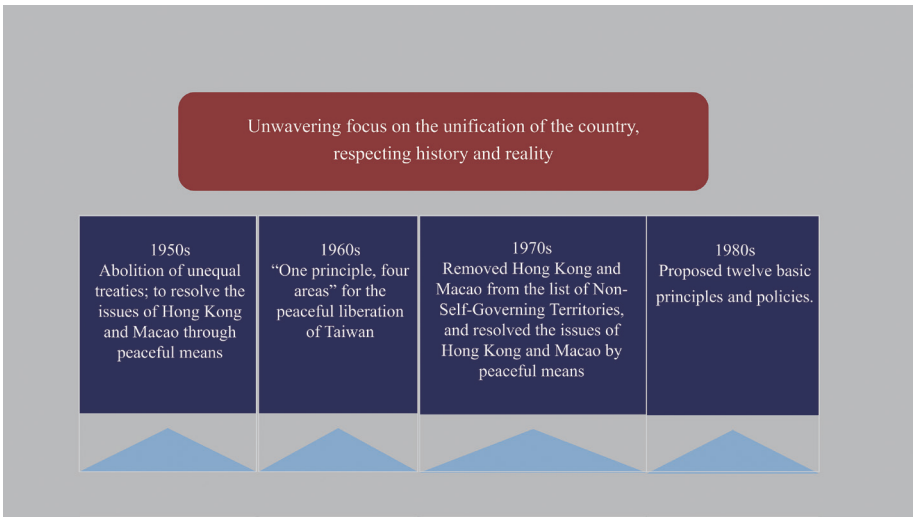
Cession of territories, payment of reparations, and infliction of pain and sufferings

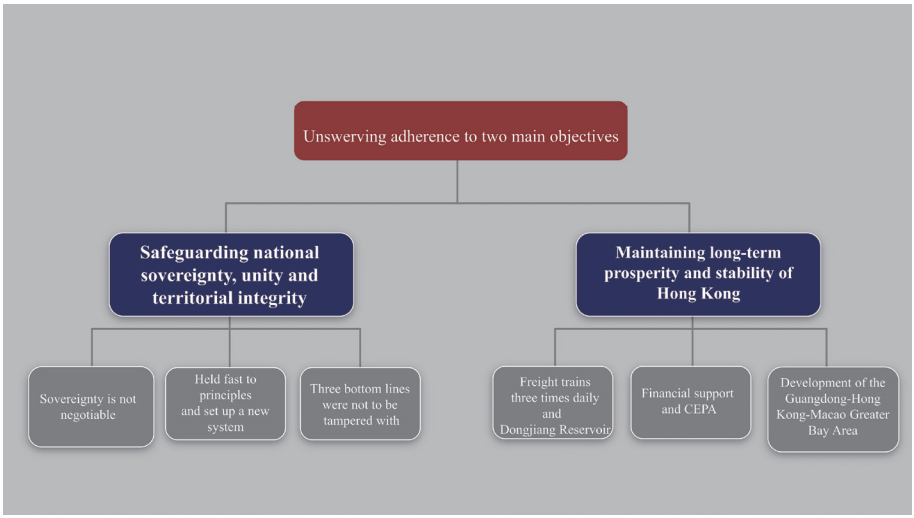



Stage I
Self-Strengthening Movement (Opium War)
Chinese learning for the essence, western learning for practical use
Zeng Guofan, Zhang Zhidong
Stage II
The Hundred Days' Reform (Sino-Japanese War of 1894-1895)
Reform in the name of ancient teaching, constitutional monarchy
Kang Youwei, Liang Qichao
Stage III
Preparatory Constitutionalism (Eight-Nation Alliance)
Nineteen Important Tenets of the Constitution
Under the guise of constitutionalism to resist revolution
Stage IV
Constitutionalism in the Republic of China (the 1911 Revolution)
Provisional Constitution, "Draft Constitution of the Temple of Heaven", Provisional Constitution for the Period of Political Tutelage of the Republic of China, Constitution of the Republic of China, etc.


中华人民共和国
宪 法
The general charter for governing the country and for peace and stability
The fundamental law of the country


Realize national rejuvenation through modernization initiatives
The three main historical missions of contemporary China
Achieve unification of the country
Maintain world peace and promote mutual cooperation on development


Unwavering focus on the unification of the country, respecting history and reality
1950s
Abolition of unequal treaties; to resolve the issues of Hong Kong and Macao through peaceful means
1960s
"One principle, four areas" for the peaceful liberation of Taiwan
1970s
Removed Hong Kong and Macao from the list of Non-Self-Governing Territories, and resolved the issues of Hong Kong and Macao by peaceful means
1980s
Proposed twelve basic principles and policies.




Basic Law: legalization of "one country, two systems"

"After nearly five years of hard work, we have a law of historical and international significance. To say that it has historical significance, not only for the past, the present, but also for the future; to say that it has international significance, not only for the third world, but also for all mankind. It's a creative masterpiece."

——by Deng Xiaoping

## Constitution: manifestation of “one country”

★ The Constitution assumes the highest legal hierarchy and greatest legal effect within the entire territory of China.

01

02

03

★ The Constitution as a whole has effect in in the HKSAR.

★ The effect of the Constitution is inseparable.

## Basic Law: manifestation of “two systems”

★The Basic Law was formulated in accordance with the Constitution and stipulates the system of the HKSAR.

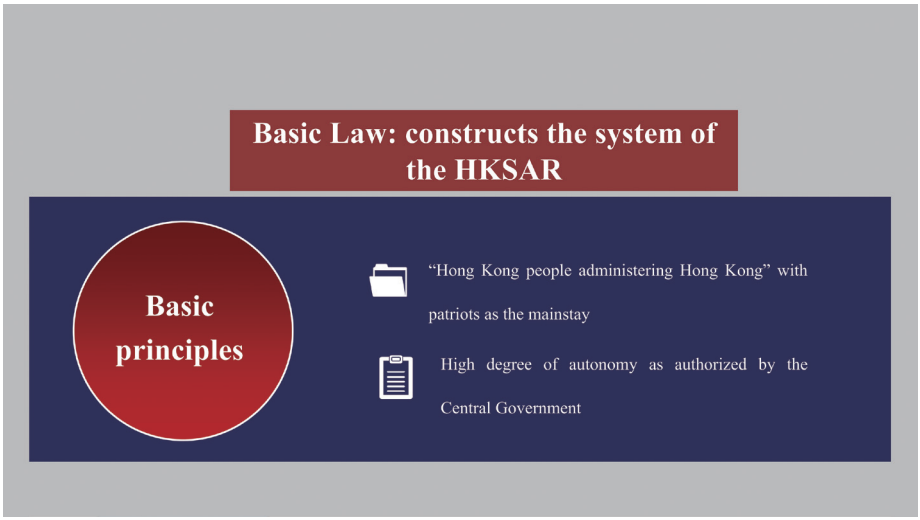
01

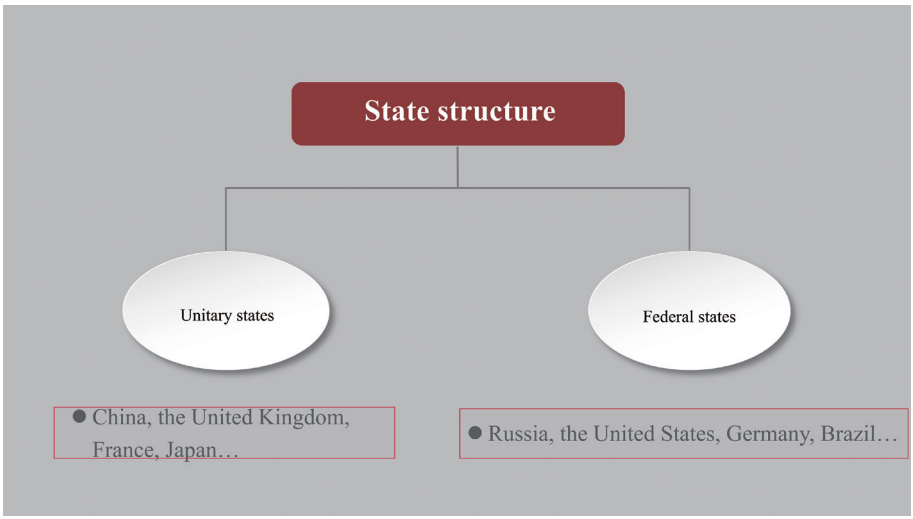
02

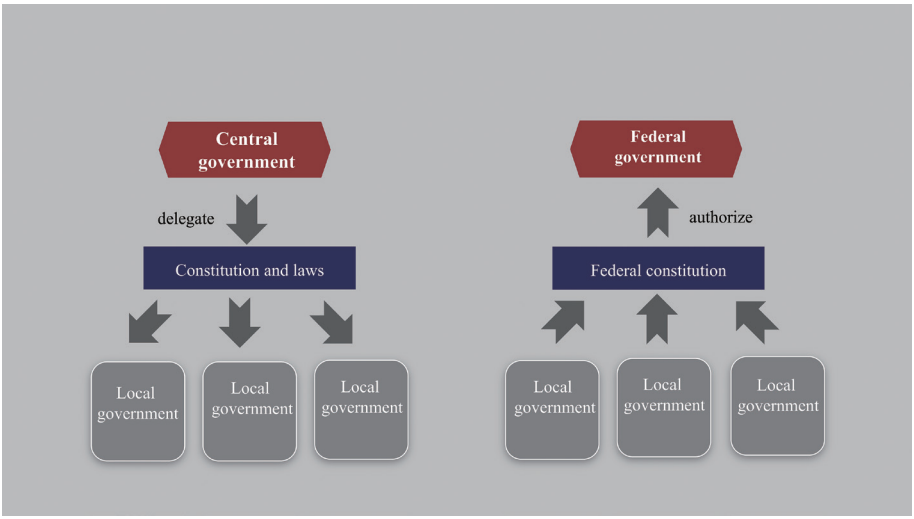
03

★ All the systems practiced in the HKSAR shall be based on the Basic Law.

★ The policies and systems in the Constitution relating to socialism shall not be practiced in Hong Kong.


Basic Law: constructs the system of the HKSAR
Basic principles
"Hong Kong people administering Hong Kong" with patriots as the mainstay
High degree of autonomy as authorized by the Central Government

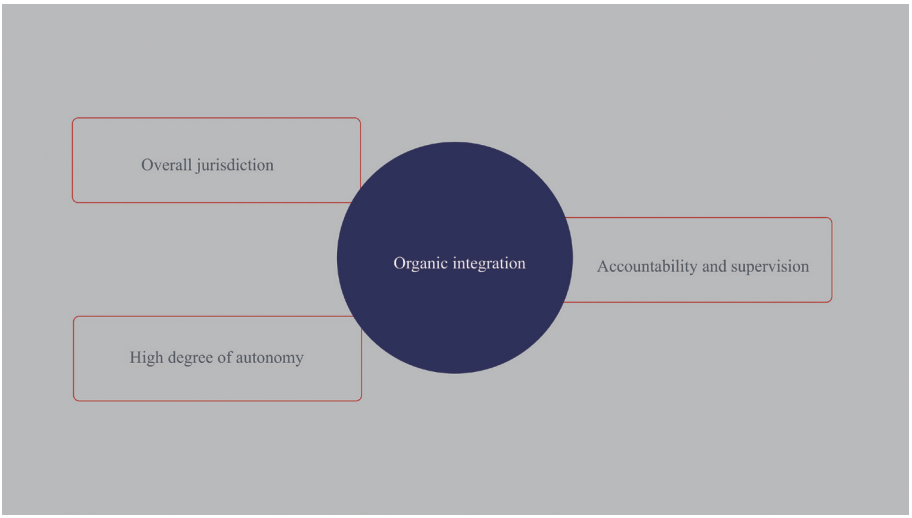

State structure
Unitary states
Federal states
China, the United Kingdom, France, Japan…
Russia, the United States, Germany, Brazil…

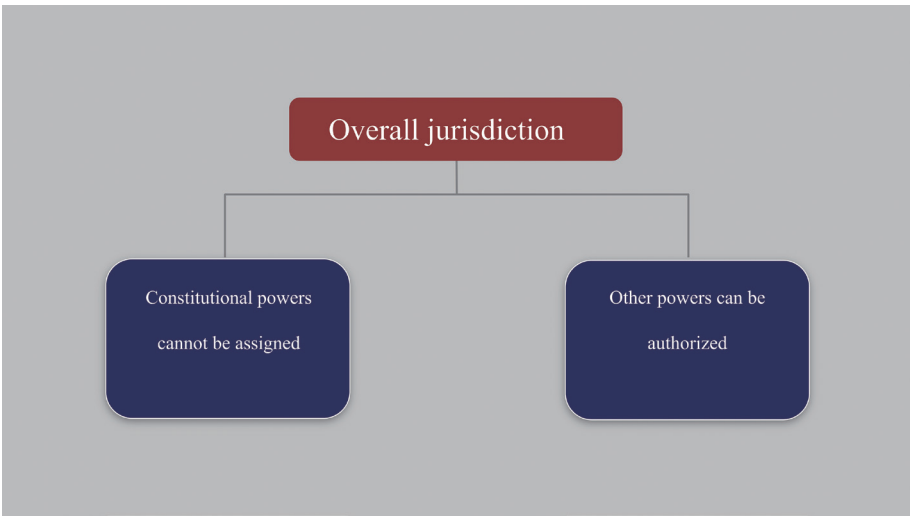


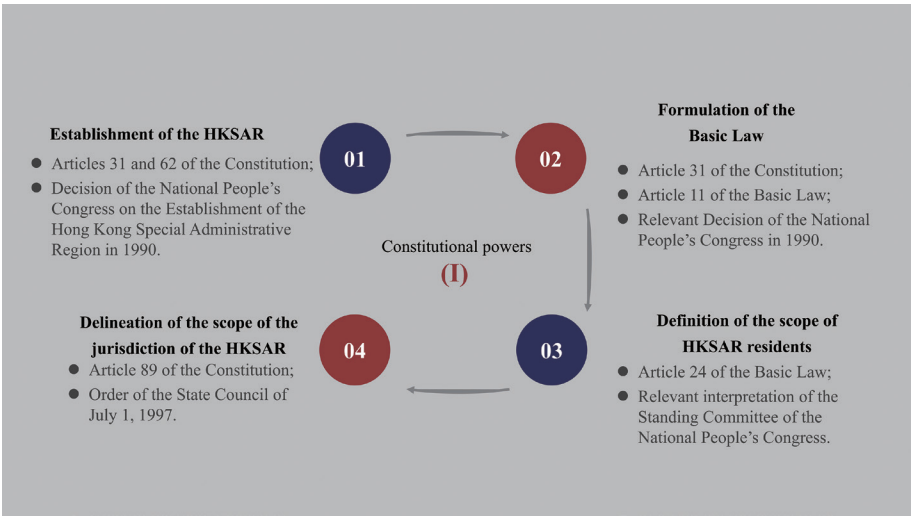

## Basic Law: a relationship of authorizing and being authorized

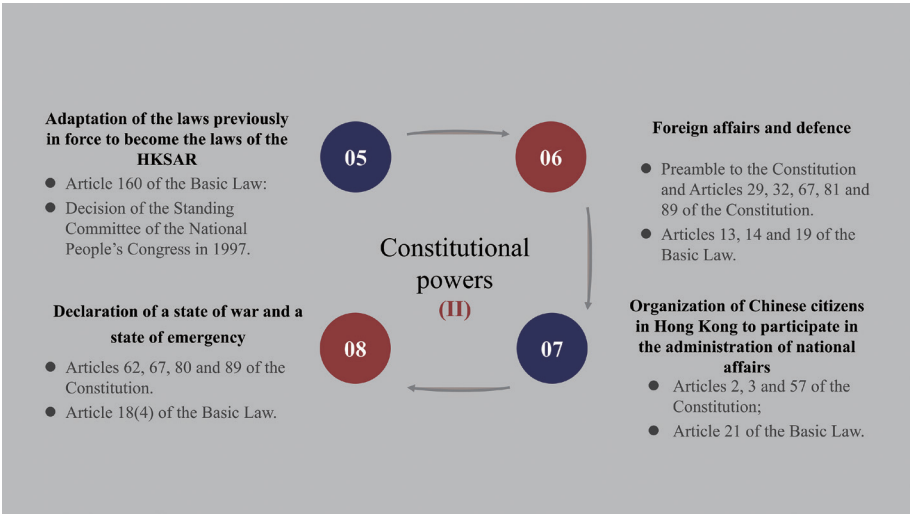
**★Article 2**: The National People's Congress authorizes the HKSAR to exercise a high degree of autonomy.

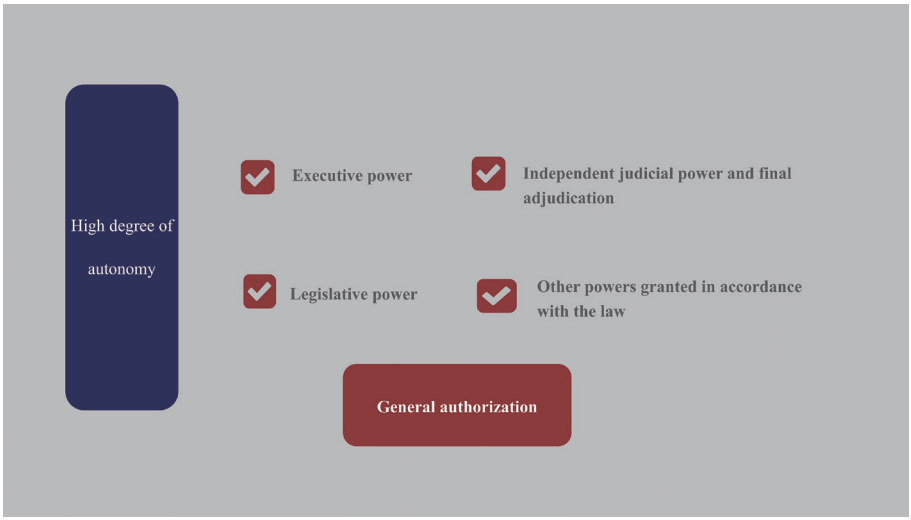
**★Article 20**: The HKSAR may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government


Overall jurisdiction
Organic integration
Accountability and supervision
High degree of autonomy


Overall jurisdiction
Constitutional powers cannot be assigned
Other powers can be authorized


Establishment of the HKSAR
Articles 31 and 62 of the Constitution;
Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region in 1990.
01
02
Formulation of the Basic Law
Article 31 of the Constitution;
Article 11 of the Basic Law;
Relevant Decision of the National People's Congress in 1990.
Constitutional powers
(I)
Delineation of the scope of the jurisdiction of the HKSAR
Article 89 of the Constitution;
Order of the State Council of July 1, 1997.
04
03
Definition of the scope of HKSAR residents
Article 24 of the Basic Law;
Relevant interpretation of the Standing Committee of the National People's Congress.


Adaptation of the laws previously in force to become the laws of the HKSAR
Article 160 of the Basic Law:
Decision of the Standing Committee of the National People's Congress in 1997.
05
06
Foreign affairs and defence
Preamble to the Constitution and Articles 29, 32, 67, 81 and 89 of the Constitution.
Articles 13, 14 and 19 of the Basic Law.
Constitutional powers
(II)
Declaration of a state of war and a state of emergency
Articles 62, 67, 80 and 89 of the Constitution.
Article 18(4) of the Basic Law.
08
07
Organization of Chinese citizens in Hong Kong to participate in the administration of national affairs
Articles 2, 3 and 57 of the Constitution;
Article 21 of the Basic Law.




**★Article 125:** Authorize the HKSAR to continue to maintain a shipping register.

**★Articles 133, 134:** Authorize the HKSAR Government to conclude air service agreements.

**★Article 154:** Authorize the HKSAR Government to issue passports of the HKSAR of the People's Republic of China.

**★Article 158:** Authorize the courts of the HKSAR to interpret the Basic Law in adjudicating cases.

**Special authorization**

★**Article 13:** Authorize the HKSAR to conduct relevant external affairs on its own in accordance with the Basic Law.

★**Article 48:** **The Chief Executive** conducts, on behalf of the HKSAR Government, external affairs and other affairs as authorized by the Central Authorities.

★**Article 62:** **The HKSAR Government** conducts external affairs as authorized by the Central People's Government.

**Specific authorization**

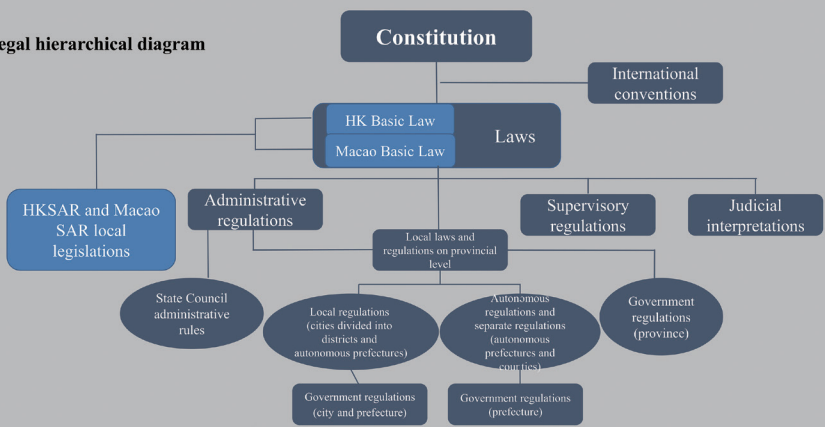
**Further authorization**

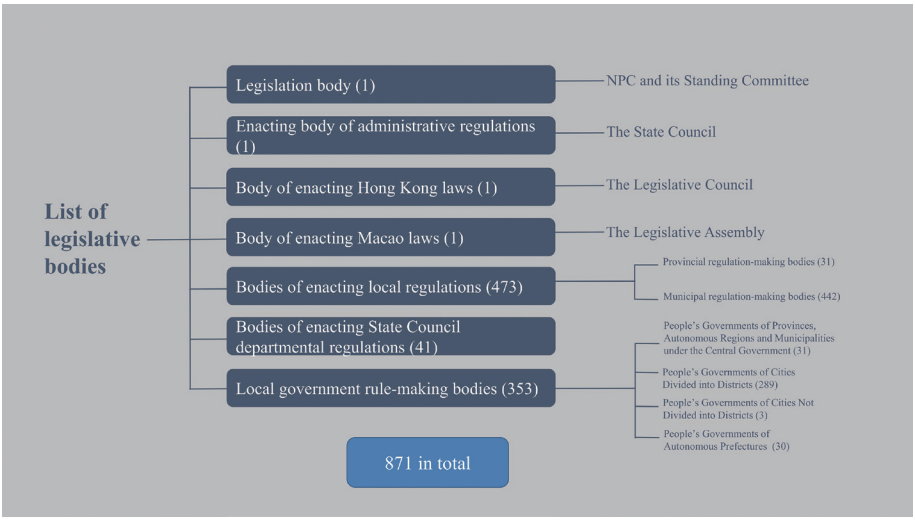
- **1. The 1996 Explanation on the Nationality Law**
- **2. The exercise of jurisdiction over the Shenzhen Bay Port Hong Kong Port Area**
- **3. Approval of the Co-operation Arrangement for Co-location arrangement**
- **4. Provisions in the Law of the People's Republic of China on Safeguarding National Security in the HKSAR**
- **5. Decision on the continuing discharge of duties by the sixth term of Legislative Council of Hong Kong**

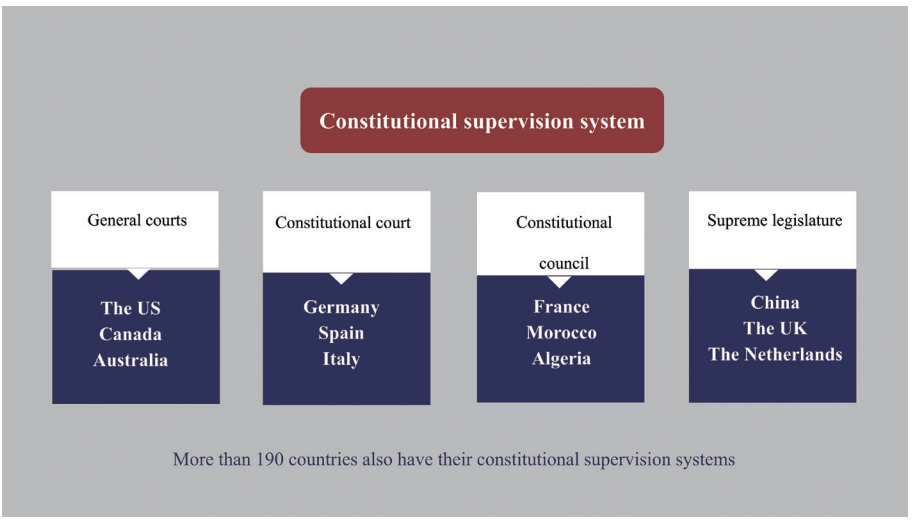
## Accountability and supervision

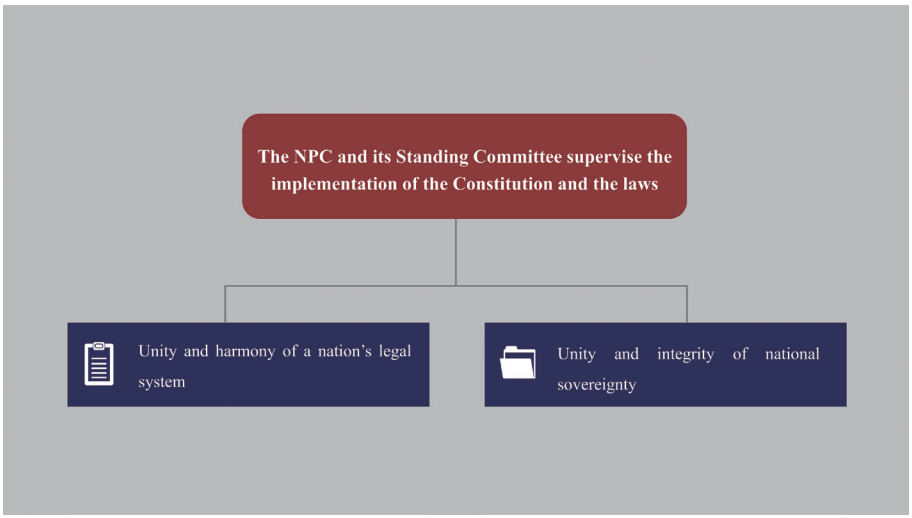
- ★ The Chief Executive is responsible for the implementation of the Basic Law and is responsible to the Central People's Government on behalf of the HKSAR.
- ★ All organs of political power in the HKSAR should exercise a high degree of autonomy within the scope of the authorization.
- ★ The Central Government has the power of supervision.

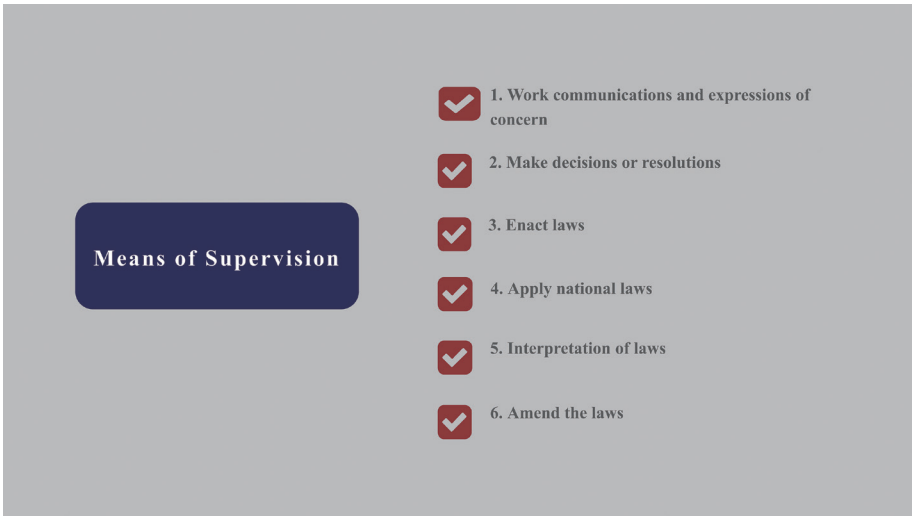
**Legal hierarchical diagram**




List of legislative bodies
Legislation body (1)
NPC and its Standing Committee
Enacting body of administrative regulations (1)
The State Council
Body of enacting Hong Kong laws (1)
The Legislative Council
Body of enacting Macao laws (1)
The Legislative Assembly
Bodies of enacting local regulations (473)
Provincial regulation-making bodies (31)
Municipal regulation-making bodies (442)
Bodies of enacting State Council departmental regulations (41)
Local government rule-making bodies (353)
People's Governments of Provinces, Autonomous Regions and Municipalities under the Central Government (31)
People's Governments of Cities Divided into Districts (289)
People's Governments of Cities Not Divided into Districts (3)
People's Governments of Autonomous Prefectures (30)
871 in total


Constitutional supervision system
General courts
The US
Canada
Australia
Constitutional court
Germany
Spain
Italy
Constitutional council
France
Morocco
Algeria
Supreme legislature
China
The UK
The Netherlands
More than 190 countries also have their constitutional supervision systems


The NPC and its Standing Committee supervise the implementation of the Constitution and the laws
Unity and harmony of a nation's legal system
Unity and integrity of national sovereignty


Means of Supervision
1. Work communications and expressions of concern
2. Make decisions or resolutions
3. Enact laws
4. Apply national laws
5. Interpretation of laws
6. Amend the laws

## Conclusion

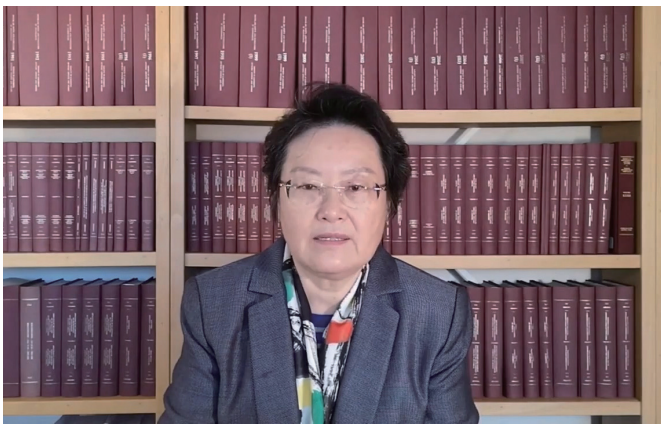
★ "'One country, two systems' is a novel concept with complex historical origin, practical situation and international context. Neither the road ahead nor the process of implementation will be smooth.

★ Having problems is not terrible, and the key is to find solutions to the problems. When the difficulties are overcome and the problems solved, the practice of 'one country, two systems' will move forward."

**— by Xi Jinping**

# THANKS

# Keynote Speech:
## "One Country, Two Systems" and its Contribution to International Law



**Xue Hanqin**

Judge and Vice President of the International Court of Justice

The Honorable Chief Executive Carrie Lam Cheng Yuet-ngor, Secretary for Justice Teresa Cheng Yeuk-wah, Distinguished guests, Ladies and gentlemen,

First of all, I would like to extend my sincere congratulations on the convening of the Basic Law 30th Anniversary Legal Summit and heartfelt appreciation to the Government of the Hong Kong Special Administrative Region (HKSAR Government) for the invitation.

It is my great honor to be invited by Madam Cheng, Secretary for Justice, to deliver a speech on the contributions of "one country, two systems" to international law, which is a big topic to address. I have personally participated in the legal work relating to treaty matters for Hong Kong's return to China. Based on my own experience and study, I would like to share some of my personal perspectives on the "one country, two systems" policy.

On April 4, 1990, the National People's Congress adopted the Basic Law of the HKSAR of the

People's Republic of China (PRC), which stipulated that the HKSAR shall be established and "one country, two systems" be implemented in the HKSAR. It was signed and promulgated the same day by the President of the PRC and entered into force on July 1, 1997. According to the Basic Law, the HKSAR shall enjoy executive, legislative and judicial power, including that of final adjudication. The previous economic and capitalist system, and way of life would remain basically unchanged. The socialist system and policies of the Mainland shall not be practiced in the HKSAR. The HKSAR enjoys a high degree of autonomy, except in foreign affairs and defence. The "one country, two systems" policy is both of vital importance in the reunification of the country and of significance in international law. With more than two decades of practice, the policy continuously demonstrates the political wisdom and foresight of its designer and contributes considerable amount of valuable experience to the great cause of national reunification. Even at the international level, this practice provides a fine example for study.

Today, I would like to highlight two aspects of the reunification process from the perspective of international law.

My first point is that Hong Kong's smooth return to China is a commendable effort of the Chinese and British governments in the peaceful settlement of international disputes. Some people may wonder why we call the Hong Kong issue as a "dispute" when it is just a matter left over from history. Disputes in international law can be defined in a narrow sense and a broad sense. A dispute, in the former, refers to a specific controversial issue, whereas in the latter, it may include complex situations and certain state of affairs and problems. For example, the Charter of the United Nations (the

Charter) provides in its purposes and principles that disputes or situations which might lead to a breach of international peace and security should be settled through peaceful means in conformity with international law. Here, "disputes or situations" have a broader context. They should all be settled by peaceful means.

China and the United Kingdom held completely different positions over the old treaties on the question of Hong Kong. China lost its jurisdiction and control over Hong Kong because of the two Opium Wars. After the Chinese Qing imperial government destroyed opium and banned the opium trade, Great Britain launched a war of aggression against China on the pretext of protecting its trade interests. As a result of its defeat in the First Opium War in 1842, the Qing imperial government was compelled to sign the Treaty of Nanjing on a British warship with the British Government, among other things, ceding the Hong Kong Island to the British. Part of the Kowloon Peninsula was ceded to the British through the Convention of Peking signed in 1860 after the Second Opium War. By the time the Qing imperial government lost the First Sino-Japanese War, China had turned into a semi-feudal and semi-colonial country, deprived of the dignity and status of a full sovereign State. Weak and defenseless, China was time and again forced to sign unequal treaties with the Western imperialist powers, by which they ruthlessly carved up and plundered the country, acquiring further interests and privileges in China. Specifically, the Convention between China and the United Kingdom Respecting an Extension of Hong Kong Territory signed in 1898 leased the entire Kowloon Peninsula and the New Territories, as the British call it, to Britain for 99 years. With regard to the above-mentioned three treaties on Hong Kong, after the overthrow


of the Qing imperial government, all the Chinese Governments that succeeded it maintained the same position that these three treaties were unequal and therefore should be abolished. Their attempts to get back Hong Kong to China, however, were rejected by the British Government. This reaction was not at all surprising, considering that at that time international law was predominantly adopted and dictated by the Western powers as a tool to safeguard their interests and needs for overseas expansion. On their part, of course, they would not accept the concept of unequal treaties.

After the Second World War, in view of establishing a new international order, the United Nations was founded in 1945. To resolve the issues of colonial territories, the Trusteeship Council was created as one of the six main organs of the UN, to supervise and examine the administration of colonial countries that had not attained independence yet and the progress of exercising self-determination. These not yet independent countries are defined as

Non-Self-Governing Territories (NSGTs) in the Charter. In 1946, the UK included Hong Kong in the list of NSGTs. According to Article 73 of the Charter, the administrative authorities, which were the suzerain or foreign occupiers, should periodically submit to the special committee under the UN General Assembly the information of NSGTs. NSGTs should not include sovereign territories, even if such territories were still governed by foreign countries. For instance, the United States once brought the Panama Canal Zone into the list of NSGTs, but the Panama's government lodged representations to the US, maintaining that although the Panama Canal Zone was not under its jurisdiction, it still exercised sovereignty over the zone. For this reason, the UN General Assembly removed the zone from the list at the request of the Panamanian government. When the Chinese National Government learned of the case, it also made representations to the relevant UN organs in the hope to remove Hong Kong from the list of NSGTs, but to no avail.

In 1960, the UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), known also as the Declaration on Decolonization. The Declaration "solemnly proclaims the necessity of bringing to a speedy and unconditional end of colonialism in all its forms and manifestations." For this reason, the UN General Assembly established the Special Committee on Decolonization to implement General Assembly resolution 1514 (XV) of 14 December 1960. In 1963, the UN General Assembly adopted the updated list of NSGTs, which included Hong Kong and Macao.

After the founding of the PRC, the Common Program of the Chinese People's Political Consul-

tative Conference, the provisional constitutional document, adopted in 1949, provided in Article 55 a principle governing the status of old treaties, according to which, the Chinese Government will review the old treaties one by one so as to decide whether to recognize, repeal, amend or renegotiate them. With respect to the three treaties concerning Hong Kong, the PRC Government maintained the position that they were null and void, because they were the result of wars of aggression. Under modern international law, outcome of aggression should not be recognized.

In late 1971, the PRC Government, as soon as it restored its legitimate seat in the United Nations, began addressing the questions of Hong Kong and Macao. On March 8, 1972, Ambassador Huang Hua, the Permanent Representative of China to the UN presented a diplomatic note to the Chair of the Special Committee on Decolonization and stated that the questions of Hong Kong and Macao were the results of unequal treaties imposed on China by the imperialist powers. In the note, it was that the Portuguese-occupied Macao and the British-occupied Hong Kong are integral parts of China's territory. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories. Consequently, they should not be included in the list of NSGTs. With regard to the questions of Hong Kong and Macao, the Chinese Government would address them in an appropriate manner when conditions permit. The UN had no rights to handle them. Accordingly, he requested to remove Hong Kong and Macao from the list of NSGTs and to delete issues relating to Hong Kong and Macao from all documents of the UN and the Special Committee on Decolonization. The Special Committee on Decoloni-

zation upon deliberation accepted the requests filed by the Chinese delegation and made recommendations to the UN General Assembly. In 1972, the 27th session of the UN General Assembly adopted resolution 2908 (XXVII), which officially deleted Hong Kong and Macao from the list of NSGTs.

By giving a detailed introduction to the history of Hong Kong, I wish to illustrate a few points of international law on the question of Hong Kong.

First, the Chinese Government has maintained a consistent position on the question of Hong Kong. At the same time, it also realizes the difference between China and the UK, in terms of the nature of the three treaties. It demonstrated its sovereignty over Hong Kong by removing it from the UN's list of NSGTs, which was officially confirmed by Resolution 2908 (XXVII) of the UN General Assembly. These acts bear legal implications in international law.

Second, notwithstanding the fact that China did not accept the inclusion of Hong Kong in the UN's list of NSGTs and its position that resolution of the question of Hong Kong fell entirely within the internal affairs of China's sovereignty, China took due regard to the reality that the UK had exercised colonial rule over Hong Kong for more than a century, during which period, China did not exercise its sovereignty over Hong Kong. On that account, according to international law, China and the UK had to resolve this historical issue through negotiations.

Third, the resolution of the question of Hong Kong cannot be detached from the general backdrop of global movement on decolonization. The decolonization movement that sprang up after the Second World War and the establishment of the principle of self-determination in international law set the international context for the return of Hong

Kong to China. Whether the UK recognized or not that these three treaties were unequal treaties, null and void, it falls within China's sovereignty to recover the territory in light of the historical trends of decolonization. At the end of the Second World War, the Chinese National Government tried to recover Hong Kong from the UK, but in vain. That failure was much due to its weak position internationally, but also due to the fact that the colonial system was not yet fundamentally challenged in international law. As many colonies gained independence in the 1950s, particularly with the adoption of resolution 1514 (XV) by the UN General Assembly, the decolonization movement made substantial progress. Many Asian, African and Latin-American countries got independent from the colonial domination and joined the United Nations as a member of the international community. It is this political development and international context that laid down the foundation for China to resolve the questions of Hong Kong and Macao in the United Nations. Today, when we study the "one country, two systems" policy, we should, first and foremost, remember the nature of the question of Hong Kong and its historical origin.

After the founding of the PRC, the Chinese Government was confronted with complicated international situations, which delayed its plan to resolve the questions of Hong Kong and Macao. In the late 1970s, as China's reform and opening-up began and the lease of the New Territories to the UK was about to expire, the question of Hong Kong was placed on the agenda before China and the UK. Although both the Chinese and the British governments demonstrated political will and good intention to cooperate for Hong Kong's return to China, the negotiation process was not without difficulties. On several important issues, it came to

impasses. Frankly speaking, without able guidance of the leaders from both sides, the negotiations would not have come to a complete success.

As we all know, the British delegation initially proposed to exchange sovereignty for administration, that is, the UK sought to continue to govern Hong Kong after China resumed the exercise of sovereignty over Hong Kong. It claimed that the Chinese were unable to govern Hong Kong properly and that the Hong Kong people asked the UK to maintain its administration. The UK's theory on sovereignty that largely reflected its colonial attitude was absolutely unfounded in international law, because sovereignty and the power of administration were inseparable and the UK's colonial rule in Hong Kong must be ended under international law. Above all, return of Hong Kong to China is the common aspiration of the entire Chinese people, including the Hong Kong people. Expectedly, the UK's proposal was rejected by China. China consistently upheld that it had never forfeited the sovereignty over Hong Kong. This principled position had never been changed and compromised. Hence, the Sino-British Joint Declaration states that China has decided to "resume the exercise of sovereignty over Hong Kong" and that the UK will "restore Hong Kong to China." These expressions legally imply that the sovereignty over Hong Kong has never been changed.

The return of Hong Kong to China marks a significant step in the reunification process of the country and also sets the premise for the exercise of "one country and two systems" policy. Notwithstanding its position on principle, the Chinese Government has made pragmatic and flexible arrangements for Hong Kong under the new system. In light of the objective of national reunification and long-term development, particu-

larly the special circumstances and needs of Hong Kong, the National People's Congress decided to establish the HKSAR with a high degree of autonomy, which would remain effective for 50 years. The "one country, two systems" policy is a pioneering initiative. Although this policy was written into the Sino-British Joint Declaration, it is a declaration unilaterally made by the Chinese Government to ensure the smooth transition and long-term prosperity of Hong Kong. The return of Hong Kong is not a simple transfer of power; its impact on the economy, the society and the welfare of the people in Hong Kong is significant. It may be recalled that Hong Kong underwent serious social turmoil when China and the UK kicked off the negotiations over the return of Hong Kong in the early 1980s. Social stability and peace was soon restored after the signing of the Sino-British Joint Declaration and Hong Kong had ever after enjoyed a new phase of rapid economic development.

From the perspective of international law, "one country, two systems" policy and practice has offered a good solution to issues that many new States face after gaining their independence. How to maintain social stability and economic growth after the establishment of the new State, and how to expand economic cooperation with other countries, including developed countries on an equal footing, while maintaining national sovereignty and independence is an issue that challenges many developing countries to date.

Being the world's trade and financial center, Hong Kong is a free port and a separate customs territory. It has implemented a common law system for a long time, maintained a capitalist way of life and has a relatively high level of economic development, which made a big contrast with the socio-economic situations in

the Mainland. The vision for "one country, two systems" is an institutional arrangement based on the basic reality to maximize the interests of the Hong Kong people and protect the long-term interests of Hong Kong. If we rigidly interpret the recovery of sovereignty as simply putting Hong Kong and the Mainland together for reunification, the status of Hong Kong as an international financial and trade hub and its social stability would certainly be undermined, detrimental both to the country and to Hong Kong.

When the "one country, two systems" policy was initially proposed, there were skepticism and cynicism among people. They doubted that Hong Kong could truly maintain a high degree of autonomy. Internationally, how to implement this policy was also challenging. For instance, to maintain the current legal system in Hong Kong, treaty status in Hong Kong must be addressed. According to the general principles of international law, after the handover, treaties concluded between China and foreign countries should extend to apply to Hong Kong, while Hong Kong as a territory has no power to conclude treaties on its own with foreign countries. This is dictated by the principle of sovereignty. However, this practice cannot be extended to Hong Kong, because to maintain the vigor of its economic activities, it is imperative for Hong Kong to enter into different treaty arrangements with foreign countries on trade, commerce, civil aviation, etc. Therefore, special arrangements have to be made.

In international law, there are various peaceful means for the settlement of international disputes. Bilaterally, negotiation is a means States may use for direct settlement of a dispute. With the involvement of a third party, means of good offices, fact-finding, mediation, and conciliation

can be opted for the resolution of disputes. For compulsory resolution, one may resort to arbitration and judicial settlement. Every State has the freedom to choose the means it deems proper to settle international disputes. This is an important principle of international law, namely, the principle of free choice of means of settlement, which derives from the principle of sovereignty. It is well known that China attaches importance to bilateral negotiations for the resolution of international disputes that bear on its national sovereignty and vital interests. It seldom accepts third-party settlement. Through bilateral negotiations, it has resolved most of its boundary disputes with its neighboring countries and delimited the maritime boundary in the Beibu Gulf with Vietnam. This practice may be incomprehensible to some people and sometimes is even interpreted as a reservation to the rule of law. Hong Kong's smooth return to China, however, provides a good example to explain China's position.

Historically, the question of Hong Kong is a complicated issue. With regard to the nature of the two Opium Wars and a series of unequal treaties concluded afterwards, we are of the view that they cannot be justified by the contemporaneous international law, because colonial expansion and exploitation must be condemned. In arranging Hong Kong's return, however, we should also take a forward-looking view, focusing on the current conditions and future of Hong Kong, as well as the long-term China-UK relations. Such complicated matters, obviously, cannot be entrusted to any third party, but resolved through direct negotiations between China and the UK. Although the negotiation process was long and difficult, once agreement was reached, execution and implementation could proceed without much difficulty. As to the political arrangements

after the handover, only the State that enjoys sovereignty over Hong Kong is able to propose such a policy as "one country, two systems" and put it into reality. This is because it falls within the sovereignty of China under international law to decide what kind system Hong Kong should adopt and how to achieve national reunification. During the transitional period from the signing of the Sino-British Joint Declaration in 1984 to the handover on July 1, 1997, China and the UK had to cooperate to map out arrangements for various affairs to ensure the smooth transition of Hong Kong. This is not only in line with China's interests but also those of the UK. The two sides therefore agreed to establish the Sino–British Joint Liaison Group to work out the details of these arrangements through negotiations.

At the international level, the Chinese and British governments both took a responsible position in handling Hong Kong's matter. By doing so, they closed a painful chapter in their bilateral relations and started a new relationship through peaceful cooperation. After the handover, the HKSAR, under the guidance of the Basic Law, has maintained its prosperity and stability. This success story of peaceful settlement of international disputes was widely acclaimed and supported by the international community. It also paved the way for the resolution of the question of Macao.

The second aspect that I would like to discuss is the treaty arrangements under the "one country, two systems" policy. They are regarded as innovative treaty practice. As I mentioned earlier, according to the provisions of the Basic Law, the laws currently in force in Hong Kong will remain basically unchanged. To achieve that goal, the question of treaty application in Hong Kong becomes especially relevant. In international

law, in case of territorial changes, the principles of treaty succession would apply. In the case of Hong Kong, there is neither a question of change of sovereignty, nor a change of territory. The "one country, two systems" policy, as is designed, while taking into account the general principles of international law and State practice, provides the HKSAR, to the largest extent possible, with a solid legal framework and a propitious international environment for it to engage in international activities for its development. This is a unique and unprecedented practice, which combines principles with pragmatism. In summary, treaty practice concerning the HKSAR has abided the following principles.

First, according to the Basic Law and the principle of "one country", the Central Government is responsible for the foreign affairs and defence relating to Hong Kong. Therefore, all the multilateral or bilateral treaties on foreign affairs and defence to which China is a party and all reservations and declarations on such treaties made by China should apply to the HKSAR. And such treaties to which the UK is a party would no longer apply to Hong Kong. This practice is based on the principle of "one country".

Second, in line with the "two systems" arrangements, the HKSAR Government may, with the authorization of the Central Government, conclude treaties with foreign states or regions on important fields reflecting the nature of sovereignty, such as reciprocal juridical assistance, civil aviation agreements, visa application, investment protection and exchange of taxation information etc. as stipulated under the Basic Law. Authorization means that every treaty the HKSAR Government is to conclude with foreign countries should be specifically authorized by the Central Government in advance. In addition, the Central

Government grants a general authorization to the HKSAR Government to conclude treaties with foreign states and regions within the scope of its autonomy. In principle, the bilateral treaties concluded by the Central Government with foreign countries in these fields do not apply to the HKSAR. This is a feature of "two systems".

Third, in the process of handling multilateral treaties, there were 27 multilateral treaties and conventions involving international organizations. The Central Government made special arrangements in the name of "Hong Kong, China" and retained the membership for Hong Kong in those international organizations that allow non-sovereign entities to participate, such as the International Maritime Organization and the World Trade Organization. This has substantially expanded the sphere for Hong Kong to engage in international activities.

Fourth, with regard to the multilateral treaties to which the Central Government is a party, including declarations and reservations made, the Central Government should, in principle, seek the views of the HKSAR Government before deciding whether such treaties should apply to Hong Kong. As to treaties on foreign affairs and defence, even though they automatically apply to Hong Kong, the Central Government would also seek the views of the HKSAR Government first.

These important principles fully embody the characteristics of the "one country, two systems" policy. Evidently, to ensure the transition, the existing treaties as applied by the UK to Hong Kong had to be sorted out first. In other words, China and the UK must work together to clear up which treaties would continue to apply to Hong Kong, which should be terminated, or be rearranged, after the handover. Legal experts from both sides had to examine and review

these treaties, one by one, to determine their status. This arduous and time-consuming process required the close cooperation between China and the UK and is vital in safeguarding the smooth transition of Hong Kong. Therefore, both sides agreed that this work must be accomplished during the transitional period.

The Sino-British Joint Liaison Group reviewed altogether more than 300 multilateral international treaties. They agreed that over 80 of them should discontinue to apply to Hong Kong after its return to China, because they either concerned foreign affairs and defence and China was not a contracting party, or they had been replaced by new treaties, or they were European regional treaties.

As to the remaining 230 or more multilateral treaties, starting from August 1991, the Sino-British Joint Liaison Group convened numerous rounds of meetings of legal experts to consider whether these treaties should continue to apply to Hong Kong. They ultimately reached agreement on the application of these treaties, which are divided by categories of area. Among these multilateral treaties, 214 will continue to apply in the HKSAR, including 127 to which China is a party and 87 to which China is not a party.

The 321 bilateral treaties and agreements under 22 categories concluded between the UK and other foreign countries before the signing of the Sino-British Joint Declaration in 1984 would no longer apply to Hong Kong after its return to China. That said, in order to ensure that Hong Kong's foreign trade, shipping and juridical assistance relations would not suffer any legal vacuum or interruption during the transitional period, the Sino-British Joint Liaison Group decided through negotiation that, during the transitional period, upon the approval of the Chinse Government, the British

Government might authorize the British Hong Kong Government to negotiate and conclude bilateral treaties in these fields with foreign countries and such treaties would continue to be applicable after the handover. The British Hong Kong Government signed a total of 61 such treaties with foreign governments before the handover.

After China and the UK reached a comprehensive agreement on the application of international treaties to Hong Kong, both sides took necessary diplomatic actions according to the practice of international treaty law to ensure these treaty arrangements would be recognized internationally. On 20 June 1997, Ambassador Qin Huasun, the Permanent Representative of China to the UN submitted a diplomatic note to the UN Secretary-General to notify the UN of the relevant treaty arrangements and request the UN Secretary-General to put the contents of the diplomatic note on record and transfer the record to other State members and specialized agencies of the UN. A list of multilateral treaties applicable to the HKSAR from 1 July 1997 was attached to the diplomatic note. Following the diplomatic note issued by China, the UK also presented a diplomatic note to the UN Secretary-General expressing welcome and support to the relevant action of the Chinese Government and attached a list of treaties applicable to Hong Kong under the rule of the British Government before July 1, 1997 and officially announced that such treaties would no longer apply to Hong Kong after its return to China. Besides, the Chinese Government notified the depositaries of all other treaties one after the other to the same effect and performed relevant legal procedures. At the same time, the UK also issued diplomatic notes to these depositaries, announcing that it would stop assuming relevant international obligations after July 1, 1997.

In respect of the bilateral treaties signed by the British Hong Kong Government during the transitional period, the Chinese Government presented diplomatic notes to the relevant countries, before and after the handover, to confirm that these treaties would continue to apply to Hong Kong after July 1 ,1997.

The legal and diplomatic actions we undertook did not encounter any objection from the international community, but with kind understanding and support. States readily accepted these arrangements. A few countries and international organizations raised legal questions on certain practice, for example, whether treaties to which China is not a party could continue to apply to Hong Kong after its return to China. After our detailed explanation of the "one country, two systems" policy and its specific institutional design, they accepted our approach. In bilateral negotiations, the question of whether bilateral treaties should automatically cover Hong Kong was raised. For instance, during the negotiations between China and Russia on the bilateral investment protection agreement, the Russian delegation proposed that the scope of the agreement should include Hong Kong. The Chinese delegation explained the treaty practice with Hong Kong on the basis of the Basic Law, and thereby introduced the practice of the "one country, two systems" policy.

After the handover, the Central Government strictly adheres to the relevant provisions of the Basic Law and gradually developed a set of principles and working procedures with the HKSAR Government. This set of principles and procedures fully manifest the following characteristics of the "one country, two systems" policy.

First, under the principle of "one country", the HKSAR Government's right to information and participation is duly respected. For every international treaty China

will participate, the Central Government would seek the views of the HKSAR Government on the applicability of the treaty to Hong Kong. Even in the case of a treaty on foreign affairs or defence that is automatically applicable to Hong Kong, the Central Government would also seek the views of the HKSAR Government on the form of its application. To my knowledge, so far, the Central Government has sought the views of the HKSAR Government on more than 350 multilateral treaties and more than 200 of them are now applicable to Hong Kong.

Second, under the arrangements of the "two systems", the Central Government does not intervene in the HKSAR Government's decision to conclude treaties in the fields of autonomy. Where specific authorization is required, the Central Government would give full account to the requests of the HKSAR Government and the actual needs of the HKSAR. I would like to share a personal experience here. In the early days of its return, we ran into the matter of reviewing the confidential memoranda of the civil aviation agreements concluded by the HKSAR Government. According to relevant regulations, the civil aviation agreements concluded between the HKSAR and foreign countries should be filed with the Central Government for record and review. As we understood, this requirement naturally included the memoranda attached to the agreements. However, the HKSAR Government expressed its difficulties in submitting some confidential memoranda to the Central Government, since these memoranda contained trade secrets. That was the first time I worked with officials of the HKSAR Government. Their professionalism and competence left a deep impression on me. Eventually, this matter was properly resolved through negotiation and consultation. This experience has

deepened my understanding of the Central Government's policy for "Hong Kong people administering Hong Kong" and the "one country, two systems" policy. The mutual trust and understanding between the Mainland and the HKSAR are continuously strengthened, and the collaboration is constantly advanced through handling a range of cases. The Central Government has full respect for the treaty-making power enjoyed by the HKSAR within the scope of its autonomy.

Third, the Central Government has granted the widest space and platform for the HKSAR to conduct international activities and to facilitate the development of Hong Kong. As we know, some treaties on human rights, environmental protection and cultural protection contain treaty monitoring mechanisms. The State Parties are obliged to report periodically their implementation to the treaty bodies. Before the handover, the British Government was responsible for overseeing the implementation of treaties in Hong Kong. The British Hong Kong Government did not participate in the review of reports or external activities. After the return of sovereignty, the HKSAR Government is responsible for preparing the performance reports and submitting the reports along with national reports to the relevant treaty bodies for review. In addition, officials from Hong Kong can directly participate, as members of the Chinese delegation in the review of Hong Kong's reports and answer questions from the members of the treaty bodies. Furthermore, representatives of the HKSAR Government can also join the delegation of the Central Government to participate in the negotiations of some international treaties and international conferences. In this regard, I had close rapport with legal officials from the HKSAR Government at several international conferences.

Fourth, the competent authorities of the Central Government and the HKSAR Government have stayed in close contacts and maintained good relationship on matters relating to treaties through the Office of the Commissioner of the Ministry of Foreign Affairs in the HKSAR. This unique working mechanism formed under "one country, two systems" safeguards national unity as well as the high degree of autonomy of the HKSAR.

To sum up, the implementation of "one country, two systems" policy demonstrates that the provisions of the Basic Law on treaties and their application have very positive effect in maintaining the long-term prosperity, stability and development of the HKSAR. It is a groundbreaking practice in international law.

In hindsight, the successful implementation of the "one country, two systems" policy in Hong Kong can be attributed to many important factors and conditions, including the favourable international environment. However, our firm confidence and unfailing efforts in implementing this policy have played a profound and decisive role in securing the success. It has contributed to the international law by offering a pioneering, effective approach to peaceful resolution of historical issues left over by the past. The valuable experience we have obtained in the implementation of the "one country, two systems" policy over the years is not only for China, but also for the world. So it is worth our constant review and reflection.

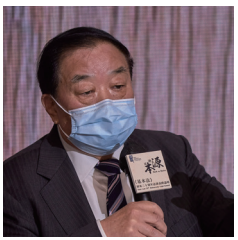
Finally, I would like to express my sincere appreciation and gratitude to the HKSAR Government for convening this important Legal Summit on the occasion of the 30th anniversary of the promulgation of the Basic Law and wish the Summit a great success.

Thank you.

# PANEL DISCUSSION 1

## The Drafting Process and Legislative Intent of the Basic Law

**Moderator:**



**Qiao Xiaoyang,**

Former Chairperson of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress

**Panelists:**

**Feng Wei,**

Former Deputy Director of the Hong Kong and Macao Affairs Office of the State Council

**Maria Tam Wai-chu, GBM, GBS, CBE, JP,**

Vice-chairperson of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress

**Elsie Leung Oi-sie, GBM, JP,**

Former Vice-chairperson of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress

**Qiao Xiaoyang:** Good morning, ladies and gentlemen. According to the arrangement of the Summit, I shall be moderating this panel, and the three of them shall be the main speakers. The four of us have been quite familiar to you now. One thing in common among us is that we have spent many years in working on, carrying out, and dealing with the Basic Law, but we have been doing so to different extents. And the most experienced here is Ms. Maria Tam Wai-chu, who is a member of the Basic Law Drafting Committee, well versed in this law from the onset, and has put a lot of effort into it. Elsie is also a veteran. Though not a member of the Drafting Committee, she is among the first in the HKSAR who has been involved with the Basic Law. And Mr. Feng, he is an able disciple of Professor Xiao Weiyun. Professor Xiao, as everyone knows, was the head of the four "guardians" of the Basic Law reputed by Hong Kong people and the convener for the drafting of the chapter on political structure of the Basic Law. I myself did not work on the Basic Law until I was appointed as a member of the Preparatory Committee for the HKSAR established in 1995, which makes me relatively a newcomer. Nonetheless, we are all engaged in the Basic Law, just like the fact you will grow fond of a person you are dealing with over time, we are deeply attached to the Basic Law. So, on December 20 of last year, Teresa Cheng Yeuk-wah, Secretary for Justice, informed me over the dinner of the 20th Anniversary of Macao's Reunification that she had an idea of holding a forum in commemoration of the 30th Anniversary of the promulgation of the Basic Law in due time this year. The idea sounds especially great to me, because we all have a very special attachment to the Basic Law, and it happens to be

the 30th Anniversary of the promulgation of the Basic Law and the 23rd Anniversary of its implementation this year. I told her on the spot that I loved her idea. Irrespective of the fact that Basic Law has gone through some trials and hardships, it has been proven and shall continue to be proven that it is feasible, achievable, and acclaimed. The key to the success of "one country, two systems" is that we have a great legal document like the Basic Law as the fundamental legal guarantee. So, we cannot commemorate it too much. This Summit is assigned a very good theme, "Back to Basics", pursuing the original intent of the Basic Law. Our topic for this session is "The Drafting Process and Legislative Intent of the Basic Law".

Under this topic, the summit organizers wish us to share some insights on the "separation of powers", the relationship between the Central Government and the HKSAR, the relationship between external affairs and foreign affairs, and other issues. So, let us hear what Mr. Feng Wei will talk about the original legislative intent.

**Feng Wei:** Thank you, Mr. Qiao, for the introduction. It has been two years since my retirement at the end of 2018, and I am very glad to be able to return to Hong Kong to review the original legislative intent of the Basic Law at a very crucial moment. Especially considering that I am doing this with Ms. Maria Tam Wai-chu, and Ms. Elsie Leung Oi-sie. In fact, we have among the audience Leung Chun-ying, Vice-chairperson of the Chinese People's Political Consultative Conference, who was the Secretary General of the Basic Law Consultative Committee at that time, and all of you present here are senior figures from the legal and political circles, which actually puts some pressure on me talking about such

an issue on such an occasion.

I will start with my thoughts on the topic. “Back to Basics” is a very good topic. I think Chief Executive Carrie Lam Cheng Yuet-ngor, by making a nice welcome speech, actually took a step “back to basics” when she clarified some very important issues concerning the Basic Law. The speech of the Chief Executive appears to me as a very deep reflection of hers, and, of the entire Hong Kong society.

Why do we need to go “Back to Basics”, and why the reflection? That means there is a problem now. Regardless of whether it is an individual or a society, if everything is going well in an orderly way towards a predetermined goal, there might be no need to look back and see what the original intent was. This is true for a society, and also for an individual. In his speech given in the morning, Mr. Zhang Xiaoming also pointed out a series of problems that have emerged in Hong Kong since the Reunification of Hong Kong, especially in recent years. It is my perception that the Hong Kong society is gradually returning to tranquility from the political riots and violent terrorist incidents in the past year, such that the entire society and the citizens are repondering the past, observing the present, and thinking about the future. It is in such a context that we are here to think about the original intent of the Basic Law, to regain the original aspiration, to clarify the direction for future development, to get rid of all kinds of interference, so that “one country, two systems” could promise a long-term and stable development. This is, as I see it, of great significance to Hong Kong and the country.

**First and foremost, I would like to give a brief talk about “Back to Basics”.** Where should we find the original legislative intent of the Basic Law? Those


of us who have read political science and law know that, to understand the British Magna Carta and other important constitutional legal writings, we must dig deep into the works of Montesquieu, Rousseau, and Hobbes. And to fully understand the US Constitution, we must devour The Federalist Papers. But, to study, explore and understand the Basic Law and its original legislative intent, where should we look for it? My personal proposal is that the answer can be sought from the series of speeches and discourses concerning the issue of Hong Kong and "one country, two systems" issued by Mr. Deng Xiaoping from the late 1980s to the promulgation of the Basic Law and during the transitional period. In her speech this morning, the Chief Executive cited at length two paragraphs from a speech of Mr. Deng Xiaoping, and Mr. Zhang Xiaoming also cited two paragraphs from it. That gives me the idea that nowadays where it has been 23 years since Hong Kong was reunified and the Basic Law has been put into effect, it carries important guiding significance for us to look back

and read, study, and comprehend Mr. Deng Xiaoping's series of discourses on Hong Kong issues and "one country, two systems" and to grasp the legislative intent of the Basic Law. These relevant discourses are made publicly available. The Liaison Office of the Central People's Government in the HKSAR has compiled a set of documents on "one country, two systems", Volume I of which is the important discourses on "one country, two systems" by the leaders of the Party and the State. It is to the best of my knowledge that as believers in academic freedom and freedom of speech in Hong Kong, no one would like to sanctify a certain person. But here, permit me to cite a passage made by Roosevelt, the thirty-second President of the United States, which I will read to everyone here. According to Roosevelt, "It is the lively and momentary brilliance revealing the essence and full meaning of things to us that has the real eternal value. One will grow wise through years of social and political life. When the brilliance of praise from others falls on him, it does not mean how important he himself is, but in the long process of the changes and progresses of human, at this short moment, a certain common will of mankind is satisfactorily manifested in him." And permit me reckon Mr. Deng Xiaoping as one of such a great politician. His talks and perceptions on the Hong Kong issue and "one country, two systems" reveal and picture not only the reality but also the full content of the Hong Kong issue and "one country, two systems" and represent the common aspirations of the people of the whole country, including Hong Kong compatriots. Also, his talks and perceptions embody the political wisdom in the political culture fostered in the long history of our Chinese nation and depicts the tolerant and broad-minded nature

of the ruling Communist Party of China on the Hong Kong issue. As of date, it has been 30 years since the promulgation of the Basic Law, and would therefore be indeed of great help for us to regain our original aspiration and ensure that "one country, two systems" would go unperturbed and further in Hong Kong that we go back to study the relevant discourses of Mr. Deng Xiaoping.

**Second, I will elucidate my opinion in a few words on the issue of the power of the Central Government or the relationship between the Central Government and the HKSAR.** For those of us who have been engaged in the handling of Hong Kong and Macao affairs for a long time in the Central Government, I consider it to be a very simple issue. But nonetheless, this is how things go in the world in most cases: when it comes to common sense issues, the simpler an issue is, the lesser attention people would pay to it. In her speech this morning, Ms. Xue Hanqin also reviewed the process of Sino-British negotiations on the Hong Kong issue. The issue of Hong Kong, in our terms, is the resumption of exercise of sovereignty, which is an act of state in either the political or legal sense. Act of state mostly takes the form of the acts of relevant central authorities. So, the resumption of exercise of sovereignty unequivocally means that the State Council or the Central People's Government shall govern the HKSAR, regardless of the actual method of governance. Failing such direct governance power of the Central People's Government over the HKSAR, Hong Kong shall not be a Special Administrative Region, but rather an independent political entity. So, when discussing this issue, we must digest the Preamble of the Basic Law, as well as its Chapter One, which addresses the relationship between the Cen-

tral Government and the HKSAR. In fact, the power of the Central Government and the relationship between the two are clearly spelt out in the Preamble of the Basic Law and well articulated in the provisions on the relationship between the Central Government and the HKSAR, from which it is crystal clear that the specific legal provisions have been laid down on such exercise of sovereignty and the power of the Central Government in the Basic Law, which is why we call the Basic Law the legalization and concretization of "one country, two systems".

Many fellow citizens in the society of Hong Kong doubt the overall jurisdiction of the Central Government, which, in fact, is quite understandable to me. The overall jurisdiction by the Central Government over the HKSAR has two levels of meaning.

1) There are powers directly exercised by the Central Government, for example, the Central Government takes charge of the foreign affairs and defense of Hong Kong, and appoints the Chief Executive and key officials of the HKSAR Government based on the nominations made by the Chief Executive; the Standing Committee of the National People's Congress interprets the Basic Law, powers like these are all direct powers of the Central Government. Also, the Standing Committee of National People's Congress accepts reports of the laws of HKSAR adopted by the Legislative Council of the HKSAR and executed by the Chief Executive and reviews them, all of which are the direct powers of the Central Government. In addition, the powers in many fields, as mentioned by Deputy Director Zhang Yong in the previous session, are direct powers.

2) The Central Government has established the local government organs of the HKSAR in accordance with the Basic Law,

including the position of Chief Executive, the Administration, the Legislative Council, the Hong Kong Courts, and particularly the Hong Kong Court of Final Appeal. Besides, the Central Government has also vested specific power in these HKSAR organs of state power by the Basic Law, which is a kind of delegation of power. In accordance with the delegation of power by the Central Government and the Basic Law, these organs put the Central Government's governance over the HKSAR into specific practice. It is very clear that the direct governance and delegated governance by the Central Government combine to form its overall jurisdiction over the HKSAR. Mr. Zhang Yong also mentioned that the Central Government has the power to supervise how the HKSAR implements the Basic Law, which is also a special authority of the Standing Committee of the National People's Congress as stipulated in our Constitution. So, I think the relationship between the Central Government and the HKSAR is quite clear. After Reunification, where did things go wrong in this regard? Personally, I believe that the issue is mainly arising from the aspects of the power of the Central Government and the relationship between the Central Government and the HKSAR. Down memory lane, one will observe that in 2003, there was a march due to the legislation on Article 23; in 2012, there was the anti-national education protest; in 2014, there was the incident of Occupy Central due to the issue of political development; and last year, the political riots and social violence incidents were as a consequence of the amendment of the Fugitive Offenders Ordinance by the HKSAR Government. All these major social and political controversies and mass protests targeted aspects of the power of the Central Govern-

ment and the relationship between the Central Government and the HKSAR. I personally figure that the Hong Kong society, or a certain number of Hong Kong people lack a clear idea about the power of the Central Government and the relationship between the two. And what problem does that lead to? There is a huge gap between how this new constitutional system works and how Hong Kong society looks at, understands, and identifies with it. That takes our long-term efforts to stop the gap. Personally, I think there are two reasons for this problem. The first is that after the Reunification of Hong Kong, to stabilize Hong Kong society and address the concerns of the Hong Kong people, the Central Government and the HKSAR Government seldom talked about the issues concerning the power of the Central Government and its relationship with the HKSAR and gave little publicity about the relevant provisions of the Basic Law. Instead, we keep saying that "one country, two systems" shall remain unchanged for 50 years. When we say that, we mainly mean that the specific social management system and lifestyle remain unchanged, but the constitutional system has undergone fundamental changes. From the Reunification until today, we have indeed discussed little about the fundamental changes. This is one reason. I think the Chief Executive has made a very good point this morning. From now on, many concepts must be further explained to the society to reach a community consensus, which is a long-term task. The second reason is that, from the standpoint of the history of constitutional development in various countries in the world, it takes an inevitable process for a new constitutional system to transform from legal provisions into an actual running mechanism. Three years, five years, eight or ten years are

too soon to see that transformation take place. For example, it took more than 50 years or even hundreds of years for the constitutional systems of the UK or the US to run effectively. That explains why when Mr. Sun Yat-sen talked about the development of China's constitutional government, he termed it the military government stage, the tutelage government stage, and the constitutional government stage. The advancement of constitutional government needs coercive measures of the state at its outset, otherwise there will be legal consequences. They are now made coercive and therefore aimed at making the constitutional government a reality. The second stage is termed the tutelage government, which means making all the citizens of the society perceive what constitutional government is and accept it. It is only on such basis that the regime will arrive at the constitutional government. So, as I speculate, Hong Kong is at the tutelage government stage. Accordingly, there is quite a long way for the implementation of "one country, two systems" in Hong Kong in future. While we are in this process, I think that the HKSAR authorities, the Chief Executive, the administration, the legislature, and the judiciary have the common responsibility to implement the Basic Law and make sure the constitutional system under it runs effectively.

There is a last thought I would like to share. I have been working on Hong Kong and Macao affairs for 28 years, in Hong Kong, Beijing, military organs, and the Central Government organs. I have learned from these 28 years of experience that the Central Government has never underestimated the difficulties in putting "one country, two systems" into effect. It is indeed very difficult. The Central Government has never wavered its confidence

in implementing it, as General Secretary Xi has repeatedly said that we would do it "firmly and unswervingly". Also, I would like everyone here and, through all of you present, the people of Hong Kong to know, that the Central Government has never lost patience with Hong Kong society. The Central Government has always exercised patience. So, I think that as long as we all work together, stay true to the original intent of "one country, two systems", this policy will surely go steady and far in Hong Kong, and Hong Kong will maintain long-term prosperity and stability.

**Qiao Xiaoyang:** Now let us hear what Wai-chu has to say.

**Maria Tam Wai-chu:** Thank you Mr. Qiao. I participated in the drafting of the Basic Law and became a member of the political system panel and the central-local relationship panel when I was about thirty-nine years old. I felt like ageing from 39 to 93 in those four years and eight months' time. There were a lot of controversies back then. The political system panel was charged with resolving the issues related to the "separation of powers", the political system, and whether the judiciary should be dominant and independent. We have never tried to make use of any foreign model of "separation of powers" for the political system of the HKSAR, or the model of the National People's Congress of the Mainland as a blueprint. But rather, as how Mr. Ji Pengfei puts it, we started off from the legal status and actual situations of Hong Kong to ensure its prosperity and stability. To this end, we have to take into consideration the interest of all social strata in a way conducive to the development of the capitalist economy. We must preserve the effective parts of the original political system and gradually blaze a democratic trail suitable for Hong Kong's conditions. That

is why we should not impose the "separation of powers" on the political structure of Hong Kong which must adhere to the PRC Constitution and the Basic Law. As Mr. Li Fei once said, besides executive, legislative, and judicial powers, there is sovereignty. There is a book (Introduction to the Basic Law of the Hong Kong Special Administrative Region) that has everything about the background, details, and controversies involved in our drafting and discussion of the Basic Law in its first edition of October 1990. After the adoption of the Basic Law in April 1990, Committee members Wang Shuwen and Wu Jianfan compiled all our arguments, discussions, and conclusions in the book. It says so in the book that there are two different opinions about administration and legislature in the drafting process. One is to follow the existing executive-led system of Hong Kong; and the other is against it, and in favor of a legislature-led system, insisting that the administration should be accountable to the legislature, in other words, a legislature-led system. But such opinion was rejected, because our group agreed that the old governing system of Hong Kong was an executive-led political system. Not only that, an executive-led political system is contemplated in the specific provisions of the Basic Law, to be specific, in the power of the Chief Executive under Article 43 that provides the Chief Executive accountability system. It is an executive-led system as well when Chairman Andrew Leung prioritizes government bills on the agenda of the Legislative Council. Besides, there is the separate vote-counting detailed in Annex II. On the Consultative Committee there were "Two Los", "Lo Senior" Lo Tak-shing and "Lo Junior" Vincent Lo Hong-sui. Mr. Lo Tak-shing made a proposal that all motions

passed in the Legislative Council must be carried by at least majority votes in both functional constituencies and geographical constituencies, including government bills, not just private bills. But Vincent proposed a simple majority of Legislative Council members for government bills against separate vote-counting in each constituency. And Vincent won at last. So now it is written in Annex II, that is, private bills may not be passed without a majority of votes in each constituency, but it only takes a simple majority for government bills. Besides, Article 74 of the Basic Law involves private bills of members. Among the drafters, there were two "Chus": the East "Chu", Dorothy Liu Yiu-chu; and the West "Chu", Maria Tam Wai-chu. As far as Article 74 was concerned, we asked what kind of private bills the members could raise, everyone agreed that they should not raise financial ones. Dorothy believed private bills concerning the political system and government operation should not be allowed, given the executive-led system. I proposed that a private bill involving government policies could only be made if it had obtained the consent of the Chief Executive in writing. What is that for? It is to maintain an executive-led system.

I just mentioned that some argued for a legislature-led system on the ground of the accountability to the legislature as provided for by Article 64 of the Basic Law. The text reads to the effect that "the Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region:", followed by a colon. Here comes a colon story. What is behind the colon? It is that the Government shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall an-

swer questions posed by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure. Some members requested the insertion that the legislature shall have the power to supervise the administration. They engaged in quite a debate over it. Some were even shouting in a high-pitched voice. What could we do about it? Finally, Mr. Zhou Nan stood out and said, when discussing the Joint Declaration, some proposed that the relevant administrative organs should be accountable to the legislature. "I asked right away, what does that mean?" The other side was the Hong Kong political advisor from the UK, as I figure, probably Robin McLaren, a former British diplomat, replied Mr. Zhou Nan and said, "let's say there are one, two, three and four functions of Hong Kong as it is now (i.e. in 1982 to 1984)", "accountability of the administration to the legislature" does not mean that we practice a legislature-led system, but that the administration is accountable for these four functions. In the end, we rejected the insertion that the legislature shall have the power to supervise the administration. In the Basic Law we have reflected as much as we could an executive-led system in the provisions concerning the allocation of powers, in the power of the Chief Executive, the power of the Government and the power of the Legislative Council.

Permit me to give my personal views on the "separation of powers" and judicial dominance. After HKSAR was established, the number of judicial review cases greatly increased, and there are certain people who put the Hong Kong Government under judicial review from time to time. But personally, I do not believe that Hong Kong is practicing judicial dominance. Judicial independence implies that we never waver over the independence of tri-

al, it has never happened nor may it ever happen. We at times hear certain people in the legal profession saying that judges have remarked that Hong Kong practices "separation of power". Permit me say here that they are citing the remark in a different context. The political system of Hong Kong is executive-led, with mutual coordination and check and balance between the administration and legislature. The problems facing us at present, such as our ranking according to the Gallup Law and Order Index, are something everyone is very clear about. So, it is hoped that the judges and the judiciary can do more about the interests of the overall situation. In short, we are not practicing judicial dominance. I think that by "separation of powers", the judge was referring to a principle of trial in the common law, known as "judicial deference". Namely, judges refrain themselves from making a ruling on issues which belong to the scope of the executive and legislative powers. In our political structure, the three powers are allocated and exercised by three different organs, with none of which can replace the other. In the common law case of Secretary of State for the Home Department v Rehman [2003] 1 AC 153, Lord Hoffmann of the Supreme Court of the UK discussed "judicial deference" to the administration and made a judgment. He gave two reasons. First, it is a constitutional requirement of decentralization that no matter how broad the court's jurisdiction is, the judicial, executive, and legislative powers are separated. So, we should see that in Hong Kong "separation of powers" is not the essence of its political structure, it should be the "allocation of three powers". For example, what is within the definition of national security? What is good for national security is not a legal issue, but a policy decision. According to the constitution of

the UK and many other countries, policy judgments are not made by the courts, but the administration. Second, from a practical perspective, it makes common sense that it is the administration which makes policy decisions. This is the special responsibility and authority of the Chief Executive. By the principles recognized by the European Court of Human Rights, it is not the responsibility of the judiciary to make decisions for decision-making departments on a pure question of administration or expediency. It should be noted that in matters of national security, failure is costly. The judiciary has to consider supporting and showing respect for the judgment of the administration, not only because the administration has access to special intelligence and expertise in the whole matter, but also because the potential consequences of this decision are borne by the entire society. I personally think that in terms of the constitutional system, we are not practicing "separation of powers", but follow the provisions of the PRC Constitution and the Basic Law. Mr. Li Fei has reminded us that besides the three powers, there is sovereignty. We respect how courts traditionally honor the principle of the "separation of powers", but I hope the legal profession will not elevate it as our constitutional structure.

As for the issue of the judicial dominance, the Court of Final Appeal has the final say on cases within the limits of the high degree of autonomy of Hong Kong. But when it comes to the relationship between the central and local governments and the powers of the Central Government, we have the corresponding provisions of Article 158(3) of the Basic Law. So, I think that judicial dominance refers to the judicial authority within the high degree of autonomy of Hong Kong, implying that no one overrides the

Court of Final Appeal. However, as for the relationship between the Central Government and the local governments, the National People's Congress is charged with the interpretation of this relationship and to make appropriate decisions. Mr. Zhang Yong has just shown it in detail. Articles 62(2) and 67(1) of our Constitution have vested in the National People's Congress and the Standing Committee of the National People's Congress the powers to oversee the implementation of the Constitution. In this regard, it is most powerful. There is also the effect of the Standing Committee's interpretations. The interpretations of the Basic Law are also binding in Hong Kong, everyone of us must abide by them, not to breach or challenge them. The HKSAR Court agrees with this in its judgment: for example, in the judicial review case where Leung Lai Kwok challenged the "831 Decision", the Judge decided that the Hong Kong Court has no jurisdiction over the 831 Decision, "the court simply has no jurisdiction to do so". In the judicial review case relating to the decision of the National People's Congress to approve the Co-location Arrangement, the Judge accepted evidence from government experts including that the decisions of the National People's Congress are binding on Hong Kong, holding that Hong Kong courts have no competence under Hong Kong law to judge whether decisions of the National People's Congress are valid.

In summary, first, we have never structured the political system of Hong Kong according to anyone's model of "separation of powers" in the first place. Second, our political system is executive-led where the administration and the legislature exercise checks and balances over each other and stay coordinated with each other. Third, the independent

factor of judicial power in this interaction is the independence of trial and adjudication.

Lastly, I think after 23 years of implementation, we still have time to fully implement the Basic Law. I hope that we can stay true to our vision and face the practical issues that are required to be addressed, make full use of our minds to practice the "One country, Two systems" better.

**Feng Wei:** Permit me to add a few words about the political system. The political system is indeed a big topic. I have learned from some historical documents that during the drafting of the Basic Law, there were many discussions and proposals on the political system. Among them are the parliamentary cabinet system, as in the UK, and the "separation of powers" as well, as in the US. In the end, based on our system of unitary state and the actual situation in Hong Kong and taking into account the previous form of political system in Hong Kong, we established the current political system stipulated in the Basic Law. After the Reunification of Hong Kong, political system is actually a recurring topic, and recently it came up again. The Chief Executive also made her opinion known. The Hong Kong and Macao Affairs Office of the State Council and the Liaison Office of the Central People's Government in the HKSAR have also expressed their opinions on the political system of Hong Kong for the first time in public. Since our theme today is "Back to Basics" and we are at this panel, I would like to make a theoretical analysis briefly. In terms of methodology, there are two ways to put a political system into perspective. On the one hand, the normative interpretation means we digest certain legal norms that establish the political system and the logical ties that link up the norms, and get a grip on the historical back-

ground of legislation and legislative intent to define the political system. As suggested by "Back to Basics" today, if we go back to the Basic Law and make a normative interpretation, in light of the speeches of Mr. Deng Xiaoping, the political system is obviously not a "separation of powers". So, I personally think the statement made by the Hong Kong and Macao Affairs Office of the State Council is quite accurate. That is what normative interpretation is. And on the other hand, legal positivism. The so-called legal positivism means that I have the option to define a political system by norms, but I mainly define it by its actual operation results and social effects. And should we resort to legal positivism to judge the current political system of Hong Kong, many may come to the conclusion of "separation of powers". That is due to the fact that since the Reunification of Hong Kong, despite the overall effective operation of the political system, in fact, it has many issues. There are many reasons for that, such as the legislative expansion of power that we often talk about, and the judicial dominance or judicial supremacy just mentioned by Ms. Tam Wai-chu. I do not have any insight on this issue. It appears to me that after the Reunification of Hong Kong, the judicial system in Hong Kong actually adopts judicial activism. This in fact clips the wings of the HKSAR Government. I once suggested to an official of the HKSAR Government that he should do something in a certain way. But he said he dared not, or else the Government would lose the case before the court. The first thing crossing his mind was losing the case before anything had been done, which was obviously also problematic. That explains why from where I see "Back to Basics", the political system of Hong Kong is not one of "sepa-

ration of powers". But why are we having such a situation now? I sense something related to ideology is going on. Our legislature, administration, and judiciary in power are running this system by the concept of "separation of powers" in actual practice, which has led to certain problems in the current political system in Hong Kong. Seeing that, I propose we recall the words of Deng Xiaoping, who made it very clear. I suggest that the legislature, administration, and judiciary of our HKSAR should resort to normative interpretation to look at the political system of Hong Kong.

**Qiao Xiaoyang:** I will add a few words on Hong Kong's political system. You call it not the "separation of powers", then what kind of system is it? As clearly wrote in a book by Professor Xiao Weiyun, what the HKSAR practices is the Chief Executive system, i.e. an executive-led system described in a fashion parallel to the presidential system and the cabinet system. I consider this as Back to Basics. Now Ms. Elsie Leung Oi-sie please.

**Elsie Leung Oi-sie:** First of all, as for the legislative intent, we actually have a great deal of materials. I have read the minutes of the Basic Law Drafting Committee and of the Basic Law Consultative Committee, and it is noted in detail in a compilation by Hoey Lee. But we should not place full reliance on that as the original legislative intent, because it was just a drafting process. While on record some people made a certain point, there was no consensus; it was not a final opinion. So, I think, the material really getting the legislative intent across to people should be the explanations by Mr. Ji Pengfei on the draft Basic Law on March 28, 1990, where he put it very clearly. He asked, what was the political system in Hong Kong? It had to follow the concept of

"one country, two systems" and the legal status of Hong Kong, operating to benefit growth of the capitalist economy and in the interests of all classes. The good part of it must be retained. Then, we have the responsibility to gradually develop a democratic system based on the actual situation in Hong Kong. This system was about the mutual coordination and regulation between the administration and legislature. To my knowledge, there are actually many different understandings on the "separation of powers". The "separation of powers" in the UK is different from that in the US. Different people have different ideas. I believe the most important thing is to resort to the provisions of the Basic Law. Article 48 of the Basic Law clearly illuminates that the responsibility of the Chief Executive shall be to lead the HKSAR to make policies. This is also the power of the administration. Among the powers related to the administration under Article 62 of the Basic Law, the first is to formulate and implement policies for the HKSAR, so the power to make policies lies with the administration. To push through her policies, the administration needs law and financial provisions, which two are in the hands of the Legislative Council. Per Article 73 of the Basic Law, the Legislative Council enacts laws and approves fiscal expenditures. That is how different powers lie in different organs. Since policies are made by the administration, the latter takes the lead. Laws are drafted to promote its policies, but members of the Legislative Council should not propose private bills involving public expenditure, political system, government operations and policies, and the members must obtain written consent from the Chief Executive before they propose them. The members of the Legislative Council cannot make

policies without the consent from the Administration, but they can lobby. They are elected by the citizens, with whose support for their initiatives they can push policies. But the power to draft laws and make policies mainly rests with the administration. It is quite clear. The distribution of the three powers, the administrative power and legislative power, as mentioned by everyone just now, has been clearly written in the Basic Law. As for the courts, they administer justice by duty and hear cases by power under no interference, so the "separation of powers" is quite clear. Some people say that the courts are not part of the government. That is not true. Who has the three powers? The government. The three powers of the government, including the administration of justice, are administrative, legislative, and judicial powers. Where does the power of judiciary come from if it is not part of the government? So, I think the "separation of powers", in general, cannot fully reflect the relationships of the powers amongst the three branches.

Besides, when it comes to an executive-led system, many people argue that it is literally absent from the Basic Law. As true as the latter statement is, one can totally recognize it between the lines. The "separation of powers" is also literally absent from the Basic Law, but some people are just assertive that what we have is the "separation of powers". I suggest we look at the provisions of the Basic Law after all. Speaking of how to place the original legislative intent, I think the explanations to the draft Basic Law mentioned just now are very important. Mr. Feng Wei also made mention just now that we should review the speeches of Mr. Deng Xiaoping and other leaders. Given the fact Mr. Deng's speech was issued before the passage of the Basic Law, his words are more

expressive of the original legislative intent. What the Chief Executive said just now about how the Central Government exercises its powers to govern Hong Kong is a citation from Mr. Deng's speech. In an interview by a newspaper last week, I cited it too to explain why the Standing Committee exercised this power on November 11. The answer is in the relationship between the Central Authorities and the HKSAR, which is actually the biggest challenge to the implementation of the Basic Law, due to the fact that this is a new constitutional relationship and it is too much for us to realize the transformation. Because the Mainland and Hong Kong are two different systems, what we have received is colonial education and what the Mainland people have received is socialism education since school age. In their opinion, certain things are inevitable. But for those of us who are not educated in socialism, we simply do not understand it. In several cases, the Central Government has not been analytical about it in clear terms. Besides, there is cultural difference which makes it a little difficult for us to apprehend it. But the speech made by Ms. Xue Hanqin just now reminded me of one night not long after the Reunification that I had a talk with her for several hours, and she told me that the significance of the Reunification was that we were returning to the national system. She was one of the representatives of China in the Sino-British Joint Liaison Group at that time. Vice-Premier Qian Qichen once told them that you were then the representatives of China. After the Reunification, Hong Kong officials would be on our side. You must change your perspective and should not treat them as your opponents. So, that depicts how we should return to the system of state governance. It requires a change in perspective and a new

look at the Central Government not as our opponent. In fact, the Reunification makes us part of the country again, so I think while it takes time to gradually establish the relationship between the Central Government and the Region over the years of the practice of the Basic Law, the most important thing is mutual trust.

On January 29, 1999, the Hong Kong Court of Final Appeal issued the judgment for the Ng Ka Ling case. In the judgement the court answered a controversial issue arising from the Ma Wai Kwan case in Hong Kong, saying HKSAR courts have the jurisdiction…to examine whether any legislative acts of the National People's Congress or its Standing Committee…are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. This decision, so controversial in the Mainland and Hong Kong, provoked many legal scholars to point out that it was on a wrong track. As a consequence, the HKSAR Government requested the Court of Final Appeal to make a clarification. In a decision made for this purpose, the HKSAR Court of Final Appeal issued a statement on February 26, 1999, saying: "The courts' judicial power is derived from the Basic Law. Article 158(1) vests the power of interpretation of the Basic Law in the Standing Committee. The courts' jurisdiction to interpret the Basic Law in adjudicating cases is derived by authorisation from the Standing Committee under arts.158(2) and 158(3). In our judgment on 29 January 1999, we said that the Court's jurisdiction to enforce and interpret the Basic Law is derived from and is subject to the provisions of the Basic Law which provisions include the foregoing. The Court's judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under art.158 which would

have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein." This is how the relationship between the Central Government and the HKSAR falls into the right place. Though the Court of Final Appeal is the highest judicial organ in Hong Kong, in the big picture, it is still under the National People's Congress. The National People's Congress is the highest organ of power in China. A local judicial organ is not in a position to question any decision of the highest organ of power, which is the principle of parliamentary supremacy in common use in many countries. This is a significant milestone. Since then, we are able to correctly place the relationship between the Central Government and the HKSAR.

As for the issue of foreign affairs, what is the difference between foreign affairs and external affairs? I think foreign affairs are in the charge of the state, they are sovereign rights. A local government does not have such rights. But external affairs are the affairs of Hong Kong towards the outside world. It is an established international commercial city and economic and trade city and its external affairs are important to us. Consulate is an illustrative example. Only the state gets to set up consulates overseas, but the HKSAR Government is allowed to set up economic and trade offices to take care of its external affairs, also its business and other affairs. This is the difference between sovereignty and non-sovereignty. In this regard, the Basic Law has also made it very clear that to participate at a meeting or

in an organization where membership of any state is required, the HKSAR may identify itself as a member of the national delegation. But in the case of the membership of any region, for example, the WTO has four members among others, one is the Chinese Mainland, one is Hong Kong, one is Macao, and the other is Taiwan. In such case, there can be closer arrangements in economic and trade matters at regional level, which explains why there are CEPA and EFTA. They recognize Hong Kong's unique position. But this goes no further than regional membership. Hong Kong can neither set up a Consulate abroad nor identify itself as Hong Kong on certain occasion of international organizations or conferences limited to states. Hence, in terms of diplomacy, I do not think we have any disputes. In the legal explanation of the case Democratic Republic of the Congo, the Standing Committee of the National People's Congress made it clear that a country shall not be allowed to pursue two foreign affairs policies. So, irrespective of what the common law provides about sovereignty matters, we are obliged to follow the national policy. Therefore, I consider the practice of the Basic Law in foreign affairs quite a smooth one.

**Qiao Xiaoyang:** Both Maria and Elsie mentioned an executive-led system. There is no mentioning of an executive-led system in the Basic Law. However, many of its provisions underlie an executive-led system. I think what is of particular importance here is the status of the Chief Executive. The latter is not only the head of Government, but also the head of, and acting for and on behalf of, the entire HKSAR. Each of the three powers is accountable to the Central Government through the Chief Executive. Under such big responsibility assigned to her, she could not have handled the as-

signment without taking the lead. Therefore, many provisions of the Basic Law are interrelated for this conclusion to be drawn. The direct confrontation with the Court of Final Appeal in the early days of Reunification, as recaptured by Elsie, brought back my memories. The CFA judgment dated January 29, 1999, made some mistakes, for which the Standing Committee of the National People's Congress issued a legal interpretation on June 26. Upon its issuance, the CFA judgment took everyone by real surprise that the unexpected constitutional crisis just happened like that. Everyone had no clue of what to do with such a huge constitutional crisis, as it was merely more than one year from the Reunification. The Central Government took a very cautious approach, and that was how the four "guardians" earned their title in the first place. The Central Government sent for the four who clarified the relationship between the Court of Final Appeal and the Standing Committee of the National People's Congress from the angle of theory, from the provisions of the Basic Law and from the provisions of the Constitution, and pointed out where the mistakes were. Then followed by the Department of Justice, suggesting the Court of Final Appeal to make a clarification. The Court of Final Appeal responded promptly as suggested, stating that it had no intention to question the Standing Committee of the National People's Congress and that the Court shall follow the interpretation by the Standing Committee of the National People's Congress. Then the spokesperson of the Legislative Affairs Commission added a word to the effect that such clarification by the Court of Final Appeal was necessary. That was how such a huge constitutional crisis was resolved, aside from other problems on deeper levels, of course.

In conclusion, I would like to make a summary. The theme of this summit is "Back to Basics", as indicated by the title, the so-called "Back to Basics", in my understanding, means the pursuit of the original aspiration and intent of the Basic Law. Whether to keep the "one country, two systems" policy unchanged and unwavering, or the practice of "one country, two systems" away from deviation or distortion, we must not forget the original aspiration and intent of the Basic Law. So how do we apprehend the original aspiration and original intent of the Basic Law? I have a few points that I would like to talk about and share with you.

**First, we must always look at the Basic Law from the standpoint of the country.**

To fully and accurately grasp and implement the Basic Law, we must first address the issue of standpoint, i.e., where do you stand in your approach to the Basic Law? The answer to that question, I believe, is also very clear. We must look at the Basic Law from the standpoint of the country, neither from the standpoint of a foreign country nor merely from the standpoint of Hong Kong, but rather, from the standpoint of our own country. Because the "one country, two systems" policy is a basic national policy, whilst the Basic Law is a law of the country. After the Reunification with the motherland, Hong Kong has been returned into the system of national governance. So, only as Chinese people and from the standpoint of our own country can we truly grasp "one country, two systems" and the Basic Law, and fully and accurately carry them out.

**Second, when trying to understand the Basic Law, we must always insist that the status of the Basic Law is provided by the Constitution.**

As the fundamental law of the

country, the Constitution has the highest legal effect and the highest legal status in the territories of the PRC, including the HKSAR. For this reason, the constitutional status of the Basic Law of Hong Kong is undoubtedly granted and protected by the Constitution of the country. Some people still doubt the validity of the Constitution in the HKSAR. There has always been such a doubt since the Reunification. On April 4, 1990, the National People's Congress specifically made a decision when enacting the Basic Law of Hong Kong, namely the decision of the National People's Congress on the HKSAR Basic Law, announcing that the Basic Law of Hong Kong is enacted according to the Constitution and the specific conditions in Hong Kong and it is constitutional. The key to this decision is the word "constitutional". It is inferable that this decision was made on the premise that the Constitution is effective in the HKSAR. If the Constitution were invalid in the HKSAR, there would have been no issue on the constitutionality of the Basic Law, hence the special decision. So, the laws that underlie the constitutional system of the HKSAR inevitably include both the Constitution and the Basic Law, and the two are inherently inseparable. From the angle of the practice of the Basic Law, the Constitution is at the top of the legal system. When it comes to the rule of law, we must first talk about the Constitution, as every legal provision involves the Constitution if we try to locate its origin. It is my opinion that, in some cases, one may have very different understandings of the provisions of the Basic Law depending on whether he treats the latter as a legal document totally independent of, or under the Constitution. Because of this, if we adhere to the notion that the Constitution and the Basic Law constitute the constitutional basis

of the HKSAR, it will help to lay an ample constitutional foundation for the practice of the Basic Law. So, I opine that we stress on education in Constitution whilst providing the education in the Basic Law of the HKSAR, and emphasize that the Constitution is the fundamental constitutional basis of the HKSAR.

**Third, to grasp the Basic Law, we must always insist that it is a law of delegation.**

Since her resumption of the exercise of sovereignty over Hong Kong, the Central Government has full control over Hong Kong, and by the policy of "one country, two systems", the HKSAR enjoys a high degree of autonomy. So how is that done? In the design of the HKSAR system, the Basic Law has built a legal bridge for interconnecting the Central Government's overall jurisdiction over Hong Kong and the high degree of autonomy of the HKSAR. And this legal bridge has a name called authorization. For this reason, it is appropriate to assert that the provisions on the high degree of autonomy of the HKSAR under the entire Basic Law are delegations by the National People's Congress to the HKSAR. The high degree of autonomy of the HKSAR is not inherent in itself, but granted by the Central Government. This is clearly known to all. So, from this angle, we often call the Basic Law a law of authorization, and that is the reason. It is based on the theory of authorization that the Basic Law grants the HKSAR a high degree of autonomy. In terms of political science and legal theory, whether it is the relationship between a federation and its member states, or the relationship between the central and local administrative regions of a unitary state, it is essentially a relationship of power, except the nature of such relationship is different. A general view is that in federal countries, the relationship between the federation

and its member states is decentralization, and in unitary states, the relationship between the central and local administrative regions is authorization. Although the two concepts, decentralization（分權）and authorization(授權), only have one different character [in the Chinese language], they are fundamentally different in nature. The most important differences are in two aspects. The first aspect is that decentralization takes place among equal subjects, whereas delegation is between superior and subordinate. Here, I would like to make an additional point that some people see the relationship between the Central Government and the HKSAR as decentralization, this is because they do not get the implication of decentralization, but some are politically motivated, spreading the idea that the HKSAR and the Central Government are equal subjects, in essence, they are trying to turn the HKSAR into an independent or semi-independent political entity. The second aspect is that the powers under a decentralization system are against each other. The power of one may be wielded against the powers of others, while the powers under a delegation system are not. This is because the overall jurisdiction of the Central Government is the source of the powers of the HKSAR, and the powers of the HKSAR are not in a position to fight the power of the Central Government. So, if we perceive such a difference, we will get to ascertain why we should emphasize authorization rather than decentralization. The legal bridge between the Central Government's overall jurisdiction over Hong Kong and the high degree of autonomy of the HKSAR can only be authorization, not decentralization. We can understand the great political and legal significance of the authorization system created by the Basic Law like this: no authorization, no "one

country, two systems".

**Fourth, to understand the Basic Law, we must always perceive all of its provisions as an organically intra-connected whole.**

I used a metaphor in a discussion held among the members of the Basic Law Committee. The metaphor goes thus, "given the preamble, one hundred and sixty articles, three annexes, and regional flag and regional emblem patterns in the Hong Kong Basic Law, it puts together so many things. But we are not putting mutually unrelated apples in the basket of the Basic Law. It is likened to a bunch of grapes, an organic whole. And the vine that bunches the grapes together is the system of the HKSAR." So, to accurately understand the Basic Law, we must realize that the entire Basic Law is organically intra-connected, and that every article must be read as a part of the entire Basic Law, not in an isolated or mechanical way. Judged by the design of the HKSAR system, every clause of the Basic Law is also equally important, disallowing any choice of one over the others or any rule bending, and every clause must be carried out in its proper place.

**Fifth, to practice the Basic Law, we must always adhere to the fundamental purpose of "one country, two systems".**

It is clarified in the Preamble of the Basic Law that the Basic Law is made by the Central Government for the fundamental purpose of safeguarding national unity and territorial integrity, which is in fact, safeguarding the sovereignty, security, and development interests of the country and maintaining the long-term prosperity and stability of Hong Kong. That makes this fundamental purpose the paramount criterion at any time to tell whether one is standing by or against "one country, two systems" and the Basic Law, or whether one gets "one country,

two systems" and the Basic Law right or wrong. When emphasizing the overall jurisdiction by the Central Government over Hong Kong, we are actually emphasizing the responsibility of the Central Government to ensure the long-term prosperity and stability of Hong Kong as well. Since the HKSAR is a local administrative region directly under the Central Government and the Central Government has made the basic policies and the Basic Law for Hong Kong, it is her responsibility to ensure the prosperity and stability of Hong Kong. Why did the National People's Congress make the decision to safeguard the national security of Hong Kong in May this year and then the Standing Committee of the National People's Congress make relevant laws for Hong Kong? Everyone knows that it is due to the hostile forces inside and outside Hong Kong that have caused chronic chaos in Hong Kong. This situation has been intensified especially after the extradition law amendment turmoil in June last year to the extent of severely endangering national security, the economic prosperity and social stability of Hong Kong, and more importantly, crossing the bottom line of "one country, two systems". So to speak, we bear and forbear, and cannot bear any more, otherwise we are about to commit historical error. So, faced with such a situation, the Central Government, vested with the responsibility to safeguard and ensure the prosperity and stability of Hong Kong, is precisely doing the right thing to serve the fundamental purpose of "one country, two systems" and the Basic Law, and this is part of the power of overall jurisdiction by the Central Government. The relevant decision made by the Standing Committee of the National People's Congress recently is actually made for the same reason.

**Sixth, to carry out the Basic**

**Law, we must always adhere to the people-centered development philosophy.**

Everything about the "one country, two systems" policy proposed by the Central Government to resolve the issues of Taiwan, Hong Kong, and Macao and realize the peaceful reunification of the country are people-centered. When leading the formulation of the "one country, two systems" policy, Mr. Deng Xiaoping emphasized over and over again that this must be done without prejudice to the interests of the residents of Taiwan, Hong Kong, and Macao. In resuming the exercise of sovereignty, which is quite unprecedented, the Central Government honored her promise. After the Reunification of Hong Kong, the Central Government has emphasized time and again that the HKSAR has the responsibility to develop its economy and improve people's livelihood, and that it prioritizes this on its agenda. This is evidence to show how the Central Government cares about Hong Kong residents and stay true to the original aspiration and intent of "one country, two systems" and the Basic Law. This is the original aspiration and intent of "one country, two systems" and the Basic Law. It is perceivable from the special policies practiced by the Central Government in Hong Kong and the high degree of autonomy granted by Basic Law to the HKSAR that one of the important purposes is to make the life of Hong Kong residents better and better after the Reunification with the motherland, not the other way round. It follows that when fulfilling the responsibility to carry out the "one country, two systems" policy and the Basic Law accurately, we must adhere to the people-centered philosophy of development, so that all Hong Kong residents shall benefit from the prosperity and stability of Hong Kong, and all the provisions of the Basic Law shall turn into their real benefits.

# PANEL DISCUSSION 2

## Interpretation of the Basic Law - the Right of Abode Case and the Oath-taking Case

**Moderator:**

**Dr. Priscilla Leung Mei-fun, SBS, JP,**

Member of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress

**Panelists:**

**Albert Chen Hung-yee, SBS, JP,**

Professor at the Faculty of Law, The University of Hong Kong

**Wang Lei,**

Professor at Peking University Law School

**Zou Pingxue,**

Professor at Shenzhen University; Director of the Center for Basic Law of Hong Kong and Macao Special Administrative Regions at Shenzhen University

**Priscilla Leung Mei-fun:** The topic for our current session is "The Interpretation of the Basic Law". After listening to the wonderful speeches in the morning, I recalled that I went to Beijing in 1987 to study the Basic Law with Professor Xu Chongde, another member of the Hong Kong Basic Law Drafting Committee. At that time, we discussed in depth issues such as separation of powers, executive-led system and why the Standing Committee of the National People's Congress (NPCSC) had the power of interpretation of the Basic Law. As early as on April 4, 1990 when the Basic Law was adopted, such issues had already been widely discussed in Hong Kong. In fact, none of these issues are new. Today, these issues have become hot topics recently because we have not struck a balance in the relationship between the Executive, the Legislature, and the Judiciary such that these questions about the origin and original intent have to be brought up again. Regarding the interpretation of the Basic Law, I also recall that during my pupillage in 1999, my team and I worked in this building for five consecutive days on the right of abode case *Ng Ka Ling*. Eventually, this case led to an interpretation of the Basic Law, which was the first interpretation of the Basic Law by the NPCSC after the handover. In this interpretation, there is a paragraph mentioning the legislative intent of Article 24 of the Basic Law, which is crystal clear. I still remember that in *Chong Fung Yuen* case later, it should be the then Chairperson Qiao (Editor's note: Qiao Xiaoyang) of the NPCSC who explicitly expressed disagreement with the Hong Kong court's interpretation of Article 24 with regard to *Chong Fung Yuen*. Chairperson Qiao thought that the NPCSC interpretation in 1999 should be applicable to *Chong Fung Yuen*.


I still recall that Ms. Elsie Leung Oi-sie, the then Secretary for Justice, did not support another interpretation of the Basic Law either because she thought that the interpretation in 1999 had already interpreted Article 24 very clearly. I also remember that in 1999, during the discussion on whether the Basic Law Article 24 needed to be interpreted after the conclusion of *Ng Ka Ling*, it was only after a lot of twists and turns that the NPCSC finally exercised this power of interpretation. Although Chairperson Qiao and the others did not agree with the Hong Kong court's interpretation of Article 24, they did not reinterpret the provisions concerning *Chong Fung Yuen*. This indicates that the Central Government has been very restrained in exercising the power of interpretation under Article 158. Unless the most crucial issue of significant public interest of Hong Kong not involved, the NPCSC would not interpret the Basic Law easily. Similarly, on the issue of oath-taking in 2016, when Sixtus Leung Chung-hang and Yau Wai-ching said something that was offensive to the People's Republic of China and

the Chinese people, I was already a front-line member of the Legislative Council (LegCo) and was sitting in the front position facing the President of Legislative Council like Mr. Tam Yiu-Chung now in this Chamber room. I heard it so clearly that I could not believe it. Therefore, eight of us, as members of the Legislative Council, together requested LegCo President Andrew Leung Kwan-yuen not to allow these two persons to re-take the oath. Back then, it was not expected that there would be a judicial review. In the end, the Government made up her mind and won the case at the judicial level of Hong Kong. The state has also promulgated another interpretation of the Basic Law for it. We can see that if not at the most critical time, in fact, the state will not interpret the Basic Law lightly. Unlike what some people have said that if Hong Kong does not implement separation of powers like the United States and the United Kingdom, there will be no rule of law in Hong Kong; actually, it is exactly the opposite. Under "one country, two systems", there are very effective checks and balances of the powers for our executive, legislature and judiciary. This is very effective within the scope of high degree of autonomy, and it has absolutely embodied the spirit of separation of powers, as mentioned by the West. However, we are a unitary state, so under the relationship between the central and local governments, we do not implement separation of powers, but the powers should check and balance one another. Today, it gives me great pleasure to have the presence of Professor Albert Chen Hung-yee from the Faculty of Law of The University of Hong Kong. Before I went to study in Beijing back then, I had consulted this senior from high school whether I should study in Beijing or not. He was already a

young law teacher at that time. Next is Professor Wang Lei, who is a professor and doctoral supervisor at the Peking University Law School and the Vice President of our Constitution Society of China. Another guest is Professor Zou Pingxue who has been working hard over the past decade. He has written many articles on the Basic Law and a lot of books. He is also the Director of the Center for the Basic Law of Hong Kong and Macao SARs at the Shenzhen University. Let us welcome Professor Albert Chen.

**Albert Chen Hung-yee:** I am honored to have the opportunity to join this seminar commemorating the 30th Anniversary of the promulgation of the Basic Law. The title of my speech is "The Right of Abode Cases in 1999 and the Relevant First Interpretation of the Basic Law by the NPCSC". I would like to give an introduction and some comments on several major issues.

The Court of Final Appeal's judgments in *Ng Ka Ling* case and *Chan Kam Nga* case in 1999 can be regarded as the first significant constitutional case law after Hong Kong's return to the Motherland. These cases gave rise to two issues. One of them was whether the courts in Hong Kong had the power to examine the validity of the acts of the central authorities, that is, the acts of the NPC and its Standing Committee, and to determine whether the act is contrary to the Basic Law. This issue is the one which was discussed this morning. That is, the Court of Final Appeal, on the application of the HKSAR Government, has resolved this issue by making a "clarification" of its original judgment. The Central Government has also accepted this clarification. The second issue arising from these cases was that among those Mainland children of Hong Kong residents, who were eligible to settle in Hong Kong and what

were the procedures for settling in Hong Kong. At the end, because of this issue, the then Chief Executive, Mr. Tung Chee-hwa, requested the NPCSC through the State Council to give an interpretation of Articles 22 and 24 of the Basic Law. Why was this request necessary? It was mainly because the HKSAR Government was of the opinion that the Court of Final Appeal's understanding of the relevant provisions of the Basic Law was inconsistent with and deviated from the original legislative intent of the Basic Law. Furthermore, this judgment would have a far-reaching and significant impact on the society of Hong Kong. This is because according to the estimation of the HKSAR Government at that time, if the judgment of the Court of Final Appeal were correct and had to be implemented, Hong Kong would be under enormous population pressure since more than 1.6 million Mainlanders would be entitled to settle in Hong Kong in the following ten years. After the NPCSC's interpretation, the court of the HKSAR finally gave the Basic Law provisions a fresh meaning in accordance with the interpretation of the Basic Law by the NPCSC.

Now I would like to talk about the role or importance of Article 158 of the Basic Law in this case. Article 158 of the Basic Law is a very important provision. It stipulates that the power of final interpretation of the Basic Law shall be vested in the NPCSC. It stipulates that if two types of Basic Law provisions are engaged in a case, then under certain circumstances, the Court of Final Appeal shall refer these relevant provisions to the NPCSC for interpretation before it decides on the case. This is provided for in Article 158(3) of the Basic Law. There are two kinds of such provisions: one is the provisions of the Basic Law concerning the

relationship between the Central Authorities and the HKSAR, and the other is the provisions of the Basic Law concerning affairs within the responsibility of the Central Government. The two provisions involved in the present cases were Articles 22 and 24. In particular, Article 22(4) involves both the affairs managed by the Central Government and the relationship between the Central Authorities and the HKSAR because Article 22(4) stipulates that for entry into the HKSAR, people from other parts of China must apply for approval. In the right of abode litigation, one of the provisions being challenged by the applicants for judicial review was the stipulation in the Immigration Ordinance that provided that even if someone meets the conditions for settling in Hong Kong as a Mainland child of a Hong Kong resident, it is still necessary to apply for a one-way exit permit from the relevant Mainland authorities (in accordance with Article 22 of the Basic Law). After that, they also have to apply to the Immigration Department of HKSAR for a Certificate of Entitlement to the Right of Abode. Only with these two documents can they settle in Hong Kong. However, the judgment of the Court of Final Appeal held that Mainland children of Hong Kong residents did not need to obtain a one-way exit permit issued by the Mainland authorities. They only needed to obtain a Certificate of Entitlement to the Right of Abode issued by the immigration authority of Hong Kong before they could settle in Hong Kong. The interpretation of Article 22 was therefore involved. Article 22 requires that people from other parts of China must apply for approval in order to enter Hong Kong. This approval procedure obviously refers to the approval procedure by the Mainland authorities. Is this provision appli-

cable to the Mainland children of Hong Kong residents? So, it involved the interpretation of Article 22 of the Basic Law, which belongs to those provisions concerning the relationship between the Central Authorities and the HKSAR or the affairs within the responsibility of the Central Government as mentioned in Article 158 of the Basic Law. However, the Court of Final Appeal did not refer this provision to the NPCSC for interpretation. In June 1999, the NPCSC gave an interpretation and stated that the Court of Final Appeal should have referred this type of provisions to the NPCSC for interpretation. Therefore, the NPCSC interpretation of the Basic Law in 1999 actually stemmed from the fact that Article 22 of the Basic Law is a provision concerning affairs within the responsibility of the Central Authorities or concerning the relationship between the Central Government and the HKSAR. It should have been referred to the NPCSC for interpretation by the Court of Final Appeal. Thus, Article 22 was among the provisions subsequently submitted by the Chief Executive of the HKSAR to the NPCSC for interpretation.

Apart from Article 22, there was also Article 24(2)(3), which is a stipulation concerning the right of abode of Mainland children of Hong Kong residents. Article 24(2)(3) was not clear as regards whether the father or mother of children (now applying to come to Hong Kong) who were born in the Mainland needed to be permanent residents of Hong Kong at the time of birth of the children concerned. If both of the parents had not been Hong Kong permanent residents when the child was born on Mainland, and the father or mother later moved to and lived in Hong Kong for seven years, and then became Hong Kong permanent residents, can the father or mother now ap-

ply for the Mainland child to settle in Hong Kong with the right of abode in Hong Kong? This was the ambiguity of Article 24(2)(3), which has later been resolved through the interpretation of the Basic Law by the NPCSC.

However, we should note that the interpretation by the NPCSC did not adopt an interpretation method that was incompatible or inconsistent with the common law. It is because the interpretation of Articles 22 and 24 of the Basic Law by the NPCSC in June 1999 was, in fact, the same as that by the Hong Kong Court of Appeal, namely, the Court of Appeal of the High Court in the present cases. It was only that the interpretation given by the Court of Appeal was overturned by the Court of Final Appeal at the stage of final adjudication in these cases. In fact, the interpretation given by the NPCSC in June 1999 only rejected the interpretation of the Court of Final Appeal but in effect affirmed the interpretation of the Court of Appeal. So, even two common law courts could have a different understanding of the relevant issues.

I would also like to mention in particular that the interpretation by the NPCSC has not overturned the actual decisions of the Court of Final Appeal in *Ng Ka Ling* or *Chan Kam Nga*. In other words, the right of abode obtained by these two persons, Ng Ka Ling and Chan Kam Nga, and the other litigants in these cases, as a result of their victory in the litigation before the Court of Final Appeal has not been affected by the interpretation of the Basic Law by the NPCSC. This is because Article 158 of the Basic Law expressly provides that an interpretation by the NPCSC shall not affect judgments which have already been made. Therefore, the interpretation of the Basic Law by the NPCSC did not overturn the judgment of the Court of Final Appeal

as far as the litigants in the two cases are concerned. The interpretation has only overruled the interpretation of Articles 22 and 24 of the Basic Law in the judgment of the Court of Final Appeal. As a result, when the courts need to interpret these two Articles in the future, they cannot follow the previous judgment of the Court of Final Appeal, but must follow the interpretation given by the NPCSC.

Another issue which I would like to discuss with you is whether the Chief Executive has the power to seek an interpretation from the NPCSC. This was very controversial at that time. Article 158 of the Basic Law does not expressly provide that the Chief Executive can request the NPCSC to interpret the Basic Law. It only stipulates that under the two circumstances mentioned earlier, it is necessary and obligatory for the Court of Final Appeal to seek an interpretation from the NPCSC. What was the role of the Chief Executive in 1999? He could not directly request the NPCSC to interpret the Basic Law; he only submitted a report to the Central People's Government, namely the State Council, in his capacity as the Chief Executive. Finally, it was the State Council that requested the NPCSC to interpret the Basic Law. What was the legal basis for the Chief Executive to submit the report? It was expressly mentioned in the report at that time that it was actually based on Articles 43 and 48(2) of the Basic Law. According to Article 43, the Chief Executive shall be the head of the Hong Kong Special Administrative Region. He shall be accountable to both the Central Government and the HKSAR. Therefore, the submission of report by the Chief Executive of the HKSAR to the Central Government is one of the acts demonstrating his accountability to the Central People's Govern-

ment. Why did he have to submit the report to the Central People's Government after the Court of Final Appeal decision in 1999? It was because Article 48(2) of the Basic Law mentioned that one of the functions of the Chief Executive is that he shall be responsible for the implementation of the Basic Law and other laws of Hong Kong. So, Article 48(2) was the legal basis for submitting the report in 1999. That is to say, when the Chief Executive was implementing the Basic Law in accordance with Article 48(2), he experienced some problems. As the judgment of the Court of Final Appeal was considered to have misunderstood the relevant Basic Law provisions, posing a serious impact on Hong Kong society, this situation was reported to the Central People's Government. After receiving the report, the Central People's Government decided to request the NPCSC to interpret the relevant Basic Law provisions. This was the legal procedure and legal basis for the interpretation of the Basic Law by the NPCSC in 1999.

As for the interpretation of the Basic Law by the NPCSC in 1999, what exactly is its legal status in Hong Kong? In December 1999, the Court of Final Appeal gave a very clear explanation in its judgment in *Lau Kong Yung* case. The NPCSC has the power to interpret the Basic Law in accordance with Article 158(1) of the Basic Law and the Constitution of the People's Republic of China. According to the understanding of the Court of Final Appeal, such power can be exercised at any time and is not limited to the situation where the Court of Final Appeal requests the NPCSC to interpret the Basic Law. If the NPCSC finds it necessary, it can promulgate an interpretation of a provision of the Basic Law under any circumstances. As for the scope of the interpretation of the

provisions of the Basic Law by the NPCSC, it is not limited to those provisions concerning the relationship between the Central Authorities and the HKSAR or concerning affairs within the responsibility of the Central Government. According to Article 158(1) of the Basic Law and the Constitution of the People's Republic of China, the NPCSC can interpret any provision of the Basic Law. Furthermore, the Court of Final Appeal also clarified that the legal effect of this interpretation given by the NPCSC could be traced back to the time when the Basic Law came into effect on July 1, 1997. That is, the interpretation by the NPCSC on the scope of the right of abode in Hong Kong under the Basic Law is not only applicable to circumstances existing after the promulgation of this interpretation, but in fact, the interpretation governed how Articles 22 and 24 should be interpreted as from the time when the Basic Law came into force on July 1, 1997. This understanding of the Court of Final Appeal in *Lau Kong Yung* is in fact based on the general principle of legal interpretation in the common law system, because in the common law tradition, when a court gives a new judgment holding that a previous court judgment has misinterpreted certain legal provisions, the relevant interpretation in the new judgment is applicable to circumstances that existed before the new judgment is pronounced. The above is Hong Kong courts' understanding of the "retrospective effect" of the interpretation of the Basic Law by the NPCSC as established in 1999 in *Lau Kong Yung*. Since then, this precedent has also been cited several times by the Court of Final Appeal and other courts.

**Priscilla Leung Mei-fun:** Now, let us welcome Professor Wang Lei of Peking University to share with us.

**Wang Lei**: I am greatly inspired by Ms. Leung's explanation on the Basic Law and Professor Chen's analysis on the interpretation of the Basic Law in the right of abode case. The issue of the right of abode in Hong Kong involves the relationship between the power of interpretation of the NPCSC and the power of interpretation of the courts in Hong Kong. On this, I would like to talk about four points.

**Firstly, the relationship between the power of interpretation of the NPCSC and that of the Hong Kong courts is the relationship between an authorizing party and an authorized party.** The NPCSC has the power to interpret the laws as well as the power to interpret the Basic Law. It can interpret all the provisions of the Basic Law and it also delegates the power to interpret the Basic Law to the courts of the HKSAR. Therefore, the relationship between the two is the relationship between an authorizing party and an authorized party. The interpretation by the NPCSC represents the Central Authorities, the permanent organ of the NPC and the will of the state. The Central Authorities have a role to play. But the power of interpretation of the Basic Law by the Hong Kong courts is the interpretation by the local courts or the courts of the HKSAR.

**Secondly, there is a very important difference between the scope of the power of interpretation of the Hong Kong courts and that of the NPCSC.** According to Article 158 of the Basic Law, the power of interpretation of the NPCSC is comprehensive. Since reunification, the interpretation by the Hong Kong courts has been made on a case-by-case basis. If the Hong Kong court's judgment is not its final decision, it can interpret the provisions of the Basic Law. In other words, not only can the provisions within

the scope of autonomy be interpreted, other provisions can also be interpreted. However, there is a restriction that if it is a provision related to affairs administered by the Central People's Government or the relationship between the Central Authorities and the HKSAR, and it is a final decision that cannot be appealed, the Court of Final Appeal of the HKSAR must refer the provisions to the NPCSC for interpretation. There is a difference in scope between the two. Of course, although the NPCSC has the power to interpret the entire Basic Law, it is exercised cautiously and rarely.

**Thirdly, about the legal binding force of the interpretation given by the NPCSC.** Since the NPCSC is the permanent organ of the highest organ of state power and it represents the will of the state, the interpretation by the NPCSC has the same effect as the law. It has the same effect like the Basic Law. Once an interpretation is made, it will be universally binding on the courts and other organs in Hong Kong and must be observed. In terms of legal binding force, the interpretation by the NPCSC has the same legal effect as the Basic Law, though it is an interpretation of the Basic Law.

**Fourthly, there is still a difference between the interpretation by the NPCSC and that by Hong Kong courts.** For instance, the interpretation of the Basic Law by Hong Kong courts is often specific, case-by-case and passive. The Hong Kong courts' interpretation is interpreting the provisions of the Basic Law in an individual case. The interpretation of the Basic Law by the NPCSC is often related to an individual case, but it is abstract, universal, and applicable in the future. The NPCSC can give an interpretation either actively or passively. When the Court of Final Appeal of the HKSAR refers the provision to

the NPCSC for interpretation in accordance with Article 158 of the Basic Law, such interpretation by the NPCSC is passive. However, the NPCSC may also, on the proposal of the Chairman's meeting of the Standing Committee, give an interpretation after a request was made. Of course, there are also situations where the State Council makes the request, or where the Chief Executive makes a request to the State Council which then makes the request for interpretation to the NPCSC.

**Priscilla Leung Mei-fun:** Thank you, Professor Wang Lei. Please welcome our next guest, Professor Zou Pingxue.

**Zou Pingxue:** It is a great pleasure to attend the Basic Law 30th Anniversary Legal Summit. Just now, Professor Chen and Professor Wang have given their wise opinions on the right of abode case. I intend to discuss the relevant legal issues on the oath-taking case of *Leung and Yau*. I will give a brief analysis of the interpretation of Article 104 of the Basic Law by the NPCSC and the relevant decisions of the Hong Kong courts. Then, with regard to the decision of the NPCSC on issues relating to the qualification of the members of the Legislative Council of the HKSAR on November 11, 2020, I will talk about the enrichment and development of the relevant legal principles involved in the oath-taking case as a result of that decision.

**I. A Brief Review of the Oath-taking Case**

We know that during the 2016 Hong Kong Legislative Council Election, some political figures representing the ideological mentality of localism and Hong Kong independence walked into the Legislative Council election from street movement. Before and after the election, there was a controversy over the eligibility of the candidates and also over the oaths, which were

taken by elected LegCo members Leung Chung-hang and Yau Wai-ching and were an insult to China. These two incidents and the resulting lawsuits were all closely related to the words and acts of Hong Kong independence. In the oath-taking case of *Leung Chung-hang and Yau Wai-ching*, the Court of First Instance and the Court of Appeal of the High Court of the HKSAR held that the two elected members were disqualified due to their refusal to take the oath as stipulated by the law. Leung and Yau continued to apply to the Court of Final Appeal for leave to appeal but it was later refused. When the judicial review of the oath-taking controversy was being heard, the NPCSC gave an interpretation of Article 104 of the Basic Law, which is the provision specifically providing for the oath-taking. After the promulgation of this interpretation, the HKSAR Government brought a judicial review against four other members who had taken the oath in the Legislative Council, namely, Lau Siu-lai, Nathan Law Kwun-chung, Leung Kwok-hung and Yiu Chung-yim. On July 14, 2017, the High Court held that the oath taken by these four persons was invalid and they were disqualified as members of the Legislative Council with effect from the day of the oath.

**II. Three Legal Issues Involved in the Interpretation of the Basic Law by the NPCSC and the Related Judicial Decisions**

We are aware that the interpretation of Article 104 of the Basic Law by the NPCSC, issued before the judgment at first instance of *Leung and Yau* was handed down, mainly concerned three aspects. First, it is stated that "to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and bear allegiance to the Hong Kong Special Administrative Region of

the People's Republic of China" is not only the legal content of the oath, but also the legal requirements and preconditions for standing for election in respect of or taking up public office. Second, regarding the specific meaning of the requirement that when assuming office, the relevant public officers, including the LegCo members, must, in accordance with law, swear, it has made four provisions. These four provisions have a formal requirement and also a substantive requirement. Third, it sets out the legal binding force of the oath prescribed by law under Article 104 of the Basic Law. It is stipulated that the oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law. Well, the judge of the Court of First Instance in *Leung and Yau* also said that even if the NPCSC had not interpreted the Basic Law before, it would not affect the judge's decision. In accordance with section 21 of the Oaths and Declarations Ordinance of the Hong Kong Laws, the judge decided that those two persons were disqualified as LegCo members for having refused and omitted to take their oath. Therefore, the decision of the President of the Legislative Council to allow Leung and Yau to re-take the oath was wrong, and Leung and Yau was disqualified as LegCo members because they failed to complete the oath-taking. This judgment is also in line with that of Judge Hartmann in *Leung Kwok-hung v Legislative Council Secretariat* in 2004 in that the act of changing the oath clearly contravened sections 16, 19 and 21 of the Oaths and Declarations Ordinance. Of course, we also know that under the local law, LegCo members are

required to take the oath in the prescribed form. If LegCo members wish to change the substance of the oath, confirmation through the legislative procedure is needed.

Reviewing the above judgments and taking into account the controversial issues related to the Basic Law after 2016, I think three issues are worthy of our attention.

1. The judgment of the oath-taking case of *Leung and Yau* and that of the case of qualifications of Lau Siu-lai, Leung Kwok-hung, Law Kwun-chung and Yiu Chung-yim as LegCo members have, in fact, clearly clarified the effect of the interpretation of the Basic Law by the NPCSC from the perspective of a judicial decision. It can be seen that the interpretation of the Basic Law by the NPCSC has binding effect on the cases heard by the Hong Kong courts. This involves the effect of the interpretation of Article 104 of the Basic Law by the NPCSC, and the court also cited *Chong Fung Yuen* in 2001. The power of interpretation of the NPCSC is not limited to the situations where the court shall request the NPCSC to interpret the Basic Law under Article 158 (3) of the Basic Law, but covers all provisions of the Basic Law. Meanwhile, the court also pointed out that the NPCSC's interpretation mechanism implemented based on the Mainland system should not be questioned by applying Hong Kong's common law practice and perspective. The Court of Appeal further explained this issue and pointed out that Leung and Yau, as the appellants, had not proved whether the interpretation of the Basic Law by the NPCSC had exceeded its statutory authority in the Mainland legal system. Relying on Hong Kong's local laws and common law alone, it was not sufficient to determine whether the NPCSC had acted ultra vires

in interpreting Article 104 of the Basic Law. The Court of Appeal also cited *Ng Ka Ling* and pointed out that the Basic Law did not authorize Hong Kong courts to decide whether the NPCSC could amend the Basic Law or whether the interpretation by the NPCSC was invalid. As such, the decision in *Leung and Yau* that the NPCSC's interpretation of Article 104 of the Basic Law had binding effect on all Hong Kong courts was emphasized again in the case of the four LegCo members later. On December 3, 2016, a High Court action was brought by the HKSAR Government against the other four LegCo members who had also added words to their oath. The Government's proceedings sought to disqualify the four as LegCo members. The Court of First Instance of the High Court handed down the judgment in 2017, holding that the oath taken by those four persons was invalid. In this case, Leung Kwok-hung was especially dissatisfied and appealed the decision. The Court of Appeal dismissed his appeal and upheld the original decision. In *Leung Kwok-hung*, after ruling on the appeal, the Court of Appeal also stressed that according to *Lau Kong Yung* and *Chong Fung Yuen*, when the NPCSC interpreted the Basic Law, Hong Kong was bound to follow it. Therefore, the power of interpretation of the Basic Law by the NPCSC has been fully recognized and respected. This is the practice of "one country, two systems" legally. The Court of Appeal stressed again that the interpretation of the Basic Law by the NPCSC was binding and was an integral part of the legal system in Hong Kong.

2. We have to recognize that with regard to the oath-taking case of *Leung and Yau*, the interpretation of Article 104 of the Basic Law by the NPCSC and the explanation submitted by the

Legislative Affairs Commission of the NPCSC on the draft interpretation of Article 104 of the Basic Law have provided a legal basis for returning officers to implement the mechanism of confirmation letter system. And it was in the election petition in relation to the confirmation letter where the Hong Kong court decided that since its drafting, the Basic Law has always substantively required candidates and LegCo members to sincerely uphold the Basic Law and bear allegiance to the HKSAR. We can see that in a number of election petitions filed by candidates whose nominations had been declared to be invalid, the court has all found that candidates and LegCo members must sincerely uphold the Basic Law and bear allegiance to the HKSAR, and that the returning officer was entitled to decide on this. More importantly, through reviewing the requirements imposed by the NPCSC and the Provisional Legislative Council on candidates for LegCo members and members of the Provisional Legislative Council when the Basic Law was drafted, the explanation submitted by the Legislative Affairs Commission of the NPCSC on the draft interpretation of Article 104 of the Basic Law, the Legislative Council Ordinance and other documents, the court stressed that since its implementation, the Basic Law had always substantively required candidates and LegCo members to sincerely uphold the Basic Law and bear allegiance to the HKSAR Government. Therefore, upholding the Basic Law, recognizing that Hong Kong is an inalienable part of China and bearing allegiance to the HKSAR which belongs to China are the most essential requirement for LegCo members and relevant candidates for public office.

3. With regard to the oath-taking case of *Leung and Yau*, the interpretation of Arti-

cle 104 of the Basic Law by the NPCSC provides a legal basis for the issue of qualification of LegCo members. The issue of qualification of LegCo members was stated more comprehensively and clearly in the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the HKSAR issued on November 11, 2020. The interpretation of Article 104 of the Basic Law by the NPCSC clearly mentioned that an oath taker who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law. Section 21(a) of the Oaths and Declarations Ordinance also provides that an oath taker who refuses to obey the oath after taking it shall be disqualified from entering on their office if they have not entered on their office, and shall vacate their office if they have already entered on their office. However, after the oath-taking case of *Leung and Yau* and the interpretation of Article 104 of the Basic Law by the NPCSC, local laws have not been strictly enforced partly because there was no relevant implementation mechanism. This time, the decision of the NPCSC on the qualification of LegCo members in the form of a NPCSC's decision has further explained and clarified Article 104 of the Basic Law that an oath taker who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law. What is the responsibility? In other words, if the act of an elected LegCo member does not meet the statutory requirements and conditions of upholding the Basic Law and bearing allegiance to the HKSAR, and once confirmed in accordance with the law, they will be immediately disqualified as a LegCo member. This is also

completely consistent with the relevant local judgments in Hong Kong. The court's decision gave an affirmative answer to whether Leung and Yau were disqualified immediately as LegCo members. The court held that section 21(a) of the Oaths and Declarations Ordinance explained very clearly that a LegCo member who refused to obey the oath shall be automatically disqualified without any further procedure required. Of course, we know the relationship between the decision of the NPCSC and Article 79 of the Basic Law. I am also aware that the local legal profession in Hong Kong has some different views on this. I think what is worth further study is Article 79 of Section 3 The Legislature of Chapter IV Political Structure of the Basic Law, which is mainly about the circumstances and procedures where the President of the Legislative Council declares that a LegCo member is no longer qualified for the office. It does not exhaust all the circumstances where other responsible bodies declare that a LegCo member is no longer qualified for the office, and legally it does not rule out other relevant circumstances of a LegCo member being disqualified. From the legal perspective, the circumstances where "the President of the Legislative Council shall declare that a member of the Legislative Council no longer qualified for the office" stipulated in Article 79 of the Basic Law obviously do not include the situation where one refuses or omits to take an oath. We can see from the stipulation under Article 35 of the Law on Safeguarding National Security in the HKSAR that a person who is convicted by the court of an offence endangering national security shall be disqualified from standing as a candidate in the elections of the Legislative Council and district councils, holding any public office in the HKSAR,

or serving as a member of the Election Committee for electing Chief Executive. If a person so convicted is a member of the Legislative Council, a government official, a public servant, a member of the Executive Council, a judge or a judicial officer, or a member of the district councils, who has taken an oath or made a declaration to uphold the Basic Law and bear allegiance to the HKSAR, he or she shall be removed from his or her office upon conviction, and shall be disqualified from standing for the aforementioned elections or from holding any of the aforementioned posts. We can note that regarding "bearing legal responsibility in accordance with law" in the interpretation of Article 104 of the Basic Law by the NPCSC, what is the meaning of the "in accordance with law" and "legal responsibility" here? There is no doubt that the "in accordance with law" here encompasses not only the currently effective laws and precedents, but also the necessary laws enacted by the NPCSC in the future, the decisions made by the NPC and its Standing Committee on legal issues, the interpretations of the existing laws by the NPCSC and the laws enacted and amended locally in Hong Kong; while the relevant "legal responsibility" depends on how it is stipulated by the specific law. Reviewing the whole case, we can see that from the very beginning, the Basic Law has precluded advocates of Hong Kong independence from entering the establishment, i.e., the Council and the Government. The Law on Safeguarding National Security in the HKSAR clearly stipulated that Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are fundamental provisions of the Basic Law. The exercise of rights and freedoms by any institution, organization or individual in the HKSAR shall not breach the provisions of Arti-

cles 1 and 12 of the Basic Law.

**III. Correct Understanding of the Interpretation of the Basic Law by the NPCSC**

The relevant content of this part overlaps with Professor Wang Lei's speech, so I will not go into many details here. We are aware that whether LegCo members of the Legislative Council of the HKSAR will act to the contrary to upholding the Basic Law and bearing allegiance to the HKSAR Government is the core and foundation underpinning the system of the Basic Law. On the one hand, the act involves the issues of the rights to vote and to stand for election. Article 26 of the Basic Law uses the words "in accordance with law" on the right to vote and the right to stand for election. That is, permanent residents of the HKSAR shall enjoy the rights to vote and to stand for election "in accordance with law". Therefore, these rights can be reasonably restricted by the law. Article 104 of the Basic Law and the interpretation of Article 104 by the NPCSC require officials, LegCo members, and judges to sincerely uphold the Basic Law and bear allegiance to the HKSAR Government. On the other hand, the Law on Safeguarding National Security in the HKSAR legislates against acts like secession and subversion of the state power and also restricts the freedom of speech and expression of individuals, including LegCo members. Of course, before the enactment of the Law on Safeguarding National Security in the HKSAR, LegCo members were not allowed to say or do anything about Hong Kong independence due to their oath taken, but the Law on Safeguarding National Security in the HKSAR imposes such reasonable restriction on individuals' freedom of speech and expression, which has confirmed that such acts may constitute a criminal offence. To

sum up the above laws, regulations and precedents, people who refuse to uphold the Basic Law or to bear allegiance to the HKSAR Government shall not be eligible to stand for election, nor be able to serve as members of the Legislative Council. Actually, this has already been made clear after the oath-taking case and the interpretation of Article 104 of the Basic Law by the NPCSC. However, some comments in the past had misled some people in Hong Kong society, making them think that people after being elected could enjoy the privilege of speech and act in the LegCo, or they could challenge the authority of the Basic Law and the authority of the Central Government and the HKSAR Government because of the so-called public mandate. When we look it back today, such unrealistic expectations and comments need to be rectified. In other words, if people after being elected as LegCo members still act in breach of their oath, they must bear the legal consequence in accordance with the law.

**Q&A Session**: I am Chan Sze Hoi, a counsel of the Department of Justice. I have a question: in the past, the interpretation of the Basic Law by the NPCSC has aroused worries about its impact on the rule of law and judicial independence among some people in Hong Kong society. May I ask if you think such worries are justified? Thank you.

**Zou Pingxue**: Let me answer the question raised by this audience. The interpretation of the Basic Law by the NPCSC is an integral part of the rule of law of Hong Kong, so the issue of undermining the rule of law in Hong Kong does not exist. First of all, the interpretation of the Basic Law by the NPCSC is stipulated both in China's Constitution and the Basic Law. The Basic Law is the core and foundation of the rule of law in Hong Kong. The

Constitution and the Basic Law jointly form the constitutional basis of the HKSAR. We cannot come to such a conclusion that the interpretation of the Basic Law by the NPCSC will undermine the rule of law of Hong Kong. Secondly, the overriding position of the interpretation of the Basic Law by the NPCSC in the constitutional structure of Hong Kong has also been affirmed by a series of decisions of the Hong Kong courts. We can say that the power of interpretation of the Basic Law by the NPCSC is an integral part of Hong Kong's rule of law. It is also precisely for the purpose of safeguarding the authority of the Basic Law and the rule of law in Hong Kong that the NPCSC exercises the power of interpretation in accordance with the law. To me, it is wrong to treat the interpretation of the Basic Law by the NPCSC as antagonistic to the rule of law and judicial independence in Hong Kong. Thirdly, I think the interpretation of the Basic Law by the NPCSC does not undermine the judicial independence in Hong Kong. It is because the interpretation of the Basic Law by the NPCSC has never interfered with the judicial independence in Hong Kong in the past. The judgments of the Court of First Instance of the High Court in Hong Kong have also shown that the interpretation of the Basic Law by the NPCSC did not interfere with the court's hearings. Also, over the years, there have been many cases in which the Hong Kong courts have interpreted the Basic Law, while the interpretation of the Basic Law by the NPCSC has been more prudent. Every interpretation was responsive and involved some major and key issues at the constitutional level, with the aim of resolving disputes and conflicts, and safeguarding the rule of law in Hong Kong. Even if the interpretation of the Basic Law by the NPCSC is related to

the cases heard by the courts, the issue of the NPCSC's intervention and interference with the cases heard by the courts does not exist either. The judicial independence has not been jeopardized in any way, which is my conclusion.

**Priscilla Leung Mei-fun:** I would also like to talk about the question posed by the counsel just now. As a matter of fact, I have been teaching the Basic Law at the City University of Hong Kong for more than 20 years. I believe that the legal profession in Hong Kong very often, only applies the common law to look into matters concerning "one country, two systems" and the Basic Law. As we all know, the Basic Law was passed by the National People's Congress. In fact, the "DNA" of the Basic Law has long indicated that the interpretation power of NPCSC is inherent in the Constitution. However, as Hong Kong practices "one country, two systems", our Basic Law has the characteristics of the common law during the process of its development, and the spirit of the common law has often been brought into it as nutrients when cases were decided by the courts. For example, as early as in 2004, Leung Kwok-hung sued the Legislative Council Secretariat, seeking to amend the content of the oath. Eventually, Justice Hartmann, the judgment of the trial judge demonstrated that the common law requirement for oaths were actually not less stringent than that of the NPCSC. Justice Hartmann said directly in his judgment many times that Article 104 of the Basic Law shall not be offended. All the words in the oaths of any LegCo member must be unanimously understood as being in line with the LegCo requirement on oaths by all the LegCo members. The oath-taking was also found to be a serious legal declaration. In other words, it came with legal responsibility

and consequences. If we look at the interpretation of Article 104 by the NPCSC after reading this common law case in 2004, it is not difficult to realize that common law and Chinese law nearly hold the same view. In particular, taking an oath represents a legal commitment, and many actions that offend oaths at common law will also come with far-reaching legal consequences.

Some people in the legal profession in Hong Kong believe that there seems to be no rule of law in Hong Kong after the interpretation of the Basic Law by the NPCSC. I believe this is certainly incorrect because Article 158 of the Basic Law in itself stipulates that our NPCSC has the power of final interpretation of the Basic Law. I would also like to supplement here. In fact, after the handover, the NPCSC has only interpreted the Basic Law five times according to Article 158(3) of the Basic Law. Professor Albert Chen said just now that the Court of Final Appeal had long recognized and accepted in *Lau Kong Yung* that the NPCSC could interpret the Basic Law at any time. I have to say that through my own observation, over the past 23 years, our state has been very determined to protect the judicial system of Hong Kong, thus exercising the power of interpretation of the NPCSC in a very restrained manner. The power of interpretation is part of the rule of law of Hong Kong. It is absolutely incorrect to say that the exercise of the power of interpretation contravenes the rule of law and contravenes the laws of Hong Kong. This is my supplement.

**Albert Chen Hung-yee:** Let me add a few words. Judicial independence is institutionally protected in Hong Kong. For example, judges cannot be removed arbitrarily. Also, judges are not subject to any external interference in the process of making

decisions, and government officials do not get in touch with judges to discuss cases litigated in courts. The tradition of judicial independence has already been very well-established in Hong Kong. The interpretation of the Basic Law by the NPCSC does not affect the independence of the judiciary, because courts still independently decide cases in accordance with the law, including Basic Law provisions as interpreted by the NPCSC.

The interpretation of the Basic Law by the NPCSC belongs to the category of legislative interpretation. In China's legal system, there is legislative interpretation, judicial interpretation, and even administrative interpretation. Legislative interpretation is a legislative act. When the NPCSC adopts an interpretation, the process is similar to its passing a law. It follows the same legislative procedure. First, a draft interpretation is prepared by the relevant department. Then advice is sought from the Hong Kong Basic Law Committee of the NPCSC in accordance with the Basic Law before the draft is submitted to the NPCSC for discussion. At the NPCSC meeting, the draft is usually discussed in groups and finally passed by voting. The NPCSC is the legislature of China, so the NPCSC performs a legislative act when it interprets the Basic Law. When a Hong Kong court applies the interpretation given by the NPCSC to adjudicate a case, it is similar to the court applying any other laws to decide on a case. The role of the court is to adjudicate cases according to the law, but what is the law? The law is enacted by the legislature. In Hong Kong, it is enacted by the Legislative Council, while in the Mainland, both the NPC and the NPCSC are the legislatures. Therefore, to me, the exercise of the power of legislative interpretation by the NPCSC does not

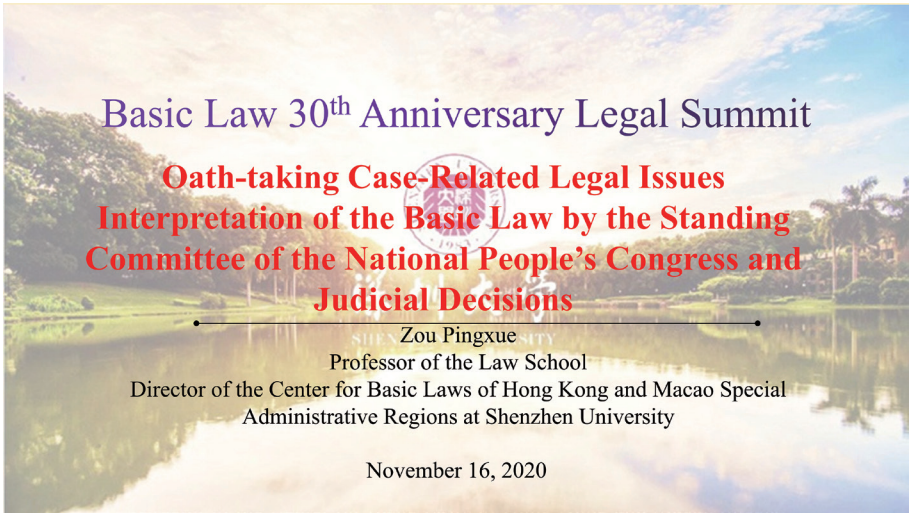
undermine judicial independence in Hong Kong nor the power of judges to adjudicate cases independently in accordance with law. As I have said earlier, if a case has already been finally adjudicated by the court, the NPCSC is not able to overturn the court's decision by interpreting the Basic Law afterwards. The rights and interests of the parties concerned in *Ng Ka Ling* and *Chan Kam Nga* have not been affected at all by the subsequent interpretation of the Basic Law by the NPCSC. The rights and interests that were granted to them by the judgment of the Court of Final Appeal were still retained by them after the NPCSC's interpretation.

Furthermore, I would like to talk about the oath-taking case of *Leung and Yau* which led to the interpretation of the Basic Law by the NPCSC in 2016. The interpretation was made because there were ambiguities in the Basic Law. As we all know, when Leung and Yau took the so-called oath for the first time, it was actually an "oath" in violation of the law. Then the President of the Legislative Council consulted a Senior Counsel and decided to arrange for these two members to take the oath again. It was precisely because the law was ambiguous at that time that the Senior Counsel advised that they should be given a chance to re-take the oath. If the law was crystal clear that the two members had been disqualified because of their failure to take the oath properly, the Senior Counsel would have given the President of the Legislative Council the following opinion: "according to the law, it is very clear that because they did not take the oath in accordance with the law for the first time, they have been disqualified as LegCo members, so they cannot re-take the oath." Since this aspect has not been clearly written in the Basic Law, the NPCSC has to promulgate this

interpretation. Of course, after the promulgation of the NPCSC's interpretation, the court must make a decision in accordance with this interpretation. If the NPCSC had not given the interpretation, and assuming that the court finally ruled that Leung and Yau could take the oath for the second time due to the grey area in the law, then they would have been able to take the oath for the second time and become LegCo members, and any subsequent interpretation given by the NPCSC would not have been able to overturn the court's decision. Just like in *Ng Ka Ling*, the NPCSC cannot deprive Ng Ka Ling of her rights and interests obtained in accordance with the court's decision. So, I believe there was a special background to the oath-taking case, and the interpretation given by the NPCSC was promulgated as a last resort. As Professor Wang Lei has just said, the NPCSC exercises its power of interpretation very cautiously. It will not exercise its power to interpret the Basic Law lightly unless it is absolutely necessary and unless there is no other way to resolve the problem.

**Wang Lei**: I would like to add one point to the oath-taking case. In fact, the requirement in the oath-taking case, is also found in the Constitution. The Constitution stipulates that citizens of the People's Republic of China are required to safeguard national security and the unity of the Motherland. In addition, the Basic Law also has such requirement for the relevant public officials, including members of the Legislative Council. The content of upholding the Basic Law and bearing allegiance to the HKSAR in the oath actually reflects one's loyalty to the country and is a legal commitment to the country and the HKSAR. We shall not take the oath-taking lightly. It is not only a commitment to a country, which encompasses the

concept of "one country", but also a legal commitment to the HKSAR. Furthermore, it is not only a formality and procedure, but also a condition for serving as the Chief Executive, a member of the Executive Council, a judge, a judicial officer and a member of the Legislative Council. The law has made it crystal clear by providing that if you refuse to take an oath, or if you make a false oath, then you shall be disqualified as a LegCo member. Therefore, taking an oath has very important legal consequences. If Article 104 of the Basic Law as well as the Oaths and Declarations Ordinance of the Legislative Council are breached and if you refuse to take an oath or if you make a false oath, because the stipulation under the Oaths and Declarations Ordinance is also very clear, then you shall be disqualified as a LegCo member. Of course, you can't take the oath again, because your act constitutes a fact and is against the law. The illegal act of Leung and Yau is already a fact, so it is impossible for them to re-take the oath. Of course, there are also some debates in the court's judgment. For example, whether it is the internal affairs of the Legislative Council or not, the answer is evidently no. Since there are clear requirements under Article 104 of the Basic Law and the Oaths and Declarations Ordinance, it is already a clear legal requirement at the statutory level. So, anyone in breach of them has to bear the consequences. Moreover, it does not belong to the immunity from legal proceedings and freedom of speech enjoyed by LegCo members because they have not yet become LegCo members when they are taking the oath. The immunity from legal proceedings and freedom of speech enjoyed by LegCo members mainly refer to speeches and voting made in respect of legislative proceedings, discussion of bills, budgets, and so on by the legislature.




I. Brief Review of the Oath-taking Case

II. Three Legal Issues Involved in the Interpretation of the Basic Law by the Standing Committee of the National People's Congress ("NPCSC") and Related Judicial Decisions

III. Correct Understanding of the Interpretation of the Basic Law by the NPCSC

# I Brief Review of the Oath-taking Case

- During the Legislative Council election of Hong Kong in September 2016, some political figures representing the ideological mentality of localism and Hong Kong independence walked into the Legislative Council election from street movement. Before and after the election, there was a controversy over the eligibility of the candidates and also over the oaths, which were taken by elected LegCo members Leung Chung-hang and Yau Wai-ching and were an insult to China. These two incidents and the resulting lawsuits were all closely related to the words and acts of Hong Kong independence. In the oath-taking case of *Leung Chung-hang and Yau Wai-ching*, (hereinafter referred to as *Leung and Yau Oath-taking Case*), the Court of First Instance and the Court of Appeal of the High Court of the HKSAR held that the two elected members were disqualified due to their refusal to take the oath as stipulated by the law. Leung and Yau continued to apply to the Court of Final Appeal for leave to appeal but it was later refused.

- When the judicial review of the oath-taking controversy was being heard, the NPCSC gave an interpretation of Article 104 of the Basic Law, which is the provision specifically providing for the oath-taking. After the promulgation of this interpretation, the HKSAR Government brought a judicial review against four other members who had taken the oath in the Legislative Council, namely, Lau Siu-lai, Nathan Law Kwun-chung, Leung Kwok-hung and Yiu Chung-yim. On July 14, 2017, the High Court held that the oath taken by these four persons was invalid and they were disqualified as members of the Legislative Council with effect from the day of the oath.

# II Three Legal Issues Involved in the Interpretation of the Basic Law by the NPCSC and Related Judicial Decisions

**01**

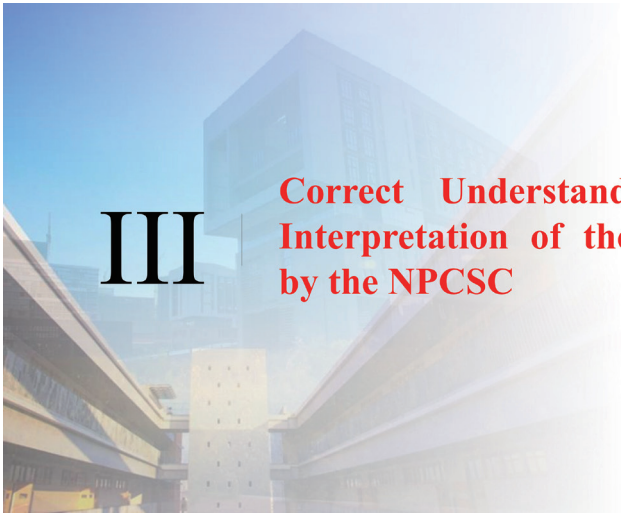
The *Leung and Yau Oath-taking Case* (and the case of qualifications of Lau Siu-lai, Leung Kwok-hung, Law Kwun-chung and Yiu Chung-yim) has clarified the effect of the interpretation of the Basic Law by the NPCSC from the perspective of a judicial decision.

**02**

The *Leung and Yau Oath-taking Case* and the interpretation of Article 104 of the Basic Law by the NPCSC have provided a legal basis for returning officers to implement the mechanism of confirmation letter system and clarified that since its drafting, the Basic Law has always substantively required candidates and LegCo members to sincerely uphold the Basic Law and bear allegiance to the HKSAR.

**03**

If the act of an elected LegCo member fails to uphold the Basic Law and bear allegiance to the HKSAR, he or she should bear corresponding legal responsibility which has been clearly provided in Article 104 of the Basic Law and the Oaths and Declarations Ordinance. However, Hong Kong has not strictly enforced the interpretation and there was no relevant implementation mechanism. The Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the HKSAR issued on November 11 clearly mentioned that the LegCo members shall bear legal responsibility, that is, if they breach the oath and "when the member is so decided in accordance with law, he or she is immediately disqualified from being a LegCo member".



# III Correct Understanding of the Interpretation of the Basic Law by the NPCSC

## Correct Understanding of the Interpretation of the Basic Law by the NPCSC

01 The interpretation of the Basic Law by the NPCSC is an integral part of the rule of law in Hong Kong, and the issue of undermining the rule of law in Hong Kong does not exist.

02 The interpretation of the Basic Law by the NPCSC does not undermine the judicial independence in Hong Kong.

03 The interpretation of the Basic Law by the NPCSC is not restricted by Hong Kong's judicial power.

04 The NPCSC has the power to interpret the Basic Law on its own initiative.

## Correct Understanding of the Interpretation of the Basic Law by the NPCSC

05 The interpretation of Article 104 by the NPCSC is not an amendment to the Basic Law.

06 The interpretation of the Basic Law by the NPCSC is not an unauthorized modification to the Basic Law, nor does it replace the legislation of Hong Kong.

07 The interpretation of the Basic Law by the NPCSC has binding effect on the pre-interpretation acts.

# Thank you for listening!

# PANEL DISCUSSION 3

## The Responsibility of Maintaining National Security under the "One Country" Principle

**Moderator:**

**Dr. Simon Lee Ho-ey, MH, JP,**

Member of the Basic Law Promotion Steering Committee

**Panelists:**

**Zhang Yong,**

Vice-chairperson of the HKSAR Basic Law Committee of the Standing Committee of the National People's Congress

**Wang Zhenmin,**

Professor at Tsinghua University School of Law

**Han Dayuan,**

Professor at Renmin University of China Law School

**Simon Lee Ho-ey:** The topic of the third panel discussion is "The Responsibility of Maintaining National Security under the 'One Country, Two Systems' Principle". We have three guests participating in our discussion today. They are Vice-chairperson Zhang Yong, who has given a keynote speech this morning, Professor Wang Zhenmin of Tsinghua University School of Law and Professor Han Dayuan of Renmin University of China Law School.

Regarding the issues of national security, there is a general national security concept in our country serving as the pillar and theoretical basis of the entire national security legal system. In the entire national security legal system in our country, it should be said that the National Security Law of the People's Republic of China (National Security Law of the PRC) was formulated on the basis of Article 28, Article 29, as well as Articles 52 to 55 of the Constitution. As an overview of the legal provisions, the National Security Law of the PRC has also enacted specific laws on certain issues in the fields of national security, including the Counter-espionage Law, the Counterterrorism Law, and the Anti-Secession Law. At the same time, the legal system of national security is structured with the contents of the Criminal Law, the Criminal Procedure Law, and the Civil Code of the entire national legal system. In this regard, we invite Professor Wang Zhenmin to introduce the status and composition of the national security legal system and the overall national security legislation in the Mainland. The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law of the HKSAR) came into effect in Hong Kong in June 2020. This

process also reflects that the HKSAR and the Central Government jointly assume the responsibility for national security laws. In fact, legislation on national security is a matter principally under the purview of the central authorities in every countries around the world. We have also clearly defined this responsibility in this legislative process, including both the Central Government and the HKSAR Government have the responsibility to protect national security. The Central Government has an overarching responsibility whilst the HKSAR Government has the constitutional and primary responsibility. Article 18 of the Basic Law, Annex III of the Basic Law, and Article 23 of the Basic Law, which originally required the HKSAR to enact legislation on national security, are actually complementary to each other. Taking a step back, from the perspective of the theory behind the legal provisions, national security is indeed an overall concept for a country to eliminate security threats from other countries, which affects every citizen of the country. With respect to the effect on the security of the whole country, if Hong Kong has an exclusionary scoping and excludes the Central Government just because of the Article 23 arrangement, it would be unreasonable and unfair to the nationals of other parts in the country and other places outside Hong Kong. On the issue of responsibility for national security, we invite Professor Han Dayuan to discuss the responsibility of Hong Kong as a special administrative region (SAR) of the nation in safeguarding national security from the national angle and technical perspective.

This panel discussion is slightly different from the previous two, which were mainly retrospect. Staring from this session, we will generally be looking into the future, so we have conducted

some preliminary analysis and research to form the basis of our discussions. In fact, the passing of the National Security Law of the HKSAR in Hong Kong will bring some new issues to the entire judicial system that has been operating in Hong Kong. In particular, since the National Security Law of the HKSAR is a law enacted by the Standing Committee of the National People's Congress (NPCSC) under the authorization of the National People's Congress (NPC), it has the characteristics of a statute law. We should attach great importance to this matter. We cannot simply use the common law method to handle or explain the Law. Facing this matter, some voices in Hong Kong once asked, "could it be that the common law courts in Hong Kong has no way to handle?" This is actually a false proposition because the common law courts are a set of mechanism, a platform, and a structure, which can handle different legal issues. In Hong Kong, we have established mechanisms for handling cases of statute laws in other countries, but there are still new challenges here. For example, according to the judicial mechanism in Hong Kong, the Hong Kong courts will invite expert witnesses from the countries of the statute laws to the court to give expert opinions on relevant legal issues when handling statute law cases. In future, Hong Kong courts, when hearing cases involving the National Security Law of the HKSAR, may invite experts in Mainland laws to explain the National Security Law of the HKSAR to the courts when they encounter problems. However, when such cases have never been tried in the Mainland, it would be difficult to provide references to the Hong Kong courts. In such scenario, an innovative legal interpretation mechanism is needed to facilitate the smooth application of the Nation-

al Security Law of the HKSAR in the Hong Kong courts.

Let us welcome Vice-chairperson Zhang Yong. He will introduce the background of the National Security Law of the HKSAR from the perspective of a broad framework.

**Zhang Yong:** Hello, everyone. I will try to introduce several concepts of the National Security Law of HKSAR, which I hope you will find helpful.

**I. Safeguarding national security falls under the purview of the Central Government**

If the responsibility to safeguard national security is placed wholly on the local government, the burden will be too much for it to bear. That is why national security is a prime concern and a prerequisite for the existence and development of a nation. In terms of the relationship between the central and local governments, the Central Government assumes the overarching responsibility for national security. There are several points about this overarching responsibility: First, the Central Government has to set a clear, uniform standard for national security. The standard for safeguarding national security should be the same in Beijing, Shanghai, Guangzhou, Hong Kong. There cannot possibly be varying standards, higher for some or lower for the others. Second, the safeguarding of national security has to be pre-emptive; actions that endanger national security cannot be allowed to succeed. That is why safeguarding national security is about prevention, suppression and punishment. Third, in order to safeguard national security, the Central Government needs to assess the risks dynamically and tackle them timely and effectively. All is well when it is peaceful and there are no risks, but when risks arise they must be tackled timely. As for the local government, constitutionally, it is

local in nature; it is not a nation. The objective of the local government as regards to safeguarding national security must align with that of the Central Government. In terms of obligation, the responsibility in safeguarding national security varies from place to place. For example, for Xinjiang and Guangdong, the extent of the responsibility of the respective local governments in relation to safeguarding national security will surely differ.

**II. Safeguarding national security in Hong Kong is a component of the overall national security framework**

There is nothing so-called the issue of Hong Kong's national security, and there is only the issue of safeguarding national security in Hong Kong. For safeguarding national security in Hong Kong, the Basic Law provides a systematic institutional design. The overall national security framework is a relatively broad concept. First, there are traditional forms of security, which is easy to comprehend: including political security, territorial security and military security. However, nowadays in the world there are many non-traditional forms of national security: such as financial security, biosecurity, cyber security and food security. Food security is also a form of national security. For a big country like ours with a population of 1.4 billion, food security is integral to national security. To safeguard national security, many relevant laws have been enacted at the national level. Let me give you some straightforward examples: such as the National Security Law of the PRC, the National Intelligence Law, the Counter-espionage Law, the Anti-Secession Law, the National Defense Law, the Counterterrorism Law, the Martial Law, the Cybersecurity Law, the Biosecurity Law, and the Garrison Laws of the HKSAR and the Macao SAR.

Safeguarding national security in Hong Kong has its own local features and uniqueness. Its policy basis lies in three not-to-cross bottom lines. The first bottom line would be endangering China's sovereignty and national security. The second would be challenging the power of the Central Government and the authority of the Basic Law. The third would be using Hong Kong for infiltration and sabotage activities against the Mainland. These three bottom lines target the specific national security risks existing in Hong Kong. In fact, over the past 30 odd years and since the 1980's, the Central Government has repeatedly emphasized and reiterated these three bottom lines. Yet, some individuals chose to turn a deaf ear, even act against them, straying further and further away from them.

Under the Basic Law of Hong Kong, there is an overall design for national security that comprises three levels: the constitutional level, the national level, and the SAR level.

The constitutional level concerns two articles of the Basic Law. Right from the start, Article 1 makes it clear that Hong Kong is an inalienable part of the PRC. It defines the constitutional status of the HKSAR; it is not an independent entity. The second one is Article 12 which provides that Hong Kong is a local administrative region directly under the Central People's Government; its nature is a local government.

On the national level and as far as the legal system is concerned, firstly, Articles 13 and Article 14 of the Basic Law stipulate that the two most obvious areas of national security, foreign affairs and national defence, are within the authority of the Central Government. Furthermore, it is provided in Article 18(3) that the NPCSC may add relevant national laws to the list of laws

in Annex III to the Basic Law thereby enable their application in Hong Kong. What are these laws? The first category is laws concerning defence and foreign affairs. Another category is laws concerning matters outside the limits of the autonomy of the HKSAR, including the laws on safeguarding national security as mentioned earlier. Thirdly, Article 18(4) of the Basic Law further stipulates two scenarios in which the Central People's Government, that is the State Council, may directly apply any national laws in Hong Kong. The first is when the NPCSC decides that a state of war exists. The second is when a turmoil beyond the control of the HKSAR and endangering national unity or security happens in the HKSAR. The NPCSC may then declare a state of emergency. In both scenarios, the application of national laws would be the last resort of the Central Government to safeguard national security in Hong Kong.

There are also two aspects with regard to the legal system at the SAR level. The first one is the retention of laws on safeguarding national security which were previously in force. Under the Basic Law, the laws previously in force in Hong Kong and the laws enacted by the legislature of the HKSAR are separately provided for. The laws previously in force in Hong Kong is a specific concept, referring specifically to the laws enacted during the British Hong Kong era before the Reunification. Their constitutional basis was the constitutional documents of United Kingdom, such as The Letters Patent and The Royal Instructions etc. These laws became invalidated when China resumed sovereignty over Hong Kong. They have remained in force only because the Chinese government, in the exercise of its sovereignty, legislated to confer new constitutional status on them. This is what

is provided in Article 160 of the Basic Law. I have heard people say that before 1997, the Chinese government had not reviewed the laws previously in force in Hong Kong. That is not true. Today, I can share with you that in anticipation of the Reunification, as early as 1991, the Chinese government set up a specialized working group to review the laws previously in force in Hong Kong. It examined each and every piece of the laws previously in force in Hong Kong. Each piece of legislation had its own report. There were also specialized studies on the customary law, equity law, and common law applicable to Hong Kong. Based on the work mentioned above, the NPCSC made a lengthy decision on February 23, 1997 as to how the laws previously in force in Hong Kong could become laws of the HKSAR. By the decision, some laws were repealed, certain provisions in some laws were repealed, while also providing for very detailed principles on applicability. This piece of work carried out before the Reunification in 1997 lasted for five whole years. This is why the laws on safeguarding national security among the laws previously in force in Hong Kong should, after 1997, be deployed to safeguard national security of China. Another area is legislating for Article 23, which you are all familiar with. The seven types of criminal conduct prescribed in Article 23 only form a part of the national security and political security.

**III. The actual situation since the Reunification**

Since the Reunification, first, Hong Kong has been unable to fulfill its responsibility. Second, the risk to national security has increased significantly. Why is the responsibility not fulfilled? There is a void in the laws of Hong Kong in terms of safeguarding national security. The laws pre-

viously in force mentioned earlier had not been adapted. Even today, astonishingly, the term "Her Majesty" cam still be found in the provisions of the Crimes Ordinance. Legislating for Article 23 has been demonized and remained to be completed. There is no enforcement mechanism for safeguarding national security. The SAR has not established any dedicated organ, nor has the Central Government set up any in the HKSAR. In the past 23 years, the courts have never tried any case involving endangering the national security of China. In reality, the threat to national security is real.

**IV. When a local government cannot take up or fulfill the responsibility for safeguarding national security, the Central Government will have to assume its overarching responsibility and establish a legal system and enforcement mechanism to safeguard national security**

As a sovereign state, there are many means to establish a mechanism for safeguarding national security. On this occasion, the Central Government has decided to establish a system and to perfect the mechanism for safeguarding national security in Hong Kong by means of a decision plus legislating. There are in fact many options available: first, the NPC and its Standing Committee may make decisions. Second, the NPCSC may apply national laws on the safeguarding national security to Hong Kong. Third, the NPCSC may also declare a state of emergency. Should the HKSAR be unable to maintain control, then a state of emergency may be declared. Fourth, new laws can be enacted, and interpretation or amendment can be made to existing laws. Fifth, in accordance with Article 48(8) of the Basic Law, the Central People's Government may issue directives to the Chief Ex-

ecutive, who shall implement the directives. In the end, the Central Government decided to use a decision plus legislating. So what is the difference between the two? A decision declares the stance, lays down the principles, determines issues, and gives express authorization, whereas legislation constructs a system, sets out the power, stipulates the obligations, and also prescribes the penalties. The two complement each other in building the system and the mechanism.

**V. The due observance of two principles throughout the drafting of the National Security Law of the HKSAR**

The first principle is to strike a balance between protecting individual rights and safeguarding national security. The second principle is to effectively integrate the Central Government's overarching responsibility with the HKSAR's constitutional responsibility. The three legislative basis of the National Security Law of the HKSAR are clear: the Constitution, the Basic Law, and the Decision of the NPC. The Constitution, as a whole, is applicable to the HKSAR, except those provisions relating to the practice of the socialist system and policies. Its effect is inseparable. For example, with regard to national security, Article 52 of the Constitution provides that citizens of the People's Republic of China, which include Chinese citizens in Hong Kong, have the obligation to safeguard national unity and the solidarity of all the country's ethnic groups. Under Article 54, citizens of the People's Republic of China shall have the obligation to safeguard the security, honor and interests of the motherland; they must not behave in any way that endangers the security, honor or interests of the Motherland. These provisions are applicable in the HKSAR.

On the specific contents of

the National Security Law of the HKSAR, there are several facets.

First, it prevents, suppresses and punishes four types of the offences. The first is secession; the second is subversion, including that of the Central Government and the SAR government; the third is terrorist activities, which differ from general offences of violence in that terrorist activities are violent act that aim to realize a political ideology; the fourth is collusion with a foreign country or with external elements.

Second, it affirms various criminal principles, which are the collective achievements of human civilization. These principles are also set out in the Criminal Law and Criminal Procedure Law of the Mainland: no punishment without a law; presumption of innocence; litigation rights; protection against double jeopardy; it is not retroactive. The National Security Law of the HKSAR was passed on June 30, 2020. It shall not apply to crimes committed before this date, and applies only to offending criminal acts committed after this date.

Third, it is the respect for and protection of human rights. The National Security Law of the HKSAR expressly provides again that when dealing with the relevant cases, provisions about human rights protection in the Basic Law and the two International Covenants on human rights protection shall be observed. This implies that the objective of the National Security Law of the HKSAR is to prevent, suppress and punish crimes that endanger national security. It only targets an extremely small number of offenders. This is for the protection of the majority of the people in Hong Kong so that they can live and work in a peaceful and orderly society.

Fourth, the National Security Law of the HKSAR lays down a coordination mechanism. As

mentioned earlier, the overarching responsibility of the Central Government and the constitutional responsibility of the SAR are to work together and complement each other. There is the establishment of the Office for Safeguarding National Security of the Central People's Government in the HKSAR (CPG Office on National Security) and the Committee for Safeguarding National Security (National Security Committee) chaired by the Chief Executive in Hong Kong. The Central Government has appointed a National Security Adviser to the National Security Committee. This ensures that the two can work closely together.

Fifth, the enforcement mechanisms fully reflect the characteristics of "one country, two systems" by having the SAR take up the primary day-to-day responsibility of safeguarding national security in Hong Kong, setting up dedicated units in the Police Force and the Department of Justice, and the Chief Executive designating judges to adjudicate cases relating to national security.

Sixth, cases being handled by the CPG Office on National Security. The Office only handles three types of cases. The first concerns cases with involvement of a foreign country or external elements, the complexity of which makes it difficult for the HKSAR administration. This scenario is bound to exist. For a local government, at times there are matters which it is unable to handle. The second is when a serious situation has arisen, when the HKSAR Government is unable to effectively enforce this law and to perform its duty. The third is when there is a major and imminent threat to national security. With the threat being imminent, the Central Government cannot sit back.

Where the CPG Office on National Security has to deal with these cases, the National Securi-

ty Law of the HKSAR has prescribed a strict procedure for this. It can only exercise jurisdiction over a case after the State Council has approved a request made either by the HKSAR Government or by the Office itself, then the investigation will be the responsibility of the Office, the prosecution will be carried out by the prosecuting organ designed by the Supreme People's Procuratorate, the adjudication will be conducted by the judicial organ designed by the Supreme People's Court, and the applicable law will be the national Criminal Procedure Law.

Seventh, the National Security Law of the HKSAR imposes special requirements on public officers. There are two provisions: the first is Article 6: a resident of the HKSAR who stands for election or assumes public office shall confirm in writing or take an oath to uphold the Basic Law of the HKSAR of the People's Republic of China and swear allegiance to the HKSAR of the People's Republic of China in accordance with the law. The second one is Article 35: a person who is convicted of an offence endangering national security, by a court in Hong Kong or by a court designed by the Supreme People's Court, in cases handled by the CPG Office on National Security, shall immediately be disqualified from standing as a candidate in the elections of the Legislative Council and District Councils, or from holding any public office. If a person who has taken an oath or made a declaration, he or she shall be disqualified from holding office, standing as candidate in election or assuming office. The purpose of this system is to further implement the principle of "Hong Kong people administering Hong Kong" with patriots as its core in the realm of safeguarding national security.

The enactment of the National Security Law of the HKSAR

is just an important first step towards safeguarding national security in Hong Kong. There is still a lot of work to be done through concreted efforts. While the law has been enacted, its life and dignity lies in its implementation. Implementation is more important. For the HKSAR, enactment of local legislation should be accomplished as soon as possible. The Decision of the NPC on May 28 has made it clear that the HKSAR shall complete the relevant legislation process as soon as possible. Meanwhile, the relevant provisions regarding safeguarding national security in the laws previously in force should be effectively activated. All in all, safeguarding national security in Hong Kong is long and arduous task, and I have full confidence of its success.

**Simon Lee Ho-ey:** Thank you Vice-chairperson Zhang Yong for bringing us some general principles and concepts of national security and the National Security Law. I would like to invite Professor Wang to introduce some details about the entire national security legal system in the Mainland.

**Wang Zhenmin:** I am very happy to share my opinion with you. According to the arrangement of the conference organizers, I will introduce the national security legislation at the national level. Everyone is familiar with and understands the laws and status of safeguarding national security in Hong Kong, but they may not know much about the related aspect at the national level.

**I. State and national security**

According to the relevant theories and practices of international law, there are four important elements that constitute a state: the first is the citizen (people); the second is the homeland (territory); the third is the sovereignty (also called "national rights"); the fourth is state power.

These four elements are indispensable. "National security" is to maintain the security of these four core elements of a state, that is to safeguard the security of their citizens, their homeland, their sovereignty and state power. This is the concept of "national security". National security is the prime concern of any nations at all times. Moreover, national security falls under the purview of the central authorities in every countries, that is, it is not an issue of scope of autonomy. No single country would allow their local governments to independently assume the responsibility for safeguarding national security. It is through national legislation, administration, law enforcement and judiciary to safeguard national security. On the issue of national security, this is a common international practice. Countries like the United Kingdom and the United States have formulated the most laws on national security. There are dozens or even more laws to safeguard national security in these countries, and there are also many laws concerning national security that are scattered among other provisions within other laws on national security. These countries have numerous laws to safeguard their national security. They are all national with no local legislation to be seen, because national security is originally under the purview of the central authorities.

## II. The overall situation of China's national security legislation

Our country's national security legislation includes the Constitution, the Criminal Law, and special legislation. Special legislation is centered on the National Security Law of the PRC (2015) and a complete national security legal system is being constructed.

(I) The Constitution

The Constitution is the highest legal embodiment of a state's

sovereignty and the fundamental law for safeguarding national sovereignty, security and development interests. In other words, the Constitution is also the fundamental law for safeguarding national security. In addition to the Preamble to the Constitution, which provides for the political security and the overall interests of the country, there are also provisions that stipulate matters concerning national security. Article 28 of the Constitution mandates that the state shall maintain public order, suppress treason and other criminal activities that jeopardize national security; Article 29 stipulates the armed forces of the state belong to people and their paramount mission is to safeguard national security, that is to strengthen national defense, resist aggression, defend the motherland, safeguard the people's peaceful work; Article 52 states the obligation of citizens to safeguard national unity and the solidarity of all the country's ethnic groups; Article 54 stipulates that citizens shall have the obligation to safeguard the security, honor and interests of the Motherland; they must not behave in any way that endangers the Motherland's security, honor or interests; Article 55 provides the obligation to perform military service. These are all constitutional provisions concerning national security. The Constitution also contains provisions on states of emergency, which is an important part of national security. It can be seen that the provisions of the Constitution on national security are certainly applicable to the SAR.

(II) The Criminal Law

The Criminal Law of the People's Republic of China was enacted in 1979 and was comprehensively amended in 1997. Chapter 1 of Part II of the Criminal Law specifically provides for crimes of endangering national security, that is acts that endanger

the sovereignty, territorial integrity and security of the state, split the state, subvert the political power of the people's democratic dictatorship, and overthrow the socialist system, all of which are acts that endanger national security. The Criminal Law provides for the crime of colluding with foreign states in plotting to harm the Motherland, splitting the country, armed rebellion, riots, subverting the political power of the state, colluding with institutions, organizations or individuals outside the country, as well as the crime of providing financial support to criminal activities that endanger national security, the crime of defecting to the enemy and turning traitor, defection, espionage, and the crime of stealing, secretly gathering, purchasing, and illegally providing state secrets or intelligence for an organization, institution, or personnel outside the country, and the crime of supplying arms and ammunition or other military materials to an enemy during war time. The Criminal Law also sets out the corresponding penalty. From East and West, both ancient and contemporary, endangering national security is a felony and a felony will naturally be heavily punished. Since the Criminal Law is not included in Annex III of the Basic Law, these provisions are not applicable to the HKSAR.

(III) The Anti-Secession Law

The Anti-Secession Law is a special law for safeguarding national security enacted in 2005. It is formulated for the purpose of opposing and checking Taiwan's secession from China by secessionists in the name of "Taiwan independence" and promoting peaceful national reunification. Why this law cannot be applied to Hong Kong? It is because this law was initially tailored for Taiwan.

(IV) The National Security Law of the People's Republic

of China

The National Security Law of the PRC enacted in 2015 is the youngest, comprehensive, global and fundamental law to safeguard national security in the world. It directs to the actual threats of national security that our country is facing and reinforces the definition of national security of our country. Some people say that the definition of China's national security is unclear. In fact, this has been stipulated clearly in the National Security Law of the PRC. It refers to a nation's power, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major national interests, are in a state where there are relatively no danger and no internal and external threats and the capability to ensure a secured status. This is the plain definition of national security in the National Security Law of the PRC. The National Security Law of the PRC is formulated in accordance with President Xi Jinping's overall concept of national security, and consists of 7 chapters and 84 articles. It stipulates the tasks of safeguarding national security in more than 10 areas, as well as the national system and mechanism for safeguarding national security and the rights, obligations and responsibilities of citizens and organizations. This includes the responsibilities of the HKSAR and the Macao SAR and the obligations and rights of Chinese citizens of the SARs in maintaining national security. This is a reaffirmation of the relevant provisions and principles of the Basic Law.

(V) Other related legislation for safeguarding national security in China

Our country has also enacted other relevant laws to safeguard national security. These include the Counter-espionage Law enacted in 2014, the Counterterrorism Law enacted in 2015, the Cy-

bersecurity Law and the Law on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China enacted in 2016, the National Intelligence Law and the Nuclear Safety Law enacted in 2017, the Cryptography Law enacted in 2019, and the Export Control Law and the Biosecurity Law enacted in 2020, as well as the Emergency Response Law, the Martial Law, the National Defense Act etc. With regard to the legislation on national security, we are forming a comprehensive legal system to safeguard national security under the Constitution and centering on the National Security Law of the PRC. The maintenance of national security is not a question of law, but a question of the legal system. This is also a common feature of all countries.

The above is the situation of national security legislation in our country. It should be noted that these laws are not listed in Annex III of the Basic Law, thus not applicable in Hong Kong and Macao. The safeguarding of national security in Hong Kong and Macao has to be led by the Central Government and coordinated by the SARs in accordance with the "one country, two systems" principle to construct a distinct legal system to safeguard national security under the Basic Law. In other words, the responsibility for safeguarding national security is the same, but the applicable laws can be different. Under the "one country, two systems" and by using the Basic Law as the basis and core, Hong Kong and Macao shall, led by the Central Government, build another set of laws to safeguard national security. The Macao SAR has completed the local legislation of Article 23 of the Basic Law and is forming a legal system to safeguard national security, and gradually improving the enforcement mechanism. The contents of Article 23 of the Basic

Law of the HKSAR and the Basic Law of the Macao SAR are the same, but the difference is that Hong Kong has not completed the local legislation on Article 23. In 2020, the Central Government has to formulate laws for safeguarding national security in Hong Kong at the national level. This newly constructed legal system and enforcement mechanism have just been implemented in Hong Kong for a few months. I believe it will achieve the desired results.

**Simon Lee Ho-ey:** Thank you Professor Wang Zhenmin. Professor Wang actually brought out a core question in his introduction: Why should we safeguard national security? I believe that no one will oppose to the safeguarding of security for all people. In fact, the legislative purpose of all laws is to protect the safety and lives of ordinary people. Why should we safeguard national security? This is because a state is a basic unit in international relations today, it is impossible to talk about any international cooperation without the state as the basic unit and as the basis. For example, in terms of resources security, we first adopt national security, and then establish some international cooperation on climate, including the Paris Agreement. A state is the basic unit of international exchanges, so we must first ensure national security before we can make other cooperation. At the same time, the state is also the most basic unit of people's life and social management. Therefore, the first thing to be resolved is the security at the national level. As Professor Wang has said and Vice-chairperson Zhang's speech has briefly introduced, in relation to Hong Kong's national security law, what is the relevant responsibility of Hong Kong from the national and constitutional levels? I would like to invite Professor Han Dayuan to

give us a speech on this aspect.

**Han Dayuan:** I would like to discuss the three issues in the context of this topic and the task given by the moderator. First, we must fulfill the constitutional responsibility of the SAR to safeguard national security by returning to the original intent of enacting the Basic Law, and constantly adhering to the original intent of the Basic Law. In my opinion, during the formulation of the Basic Law, the obligations of national security that shall be fulfilled by the HKSAR as a local government have already been written into the Basic Law. As our topic today is go "Back to Basics" of the Basic Law, it allows us to experience the historical progress of the Basic Law in its 30 years' development and to further cherish this hard-earned creative masterpiece. We all know that in the past 30 years, great changes have taken place in China and around the world. Although the implementation of "one country, two systems" has encountered some new challenges and problems, it is an objective fact that Hong Kong has achieved a remarkable accomplishment. When one asked why "one country, two systems" could make an achievement, in my opinion, the main reason is that we have constructed a new constitutional order based on the Constitution and the Basic Law, established the core value of national sovereignty and territorial integrity, clarified the relationship between the Central Government and the SAR, and always regarded maintaining the long-term prosperity and stability of Hong Kong as a national goal, which is also a national mission. This point has been made extremely clear by Mr. Deng Xiaoping when he met with Mrs. Thatcher in 1982. For the basic position on the Hong Kong issue, three issues were raised at that time, especially the dis-

cussion on national sovereignty, which still has important practical significance for our implementation of the Central Government's overall jurisdiction. However, such propositions with clear historical legitimacy and clear legal basis such as safeguarding national sovereignty have been challenged by certain people in recent years, and there has even been a phenomenon of openly challenging national sovereignty. In fact, when the Basic Law was enacted 30 years ago, some problems were already foreseen. For example, as mentioned by the two guests earlier, Article 23 of the Basic Law stipulates the constitutional duty of the SAR to safeguard national sovereignty and security, which is an obligatory clause of the Central Government to the SAR. It is because it is the original intent of "one country, two systems" and the primary mission of the state to safeguard national sovereignty, unity and security in the present world. Therefore, when reviewing the past 30 years concerning the Basic Law, we cannot avoid the problems that existed in the implementation of the Basic Law. We must adhere to the principle of "patriots governing Hong Kong" in the Constitution and the Basic Law in the light of the actual situation in Hong Kong, and continuously improve some of the systems related to the Basic Law. With the development of the implementation of "one country, two systems", how to seek a reasonable balance between the stability and social changes for the Basic Law is also a new proposition that we are all concerned about.

Second, in order to fulfill its constitutional responsibility to safeguard national security, the SAR must respect the authority of the Constitution and maintain the constitutional order of the country. Put another way, the constitutional responsibility we have to fulfill is, first of all, a constitutional

obligation, since our two guests also mentioned that the Constitution is the supreme law and a fundamental law in the legal system of the People's Republic of China. All laws and all national systems, including the institutional arrangement of "one country, two systems", derive their source of power from the Constitution. Therefore, according to the Constitution, the first sentence of the Basic Law is that Hong Kong has been part of the territory of China since ancient times, which confirms the historical legitimacy of Hong Kong as a territory of China. Article 1 also provides that the HKSAR is an inalienable part of the People's Republic of China. Article 12 stipulates that the HKSAR shall be a local administrative region of the People's Republic of China, which shall come directly under the Central People's Government. These articles are the core provisions of the Basic Law, embodying the premise and basic requirements of "one country, two systems" and the sovereignty of the state. Hence, we will never waver on these fundamental issues. Article 2 of the National Security Law of the HKSAR passed on June 30 not only reaffirms the legal status of the HKSAR and the importance of Articles 1 and 12 of the Basic Law, but further clarifies that these two articles are the fundamental provisions in the Basic Law. From the expression of legal text, fundamental clause refers to the prerequisite, basic and fundamental norms in supporting the whole normative system, and it is also an essential norm with the most core value. On November 11, 2020, the Twenty-third Session of the Standing Committee of the 13th National People's Congress adopted a Decision on Issues Relating to the Qualification of the Members of the Legislative Council of the HKSAR, in which the three basis of the Constitution

were clarified at the same time. The first basis is Article 52, citizens of the People's Republic of China have the obligation to safeguard national unity; the second basis is Article 54, citizens of the People's Republic of China have the obligation to safeguard the security, honor and interests of the Motherland; they must not behave in any way that endangers the Motherland's security, honor or interests; it also specifies in paragraph 1 of Article 67 that the NPCSC shall oversee the enforcement of the Constitution, that is to say, as a permanent body of the highest authority, the NPCSC shall fulfill its constitutional responsibility to oversee the enforcement of the Constitution in the SAR. These three articles of the Constitution clarify the effect of the Constitution in the SAR. Under the Constitution of China, it is the responsibility of all state organs to safeguard national security and unity, and it is also a clear constitutional obligation that all Chinese citizens, including all Chinese citizens in Hong Kong, shall fulfill. The design of political systems, including "one country, two systems", is based on the consideration of sovereignty, security and territorial integrity as the philosophy of a country's existence and priority interests. For that reason, we often say that the premise of "one country, two systems" is "one country", that is, the unity of sovereignty and territorial integrity. Without national unity and territorial integrity, it is impossible to talk about the so-called "two systems". From the perspective of the relationship between the Constitution and the Basic Law, no matter how high the autonomy of the SAR enjoys under the Basic Law, the fundamental constitutional premise of "one country" cannot be breached, challenged or violated at any time or on any issue. By consolidating the consensus

through the Basic Law, all of its meaning lies in the sincere recognition of "one country" from the heart and the clarification of the citizens' belonging to the national identity. These principles should be common knowledge in any society under the rule of law. However, these common knowledge sometimes have become a controversial topic for some people in Hong Kong, and it has also caused confusion among certain young people in their national identity. In this sense, the Decision of the NPC on November 11 has clarified the legal rules and drew a clear distinction for the national loyalty of public officers, with the aim of safeguarding the sovereignty and dignity of the state. Therefore, if we cannot reach a high degree of consensus on this fundamental and prerequisite issue, we will not be able to smoothly advance the great practice of "one country, two systems" in the future implementation of the Basic Law. National identity is not an abstract principle and academic proposition, nor is it merely a provision written in a legal text. It should become our value consensus and our common way of life. In the formulation of social consensus based on the rule of law, people enjoy full rights and freedom, while a society lacking such a consensus cannot respect the rule of law. The Basic Law forges the consensus of all Chinese people, including compatriots in Hong Kong, and provides a normative system full of wisdom, flexibility and openness for protecting the dignity of human beings and the values of the legal system.

Third, we must strengthen national consciousness and promote patriotism. In order to fulfill its constitutional responsibility of safeguarding national security, the HKSAR Government must perfect its education on the national security law and strengthen the

national consciousness of the people based on the Constitution. The Fifth Plenary Session of the 19th Central Committee of the Chinese Communist Party has expressly proposed to strengthen the national consciousness and patriotism of compatriots in Hong Kong and Macao. I think this is an essential requirement. Not only has it summarized the experience of Hong Kong's return to China in the past 23 years, the specific conclusion on the experience and lessons learned since the onset of the disturbances arising from the opposition to the proposed legislative amendments to the Fugitive Offenders Ordinance also deserves our great attention and serious consideration. On the relationship between "one country" and "two systems", there are still discrepancies and misunderstandings about "one country". Certain members of the Legislative Council refuse to recognize the sovereignty of the state over Hong Kong, refuse to pledge allegiance to the country and the SAR, refuse to uphold the Basic Law, and even advocate and support "Hong Kong independence", which is not allowed in any sovereign state. We say that the opposition or members of the opposition could have their own political beliefs, make aggressive and critical comments on the government's current affairs, and monitor and supervise the power of the government, given that they respect the sovereignty of the state and the constitutional order. This is not only a basic obligation as a citizen, but also a basic political ethics as a public officer. In the cultivation of national consciousness, the SAR has already started related education on the Constitution, the national security laws, and various legislations. We shall seek a broad social consensus through education on the national security laws and the Constitution. As regards the education of the national securi-

ty laws for students at all levels in schools, we must establish an education system that is compatible with "one country, two systems", especially on how to find a balance between the order of security, human rights, freedom, and values that students are concerned about. We shall educate them with persuasion from the perspective of the Constitution, the Basic Law and the national security laws. The National Security Law of the HKSAR also has the core concept of respecting and protecting human rights and maintaining a balance between freedom and order. The fundamental purpose of safeguarding national security is to protect human rights, and the protection of human rights is based on national security. There is no conflict between the two, and a balance can be struck. At the same time, we shall raise the awareness of civil servants, teachers and the general public on the national security laws. At present, the world is still facing severe challenges posed by the "COVID-19" epidemic and the international order is filled with uncertainties. At this time, we should adhere to the original intent of "one country, two systems", cherish the achievements of "one country, two systems", and objectively look into the challenges and problems faced by "one country, two systems", so that "one country, two systems", a great institutional innovation carrying the wisdom and historical mission of the Chinese people, will continue to preserve its robust energy of life, and make contributions to the political civilization of mankind.

**Simon Lee Ho-ey:** Thank you Professor Han. Professor Han's speech brought up a core content. National security education and people's understanding of the national security laws and national security should be enhanced to national awareness. Let

me summarize Professor Han's speech briefly. Due to the fact that we understand that national security awareness is closely related to the lives of everyone in society and is a joint construction of interests, we must comprehend the national security laws, and more importantly, to understand why we need national security and have national security laws. It is needed for the interests and well-being of ourselves and society, and in the end, it is more important to convey a national consciousness, which is a sense of value and moral integrity. This also explains the reason that the awareness of the obligation to abide by the law emphasized in Article 10 of the National Security Law of the HKSAR on national security education is also an awareness of national security.

To briefly summarize, we have extensively discussed the responsibility of national security in this session. We can see that national security should be considered from the perspective of the entire country and the people. When I talked about national security in a lecture yesterday, some people criticized me by saying, "why do you talk about national security from an overall national security concept? You should not talk about other areas." I think such criticism is extremely narrow-minded. Indeed, national security requires apprehension of different aspects, such as the measure mandating people to wear masks that we are facing today is actually a public health issue in social security. I hope everyone can have a better understanding of the importance of national security through this panel. I am grateful to the Secretary for Justice and colleagues of the Department of Justice for inviting me to join this panel. I am also delighted that the Basic Law 30th Anniversary Legal Summit has been successfully held at this special time. Finally, I hope that our "Back to Basics" can continue. Thank you all.

# System and Mechanism of Safeguarding National Security

Zhang Yong
Deputy Head of the Legislative Affairs Commission
&
Vice-chairperson of HKSAR and Macao SAR Basic Law Committees
of the Standing Committee of the National People's Congress

## I. Safeguarding national security falls under the purview of the Central Government

- Prime concern for the nation
- Prerequisite for existence and development

## Safeguarding national security

### Central Government overarching responsibility

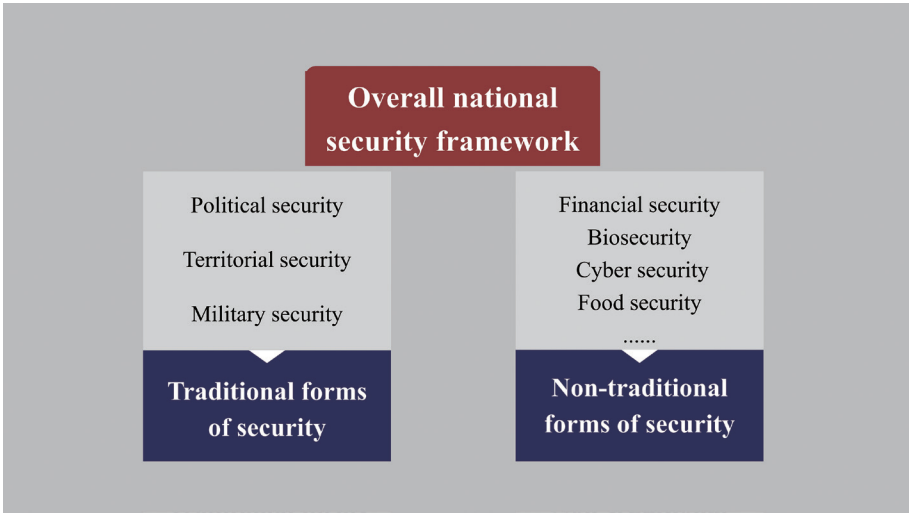
- Set a clear, uniform standard for national security
- Be pre-emptive and is about prevention, suppression and punishment
- Assess the risks dynamically and tackle them timely and effectively

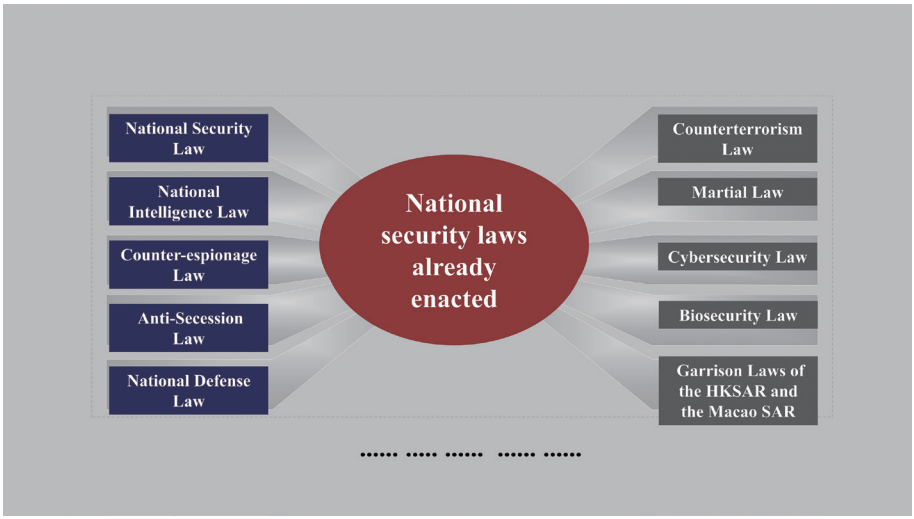
### Local government constitutional responsibility

- Constitutionally: local in nature
- Objective: unification
- Obligation: variation

## II. Safeguarding national security in the HKSAR

- A part of the overall national security framework
- Systematic institutional design under the Basic Law


Overall national security framework
Political security
Territorial security
Military security
Traditional forms of security
Financial security
Biosecurity
Cyber security
Food security
.....
Non-traditional forms of security


National Security Law
National Intelligence Law
Counter-espionage Law
Anti-Secession Law
National Defense Law
National security laws already enacted
Counterterrorism Law
Martial Law
Cybersecurity Law
Biosecurity Law
Garrison Laws of the HKSAR and the Macao SAR
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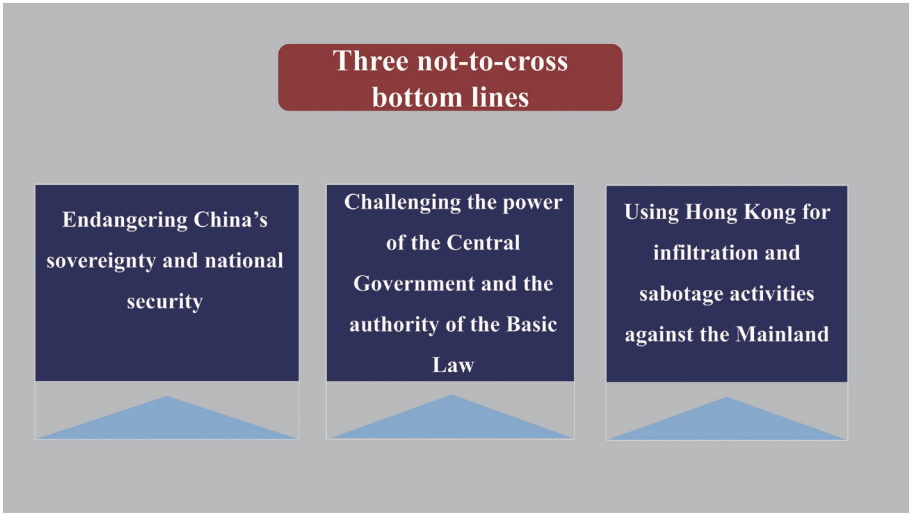
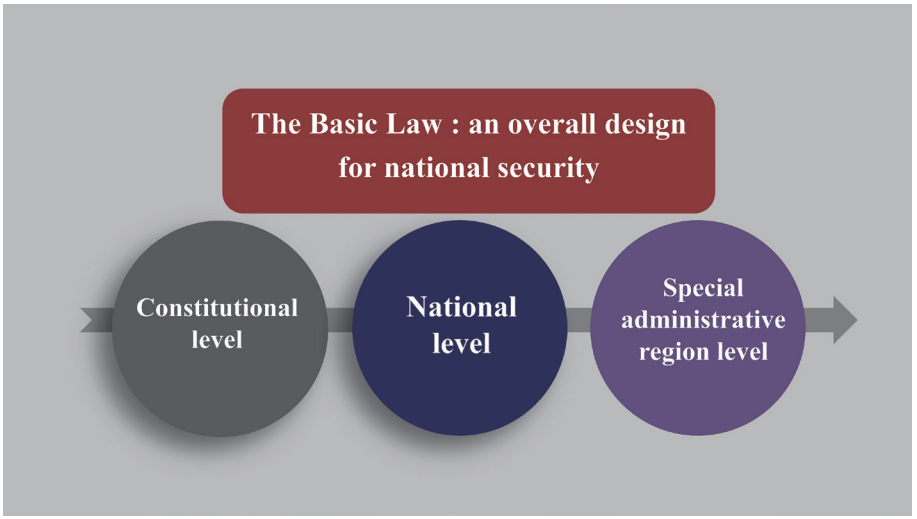
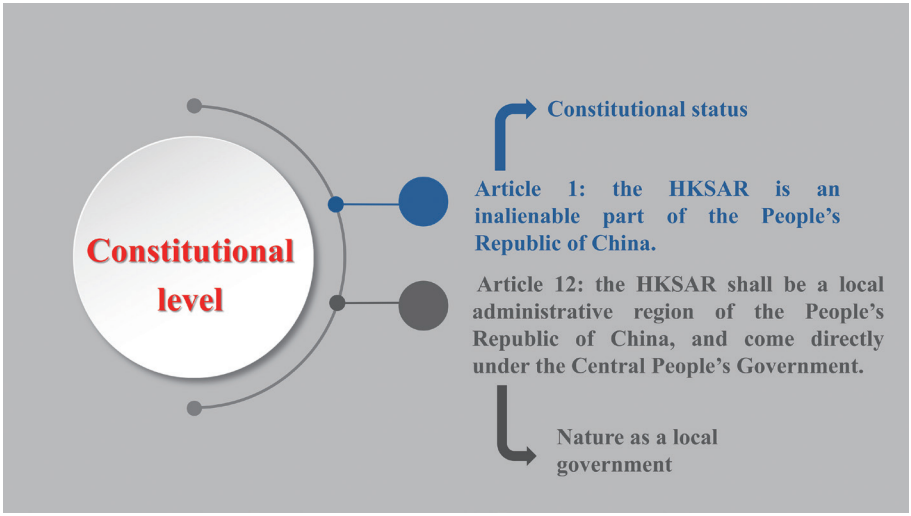
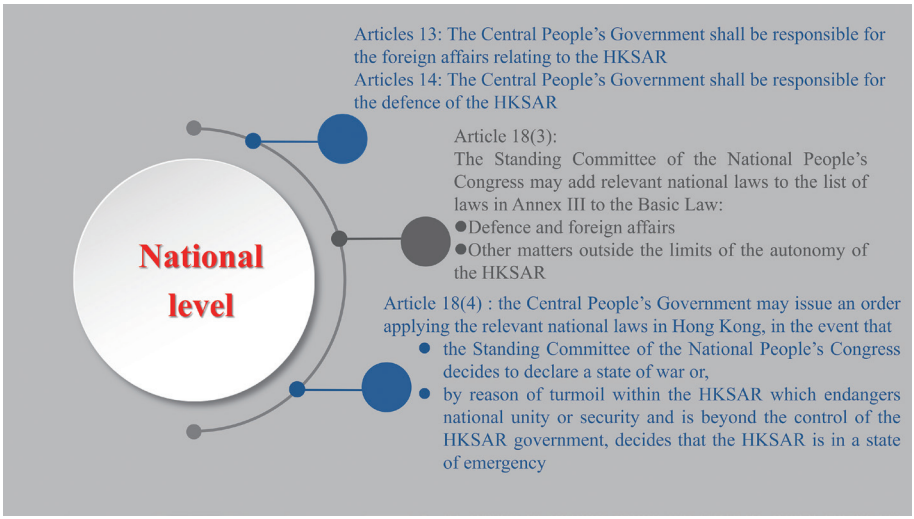
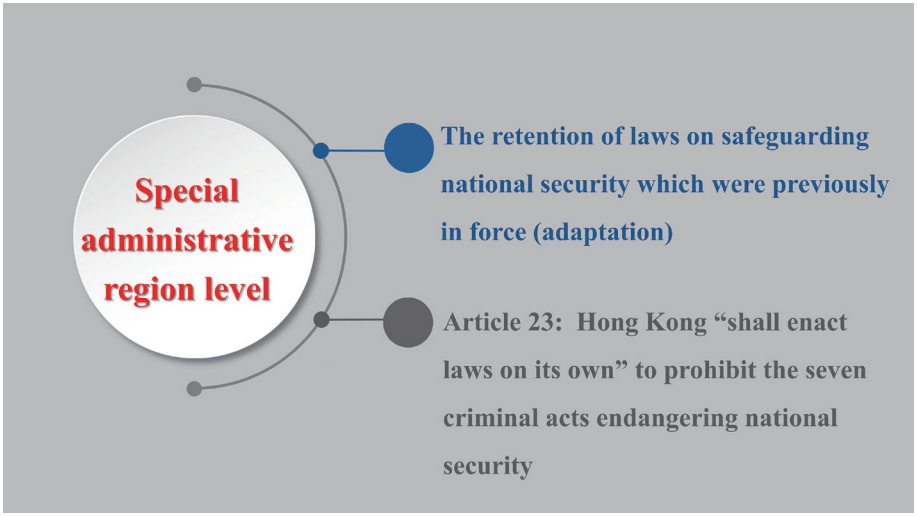
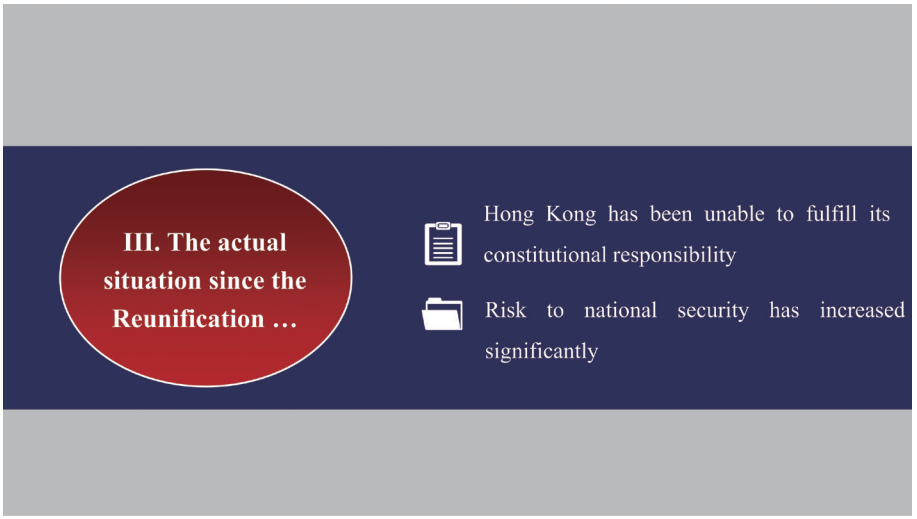

Three not-to-cross bottom lines
Endangering China's sovereignty and national security
Challenging the power of the Central Government and the authority of the Basic Law
Using Hong Kong for infiltration and sabotage activities against the Mainland


The Basic Law : an overall design for national security
Constitutional level
National level
Special administrative region level


Constitutional level
Constitutional status
Article 1: the HKSAR is an inalienable part of the People's Republic of China.
Article 12: the HKSAR shall be a local administrative region of the People's Republic of China, and come directly under the Central People's Government.
Nature as a local government


National level
Articles 13: The Central People's Government shall be responsible for the foreign affairs relating to the HKSAR
Articles 14: The Central People's Government shall be responsible for the defence of the HKSAR
Article 18(3):
The Standing Committee of the National People's Congress may add relevant national laws to the list of laws in Annex III to the Basic Law:
●Defence and foreign affairs
●Other matters outside the limits of the autonomy of the HKSAR
Article 18(4) : the Central People's Government may issue an order applying the relevant national laws in Hong Kong, in the event that
● the Standing Committee of the National People's Congress decides to declare a state of war or,
● by reason of turmoil within the HKSAR which endangers national unity or security and is beyond the control of the HKSAR government, decides that the HKSAR is in a state of emergency


Special administrative region level
The retention of laws on safeguarding national security which were previously in force (adaptation)
Article 23: Hong Kong "shall enact laws on its own" to prohibit the seven criminal acts endangering national security


III. The actual situation since the Reunification …
Hong Kong has been unable to fulfill its constitutional responsibility
Risk to national security has increased significantly

**A void in the legal system**

- Laws previously in force: had not been adapted
- Legislating for Article 23: has not been completed

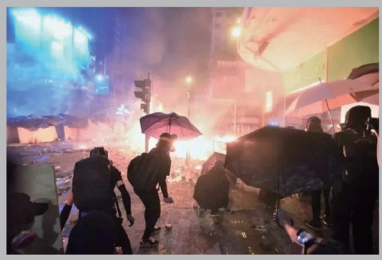
**Lack of enforcement mechanism**

- The Special Administrative Region has not established any dedicated organ
- The Central Government has not set up any specialized department

**The courts have never tried any case involving endangering the national security of China in the past 23 years**

**Risk to national security has increased significantly**

Illegal "Occupy Central" movement



"Amendment of the Fugitive Offenders Ordinance" saga

**IV. The Central Government assumes its overarching responsibility**

- Establish a legal system and enforcement mechanism
- A decision + legislating

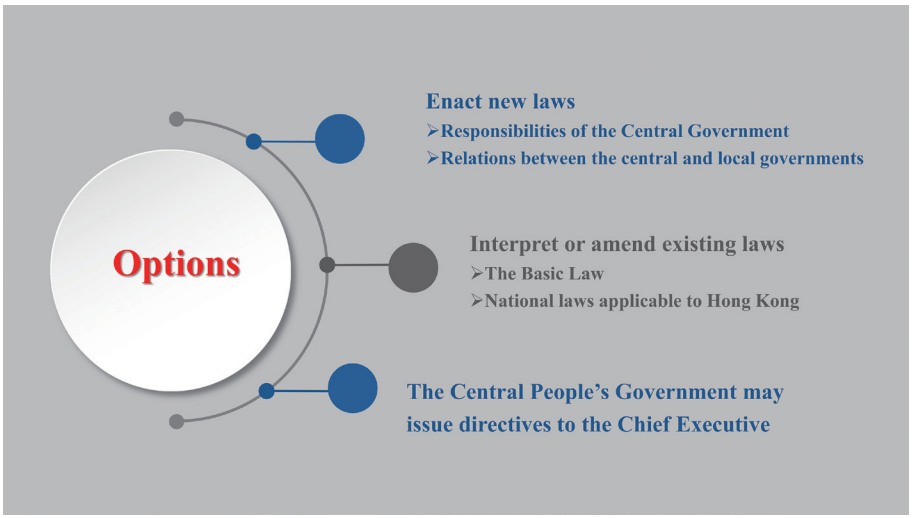

**The National People's Congress and its Standing Committee may make decisions**

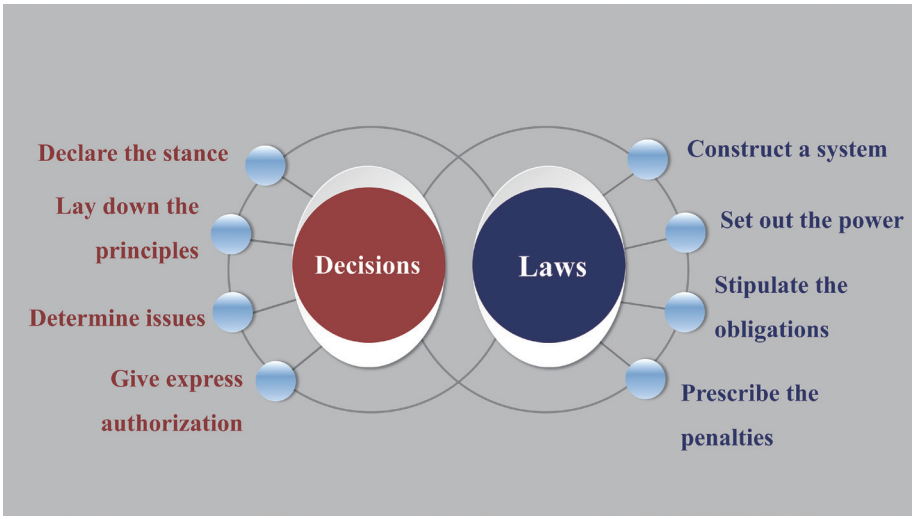
**The Standing Committee of the NPC may add relevant national laws in Annex III to the Basic Law.**

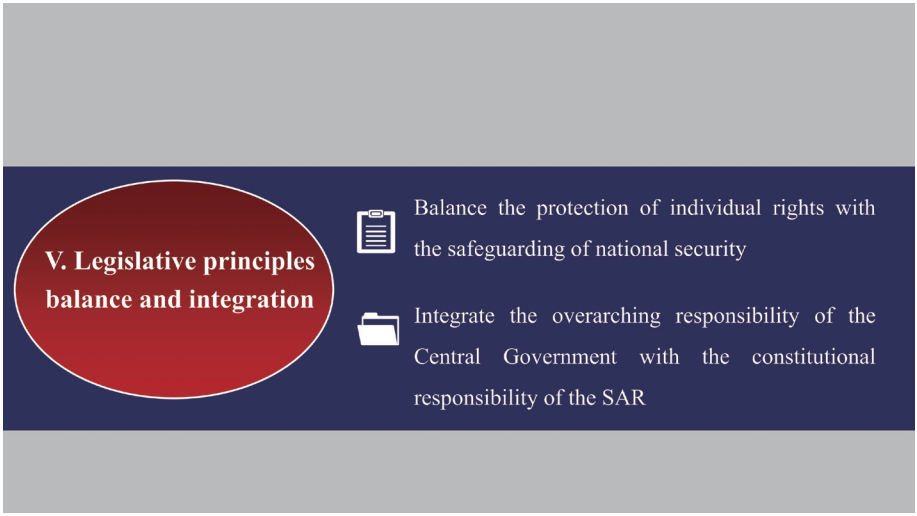
- **Foreign affairs**
- **Defence**
- **Other matters outside the limits of the autonomy of the HKSAR**

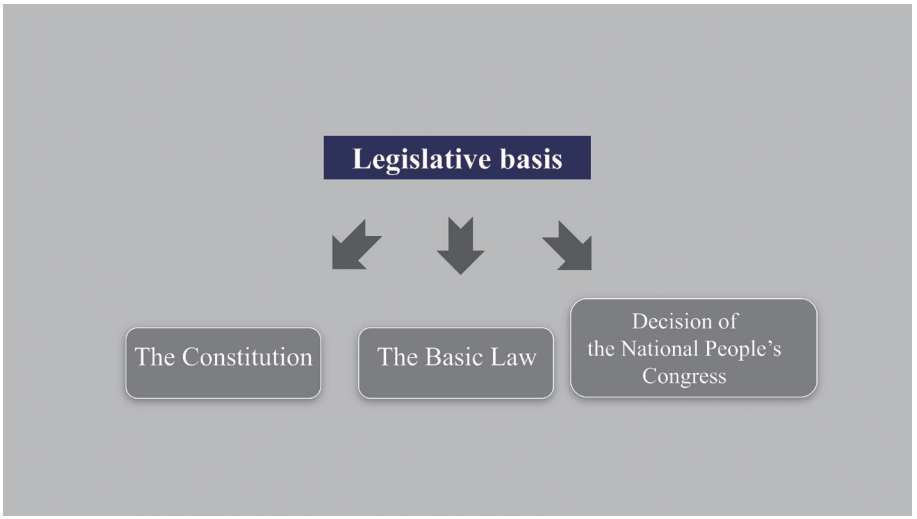
**The Standing Committee of the NPC may declare a state of war or decides that the HKSAR is in a state of emergency**

- **the Central People's Government may apply any national laws in Hong Kong**


Options
Enact new laws
➢Responsibilities of the Central Government
➢Relations between the central and local governments
Interpret or amend existing laws
➢The Basic Law
➢National laws applicable to Hong Kong
The Central People's Government may issue directives to the Chief Executive


Declare the stance
Lay down the principles
Determine issues
Give express authorization
Decisions
Laws
Construct a system
Set out the power
Stipulate the obligations
Prescribe the penalties


V. Legislative principles balance and integration
Balance the protection of individual rights with the safeguarding of national security
Integrate the overarching responsibility of the Central Government with the constitutional responsibility of the SAR


Legislative basis
The Constitution
The Basic Law
Decision of the National People's Congress

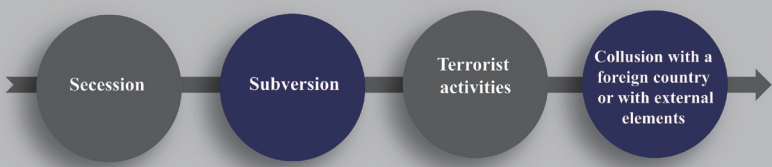
**Article 52 of the Constitution**

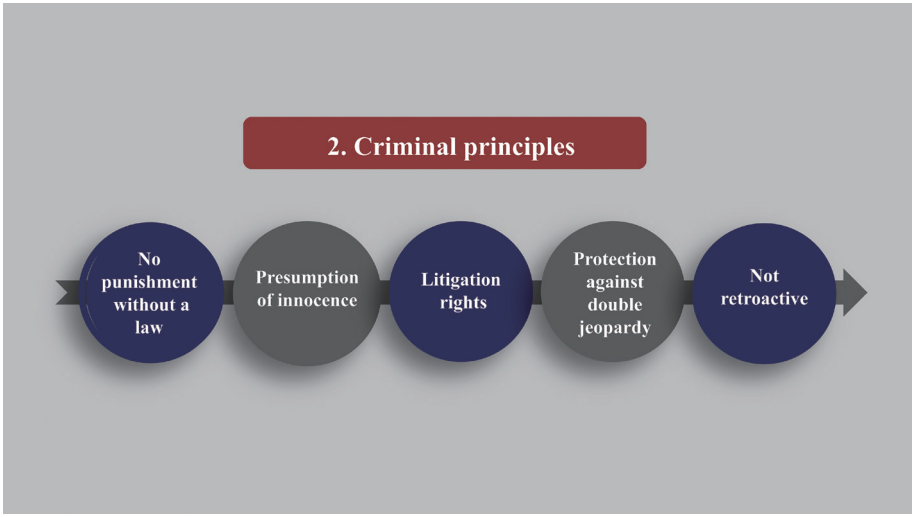
- Citizens of the People's Republic of China shall have the obligation to safeguard national unity and the solidarity of all the country's ethnic groups.

**Article 54 of the Constitution**

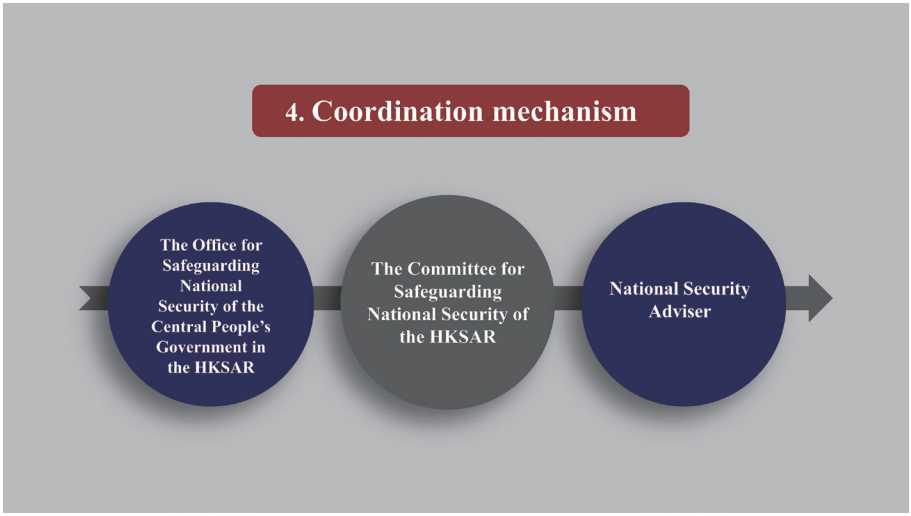
- Citizens of the People's Republic of China shall have the obligation to safeguard the security, honor and interests of the motherland; they must not behave in any way that endangers the motherland's security, honor or interests.

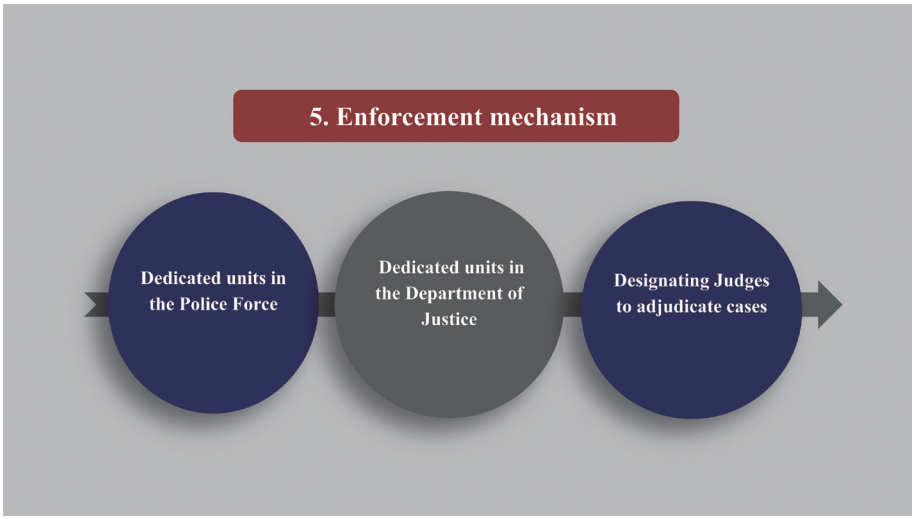
**1. Prevent, suppress and punish four types of the offences**




2. Criminal principles
No punishment without a law
Presumption of innocence
Litigation rights
Protection against double jeopardy
Not retroactive


3. Respect and protect human rights
Hong Kong Basic Law
The International Covenant on Civil and Political Rights
The International Covenant on Economic, Social and Cultural Rights


4. Coordination mechanism
The Office for Safeguarding National Security of the Central People's Government in the HKSAR
The Committee for Safeguarding National Security of the HKSAR
National Security Adviser


5. Enforcement mechanism
Dedicated units in the Police Force
Dedicated units in the Department of Justice
Designating Judges to adjudicate cases

## 6. Cases under the jurisdiction of the CPG Office on National Security

**Scope of jurisdiction**

- Cases with involvement of a foreign country or external elements, the complexity of which makes it difficult for the HKSAR administration
- A serious situation has arisen, when the HKSAR Government is unable to effectively enforce this law
- A major and imminent threat to national security has occurred

**Trial procedure**

- Upon approval by the Central People's Government of a request made either by the HKSAR Government or by the Office itself
- The CPG Office on National Security shall initiate an investigation

The Supreme People's Procuratorate shall designate a prosecuting organ to prosecute

The Supreme People's Court shall designate a judicial organ to adjudicate

- The national Criminal Procedure Law and other laws shall apply

## 7. Special requirements on public officers

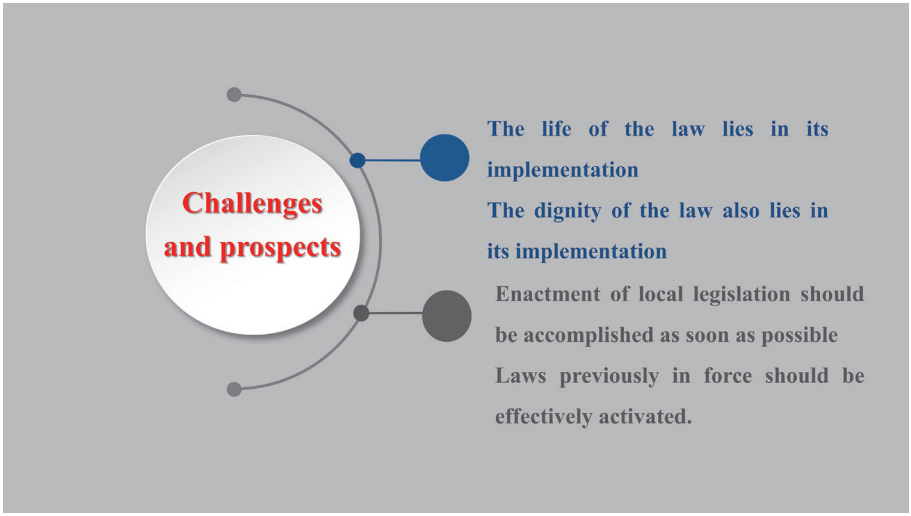
**Article 6**

A resident of the HKSAR who stands for election or assumes public office shall confirm in writing or take an oath to uphold the Basic Law of the HKSAR of the People's Republic of China and swear allegiance to the HKSAR of the People's Republic of China in accordance with the law.

**Article 35**

A person who is convicted of an offence endangering national security by a court ------

- shall be disqualified from standing as a candidate in the elections of the Legislative Council and district councils of the HKSAR or holding any public office in the HKSAR, or serving as a member of the Election Committee for electing the Chief Executive
- has taken an oath or made a declaration, he or she shall be removed from his or her office upon conviction, and shall be disqualified from standing for the aforementioned elections or from holding any of the aforementioned posts


Challenges and prospects
The life of the law lies in its implementation
The dignity of the law also lies in its implementation
Enactment of local legislation should be accomplished as soon as possible
Laws previously in force should be effectively activated.


THANKS

# An Introduction to National Security Legislation in China

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## I. State and national security

**State**: According to international law, four important elements that constitute a state : **people, territory, sovereignty and state power**

**National security:** national security is to maintain the security of the core elements of a state such as homeland, citizen, sovereignty and state power.

National security is the prime concern.

National security falls under the purview of the central authorities in every countries, and it is through national legislation to safeguard national security.

Countries like the United Kingdom and the United States have formulated the most laws on national security. There are dozens or even more laws to safeguard national security in these countries, and there are also many laws concerning national security that are scattered among other provisions within other laws on national security.

## II. The overall situation of China's national security legislation

**Our country's national security legislation includes the Constitution, the Criminal Law, and special legislation. Special legislation is centered on the National Security Law of the People's Republic of China and a complete national security legal system is being constructed.**

**(I) The Constitution (1982)**

**The Constitution is the highest legal embodiment of a state's sovereignty and the fundamental law for safeguarding national sovereignty, security and development interests.**

**Article 28** The state shall maintain public order**, suppress treason and other criminal activities that jeopardize national security**, punish criminal activities, including those that endanger public security or harm the socialist economy, and punish and reform criminals.

**Article 29** The armed forces of the People's Republic of China belong to the people. Their missions are to strengthen national defense, resist aggression, defend the motherland, safeguard the people's peaceful work, participate in national development, and work hard to serve the people.

The state shall make the armed forces more revolutionary, more modernized and better regulated in order to strengthen national defense capabilities.

**Article 52 Citizens of the People's Republic of China shall have the obligation to safeguard national unity and the solidarity of all the country's ethnic groups.**

**Article 54 Citizens of the People's Republic of China shall have the obligation to safeguard the security, honor and interests of the motherland; they must not behave in any way that endangers the motherland's security, honor or interests.**

**Article 55** It is the sacred duty of every citizen of the People's Republic of China to defend the motherland and resist aggression.

It is an honorable obligation of citizens of the People's Republic of China to perform military service or join the militia in accordance with law.

The Constitution also contains provisions on states of emergency.

### (II) The Criminal Law (enacted in 1979 and amended in 1997)

**Chapter 1 of Part II** of the Criminal Law provides **for crimes of endangering national security**, that is **acts that endanger the sovereignty, territorial integrity and security of the state, split the state, subvert the political power of the people's democratic dictatorship, and overthrow the socialist system**. The specific charges are stipulated in 12 articles from Article 102 to Article 113 of Chapter I of the Criminal Law, including 11 charges.

The criminal act endangering the national security of the People's Republic of China is the most detrimental crime in China's Criminal Law, and the maximum penalty can be death penalty, which is also the practice in many countries.

Article 102 **crime of colluding with foreign states in plotting to harm the motherland**
Article 103 **crime of splitting the country**
Article 104 **crime of armed rebellion or riots**
Article 105 **crime of subverting the political power of the state**
Article 106 **penalties for colluding with institutions, organizations or individuals outside the country**
Article 107 **crime of providing financial support to criminal activities that endanger national security**
Article 108 **crime of defecting to the enemy and turning traitor**
Article 109 **crime of defection**
Article 110 **crime of espionage**
Article 111 **crimes of stealing, secretly gathering, purchasing, and illegally providing state secrets or intelligence for an organization, institution, or personnel outside the country**
Article 112 **crime of supplying arms and ammunition or other military materials to an enemy during war time**
Article 113 Whoever commits the crimes of endangering national security may be sentenced to death and be punished by having his property confiscated

### (III) The Anti-Secession Law (2005)

The Anti-Secession Law is formulated, in accordance with the Constitution, for the purpose of opposing and checking Taiwan's secession from China by secessionists in the name of "Taiwan independence", promoting peaceful national reunification, maintaining peace and stability in the Taiwan Straits, preserving China's sovereignty and territorial integrity, and safeguarding the fundamental interests of the Chinese nation. The law consists of 10 articles, which are only applicable to the Taiwan issue. The main content is to promote cross-Straits exchanges and cooperation, and to express the principles and policies of peaceful reunification, as well as the possible ways and strategies to achieve peaceful reunification. It also explicitly authorizes for the first time the bottom line of the major principle that the state shall employ **"non-peaceful means"** to achieve national reunification under three circumstances.

The Anti-Secession Law legalizes a series of policies towards Taiwan formulated by the state over the years. It is in line with international norms to fight against secession, safeguard national sovereignty and territorial integrity, and achieve reunification with laws.

### (IV) The National Security Law of the People's Republic of China (2015)

As the youngest national security law in the world, China's National Security Law embodies the characteristics of the 21st century, especially in light of the internal and external security environment and national conditions faced by China, and clarifies that "national security" refers to a **nation's power, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major national interests, are in a state where there are relatively no danger and no internal and external threats and the capability to ensure a secured status.**

According to the general concept of national security and the corresponding definition of national security, the National Security Law contains 7 chapters and 84 articles, which stipulate the specific tasks of safeguarding national security in 13 areas, including traditional military and territorial security, and also non-traditional security such as political, economic, cultural, social, scientific and technological, information, ecological, resource, and nuclear security, as well as new areas such as outer space, international undersea area, and polar regions, and security of China's overseas interests. It also includes the security of new areas such as outer space, the international submarine area and the polar regions, and the security of China's overseas interests.

The National Security Law also provides for a relatively detailed and scientific division of responsibilities and scope of authority between the central and local authorities, making it clear that all localities, including the Hong Kong and Macao Special Administrative Regions, have the responsibility to safeguard national security.

The National Security Law also stipulates the obligations and corresponding rights of citizens and organizations in safeguarding national security, making it clear that safeguarding national sovereignty, unity and territorial integrity is the common obligation of all Chinese people, including compatriots in Hong Kong, Macao and Taiwan.

**(V) Other related legislation:**

Counter-espionage Law enacted in 2014, the Counterterrorism Law enacted in 2015, the Cybersecurity Law and the Law on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China enacted in 2016, the National Intelligence Law and the Nuclear Safety Law enacted in 2017, the Cryptography Law enacted in 2019, and the Export Control Law and the Biosecurity Law enacted in 2020, the Emergency Response Law enacted in 2007 and other comprehensive or special laws related national security.

In sum, **under the Constitution, we should build a comprehensive legal system for safeguarding national security with the National Security Law as the center**.

It should be noted that these laws are not included in Annex III of the Basic Law, thus are not applicable in Hong Kong and Macao. **The safeguarding of national security in Hong Kong and Macao has to be led by the Central Government and coordinated by the Special Administrative Regions to construct a distinct legal system.**

**(VI) Legislation for safeguarding national security in the Hong Kong and Macao SARs**

**1. Macao SAR:**

The Basic Law of Macao (1993) and legislation of Article 23 of the Macao Special Administrative Region (2009) Macao's National Security Law (official name in Portuguese is Lei relativa à defesa da segurança do Estado)

Article 23 of the Basic Law of Macao: The Macao Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

The Macao Special Administrative Region National Security Law is a Macao law enacted by the Legislative Assembly of the Macao Special Administrative Region in accordance with Article 71 (paragraph 1) and Article 23 of the Basic Law of Macao, on the prohibition of crimes against national security. The Law contains 15 articles, which stipulate seven types of criminal acts that endanger national security, such as treason and secession, and their corresponding penalties.

The successful completion of the legislative process of Macao Special Administrative Region National Security Law signifies the full implementation of the Basic Law, the conscientious fulfillment of the constitutional responsibilities conferred by the Basic Law, and the plugging of the gaps in the laws safeguarding national security that have existed since the reunification of Macao, which is of great significance to safeguarding national security, protecting the rights and freedoms of Macao residents in accordance with the law, and maintaining the long-term prosperity and stability of Macao society.

**2. HKSAR:** (1) The Hong Kong Basic Law (1990) and its Article 23, as well as the relevant local laws of Hong Kong;

(2) Since the reunification, Hong Kong has neither completed the local legislation of Article 23 of the Hong Kong Basic Law nor properly implemented the relevant local laws on safeguarding national security, resulting in Hong Kong being in a state of "undefended" in terms of national security for a long time. To this end, on May 28, 2020, the Third Session of the 13th National People's Congress adopted the ***Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*** and on June 30, the Standing Committee of the NPC adopted the ***Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*"** (**National Security Law of the HKSAR**).

The National Security Law of the HKSAR is enacted, in accordance with the Constitution, the Basic Law of Hong Kong, the NPC's Decision, the principle of "one country, two systems" and the actual situation of Hong Kong, for the purpose of preventing, suppressing and imposing punishment for the offences of secession, subversion, organization and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to Hong Kong. It made use of national legislation to convict these four acts that seriously endanger national security. This will improve the legal system and relevant enforcement mechanism for safeguarding national security from both the national and the Hong Kong SAR levels, refine the allocation of powers and responsibilities between the Central Government and the Special Administrative Region in safeguarding national security, resolve the segregation of jurisdiction over national security cases and the regulation of relevant acts between the Central Government and the HKSAR, as well as providing guidance for the further enhancement of the legal system and enforcement mechanism for the protection of national security in Hong Kong.

The National Security Law of the HKSAR consists of six chapters and 66 articles, with the following chapters: General Principles, The Duties and the Government Bodies of the Hong Kong Special Administrative Region for Safeguarding National Security, Offences and Penalties, Jurisdiction, Jurisdiction, Applicable Law and Procedure, Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region, and Supplementary Provisions. This is a comprehensive law that combines substantive, procedural and organizational law.

# PANEL DISCUSSION 4

## Implementing "One Country, Two Systems" under the Basic Law and its Benefits to the HKSAR

**Moderator:**

**The Hon. Martin Liao Cheung-kong, GBS, JP,**

Member of the HKSAR Legislative Council

**Panelists:**

**Zhao Yun,**

Professor and Head of Department of Law at the University of Hong Kong

**Si Yanli,**

Deputy Director of the Research Office of the Supreme People's Court, Judge

**Edward Liu Yang,**

Legal Director at Hill Dickinson LLP

**Martin Liao Cheung-kong:** Our topic today is "Implementing 'One Country, Two Systems' under the Basic Law and its Benefits to the Hong Kong Special Administrative Region (HKSAR)".

We have invited several heavyweight guests and speakers as our panelists. Our first speaker is Professor Zhao Yun, Head of Department of Law at the University of Hong Kong. Professor Zhao received his Ph.D. in Law from Erasmus University Rotterdam, having previously received an LLM from Leiden University and an LLM and LLB from China University of Political Science and Law. He is endowed with Henry Cheng Professorship in International Law in the University of Hong Kong and appointed as Chair Professor in International Law in Xiamen University. His field of research is very wide. He was the Director of the Center for Chinese Law in 2013 and 2017 and is currently a Council Member of China Law Society and a Standing Council Member of the Chinese Society of International Law. He is listed as arbitrator in several international arbitration commissions. Professor Zhao Yun is going to share his opinions on the "Mainland and Hong Kong Closer Economic Partnership Arrangement". Let us welcome Professor Zhao.

**Zhao Yun:** Thanks for the invitation from the Department of Justice. In my opinion, the successful implementation of "one country, two systems" in Hong Kong has brought enormous opportunities for Hong Kong's development. Today, I would like to focus my sharing on CEPA, that is "the Mainland and Hong Kong Closer Economic Partnership Arrangement".

Under the arrangement of "one country, two systems", Hong Kong is a separate customs territory and recognized by the

World Trade Organization (WTO) as an independent member. According to the rules of WTO, which allow its members to establish free trade zones where more preferential systems and treatment can be implemented therein. We all hold that within the framework of "one country, two systems", Hong Kong can earn a good deal of preferential treatment. It is against this background that the Mainland and Hong Kong signed "CEPA" which came into full force on July 1, 2003. This agreement covers four broad areas: trade in goods, trade in services, economic and technical cooperation, and investment. We can learn from the regulations in these four areas that Hong Kong was being presented with numerous privileges. Hong Kong also received broader and more preferential treatment way ahead of other WTO members.

In terms of trade in goods, the Mainland, under relevant WTO regulations, has undertaken to reduce tariffs and open up markets within a few years after accession to the WTO. There are relevant provisions in CEPA which stipulated that on January 1, 2004, the 273 Hong Kong products with Mainland product codes that fulfil the CEPA rules of origin can enjoy zero tariff treatment, and such treatment will be extended to other Hong Kong products from January 1, 2006. Up to now, we will find that the tariff imposed on a great deal of products from other WTO members has been maintained at about 15% under the WTO framework whereas Hong Kong products are enjoying zero tariff preference.

In the field of trade in services, Hong Kong businessmen can have early access to the Mainland market under CEPA. CEPA liberalized 18 service sectors, including telecommuni-


cations and convention and exhibition etc. Besides, the capital requirement or business scope has been removed or relaxed in these sectors. For example, in the banking sector, the capital requirement and business scope requirement have been reduced from USD 20 billion to USD 6 billion. Furthermore, the minimum prior operation period for setting up a branch has lowered from two years to zero and the minimum prior operation period for running the Renminbi business in the Mainland has reduced from three years to two years, which is a very prominent example. It follows that our Hong Kong service suppliers have indeed been provided with advantageous treatment.

In the area of investment, the CEPA framework permits Hong Kong businessmen to establish sole proprietorship more quickly and certain industries have exceeded the concessions committed by the Mainland on accession to the WTO. In this regard, the Foreign Investment Law has come into effect this year under which the privileges endowed with Hong Kong are even more favorable. If we look at the provisions of the Negative List, we

would realize the list under CEPA and WTO are not the same. I am going to illustrate the two aspects of the provisions by using legal services as an example. I wrote an article several years ago that specifically discussed and compared the differences in treatment under CEPA and WTO. We can obviously see that Hong Kong's legal service providers enjoy more preferential treatment, including the establishment of partnership associations with Mainland law firms in Guangzhou, Shenzhen and Zhuhai and the retention of Hong Kong and Macao legal practitioners to Mainland law firms as their legal consultants. You may have noticed that China has made some novel initiatives regarding Hong Kong legal practitioners practicing in the Guangdong-Hong Kong-Macao Greater Bay Area. Therefore, we can perceive that there are indeed lots of new developments and Hong Kong businessmen have always been offered countless preferential treatment. The provisions of CEPA can serve as a very meaningful example for international practice.

I will principally discuss the investment agreement reached in 2017. This agreement not only covers general provisions about fair and reasonable treatment and prohibition of illegal expropriation etc., but it also focuses on constructing a CEPA investment dispute settlement mechanism. Investment dispute mechanisms generally resort more to investment arbitration, which is of great importance in my opinion. According to the provisions of CEPA, investors may submit an application to mediate to a mediation institution in the place where the investment is made based on relevant regulations. If the mediation fails, the party concerned may initiate legal proceedings. In addition to general negotiations and consultations,

it provides a mechanism for investment mediation, which I think is excellent. It stipulates that mediation shall be undertaken by a mediation institution at the side where the investment is made, and mandates the publication of a list of mediation institutions and mediators that are mutually agreed by the two sides. By comparing with the general investment agreements, CEPA investment agreement allows the parties to have certain degree of flexibility which the parties may at any time decide to participate in or withdraw from mediation on a voluntary basis. One of the notable procedural feature is the setting up of a mediation committee comprised of three mediators. The mediators shall have attained the relevant mediation qualifications and shall have experience in the fields of cross-border trade and/or investment. I think this is a great arrangement as it enables mediators with different backgrounds to be involved in mediating cases and ensures a balance of the rights of the parties concerned in the mediation process. The participation of mediators from different backgrounds can bring more innovative solutions, and is conducive for both parties to smoothly resolve their investment disputes. In terms of ensuring the confidentiality of mediations and transparency of relevant procedures, confidentiality does not extend to the fact that the parties concerned agree to mediation and they may reach an agreement through mediation. These provisions are of great importance to the settlement of investment disputes. In light of the above discussions, it can be seen that CEPA is a special economic and trade partnership arrangement made between the Mainland and Hong Kong according to WTO rules under the framework of "one country, two systems". It fully reflects the Central

Government's support for Hong Kong's economic development and long-term prosperity and stability. In the long run, I believe if we continue to adhere to the dual advantages of "one country" and "two systems", we will definitely achieve further success.

**Martin Liao Cheung-kong:** Let me summarize. From the signing of CEPA initially in 2003, we have witnessed its contents has been continuously enriched which have currently covered trade in goods, trade in services and investment agreements. I think it has always been a new practice of "one country, two systems". At present, our country is commanding an important development strategy, that is the Guangdong-Hong Kong-Macao Greater Bay Area, and is now proceeding in full speed. CEPA and the Greater Bay Area are closely related. CEPA further opens up the preferential measures which implement and advance the full liberalization of trade in services on an early and pilot basis in the Greater Bay Area. Thus, it brings about tremendous development opportunities to the legal practitioners in Hong Kong.

Our next topic is the "Arrangement for Mutual Legal Assistance concerning Civil and Commercial Matters between the Mainland and the HKSAR". Let us welcome Judge Si Yanli, Deputy Director of the Research Office of the Supreme People's Court. Judge Si obtained her Ph.D. in Civil and Commercial Law from China University of Political Science and Law. She joined the Supreme People's Court in 2006 and served as Director of the Hong Kong and Macao Affairs Office under the Research Office of the Supreme People's Court in 2015. She was appointed to her current position in 2020. In recent times, Judge Si has represented the Supreme People's Court to liaise with the

HKSAR on several legal arrangements on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, in Matrimonial and Family Cases and Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings etc. Judge Si has profound background and extensive experience in legal, judicial and Hong Kong and Macao affairs.

**Si Yanli:** It is my pleasure to gather virtually with you to commemorate the 30th Anniversary of the Basic Law. Today, I would like to share with you the situation of judicial assistance in civil and commercial matters between the Mainland and Hong Kong. Article 95 of the Basic Law provides legal basis for the Mainland and Hong Kong to develop judicial assistance in civil and commercial matters. It can be said that the judicial assistance in civil and commercial matters between the Mainland and Hong Kong is a faithful implementation of "one country, two systems" and the Basic Law in the judicial field. In practice, what is its demand? Let us look at a few sets of data. First, let us take a look at the situation of movement of people between the two places. In recent years, Hong Kong residents have made over 150 million visits to and from the Mainland every year. Second, the exchange of economic and trade between the two places. In the past five years, Hong Kong's investment in the Mainland has accounted for over 60% of the total foreign investment each year. As you can see, both the movement of people and exchange of economic and trade are constantly soaring. This results in an increasing number of cross-border disputes which brings about greater demands for judicial assistance in cross-border civil and commercial matters. To make better adaption to the practical needs, the Supreme

People's Court has signed seven judicial assistance arrangements with the HKSAR since the return of Hong Kong to China. The seven arrangements can be divided into three stages and three categories. The first stage is the initial development stage from 1997 to 2006; the second stage is the stagnation stage from 2006 to 2016; the third stage is the rapid development stage from 2016 to date. At the same time, this seven arrangements can be divided into three categories, namely assistance in procedural matters, assistance in arbitration procedures, and assistance in court decisions. These seven arrangements, developed from scratch, from point to aspect and in a progressive manner, have basically achieved comprehensive coverage over judicial assistance in civil and commercial matters and established an interregional judicial assistance system with Chinese characteristics. I will highlight a few arrangements in the following.

**I. Arrangements Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR**

This arrangement has been implemented for 20 years and the overall enforcement is great. It will be further amended and improved by the Mainland and Hong Kong in order to adapt to the new practical needs. The following issues will be taken as the main concerns: first, the relationship between recognition and enforcement has to be clarified, whether recognition is the prepositive procedures of enforcement. The second is whether a court may take preservative measures against the respondent's property pursuant to the application by the party concerned before or after it accepts the application for recognition and enforcement of an arbitral award. The third is whether the applicant may apply to both

courts in the Mainland and Hong Kong if the respondent has properties which may be subject to enforcement in the two places. The fourth is should the scope of mutual assistance be determined by the criterion of the arbitral institutions or the standards of the seat of arbitration. These issues are of major concern to the industry.

**II. Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR**

This arrangement was signed in 2019 which aims at mutual assistance in court-ordered interim measures in aid of arbitral proceedings, or an arrangement with preservation or interim measures for mutual assistance. Its basic idea is to treat the arbitral proceedings of Hong Kong and the Mainland on par by covering measures prior and during arbitration, including property preservation, evidence preservation and conduct preservation. This arrangement is the first and the only document on mutual assistance in interim measures in aid of arbitral proceedings signed between the Mainland and other jurisdictions. It is a pragmatic measure of the Central Government to support Hong Kong in developing its legal services industry and establishing as the center for international legal and dispute resolution services in Asia Pacific Region. It is a specific manifestation for developing closer interregional judicial assistance under the "one country" principle. This arrangement has been implemented for one year. In accordance with this arrangement, the Mainland courts had accepted 32 applications for preservation in arbitral proceedings from Hong Kong involving USD 1.5

billion, as of October 19, 2020.

**III. Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to Choice of Court Agreements between the Parties Concerned**

This arrangement concerns mutual recognition and enforcement of judgments in civil and commercial matters between the Mainland and Hong Kong courts and was signed in 2006 and entered into force in 2008. Its scope of application is limited to judgments requiring payment of money in a civil and commercial cases and it requests the parties concerned to expressly agree in writing that a people's court of the Mainland or a Hong Kong court shall have exclusive jurisdiction. It can be seen that its scope of application is very narrow and the applicable conditions are very stringent. Therefore, the legal professionals in the Mainland and Hong Kong have been finding ways to expand the scope of assistance to further enhance the well-being of the people in the two places since 2016.

**IV. Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the HKSAR**

In 2017, on the 20th Anniversary of Hong Kong's return to China, the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the HKSAR was signed with the joint efforts made by people from the Mainland and Hong Kong. This arrangement has the following features: First, the greatest common divisor of matrimonial and family cases in the Mainland and Hong Kong is brought into the scope of assistance. Second,

the latest achievements in family cases reform in the Mainland and Hong Kong have been embodied. Cases involving the return of underage children that are of great concern to all walks of life in Hong Kong have all been incorporated which also implement the values of maximizing the children's interests. Third, the techniques for expressing a provision is innovative. It includes orders related to division of property in the scope of assistance and realizes effectively the docking of the legal systems of the Mainland and Hong Kong.

**V. Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR**

This arrangement was signed in 2019. It has three features. Firstly, it marks the attainment of extending the coverage of judicial assistance to substantially the entire civil and commercial fields between the Mainland and Hong Kong and achieving the largest scope of mutual recognition which is beyond the extent of assistance with foreign countries. Secondly, this arrangement adopts a more open and active stance than international conventions in terms of intellectual property rights issues. The provisions provide forward-looking regulations for recognition and enforcement of the decisions in intellectual property rights cases which can benefit the Guangdong-Hong Kong-Macao Greater Bay Area in its innovation-driven development. Thirdly, closer assistance has been accomplished by including monetary and non-monetary rulings in the scope of reciprocal assistance. The signing of the above arrangement has clearly demonstrated that the differences in legal system would not constitute an obstacle to cooperation between

the Mainland and Hong Kong as long as we adhere to "one country, two systems" and show mutual appreciation and respect. We can also fully leverage on the advantages of "two systems" under the premise of "one country" to achieve closer assistance. I would like to share with you that at present, the Supreme People's Court and the Department of Justice of the HKSAR are actively studying and promoting the assistance in cross-border insolvency that the industry is concerned about. We hope that we could achieve a breakthrough as soon as possible.

In general, the Supreme People's Court shall give its full support to all issues that are beneficial to Hong Kong's long-term prosperity and stability, Hong Kong people's welfare and Hong Kong's integration into China's overall development. In the next step, the Supreme People's Court will continue to fully and accurately interpret and implement the policy of "one country, two systems", expand the breadth and depth of judicial assistance between the Mainland and Hong Kong, and further enhance the level and effect of reciprocal assistance.

**Martin Liao Cheung-kong:** Our next speaker is Mr. Edward Liu. Mr. Liu is the Legal Director at Hill Dickinson Hong Kong. He is qualified to practice law in England and Wales and China. His main area of practice is in commercial and shipping litigation and arbitration. He is extensively experienced in handling international commercial disputes, covering areas such as sales of goods/trade and commodities, energy and offshore projects, shareholder and equity-related disputes, international investment especially those connected with "Belt and Road Initiative" projects, frauds, worldwide enforcement of judgments and

arbitration awards etc. He has been appointed as members of a number of advisory bodies to the HKSAR Government, including Advisory Committee on Promotion of Arbitration, Steering Committee on Mediation as well as Aviation Development and Three-runway System Advisory Committee. Let us welcome Mr. Liu.

**Edward Liu Yang:** It is my profound honor to be invited to share my experiences and thoughts with you, in particular Judge Si Yanli has given a detailed introduction on the series of arrangements on reciprocal judicial assistance signed between the Mainland and Hong Kong since Reunification. Judge Si Yanli presented and shared with us from the perspective of a judge of the Supreme People's Court in the Mainland. I believe you can tell from my accent that I have a Mainland background but presently I am a Hong Kong resident and have come to Hong Kong for 10 years. In addition, I am a lawyer qualified to practice law in the UK and China and I am practicing in Hong Kong. It might due to my relatively complicated background that I was identified by the Secretary for Justice Ms. Cheng and her colleagues in the Department of Justice to do this sharing. I want to share two points from the perspective of my own practice.

Firstly, lawyers engaged in commercial matters like us have more or less encountered the arrangements that Judge Si Yanli just mentioned, except the arrangements in matrimonial and family cases which I do not handle this aspect of business myself thus I may not have an in-depth understanding. But when we communicate with our clients and when we study these arrangements, we tend not to associate them with the Basic Law. Today can be said to be the

first time for us, as a lawyer or as a professor of law, to discuss these arrangements from the perspective and angle of the Basic Law. While Judge Si Yanli was giving the introduction, I was thinking it would be extremely difficult, especially in the field of civil and commercial cases, to recognize and enforce a foreign decision in civil and commercial matters if Hong Kong is not a part of China and if there is no "one country, two systems", unless there is a bilateral agreement between the two sides concerned or mutual beneficial conditions. It is precisely because Hong Kong is a part of China and it enjoys unique advantages under "one country, two systems", the judgments in Hong Kong as well as those in the Mainland can be mutually and smoothly recognized and enforced, which is a significant advantage for Hong Kong. In addition, our industry looks forward to the passing of the comprehensive arrangements on judgments of civil and commercial matters signed last year as soon as feasible. Now we have a relatively smooth Legislative Council, so we hope that it could be passed shortly. I believe that the passing of this arrangement has nothing detrimental but beneficial and only pros not cons to our legal profession regardless of their stances. After the arrangement in interim measures came into force last year, I was much honored to be the first lawyer to obtain interim measures through the arrangement in Hong Kong. The arrangement was passed on October 1. However, the Mainland was having the Golden Week holiday until October 7 so I received relevant freezing orders from Shanghai Maritime Court on October 8. Therefore, I am the beneficiary, so are all lawyers in Hong Kong. During the signing of the arrangement in interim measures,

my Singaporean lawyer friend said he envies us and Hong Kong, and what is the reason for China to treat Hong Kong so well. I told him that because Hong Kong is part of China but Singapore is not, unless you are willing to join China. He had nothing to say. This is owing to the fact that there is "one country, two systems".

Secondly, I think the common law in Hong Kong has progressed and developed since its Reunification in 1997, the Constitution, the Basic Law, the interpretation of the law by Standing Committee of the National People's Congress, decisions of National People's Congress and these series of arrangements have become part of the common law in Hong Kong. Yet, inferring from my field and own contacts, people actually do not have a strong understanding of this aspect. When it comes to common law and Hong Kong's legal system, people tend to introduce and consider the common law from the traditional pre-Reunification point of view. From now on, I think that every legal professionals need to be aware that these series of reciprocal arrangements that we are currently enjoying are attributable to the safeguards of the Basic Law and "one country, two systems".

Lastly, the Department of Justice held a seminar titled "Is Hong Kong Still Irreplaceable" in Beijing in December 2019. I was also invited as one of the guests to share my opinions. On the same issue this year, I still hold the belief that Hong Kong is irreplaceable, at least from a legal standpoint. Besides, as a practicing lawyer in Hong Kong with a Mainland background and as a fresh Hong Kong resident, I benefit from the status of Hong Kong and the status of "one country, two systems". When

I was in the Mainland and met with my Mainland clients, they would be more respectful despite my background as a Mainlander because they consider I am a Hong Kong lawyer. They trust my professional skills and I am not required to do anything beyond my professions. All these suggest that our lawyers and legal practitioners in Hong Kong have been enjoying the unique advantages under the Basic Law and "one country, two systems", which worth cherishing and applauding.

**Martin Liao Cheung-kong:** Thanks Mr. Liu. We just referred to the arrangements on reciprocal recognition and enforcement of judgments in civil and commercial matters and matrimonial and family cases. I believe Hong Kong will implement and enforce these corresponding judicial cooperation soon. This also reflects that two different systems can have an arrangement on reciprocal judicial assistance. I think this is of great significance in reducing duplicated litigations and enhancing judicial trust between the Mainland and Hong Kong. I believe it all boils down to bringing great boons to establishing Hong Kong as an international legal and dispute resolution services center in Asia Pacific Region, improving the international legal services and dispute resolution mechanism of the Greater Bay Area and even constructing an international dispute resolution mechanism for the "Belt and Road Initiative". With the in-depth integration between HKSAR and the Mainland, it will take us to a new level. China is now breaking new grounds in pursuing opening up on all fronts. Under the policy of "one country, two systems", we shall be able to develop better mechanisms for cooperation and institutional innovation to further improve people's welfare in the Mainland and Hong Kong.

# Introduction on Judicial Assistance in Civil and Commercial Matters between the Mainland and Hong Kong

Si Yanli
Deputy Director, Research Office of the Supreme People's Court

November 2020

● **Legal basis - Article 95 of the Basic Law of HKSAR**

The Hong Kong Special Administration Region (HKSAR) may, through consultations and in accordance with law, maintain juridical relations with the juridical organs of other parts of the country, and they may render assistance to each other.

● **Implementation of "one country, two systems" in the judicial field**

## Practical demands

**(1) Close and frequent movement of people**

**Hong Kong residents had made over 150 million visits to and from the Mainland each year from 2014 to 2019.**

**Exchanges between Mainland and Hong Kong Residents**

| | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 |
|---|---|---|---|---|---|---|
| Hong Kong Residents' Visits to and from the Mainland | 153 million | 159 million | 162 million | 160 million | 160 million | 160 million |
| Number of registered marriages with foreigners and residents of Hong Kong, Macao and Taiwan | 47,000 couples | 41,000 couples | 42,000 couples | 41,000 couples | 48,000 couples | 49,000 couples |

Note: Data source: number of entry-exits in the past years from the Exit-Entry Administration Bureau of the Ministry of Public Security and National Immigration Administration and *Statistical Report of the People's Republic of China on the Development of Social Services* in the past years from Ministry of Civil Affairs

**(2) Enhanced exchange of economic and trade**

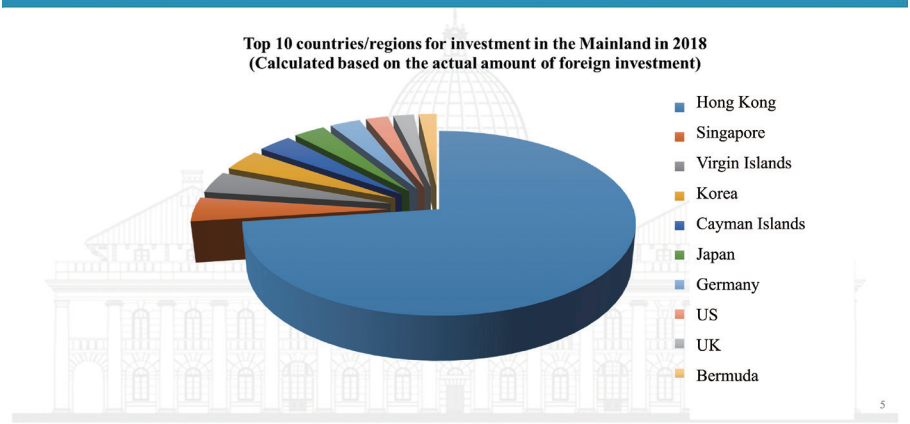
**Hong Kong's investment in the Mainland had accounted for over 60% of the total foreign investment each year from 2014 to 2018.**

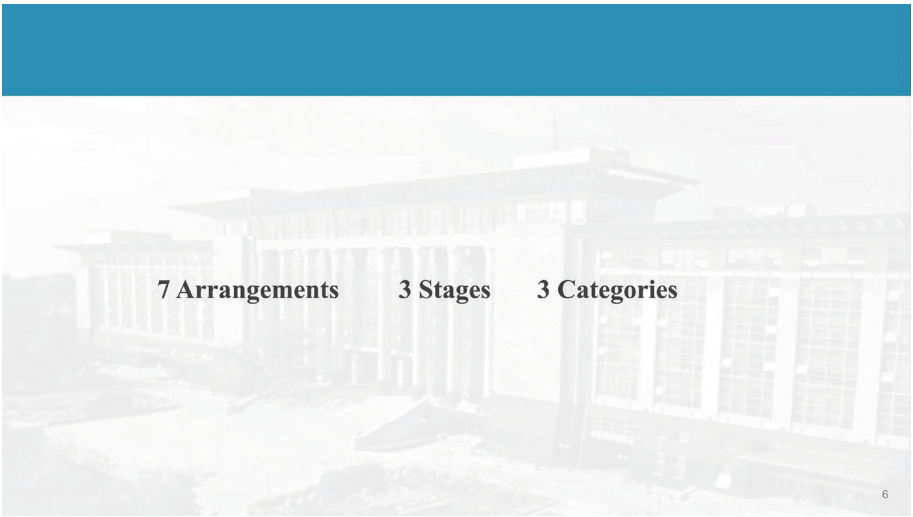
**Foreign Direct Investment in the Mainland from 2014 to 2018**

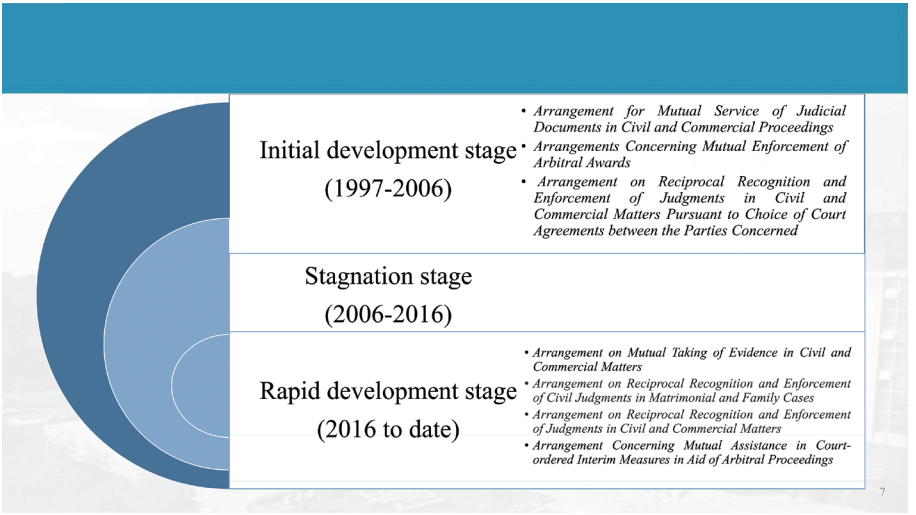
(Unit: USD 100 million)

| | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|
| Total foreign direct investment in the specified year | 1195.60 | 1262.70 | 1260.00 | 1310.40 | 1383.05 |
| Hong Kong direct investment | 857.40 | 926.70 | 871.80 | 989.20 | 899.17 |
| Hong Kong's share in foreign investment | 71.71 % | 73.39 % | 69.19 % | 75.49% | 65.01% |

Note: Data source: official website of the Ministry of Commerce


Top 10 countries/regions for investment in the Mainland in 2018
(Calculated based on the actual amount of foreign investment)
Hong Kong
Singapore
Virgin Islands
Korea
Cayman Islands
Japan
Germany
US
UK
Bermuda
5


7 Arrangements
3 Stages
3 Categories
6




● **3 Categories**

*** Assistance in procedural matters**

*Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings* (1998)

*Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters* (2016)

*** Assistance in arbitration procedures**

*Arrangements Concerning Mutual Enforcement of Arbitral Awards* (1999)

*Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings* (2019)

*** Mutual assistance in court decisions**

*Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Pursuant to Choice of Court Agreements between the Parties Concerned* (2006)

*Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases* (2017, to be enforced)

*Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (2019, to be enforced)

**The 7 arrangements, developed from scratch, from point to aspect and in a progressive manner, have basically achieved comprehensive coverage over judicial assistance in civil and commercial matters and established an interregional judicial assistance system with Chinese characteristics.**

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- I. *Arrangements Concerning Mutual Enforcement of Arbitral Awards*

The overall enforcement is great. Further amendments and improvements will be made concerning the following issues:

1. Relationship between recognition and enforcement.
2. Whether the court may take preservative measures against the respondent's property pursuant to the application by the party concerned before or after it accepts the application for recognition and enforcement of an arbitral award?
3. Whether the applicant may apply to both courts in the Mainland and Hong Kong simultaneously if the respondent has properties which may be subject to enforcement in the two places?
4. Scope of reciprocal assistance. The criterion of arbitral institutions? Or the standards of the seat of arbitration?

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- II. *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings*

**Basis idea:** to treat the arbitral proceedings of Hong Kong and the Mainland in terms of interim measures on par.

Covering measures prior and during arbitration, including property preservation, evidence preservation and conduct preservation.

**This arrangement is the first and the only document on mutual assistance in interim measures in aid of arbitral proceedings signed between the Mainland and other jurisdictions. It is also a pragmatic measure of the Central Government to support Hong Kong in developing its legal services industry and establishing as the center for international legal and dispute resolution services in Asia Pacific Region. It is a specific manifestation for developing closer interregional judicial assistance under the "one country" principle.**

**Since the commencement of the Arrangement in October 1, 2019, the Mainland courts had accepted 32 applications for preservation in arbitral proceedings from Hong Kong as of October 19, 2020. The above applications was accepted by 17 intermediate people's courts in 12 cities in the Mainland.** The total application amount reached RMB 10.4 billion (USD$1.5 billion). Wherein, at least 17 applications for property preservation have been approved by the courts and the total amount of preservation is approximately RMB 8.7 billion (USD $1.3 billion).

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III. *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Pursuant to Choice of Court Agreements between the Parties Concerned*

* The parties concerned expressly agree in writing that Hong Kong courts or people's courts of the Mainland shall have exclusive jurisdiction.

* It is only applicable to judgments requiring payment of money in a civil and commercial cases, excluding decisions involving confirmation of any rights and interests and/or performance of certain act.

* It is not applicable to other civil and commercial cases involving marriage, inheritance, tort, labor dispute, bankruptcy, etc.

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• IV. *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases*

* The greatest common divisor of matrimonial and family cases in the Mainland and Hong Kong is brought into the applicable scope.

* The latest achievements in family cases reform in the Mainland and Hong Kong have been embodied. Cases involving the return of underage children that are of great concern to all walks of life in Hong Kong have all been incorporated which also implement the values of maximizing the children's interests.

* The techniques for expressing a provision is innovative. It includes orders related to division of property in the scope of assistance and realizes effectively the docking of the legal systems of the Mainland and Hong Kong.

According to the comments from the industry, this judicial assistance arrangement is the most public opinion focused, closest to people's livelihood and most conform to people's aspiration between the two places in recent years. It is another significant measure to implement and enrich the "one country, two systems" policy in the form of a legal document. It fully demonstrates that the legal professionals from the two places have a strong sense of responsibility and proactive attitude by putting the interests of our country as top priorities, the understanding and cooperation as the mind, and the well-being of our people as the important mission.

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- V. *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*

* It can cover more than 90% of the civil and commercial cases between the Mainland and Hong Kong, marks the attainment of extending coverage of judicial assistance to substantially the entire civil and commercial fields between the Mainland and Hong Kong and achieving the largest scope of mutual recognition and assistance which is beyond the extent of assistance with foreign countries.

* This arrangement adopts a more open and active stance than international conventions in terms of intellectual property rights issues. The provisions provide forward-looking regulations for recognition and enforcement of the decisions in intellectual property cases which can benefit the Guangdong-Hong Kong-Macao Greater Bay Area in its innovation-driven development.

* Monetary and non-monetary rulings have been included in the scope of reciprocal assistance.

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The signing of the above arrangements has clearly demonstrated that the differences in legal system would not constitute an obstacle to cooperation between the Mainland and Hong Kong as long as we adhere to the "one country, two systems" policy and show mutual appreciation and respect. We can also fully leverage on the advantages of "two systems" under the premise of "one country" to achieve closer assistance.

Next, the legal professionals in the Mainland and Hong Kong will continue to fully and accurately interpret and implement the policy of "one country, two systems" and connect the adherence to the principle of "one country" with the respect for the differences between the "two systems"; we will continue to expand our common ground for collaboration, continue to expand the breadth and depth of judicial assistance between the two places and enhance the level and effect of reciprocal assistance by exploration and innovation with a more open, broader and liberated mindset.

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# Closing Remarks

The Honourable Ms. Teresa Cheng Yeuk-wah, GBS, SC, JP, Secretary for Justice, the Government of the Hong Kong Special Administrative Region, the People's Republic of China


The Honorable Chairperson Qiao and Deputy Director Feng, distinguished guests and friends,

In my closing remarks, I should explain the reason organizing this event. As Chairperson Qiao mentioned earlier this morning, we had this idea a year ago. That said, we need to make sure that we can invite and engage heavyweight speakers, like all those who have joined us today, before holding the event. Therefore, please allow me to express gratitude to our experts for sharing their experience with us.

I would like to share with you why do we use the concept of "Back to Basics". We realized that there are many incomprehension of the Basic Law: some

forget the Constitution, some say the Constitution does not apply in Hong Kong, some even forget that "one country" is the pre-condition of "one country, two systems". Hence, we decided to use the theme "Back to Basics" to host this Basic Law 30th Anniversary Legal Summit.

Speaking of going "Back to Basics", we must recollect that Vice-Chairperson Zhang and the Chief Executive respectively mentioned "learning the new by reviewing the old" and "staying true to the original intention" this morning. I think these three phrases are entirely consistent. As Judge Xue and Vice-Chairperson Zhang remarked, to go "Back to Basics", we need to start from the historical background of the signing of unequal treaties. China has always taken the same position on the status of Hong Kong, that is, it does not recognize Hong Kong as a colony at all times. In addition, as Judge Shi Jiuyong commented in an activity held in Hong Kong in 2017, United Nations General Assembly Resolution 2908 (XXVII) adopted in 1972 has actually confirmed China's long-standing position over the status of Hong Kong and the nature of the three unequal treaties. This marks an extremely important turning point.

Many of our guests referred to the speeches by Mr. Deng Xiaoping on "one country, two systems" today, which I take the opportunity to supplement. In the 1970s, Mr. Deng Xiaoping told MacLehose, the then Governor of Hong Kong, loud and clear that China will resume the exercise of sovereignty, and it will also maintain the capitalist system in Hong Kong. We can still recall the former British Prime Minister Margaret Thatcher's visit to China to meet with Mr. Deng Xiaoping in 1982. He expressed in no uncertain terms

that sovereignty is not negotiable. However, we tend to neglect another very important incident that is particular relevant to Hong Kong, that is the amendment to the Constitution and introduction of Article 31 by China in 1982. The Constitution was enacted in 1954 and has been amended from time to time. The amendment in December 1982 is of great significance to Hong Kong, as Article 31 provides that "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall, in light of specific conditions, be prescribed by law enacted by the National People's Congress." This amendment is especially crucial as it has paved the way for the establishment of the Hong Kong Special Administrative Region (HKSAR) and the formulation of the Basic Law.

We shall highlight and recap the two points reiterated by Vice-Chairperson Zhang Yong this morning. The first is about our nation's system. China practices a unitary system under which all powers flow from the Central Government. On that account, the HKSAR was established by the Central Government with the exercise of its power and the powers enjoyed by the HKSAR are wholly authorized by the Central Government. The second is about the legal hierarchical diagram as shown in Vice-Chairperson Zhang Yong's video this morning. The diagram indicates that the Constitution is at the upmost of the hierarchy which is above our Basic Law and other laws of Hong Kong, and the laws enacted by a total of 871 legislative bodies in the Mainland as well. With this background, we would then be able to return to the basics. After the addition of Article 31 to the amended Constitution, the Central People's Government pro-

posed 12 principles to the United Kingdom (UK) on July 12, 1983, which later became part of the Sino-British Joint Declaration as Article 3. These 12 principles have also been incorporated into the Basic Law. We have to pay heed to Article 3 of the Sino-British Joint Declaration that it is indeed a declaration unilaterally made by the Chinese Government on its plans regarding Hong Kong, as opposed to some suggestions that this was drafted upon the request by the UK. As Judge Xue pointed out earlier, in light of transitional arrangements, both China and the UK had their respective obligations to fulfil. After the transition, however, it was purely within the ambit of the sovereignty of China.

The matters brought up by Judge Xue this morning remind me of two important aspects. To begin with, she made it clear that the return of Hong Kong to China has set a laudable example on peaceful resolution for countries. Although China and Britain might have disputes due to their differences in interpreting the nature of the treaties, the successful and peaceful reunification of Hong Kong has played an important role in the innovative application of international practice and international law, and provides an ingenious and pragmatic precedent for the international society. Furthermore, Judge Xue recalled that during the transitional period, which may perhaps be overlooked by us, the Central Government had done a lot of work for Hong Kong. They had meticulously dealt with matters concerning the extensive collection of international treaties and international organizations to ensure a smooth and peaceful transition for Hong Kong. They had put in a lot of effort. As Vice-Chairperson Zhang Yong told us about the

formulation of the 160 articles of the Basic Law, they had spent five years reviewing existing laws and examining hundreds of international treaties one by one. It shows that the Central Government attached great importance and extended pivotal support to Hong Kong.

Nevertheless, the first step for implementing the policy of "one country, two systems" proposed by Mr. Deng Xiaoping was to go through the legal procedure. In April 1985, the Basic Law Drafting Committee (BLDC) was established at the third session of the Sixth National People's Congress (NPC). At the first plenary meeting held by the BLDC following its establishment, the Basic Law Consultative Committee (BLCC), being described as the largest and the most representative advisory organization in the history of Hong Kong, was set up. The drafting of the Basic Law took four years and eight months. The active participation and heated debates of people from all walks of life during the process enables it to be a highly engaging legislative exercise. Today, we learnt that there was a debate over "East and West Chus" (namely Ms Dorothy Liu Yiu-chu and Ms Maria Tam Wai-chu) and "Los Senior and Junior" (namely Mr Lo Tak-shing and Mr Vincent Lo Hong-sui). Nonetheless, since they were working towards the same goal of facilitating the peaceful return of Hong Kong to China, they were able to reach consensus and shape our present Basic Law.

How should we understand the Basic Law? Why do we need to go "Back to Basics" after 23 years of practice? I am grateful to Deputy Director Feng for sharing his experience and speaking from his heart. He analyzed whether the misunderstandings to the political structure might be the

causes of certain problems etc. His explanation is that our method of thinking and the use of legal positivism to understand the system under the Basic Law may attribute to the problems. This is exactly why we need to go "Back to Basics". He also clearly stated that a method of normative interpretation should be adopted to correctly comprehend the Basic Law. As such, we would not use the term "separation of powers" and will fully appreciate that the Basic Law provides for a system of allocation of powers, and distinct functions amongst the three branches would complement each other. Regarding the political structure of Hong Kong, in addition to studying the provisions of the Basic Law, we can learn from Maria Tam Wai-chu's sharing in the panel discussion on original legislative intent this morning that the practice of an executive-led system was affirmed after a series of discussion and consideration in the drafting stage. Chairperson Qiao Xiaoyang later cited the concept that Hong Kong practices a "Chief Executive System" was stemmed from these discussions as well.

Please allow me to quote Chairperson Qiao's six keys to study the Basic Law. He emphasized: First, one must view the Basic Law from the national perspective. Second, the constitutional status of the Basic Law and Hong Kong is granted by the Constitution and the Constitution has legal effect in the HKSAR. We must insist the notion that the Constitution and the Basic Law form the constitutional order of the HKSAR. Third, Basic Law is an "authorization law", a main feature of the unitary state I mentioned just now. The high degree of autonomy of the HKSAR is not inherent in itself, but granted by the Central Government. Hence, the Basic Law built a legal bridge named

"authorization" by linking the overall jurisdiction exercised by the Central Government with the high degree of autonomy exercised by Hong Kong. Fourth, the Basic Law is an organically intra-connected whole. Chairperson Qiao expressed all the provisions in the entire Basic Law metaphorically as a bunch of grapes. It is an organic whole and the grapes was bunched and connected by the vine. They are interrelated. You cannot single out a provision or certain part of it. I think his analogy is exceptionally appropriate and also brings out the key of how to understand the Basic Law. As an illustration, on the issue of interpretation, some may suggest the Hong Kong courts can make interpretations. According to Articles 158(2) and 158(3), Hong Kong courts can clearly interpret the provisions of the Basic Law under prescribed circumstances. While looking at the Article as a whole, we will certainly also recognize that the power of final interpretation belongs to the NPCSC. The Hong Kong courts' interpretation is restricted and such exercise of power of interpretation is also authorized by the NPCSC. Fifth, the Preamble of the Basic Law lays down the fundamental principle for "one country, two systems" and the Basic Law. We all know there are two points that are of particular importance in the Preamble of the Basic Law: safeguarding national unity and territorial integrity, and maintaining the long-term prosperity and stability of Hong Kong. These two major points underline the power of overall jurisdiction by the Central Government and its constitutional responsibility to maintain prosperity and stability of Hong Kong. For instance in the recent legislative exercise of the national security law, the Central Government assumes constitutional

responsibility for safeguarding national security and the stability of Hong Kong. The Central Government should also uphold the fundamental principle of "one country, two systems" and the Basic Law. On this basis, we can truly understand the NPC's decision in safeguarding Hong Kong's national security and the content of the relevant laws enacted by the NPCSC for implementation in Hong Kong. Sixth, it is to have the people-centered development philosophy. Similar to all countries, our nations' original intent has always been putting our people's well-being and interests first. Pondering this expression, we can understand the original aspiration and intent of "one country, two systems" and the Basic Law is to improve and develop from the perspective of people's well-being, ensures a better place for Hong Kong residents to live and work in and the stability and prosperity of the society.

The topics for our afternoon sessions were particularly meaningful. The first topic we set was to discuss the issues and cases in relation to the interpretation of the Basic Law under Article 158. When we have a proper understanding of the Basic Law and recognize how to read its provisions, we can easily appreciate that the overall formulation and mechanism of Article 158 is extremely comprehensive. It ensures that judicial independence would not be affected by the provision and at the same time warrants consistency on the interpretation within the country. Being a constitutional document, the power to interpret the Basic Law is certainly vested in the Standing Committee of the NPC, the permanent organ of the highest organ of state power – the NPC. No matter you approach with the concepts proposed by Chinese jurists or that of Lord Bingham

of the United Kingdom, the meaning of judicial independence is quite simple, that judges could freely and independently make their judgements based on the evidence in accordance with the law. This constantly applies to judicial independence of all regions and jurisdictions. The Article 158 interpretation is a legislative interpretation. For that reason, when the Hong Kong courts refer to the NPCSC's interpretation to adjudicate a case, it is like applying any other laws to make a judgment. Thus, it is important to appreciate that Article 158 does not undermine judicial independence, in particular the judges' power to decide a case freely and independently.

The two other sessions held this afternoon fully returned to our original intent, that is safeguarding national unity and territorial integrity and maintaining the long-term prosperity and stability of Hong Kong. First of all, the discussion on national security is the first of the original intent of the Basic Law. National security covers a wide range of subjects. I am exceptionally aware that many people think only that Article 23 of the Basic Law concerns national security. Vice-Chairperson Zhang Yong has precisely specified that this understanding is absolutely mistaken. The Basic Law actually provides for national security at three levels: the constitutional level, the national level and the SAR level. The SAR level can be further divided into two aspects, one is existing laws and the other is legislation on Article 23 of the Basic Law. Hence, we must acquire a proper and comprehensive understanding of the Basic Law in order to acknowledge our relevant responsibility in maintaining national security. I would like to take this opportunity to share my apprehension on the two phrases in the Law of

the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the National Security Law of the HKSAR). The first phrase is "this Law" stipulated in the National Security Law of the HKSAR which means the National Security Law of the HKSAR. The second phrase is "offences endangering national security" or "acts endangering national security" introduced by the National Security Law of the HKSAR. It follows that the National Security Law of the HKSAR makes four types of acts and activities that endanger national security a crime, but the extensive scope of national security undoubtedly surpasses those covered by the said Law. This corroborated the elaboration by Vice-Chairperson Zhang Yong as I have referred earlier: the laws on safeguarding national security which were previously in force in Hong Kong should be retained at the SAR level, for example section 2 of the Crimes Ordinance embodied treason and other provisions relate to crimes of endangering national security. Therefore, when we comprehend the entire system on national security law, we should refer to the existing laws along with the offences and acts specifically provided in the National Security Law of the HKSAR.

The final panel discussion examined the benefits brought to Hong Kong through the Basic Law. We have all learnt that CEPA would not exist and we would not be able to enjoy the benefits therein but for "one country, two systems" and we being part of China. Regardless of the legal profession or business sector, we can all enjoy these preferential treatment since our "two systems" are within "one country". Judge Si Yanli mentioned the numerous

arrangements on judicial assistance. These groundbreaking arrangements can be secured and exclusively enjoyed by Hong Kong simply because we are part of the country. This is beyond the reach of other countries. Edward Liu Yang discussed the arrangement on reciprocal enforcement of civil and commercial judgments. It may appear commonplace. However, this arrangement allows the Mainland and Hong Kong to mutually recognize and enforce certain judgements relating to intellectual property and the scope has gone beyond the existing requirements of the Hague Judgments Convention. This highlights the unique position and advantage of Hong Kong under "one country, two systems". Under the interim measures in aid of arbitral proceedings, Hong Kong is the first and only jurisdiction that a party to arbitral proceedings outside of the jurisdiction of the Mainland can apply for interim measures from the relevant Mainland courts.

Therefore, our legal summit enables us to discuss "one country, two systems" and explore how to capitalize on the strengths of Hong Kong through the advantages of "two systems" on the premise of "one country" from a legal perspective. From today onwards, there are many questions and topics that we could further study and explain. I am here to share with you two matters that have already been formally determined. First, the Department of Justice is actively making preparations for the compilation of a book incorporating cases and materials related to the Basic Law. We strive to publish the book in 2022 to commemorate the 25$^{th}$ anniversary of the return of Hong Kong to China. Our colleagues are sparing no effort to achieve that goal and your support would be appreciated.

Another activity is also closely related to the Basic Law. Endeavour Education Centre Limited will launch a series of activities starting tomorrow to coach some teachers on issues relating to the Constitution, Basic Law, and the National Security Law of the HKSAR. The Department of Justice fully supports the initiative and will collaborate with the Centre. Moreover, we are working with some private practitioners and institutions to prepare electronic materials with the hope that it would provide more comprehensive and accurate information for the education and promotion of these laws to the general public.

Once again, I would like to express my heartfelt gratitude to Chairperson Qiao and Deputy Director Feng for coming all the way from Beijing to attend the summit. Thank you. We are indebted to our Hong Kong speakers and experts and all the speakers and experts participating online for taking time out of their busy schedule to share their insights with us. I also express my appreciation to my colleagues at the Department of Justice. We mapped out this event for a year, but it was constantly postponed and rescheduled due to various reasons. When we finally decided to proceed, my colleagues put in a lot of effort to organize it within a short time. You cannot imagine how heavy their workload was. Please allow me to name two colleagues that I am particularly grateful to: they are Llewellyn Mui Kei-fat and Grace Wu Ka-yan.

Finally, we went "Back to Basics", "stayed true to the original intent" and "learnt new by reviewing the old" today. I hope, in time to come, we could consolidate the foundation and ensure the continued success of "one country, two systems". Thank you.

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