A New Constitutional Order in Hong Kong: Managing Conflict Over the Interpretation of the Basic Law

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I. INTRODUCTION

The power of interpretation of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (the Basic Law) is quite a sensitive and controversial issue. The Basic Law is not only the constitutional law of the Hong Kong Special Administrative Region (Hong Kong or HKSAR), but it is also a national law of China. The bodies exercising the power of interpretation are therefore from both mainland China and HKSAR, and apply different regimes to interpret law. In their attempts to harmonize the conflict between both sides, the lawmakers of the Basic Law have created a unique system for its interpretation. In practice, unfortunately, this unique system still results in disputes – in particular, mainland Chinese scholars argue that when Hong Kong courts examine legislative conduct of the central government, the courts are exceeding their authority over Chinese sovereignty, whilst some Hong Kong scholars assert that the central government interferes with the independence of the Hong Kong judiciary.

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1 Jiu Xianggang te bie xing zheng qu zhong shen fayuan de you guan pan jue nei di fa lv jie ren shi fa biao yi jian, [Mainland Legal Professionals Express Opinions on Certain Judgments Made by the HKSAR Court of Final Appeal], Renmin ri bao (PEOPLES DAILY) Feb. 8, 1999; Bing Ling, Can Hong Kong Courts Review and Nullify Acts of the National People’s Congress? 29 Hong Kong L. J. 8 (1999).

2 Jia Risi, Qing Renda shi fa de hou
Ka-Ling and Others v Director of Immigration\(^3\) was the first so-called “constitutional crisis” after the reunification of Hong Kong and the mainland, and prompted conflict involving these kinds of arguments. This paper aims to analyze the different mechanisms used to interpret law in mainland China and HKSAR, describe the disputes arising from the interpretation of the Basic Law in practice, and then put forward some proposals to improve the process of interpretation of the Basic Law.

II. THE SYSTEM OF INTERPRETING LAW IN MAINLAND CHINA

A. The NPCSC exercises the power to interpret law

In mainland China, the allocation of national power is found in the Constitution. Originally, Article 31 of 1954 Constitution\(^4\) (the first Constitution of the PRC) regulated that the Standing Committee of the National People’s Congress (NPCSC or Standing Committee) exercises the power to interpret law. The 1975 Constitution\(^5\) retained

\(^3\) Ng Ka-Ling and Others v. Director of Immigration [1999] 1 H.K.L.R.D. 315 (hereinafter Ng Ka-Ling case).

\(^4\) 中华人民共和国宪法第三十一条: “全国人民代表大会常务委员会行使下列职权：……(三) 解释法律。” (1954年9月20日第一届全国人民代表大会第一次会议通过), Zhonghua Renmin Gongheguo xian fa [Constitution of the People’s Republic of China (adopted at the First Session of the First National People’s Congress on Sep. 20, 1954)], Article 31: “The Standing Committee of the National People’s Congress exercises the following functions and powers: …(3) to interpret laws.”

\(^5\) 中华人民共和国宪法第十八条: “全国人民代表大会常务委员会是全国人民代表大会的常设机关。它的职权是：召集全国人民代表大会会议，解释法律，制定法令，派遣和召回驻外全权代表，接受外国使节，批准和废除同外国缔结的条约，以及全国人民代表大会授予的其他职权。” (1975年1月17日中华人民共和国第四届全国人民代表大会第一次会议通过), Zhonghua Renmin Gongheguo xian fa [Constitution of the People’s Republic of China (adopted at the First Session of the Fourth National People’s Congress on Jan. 17, 1975)], Article 18: “The Standing Committee of the National People’s Congress shall be a permanent organ of the National People’s Congress. It exercises the following functions and powers: to convene a session of the National People’s Congress; to interpret laws; to enact decrees; to decide on the dispatch or recall of plenipotentiary representatives abroad; to receive foreign diplomatic representatives; to ratify or abrogate treaties concluded with foreign states; and to exercise such other functions and powers as the National
this mechanism. The 1978 Constitution and 1982 Constitution (the latter being the current Constitution of the PRC) granted the NPCSC the additional power to interpret not only law, but also the Constitution. The rationale behind this principle is that if a provision of law is ambiguous, the legislature itself is best placed to know the original meaning of the legislation and can therefore provide the most accurate interpretation of that legislation. This rationale is indicative of “parliamentary supremacy” — a constitutional tradition of a socialist country.

If viewed from the common law perspective, this interpretation mechanism is inconsistent with the need to have a system of “checks and balances.” If the NPCSC can exercise both the power to make law and interpret law, it is reviewing the legitimacy of its own acts. For example, the NPCSC is not only the maker of the Constitution, but it is also the institution of constitutional review.

B. The interpretation of law has coequal legal effect as law

In the Legislation Law of the PRC (2000), the rules regarding interpretation of law are found in Chapter Two “National Law”. Under Article 42, an interpretation of law is required in the following two
circumstances: A) if the specific meaning of a provision of legislation requires further clarification; and B) if, after enactment of legislation, a new situation arises requiring clarification of the basis of application of that legislation. Article 47\textsuperscript{10} makes it clear that legislative interpretations issued by the NPCSC shall have the same force as national law. In accordance with Article 46,\textsuperscript{11} the requirement for adopting a draft legislative interpretation is the same as that for adoption of a national law – that is, approval by more than half of all members of the Standing Committee.

C. 

*The supreme judiciaries have the right to make judicial interpretations*

“Judicial interpretation” is a particular concept in mainland China that is different to legislative interpretation. If the meaning of a provision of law needs further specific clarification, such clarification is obtained by way of a legislative interpretation. If the question is how to apply and implement the law, clarification is obtained by way of a judicial interpretation instead. Within the legal context of mainland China, both the Supreme People’s Court (SPC) and Supreme People’s Procuratorate (SPP) can exercise the power to make judicial interpretations. Sometimes such interpretations are given separately, and sometimes jointly. If their respective interpretations contradict, the NPCSC will act as a referee in resolving the inconsistency.\textsuperscript{12}

\textsuperscript{10}See Legislation Law of the PRC, *supra* note 9, at Article 47: “The legal interpretation adopted by the Standing Committee of the National People’s Congress has the same effect as the laws enacted by it.”

\textsuperscript{11}See Legislation Law of the PRC, *supra* note 9, at Article 46: “The draft legal interpretation for vote shall be subject to adoption by a simple majority of the total membership of the Standing Committee and be promulgated by the Standing Committee in an announcement.”

\textsuperscript{12}全国人民代表大会常务委员会关于加强法律解释工作的决议(1981年6月10日中华人民共和国第五届全国人民代表大会常务委员会第十九次会议通过), *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Yuan Hui Guan Yu Jia Qiang Fa Lv Jie Shi Gong Zuo De Jue Yi* [Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law (adopted at the 19th Meeting of the Standing Committee of the Fifth National People’s Congress on June 10, 1981)], Article 2: “Interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People’s Court. Interpretation of questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates shall be provided by the Supreme People’s Procuratorate. If the interpretations provided by the Supreme People’s Court and the Supreme People’s Procuratorate are at variance with each oth-
Judicial interpretations are produced as regulatory documents rather than judicial decisions. Unlike ratio decidendi in a common law jurisdiction, in the PRC judicial system a written judgment of an individual case does not have binding effect as precedent for deciding future cases.

D. Legislative interpretation prevails and can overrule judicial interpretation

When both the NPCSC and supreme judiciaries issue an interpretation on the same matter, the legislative interpretation prevails over the judicial interpretation, which is immediately rendered void.\(^\text{13}\)

An example of the operation of this rule concerns the judicial interpretation made in 2000 by the SPC, regarding “an organized crime with the characteristics of a criminal syndicate.” According to the SPC judicial interpretation, an organized crime with an underworld nature would not be ascertained and adjudged unless it was proven that some government officials took part in the crime or provided illegal protection.\(^\text{14}\) This interpretation was considered quite controversial due to the fact that not every criminal syndicate would have government officials amongst its members.\(^\text{15}\) Two years later, the...
NPCSC made a legislative interpretation on the same point, modifying the position taken by the judicial interpretation. Now, according to the legislative interpretation, the involvement of a government official is no longer an essential element of finding that a criminal syndicate exists.\(^\text{16}\)

**E. Legislative interpretation is separated from final adjudication**

Under the mainland Chinese legal system, the NPCSC interprets law while the SPC exercises the power of final adjudication. Although the legislative interpretations of the NPCSC are one of the legal bases that courts should follow, the NPCSC does not take the place of the SPC in deciding any specific case – the court retains the final say on ascertaining the facts and reaching a legal decision. The general view both in academia and in practice is that the NPCSC does not interfere in final adjudication, despite its power to interpret law.\(^\text{17}\)

**F. Courts do not have the power of constitutional review**

In mainland China, courts (including the SPC) do not exercise the power to declare legislation void on the ground of inconsistency with the Constitution. According to the Chinese Constitution, both the NPC and NPCSC have the right to supervise the implementation of the Constitution, but only the NPCSC has the right to interpret the Constitution.\(^\text{18}\) The means by which constitutional review is carried

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\(^{18}\) See Constitution of the PRC, supra note 7, at Article 62: “The National People’s Congress exercises the following functions and powers: …(2) to supervise the enforcement of the Constitution;” Constitution of the PRC, supra note 7, at Article 67: “The Standing Committee of the National People’s Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement…..”
out does not involve declaring legislation void, but it is instead exercised by repealing the law or regulation which is contradictory to the Constitution. Many institutions share the power of repealing legislative documents, subject to the hierarchy set by the Legislation Law of the PRC. For example, the NPC has authority to amend or cancel inappropriate national laws; the NPCSC can set aside bad administrative regulations and local decrees; the State Council can repeal unlawful administrative rules and local rules; and provincial People’s Congresses or People’s Governments are able to set aside their respective rules.  

III. THE SYSTEM OF INTERPRETING LAW IN HONG KONG

A. Only the judiciary has the power to interpret law

In Hong Kong, the power of interpretation of law rests solely with the judiciary. Neither the legislature nor the executive can make authoritative interpretations. Indeed, “The sole power of the judiciary to pronounce authoritative interpretation of legislation goes to the very root of the common law system.”  

This is an established principle in the common law system, operating as a checks and balances mechanism, to avoid unrestricted interpretation by the legislature. Under the common law system, the legislature should stand by after the law has been passed, and the destiny of that law lies in the

19 中华人民共和国立法法第八十八条Zhonghua Renmin Gongheguo Li fa fa [Legislation Law of the PRC], Article 88: “The limits of power for altering or annulling laws, administrative regulations, local regulations, autonomous regulations, separate regulations or rules are as follows:
(1) The National People’s Congress has the power to alter or annul any inappropriate laws enacted by its Standing Committee, and to annul any autonomous regulations or separate regulations which have been approved by its Standing Committee but which contravene the Constitution or the provision of the second paragraph in Article 66 of this Law;
(2) The Standing Committee of the National People’s Congress has the power to annul any administrative regulations which contradict the Constitution and laws, to annul any local regulations which contradict the Constitution, laws or administrative regulations, and to annul any autonomous regulations or separate regulations which have been approved by the standing committees of the people’s congresses of the relevant provinces, autonomous regions or municipalities directly under the Central Government but which contravene the Constitution or the provision of the second paragraph in Article 66 of this Law;
(3) The State Council has the power to alter or annul any inappropriate rules of the departments and of local governments.”

20 JOHANNES M. M. CHAN, supra note 2, at 63.
hands of independent judges. However, seen from civil law tradition, this idea is untenable. The legislature is comprised of elected representatives of the public, and represents the majority opinion of society. It therefore seems to be inconsistent with the principle of democracy when judges have the power of legislative interpretation rather than the legislature itself.\footnote{In both civil law countries and common law countries, judges are normally appointed while members of legislature are elected by people, directly or indirectly. In mainland China, judges are nominated by the president of the appropriate level of people’s court and appointed by the standing committee of the corresponding level of people’s congress, while people’s court deputies are elected from the applicable level (or next lower level) of people’s congress. So it can be seen that the legislature, rather than appointed judge, represents public opinion. See 王振民, supra note 8, at 367.} The remediation for this issue is that the legislature may amend laws or issue new laws if it considers that the interpretation of a judge is improper.

B. Interpretation of law is combined with adjudication

Under the common law system, courts interpret law through hearing and determining specific cases. Judgments are important instruments by which law is interpreted, and doctrines created. A judgment can generally be divided into two parts: \textit{ratio decidendi} (the doctrine and reasoning of the case, which is legally binding); and \textit{obiter dictum} (the incidental comment of the case, which is not binding, but is persuasive and instructional).\footnote{Peter Wesley-Smith, \textit{An Introduction to the Hong Kong Legal System} 80 (Oxford U. Press, 3d ed. 2002).} Of course the \textit{ratio} part is more important in both the interpreting and creating sense. In Hong Kong, all courts have the right of adjudication and interpretation. In terms of final adjudication, the power of interpretation was originally held by the Judicial Committee of the Privy Council (before reunification), followed by the Court of Final Appeal (the CFA) after reunification. After reunification, the CFA took the place of Judicial Committee of the Privy Council in exercising final adjudication, and the decision of the former body is no longer binding on the Hong Kong judiciary (though it does have persuasive value).

C. Courts have the power of constitutional review of legislation

In the colonial age, the Hong Kong courts had the power to review whether the laws made by the legislature (constituted by the
Governor together with the Legislative Council) went against the constitutional documents of Hong Kong at that time (*Hong Kong Letters Patent* and *Hong Kong Royal Instruction*), or exceeded the scope of their lawmaking authority. In 1991, with the adoption of the *Hong Kong Bill of Rights* and the corresponding amendment of the *Hong Kong Letters Patent*, the Hong Kong courts would exercise the power of constitutional review of local legislation. This power continued after the transfer of sovereignty, for example in *Ng Ka-Ling and Others v Director of Immigration* and *Chan Kam Nga and Others v Director of Immigration*, a Hong Kong court pronounced some sections of the *Immigration (Amendment) (No.2) Ordinance 1997* and *Immigration (Amendment) (No.3) Ordinance 1997* void due to contravention with Article 24 of the Basic Law.

**D. Before reunification, Hong Kong courts did not have the jurisdiction to review UK imperial acts**

This point is somewhat controversial. Generally speaking, colonial courts could not review British legislation. However one Hong Kong scholar states that “colonial courts in fact had jurisdiction to review imperial acts and decisions, only Acts of Parliament being immune due to the peculiar rule of parliamentary supremacy, and even they [were] not immune if they went beyond the jurisdic-

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25 *Ng Ka-Ling case, supra* note 3.
26 *Chan Kam Nga and Others v Director of Immigration* [1999] 1 H.K.L.R.D. 304.
27 Paragraph 1(2) of Schedule 1 of *Immigration (Amendment) (No.2) Ordinance* does not regard the relationship between a man and a child born to him out of wedlock as the relationship between a father and a child, so it is overruled due to being inconsistent with Article 24(3) of the Basic Law. Sections 2 A (1), 2 AA (1)a and 53D(3)(a) of the *Immigration (Amendment) (No.3) Ordinance* were found inconsistent with Article 22(4) of the Basic Law, because the Sections required permanent residents residing on the Mainland to hold a one-way-permit before they could enjoy the constitutional right of abode. The Hong Kong judge, however, thought that in Article 22(4) of the Basic Law, the residents residing on the Mainland should not be classified as “people from other parts of China” who need to apply for approval when entering into Hong Kong. See *Ng Ka-Ling, supra* note 3.
tion acquired by the Crown in relation to the colony."\textsuperscript{29} However in \textit{Hong Kong SAR v Ma Wai Kwan, David, Chan Kok Wai, Donny and Tam Kim Yuen,}\textsuperscript{30} the Court of Appeal held that colonial courts had no power to review and overturn the Acts of British Parliament, nor any imperial conduct in relation to Hong Kong (e.g. the designation of the Hong Kong Governor) before reunification. Similarly, after reunification, as regional courts of the PRC, it was considered that Hong Kong courts could not review or overturn the conduct of the NPC and its Standing Committee. This doctrine, however, was reversed by the Court of Final Appeal in the \textit{Ng Ka-Ling} case.\textsuperscript{31}

IV. THE HARMONIOUS PROVISIONS ON THE POWER OF INTERPRETATION IN THE BASIC LAW

As is apparent, mainland China and Hong Kong each have a distinct regime and philosophy of interpreting law and in each respective jurisdiction the separate regimes are utilized. But in the matter of interpreting the Basic Law, these institutional and cultural differences inevitably collide. In order to safeguard the “one country, two systems” philosophy, the Basic Law has dual-based characteristics in many aspects. It is not only a national law of the PRC, but also the constitutional law of HKSAR; it is effective nationwide while it is mainly enforced in Hong Kong; its contents include either terms about Hong Kong autonomy or terms relating to the central government’s affairs and the relationship between the mainland and Hong Kong. Therefore, the bodies who have the right to interpret the Basic Law unavoidably involve both the central government authorities and HKSAR authorities.

If only the central authorities had the power of interpretation, a high degree of autonomy and the right of final adjudication for Hong Kong courts would probably lack assurance. On the other hand, if only Hong Kong authorities could interpret the Basic Law, the “one

\textsuperscript{29} Yash Ghai, \textit{Litigating the Basic Law: Jurisdiction, Interpretation and Procedure, in Hong Kong’s Constitutional Debate: Conflict over Interpretation} 15-16 (Hong Kong U. Press 2000).

\textsuperscript{30} \textit{Hong Kong SAR v Ma Wai Kwan, David, Chan Kok Wai, Donny and Tam Kim Yuen} [1997] H.K.L.R.D. 761.

\textsuperscript{31} Please see part 5(1) of this paper for discussion regarding the reasoning of the Court of Final Appeal and the process by which the NPCSC issues interpretations.
country” part of the philosophy would be difficult to maintain. Even worse, an embarrassing situation could happen where the central authorities would have to be subject to the authorities of a special administrative region. After considering the differences of mainland China and Hong Kong, the law-makers developed a unique mechanism for the interpretation of the Basic Law.

A. The power of interpreting the Basic Law is vested in the NPCSC

The first paragraph of Article 158 of the Basic Law enacts that the power of interpretation of this law is vested in the NPCSC. This provision accords with the Chinese Constitution and Legislation Law. The purpose of this provision is to guarantee a uniform understanding of the Basic Law nationwide. Article 158 does not set any restriction on the scope of the NPCSC’s power of interpretation. Theoretically, the NPCSC is therefore entitled to issue interpretations relating to any or all the terms of the Basic Law and is capable of exercising this power when it thinks fit.

B. The NPCSC authorizes the Hong Kong courts to interpret the terms of the Basic Law which are within the scope of their regional autonomy

For the provisions of the Basic Law that are within the scope of autonomy granted to Hong Kong by the Basic Law itself, the NPCSC authorizes the Hong Kong courts to exercise the power of interpretation rather than exercising that power itself. As the provisions within the scope of such autonomy do not relate to the central government’s affairs and the relationship between the mainland and Hong Kong, Hong Kong courts have the entire power to construe these provisions and the central government will not interfere with such interpretation. This rule accords with the principle of “a high

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32 Basic Law of the Hong Kong Special Administrative Region of the PRC (Basic Law) at Article 158(1): “The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.”

33 See Constitution of the PRC, supra note 7, at Article 67.

34 See Legislation Law of the PRC, supra note 9, at Article 42(1): “The power of legal interpretation belongs to the Standing Committee of the National People’s Congress.”

35 See Basic Law, supra note 32 at Article 158(2): “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.”
degree of autonomy” and “Hong Kong people govern Hong Kong,” and meets the need that Hong Kong courts exercise the power of final adjudication and interpretation of law. However it is clear that the Hong Kong courts acquire this power not from the direct grant of the Basic Law, but from the authority of the NPCSC itself. This point may help to consider later-mentioned dispute.

C. Central authority reserves the power to interpret terms that are outside the scope of Hong Kong’s autonomy, and the resulting interpretations will be binding on Hong Kong courts

This is the most complicated part of the interpretation regime for the Basic Law. Under the third paragraph of Article 158 of the Basic Law, Hong Kong courts also have the power to interpret other Basic Law terms that are not within the scope of Hong Kong’s autonomy. However, if the courts are required to interpret terms concerning affairs which are the central government’s responsibility and concern the relationship between the central government and Hong Kong, and if such interpretations will affect the judgment of a case, the Hong Kong courts (through the Court of Final Appeal) shall seek an interpretation from the NPCSC before making a final judgment. When the Standing Committee makes an interpretation of a relevant provision, the Hong Kong courts’ application of that provision should follow that interpretation.

36 See 中华人民共和国政府和大不列颠及北爱尔兰联合王国政府关于香港问题的联合声明, Zhonghua Renmin Gongheguo zheng fu he Da Buliedian ji Bei Ai’erlan Lianhe Wangguo zheng fu guanyu Xianggang wen ti de lian he sheng ming, (Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong), Articles 3(2) and 3(4): “The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants”. See also Basic Law, supra note 32, at Article 2.

37 See Basic Law, supra note 32. It is the NPCSC who authorizes the Hong Kong courts to exercise the power of interpretation.

38 See Basic Law, supra note 32, at Article 158(3): “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
Therefore, under Article 158(3) of the Basic Law, Hong Kong courts are in fact capable of interpreting all terms of the Basic Law, subject to some important conditions. That is to say, if a case concerns central government affairs and the relationship between mainland China and Hong Kong, the courts (through the Court of Final Appeal) have the legal duty to seek an authoritative interpretation from the Standing Committee prior to determining the respective judgment. In practice, this paragraph of the Basic Law contains the most important (and controversial) content in the attempts to harmonize interpretation of the Basic Law.

D. The NPCSC should consult the Basic Law Committee before giving interpretations

This is a requirement which must be observed by the Standing Committee. The Basic Law Committee is a consultative institution which is subject to the NPCSC, comprising twelve senior experts who are familiar with Hong Kong affairs, and many are experts on law. Among them, six are from mainland China and the other six experts are from Hong Kong. The functions of the Basic Law Committee are prescribed in the Basic Law. The Basic Law Committee is able to put forward its opinion for consultative use in situations where the NPC and its Standing Committee exercise the following four powers: A) returning a law enacted by the Hong Kong SAR legislature on the grounds that it is not in conformity with the provisions of the Basic Law; B) adding or deleting laws in Annex III (National Laws to be Applied in the Hong Kong Special Administrative Region); C) general interpretation of the Basic Law; and D) amending the Basic Law.

rendered shall not be affected.”

39 See Basic Law, supra note 32, at Article 158(4): “The standing committee of the National People’s Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.”

40 For example, the former Secretary for Justice Ms. Elsie Leung held the position of vice president of the Committee; Law Professor Albert Chen and Ms. 谭惠珠 Tan Huizhu (Barister) are current members of the Committee. Mr. 梁定邦 Liang Dingbang (SC) is a former member of the Committee.

41 See Basic Law, supra note 32, at Articles 17, 18, 158 and 159.

42 See Basic Law, supra note 32, at Article 17.

43 See Basic Law, supra note 32, at Article 17.

44 See Basic Law, supra note 32, at Article 158.

45 See Basic Law, supra note 32, at Article 159.
However, the opinion of the Basic Law Committee does not have to be adopted by the NPCSC, and the Basic Law does not prescribe that the NPCSC’s decision must be based on the opinion of the Basic Law Committee. Therefore in practice, this requirement appears to be more of a procedural requirement, with the Basic Law Committee’s opinion providing a point for reference.

In the author’s view, this system is a product of wise, systematic design. The law-makers attempt to use the best of both worlds so that the different interpreting regime of mainland China and Hong Kong can be harmonized and coexist in the interpretation of the Basic Law. Unfortunately, serious disputes still occur in practice.

V. DISPUTES IN PRACTICE

After the transfer of sovereignty of Hong Kong, some serious disputes arose regarding the power of interpretation of the Basic Law. The aim of this paper is not to comprehensively analyze and answer the questions raised in these disputes. Rather, it seeks to identify ways to improve the harmonization of the different interpretation methods.

A. Do Hong Kong courts have the power to review the conducts of the NPC and its Standing Committee?

This is the most controversial and influential issue in the so-called “constitutional crisis” arising from interpretation disputes. Formerly, the Court of Final Appeal recognized that Hong Kong courts could not review and overturn conduct or legislation of the NPC and its Standing Committee. However, this doctrine has since been reversed by the Court of Final Appeal in the Ng Ka-Ling case. The judgment of this case states very clearly:

“What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalid if inconsistency is

46 Supra notes 1 and 2.
found. It is right that we should take this opportunity of stating so unequivocally.”

On this issue, sharp collision occurs between the different legal systems and constitutional traditions of the mainland and Hong Kong. The reasoning employed by the Court of Final Appeal is that the Basic Law is the HKSAR’s “Constitution” which should have higher legal status than normal legislation. Therefore, even laws which are made by the NPC and its Standing Committee cannot contravene the Basic Law. This raises the question of who has the authority to judge whether a law promulgated by the NPC contravenes the Basic Law. In the light of the Ng Ka-Ling case, Hong Kong courts enjoy this right of final adjudication and have the right to interpret the provisions of the Basic Law in individual cases.

This decision of the CFA has been strongly criticized by some mainland senior experts of law, such as Professor Xu Chongde (Renmin University), Professor Xiao Weiyun (Peking University) and Professor Wu Jianpan (Chinese Academy of Social Sciences). They claim that the Hong Kong courts’ power of interpretation comes from the authority of the NPCSC and is therefore limited. After all, how can a grantee supervise its grantor? The adjudication of a Hong Kong court could not be above the National People’s Congress or its Standing Committee. As the organs of the highest state authority of the country (not merely a legislative organ), their acts and decisions are not subject to challenge or veto by any other institution.

At the same time, some Hong Kong scholars applaud the decision of the CFA. A law Professor alleges that: “Looking from another perspective, the question is not whether the CFA puts itself above the NPCSC. Instead, the question is whether the NPCSC is bound by the Basic Law.” A senior Hong Kong barrister says that “the CFA’s approach was not only logical but also right.”

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47 Ng Ka-Ling case, supra note 3.
49 XIAO WEIYUN & OTHERS, Why the Court of Final Appeal was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 55-60 (Hong Kong U. Press 2000).
49 JOHANNES M. M. CHAN, supra note 2, at 66.
50 DENIS CHANG, The Reference to the Standing Committee of the National People’s Con-
NPCSC contradict the Basic Law, Hong Kong courts have the discretion to review such acts under the common law system. Therefore, the decision of the CFA is tenable.

The decision of the CFA invited not only sharp criticism from mainland experts, but also determined objection from Hong Kong administration authorities relating to the resultant change in crucial immigration control policy. Roughly one month after the decision, the CFA unprecedentedly delivered a clarification judgment to respond to the application of the Hong Kong Immigration Department:

“The Court’s judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under Art. 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court’s judgment question, and the Court accepts that it cannot question, the authority of the National People’s Congress or the Standing Committee to do any act which is in accordance with the provision of the Basic Law and the procedure herein.”

Some scholars think that the Court’s clarification judgment did not in substance retreat from the assertion on the matter of constitutional jurisdiction enunciated in its original judgment, and that the clarification was just a linguistic decoration. Either way, the central authority still welcomed the clarification judgment, so a possibly severe constitutional crisis has been mitigated.

B. Does the HKSAR Government have power to suggest that the central authority should make an interpretation?

After the CFA issued its decision in the Ng Ka-Ling case, the HKSAR Government assessed its possible influence on the matter of right of abode in Hong Kong. The astonishing outcome was that at
least 1,670,000 people were qualified to have the right of abode in Hong Kong in the seven years after the Ng Ka-Ling case. In practical terms, this meant Hong Kong could potentially expand its existing population by one fourth over that period, which was a number not able to be supported by this region. On May 20, 1999, the HKSAR Government submitted a report to the State Council, seeking its request for an authoritative interpretation from the NPCSC regarding certain terms in question. The report stated:

“The CFA’s interpretation of the relevant provisions of the Basic Law is different from the HKSARG’s understanding of the wording, purpose and legislative intent of these provisions. Queries and arguments as to whether the CFA’s interpretation is in line with the Basic Law have been raised in the community… We have considered carefully and repeatedly the available options for resolving this issue. As the issue is one of principle involving how the Basic Law should be interpreted, and as the control of entry of mainland residents into Hong Kong has a bearing on the relationship between the Central Authorities and HKSAR, the HKSAR is no longer capable of resolving the problem on its own.”

The State Council agreed that clarification of the issue was required, and requested the NPCSC make an interpretation accordingly. On June 26, 1999, the NPCSC issued its interpretation. The NPCSC noted that the CFA’s interpretation of the relevant Basic Law provisions concerned central government affairs and the relationship between Hong Kong and the central authority. However before making its interpretation, the CFA had not sought an interpretation of the Standing Committee in compliance with the requirement of Article 158(3) of the Basic Law, and the CFA’s own interpretation was not consistent with the legislative intent. Thus the interpretation of the

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54 全国人民代表大会常务委员会关于中华人民共和国香港特别行政区基本法第二十二条第四款和第二十四条第二款第(三)项的解释 Quanguo Renmin Daibiao Dahui chang wu wei yuan hui guan yu Zhonghua Renmin Gongheguo Xianggang te bie xing zheng qu ji ben fa di er shi er tiao di si kuan he di er shi shi si tiao di er kuan di san xiang de jie shi (The Interpretation by the Standing Committee of the National People’s Congress of Article 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the
NPCSC was required.

This situation raised the question of whether or not the HKSAR Government has the right to initiate a request for the central authority to commence the interpretation procedure in relation to the Basic Law. Some Hong Kong scholars think that the HKSAR Government is not the suitable body to seek an interpretation from central authority, because the Basic Law does not expressly give the HKSAR Government the power to do so.\(^{55}\) According to Article 158(3) of the Basic Law, only the Court of Final Appeal is authorized to initiate this procedure. One particularly radical criticism describes the action of the HKSAR Government in initiating the NPCSC interpretation as “a bargain which betrays rule of law.”\(^{56}\)

On the other hand, the Hong Kong Government emphasizes that the legal basis for its initiation of the interpretation procedure is found in Article 43\(^{57}\) and Article 48(2)\(^{58}\) rather than Article 158. Under Article 43 and Article 48(2) of the Basic Law, the Chief Executive (CE) is responsible to the Central People’s Government and Hong Kong Special Administrative Region, and represents HKSAR (not merely the HKSAR Government). One of the CE’s duties is to enforce the Basic Law. Therefore, when there are some difficulties in enforcing the Basic Law, the CE has the power and responsibility to report the situation to the State Council. It is then a matter for the State Council to decide whether or not the suggestion will be accepted and an interpretation requested from the NPCSC.

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57 See the Basic Law, supra note 32, at Article 43(1): “The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent the Region.” 43(2): “The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People’s Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.”

58 See the Basic Law, supra note 32, at Article 48(2): “The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions: ...(2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region.”
C. Is the NPCSC’s interpretation binding on Hong Kong courts?

Theoretically, the answer is clear that the NPCSC’s interpretation has a binding effect on Hong Kong courts in accordance with Article 158(3) of the Basic Law. In other words, once the Standing Committee makes an interpretation on any provision, Hong Kong courts’ application of that provision must follow the relevant NPCSC interpretation. However, the situation in practice is not always as clear.

In 2000, the Court of Final Appeal dealt with *Chong Fung Yuen v The Director of Immigration.* The dispute in this case concerned whether or not children born in Hong Kong as a result of their parents’ illegal entry to or prolonged stay in Hong Kong, have the right of abode. On this point, the Hong Kong *Immigration Ordinance* Cap. 115, answered in the negative. Counsel for Chong Fung-Yuen (the child in question) argued that the relevant provision of the *Immigration Ordinance* should therefore be pronounced void, as the Basic Law does not impose any restriction on the identity or citizenship of the parents of “Chinese citizens born in Hong Kong.”

This issue was already addressed by the Interpretation of the NPCSC on June 26, 1999, regarding the Basic Law. The Interpretation states that the *Immigration Ordinance* is consistent with the legislative intent reflected in the “Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China” adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People’s Congress on August 10, 1996. If the court were to follow the position of the Interpretation, Chong Fung-Yuen would not be found to have the

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59 *Chong Fung Yuen v The Director of Immigration* [2001] 2 H.K.L.R.D. 533.
60 The relevant provision of the Hong Kong *Immigration Ordinance* Cap 115 stipulated that for a Chinese citizen born in Hong Kong to be a permanent resident, one of his parents must have been settled or had the right of abode in Hong Kong at the time of his birth or at any later time. See *Immigration Ordinance* Cap 115 at Schedule 1, para 2(a).
61 See the *Basic Law,* supra note 32, at Article 24(1).
62 全国人民代表大会常务委员会关于中华人民共和国香港特别行政区基本法第二十二条第四款和第二十四条第二款第(三)项的解释 Quanguo Renmin Daibiao Dahui chang wu wei yuan hui guan yu Zhonghua Renmin Gongheguo Xianggang te bie xing zheng qu ji ben fa di er shi er tiao di si kuan he di er shi si tiao di er kuan di san xiang de jie shi [Interpretation of the Standing Committee of the National People’s Congress on Paragraph 4, Article 22 and Paragraph 2(3), Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (adopted at the Tenth Session of the Ninth Standing Committee of the National People’s Congress, Jun. 4, 1999)].
right of abode. However the CFA found that the NPCSC’s Interpretation regarding the legislative intent of Article 24(2) was not binding on this particular case, due to the fact that it constituted a kind of *obiter dictum* rather than *ratio decidendi*. What the Interpretation solved is the issue of children born on the mainland to Hong Kong parents, while the present case concentrated on the issue of children born in Hong Kong to mainland couples. As a result, the CFA applied the traditional interpretation method of common law in its application of Article 24(2) rather than following the position of the Interpretation.

Following the CFA’s decision in the *Chong Fung-Yuen* case, a spokesman for the NPCSC expressed concern that the decision of the CFA was inconsistent with the NPCSC’s interpretation. But what is interesting is that Hong Kong Government had promised that, if it lost the lawsuit, the Government would absolutely accept the decision of court and not seek an interpretation from central authority. Afterwards, Hong Kong Government kept its promise and the central authorities did not take any measures to nullify the controversial interpretation of the CFA in *Chong Fung-Yuen* case.

**D. Does the NPCSC have the power to ‘actively’ interpret the Basic Law?**

There are two possible situations in which the NPCSC’s ‘active’ interpretation of the Basic Law (i.e. issuing its interpretation in absence of a request from the Hong Kong authorities) will be necessary: A) if a case tried in a Hong Kong court relates to the affairs of the central government or the relationship between Hong Kong and the central authority, but neither the CFA nor the Hong Kong Government seeks an interpretation from the NPCSC (as occurred in the *Chong Fung-Yuen* case); and B) where an important dispute regarding an understanding of a provision of the Basic Law arises and does not involve legal proceedings (meaning the CFA is not involved).

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63 See 陈弘毅, *Chen Hongyi*, supra note 24, at 392-393.
64 全国人大常委会法工委发言人就香港特区终审法院对居港权案件的判决发表谈话, 2001年7月21日法制日报. Quanguo Renda chang wei hui fa gong wei fa yan ren jiu Xianggang te bie xing zheng qu zhong shen fa yuan dui jv quan quan de pan jue fa biao tan hua [Speech Delivered by the Spokesman of the Standing Committee of the National People’s Congress on the HKSAR Court of Final Appeal’s Judgment of the Case on Residence Permit in HK], Fa zhi ri bao (LEGAL DAILY), Jul. 21, 2001.
The second scenario prompting an NPCSC interpretation of the Basic Law occurred in 2004.

In 2004, there was vigorous debate in Hong Kong regarding amendment of the Basic Law in relation to the method of electing the CE and the Legislative Council. These provisions are set out in Article 7 of Annex I and Article 3 of Annex II of the Basic Law. The major questions to be resolved included: A) is the phrase “subsequent to the year 2007” inclusive of the year 2007; B) does the phrase “if there is a need” mean that amendment is essential; C) who determines that there is a need for an amendment and who is able to propose a bill of amendment; D) did application of current provisions prevail if no amendment resulted. On April 6, 2004, after consultation with the Basic Law Committee, the NPCSC issued an interpretation on above-mentioned issues without an express application or request from the Hong Kong authorities.

From a legal perspective, the ability of the NPCSC to actively issue an interpretation without application by the Hong Kong authorities is clear. In light of both the Chinese Constitution and the Basic Law, the NPCSC does have the entire power to interpret the Basic Law provisions. Article 158 of the Basic Law does not set any restriction on the interpretation powers of the NPCSC. The NPCSC can exercise the power of interpretation in circumstances where no relevant lawsuit has been tried in Hong Kong courts and where no interpretation has been requested. This power has been admitted by

65 Albert H. Y. Chen, The Constitutional Controversy of Spring 2004, 34 HONG KONG L.J. 218 (2004). See also, Basic Law, supra note 32, at Annex I, Article 7: “If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval,” and Basic Law, supra note 32, at Annex II, Article 3: “Method for the formation of the Legislative Council and its voting procedures subsequent to the year 2007: With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record.”


67 Supra notes 32, 35, 38 and 39.
the Court of Final Appeal, notably in *Lau Kong-Yung and Others v The Director of Immigration*,68 where the CFA stated that the interpreting power of the NPCSC is not limited in scope to instances where the CFA seeks an interpretation in conjunction with a case.

However, despite the clear existence of legal authority, it is still necessary to consider whether or not it is appropriate for the NPCSC to actively interpret the Basic Law in this way. Such unprompted interpretations of the Basic Law by the NPCSC have in fact resulted in unease and controversy thus far. Some members of the Legislative Council have expressed concern that this style of active interpretation by the NPCSC will endanger the fundamental principles that Hong Kong should have “a high degree of autonomy” and have “Hong Kong people govern Hong Kong.”69

VI. PROPOSALS TO IMPROVE THE INTERPRETATION OF THE BASIC LAW

When analyzing the conflict arising from the interpretation of the Basic Law, what we should not forget is that although Hong Kong is a tiny territory compared to mainland China, HKSAR enjoys the same status in terms of final jurisdictional powers, as it has the right of final adjudication. Although this is the case, there is a sensitive situation relating to the fact that as a Special Administrative Region, Hong Kong cannot have equal status with the central authority in a political sense. What the “one country, two systems” principle aims to resolve is this relationship between the regional and central authorities. Clearly the “one system” of the central authority is of a higher political status than the “one system” of the Special Administrative Region. The Court of Final Appeal is the supreme court of the HKSAR, and the cases with which it deals often involve both legal and political issues, which are hard to distinguish. The judicial relationship between the CFA and the NPCSC is therefore complex. In the following section, the author would like to put forward several proposals to address this situation, and hopes these proposals could

help the harmony of interpretation of the Basic Law.

A. *A harmonious mechanism between Hong Kong and central authorities needs to be established*

After the transfer of sovereignty, both the Hong Kong and mainland government bodies have taken great efforts to establish harmonious interpretation and dispute mechanisms. In the economic domain, the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)\(^{70}\) has proven very fruitful. In the judicial area, the application of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region\(^{71}\) and the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned\(^{72}\) are encouraged. But unfortunately, there is no similarly effective arrangement in the domain of constitutional cooperation.

The Basic Law has drawn a line between central government affairs and affairs to be addressed by Hong Kong in exercising its autonomy, however that line is not always clear and sometimes issues will arise that are ambiguous and problematic. That is why a standardized harmonious mechanism between the Hong Kong and central authorities is expected.\(^{73}\) The author suggests that this mechanism should be established between the NPCSC and the CFA. The reason why these two institutions are most appropriate for the making of

\(^{70}\) *Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)*, signed Jun. 29, 2003 and Sep. 29, 2003 respectively. The Mainland and Hong Kong submitted a joint notification regarding the CEPA to the World Trade Organization (WTO) on Dec. 27, 2003.

\(^{71}\) *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (Jun. 21, 1999).

\(^{72}\) *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned* (Jul. 14, 2006).

\(^{73}\) The author’s personal suggestion is that an arrangement regarding political consultation between the Mainland and Hong Kong could be developed and agreed upon. The main contents could include: Who are the representatives of both sides? How do they discuss? What issues can be discussed? When and where they meet? What kind of outcome could be achieved?
such an arrangement is that they are the respective guardians of the Chinese and Hong Kong Constitutions, and no other institutions can take their place in this respect. Considering that the NPCSC enjoys supremacy in the Chinese legal system, the NPCSC could choose to authorize the Committee for Legal Affairs (operating under the NPCSC) as its representative to discuss matters with the CFA, its Hong Kong counterpart.

Some may question whether the establishment of a standardized harmonious mechanism undermines judicial independence in Hong Kong, even if the aim of such a mechanism is to reduce conflict. The response to this potential criticism is that the counterpart of the mainland institution is not actually the Hong Kong SAR Government, but the Court of Final Appeal. Using the CFA as the NPCSC counterpart instead of the Hong Kong SAR Government in this process is an indication that the central authority maintains and respects the principles of Hong Kong autonomy and judicial independence, because it means the central authority will not exert a political pressure, via the Chief Executive of HKSAR, on the Hong Kong judiciary, and the power of final adjudication is still in the hands of the CFA. Indeed, the purpose of establishing such a mechanism is to seek early communication and mutual understanding between the authorities on potentially controversial issues, therefore decreasing the likelihood that the NPCSC would exercise its authority of interpreting the law and nullifying decisions of the CFA in an active, uninvited manner. Another viewpoint is that the harmonious mechanism also aims to maintain and protect the operation of the rule of law in Hong Kong. It can therefore be seen that the benefits of a harmonious mechanism are by far greater than any detriments.

On the issue of establishing a harmonious mechanism, one scholar suggests that the Basic Law Committee could act as the representative of the NPCSC in taking on the responsibility of communication.\(^\text{74}\) This is not a tenable suggestion. The function and duty of the Basic Law Committee has already been stipulated in the Basic Law, and it is merely a consultative committee. If it is to be transformed into a working committee that can bear the tasks which are

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distributed by the NPCSC, the legislature must first amend the Basic Law to allow the committee to do so. But as the “Constitution” of HKSAR, the Basic Law should not be changed frequently or in a rash manner. Another barrier is that the Basic Law Committee is comprised of members from both sides of the conflict, and it is clearly not suitable to designate such a committee to be the sole representative of one side.

Professor Albert Chen suggests that the ideal way in which to implement Article 158 of the Basic Law is that both the mainland and Hong Kong should act in a self-restrictive manner.\(^75\) That is, the NPCSC does not interpret provisions that concern the matters within the scope of Hong Kong’s autonomy, and the CFA does not interpret provisions that concern central government affairs. For questions concerning the relationship between these authorities, the CFA should loyally perform its duty to seek an interpretation from the central authority. Ultimately, then, a reasonable constitutional tradition could be established. Professor Chen is certainly correct on this point, as mutual exercise of self-restraint is crucial for achieving harmony of interpretation. Unfortunately, such a reasonable constitutional tradition has not yet been established. So far, the NPCSC has shown a self-restrictive tendency, as exhibited in the Chong Fung-Yuen case, but the CFA has not attempted to initiate referring procedures that are provided for in the Basic Law. No substantial progress can be expected to be made, even with the establishment of a standardized harmonious mechanism, without the willingness of both authorities to take initiatives to seek common understanding.

In a sense, it is unfair to excessively criticize the CFA for its failure to request NPCSC interpretations thus far. Some scholars point out that as a judicial institution in a common law jurisdiction, it may be very uncomfortable for the CFA to actively seek a legal interpretation from a legislative body. “Even the Supreme People’s Court never formally asks for a legislative interpretation from the NPCSC. So it is really awkward to require a new-established Court of Final Appeal to do so.”\(^76\) Another reason for the CFA’s reluctance may be

\(^75\) See also 陈弘毅 CHEN HONGYI, supra note 24, at 413.

\(^76\) See 王振民 WANG ZHENMIN, supra note 28, at 369. (“…在内地的最高人民法院还从来没有正式公开向全国人大常委会申请过解释宪法和法律的情况下，要求一个新成立的特区终审法院这么做，实在有点强人所难.”)
that under the constitutional framework of the Basic Law setting out
the three governmental branches, the judicial branch is the most in-
dependent from the influence of the central authority. \(^77\) The Hong
Kong civil society has placed a natural expectation on the CFA to
maintain the rule of law and judicial independence. This expectation
makes it very difficult for the CFA to take a “bending” stance in its
interactions with central authority.

However, no matter how difficult the situation, the interpretation
framework that is currently in place requires that the CFA should be
the authority responsible for taking the ‘first step’. As the CFA no
doubt understands, the essence of rule of law is loyalty to the law. In
prescribed situations, the CFA has a legal obligation to refer to the
central authority. When the judges of the CFA and the High Court as-
sume office, they must swear to uphold the Basic Law. \(^78\) This oath
should not be merely a slogan.

B. The NPCSC should avoid interpreting the Basic Law actively

The NPCSC has an unconditional power of interpretation, but
this does not mean that more frequent and expansive use of this pow-
er will produce better effects. In accordance with the Basic Law, the
interpretation of the NPCSC does not overrule the legal effect of a
judgment previously made by a Hong Kong court. However in prac-
tice, the NPCSC’s interpretation will terminate the binding effect of
such a judgment on subsequent cases. So, an interpretation by the
NPCSC will undoubtedly lower the reputation of the Hong Kong
courts and affect the Hong Kong people’s confidence in their judicial

\(^77\) Under the Basic Law, judges are appointed by the Chief Executive on the recommendation
of an independent commission, and the appointment or removal of judges of the CFA
and the Chief Judge of the High Court require endorsement by the Legislative Council.
Therefore, the appointment of Hong Kong judges is not within the control of the central
government. Moreover, the CFA exercises final adjudication while principal officials in the
executive branch are appointed by the central government, and legislation is reviewed by the
NPCSC. The judicial power is the most independent from the central authority's influence
among three branches. See Basic Law, supra note 32, at Articles 17, 45, 48, 88 and 90.

\(^78\) See Basic Law, supra note 32, at Article 104: “When assuming office, the Chief Execu-
tive, principal officials, members of the Executive Council and of the Legislative Council,
judges of the courts at all levels and other members of the judiciary in the Hong Kong Spec-
ial Administrative Region must, in accordance with law, swear to uphold the Basic Law of
the Hong Kong Special Administrative Region of the People’s Republic of China and swear
allegiance to the Hong Kong Special Administrative Region of the People’s Republic of
China.”
independence, and maybe even the “one country, two systems” concept. As a result, the NPCSC’s interpretation is required only when there are sufficiently essential issues at stake. Otherwise, if the NPCSC interprets the Basic Law too ‘actively’, it will create the impression that the central authority wishes to undermine the autonomy of HKSAR. The purpose of an NPCSC interpretation should only be to resolve intractable issues relating to Hong Kong, because overuse of the interpretative power will cause Hong Kong greater trouble, by damaging the rule of law and judicial independence in Hong Kong.

Another point is that there is no use for policies that aim to transform Hong Kong into another Shanghai. Part of Hong Kong’s unique contribution to the whole country is maintaining a vastly different social system from mainland China and playing a particular role that developed cities in the mainland cannot replace. The ability of Hong Kong to maintain its unique characteristics is the essence of the “one country, two systems” principle. At same time, the central government should trust the judicial discretion of the Hong Kong courts; even more so it must trust the political wisdom of the Hong Kong Government. Although there are difficulties that arise from time to time, the mainland should still have faith that the HKSAR can identify appropriate resolutions. For example, the decision in the *Chong Fung-Yuen* case resulted in more and more pregnant mainland Chinese women flooding into Hong Kong to bear their children. In response, the Hong Kong Government engaged various countermeasures, such as restricting entry for pregnant mainland women, and boosting the medical fees for these women.\(^79\)

If, however, the Hong Kong Government truly cannot find a solution to a problem, the mainland authorities should trust that either the CFA or HKSAR Government will apply to the NPCSC for an interpretation, as appropriate. Therefore, the NPCSC should try not to interpret the Basic Law without application from Hong Kong authorities except for situations of absolute necessity.

\(^79\) See, e.g., *HK hikes birth fees to stem flood of pregnant tourists*, Reuters Dec. 21, 2006 at http://www.alertnet.org/thenews/newsdesk/HKG174728.htm. This raises the additional question of whether or not the countermeasures engaged are reasonable, or whether or not the countermeasures constitute discrimination against pregnant women from the mainland.
C. Try to survey and respect Hong Kong public opinion prior to making an interpretation

One of basic principles underpinning the concept of “one country, two systems” is that “Hong Kong people govern Hong Kong,” therefore the public opinion of Hong Kong society is extremely important. For both Hong Kong and central authorities, a necessary step before the making of decisions regarding the Basic Law is to survey the public opinion of Hong Kong society. This opinion is comprised of at least two perspectives. From a representative perspective, such opinion is demonstrated through the majority opinion of the Hong Kong Legislative Council and the majority opinion of Hong Kong Deputies of the National People’s Congress (and the Chinese People’s Political Consultative Committee in a broader sense). More directly, such opinion is also shown in the position taken by the majority of the Executive Council of HKSAR. In a practical sense, public opinion is reflected in the dominant opinions of the media in Hong Kong and the majority opinions of Hong Kong residents derived from extensive polls.

In the Ng Ka-Ling case, the Hong Kong Government dared to unprecedentedly seek an interpretation from the NPCSC without deriving direct authority from the Basic Law. One important reason for this was that the Hong Kong Government had already obtained the support to do so, from a majority of members of the Legislative Council, and also from the Hong Kong Executive Council in accordance with Article 56 of the Basic Law.

A contrary case involves the promulgation of legislation pursuant to Article 23 of the Basic Law. In 2003, the draft National Security

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80 Ng Ka-Ling case, supra note 3.
81 On May 19, 1999, the Legislative Council of Hong Kong voted to pass a bill supporting the Chief Executive to seek an interpretation from the Standing Committee of National People’s Congress. See Legislative Council document CB(3)1659/98-99.
82 See Basic Law, supra note 32, at Article 56(2): “Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.”
83 See Basic Law, supra note 32, at Article 23: “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the region from establishing ties with foreign political
Ordinance aroused serious debate and much of the Hong Kong public had a negative attitude towards the document. On July 1, some 500,000 people paraded to show their objection. On September 5, the Chief Executive had to withdraw the draft from consideration and promised that the legislative process would not recommence until a consensus could be reached regarding the content of the ordinance. We can see very clearly from this incident that although legislative efforts may have sufficient legal legitimacy under the Basic Law, the Hong Kong Government must consider (and on occasion reach a compromise with) opposing public opinion.

Both the Hong Kong government and the central authority must draw lessons from both past successful experiences and failures when facing interpretation of the Basic Law in the future.