

1998

Interpreting the Basic Law with Chinese characteristics

James C. HSIUNG

Follow this and additional works at: <http://commons.ln.edu.hk/cppswp>



Part of the [Constitutional Law Commons](#), [Law and Society Commons](#), and the [Political Science Commons](#)

Recommended Citation

Siung, J. C. H. (1997). Interpreting the Basic Law with Chinese characteristics (CPPS Working Paper Series No.73). Retrieved from Lingnan University website: <http://commons.ln.edu.hk/cppswp/38/>

This Paper Series is brought to you for free and open access by the Centre for Public Policy Studies 公共政策研究中心 at Digital Commons @ Lingnan University. It has been accepted for inclusion in Centre for Public Policy Studies : CPPS Working Paper Series by an authorized administrator of Digital Commons @ Lingnan University.

No. 73 (1/98) CPPS

INTERPRETING THE BASIC LAW
WITH CHINESE CHARACTERISTICS

by

Professor James C. Hsiung

Faculty of Social Sciences
Lingnan College
Hong Kong
February 1998

INTERPRETING THE BASIC LAW WITH CHINESE CHARACTERISTICS

CAPS and CPPS Working Papers are circulated to invite discussion and critical comment. Opinions expressed in them are the author's and should not be taken as representing the opinions of the Centres or Lingnan College. These papers may be freely circulated but they are not to be quoted without the written permission of the author. Please address comments and suggestions to the author or the series editors.

© James C. Hsiung

Professor James C. Hsiung is the Head of Department of Politics and Sociology and Chair Professor of Political Science, Lingnan College, Hong Kong.

Faculty of Social Sciences
Lingnan College
Tuen Mun
Hong Kong
Tel : 2616 7429-32
Fax : 2591 0690

INTERPRETING the BASIC LAW

with

CHINESE CHARACTERISTICS*

James C. Hsiung
Lingnan College, and
New York University

*Written for the 29 November 1997 session of the Basic Law Series, sponsored by the University of Hong Kong Centre of Comparative and Public Law, in conjunction with the Hong Kong Bar Association. I am grateful for comments on an earlier draft graciously extended by Mr. Stephen Kai-yi Wong, Acting Solicitor General, HKSAR. Any remaining imperfections remain my sole responsibility.

Introduction

While the Basic Law is the mini-constitution of the Hong Kong Special Administrative Region (HKSAR) and, as such, the measure of all future legislations of the SAR's legislature, its often imprecise language and succinct provisions, nevertheless, leave plenty of room for specification or elaboration, something to be achieved through definitive interpretation. Under Article 158, the responsibility of this authoritative interpretation falls upon the Standing Committee of the National People's Congress (hereinafter referred to as NPC SC). The need for interpretation is made all the greater, and more complicated, because of the vast differences between Hong Kong's inherited common-law legacy and China proper's continental-law tradition and socialist system. The task of bridging the gaps arising from the differences are not made any easier by the "one country, two systems" model implanted in the SAR by the Basic Law.

Before we examine the terms of Article 158, including the role of the Committee of the Basic Law of the HKSAR (or the Basic Law Committee, for short), which is the focus of

today's seminar in the Basic Law Series, it bears noting that the Basic Law provides for recourse to legislative interpretation, rather than judicial or even executive interpretation.^{1/} (If we define "judicial review" as one to be performed by the Supreme People's Court in Beijing in lieu of the NPC SC, then interpretation by the HKSAR courts under authorization from NPC SC, per Art. 158, is not judicial review per se.) Our question is: Why? The answer to this pregnant question, in fact, holds the key to many other fundamental questions regarding interpretation and many other issues of obvious concern to this seminar series.

Simply put, the answer is inherent in the unitary system of the People's Republic of China (PRC), the significance of which can be more fully appreciated by contrasting it to a federal system such as is found in the United States. In the latter system, whatever power is not explicitly delegated to the Federal Government under the Constitution (residuary powers) invariably inures to the several States or the people.^{2/} By contrast, in a unitary system such as the PRC's, whatever power is not otherwise granted to the localities (provinces, autonomous regions, etc.) is reserved for the Central Government.^{3/} The PRC Constitution, in delineating the Center-locality division of powers, explicitly subsumes the localities to the Center. Article 31 of the PRC Constitution vests the power of establishing "special administrative regions" in the Central Government (the "state"), while the function of prescribing their sociopolitical system by law is exercised by the NPC. The gravitation toward the Center in this unitary system, as reflected in the NPC's power over interpretation of all laws of the land, is to ensure both unity of all regions and, equally, the hierarchy of the country's legal system.^{4/} These two concerns – national unity and legal hierarchy – are clearly reflected in the makeup of the Basic Law in that the HKSAR's "high degree of autonomy" is the result of a grant (authorization) by the Central Government, as is spelled out in Article 2 of the Basic Law. Hence, the NPC (acting through its Standing Committee) is the ultimate organ endowed with the power to render authoritative interpretation to the provisions of the HKSAR Basic Law of its own creation, should an interpretation become necessary.^{5/}

Once we take cognizance of this first principle -- that China's unitary system is a controlling factor for Center-locality relations -- we are ready to pursue other related points.

Functions of Interpretation

And the Basic Law

In general, the functions of legal interpretation by the NPC are fourfold, viz.: to amplify a law; to flesh out the details; in effect, to update the law; and to uphold provisions of the law against contravening behavior.^{6/} But, in the case of the SAR's Basic Law, interpretation serves two additional functions, namely: to ensure that the "one country, two systems" model is implemented in the Hong Kong SAR in accordance with the intendment of the model's creators, and to help resolve any possible complications arising from discrepancies between Hong Kong's inherited common-law tradition and China's socialist continental-law system.^{7/}

Article 158 of the Basic Law contains three stipulations: (a) an affirmation that the power of interpretation of the Basic Law is vested in the NPC SC; (b) that before making an interpretation, the NPC SC shall consult its Basic Law Committee; and (c) the Courts of the SAR, in adjudicating cases (as distinct from litigation in abstract), may be authorized by the NPC SC to interpret certain provisions of the Basic Law.

◇ Although Art. 158 provides for the option by an SAR court to interpret provisions of the Basic Law, it is by no means judicial interpretation in the normal sense of the term. In the first place, prior authorization must be sought. Secondly, even after authorization, an SAR court can only interpret those provisions of the Basic Law concerning matters "which are within the limits of the autonomy of the Region," and only in adjudicating a case at hand. On provisions concerning "affairs which are the responsibility of the Central People's Government, " or concerning the Center's relationship with the SAR, the latter's courts are obligated, before making their final judgments that are not appealable, to "seek an interpretation " from the NPC SC through the territory's Court of Final Appeal. The SAR's courts, furthermore, are required to "follow the interpretation" of the NPC SC, once it has been rendered. The bottom line is: (a) the ultimate power of interpreting the Basic Law still rests with the NPC SC; (b) the courts of the SAR may interpret some (not all) provisions of the Basic Law, insofar as they pertain to matters "within the limits" of the region's autonomy, but only with authorization from the Center (i.e., the NPC SC); (c) no court of the SAR has

the power of judicial review, passing on the constitutionality or legitimacy of either provisions of the Basic Law per se or what the Center (through the NPC) has done in pursuance of provisions of the Basic Law. Efforts to seek judicial review by a Hong Kong court -- such as were tried by some well-intentioned purists earlier in 1997 to make the Court of Appeal rule on the alleged illegality of the SAR's Provisional Legislature -- were, therefore, doomed to failure simply because, first, the Provisional Legislature was a creation of the NPC in Beijing, which had acted well within the bounds of the division of powers in China's unitary system; and, secondly, it was not up to an HKSAR court to dismantle something so created under the powers of the NPC SC.

◇ So far as can be ascertained, the Central Government in Beijing attaches a special importance to its relations with the Hong Kong SAR. This can be seen in two ways. First, although Art. 31 of the PRC speaks of the state's power in creating "special administrative regions" (in plural), the HKSAR is the first and only special administrative region created thus far. Besides, even if other "autonomous regions" can be considered as quasi-equivalents of an SAR, it remains true that in no other case did the NPC enact a mini-constitution similar to the Basic Law of the Hong Kong SAR. Second, on the question of interpretation, there is no comparable requirement that legislations enacted by other autonomous regions be interpreted by the NPC, nor even by the provincial legislature at the next higher level than each autonomous region. In most cases, the power of interpreting local legislations devolves upon the legislature of each autonomous region itself.^{8/}

◇ Those trained in the common-law tradition, who appreciate the importance of stare decisis, may be instinctively inclined to search for evidence of how the NPC SC actually exercised its power of dispensing interpretation to laws enacted by lower-level legislatures. The truth of the matter is, however, not even once did the NPC SC ever exercise this power.^{9/} It, nevertheless, did have occasion to offer interpretations to prior legislations of its own making or to provisions of the PRC Constitution. A survey of this body of interpretative history might shed some light on what the NPC SC is likely to do in the event it is called upon to offer an interpretation to provisions of the Basic Law of the Hong Kong SAR.

NPC's Record of Legislative Interpretation

At least on six occasions since the 1950's, the occasion arose when the NPC had to fulfill its function of legislative interpretation. Usually, the text of its interpretation took the form of a "decision."^{10/} For instance, in a decision adopted on March 10, 1955, the NPC SC in its first instance of legislative interpretation uniformized the terms of office for the people's congresses at all levels throughout the country (which would otherwise have non-synchronous terms of office, as a result of the various time periods in which they were first elected). The NPC SC's decision in effect amended Art. 57 of the PRC Constitution. In three other instances in the 1950s, and again once in 1983, the NPC SC offered interpretations -- some of them similar amendments, in effect, to other provisions of the PRC Constitution -- or to certain laws enacted earlier by the NPC. The decline in the cases of interpretation brought before the SC after 1979 was a result of the institution of a Commission of Legislative Affairs (fazhi gongzuo weiyuanhui), which undertook the task of answering most of the queries for interpretation.^{11/}

Since, as stated, there is no other "special administrative region" in China and, hence, no other mini-constitution enacted by the NPC similar to the HKSAR Basic Law that would need interpretation, there is nothing in the NPC SC's record of legislative interpretation which could offer a guide in the event interpretation of the HKSAR Basic Law should become an issue. The next best thing is the cumulative practice of the NPC SC's interpretations given in the six known cases. It is for this reason that a look into the NPC SC's cumulative practice of interpretation at large might be meaningful, to the extent that generalizations can be made concerning the SC's approach to the task of interpretation. The criteria and modes of interpretation used in past instances will help illuminate on how the NPC SC may likely approach the task of interpreting the HKSAR's Basic Law, in consultation with the NPC's Basic Law Committee. Professor Cai Dingjian identified the following patterns or principles that can be deduced from the NPC SC's interpretive record, some of which need no elaboration:^{12/}

*Linguistic interpretation.

*Apparent meaning.

*Purposive connotations (also known as amplification). The NPC SC may introduce through interpretation new meaning or meanings to a provision on the basis of its original wording, but within the parameters of the spirit and language of the original legislation.

*Systemic interpretation – that is, by reference to China’s overall Constitutional system. An example concerned the question whether members of the NPC’s functional committees could serve concurrently in the executive branch of the Central Government. This was a separate, and different, question from the Constitutional ban on incumbent members of the NPC SC serving in the Executive branch or in the state procuracy. After considering the rationale behind the Constitutional restriction as such, which was predicated on the potential conflict of interest, the NPC SC decided that members of the NPC’s functional committees were likewise bound by the same Constitutional prohibition for the same reason.

*Reference to legislative history and other backgrounds.

*Strict constructionism. An example in point was the construction of Art. 15 of the Marriage Law, which stipulates an obligation on the part of parents to rear, support, and educate their children and, in return, children’s obligation to support and care for their parents in old age. Here, as Cai points out, the word “children” has to be given a strict construction: In reference to the parents’ obligation, the word “children” connotes minors or children incapable of supporting themselves on their own. The latter reference to the children’s obligation toward their parents in old age, on the other hand, implies grown-up children who have the capability of making a living by the use of their own labor.

The Role of the Basic Law Committee in NPC SC’s Interpretation Function

The mandate for a Hong Kong SAR Basic Law Committee (or Basic Law Committee, for short) was contained in a decision of the NPC, dated April 4, 1990, known by its long name: “The NPC Decision Approving the Recommendation of the HKSAR Basic Law Drafting Committee for the Establishment of a Committee for the Basic Law of the Hong Kong Special Administrative Region, under the Standing Committee of the National People’s Congress.” As per this Decision, the Basic Law Committee was inaugurated on 1 July 1997, for a term of five years, to function as a “working committee” under the NPC SC.^{13/} The Committee’s

membership of twelve includes six each from Hong Kong and China proper. The Committee's Chairman, Xiang Chunyi, is from China proper; and its Vice Chairman, Huang Baoxin (in Mandarin pronunciation), is from Hong Kong. The six Hong Kong members were nominated, from among local pundits who are Hong Kong permanent residents and holding no foreign passports, by the SAR's Chief Executive in conjunction with the President of the territory's Court of Final Appeal. Backgrounds of the mainland Chinese contingent of six were more mixed: Mr. Xiang, the Chairman, and Qiao Xiaoyang, another member of the Basic Law Committee, are veterans from different legal-work committees of the NPC SC. Liu Zheng, a third member of the Committee, is a Deputy Secretary-General of the NPC SC. Wu Jianfan, the fourth member of the Committee, is from the Institute of Law, Chinese Academy of Social Sciences, who participated in the erstwhile Basic Law Drafting Committee. The remaining two members, Wang Yingfan and Chen Ziyang, are from either the Chinese foreign service or the State Council's Hongkong and Macao Office.

Although the Basic Law Committee is billed as a regular working committee under the NPC SC, all indications are that, on an ordinary day, it is not in fact a functioning unit. This is not surprising, as the Committee is in place essentially in anticipation of a rare occasion when the NPC SC, pursuant to Art. 158 of the Basic Law, is to consult the Committee before making an interpretation of the Law.

People in the know in Beijing liken the Committee to a "spare tire," whose real value is not appreciated until the right occasion arises. In terms of its function and status, the best description I have heard is that it is comparable to the Commission of Legislative Affairs (fazhi gongzuo weiyuanhui) alluded to earlier, except that the latter, with a staff of 200, has to deliver on a routine basis. While likewise a unit under the NPC SC, the Basic Law Committee, on the other hand, may not have to deliver anything unless and until consulted by its parent organization at the opportune moment. If the analogy with the Commission of Legislative Affairs is valid, then the Basic Law Committee's expert opinions, offered when consulted, are only recommendations for the ear of the NPC SC before it has to make a final decision. The Commission of Legislative Affairs is known to offer alternative plans or solutions, to be selected by its patron.^{12/} If this is any guide, it may very well be what one can expect of the Basic Law Committee to do, namely: submitting alternative answers on demand for questions

framed and posed by the NPC SC in the course of finding an appropriate interpretation when clarification of certain provisions of the Basic Law is sought by an application of the SAR's Court of Final Appeal.

Both by dint of Art. 158 of the Basic Law, and in light of the past practice of the NPC SC of not making a final decision, on interpretation as well as on legislative matters, without having considered a "menu of choice," as it were, offered by a relevant component unit within the NPC. The moral of all this is: The Basic Law Committee will have plenty of opportunity to have its views heard before the NPC SC ends its search for a definitive answer in rendering an interpretation of the Basic Law. I may add an obiter dictum in this connection: the six members hailing from the Hong Kong SAR seem to have an institutionalized channel for making their input and, hopefully, an impact. Another healthy avenue of input would conceivably be through the Hong Kong delegation to the NPC, especially if it is adequately represented on its Standing Committee. The only way they (the Hong Kong members of the Basic Law Committee and the Hong Kong deputies in the NPC) will be deprived of an opportunity to make their views known to the NPC SC is when they abdicate their responsibility and remain quiet.

Conclusions

From the above discussion, the following conclusions seem to be in order:

(a) The role to be played by the NPC SC in the interpretation of the Hong Kong Basic Law is framed by the peculiar Center-locality relationship as defined by China's unitary system. Although the NPC SC is obliged, under Art. 158 of the Basic Law, to consult the Basic Law Committee before making a decision in the interpreting process, the fact is that the said Committee is an organ under the NPC SC. The only crucial difference between the Basic Law Committee and other organs similarly under the SC's jurisdiction, such as the Commission of Legislative Affairs (fazi gongzuo weiyuanhui) is that half of the former's membership is made up of publicists from Hong Kong.

Since the Hong Kong SAR is the first and thus far the only "special administrative region" established by the Center, acting through the NPC SC as it did, under Art. 31 of the

PRC Constitution, there is no stare decisis, or body of precedents of similar past NPC SC interpretation practice relevant to the HKSAR's Basic Law. The NPC SC's cumulative record of legislative interpretation with regard to the PRC Constitution and to its own legislations enacted earlier, seems, however, to be the only thing capable of offering a preview of what the NPC SC might do in the event an interpretation of the Hong Kong SAR Basic Law is called for.

(b) If the experience of the Legislative and Legal-Work Committee is any guide, the Basic Law Committee, which the NPC SC has to consult when the occasion arises for an interpretation of the Law, will play an indispensable but relatively limited role in the process. Its role will likely be confined to doing the necessary leg-work and drawing up a "menu of choice," consisting of alternative answers, for consideration by the NPC SC before it makes the final decision. Still, the six Hong Kong members on the Basic Law Committee, along with the Hong Kong delegation to the NPC, will have plenty of opportunity to have their input presumably presented from the perspective of Hong Kong 's residents, if it should be at variance with the Center's policy orientation.

ENDNOTES

1. Cf. Cai Dingjian and Liu Xinghong, "On Legislative Interpretation," Zhongguo faxue [Chinese Legal Science], No. 6, 1993, 36-43.
2. Cf. the Tenth Amendment, Constitution of the United States of America.
3. A most eloquent exposition of this point is in Xu Anbiao, "The Delinication of Powers Between the Center and the Localities," Zhongguo faxue [Chinese Legal Science], No. 3, 1996, 38-43.
4. Xu Anbiao, op. cit., at 41.
5. Wu Jianfan, "'One Country, Two Systems' and the Hong Kong Basic Law," Zhongguo faxue [Chinese Legal Science], No. 3, 1997, 3-15, at 6.
6. Cai and Liu, op. cit., at 37.
7. Wu Jianfan, op. cit., at 11.
8. Cai and Liu, op. cit. at 40. According to Art. 17 of the Basic Law, the NPC SC has the power to review laws enacted by the HKSAR's legislature, to determine if they conform to the provisions and intent of the Basic Law.

9. I am grateful for this information provided in a personal communication by Professor Cai Dingjian of Beijing University (Beida), who before joining the Beida faculty had been for ten years with the legal research arm of the NPC SC, something, I reckon, comparable to the Congressional Research Service in Washington, D. C.

10. This discussion is based on Cai and Liu, op. cit., at 41, and a personal communication from Prof. Cai.

11. Cai and Liu, op. cit.

12. Ibid., at 42-43.

13. Gazette of the NPC SC, No. 4, 1997, at 594.

14. Based on personal communications from Prof. Cai, in response to my queries.