

Further Statement of the Hong Kong Bar Association

On Article 22 of the Basic Law

Under the constitutional framework of the Hong Kong Special Administrative Region (HKSAR), the Basic Law is a national law of the People's Republic of China (PRC), having been enacted by the National People's Congress pursuant to Article 31 of the Constitution of the PRC.

Article 11 of the Basic Law provides:

“In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.”

The “relevant polices” as mentioned and enshrined in the Basic Law include that the HKSAR shall enjoy “a high degree of autonomy” (Article 12) and executive, legislative and judicial powers, including the power of final adjudication (Article 2), whilst the Central People's Government (CPG) shall be responsible for the foreign affairs and defence relating to the HKSAR (Articles 13 and 14).

As to HKSAR's internal affairs, Article 22(1) provides:

“No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”

The effect of Article 22 is to prohibit interference in the internal affairs of the HKSAR by any part of the CPG, which is itself bound by the provisions of the Basic Law, being a national law of the PRC, including Article 22(1).

After public comments made last week by the Hong Kong and Macau Affairs Office (HKMAO) and the Liaison Office of the CPG in the HKSAR (LOCPG) in respect of a recent Court of Appeal judgment on the Emergency Regulations Ordinance and affairs in Legislative Council and public reaction to them (including a statement issued by HKBA on 14 April 2020), the LOCPG on 17 April 2020 made further public statements on the meaning of Article 22(1) of the Basic Law.

The LOCPG said that it and the HKMAO are not “department[s] of the Central People's Government” within the meaning of Article 22(1). It went on to say that they were bodies authorised by the CPG to handle HKSAR's affairs and had the right to exercise supervision and express serious views on affairs regarding HKSAR and the Mainland.

The implication the LOCPG seeks to convey is that the LOCPG and the HKMAO are somehow excluded from the non-interference principle guaranteed by Article 22(1).

Over the weekend of 18-19 April 2020, the HKSAR Government issued no fewer than 3 public statements reflecting a degree of hesitation and confusion about the status of the LOCPG under Article 22. The HKBA notes that the HKSAR Government had previously presented a paper to the Legislative Council in 2007¹, unequivocally confirming that the LOCPG is an office of the CPG set up in Hong Kong with the consent of HKSARG Government under Art 22(3), and that the HKSAR Government had published the details of the LOCPG as one of 3 offices of the CPG set up in HKSAR in Gazette No. 3/2000 after its name change from “Xinhua News Agency”.² The Secretary for Constitutional and Mainland Affairs had also in 2018 confirmed that personnel of the LOCPG must abide by the laws of Hong Kong in accordance with Article 22.

Regrettably, the recent public statements made by the LOCPG and the HKSAR Government on such a highly important legal issue have caused deep public unease. As mentioned, the CPG is itself bound by the Basic Law. There would appear to be no question but that the HKMAO, being an administrative agency of the State Council of the PRC, and the LOCPG, being the Liaison Office of the CPG in HKSAR, are bound by the Basic Law, including the prohibition of interference in the internal affairs of the HKSAR under Article 22(1).

In any event, there is no provision in the Basic Law which confers on the HKMAO and LOCPG the power of “supervision” over affairs which the HKSAR administers on its own. If “supervision” by the HKMAO and LOCPG is intended to connote their intervention in matters falling within the remit of the HKSAR's autonomy under the Basic Law, as opposed to observing and reporting back to the CPG, such a role would be inconsistent with Articles 11, 12 and 22 of the Basic Law.

The recent statements of the LOCPG and the HKSAR Government are plainly inconsistent with what was said by the HKSAR Government in 2007 and 2018. On such an important issue, and given the plain and obvious meaning of Article 22 of the Basic Law, the people of Hong Kong are entitled to a clear, reasoned and properly supported exposition of the legal position. The current uncertainty contributes to undermining confidence in both the CPG's and the HKSAR Government's commitment to the principle and practice of one-country, two-system enshrined in the Basic Law.

HONG KONG BAR ASSOCIATION

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¹ Legco Paper No. CB(2)898/06-07(02)

² See General Notice 300