

The Bar's Position Paper on the
"Procedure for seeking an interpretation of the Basic Law under Article
158(1) of the Basic Law"

1. The LegCo Panel on Administration of Justice and Legal Services asked the Hong Kong Bar Association ("the Bar") to attend a meeting on 27 February 2012 where the topic of "Procedure under Article 158(3) of the Basic Law for the Court to make a reference to the Standing Committee of the National People's Congress for an interpretation of the Basic Law" was discussed. The meeting was attended by Mr Hectar Pun (on behalf of the Bar), the Secretary for Justice, the Solicitor General and a Deputy Law Officer (on the Administration's behalf).

2. At the meeting, the Bar reiterated its position on "judicial reference" as set out in its Press Statements issued on 8 June 2011 and 13 June 2011 respectively and emphasised that the procedure for interpretation should be made more transparent because:
 - (1) the Standing Committee of the National People's Congress ("NPCSC") was interpreting the Basic Law of the HKSAR which is a national law of the People's Republic of China ("PRC");

 - (2) as the Interpretation would be binding on the Courts of the HKSAR, the parties to the litigation should be given a right to make representations to the NPCSC before the Interpretation was issued;

 - (3) since the Interpretation would affect not only the parties to the litigation but also impact on the Hong Kong society, it was advisable that Hong Kong residents, scholars and interested bodies (such as the Hong Kong Bar Council and the Law Society) should also be consulted. In fact, the Legislative Council of Hong Kong routinely consults the Bar on all major legislative initiatives.

3. The Bar has now been asked by the Panel to attend its meeting on 28 May 2012 to discuss on the topic of “Procedure for seeking an interpretation of the Basic Law under Article 158(1) of the Basic Law”.

4. The Bar notes that:

(1) Article 158(1) of the Basic Law was commented in Chan and Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011) where at paragraph 2.082¹, reference was made to the judgment of the Court of Final Appeal (“CFA”) in *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300. There, the CFA, unanimously rejected the submission that the NPCSC’s power of interpretation under Article 158 was confined to act within the scope of Hong Kong’s autonomy and held that the power of the NPCSC is plenary and not limited by Article 158(2) and (3); it extends to any provision of the Basic Law and may be invoked in the absence of pending litigation.

(2) Further, in paragraphs 7.125 to 7.126², the learned authors suggested that “shortly after the Basic Law came into force, the CE realised that he may also enjoy a similar power to request the NPCSC to make an interpretation of the Basic Law, even though such power may not have been granted expressly by the Basic Law”.

(3) The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR (Adopted by the Standing Committee of the Ninth NPC at its Tenth Session on 26 June 1999) recites in the Preamble that the State Council submitted the relevant motion requesting the NPCSC to interpret the specified provision of the Basic Law “upon the report furnished by the Chief Executive of the Hong Kong Special

¹ C. L. Lim & Johannes Chan, “Autonomy and Central-Local Relations” in Johannes Chan & C. L. Lim (eds), *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2011)

² Benny Tai, “The Chief Executive” in Johannes Chan & C. L. Lim (eds), *ibid.*

Administrative Region under the relevant provisions of Articles 43 and 48(2) of the Basic Law”.

- (4) In paragraph 2.054³, specific reference was made to the report of the Chief Executive of 20 May 1999 and the “reasoning that while the courts have the express authority under the Basic Law to request such an authoritative interpretation, so too does the Executive Branch on account of its duty to apply the laws of Hong Kong”.
- (5) The report of the Acting Chief Executive to the State Council dated 6 April 2005, which led to the State Council’s motion requesting and the NPCSC adopting the Interpretation by the NPCSC of Article 53(2) of the Basic Law of the HKSAR (Adopted by the Standing Committee of the Tenth NPC at its 15th Session on 27 April 2005), also refers to Articles 43 and 48(2) of the Basic Law.
- (6) Li Fei, the Deputy Director of the Legislative Affairs Commission of the NPCSC, made reference in his Explanation of the Draft Interpretation to the NPCSC Session on 24 April 2005 to the “function” (職權) conferred under Articles 43 and 48(2) of the Basic Law upon the Chief Executive in respect of the Acting Chief Executive’s report to the State Council.
- (7) In this connection, Benny Tai, a legal academic from the University of Hong Kong, was of the view that “[the] NPCSC’s interpretations did not explain on what basis the power to make a request to the NPCSC for interpreting the Basic Law by the CE could be derived from these two very general provisions”. Earlier, Benny Tai indicated at paragraph 7.003 that the Chief Executive “is supposed to be the agent of the Beijing Government in Hong Kong to protect the interests of the sovereign in the territory”.

³ See note 1 above.

5. Article 43 of the Basic Law designates the Chief Executive as the head of the HKSAR and shall represent the HKSAR, and is accountable to the Central People's Government and the HKSAR in accordance with the provisions of the Basic Law. Article 48(2) provides that the Chief Executive is to be responsible for the implementation of the Basic Law and other laws which apply in Hong Kong.
6. In relation to Article 43 of the Basic Law, the Bar notes that C L Lim considers at paragraph 28.063⁴ of Chan and Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011) the accountability of the Chief Executive to the Central People's Government and suggests that the Chief Executive "is therefore at liberty, and possesses a constitutional duty, to report fully to the Central People's Government about the situation in Hong Kong". At paragraph 28.064, he referred to the parts of Article 43 which state that the Chief Executive "shall represent the Region" and "be accountable to the [HKSAR]", Lim indicates that these words clearly suggest that "the Chief Executive represents the people of Hong Kong and their views".
7. A descriptive account of how the 1999 NPCSC Interpretation and 2005 Interpretation came about revealed that the following steps had been taken:
 - (a) the Chief Executive of the HKSAR made a report to the Central People's Government/ State Council;
 - (b) the State Council, having considered the Chief Executive's report, proposed a motion to the NPCSC according to the Constitution of the People's Republic of China and the Basic Law;
 - (c) the NPCSC's Council of Chairmen, having considered the motion of the State Council through its Legislative Affairs Commission, decided to place the adoption of an interpretation of the Basic Law in the agenda of a session of the NPCSC;

⁴ C. L. Lim, "Right to Vote and Right to Political Participation" in Johannes Chan & C. L. Lim (eds), *ibid.*

- (d) the NPCSC's Committee for the Basic Law of the HKSAR was consulted in respect of a draft of the interpretation of the Basic Law;
 - (e) the NPCSC Session deliberated in the plenary meeting and sub-division meetings on the draft of the interpretation of the Basic Law (including initially the presentation of an explanation of the draft by the Legislative Affairs Commission and following sub-division meetings, the presentation of the results of the deliberation by the Law Committee) and then voted on the adoption of the interpretation;
 - (f) the promulgation of the adopted interpretation of the NPCSC and its subsequent publication.⁵
8. It appears that Steps (b) to (e) have corresponding underpin in the Constitution, the Organic Law of the National People's Congress, and the Rules of Procedure of the NPCSC respectively.

⁵ It might be useful to note that on 17 November 2011, the Chief Executive of the Macao Special Administrative Region wrote to the NPCSC to seek the consideration and determination (酌定) by the NPCSC of whether it was necessary for there to be an interpretation of Paragraph 7 of Annex I and Paragraph 3 of Annex II to the Basic Law of the Macao Special Administrative Region. The Council of Chairmen of the NPCSC considered the letter and came to the view that in accordance with Article 67(4) of the Constitution and Article 143(1) of the Basic Law of the Macao Special Administrative Region it was necessary and appropriate for the NPCSC to make an interpretation of the relevant provisions of Annex I and Annex II to the Basic Law of the Macao Special Administrative Region. The NPCSC deliberated on a draft interpretation in its December 2011 Session and adopted the interpretation to Annex I and Annex II to the Basic Law of the Macao Special Administrative Region on 31 December 2011. The Chief Executive of the Macao Special Administrative Region had in this episode approached the NPCSC directly without the intervention of, or through the good offices of, the State Council. Previously, the Council of Chairmen of the NPCSC initiated in 2004 the making of an interpretation of Annex I and Annex II to the Basic Law of the HKSAR, which was adopted by the NPCSC Session on 6 April 2004.

9. Regarding Step 7(a), it is worth noting that the Bar issued a Press Release in May 1999 to express its disapproval of the Government's manoeuvre to seek a re-interpretation of a case decided by the Court of Final Appeal. The Bar doubted that it was constitutionally or legally unacceptable for the Government to seek re-interpretation of the provisions of the Basic Law decided by the Court. Further, the Bar also made a Statement on 14 April 2005 to express its deep disappointment at the Acting Chief Executive's decision to request the NPCSC to interpret Article 53 of the Basic Law when there were pending judicial review applications raising the issues of interpretation of the same article of the Basic Law. (Both the Press Release and Statement are attached for ease of reference.)
10. Article 158(3) of the Basic Law prescribed a mechanism for the Court of Final Appeal to refer provisions of the Basic Law that are excluded provisions for interpretation by the NPCSC before final adjudication of a case, so long as the interpretation of those provisions are necessary in the adjudication of that case. This mechanism is generally referred to and known as the "judicial reference".
11. There are no provisions in the Basic Law of the HKSAR which specifies a mechanism for seeking an interpretation of the Basic Law by the NPCSC other than "judicial reference" made by the Court of Final Appeal under Article 158(3).
12. The Basic Law of the HKSAR is a national law and the NPCSC is vested with the power to interpret national laws under the Constitution. The State Council is clearly empowered under the Constitution and the Rules of Procedure of the NPCSC to submit proposals to the NPCSC. The absence of provisions in the Basic Law of the HKSAR specifying a procedure for seeking an interpretation of the Basic Law by the NPCSC other than judicial reference made by the Court of Final Appeal under Article 158(3) does not, however, preclude the Central Authorities from deciding that an interpretation of certain provision(s) of the Basic Law of the HKSAR is necessary and appropriate, and proceeding to draft, deliberate and adopt such an interpretation.

13. The fundamental question (from the Bar's point of view) is whether it is constitutionally or legally acceptable for the Chief Executive to submit a report requesting the Central People's Government to consider proposing to the NPCSC for interpretation of the Basic Law. This question can only be answered by reference to a particular situation and cannot and should not be answered in a vacuum.
14. Nevertheless, the Bar would respectfully suggest that the Chief Executive, when deciding whether he would request the State Council to propose to the NPCSC for an interpretation of certain provision(s) of the Basic Law, should take into account a myriad of factors, including in particular that he should, where and whenever it is possible, to promote the autonomy of the HKSAR as opposed to intervention of the Central Authorities; further that he should respect the principle of separation of powers, and be fully supportive of the independent judicial power guaranteed under the Basic Law. Lastly, such a reference should always be considered as the very last resort and would only be invoked after the most careful consideration of all the circumstances then prevailing. The Bar would also encourage the Administration that, whenever possible, to consult the public and the legal profession to solicit views and consensus before making a decision.

Dated the 25th day of May 2012.

The Hong Kong Bar Association