

Research on the System of Interpretation of the Basic Law of Hong Kong

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Abstract: The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (PRC) is implemented within the framework of the law rule, which is closely related to the Basic Law interpretation mechanism. It is stipulated in the Basic Law that the Standing Committee of the National People's Congress (NPC) has the authority of interpretation, and the Standing Committee of the NPC authorizes Hong Kong (HK) courts to have the power of interpretation when trying cases. Under the "One Country, Two Systems" policy, the common law goes on to be adopted in HK according to the Basic Law provisions. Therefore, that Law combines the background of the socialist law mechanism with Chinese features as well as the common law mechanism. The interaction and coordination between the two is an important issue in its implementation. This paper provides an overview of HK Basic Law interpretation system, and provides an overall review of the five interpretations of the National People's Congress Standing Committee since the construction of HK Special Administrative Region (HKSAR). It analyzes differences in legal interpretation rules between the two regions, and explores the connection and coordination between the two interpretation mechanisms of the NPC Standing Committee and HK courts.

Keywords: the Basic Law of Hong Kong, the System of Interpretation, the NPC Standing Committee

1. Introduction

In 1997, "one country, two systems." policy began to be conducted in Hong Kong. To implement this primary national policy, the fundamental Law of Hong Kong implements "The PRC's HK Special Administrative Region". With a view to upholding this basic national policy, HK Basic Law of Special Administrative Region of the PRC has already been implemented nationwide. That Law is considered as HK constitutional law which condenses the legal wisdom of Chinese mainland and HK. Furthermore, it's also one result of achieving a balance between the mainland legal system and the Anglo-American legal system in HK.

Although Basic Law has achieved good results in dealing with the significant differences in the legislative tradition between China and Britain, as well as various interests and concepts in Hong Kong society. It has also given rise to many controversies. Among these disputes, the right to interpret that law has become an important aspect of the dispute. The interpretation system of HK Basic Law was established together when the law is implemented. It's just for more than 20 years, there are still many conflicts and differences between the Basic Law that the Standing Committee of the National

People's Congress (NPCSC) and HK courts in the existing judicial interpretation system. With the aim of ensuring an accurate comprehending and fulfillment of the Basic Law, this specific research and analysis on the interpretation regime of HK Basic Law is of great theoretical and practical significance.

2. Materials and methods

2.1. Evolution of HK statutory interpretation system

Before the return, HK belonged to the system of the common law under British law. According to the tradition of the common law system, the court is both a judicial authority and has the capability of explaining the law. Interpreting the law is generally completed. Simultaneously, cases are handled via the judicial authority, that is, interpreting the law exists in the judicial process, and both belong to the same process. At that time, the Judicial Committee of the Privy Council of the UK was highest interpretive authority in HK, with the authority of final judicial review and interpretation, while the HK Supreme Court did not possess the authority of final judicial review.

After Hong Kong returned back in 1997, under the guidance of "One country, two systems" and the Constitution, the issue on the interpretation power of HK Basic Law was explicitly stipulated in Article 158 of the law. The first clause of this article clearly states that the power of interpretation concerning HK Basic Law pertains to the Standing Committee of the National People's Congress, and synchronously authorizes HK courts to explain HK Basic Law in the second clause. The third clause stipulates that although the Court of Final Appeal of HKSAR has the authority of judicial final adjudication, it is necessary to request an explanation from the Standing Committee of the NPC prior to making a final judgment that is not appealable in specific circumstances. The fourth clause requires the Standing Committee of the NPC to consult opinions on its HKSAR Basic Law Committee before interpreting the Basic Law.

In the interpretation system of the Basic Law, we can deeply appreciate that the design of this system fully demonstrates this principle of "One country, two systems". According to Chinese Constitution, the Standing Committee of the NPC executes the authority of interpreting laws, additionally; it has the ultimate power of interpretation. HK Basic Law was stipulated via the NPC and interpreted by the Standing Committee of the NPC, reflecting this principle of "One country". But because the Basic Law is mainly applied specifically in Hong Kong, which has a strong tradition of common law, retaining the original interpretation system in HK also reflects the "Two systems".

2.2. The basic features of HK Basic Law explanation system

Interpreting HK Basic Law differs among scholars. Some scholars refer to it as the "dual-track system of interpretation of HK Basic Law," arguing that within a unitary state, "one country, two systems" implies that the central Government system is superior to that of the local Government and that the operation of the two systems inevitably gives rise to a situation of "equality" and "inequality." And this inequality of power attributes and ideological equality constitutes a two-track power relationship [1]. Some scholars have also called it the "dualistic mechanism for explaining HK Basic Law," arguing that the mechanism for interpreting it not only recognizes that it has been a part of Chinese legal mechanism but also establishes that Hong Kong will continue to practice the Common Law and that a single party can't propose a solution, also allows for a "one country, one country, one country" principle to prevail. This is in line with the code of "one country" and can maintain the direction of "two systems"[2].

Some scholars refer to it as the "monistic interpretation mechanism" or the "dual interpretation mechanism", believing that the interpretation of the NPC Standing Committee and the interpretation

of the HK Court of Final Appeal become inherent rights in terms of power nature. The latter comes from the authorization of the former, is a successor power, and belongs to the former. In terms of power relations, it is the relationship between authorization and being authorized. In terms of status effectiveness, the latter must submit to the former. In terms of scope of interpretation, the former can interpret all terms on its own, while the latter must be able to interpret certain terms under strict conditions and procedures. In terms of the activation of the power of interpretation, the former has both initiative and passivity, while the latter can only be exercised during the trial of a case, which has passivity. Therefore, this interpretation mechanism of HK Basic Law can be summarized as the "monistic interpretation system" or the "dual interpretation system". The "monistic interpretation system" reflects the power of the Standing Committee of the NPC to interpret and the interpretation power of HK courts comes from its authorization. The former has characteristics such as higher legislative interpretation than the latter's judicial interpretation. The "dual interpretation system" or the "dual interpretation system related to principal and subordinate" indicates that the two interpretation powers or subjects cannot be achieved by other formulations [3].

From this point, we can see that Hong Kong courts' explanation of the Basic Law is not based on customary law, but is obtained purely from the authorization of NPCSC, which is the most fundamental feature of the HK system of interpreting that Law [4]. Therefore, Hong Kong courts must abide by provisions of the Constitution and the Basic Law when interpreting the law.

3. Results and discussions

3.1. Five explanation of the Basic Law by the NPCSC in practice

3.1.1. Initiation and reasons for interpreting the Basic Law

In last five times, the explanation of the Basic Law via NPCSC is mainly based on the interpretation of the first three periods, previous scholars have already had a sufficient summary, and we will focus on the latter two interpretations of it.

In 1999, due to the controversy surrounding the judgment of the abode right case, the HK government chose to bypass the HK Court of Final Appeal after evaluating advantages and disadvantages of amending that law and inviting the "People's Congress to interpret the Law". The Chief Executive applied for the State Council and submitted a procedural request to the Standing Committee of the NPC for an explanation of Articles 22 and 24 of HK Basic Law. The above-mentioned law interpretation in 2004 was initiated by the Standing Committee of the NPC in response to Article 7 of Annex 1 and Article 3 of Annex 2 of the above-mentioned law. The reason for the interpretation of the law in 2005 was the resignation of the then Chief Executive, Dong Jianhua, which sparked a lot of controversy around the by election process. Similar to the first interpretation, the interpretation of the law is requested by the Chief Executive to the State Council, and then submitted to the Standing Committee of the NPC.

As to the 2011 Congo case, due to the incapability of determining whether China's absolute sovereign immunity could be applied in Hong Kong, Hong Kong courts faced jurisdictional issues, triggering the condition formulated in Article 158 of the Basic Law to "interpret the provisions of this Law regarding affairs handled by the Central People's Government or the correlation between the Central Government and the HKSAR, which in turn affect the case judgment". Finally, the HK court required the Standing Committee of the People's Congress to explain the law. That is also the only time that the HK Court of Final Appeal has voluntarily requested the Standing Committee of the NPC to explain disputed Basic Law provisions according to the procedures, with standardized procedures and timely resolution of disputes, which is a model in previous interpretations of the law. The law is interpreted in 2016, which was initiated by the Standing Committee of the NPC with the intention of

timely curbing and combating the separatist "Hong Kong independence" forces. It clarifies the legal conditions and necessary procedures for the election and appointment of public officials when taking the oath, and also stipulates the form, attitude, process, content, and supervision system of the oath.

3.1.2. Purpose of the interpretation

The basic Law was interpreted in 1999 with the intention of clarifying many vague and misunderstandings about the enactment of laws caused by the issue of residency rights to prevent the creation of social chaos.

The basic Law was interpreted twice in 2004 and 2005 to make the executive authorities exercise their functions and powers in a long-term and efficient manner and guarantee a perfect conversion of political power through interpreting it. Hong Kong will not come to a standstill because of this incident.

The Basic Law was interpreted in 2016, which effectively combated the forces of "HK independence" and prevented people who disagree with national sovereignty from entering the Legislative Council.

All in all, the five legal interpretations are instrumental in the practical fulfillment, stability and operation of the Basic Law [5].

3.2. Comparison of rules of interpretation

From the above five interpretations of the Basic Law, there are differences in the rules of interpretation applied by the NPCSC and the Hong Kong courts.

(1) The Standing Committee of the NPC emphasizes that interpretation should abide by the original intention of legislation, while Hong Kong courts focus on teleological interpretation [6]. The legislative interpretation rules of the Standing Committee of the NPC emphasize that law interpretation must comply with "original intention of the legislation" or be limited to the meaning of the articles themselves, while the judicial interpretation of Hong Kong courts adopts the common law legal interpretation rules to explore the "intention of the legal text" and tends to be "teleological" interpretation.

(2) In the theory concerning law interpretation of the Standing Committee of the NPC, law interpretation mainly starts from the aspects of context, history, system, purpose and so on, while HK courts, influenced by tradition of the common law system, will comprehensively adopt literal rule, the golden rule and the mischief rule and the purpose interpretation method for legal interpretation.

(3) The legal interpretation of the Standing Committee of the NPC is abstract, while the legal interpretation of HK courts is specific. The legal interpretation of the Standing Committee of the NPC will not be combined with the trial of specific cases and it belongs to the category of "abstract interpretation". The law interpretation by HK courts must be combined with specific cases, and courts have no authority to make abstract interpretations of hypothetical legal issues.

3.3. Recommendations for harmonization of the interpretation system

(1) The NPCSC in interpreting the Law should be listed in detail to support the primary interpretation. In countries where common law is adopted, legal interpretations are supported by detailed explanatory notes, which record the process of factual and legal reasoning to achieve the most convincing judgment. The common law tradition has deeply influenced Hong Kong and it will be more receptive to such reasoning. Of course, this does not mean that the NPCSC's interpretation needs to follow the standard law interpretation model entirely. Still, it needs to be able to at least list each interpretative base's source and screening process. For example, in the case of textual and logical interpretation, it can explain the literal meaning of the material and the process of reasoning. In the

performance of the original purpose, it can explain how the original meaning is arrived at, and so on. Helping the Standing Committee of the NPC gain advantages of common law interpretation when the law is interpreted, effectively enhancing its recognition in future interpretations, and also effectively coordinating the common and socialist law systems interpretation rules.

(2) The same rules of interpretation should maintain consistency. The five interpretative practices apply different rules of interpretation. Although applying interpretation rules according to specific circumstances is a common practice in various countries around the world, using the same interpretation rule can bring more consistency to the interpretation, making the application of interpretation rules more logical, and subsequent reasoning will also be more rigorous.

4. Conclusion

Behind the collision of the two powers of interpretation is the difference in the systems of legal interpretation, which is inevitable as long as there is a dual system of legislative and judicial interpretation co-existing in the same region. However, such a conflict does not necessarily lead to a "zero-sum game." Both interpretative powers are intended to protect the effective operation of the Basic Law, so even if the results of the two interpretations may be different, they need to join hands to achieve their ultimate goal and should not be restricted by the differences in the legal systems, but rather, should make up for the inadequacies of each other, to effectively avoid the harm caused by the misapplication of the Basic Law. Instead, they should compensate for each other's deficiencies to avoid the injury caused by incorrect application. Legal systems are not static, and it is believed that with the deepening of legal exchanges between the two places, the formation of a dialogue mechanism, and the strengthening of the integration of constitutional culture, the two systems of legal interpretation will achieve better convergence and integration.

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