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OPINIONS OF THE SPECIAL GROUP ON LAW REGARDING SECTION 4 OF CHAPTER 4 "THE JUDICIAL ORGANS" OF THE DRAFT (AUGUST 1987) OF THE BASIC LAW

(passed by the Executive Committee on 4 November 1987)

Special Group on Law

CCBL-SG/LES-RP01(E)-871030

The Special Group on Law held two meetings to discuss the draft articles of Section 4 of Chapter 4 of the Basic Law, and drafters from the legal sector were invited to the meetings. The following is a collation of the views expressed by members of this Special Group during the meetings. These views are now submitted for the reference of the Drafting Committee.

On Article 1:

Members had no objection to this article.

On Article 2:

Members noted that term "other special courts" was obscure as the reader would not know what courts the term referred to. A member suggested to compile a glossary of common terms in the Basic Law so that their definitions could be clear at a glance.

On Article 3:

A member suggested defining the term "final adjudication" in this article so that the definition could apply to the same term used in subsequent articles.

On Article 4:

A member pointed out that there was no stipulation as to which courts in Hong Kong could interpret the Basic Law. It was proposed that this article specify that "the court of final appeal of the HKSAR shall have the right to interpret the Basic Law".

On Article 5:

1. A member pointed out that under the present legal system, a case involving an act of state could be judged by the courts only if that act of state affected the rights and interests of the people; under other circumstances, the courts had no right to judge the legitimacy of any act of state. The member also held that the courts should consult the Chief Executive if they were not sure whether they should handle certain cases or not.

2. A member was dubious about paragraph 3 of the note and asked if the sentence " the Chief Executive shall be consulted" meant that the Chief Executive "must be" consulted or "may be" consulted. In addition, a member asked about the definition of "the Central Government" and wondered if state organisations were included.

3. As regards the difference between an "act of state" and a "fact of state", a member pointed out that the courts could obtain a certificate from the executive authorities, which proved that a certain matter was an "act of state"; but the courts could decide on its own whether a matter was a "fact of state". In other words, the courts had a certain extent of jurisdiction over only the "acts of state" but not the "facts of state". The courts had to accept the Government's certification regarding the "facts of state".

4. A member noted that since within the common Law framework the courts' handling of the "facts of state" and "the acts of state" was already provided for under the present Hong Kong legal system, a provision under the Basic Law stipulating the maintenance of the present legal system would suffice.

5. However, a member maintained that there should be clear stipulations as to how the courts would handle cases regarding "facts of state" and "acts of state", and it should be specified who or what departments would have the power to issue certificates regarding "facts of state" and what the SAR courts were supposed to do after receiving the certificates. Another member proposed that the definitions of a "fact of state" and an "act of state" as well as the arrangement for handling cases of such nature be listed out in an appendix to the Basic Law.

6. A member wondered if the Chief Executive who was to be elected by Hong Kong people would be impartial in issuing certificates regarding the "facts of state"? But there were members who said that they would feel anxious if only the Central Government would be involved in the issue of certificates regarding the "facts of state".

7. A member raised the following three points: 1) Article 5 should specify that the future jurisdiction of the SAR courts would be in accordance with the laws of Hong Kong; should disputes arise, they would be referred to the Basic Law Committee for settlement; 2) The Central Government could authorise the SAR courts to handle certain special cases, e.g. those which partly involved defence and foreign affairs; 3) as to the more serious cases that involved defence and foreign affairs, the Drafting Committee should consider how the SAR could refer them to the Central Government.

8. The following points were raised by another member: 1) The provisions regarding the jurisdiction of the SAR courts should not be too detailed lest they should lack flexibility in the future; 2) Any organisations of the Central government set up in the SAR should be under the jurisdiction of the SAR courts and should not be subject to any priviledged treatment; 3) The operation of Hong Kong courts after 1997 should be the same as that before 1997; 4) The HKSAR courts should be allowed to decide whether a case involved defence and foreign affairs; and since Hong Kong and China had two distinct jurisdictions, any conflict of laws should be settled in accordance with this principle.

On Article 6:

Members had no objection to this article.

On Article 7:

A member pointed out that the membership, terms of reference, etc. of the "independent commission" mentioned in this Article were not elaborated on. It was proposed that these issues be stipulated in an appendix.

On Article 8:

A member held that the word "misbehaviour" had to be defined, but another member maintained that it was difficult to define this kind of words, and that the word was already used in the Royal Instructions.

On Article 9:

A member asked if the phrase "chief judges of the court of final appeal and the supreme court of the HKSAR" included judges invited from overseas who are serving on a temporary basis. Members found that the Consultative Committee's interpretation of this article seemed to be different from that of the Drafting Committee. It was suggested that this article be clearly explained. In addition, a member noted that the appointment and removal of other judges of the supreme court and of the judges regional courts were not mentioned in this Article.

On Article 10:

A member pointed out that the phrase "the previous system of appointment and removal" was obscure, and it was not clear which point of time the word "previous" referred to. A member suggested replacing the phrase with "the system before the establishment of the HKSAR", but another member expressed reservations about this suggestion on the ground that in some articles in the Basic Law, the terms "previous" or "existing" referred to the time before 1997 whereas in other articles, they pointed to 1984 when the Joint Declaration was signed. A member proposed that the present system of appointment and removal of judicial officers be clearly written down, and the article could just stipulate that this system would remain in force after 1997.

On Article 11:

Members had no objection to this article.

On Article 12:

A member pointed out that the word "before" was too vague. Besides, the present civil service was undergoing constant changes, in fact it was changing for the worse; if such a system developed into a very unreasonable system by 1997, would the system be retained and treated as the norm? A member held that the Basic law should avoid using such ambiguous term. Another member proposed that the Basic Law should have clear indication as to in which articles the term "previous"/"existing" referred to the system before 1997, and in which articles it referred to that before 1984. However, a member maintained that these terms used in the Basic Law should always refer to the systems before 1997 instead of those of 1984 (when the Joint Declaration was signed).

On Article 13:

A member pointed out that the article only provided for the economic protection of judges and other judicial officers who retired, but there was no provision for the financial independence of incumbent judges and other judicial officers. A member suggested all the articles that were provisional but not permanent in nature should be listed in a separate section.

On Article 14:

Members had no objection to this article.

On Article 15:

Members had no objection to this article.

On Article 16:

A member suggested incorporating the international covenant regarding rights of inhabitants into the Basic Law; in order to prevent the Basic Law from being too lengthy, the articles of the international covenant could be laid down as an appendix. Other members added that by listing out the rights and duties of the inhabitants, future conflicts could be avoided.

On Article 17:

Members had no objection to this article.

On Article 18:

Members had no objection to this article.

法律專責小組對基本法第四章第四節「司法機關」條文草稿（一九八七年八月）的意見

（1987年11月4日經執行委員會通過）

中華人民共和國香港特別行政區基本法諮詢委員會
法律專責小組

本組曾就基本法第四章第四節條文草稿召開兩次會議，並邀得起草委員會中法律界委員參加討論。茲將本組委員在會議中發表的意見整理如下，供起草委員會參考。

關於第一條： 委員對這條沒有異議。

關於第二條： 有的委員擔心「其他專門法庭」意義含糊，令人不知其所指的是哪些法庭；另有委員建議編寫一些在基本法內常見的辭彙，使各名詞的定義能一目了然。

關於第三條： 有委員建議把「終審權」的定義在此條文中作一解釋，使其他提及特區終審權的條文都以此解釋為準。

關於第四條： 有委員指出此條文並無列明哪些香港法庭有權解釋基本法，建議寫明「香港特別行政區的終審法院有權解釋基本法」。

關於第五條：1. 有委員指出，根據現時的法律制度，當某項國家行為影響居民的權益時，法庭才可受理該類案件；否則法庭無權判別某項國家行為的合法性。該委員並建議，法庭若遇有難題不知應否受理某些案件時，可徵詢行政長官的意見。

2. 有委員對說明中的第三段提出疑問，希望可以明確指出「應征詢行政長官的意見」一句意思是「必須」征詢抑或是「可以」征詢其意見。此外，亦有委員問及「中央政府」的定義為何，是否包括國家機構？

3. 關於「國家行為」及「國家事實」之區別，有委員指出法庭可向行政機關領取証明書，証明某事件屬於「國家事實」；至於「國家行為」，法庭可有權自行判別。換言之，法庭對「國家行為」具有某程度的管轄權，但對「國家事實」則全無管轄權，必須接受政府的說明。

4. 有委員指出在普通法體系中，現時香港的法律制度已經對法庭對「國家行為」及「國家事實」的處理有所規定，所以基本法只需列明特區將保留現有法律制度便可。

5. 但有委員則主張用清晰的條文列明特區法庭對有關「國家行為」及「國家事實」之案件的處理方法，並列明誰人或哪些部門有權對「國家事實」頒佈說明書，及特區法庭對此等說明書的處理方法等。並有委員建議把有關「國家行為」及「國家事實」的解釋和安排詳細列作附件。

6. 有委員擔心將來的行政長官既由香港人選出，若由行政長官對「國家事實」頒佈說明書，他的判斷會否有偏差？但亦有委員表示不放心單由中央政府頒佈有關國家事實的說明書。

7. 有委員提出以下三點建議：(1)在第五條中列明將來特區法院的管轄權按照香港法律的規定；遇有爭議時，則轉交基本法委員會處理；(2)對一些特別案件，例如只有部份涉及國防和外交的案件，中央政府可授權特區法庭處理；(3)至於一些案情嚴重和涉及重要國防和外交事務的案件，草委會應考慮如何由特區交中央政府處理。

8. 此外，有委員提出以下數點意見：(1)有關特區法院管轄權的條文不應訂得太細緻，以免日後運作上缺乏彈性；(2)在特區設立的中央政府機關應在特區法庭的管治範圍之內，不應因其為中央政府機關便享有任何特別待遇；(3)九七年後特區法庭的運作應與九七年前一樣；(4)特區法庭應可決定某些案件是否涉及國防和外交事務；而香港和中國應被視為兩個不同的法律地區，遇有法律衝突時，可按此原則處理。

關於第六條： 委員對這條沒有異議。

關於第七條： 有委員認為該「獨立的委員會」的成員、權力等問題均無規定，建議用附件形式把這些問題詳述。

關於第八條： 委員認為「行為不檢」一辭的定義必須界定，但有委員指出這種辭句很難清楚界定，況且在「英皇制誥」中現已有採用此詞。

關於第九條： 有委員問及條文所指「終審法院及高等法院首席法官」是否包括臨時性從外地邀請來港的法官。委員認為草委會及諮委會對這條條文的理解好像有點不同，建議清楚闡釋一下。此外，有委員指出高等法院其他法官及區域法院法官的任免安排在此條文中沒有提及。

關於第十條： 有委員指出「原有的任免制度」一詞意義含糊，沒有清楚指出哪個時候的制度才算是「原有」的制度。有委員建議改用「在特區成立以前的制度」，但有委員表示，在基本法中有些條文所用「原有」或「現有」等詞是指九七年以前，但另一些條文用這些詞句卻是指八四年《中英聯合聲明》簽署之時，所以該委員對以上建議表示保留。此外，有委員建議清楚寫出現時司法人員的任免制度，而條文則可規定九七年後將繼續保持此制度。

關於第十一條：委員對這條沒有異議。

關於第十二條：委員認為「原來的標準」一詞意義含糊，加以現時的公務員制度正在不斷地改變，而且每況愈下，假設此制度一直發展到九七年時已是一個很不合理的制度，是否仍以此為「原來的標準」？ 有委員認為基本法應避免採用此類含糊字句。 另有委員則建議在基本法中清楚列明「原有」、「現有」等詞在哪些條文中是指九七年之前，哪些條文是指八四年之前。有委員卻認為基本法中所有此類詞句都應該指九七年以前而不應是八四年聯合聲明簽署之時。

關於第十三條：有委員指出條文只規定退休法官及其他司法人員的經濟保障，卻沒有保障在職法官及其他司法人員的財政獨立問題。有委員建議用獨立的章節列出所有過渡性而非永久適用的條文。

關於第十四條：委員對這條沒有異議。

關於第十五條：委員對這條沒有異議。

關於第十六條：有委員認為應把有關居民權利的國際公約納入基本法中，但為免基本法過於冗長，可把公約的條文列作附件。其他委員並補充說，列明居民的權利的義務可避免日後發生衝突。

關於第十七條：委員對這條沒有異議。

關於第十八條：委員對這條沒有異議。