

## **The Standing Committee's interpretation - a note by Bob Allcock, Solicitor General**

No one doubts that the Standing Committee of the National People's Congress has the power of interpretation – it is expressly set out in the Basic Law itself. But there has, nevertheless, been criticism on other grounds.

Some argue that the Standing Committee's power of interpretation should never be exercised. They say it undermines Hong Kong's high degree of autonomy and blurs the distinction between the "two systems. But the high degree of autonomy is defined by the Basic Law, and is subject to the Standing Committee's power of interpretation. The exercise of that power is a reflection of the limits of Hong Kong's high degree of autonomy, not an erosion of it.

Moreover, the "two systems" are not entirely separate. They exist within one country. The relationship between Hong Kong and the central authorities is set out in the Basic Law, a law that applies throughout the country. An interpretation by the Standing Committee is the exercise of a constitutional power that was designed to ensure that the Basic Law is correctly implemented throughout the country.

Others argue that the power of interpretation should not have been exercised in this case, since the provisions in question are quite clear. But the debate in Hong Kong has revealed many areas of uncertainty.

For instance, Annex I of the Basic Law refers to the possibility of amending the method for selecting the chief executive "for the terms subsequent to the year 2007". Different views had been expressed as to whether amendments could be made for the purposes of the selection process in 2007. The Standing Committee's interpretation has made it clear that, if there is a need, the process can be amended for that year.

Second, Annex II sets out how the Legislative Council shall be formed in its first three terms. It then provides how that Annex can be amended if there is a need to do so. What it does not make clear is how the fourth-term LegCo is to be formed if there is no need to amend Annex II, or if no agreement can be reached on the nature of the amendment. Some people feared there would be a vacuum,

which only the NPC could fill by amending the Basic Law. The Standing Committee has now ruled that this would not be the case. If there is no amendment, the method in the Annex that will be used this September would continue to apply in future.

Another objection was based on the fact that the interpretation was initiated in Beijing, not from Hong Kong. On the only previous occasion when the Standing Committee has issued an interpretation, it was at the request of the Chief Executive - following the court's right-of-abode ruling. At the time, critics said it was unconstitutional, but that proved to be wrong.

In the present case, critics can no longer argue this, nor can they say the interpretation interferes with judicial independence. Instead, they complain that it "opens the door" for further interpretation. But the Standing Committee has always had that power, and has clearly exercised self-restraint in its exercise.

The final criticism is based on the view that the interpretation is, in effect, an amendment to the Basic Law. I beg to differ. The two Annexes of the Basic Law provide a mechanism by which the methods for selecting the chief executive, and for forming LegCo, can be amended "if there is a need". The Annexes do not, however, explain the procedure for determining whether or not there is such a need. If the matter were to be resolved judicially, the court would have to decide on the correct procedures. According to the leading text on statutory interpretation, such a decision "involves expounding the verbal formula of the enactment creatively, using its wording as a guide to the imputed intention". Such creativity by a court would not be condemned as an "amendment". We should not apply double standards when the Standing Committee adopts a similar approach.

The interpretation merely clarifies the procedures to be followed: the chief executive shall make a report to the Standing Committee regarding whether there is a need to make an amendment, and the Standing Committee shall make a decision "in the light of actual situation" and "in accordance with the principle of gradual and orderly progress".

Some people claim that the interpretation has put an end to the current debate on democratic development. That seems unlikely. There appear to be strong aspirations for such development. But these must be kept within the

constitutional framework. The city began its democratic development comparatively recently. As we take it forward, we should not forget that Hong Kong has already achieved remarkable prosperity and stability, and an enviable reputation for protecting human rights. “Gradual and orderly progress” is a formula that allows us to move forward on the firm basis of those achievements.