



Meeting of the Basic Law Committee.

Interpretation of the Basic Law

Enacted under the Constitution of the PRC, the Basic Law is a national law comprising elements of both “one country” and “two systems”, and is the backbone of Hong Kong’s fundamental structure. As a constitutional law, the provisions in the Basic Law cannot be too meticulous in content. In light of this, the Basic Law has to be substantiated through practical implementation. After more than 10 years of implementation, the legal sectors in the Mainland and Hong Kong have now worked out the mechanism on interpretation of the Basic Law under the “One Country, Two Systems” principle. There are two major limbs. The first is interpretation of the Basic Law by the SCNPC, and the second is judicial interpretation by the courts of Hong Kong, in particular interpretation made by the Court of Final Appeal.

Interpretation of the Basic Law by the SCNPC

The Mainland adopts the continental legal system of legislative interpretation under the PRC Constitution. The power is vested in the legislature to interpret the law. On the other hand, traditionally Hong Kong adopts the common law system of judicial interpretation under which judges interpret and apply the law. The Basic Law has incorporated both by setting out the SCNPC’s power and the Hong Kong courts’ authorised power of interpretation of the Basic Law. Article 158 provides that the power of



Members of the Third Basic Law Committee.

interpretation of the Basic Law shall be vested in the SCNPC. It also provides that Hong Kong courts are authorised to interpret the Basic Law in adjudicating cases, and prescribes certain situations in which they must seek an interpretation by the SCNPC before making their final judgments, which are not appealable. Since the establishment of the HKSAR, the SCNPC has on four occasions exercised its constitutional power to interpret provisions in the Basic Law to clarify certain fundamental legal issues, with a view to facilitating the smooth implementation of the Basic Law.

The first occasion related to the right of abode issue. Article 24 confers a right of abode in Hong Kong to certain categories of persons. That article confers right of abode in Hong Kong on persons (Mainland children) of Chinese nationality who were born to permanent residents of Hong Kong and raised on the Mainland who did not previously enjoy such a right. Should all these Mainland children arrive at the same time, the impact on social support services would have been extremely difficult to bear. The Hong Kong Government, therefore, introduced amendments to the Immigration Ordinance on 10 July 1997, which took effect from 1 July 1997, to implement a Certificate of Entitlement Scheme (the Scheme) to address the problem arising from these Mainland children. The legislation provides that, to enjoy their right of abode, they must hold a valid travel document, which in practice means a valid One Way Permit issued by Mainland authorities, affixed with a valid Certificate of Entitlement issued by the Immigration Department. In order to obtain



Chairman of the SCNPC Mr Wu Bangguo. (Photo courtesy Xinhua News Agency.)

a Certificate of Entitlement, they must also prove to the satisfaction of the Director of Immigration that at least one of their parents has the right of abode in Hong Kong.

The Scheme was challenged before the courts as being inconsistent with the Basic Law. On 29 January 1999, the Court of Final Appeal delivered its judgments in *Ng Ka Ling & Others v Director of Immigration (1999) 2 HKCFAR 4* and *Chan Kam Nga & Others v Director of Immigration (1999) 2 HKCFAR 82* relating to Chinese nationals born outside Hong Kong who claimed the right of abode. The Court of Final Appeal allowed the appeals and held that under the Basic Law, the children of parents who had the right of abode in Hong Kong also had the right of abode, irrespective of whether they could obtain the Mainland authorities approval under the Scheme. Faced with

this massive immigration problem, the Chief Executive sought an interpretation by the SCNPC of the relevant parts of Articles 22 and 24 of the Basic Law. The SCNPC confirmed on 26 June 1999 that the provisions in the Basic Law were to be interpreted in such a way that for the children of Chinese nationality born in the Mainland, only those whose parents who had become permanent residents of Hong Kong at the time of their birth should have the right of abode, and that it was mandatory for them to apply to the relevant Mainland authorities for approval to enter Hong Kong.

In *Lau Kong Yung & Others v Director of Immigration* (1992) 2 HKCFAR 300, the Court of Final Appeal held that the SCNPC's power of interpretation was in general and unqualified terms, and that any such interpretation was binding on the courts of Hong Kong. The judgment placed beyond doubt the legality and constitutionality of the SCNPC interpretations. In a subsequent Court of Final Appeal decision in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 234, it was further reiterated that the SCNPC's power of interpretation originating from the Constitution of the PRC was "in general and unqualified terms", and was binding on the courts of Hong Kong and constituted part of the system in Hong Kong.

The second occasion related to the constitutional development of Hong Kong, specifically the provisions in the Basic Law on the method for the selection of the Chief Executive and the method for the formation of the Legislative Council after 2007. The Basic Law does not have clear provisions spelling out the procedures for amending the relevant provisions. The SCNPC on 6 April 2004 issued its Interpretation to Article 7 of Annex I and Article III of Annex II of the Basic Law, prescribing a "mechanism for amending the electoral method for selection of the Chief Executive and the method for the formation of the Legislative Council". The interpretation set out clearly the procedural requirements necessary for Hong Kong's further constitutional development and contributed to its advancement.

The third occasion related to the length of office of the Chief Executive of Hong Kong. In March 2005, the State Council accepted the resignation of the second-term Chief Executive in the middle of his five-year term. A question arose as to whether the term of office of his successor should be a full five-year term, or the remainder of the original five-year term (i.e. two years). The Basic Law does not expressly deal with the situation in question. To avoid any uncertainty concerning the selection of the Chief Executive, the then acting Chief Executive requested an interpretation of the Basic Law by the SCNPC. The SCNPC interpreted that, having regard to the relevant provisions of the Basic Law, the term of office of a new Chief Executive, in such circumstances, should be the remainder of the original five-year term.

The fourth occasion related to the application of the doctrine of state immunity. The case involved proceedings launched by an American company against the Democratic Republic of the Congo (DR Congo) seeking



enforcement of two arbitral awards in Hong Kong. The Court of Appeal overturned the verdict in favour of DR Congo, and the latter appealed to the Court of Final Appeal, arguing that Hong Kong should follow the Mainland policy on state immunity and grant them absolute state immunity against legal actions. On 30 June 2011, the Court of Final Appeal referred to the SCNPC for an interpretation of Articles 13(1) and 19 of the Basic Law to determine, *inter alia*, whether the Hong Kong courts were bound to apply the rule or policy on state immunity determined by the CPG, and the effect of Articles 13(1) and 19 of the Basic Law on the common law doctrine of state immunity in force in Hong Kong before 1 July 1997. This was the first time the Court of Final Appeal invoked the mechanism provided under Article 158(3) of the Basic Law to make a reference to the SCNPC for an interpretation of the Basic Law provisions on its own initiative.

On 26 August 2011, the SCNPC adopted the “Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress”, which confirmed, *inter alia*, that Hong Kong should grant absolute state immunity to DR Congo. The final judgment of the Court of Final Appeal given on 8 September 2011 followed the SCNPC’s interpretation and confirmed DR Congo’s entitlement to absolute state immunity. The judgment forms an important judicial precedent setting out beyond doubt that the PRC’s policy on absolute state immunity also applies to Hong Kong.

These four instances of SCNPC interpretation were all made for the long-term and fundamental interests of Hong Kong, with the aim of safeguarding Hong Kong’s prosperity and stability, and resolving major problems encountered during the course of its development.

Judicial Interpretation of the Basic Law by the Hong Kong Courts

According to Article 158, the SCNPC authorises the courts of Hong Kong to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the HKSAR. The courts of Hong Kong may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts of Hong Kong, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the HKSAR, and if such interpretation will affect the judgments on the cases, the courts of the HKSAR shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the SCNPC through the Court of Final Appeal of the HKSAR.

In accordance with the above provisions, the courts of Hong Kong have the duty and responsibility to interpret the Basic Law provisions. Article 11(2)



The Court of Final Appeal of the HKSAR. ©

provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law. Since reunification, the courts of Hong Kong have been carrying out review in accordance with the Basic Law to ensure compliance with the Basic Law by the legislature and executive authorities.

During the process of case adjudication, the courts of Hong Kong have made interpretations to quite a number of provisions in the Basic Law, contributing greatly to the enrichment of its substance and facilitating future implementation. The cases involved covered a wide spectrum, including human rights, right of election, right of abode, lawful traditional rights and interests of indigenous inhabitants of the New Territories, official languages, power of final adjudication, powers and functions of the Chief Executive, property rights and the constitutionality of legislation affecting the salaries of civil servants.

Of the decisions made in strict accordance with the relevant Basic Law provisions, some were in favour whilst some were against the Government, highlighting the effectiveness of the Basic Law in protecting the rule of law



Former Chief Justice of the Court of Final Appeal Andrew Li Kwok-nang. (Photo courtesy Wen Wei Po.)



and human rights. Some judgments also triggered subsequent amendments to the relevant legislations, forming a circle of interaction between common law and legislation, thus enriching Hong Kong's legal system. A typical example is the case of *Leung Kwok Hung & Others v Chief Executive of the HKSAR* (HCAL 107/2005). In February 2006, the Court of First Instance ruled that with regard to interception of telecommunications, section 33 of the Telecommunications Ordinance, which authorised the interception, detention or disclosure of any message or any class of messages, was unconstitutional. The court also ruled that the Executive Order did not constitute a set of "legal procedures" for the purposes of Article 30. Subsequent to the court ruling, the Interception of Communications and Surveillance Ordinance was enacted in August 2006, providing a legal basis for and regulating the conduct of interception of communications and the use of surveillance devices by law enforcement agencies. It also provides for procedural safeguards to protect the right of privacy. Apart from a few exceptions, all interception and the more intrusive type of covert surveillance must be authorised by one panel judge. The law enforcement agencies are also required to conduct internal reviews while independent oversight is provided by the newly created Commissioner on Interception of Communications and Surveillance. The Ordinance has struck a fair balance between the maintenance of law and order and the protection of privacy.

Hong Kong's way of life

Article 5 guarantees the continuity of the previous way of life in Hong Kong. This guarantee is fully detailed in Chapter III, dealing with the fundamental rights and duties of Hong Kong residents and Chapter VI dealing with education, science, culture, sports, religion, labour and social services.

On 23 August 2010, eight Hong Kong citizens were killed and seven injured when a gunman took them hostage in their tour bus in Manila. A candlelight vigil, attended by thousands of deeply grieved Hong Kong citizens, was held at Chater Garden in Central on 27 August 2010.



Fundamental Rights and Duties of Hong Kong Residents

Safeguarding the Rights and Freedoms of Hong Kong Residents

Article 4 provides that Hong Kong shall safeguard the rights and freedoms of residents of Hong Kong and of other persons in Hong Kong in accordance with the law. Chapter III of the Basic Law specifically safeguards various fundamental rights and freedoms of residents in Hong Kong, including freedom of the person; freedom of movement; freedom of conscience and religious belief; equality before the law; freedom of speech and of the press; freedom of association, assembly, procession and demonstration; freedom and privacy of communication; freedom in the choice of occupation and to engage in academic research; the right of access to the courts and judicial remedies; the right to social welfare in accordance with law; and freedom of marriage.