



# Constitutional Review of Legislation

As mentioned in the last issue, *The Focus* of this issue will discuss the role of the judiciary in the implementation of the Basic Law. Since Reunification, the HKSAR courts have, where necessary, conducted constitutional review of particular HKSAR legislative provisions that are challenged before them. Under this function, when a local law (eg, a provision in an ordinance) is not consistent with the Basic Law, the court will hold that the Basic Law prevails over the local law. This is derived from the supremacy of the Basic Law which is the constitutional instrument of the HKSAR adopted by the NPC under Articles 31 and 62(13) of the Constitution of the PRC.

### Supremacy of the Basic Law

The supremacy of the Basic Law in the legal system of the HKSAR is clearly spelt out in BL 11 which provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law.

Such supremacy is reinforced by BL 8, 18 and 160. BL 8 (read with BL 18) provides for the continuing application in the HKSAR of “laws previously in force” (ie, the common law, rules of equity, ordinances, subordinate legislation and customary law), except for any laws that contravene the Basic Law and subject to any amendment by the legislature of the HKSAR. BL 160 provides that laws declared by the NPCSC to be in contravention of the Basic Law shall not be adopted upon the establishment of the HKSAR, and that any laws later discovered to be in contravention of the Basic Law shall be amended or cease to have force in accordance with the relevant procedure.

In addition, BL 17(2) requires the HKSAR to report laws enacted by the local legislature 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 affairs within the responsibility

of the Central Authorities or regarding the relationship between the Central Authorities and the [HKSAR]”. Any such law returned by the NPCSC shall immediately be invalidated.

Accordingly, any law which is inconsistent with the Basic Law does not form part of the laws of the HKSAR.

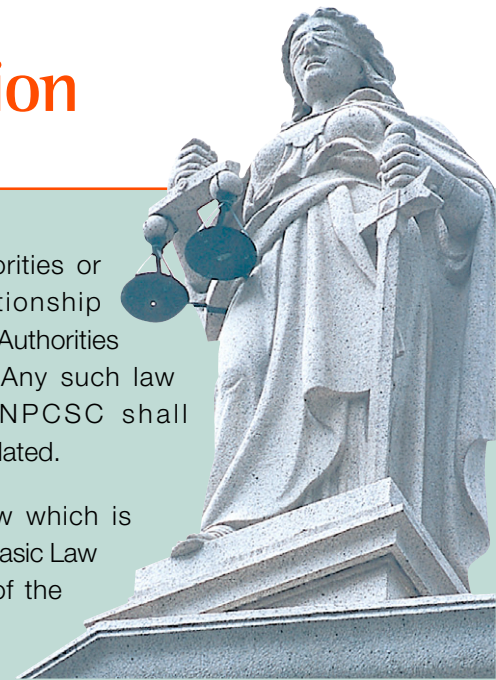
### Powers of the judiciary

BL 19(1) vests the HKSAR with independent judicial power, including that of final adjudication, and BL 19(2) then confers judicial power on the courts of the HKSAR by providing that “[t]he courts of the [HKSAR] shall have jurisdiction over all cases in the [HKSAR], except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.” The courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs (BL 19(3)). The judicial powers of the courts of the HKSAR are further expressly provided for in BL 80, 82 to 85.

Under BL 158, the NPCSC authorises the courts of the HKSAR to interpret, in adjudicating cases, the provisions of the Basic Law under specified circumstances.

### Constitutional review in common law jurisdictions with a written constitution

In leading common law jurisdictions with a written constitution, such as the US, Canada and Australia<sup>1</sup>, it has been firmly established by their courts that, on the basis of the supremacy of the constitution, legislation may be reviewed and struck down by courts as being inconsistent with relevant provisions of the constitution.



<sup>1</sup> See pp 10-11 for more information on the respective positions in these jurisdictions.

## Constitutional review in Hong Kong before Reunification

Before Reunification, the Letters Patent and the Royal Instructions were the key constitutional documents of Hong Kong.<sup>2</sup> The Letters Patent were amended in June 1991 to provide that no local law could be made which restricted the rights and freedoms enjoyed in Hong Kong in a manner which was inconsistent with the ICCPR as applied to Hong Kong.

Hong Kong courts before Reunification exercised the power to conduct constitutional review of local legislation. One illustration was the case of *R v Lum Wai-ming* (1992) 2 HKPLR 182, where the High Court held that the presumption in the Dangerous Drugs Ordinance (Cap 134) (presuming a person to have had a certain drug in his possession if he was proved to have had in his physical possession the keys of the relevant motor vehicle which contained the drug) was inconsistent with the presumption of innocence guaranteed under Article 14(2) of the ICCPR. The presumption in the Ordinance was therefore *ultra vires* the legislative powers conferred by the Letters Patent.

## Constitutional review in Hong Kong after Reunification

Since Reunification, constitutional review has continued to be conducted by local courts. Judges see themselves as entrusted with the constitutional duty to ensure that the legislature and the executive of the HKSAR abide by the Basic Law. The CFA in *Ng Ka Ling v Director of Immigration* explained this role as follows:<sup>3</sup>

“ In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. ”

Issues which have been covered in such proceedings are wide-ranging, and have significant implications for the development of the HKSAR. They include, for example, the following :

- a the constitutionality of the Provisional Legislative Council;
- b the extent to which Chinese citizens born on the Mainland to Hong Kong residents have the right of abode;
- c whether the national and regional flags are to be protected against desecration;
- d the constitutionality of the abolition of municipal councils;
- e the constitutional freedom of residents to travel and to enter the HKSAR.



In adjudicating challenges against local legislation on the ground of its inconsistency with the Basic Law, the HKSAR courts have adopted a purposive approach in the interpretation of the Basic Law. According to the CFA in *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533<sup>4</sup>, at p 546, the role of the courts in interpreting the Basic Law is to construe the language used in the text of the enactment in order to ascertain *the legislative intent as expressed in the language*.

In short, constitutional review of the HKSAR legislation has helped to ensure that the supremacy of the Basic Law by virtue of BL 11 (as well as BL 8, 18 and 160) is fully respected and implemented in the HKSAR.

<sup>2</sup> Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia Ltd, 1994), at p 42.

<sup>3</sup> [1999] 1 HKLRD 315, at p 337.

<sup>4</sup> See Issue No. 2, p 5 for a summary of the judgment.



## THE FOCUS

# An Extract of the Speech of the Secretary for Justice on **‘Understanding “One Country, Two Systems” through Hong Kong’s Constitutional Development’**



### Introduction<sup>1</sup>

Although the Basic Law has now been in force for almost seven years, there are many aspects of it that are not widely appreciated. We have tended to emphasize the “Two Systems” part of the formula. It is, of course, important that there is understanding, both here and overseas, of the extent to which the systems in the Mainland and in Hong Kong differ. However, the “One Country” part of the formula is equally important ... The fact is that, under our new constitutional order, there are areas in respect of which the Central Authorities have a legitimate role to play in Hong Kong. Those areas are not limited to defence and foreign affairs. For example, the power to amend the Basic Law is vested in the [NPC], and the [NPCSC] has the power to interpret the Basic Law.

... I will explain how recent events in respect of our constitutional development are entirely consistent with the principle of “One Country, Two Systems” ...

### NPCSC’s Interpretation

The NPCSC ... (on 6 April) issued its Interpretation [of Annexes I and II of the Basic Law]. Its rulings ... may be summarised as follows.

First, the phrases “subsequent to the year 2007” and “after 2007” stipulated in the two Annexes include the year 2007.

Second, the provisions in the two Annexes that “if there is a need” to amend the method for selecting the [CE]s for the terms subsequent to the year 2007 or

the method for forming the [LegCo] and its procedures for voting on bills and motions after 2007 mean they may be amended or remain unamended.

Third, the [CE] shall make a report to the NPCSC as regards whether there is a need to make an amendment; and the NPCSC shall, in accordance with the provisions of [BL 45 and 68], make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the two methods, and LegCo’s procedures for voting on bills and motions, and proposed amendments to such bills shall be introduced into the [LegCo] by the [HKSARG].

Fourth, if no amendment is made to the two Annexes, the provisions relating to the method for selecting the [CE] in Annex I will still be applicable to the method for selecting the [CE], and the provisions relating to the method for forming the third term of the [LegCo] in Annex II and the provisions relating to its procedures for voting on bills and motions in Annex II will still be applicable to the method for forming the [LegCo] and its procedures for voting on bills and motions.

...

### CE’s Report to the NPCSC

In mid-April 2004, the [CE] submitted his Report to the [NPCSC]. That Report endorsed the two Reports of the [Constitutional Development] Task Force and agreed with its views and conclusion. It also stated that the [CE] considered that the methods for selecting the [CE] in 2007 and for forming the [LegCo] in 2008 should be amended,

<sup>1</sup> Certain sub-titles appearing in the extract have been added by the editor for ease of reference.

so as to enable Hong Kong's constitutional development to move forward. Finally, it requested the NPCSC to determine, in accordance with the provisions of [BL 45 and 68], and in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress, whether the methods for selecting the [CE] in 2007 and for forming the [LegCo] in 2008 may be amended.

### NPCSC Decision

The Decision of the NPCSC was issued on 26 April 2004. The material parts of that Decision may be summarised as follows.

First, the election of the third [CE] to be held in 2007 shall not be by means of universal suffrage. The election of the [LegCo] in the fourth term in 2008 shall not be by means of an election of all the members by universal suffrage. The ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain unchanged. The procedures for voting on bills and motions in the [LegCo] are to remain unchanged.

Second, subject to the above part of this Decision not being contravened, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third [CE] in 2007 and the specific method for forming the [LegCo] in the fourth term in 2008 according to [BL 45 and 68] and Annex I and Annex II to the Basic Law.

...

I now turn to the legal issues involved.

### Hong Kong's relationship with the Mainland

China is a unitary state. As a result, power emanates from the Central Authorities, which may authorize regions to exercise specified powers. Those regions do not, however, have any residual powers.

Under Article 31 of the PRC Constitution :

“

The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the [NPC] in the light of specific conditions.

”

Under Article 62(13) of the Constitution, the NPC has the power to decide on the establishment of special administrative regions “and the systems to be instituted there”. Special administrative regions do not have the power to unilaterally alter the systems that have been decided upon by the NPC.

The Basic Law of the HKSAR was promulgated by the NPC in accordance with Articles 31 and 62(13) of the Constitution.

### The Joint Declaration

...

One important aspect of the Joint Declaration was its guarantee of the continuity of Hong Kong's capitalist, social and legal systems. However, at the time the Joint Declaration was signed, the arrangements for selecting the head of the local government and members of the [LegCo] did not involve any democratic element. The governor was appointed by the British Government, and members of the [LegCo] were either appointed or ex-officio members. There was therefore no question of the Joint Declaration preserving any democratic system. Instead, it set out the electoral principles I have just referred to.<sup>2</sup> There is no mention of universal suffrage in the Joint Declaration.

The arrangements currently in effect in Hong Kong for selecting the [CE] and electing members of the [LegCo] are entirely consistent with the guarantees in the Joint Declaration. The recent NPCSC decision will not prevent future electoral arrangements from being consistent with the Joint Declaration.

<sup>2</sup> Those principles include : the CE will be appointed by the CPG on the basis of the results of elections or consultations to be held locally; the HKSAR's legislature shall be constituted by elections.

## The Basic Law

The CPG's basic policies regarding Hong Kong are enshrined in the Basic Law, which is a national law promulgated by the NPC. The following Articles are particularly relevant in determining the relationship between Hong Kong and the Central Authorities ...

[BL 1] - The [HKSAR] is an inalienable part of the [PRC].

[BL 2] - 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].

...

## High degree of autonomy

Hong Kong is guaranteed a "high degree of autonomy" both by the Sino-British Joint Declaration and the Basic Law. Such a high degree of autonomy is clearly different from complete autonomy ... That high degree of autonomy does not, however, include the power to act in a way that contravenes the Basic Law. [This] principle is reflected in :

[BL 11] - no law enacted by the legislature shall contravene the Basic Law.

[BL 48(2)] - the [CE] shall be responsible for the implementation of the Basic Law.

Nor does the HKSAR have the authority to amend the Basic Law. Under [BL 159], that power is vested in the [NPC].

The Preamble to the Basic Law states that the Basic Law prescribes "the systems to be practised in the [HKSAR], in order to ensure the implementation of the basic policies of the [PRC] regarding Hong Kong" ... Since the Basic Law prescribes certain systems,

and Hong Kong's high degree of autonomy must be exercised in accordance with the Basic Law, Hong Kong does not have the autonomy to amend the prescribed systems ...

## Electoral arrangements

The methods for selecting the [CE] and for electing members of the [LegCo] are prescribed in Annexes I and II (respectively) of the Basic Law ... Both [BL 45 and 68] state that the relevant methods shall be specified in the light of the actual situation in the HKSAR, and in accordance with the principle of gradual and orderly progress; and that the ultimate aim is universal suffrage.

In order to facilitate amendments to the electoral arrangements, Annexes I and II lay down a method of amendment that is less formal than the amendment mechanism in [BL 159]. They provide that "If there is a need" to amend the methods, such amendments must be made :

- 1 with the endorsement of a two-thirds majority of all members of the [LegCo]; and
- 2 with the consent of the [CE].

In addition, amendments relating to the selection of the [CE] must be reported to the [NPCSC] "for approval", and amendments relating to election of LegCo members must be reported to the NPCSC "for the record". It is clear, therefore, that change can be effected only if LegCo, the CE, and the NPCSC each fulfil their respective roles.

**Annexes I and II** provide for the possibility of change to the methods set out there, but the NPCSC is given a role to play. Amendments to the method for selecting the [CE] must be submitted to the NPCSC “for approval”. Amendments to the method for electing members of LegCo must be submitted to the NPCSC “for the record”. The different terminology indicates that the NPCSC has a different function to perform in respect of the two types of amendment. Amendments submitted to the NPCSC “for approval” can be rejected by the NPCSC for any reason. For amendments submitted “for the record”, however, it seems that the NPCSC could only refuse to record them if they were in breach of the Basic Law. The net effect, however, is that no amendments can be effective unless a consensus is reached by the three parties involved on arrangements that are consistent with the Basic Law.

These express provisions make it very clear that it is not within Hong Kong’s high degree of autonomy unilaterally to amend the electoral methods. Moreover, the participation of the NPCSC in proposals to amend those methods is expressly envisaged. Such participation would therefore not erode Hong Kong’s high degree of autonomy.

### Power to interpret the Basic Law

The fact that the Basic Law is a national law that applies in two fundamentally different legal systems raises issues of interpretation. Those issues are resolved by [BL 158] which provides that :

- 1 the power of interpretation shall be vested in the NPCSC;
- 2 the [HKSAR] courts may interpret provisions of the Basic Law in adjudicating cases but, in certain cases, they must seek an interpretation of the relevant provisions from the NPCSC.

The NPCSC’s power to interpret the Basic Law reflects Article 67(4) of the PRC Constitution, which empowers the NPCSC to interpret all national laws.

In December 1999, [the CFA] decided, in the case of *Lau Kong Yung v Director of Immigration*<sup>3</sup>, that the NPCSC has the power to interpret any provision of the

Basic Law, and that such an interpretation is binding on Hong Kong’s courts.

There is therefore no doubt that the NPCSC’s Interpretation of Annexes I and II of the Basic Law was lawful and constitutional. In making the Interpretation [the NPCSC] observed due process, by first consulting the Committee for the Basic Law.


The clarification of the two Annexes by the Interpretation means that those Annexes are to be read and understood as if they had always contained that clarification.

...

### Responses to criticisms

The CE’s Report to the NPCSC complied with the NPCSC’s Interpretation, since it was a report as regards whether there is a need to make an amendment to the two Annexes. Critics have, however, objected to the fact that the Report set out a number of factors which we should have regard to in considering how the methods should be determined. The critics argue that these factors are hurdles to further democratization. That is not the case. A requirement to have regard to certain factors does not mean that there are fixed criteria that must be satisfied. It simply means that there must be

<sup>3</sup> [1999] 3 HKLRD 778.



a weighing-up of those factors. Such an approach is commonplace in administrative decision-making, where a decision-maker is required by law to have regard to all relevant factors and to disregard irrelevant factors.

The NPCSC Decision also complied with the NPCSC's Interpretation, since it was a determination as regards whether there is a need to amend the two Annexes. Critics have objected to the fact that the Decision ruled out universal suffrage in 2007 and 2008, and they have queried the legal effect of the Decision. However, it is clear that the NPCSC has the power, both under the Annexes and under the Interpretation, to decide whether any particular amendment is consistent with the Basic Law. In particular, it has the power to decide whether a particular amendment is specified "in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress".

Since the NPCSC has that power, there is no legal reason why it cannot exercise it at the beginning of the process, rather than at the end ... With regard to the effect of the Decision, it does not purport to have legislative effect. However, it is a formal decision by the permanent body of the country's highest organ of state power, acting within its constitutional powers. There is therefore no doubt that it has legal effect as a decision.

Some people have alleged that the NPCSC's Interpretation and Decision have undermined "one country, two systems", damaged the rule of law, eroded Hong Kong's high degree of autonomy ... Those allegations are unfounded.

The concept of "one country, two systems" must be understood in the light of the constitutional fundamentals set out in the PRC Constitution and the Basic Law. In particular, "one country, two systems" does not mean that the HKSAR has that power to unilaterally change its constitutional system. It is clearly stated in the two Annexes to the Basic Law that the NPCSC has a role

to play in respect of any such change. This reflects the fact that constitutional amendments in Hong Kong would affect the relationship between the [HKSAR] and the Central Authorities, and could affect the country as a whole. The exercise by the NPCSC of its constitutional powers is an aspect of "one country, two systems", not a contravention of it.

The rule of law requires that everyone, including government officials, are subject to the law and must comply with it. That principle has been fully observed in the case of the NPCSC's Interpretation and Decision. The former was authorized by [BL 158], and the latter was in conformity with the Interpretation and the Basic Law. Due process was observed throughout ...

A "high degree of autonomy" does not mean complete autonomy. Moreover, that expression must be understood in the context of other provisions in the Basic Law ... Hong Kong's high degree of autonomy is therefore limited to the extent that it cannot unilaterally change any of those systems or principles laid down in the Basic Law. With regard to electoral arrangements, Hong Kong's high degree of autonomy is defined by reference to [BL 45 and 68] and the two Annexes. Since the Interpretation and Decision comply with those provisions, Hong Kong's high degree of autonomy has not been eroded ...