

## The Focus



### High Degree of Autonomy - The Demarcation Issues between the Central Authorities and the HKSAR<sup>①</sup>

#### What are Demarcation Issues?

In any country where constitutional powers may be exercised both by the national and regional authorities, demarcation issues are bound to arise. In federal systems of government, demarcation issues may, for example, arise out of intergovernmental political or financial relations, litigation on justifiable issues of private law or criminal law, and disputes regarding the balance of legislative, executive and judicial powers amongst the central and regional governments, etc. The constitutional arrangements between the Mainland and the HKSAR under the Basic Law, when compared with those in federal systems, have accounted for the different nature and types of demarcation issues arising in the HKSAR.

#### The Nature of Autonomy of the HKSAR

“High degree of autonomy” is one of the important concepts enshrined in the underlying principle of “One country, Two systems” under the Basic Law. BL 2 stipulates that:

“The [NPC] authorizes the [HKSAR] to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of [the Basic Law].”

The PRC is a unitary system. Under such a system there is only one state, and powers enjoyed by any local governments are conferred by that state. The HKSAR is a local administrative region of the PRC, which comes directly under the CPG (BL 12). Its powers come from and is granted by the Central Authorities (BL 2). Though the CPG is expressly responsible for the foreign affairs and defence of the HKSAR and certain other matters such as the appointment of the CE and principal officials of the HKSARG, most other matters are within the HKSAR’s autonomy. The concept of high degree of autonomy at least has

a nation-wide effect, as the Basic Law embodying this concept is a national law of the PRC that binds all parts of China. These are the unique characteristics of the autonomy of the HKSAR that is different from other countries with a federal system of government. In federations such as Australia and the USA, the powers of the member states are inherent while the powers of the central government are in fact only assigned to it by the member states. This is the reverse of the position in a unitary system like the PRC.

#### Autonomy of the HKSAR

**Autonomy in legislative power:** The Basic Law does not enumerate the areas over which the HKSAR may legislate. Instead, laws may be enacted on any subject matter that is within Hong Kong’s high degree of autonomy under the Basic Law. All laws enacted by the HKSAR legislature shall, however, be reported to the NPCSC for the record pursuant to BL 17. This contrasts with the position in many federal jurisdictions, where the legislative powers of central government are broader, and the powers of the regions are more restricted. Such legislative powers in federal jurisdictions are a frequent source of demarcation issues.

**Autonomy in executive power:** Hong Kong’s high degree of autonomy means there are relatively few restrictions on its executive power. The HKSARG does not, of course, have authority over defence or foreign affairs, but it may conduct “external affairs” as authorized by the CPG under the Basic Law. The provisions in the Basic Law dealing with external affairs distinguish between those agreements that the HKSAR may enter into on its own and those for which the authorization of the CPG is required. Although there could, in theory, be a difference of opinion as to whether the HKSAR could act without authorization, as with legislative powers the scope for such problems is relatively limited. This situation again

<sup>①</sup> This article is based on a paper presented by the Solicitor General in a comparative constitutional law conference held in April 2000, jointly organized by the Department of Justice and the Faculty of Law, University of Hong Kong.

## The Focus



contrasts with that in many federal jurisdictions where demarcation issues concerning executive power can arise in many areas, particularly when there is no reference in the constitution to the sharing of executive power.

**Autonomy in judicial power:** Hong Kong's courts have jurisdiction over all cases in the Region, except for restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong. In particular, HKSAR courts have no jurisdiction over acts of state such as defence and foreign affairs. These restrictions are, however, comparatively minor when compared with those of regional courts in some federations.

### High Degree of Autonomy and BL 158 as the Key Mechanism for Resolving Demarcation Issues

In summary, BL 158 provides that the power of interpretation of the Basic Law shall be vested in the NPCSC. The HKSAR courts are, in turn, authorized to interpret all provisions in the Basic Law in adjudicating cases. However, the CFA must submit a judicial reference to the NPCSC for interpretation of the relevant BL provisions if the three criteria prescribed by BL 158(3) are satisfied, and the courts shall follow such interpretation when applying the relevant provisions. The three criteria are as follows:

- (1) the provision concerns affairs which are the responsibility of the CPG or the relationship between the Central Authorities and the HKSAR (“an excluded provision”);
- (2) the court needs to interpret the provision and such interpretation will affect the judgment in the case; and
- (3) the court's final judgment is not appealable.

Given Hong Kong's high degree of autonomy, the HKSAR courts are able to interpret most provisions on their own. Even if an

excluded provision needs to be interpreted in order to resolve a demarcation issue, that issue could still be the subject of legal proceedings in the HKSAR courts. It is also possible that a demarcation issue could be resolved by an interpretation of the Basic Law made by the NPCSC under BL 158(1), ie otherwise than when requested by the CFA to give an interpretation; relevant example is the NPCSC's Interpretation of 26 June 1999 of BL 22(4) and BL 24(2)(3). However, it is unlikely that the NPCSC would exercise this power of interpretation of the Basic Law save in wholly exceptional circumstances, particularly in respect of provisions that are not excluded provisions.

Since Reunification, there have been demarcation issues that arose in the context of the right of abode cases decided by the CFA in January 1999. They can be summarized as follows:

- (1) Whether the HKSAR's courts could review for consistency with the Basic Law acts of the NPC and the NPCSC relating to the HKSAR.
- (2) Whether or not the CFA could interpret BL 22(4) and BL 24(2)(3) on its own, or had to seek an interpretation from the NPCSC.
- (3) Whether it was lawful and constitutional for the CE to request an interpretation by the NPCSC of BL 22(4) and BL 24(2)(3), after the CFA had itself interpreted them.
- (4) Whether the NPCSC could interpret the Basic Law provisions otherwise than when the CFA refers the provisions to it under BL 158(3).

Issues 1, 3 and 4 were answered in the affirmative. In respect of issue 1 the CFA had clarified that it did not and could not question the authority of the NPC or the NPCSC to do any act that is in accordance with the provisions of the Basic Law and the procedure therein. The

## The Focus



Government relies in particular on the CE's constitutional duties both to implement the Basic Law (BL 48(2)) and to be accountable to the CPG (BL 43(2)) in support of the positive answer to issue 3. The CFA held, regarding issue 4, that the NPCSC has a free-standing power to interpret any provision in the Basic Law and, if it does so, Hong Kong courts are bound by that interpretation.

For issue 2, the CFA assumed that BL 22(4) concerned the relationship between the Central Authorities and the Region (ie it was an excluded provision) but declined to seek interpretation of the article from the NPCSC on the basis that it was not the "predominant provision" that needed to be interpreted in the case. Subsequently, the NPCSC decided that both articles in issue 2 should have been referred to it for interpretation.

### Conclusion

Those are the demarcation issues that have arisen in Hong Kong since Reunification and the ways that they have been resolved. Hong Kong's high degree of executive, legislative and judicial power makes it unlikely that we will face many of the demarcation issues that exist in federal jurisdictions. Moreover, if such issues do arise, the BL 158 mechanism is available for their resolution.

### A Survey to find out the Public's Understanding of the Basic Law conducted in the Fourth Quarter of 2000

A recent survey commissioned by the Constitutional Affairs Bureau on the public's awareness of the Basic Law shows that 79.4% of the general public and 80.2% of all students considered that they had some/good knowledge of the Basic Law or had heard of the Basic Law. The corresponding figures for teachers and civil servants were 99.8% and 99.7% respectively. Among those who thought that they needed to have a more comprehensive understanding of the Basic Law, the majority would like to have a better understanding of the following aspects: (1) "Fundamental rights and duties of the residents" (Chapter III of the Basic Law), (2) "Relationship between the Central Authorities and the HKSAR" (Chapter II of the Basic Law) and (3) "Education, Science, Culture, Sports, Religion, Labour and Social Service" (Chapter VI of the Basic Law).

Like other target segments, a great majority of the civil servants (85.3%) obtained information about the Basic Law through television, mostly the Government's announcements of public interest. 31.7% of civil servants had participated in Basic Law related training/activities provided by government departments. More than half of them found such training/activities very/quite effective.