

# The Role of the National People's Congress under the Basic Law

## I. Introduction

1. The NPC is the “highest state organ of power” in the PRC.<sup>1</sup> Each congress is elected for a five-year term,<sup>2</sup> during which it exercises significant legislative and policy-making powers. The NPCSC, the permanent body of the NPC, plays an equally significant role in the constitutional structure of the PRC.
2. The Constitution grants extensive authority to both the NPC and the NPCSC. The Basic Law, on the other hand, makes provisions for the application of the relevant powers in respect of the HKSAR. This dual framework is instrumental in upholding the authority of the Central Authorities, including the NPC, the NPCSC and the CPG, and empowering the HKSAR with a high degree of autonomy.
3. A comprehensive understanding of the status, powers, and functions of the NPC and the NPCSC under both the Constitution and the Basic Law is essential for appreciating their contribution to the prosperity, stability and security of the HKSAR.

## II. The NPC and the NPCSC at a glance

4. The Constitution lays out the extensive powers of the NPC and the NPCSC. The powers of the NPC include amending the Constitution, enacting basic laws, electing and removing top officials, approving the state budget, plans for national economic and

social development, deciding on the establishment of special administrative regions and the systems to be instituted there and supervising the enforcement of the Constitution.<sup>3</sup> The NPC holds one session annually but a session of the NPC may be convened at any time when the NPCSC deems necessary or when more than one-fifth of the deputies to the NPC propose it.<sup>4</sup>

5. The NPCSC, as the permanent body of the NPC, exercises functions and powers according to the Constitution as well as other functions and powers accorded to it by the NPC.
6. The NPCSC’s constitutional authority, primarily outlined in Articles 58 and 67 of the Constitution, encompasses a broad range of functions. It exercises supervisory functions that include oversight of both the enforcement of the Constitution and the operations of the State Council and other state organs, as well as the power to revoke administrative regulations, decisions and orders formulated by the State Council that conflict with the Constitution and laws, and the power to revoke local regulations and resolutions that conflict with the Constitution, laws or administrative regulations.<sup>5</sup> In its legislative role, the NPCSC is empowered to enact and amend laws that are not reserved for the NPC, including those applicable to the HKSAR.<sup>6</sup> The NPCSC is also vested with interpretative authority, enabling it to interpret the Constitution and all laws, including the Basic Law.<sup>7</sup> Furthermore, it is authorized to appoint and remove key government officials based on

<sup>1</sup> Article 57 of the Constitution.

<sup>2</sup> Article 60 of the Constitution.

<sup>3</sup> Articles 62 and 63 of the Constitution.

<sup>4</sup> Article 61 of the Constitution.

<sup>5</sup> Articles 67(1), (6)-(8) of the Constitution.

<sup>6</sup> Articles 58 and 67(2) of the Constitution.

<sup>7</sup> Articles 67(1) and 67(4) of the Constitution.



nominations or recommendations.<sup>8</sup> Additionally, the NPCSC is authorized to make decisions on significant national matters, ranging from treaties and emergencies to other critical governance issues.<sup>9</sup>

### III. Authority in action – the roles of the NPC and the NPCSC

7. The NPC and the NPCSC both play pivotal roles in the constitutional framework set forth by the Basic Law. Their interrelated functions and coordinated operation ensure that the HKSAR's governance remains congruent with the principle of "one country, two systems".

8. To start with, the Basic Law itself was enacted by the NPC under Articles 31<sup>10 11</sup> and 62(14)<sup>12</sup> of the Constitution. Article 67(1) grants the NPCSC specific authority in overseeing the enforcement of the Constitution including Article 31 and the Standing Committee is also vested with the power to interpret laws including the Basic Law.<sup>13</sup> Notably, BL 158 reiterates the NPCSC's authority to interpret the Basic Law while BL 159 reserves the exclusive power of amendment to the NPC.

9. The NPC and the NPCSC play a leading role in the founding of the HKSAR and in safeguarding the

prosperity and stability of the city. The following would examine the interrelated and coordinated roles of the NPC and its Standing Committee in the robust and successful implementation of the "one country, two systems" policy.

#### (i) As the Founder of the HKSAR

10. The NPC, and its Standing Committee, have made use of their powers to establish the HKSAR and to pave the way for the successful implementation of the Basic Law on 1 July 1997. In preparing for the resumption of exercise of sovereignty in Hong Kong in 1997, the NPC adopted a decision in 1985 to establish the Drafting Committee for the Basic Law of the HKSAR of the PRC.<sup>14</sup> The Basic Law was enacted, after almost five years' hard work and deliberation,<sup>15</sup> on 4 April 1990 by the NPC as the constitutional instrument for the establishment of the HKSAR and the implementation of the "one country, two systems" policy in the Region.<sup>16</sup> The same NPC decision also stated unequivocally that the Basic Law is constitutional.<sup>17 18</sup> On the same date of the enactment of the Basic Law, the NPC adopted a decision on the establishment of the HKSAR on 1 July 1997. The above NPC decisions, together with the Basic Law, firmly establish Hong Kong's status as a special administrative region within the PRC and

<sup>8</sup> Articles 67(9)-(13) of the Constitution.

<sup>9</sup> Articles 67(5), (15), (19) and (21) of the Constitution.

<sup>10</sup> Article 31 of the Constitution provides that:

"The state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People's Congress."

<sup>11</sup> The English translation of the Constitution used in this article follows that adopted by Instrument A7 of the Hong Kong e-Legislation, which is reproduced from the NPC website.

<sup>12</sup> Article 62(14) of the Constitution provides that:

"The National People's Congress shall exercise the following functions and powers:

...

(14) deciding on the establishment of special administrative regions and the systems to be instituted there;"

<sup>13</sup> Article 67(4) of the Constitution.

<sup>14</sup> See the *Decision of the National People's Congress on the Establishment of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* adopted on 10 April 1985 at the 3<sup>rd</sup> Session of the 6<sup>th</sup> NPC.

<sup>15</sup> The Drafting Committee of the Basic Law was composed of members from both Hong Kong and the Mainland. The first draft of the Basic Law was published by the Drafting Committee in April 1988, followed by a five-month public consultation exercise. The second draft was published in February 1989, and the subsequent consultation period ended in October 1989.

<sup>16</sup> The Basic Law was adopted by the NPC at the 3<sup>rd</sup> Session of the 7<sup>th</sup> NPC on 4 April 1990.

<sup>17</sup> See the *Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* adopted at the 3<sup>rd</sup> Session of the 7<sup>th</sup> NPC on 4 April 1990.

<sup>18</sup> It is stated in the Decision that, after referring to Article 31 of the Constitution, the Basic Law is constitutional as it is enacted in accordance with the Constitution and in the light of the specific conditions of Hong Kong. It goes on to provide that the systems, policies and laws to be instituted after the establishment of the HKSAR shall be based on the Basic Law of the HKSAR.



provide solid authority for the implementation of the “one country, two systems” policy in the HKSAR.

11. In anticipation of the commencement of the Basic Law on 1 July 1997, the NPC adopted a decision, also on 4 April 1990, to establish the Committee for the Basic Law of the HKSAR (“Basic Law Committee”) under the NPCSC when the Basic Law is put into effect.<sup>19</sup> The functions of the Basic Law Committee are to study questions arising from the implementation of BL 17, BL 18, BL 158 and BL 159 and to submit its views on those questions to the NPCSC.

12. The Basic Law was drafted in Chinese. To ensure the Basic Law’s smooth implementation in the bilingual legal system of Hong Kong, the NPCSC adopted a decision on 28 June 1990 deciding that the English translation of the Basic Law, examined and approved under the aegis of the Law Committee

of the NPC, shall be the official English text and shall be equally authentic as the Chinese text.<sup>20</sup>

13. Further, the NPCSC oversaw the adoption of laws previously in force in Hong Kong. On 23 February 1997, the NPCSC adopted a decision on the treatment of laws previously in force in Hong Kong in accordance with BL 160 (“BL 160 Decision”).<sup>21</sup> This Decision listed out ordinances and subordinate legislation as well as provisions in ordinances and subordinate legislation previously in force in Hong Kong which contravened the Basic Law and therefore not adopted as part of the laws of the HKSAR. In addition, the BL 160 Decision laid down important principles for the application of laws previously in force in Hong Kong. Such pre-1997 laws are to be applied with necessary modifications, adaptations, restrictions and exceptions to make them conform with the status of the HKSAR and the Basic Law after 1 July 1997.

<sup>19</sup> See the *Decision of the National People's Congress Approving the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress* adopted at the 3<sup>rd</sup> Session of the 7<sup>th</sup> NPC on 4 April 1990.

<sup>20</sup> See the *Decision of the Standing Committee of the National People's Congress on the English Text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* adopted on 28 June 1990. This Decision further provides that in case of any discrepancy in the meaning of wording between the English text and the Chinese text, the Chinese text shall prevail.

<sup>21</sup> See the *Decision of the Standing Committee of the National People's Congress Concerning the Handling of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* adopted at the 24<sup>th</sup> Meeting of the Standing Committee of the 8<sup>th</sup> NPC on 23 February 1997.



14. Remarkably, the NPC and its Standing Committee made use of their legislative power as well as decision-making power in founding the HKSAR and creating favourable conditions for the implementation of the Basic Law on 1 July 1997.

### **(ii) As the Guardian of “One Country, Two Systems”**

15. Since 1 July 1997, the NPC and its Standing Committee, entrusted with the power to oversee the enforcement of the Constitution including Article 31,<sup>22</sup> assume the role to oversee the proper implementation of the Basic Law and the “one country, two systems” policy in the HKSAR. They make decisions in relation to the HKSAR from time to time to ensure that “[one country, two systems] is fully applied in Hong Kong without being bent or distorted. This will enable us to keep advancing in the right direction”.<sup>23</sup> The following would discuss two important decisions by the NPC safeguarding the faithful and accurate implementation of the “one country, two systems” policy.

#### **5.28 Decision**

16. A decision of fundamental importance made by the NPC in respect of the post-1997 HKSAR is the *Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security* (“5.28 Decision”).<sup>24</sup> Notwithstanding that the HKSAR has a constitutional duty to enact law to safeguard national security under BL 23, the HKSAR was not able to fulfil this obligation for more than two decades. There were deficiencies in Hong Kong’s national security law as exposed during the social chaos and large-scale street violence in 2019,

which ultimately led to the Hong Kong version of “colour revolution” posing serious threats to the sovereignty, national security and development interests of the PRC. On 28 May 2020, the 13<sup>th</sup> NPC adopted the 5.28 Decision pursuant to Articles 31, 62(2), 62(14) and 62(16) of the Constitution and the relevant provisions of the Basic Law and entrusted its Standing Committee to formulate the relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security. Following this decision, the NPCSC enacted the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“NSL”) and added the same to the list of national laws in Annex III to the Basic Law on 30 June 2020.

17. The timely enactment of the NSL in 2020 plugged the gaping hole in Hong Kong’s national security law regime and brought an end to the social chaos and street violence in the HKSAR then. The new law restores the prosperity and stability of the city. Plainly, the NPC and its Standing Committee have worked diligently together to safeguard the steadfast and successful implementation of the “one country, two systems” policy in the HKSAR.

#### **Decision of the National People’s Congress on Improving the Electoral System of the Hong Kong Special Administrative Region (“Electoral Decision”)**

18. The principle of “Hong Kong people administering Hong Kong” is central to the Region’s political structure.<sup>26</sup> Deng Xiaoping made it abundantly clear that under the principle of “one country, two systems”, “Hong Kong people administering Hong Kong” has its scope and criteria.<sup>27</sup> Hong Kong should be managed by Hong

<sup>22</sup> See Articles 62(2) and 67(1) of the Constitution.

<sup>23</sup> 習近平主席明確指出，中央貫徹“一國兩制”方針，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。(President Xi Jinping’s speech delivered on 1 July 2017 at the Meeting Celebrating the 20<sup>th</sup> Anniversary of Hong Kong’s Return to the Motherland and the Inaugural Ceremony of the Fifth Term of the HKSARG.)

<sup>24</sup> The 5.28 Decision was adopted at the 3<sup>rd</sup> Session of the 13<sup>th</sup> NPC on 28 May 2020.

<sup>25</sup> The Electoral Decision was adopted at the 4<sup>th</sup> Session of the 13<sup>th</sup> NPC on 11 March 2021.

<sup>26</sup> See Session IV(4) of *Explanations on “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” and Its Related Documents* by Ji Pengfei (addressing the 3<sup>rd</sup> Session of the 7<sup>th</sup> NPC on 28 March 1990).

<sup>27</sup> According to Deng Xiaoping, there were three criteria of being patriots: first, to respect one’s own nation; second, to sincerely support the resumption of the exercise of sovereignty over Hong Kong by the Motherland; and third, not to impair Hong Kong’s prosperity and stability (Deng Xiaoping, “One Country, Two Systems” in *Deng Xiao Ping’s Discussion of Hong Kong Issues*, 2<sup>nd</sup> edn., Joint Publishing (H.K.) Co., Ltd, 2020, p. 8).



Kong people, with patriots forming the mainstay. BL 104 relevantly requires that when assuming office, the CE, principal officials, members of the ExCo and of the LegCo, judges of the courts at all levels and other members of the judiciary in the HKSAR must, in accordance with law, swear to uphold the Basic Law of the HKSAR and swear allegiance to the HKSAR of the PRC.<sup>28</sup>

19. Notwithstanding the principle of "Hong Kong people administering Hong Kong" and the requirements of BL 104, some people returned in the general election for the LegCo held in September 2016 refused to take the LegCo Oath and swear allegiance to the HKSAR of the PRC.<sup>29</sup> Some members of the LegCo repeatedly used filibustering and other methods to disrupt the normal operation of the LegCo.<sup>30</sup> In order to ensure that Hong Kong's electoral system would "conform to the policy of 'one country, two systems', meet the realities in the HKSAR and serve to ensure that Hong Kong is administered by people who love the country and

Hong Kong; be conducive to safeguarding national sovereignty, security, and development interests of the country and maintain the long-term prosperity and stability of Hong Kong",<sup>31</sup> the NPC adopted the Electoral Decision in accordance with Articles 31 and 62(2), (14) and (16) of the Constitution, and the relevant provisions of the Basic Law, and the NSL to improve the electoral system of the HKSAR and authorize the NPCSC to amend Annexes I and II to the Basic Law in accordance with the Decision.

20. On 30 March 2021, the NPCSC amended Annexes I and II to the Basic Law pursuant to the Electoral Decision, setting out specific provisions for the new electoral system to be implemented in the HKSAR. The Improving Electoral System (Consolidated Amendments) Bill 2021 was passed by the LegCo on 27 May 2021 to amend the relevant local laws to give effect to the amended Annexes I and II. The legislative amendments have provided for the method for selecting the CE, reconstituted the Election Committee and updated

<sup>28</sup> Cf. Article 6(3) of the NSL which provides that:

"A resident of the Region 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 [PRC] and swear allegiance to the [HKSAR] of the [PRC] in accordance with the law."

<sup>29</sup> See for example *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460 at [4]-[6].

<sup>30</sup> For instance, a LegCo member snatched a senior government official's folder at a joint meeting of two LegCo panels and ignored the Chairperson's repeated demands for him to return the folder. Eventually, the joint meeting was suspended. See *Secretary for Justice v Leung Kwok Hung* (2021) 24 HKCFAR 234.

<sup>31</sup> See the preambular paragraph of the Electoral Decision.



the composition and formation of the LegCo.<sup>32</sup> The Electoral Decision and the amendments of Annexes I and II to the Basic Law made by the NPCSC ensured an orderly evolution of Hong Kong's electoral system in accordance with the principle of gradual and orderly progress under the Basic Law.<sup>33</sup>

### **Legal effect of decisions of NPC and NPCSC**

21. At this juncture, it may be prudent to consider the legal effect and status of "decisions" adopted by the NPC and the NPCSC. As far as Chinese Mainland law is concerned, legal instruments entitled "decisions" made by the NPC and the NPCSC carry the same legal force as legal instruments entitled laws.<sup>34</sup> Concerning the effect of the NPCSC decisions in the HKSAR, the CA expressed the following views in *obiter in Kwok Cheuk Kin v Secretary for Justice* [2021] 3 HKLRD 140 at [66]:

"Under both the Constitution and the Basic Law, the Standing Committee has the ultimate authority and power to decide if a subject matter lying at the interface of the two systems conforms with the Constitution and the Basic Law. The authority of the Standing Committee to make such decision must be fully acknowledged and respected in the HKSAR. As both the Mainland and Hong Kong systems are within one country and one national constitutional order, such Standing Committee's decision made in conformity with the Constitution and the Basic Law under the Mainland system is binding in Hong Kong."

### **(iii) As a Facilitator**

#### **Co-location arrangements**

22. In the event that the HKSAR does not have sufficient authority under the Basic Law to pursue a particular goal, BL 20 may come to its aid. BL 20 enables the HKSAR to enjoy other powers granted to it by the NPC, the NPCSC, and the CPG, equipping the Region with additional powers to adapt to evolving political, administrative, or socio-economic circumstances.

23. For instance, the NPCSC adopted a decision in October 2006 regarding the co-location of the customs, immigration and quarantine ("CIQ") facilities of both Hong Kong and the Mainland at the Shenzhen Bay Port.<sup>35</sup> This Decision provides the necessary authority for the HKSAR to establish a "Hong Kong Port Area" inside the Shenzhen Bay Port, as well as to exercise jurisdiction over that area and implement CIQ procedures according to Hong Kong laws.<sup>36</sup> The co-location arrangement is vital for streamlining clearance procedures and enhancing clearance efficiency, thereby facilitating the increasingly frequent cross-border travel between the two places under the principle of "one country, two systems".

24. In 2017, the NPCSC adopted a decision approving the Co-operation Arrangement made between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement.<sup>37</sup> This Decision authorizes the Mainland authorities to exercise CIQ controls within a designated Mainland

<sup>32</sup> The Election Committee is expanded from 1,200 members from four sectors to a total of 1,500 members from five sectors. The Election Committee is also entrusted with two new functions, namely electing 40 LegCo members and nominating all candidates for the LegCo. Meanwhile, the number of LegCo members has been increased from 70 to 90, of which 40 are returned by the Election Committee, 30 by functional constituencies, and the remaining 20 by geographical constituencies through direct elections.

<sup>33</sup> Cf. BL 45(2) and BL 68(2).

<sup>34</sup> Chen Albert Hung-Yee and Yap Po Jen, *The Constitutional System of the Hong Kong SAR*, Hart Publishing, 2023, p. 48.

<sup>35</sup> See the *Decision of the Standing Committee of the National People's Congress on Empowering the Hong Kong Special Administrative Region to Exercise Jurisdiction over the Shenzhen Bay Port Hong Kong Port Area* adopted at the 24<sup>th</sup> Meeting of the Standing Committee of the 10<sup>th</sup> NPC on 31 October 2006.

<sup>36</sup> See the Preamble of the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591).

<sup>37</sup> See the *Decision of the Standing Committee of the National People's Congress on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement* adopted at the 31<sup>st</sup> Session of the Standing Committee of the 12<sup>th</sup> NPC on 27 December 2017.



Port Area in the West Kowloon Station.<sup>38</sup> The Decision clearly states that the Co-operation Arrangement is consistent with the Constitution and the Basic Law. The co-location arrangement at the West Kowloon Station is critical to fully unleashing the transport, social and economic benefits of the express rail project, strengthening Hong Kong's strategic status as a transport hub in the region.

25. These two Decisions highlight an innovative and pragmatic approach adopted by the NPCSC in dealing with changes not anticipated at the time of the drafting and enactment of the Basic Law. They also demonstrate the willingness of the NPCSC to facilitate growth and development of the HKSAR in a rapidly changing environment. The Decisions enable Hong Kong's different systems to develop within the parameter of the Basic Law to suit contemporaneous needs and circumstances of the city.<sup>39</sup>

#### **(iv) As a Custodian**

26. By making the BL 160 Decision, the NPCSC has played a pivotal role in the adoption of laws previously in force in Hong Kong. The NPCSC's role in Hong Kong law, however, is not limited to pre-1997 laws, the Standing Committee also oversees legislation passed by the LegCo of the HKSAR.

BL 17(2) requires the HKSAR to report laws enacted by the LegCo to the NPCSC for the record. The NPCSC is empowered by BL 17(3) to return any such law which is "not in conformity with the provisions of [the Basic Law] regarding the affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the [HKSAR]" after consulting the Basic Law Committee. Any such law returned by the NPCSC shall immediately be invalidated.

27. The application of national laws within the HKSAR is another significant aspect of the NPCSC's role in the city's law. The NPCSC determines whether a national law should be added to or deleted from the list of laws in Annex III to the Basic Law after consulting the Basic Law Committee and the HKSARG. Under BL 18, the NPCSC has the power to apply national laws in areas such as defence, foreign affairs, and other matters that lie beyond the HKSAR's defined autonomy. The national laws listed in Annex III shall be applied locally by way of promulgation or legislation by the HKSAR.

28. Currently, 14 national laws have been listed in Annex III to the Basic Law, and additional laws may be added to or deleted from the list. The NPCSC

<sup>38</sup> See the Preamble of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632).

<sup>39</sup> The legality of Cap. 632 and the co-location arrangement implemented at West Kowloon Station were challenged but upheld by the CA in *Kwok Cheuk Kin v Secretary for Justice* (above).



## The Focus

ensures that the list of national laws in Annex III remains updated and relevant, properly reflecting the HKSAR's status as an inalienable part of the PRC.

### **(v) As the Final Interpreter of the Basic Law**

29. Article 67(4) of the Constitution specifically authorizes the NPCSC to interpret laws, including the Basic Law.<sup>40</sup> This role is reinforced by BL 158 which vests the NPCSC with the power of interpretation of the Basic Law.<sup>41</sup> The NPCSC's interpretative powers under BL 158 is plenary that covers all the provisions of the Basic Law. The NPCSC may exercise its interpretative power on its own motion even in the absence of litigation or on request from another institution, e.g., on request from the CFA during litigation.<sup>42</sup> To date, only five interpretations have been issued, demonstrating the restraint exercised by the NPCSC.

#### **Interpretation, not adjudication**

30. The NPCSC's role in the interpretation of the Basic Law under BL 158 is markedly different from the power of Hong Kong courts in adjudication of cases. To appreciate this distinction, it is essential to differentiate between interpretation and adjudication. Adjudication involves hearing and resolving cases by applying the law, whereas interpretation "means determining the meaning of a provision of the law".<sup>43</sup> Under BL 82, the CFA holds

the power of final adjudication, in other words, the NPCSC has no role in hearing cases, weighing evidence, or disposing a case by application of the law. Sir Anthony Mason AC KBE, a former non-permanent judge of the CFA, commented that:

"... the BL's distinction between the power of authoritative interpretation and the power of final adjudication leaves the Hong Kong courts in a position where their decisions are respected and prevail, even if their interpretations of the BL may give way on occasions to different interpretations based on a different system of law."<sup>44</sup>

31. The NPCSC's power of interpretation under BL 158 was closely examined by the CFA in *Lau Kong Yung & Others v Director of Immigration* (above). The case involved a number of plaintiffs who had overstayed in Hong Kong after arriving on the strength of two-way Chinese exit permits. They claimed to be Chinese nationals born in the Mainland to permanent residents of Hong Kong, asserting their right of abode in the HKSAR under BL 24(2)(3). In its judgment, the CFA stated clearly that:

"It is clear that the Standing Committee has the power to make the Interpretation. This power originates from art.67(4) of the Chinese Constitution and is contained in art.158(1) of the Basic Law itself. The power of interpretation

<sup>40</sup> Article 67(4) of the Constitution provides that:

"The National People's Congress Standing Committee shall exercise the following functions and powers:

...

(4) interpreting laws;"

<sup>41</sup> BL 158 relevantly provides that:

"The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

..."

<sup>42</sup> BL 158. See also *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 at [63] and [164].

<sup>43</sup> Ghai, Y., *Hong Kong's New Constitutional Order*, 2<sup>nd</sup> edn., Hong Kong University Press, 1999, p. 199.

<sup>44</sup> Sir Anthony Mason AC KBE, "The Rule of Law in the Shadow of the Giant: The Hong Kong Experience" [2011] 33 Sydney Law Review 623, 644.



of the Basic Law conferred by art.158(1) is in general and unqualified terms.

That power and its exercise is not restricted or qualified in any way by art.158(2) and 158(3)."

### **The five NPCSC Interpretations**

32. Since 1 July 1997, the NPCSC has made five interpretations of the Basic Law pursuant to BL 158. These include one interpretation made under BL 158(3) and four interpretations made under BL 158(1). The small number of NPCSC interpretations means that the Hong Kong courts have been given almost a free hand making their own interpretation of the Basic Law when adjudicating cases.

#### ***The First Interpretation on the right of abode***

33. In 1999, the NPCSC issued its first interpretation of the Basic Law<sup>45</sup> in response to a request from the HKSARG regarding the right of abode. The interpretation clarified the meaning of BL 22(4) and BL 24(2)(3), in the aftermath of the CFA's decisions in *Ng Ka Ling*<sup>46</sup> and *Chan Kam Nga*.<sup>47</sup> The CFA ruled in *Ng Ka Ling* that children born in the Mainland to Hong Kong permanent residents enjoyed right of

abode in Hong Kong even if neither of their parents were Hong Kong residents at the time of their birth. Hence it would not be necessary for such children to apply for relevant approval from the Mainland authorities to enter Hong Kong and to settle. The NPCSC, however, clarified that under BL 22(4), all persons from other parts of the country directly under the Central Government, including children of permanent residents of the HKSAR, must apply for the necessary approval from the authorities in their place of residence and may only enter the HKSAR with valid certificates issued by such authorities. Further, children of permanent residents of the HKSAR born in the Mainland could only enjoy right of abode if at least one of their parents had already obtained Hong Kong permanent residency at the time of their birth.

34. The interpretation was significant not only for stopping immediately the huge influx of children from the Mainland but also because it expressly states that "[t]his Interpretation does not affect the right of abode in the [HKSAR] granted to the litigating party in the case through the judgment made by the [CFA] of the [HKSAR] on 29 January 1999." The CFA's decisions in *Ng Ka Ling* and *Chan Kam Nga* have

<sup>45</sup> This interpretation and its effect were discussed by CFA in *Lau Kong Yung* (above).

<sup>46</sup> *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4.

<sup>47</sup> *Chan Kam Nga & Others v Director of Immigration* (1999) 2 HKCFAR 82.



been respected and the decisions can still prevail so far as the litigating parties are concerned.

### ***The Second Interpretation on the electoral reform procedures***

35. In 2004, the NPCSC on its own initiative interpreted Article 7 of Annex I and Article 3 of Annex II to the Basic Law, which govern the selection of the CE and the formation of the LegCo. The interpretation was necessary because the relevant provisions in the Basic Law only provide an outline of the HKSAR's electoral framework but not exhaustive details on procedural changes beyond 2007.

36. The interpretation clarified that the NPCSC, in determining whether there is a need to amend the method for selecting the CE and the method for forming the LegCo, shall make a decision in light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress.

### ***The Third Interpretation on the length of CE's term of office***

37. In April 2005, following a request from the State Council,<sup>48</sup> the NPCSC issued its third interpretation covering BL 53(2). The NPCSC interpretation clarified that if a CE of the HKSAR vacates office before completing the original five-year term, the successor would only serve the remainder of the original term rather than a brand new five-year tenure.

38. This interpretation was prompted by the resignation of Tung Chee-hwa, the HKSAR's first CE, and was triggered by the need to maintain political stability while ensuring continuity in governance.

### ***The Fourth Interpretation on the foreign state immunity***

39. The fourth interpretation, issued in 2011, emerged from a judicial reference by the CFA in the context of the *Congo* case.<sup>49</sup>

40. At crux of *Congo* was whether Hong Kong courts had jurisdiction to entertain claims against foreign states engaged in commercial activities,

or whether the PRC's policy of absolute state immunity should prevail. The majority decided to refer to the NPCSC under BL 158(3) four questions on the interpretation of BL 13(1) and BL 19 in relation to the issue of state immunity. The NPCSC's interpretation, clarifying that the rules or policies on state immunity fall within diplomatic affairs in the realm of foreign affairs of the state, reaffirmed the majority's provisional judgment that the HKSAR must apply and give effect to the rules or policies on state immunity determined by the CPG. As the CPG applied the doctrine of absolute state immunity, the HKSAR cannot apply a doctrine different from that of the CPG.

41. Following the promulgation of the Law of the People's Republic of China on Foreign State Immunity on 1 January 2024, there is a shift of the PRC's policy from absolute state immunity to restrictive state immunity. It means that foreign states will no longer enjoy immunity from court proceedings or execution in relation to certain commercial transactions and assets. While the Law on Foreign State Immunity has not been added to Annex III to the Basic Law, following the CFA's decision in *Congo* and the NPCSC interpretation on BL 13(1) and BL 19, the HKSAR shall "give effect to the rules or policies on state immunity that the [CPG] has determined". In other words, the institutions in the HKSAR including the courts shall apply restrictive state immunity in cases involving a sovereign party.

### ***The Fifth Interpretation on oath-taking of public officials***

42. On 7 November 2016, the NPCSC on its own initiative issued an interpretation of BL 104. The 2016 interpretation was intended to ensure that public office holders specified in BL 104, when assuming office and taking oath, swear in accordance with the law to uphold the Basic Law of the HKSAR and swear allegiance to the HKSAR of the PRC in an accurate, complete and solemn manner. The interpretation has clarified that any oath taken in a manner that is not sincere or solemn is considered a "declination" to take an oath, and that the oath taken

<sup>48</sup> The State Council made the request following a report submitted by the HKSARG in respect of the term of the new CE to be elected to fill the vacancy left by the resignation of the CE then. The report recommended that the NPCSC be requested to make an interpretation of BL 53(2).

<sup>49</sup> *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95.



is rendered invalid. As such, the person taking the oath is regarded as having forthwith lost his / her qualification for the corresponding public office and the person therefore cannot assume such public office, nor exercise his / her duties or enjoy the corresponding benefits of the office.

43. The five interpretations made by the NPCSC merely explain the legislative intent and clarify the meaning of relevant Basic Law provisions. As demonstrated in the *Congo* case, the NPCSC, however, has not determined or adjudicated any case. Adjudication remains squarely within the realm of the Hong Kong courts under BL 2, BL 19 and BL 82.

#### **(vi) As the Legislator**

44. As a constitutional instrument, the Basic Law cannot be amended lightly. The Basic Law was enacted by the NPC, the highest state organ of power, and can only be amended by the NPC. BL 159 prescribes the procedures for amending the Basic Law. Under BL 159, only the NPCSC, the State Council and the HKSAR may propose bill to amend the Basic Law. Before a bill for amendment to the Basic Law proposed by the HKSAR can be submitted to the NPC for consideration, the consent of two-thirds of

the NPC Deputies of the Region, two-thirds of all the LegCo members and the CE must be obtained. Further, any bill for amendment to the Basic Law must be studied by the Basic Law Committee and the Committee must have submitted its view before the bill is put on the agenda of the NPC. BL 159 also ensures that no amendment to the Basic Law shall contravene the established policies of the PRC regarding Hong Kong. Up till now, the NPC has not made any amendments to the Basic Law.

### **IV. Concluding remarks**

45. As the HKSAR continues to navigate social and legal developments under the Basic Law, a comprehensive understanding of the roles of the NPC and its Standing Committee is essential in ensuring the successful implementation of the Basic Law and the “one country, two systems” policy. The NPC and its Standing Committee have offered unwavering support to the HKSAR ever since 1 July 1997. Looking ahead, the roles of the NPC, together with the NPCSC, will remain pivotal as the HKSAR continues to develop and thrive under the auspices of the Basic Law as well as “one country, two systems”.