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China (People's Republic).  
Consultative Committee for the  
Basic Law of the Hong Kong Special  
Administrative Region. Special  
Group on Law

1381158-01      Final report on powers of  
interpretation and amendment of the  
basic law. [1987].

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FINAL REPORT ON  
POWERS OF INTERPRETATION  
AND AMENDMENT OF THE BASIC LAW

(passed by the Executive Committee on 14 March 1987)

Special Group on Law;

Special Group on  
the Relationship between  
the Central Government and the HKSAR

1. Provisions on Power of Interpretation and Amendment of the Basic Law under the Joint Declaration:
  - 1.1 "The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, ...." (para 1, Section 1, Annex I)
  - 1.2 "Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication." (para 2, Section I, Annex I)
  - 1.3 "After the establishment of the Hong Kong Special Administrative Region the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation, and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region Legislature." (para 1, Section II, Annex I)
  - 1.4 The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. "The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid."
  - 1.5 "The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region Legislature as above."
2. The present practice regarding the interpretation of law in force in Hong Kong
  - 2.1 Under the common law, the legislature enacts legislation and the courts interpret the legislation and thereby declare the meaning of the law.

- 2.2 All courts of Hong Kong have the right to and must interpret any law which relates to the specific cases which they are adjudicating. Furthermore, all courts are bound to apply any legislation which is relevant to the case then being tried, even though the meaning may be obscure or the courts may consider the legislation is in need of amendment. Any judicial interpretation by the Court of Appeal is binding on all courts in Hong Kong including other courts of appeal. Judicial interpretation made by other courts are authoritative and binding on lower courts to a certain extent.
- 2.3 The courts in interpreting any law have the power to declare invalid any law which has not been passed in accordance with proper procedures or if it is subordinate or subsidiary legislation and contravenes the superior legislation.
- 2.4 The courts have no power to adjudicate on hypothetical issues and hence, decide either legal questions in the abstract or academic issues. Hence, the courts have no power to interpret laws other than as part of their judicial decision in a specific case.
- 2.5 The power of final adjudication at present lies with the Privy Council in the United Kingdom.
- 2.6 Under the law of Hong Kong, there is no power of interpretation of laws by the legislature and indeed, insofar as the legislature may express opinions as to the meaning of certain legislation whether it be legislation to be passed or which has been passed, the same will not be considered by the courts. Furthermore, the courts will not give retrospective effect to legislation unless constrained to do so by the wording of the legislation itself.
- 2.7. There is no power of executive interpretation under the law of Hong Kong. Interpretation made by the executive authority of laws in the course of its administration is unofficial, has no binding effect and is in any event, subject to review by the courts under their judicial functions.
- 2.8 Other interpretation of legislation, for example in textbooks may be allowed to be cited in courts if the author is considered as "authority" but as a legal matter, such interpretation has no more than persuasive effect.

2.9 There are certain matters, chiefly relating to foreign affairs where the declaration of the Government is treated as a conclusive statement binding upon the courts. Such declarations may be described as Acts of State. They relate to matters which fall to the executive to determine:-

- (a) Recognition of States or Government.
- (b) Status of foreign States of Government.
- (c) The question whether a person is entitled to diplomatic status.
- (d) The existence of a state of war.
- (e) The extent of national territory.

This executive "Act of State" is treated as a declaration of an existing state of facts and not as interpretation of the law.

3. Interpretation of laws and the system in force in the People's Republic of China

3.1 It is understood in the People's Republic of China, legal interpretation may be divided into 2 broad groups, namely: official and unofficial interpretation.

3.1.1 Official Interpretation

(a) Provisions under the Chinese Constitution:

Article 62

"The National People's Congress exercises the following functions and powers:

- (1) to amend the Constitution;
- (2) to supervise the enforcement of the Constitution;
- (3) to enact and amend statutes concerning criminal offences, civil affairs, the state organs and other matters;
- (11) to alter or annul inappropriate decisions of the Standing Committee of the National People's Congress;"

Article 67

"The Standing Committee of the National People's Congress exercises the following functions and powers:

- (1) to interpret the Constitution and supervise the enforcement;
- (2) to enact and amend statutes with the exception of these which should be enacted by the National People's Congress;

- (3) to enact, when the National People's Congress is not in session, partial supplements and amendments to statutes enacted by the National People's Congress provided that they do not contravene the basic principles of these statutes;
- (4) to interpret statutes;"
- (b) By Articles 67(1) and (4) of the Constitution, the Standing Committee of the National People's Congress (NPC) has the function and power to interpret the Constitution and statutes. Although the Constitution does not empower the NPC itself to undertake the work of legislative interpretation by Article 62(11), the NPC may amend or cancel inappropriate decisions of the Standing Committee of NPC. In addition, apparently, local legislation may be interpreted by the relevant local legislature.
- (c) Legislative interpretations made by the Standing Committee of the NPC are binding on the courts.
- (d) These legislative interpretations are not restricted to be made to a specific case. Power of legislative interpretation can be exercised with or without the context of a specific case.
- (e) Actual examples of the Standing Committee of the NPC exercising this power of interpretation is rare and thus it is difficult to assess its impact on the judicial system.
- (f) Judicial interpretation carries with it a lower status and may be exercised not only by judges but also by the procuracy. The power of judicial interpretation is delegated to a given judicial or procuratorial body from the relevant legislative body and binds only the case under consideration wherein such a power was exercised. It has no generally binding effect.
- (g) Executive interpretation likewise occupies a less than exalted status. It denotes that power of interpretation of the law exercisable by the executive organs of government when confronted with particular cases in the course of discharging their executive or administrative duties.

### 3.1.2 Unofficial Interpretation

Unofficial interpretation mainly applies to the interpretation of laws in academic researches,

publications and textbooks. This kind of interpretation has no legal binding effect.

4. The power of interpretation of the Basic Law

The Basic Law will be legislation enacted by the NPC under powers conferred upon it by Article 31 of the PRC Constitution which stipulates that "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." The Basic Law thus will become a constitutional instrument governing Hong Kong. Furthermore, Hong Kong and the PRC exercise very different legal systems as delineated in Sections 2 and 3 above. The following points arise:

4.1 The Jurisdiction of the courts of Hong Kong in respect of the Basic Law.

Views have been expressed that in keeping with the Joint Declaration and in particular, in preserving the laws presently in force in Hong Kong, the courts of Hong Kong will of necessity have to interpret all laws in force in Hong Kong including the Basic Law. Under the common law, no interpretation other than judicial interpretation by a court of record would be recognised by the courts.

The power of interpretation would operate in the following way:

- i. It has been proposed that if in the course of litigation a dispute arises as to whether the interpretation of the Basic Law involves a determination as to whether it is a matter of defence or foreign affairs, the question may be referred either by direction of the court or upon application of one of the parties to a constitutional court composed partially of representatives of NPC and partially of Hong Kong judges. Again, in keeping with the existing law, the courts would be empowered to reach their own conclusion in cases where they felt able but their decisions would be subject to review by the constitutional court on an application by one of the parties. A view has also been expressed that the constitutional court referred to above should be a committee rather than a court. A committee could potentially exercise jurisdiction of its own motion

whereas a court only exercises jurisdiction upon application. Likewise a committee is able to look into hypothetical questions whereas a court only looks at issues involved in a particular case.

- ii. Whether the body constitutes a committee or a court, it should be open to the parties to proceedings in court and to representatives of the NPC and the SAR Government (presumably the Attorney General or any later equivalent) to appear before the body and make representations.
- iii. No determination of the body referred to above should have retrospective or retroactive effect nor should it affect the validity of any act bona fide done under any law declared to be invalid as a result of a ruling of the body. Anybody who has been adversely affected by anything done under a law declared to be invalid should have a right of redress as against the SAR Government.
- iv. In keeping with the existing common law in Hong Kong, the courts in applying the Basic Law will defer to the PRC executive authority in respect of all declarations as to existing facts which relate to foreign affairs.
- v. The doctrine of stare decisis should remain in force.

#### Other Views

- (i) The view has been expressed that Hong Kong courts should be allowed to interpret all parts of the Basic Law in order to maintain the independence of the judiciary and high autonomy of the SAR.
- (ii) Views have been recorded that Hong Kong courts can only in the course of adjudicating a case interpret the parts of the Basic Law which deal with the internal self government of the SAR.
- (iii) Another opinion has been recorded stating that the Hong Kong courts should have jurisdiction on all cases that involve any parts of the Basic Law. But final adjudication on these cases should rest with the Standing Committee of the NPC instead of in the Court of Final Appeal of the SAR.
- (iv) The view was also recorded expressing the worry that giving Hong Kong courts the power of interpreting the Basic Law may infringe upon the sovereignty of China

and it was not realistic to have SAR courts interpret a law enacted and promulgated by the NPC.

- (v) It has been pointed out however that unless the Hong Kong courts have the power to interpret the Basic Law, the power of final adjudication will not lie with the Hong Kong SAR as stipulated in the Joint Declaration.

4.2 Should there be legislative interpretation of the Basic Law?

Since legislative interpretation is a concept alien to the common law which by the Joint Declaration will be maintained, the question of interpretation by the legislature is something which is undesirable.

It has been suggested as follows:-

The Standing Committee of the NPC has legislative interpretation power on the Basic Law, whereas the SAR courts in dealing with cases can have judicial interpretation power to interpret each and every clause in the Basic Law.

- (i) In respect of interpretation of clauses in the Basic Law that fall within the jurisdiction of the SAR, the Standing Committee of the NPC should delegate full power to the SAR courts without reservation.
- (ii) In cases where clauses in the Basic Law that are beyond the jurisdiction of the SAR fall to be interpreted, the Standing Committee of the NPC can exercise its interpretation power upon the matter being referred to it by a special committee which comprises both SAR and Central Government. Interpretation is to be made by the Standing Committee through a special committee which comprises both SAR and Central Government representatives (SAR members should be the majority). Interpretations made by the Standing Committee will not have retrospective or retroactive effect and will not affect acquired or accrued rights or cases decided, and it will become legally binding on future cases.

The following other opinions have also been expressed:

Opinion A

It was feared that any legislative interpretation by the NPC will affect final adjudication of the SAR

court. Persons involved in a case may wait intentionally for the NPC to exercise its legislative interpretation power in the hope of a favourable interpretation of the relevant clauses. This may hinder the independence of the judicial process. If the first mentioned proposal is accepted then this fear may be alleviated.

### Opinion B

Legislative interpretation by the NPC would not affect the power of final adjudication of the SAR courts if legislative interpretation by the NPC does not have retroactive effect and shall not affect acquired or accrued rights or cases decided. If the legislative interpretation and judicial interpretation are different in a case, the case cannot be used as a precedent in future disputes. Thus the right of final adjudication of the SAR will not be affected.

- 4.3 Which party (SAR courts? PRC courts? or Committee/court comprised of members from both SAR and PRC?) should be responsible for the constitutional review of Hong Kong legislation?

Provisions under the Joint Declaration:

"The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the NPC for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid." (para 2, Section II, Annex I)

Provisions under the Chinese Constitution:

The Standing Committee of the National People's Congress has the power "to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations" (Article 67(8))

- A. The provision in the Joint Declaration that the laws enacted by the legislature of the SAR are reported to the Standing Committee of the NPC for the record simply implies that the laws to be enacted are to be so reported. It does not include or imply a power to veto. A view has also been expressed that there is no other right of veto either in the NPC or in the

Standing Committee of the NPC of laws enacted by the legislature of the SAR provided that the laws do not relate to defence or foreign affairs.

- B. The following opinions have been expressed as to how questions of whether the laws enacted by the SAR legislature are in accordance with the Basic Law should be decided. It should be noted that any legislation made by the future legislature of the SAR or any existing legislation which were to contravene the Basic Law would under the common law be held invalid by the courts as part of their judicial function. This would inevitably be so irrespective of whether there were any other mechanism for deciding whether there were contravention of the Basic Law.

It is proposed that if the Standing Committee consider that a law enacted by the legislature of the SAR reported to it infringed the Basic Law it may seek to have it declared void by the constitutional court referred to in 4.1 above. Such a reference to the constitutional court would have to be made within a specified time of the enactment being reported to the Standing Committee of the NPC. It is proposed that a suitable period would be 3 months. In default of such a reference as referred to above, any law enacted by the legislature of the SAR would be examined in the course of judicial proceedings in which its provisions fell to be considered.

Other views have also been expressed:

#### Opinion A

Courts of the SAR should have the power to adjudicate cases that involve the consistency of local legislation with the Basic Law. But the power of final adjudication of these cases should rest with the Standing Committee of the NPC.

#### Opinion B

SAR courts have no jurisdiction on cases that involve the consistency of local legislation with the Basic Law. Only the Standing Committee of the NPC has such an authority.

#### Opinion C

The Standing Committee of the NPC will not exercise

the power to declare void any laws of the SAR which do not affect the power relations between the Central Government and the SAR or which do not encroach on the Central Government's responsibility for defence and foreign affairs but which deal exclusively with Hong Kong's internal affairs. The Standing Committee's powers are in any event confined to the negative power of declaring void; it will not exercise any positive power of interpretation of the laws enacted by the SAR Government, and there is no general power of disallowance of laws by the Standing Committee or the NPC.

## 5. Amendment of the Basic Law

Provisions under the Joint Declaration:

"The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, ..... (para 1, Section I, Annex I)

Provisions under the Chinese Constitution:

Article 31

"The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."

Article 62

"The National People's Congress exercises the following functions and powers:

- (3) to enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters;
- (12) to approve the establishment of provinces, autonomous regions, and municipalities directly under the Central Government;
- (13) to decide in the establishment of special administrative regions and the systems to be instituted there:"

Article 64

"Amendments to the Constitution are to be proposed by the Standing Committee of the National People's Congress or by more than one-fifth of the deputies to

the National People's Congress and adopted by a majority vote of more than two-thirds of all the deputies to the Congress.

Statutes and resolutions are adopted by the majority vote of more than one-half of all the deputies to the National People's Congress."

5.1 The following points arise:

It is generally held that since the Basic Law shall be enacted and promulgated by the NPC, it and only it shall have the power to amend the Basic Law.

5.2 Who can propose amendments to the Basic Law?

Opinion A

Members note that under the Chinese Constitution, the NPC and the State Council have the right to propose amendments to basic statutes. The by-law of the NPC provides that 30 members of the NPC together can initiate the proposal to amend the basic statutes. Therefore the NPC should have the power to initiate amendment to the Basic Law.

Opinion B

Nevertheless, it was proposed that the SAR Government or the SAR legislature should have the right to initiate proposals for amendments of the Basic Law.

Opinion C

An opposing view to this proposal is that if people of foreign nationals are permitted to sit on the SAR legislature, then they may change a very important law of China.

Opinion D

The Hong Kong delegates to the NPC shall have the sole right to propose amendments to the Basic Law.

Opinion E

Directly elected representatives from Hong Kong shall have the sole right to propose amendments to the Basic Law.

Opinion F

The Hong Kong Legislature shall have the sole right to propose amendments to the Basic Law with no restriction on the composition of the Legislature provided they are all local inhabitants as stated under the Joint Declaration.

5.3 The procedure of amending the Basic Law

There is consensus that prior to any proposal for amendment of the Basic Law, a consultative process should be conducted in Hong Kong to consult the views of the people of Hong Kong in similar manner to the functioning of Consultative Committee for the Basic Law at present.

The view has also been expressed that in addition to the consultation process prior to any proposal for amendment to the Basic Law being considered formally by the NPC, the proposed amendment should be previously considered by the legislature of the SAR for approval. Differing views have been expressed as to whether there should be a two-thirds majority or a simple majority. However, views have also been expressed that this proposal would infringe upon the NPC's right to amend its own law (enacted and promulgated by it).

5.4 It has been proposed that the Basic Law should contain a provision prohibiting any amendment which would conflict with the Joint Declaration.

\* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

# 基本法解釋及修改權 最後報告

(1987年3月14日經執行委員會通過)

中華人民共和國香港特別行政區基本法諮詢委員會  
法律及中央與特別行政區關係專責小組  
基本法解釋及修改權工作組

1. 聯合聲明中有關基本法解釋及修改權之條文

1.1 附件一第一段：

「中華人民共和國憲法第三十一條規定：“國家在必要時得設立特別行政區。在特別行政區內實行的制度按照具體情況由全國人民代表大會以法律規定。”據此，中華人民共和國將在一九九七年七月一日對香港恢復行使主權時，設立中華人民共和國香港特別行政區。中華人民共和國全國人民代表大會將根據中華人民共和國憲法制定並頒佈中華人民共和國香港特別行政區基本法(以下簡稱《基本法》)」

1.2 附件一第一節第二段：

「除外交和國防事務屬中央人民政府管理外，香港特別行政區享有行政管理權、立法權、獨立的司法權和終審權。」

1.3 附件一第二節第一段：

「香港特別行政區成立後，香港原有法律(即普通法及衡平法、條例、附屬立法、習慣法)除與《基本法》相抵觸或香港特別行政區的立法機關作出修改者外，予以保留。」

1.4 附件一第二節第二段：

「香港特別行政區的立法權屬於香港特別行政區立法機關。立法機關可根據《基本法》的規定並依照法定程序制定法律，報中華人民共和國全國人民代表大會常務委員會備案。立法機關制定的法律凡符合《基本法》和法定程序者，均屬有效。」

1.5 附件一第二節第三段：

「在香港特別行政區實行的法律為《基本法》，以及上述香港原有法律和香港特別行政區立法機關制定的法律。」

2. 有關解釋現行香港法例的法律

2.1 根據普通法的規定，立法機關負責制定法例，法院則負責解釋法例並宣告其含義。

2.2 任何香港法院都有權力和責任對審判中的具體案件所涉及的法律進行解釋。在進行審判時，法院必須應用與受審案件有關的法例，即使該法例意義含糊或法院認為有必要修改。上訴法院所作的司法解釋對任何香港法院，包括其他上訴法院在內，均具有約束力。其他法院所作的司法解釋也具有一定程度的法律效力和權威，可以約束較低級的法院。

2.3 法院在解釋法律時，有權宣佈任何未經法定程序通過的法律或與條例有所抵觸的附屬立法為無效。

2.4 對於假設的問題(即抽象的法律問題或學術性問題)，法院無權作出裁定。因此，法院祇能在審判個別具體案件過程中進行司法解釋。

2.5 已獲香港法院裁決的案件，可呈交英國樞密院終審。

- 2.6 根據香港的法律，立法機關沒有任何解釋法律的權力。立法機關可以對某些即將或已經通過的法例的含義發表意見，但法院在進行審判時是不會考慮該等意見的。此外，除非法例本身另有規定，否則法院不得賦予該法例回溯效力。
- 2.7 在香港的法制中，並沒有行政解釋權。行政機關在其工作範圍內對法律進行的任何解釋都是非正式的，沒有法律效力的，並且需要經過法院的審查。
- 2.8 其他方面對法例的解釋，例如見於教科書上的，假如作者具有權威地位的話，可以在法院內引述，以增強說服力，但該等解釋並沒有法律效力。
- 2.9 就某些主要涉及外交事務的問題，政府的聲明具有決定性，對法院有約束力。這些聲明可稱為國家行為 (ACTS OF STATE)，所涉及的事項需要由行政機關決定：
- a. 承認某國家或政府
  - b. 外國政府的地位
  - c. 個別人士是否享有外交地位
  - d. 國家是否進入戰爭狀態
  - e. 國家領土的範圍
- 這些由行政機關決定的國家行為被視為對事實現況的聲明，而不是對法律的解釋。

### 3. 中國現行法制中的法律解釋

#### 3.1 在中華人民共和國，法律解釋可分為正式解釋和非正式解釋兩類：

##### 3.1.1 正式解釋

###### a) 中國憲法中之有關條文：

第六十二條：「全國人民代表大會行使下列職權：

- (1) 修改憲法；
- (2) 監督憲法的實施；
- (3) 制定和修改刑事、民事、國家機構的和其他的基本法律；
- (4) 改變或者撤銷全國人民代表大會常務委員不適當的決定；

第六十七條：「全國人民代表大會常務委員會行使下列職權：

- (1) 解釋憲法，監督憲法的實施；
- (2) 制定和修改除應當由全國人民代表大會制定的法律以外的其他法律；
- (3) 在全國人民代表大會閉會期間，對全國人民代表制定的法律進行部份補充和修改，但是不得同該法律的基本原則相抵觸；
- (4) 解釋法律；

- b) 根據中國憲法第67條(1)和(4)，全國人民代表大會常務委員會有權解釋憲法和法律。雖然第62條(4)沒有授權人民代表大會解釋憲法和法律，但人民代表大會也有權修改或撤銷人大常委會不適當的決定。此外，地區性法例可由有關的地區立法機關解釋。
- c) 由人大常委會作出的立法解釋對法院有約束力。
- d) 不一定要對具體案件，才可作出立法解釋。無論是否針對具體案件，都可行使立法解釋權。
- e) 人大常委會行使立法解釋權的實例極少，所以很難估計其對司法制度的影響。

- f) 司法解釋的地位較次等，該項權力可由法官或檢察機關行使。司法解釋權是由特定的立法機關授予指定的司法或檢察機關，祇對受審中的案件有約束力，而在一般情況下，是沒有約束力的。
- g) 行政解釋的地位也是較為次等的。行政解釋權是指行政機關在執行其行政或管理職務時，如遇特殊案件，可對其有權執行的法律進行解釋。

### 3.1.2 非正式解釋

非正式解釋主要是指法學方面的學術研究、著作和教科書對法律的解釋，這種解釋沒有法律約束力。

## 4. 基本法解釋權

基本法是人大根據中國憲法第三十一條：「國家在必要時得設立特別行政區。在特別行政區內實行的制度按照具體情況由全國人民代表大會的法律規定」，獲授權制定的法例，故將成為香港特別行政區的憲制性文件。此外，如上文第2、3節所述，香港與中國的法律體系截然不同。因此，便產生了以下問題：

### 4.1 香港就基本法擁有的解釋權

為了符合聯合聲明的規定和應用香港原有的法律，香港的法院在應用基本法時，必須對香港所行使的全部法律(包括基本法在內)具有解釋權。普通法規定，除香港的法院所作的司法解釋之外，其他任何法律解釋，法院均不予承認。

解釋權將透過以下方式行使：

- i. 在訴訟過程中，如不能確定在解釋基本法時，是否需要決定事件所屬範圍(是否屬國防或外交事務)，則可由法院指示或由與訟一方申請，將案件交由一個人民代表大會代表和香港法官組成的憲法法庭審理。為了符合現行法律的規定，如法院認為有能力審理的話，便可進行審判，但如與訟一方提出申請，則所作判決可能要經憲法法庭審查。有意見認為上述憲法法庭應是一委員會。委員會可以主動行使其權力，而法庭在審理案件時才能行使其權力。此外，委員會可以研究假設的法律問題，法庭則祇能審定具體案件所涉及的問題。
- ii. 無論該組織以委員會或法院的形式出現，都必須准許與訟雙方、人民代表大會代表和特別行政區代表(假定是律政司或與其相當的官員)向其提出申訴。
- iii. 該組織作出的判決不應有回溯效力。如該組織的判決引致任何法律宣告無效，已根據該法律作出的正當行為的效力應不受影響。任何人士如因法律宣告無效而遭受不良影響，應有權向特區政府提出索償。
- iv. 為了符合香港現行普通法的規定，法院在應用基本法時得遵從中華人民共和國行政機構就有關外交事務現況所作的一切聲明。

- v. 「服從前例原則」應維持有效。

其他意見：

- i. 持相反意見者則認為為了保持特區的司法獨立及高度自治，特區法院應有權解釋基本法內的所有條文。
- ii. 另有意見認為在審訊過程中，香港法院只可以解釋基本法內有關特區內部事務的條文。
- iii. 另一意見認為特區法院應有權審理所有涉及基本法任何部份案件，惟這些案件的終審權應屬人大常委會，而非特區終審庭所有。
- iv. 亦有意見認為如特區法院有權解釋基本法，則可能侵犯中國主權，而且基本法是人大制定及頒佈的法律，如由特區法院解釋，似乎不切實際。
- v. 但有意見認為除非香港法院有權解釋基本法，否則，香港特別行政區便不能按《中英聯合聲明》規定享有終審權。

#### 4.2 基本法應否有立法解釋？

由於在普通法的法制下並沒有立法解釋這觀念，而《中英聯合聲明》已規定特區得沿用普通法，故此，立法解釋並不足取。

就此問題有以下提議：

人大常委會對基本法有立法解釋權，而特區法院在審理案件時可有司法解釋權，以解釋基本法內任何條文。

- i. 人大常委會應毫無保留地向特區法院授予全權，以解釋在特區權力範圍內的基本法條文。
- ii. 至於在特區權力範圍以外的基本法條文，如經中央及特區成員組成的特別委員會向人大常委會提交，人大常委會可對此等條文行使其解釋權。人大常委會進行解釋時，應透過一個由特區及國內代表（特區代表佔大多數）組成的特別委員會。人大常委會所作的解釋對已審結的案件及既得之權益並無回溯力，但對未來的案件具有法律效力。

就此問題亦有以下各種不同意見：

意見 A

有人擔心人大常委會的立法解釋會影響特區法院的終審決定。案件的當事人可能故意等待人大常委會對有關係文進行立法解釋，以期望此解釋對其有利。這做法可能妨礙整個司法過程。但假如上述的建議被採納的話，這擔憂便可解除。

意見 B

如人大常委會的立法解釋沒有回溯力，且不影響既得權益及已審結或正在審理的案件，則其立法解釋並不影響特區終審權。如一案件所牽涉的法律條文，其經立法解釋及司法解釋的意義各有不同，此案件則不能作為以後訴訟的先例。因此，特區的終審權並不受影響。

4.3 甚麼機關(特區法院? 中國法院? 或是由特區及中國成員組成的委員會/法庭?)負責對香港法例作憲法審查?

聯合聲明中的有關條文:

附件一第二節第二段:「香港特別行政區的立法權屬於香港特別行政區立法機關。立法機關可根據《基本法》的規定並依照法定程序制定法律,報中華人民共和國全國人民代表大會常務委員會備案。立法機關制定的法律凡符合《基本法》和法定程序者,均屬有效。」

中國憲法中的有關條文:

第六十七條第八節:人大常委會有權「撤銷省、自治區、直轄市國家權力機關制定的同憲法、法律和行政法規相抵觸的地方性法規和決議。」

- A 聯合聲明規定特別行政區立法機關制訂的法律須報人民代表大會常務委員會備案,其意思僅指將來制訂的法律須向人大常委備案,而不包含或暗示否決權。此外並有意見表示,特別行政區立法機關制訂的法律,凡與國防或外交事務無關者,人民代表大會或人大常委會無權否決。
- B 至於如何決定特區制定的法律是否符合基本法,則有以下意見。未來特區立法機關制定的任何法例或現行的任何法例,如與基本法相違者,均由法院根據基本法宣告為無效。此乃法院司法功能之一。無論是否還有其他機構處理此問題,法院依然有此職責。

有建議指出如人大常委會認為由特區立法機關制定並向其呈報的法律是違反基本法,人大常委會可透過以上4.1所述的憲法法庭宣佈該法律為無效。提交憲法法庭的行動須在該法律呈報人大常委會後的某段時間內進行。有建議認為應以三個月為期限。特區立法機關制定的任何法律,如沒有如上所述提交憲法法庭,則會在涉及其條文的司法程序中受審查。

還有其他意見:

意見 A

如案件涉及本地法例與基本法是否相符的問題,特區法院亦應有權審理,惟此類案件的終審權應屬人大常委會所有。

意見 B

如案件涉及本地法例與基本法是否相符的問題,特區法院無權審理。只有人大常委會才有此權力。

意見 C

任何特區法律,如既不影響中央特區權力關係,亦不干預中央在國防及外交事務的責任,而只涉及香港內部事務,則人大常委會不會行使其權力宣佈此類法律無效。

在任何情況下,人大常委會的權力只限於宣佈法律為無效的消極權力,而不能行使積極的權力,以解釋特區政府制定的法律。人大或其常委會均無駁回法律的一般權力。

## 5. 基本法的修改權

聯合聲明中的有關條文：

附件一第一節第一段：「中華人民共和國全國人民代表大會將根據中華人民共和國憲法制定並頒佈中華人民共和國香港特別行政區基本法(以下簡稱《基本法》)」

中國憲法內有關條文：

第三十一條：「國家在必要時得設立特別行政區，在特別行政區內實行的制度按照具體情況由全國人民代表大會以法律規定。」

第六十二條：「全國人民代表大會行使下列職權：

(三)制定和修改刑事、民事、國家機構的和其他的基本法律；

(十二)批准省、自治區和直轄市的建置；

(十三)決定特別行政區的設立及其制度」

第六十四條：「憲法的修改，由全國人民代表大會常務委員會或者五分之一以上的全國人民代表大會代表提議，並由全國人民代表大會以全體代表的三分之二以上的多數通過。法律和其他議案由全國人民代表大會以全體代表的過半數通過。」

### 5.1 需要研究的問題包括：

一般認為，既然基本法是由人大制定及頒佈，當然只有人大才有權修改。

### 5.2 誰可動議修改基本法？

#### 意見 A

根據中國憲法，人大及國務院均有權動議修改基本法律。人大的附屬法例規定若有三十位人大的成員聯名，便可提出修改基本法律的動議。所以人大應有權提出修改基本法。

#### 意見 B

特區政府或特區的立法機關亦應有權提出修改基本法的動議。

意見 C

反對意見認為如准許外籍人士在特區立法機關獲得議席，這便間接使他們有權修改中國的法律。

意見 D

香港的人大代表應單獨享有動議修改基本法的權利。

意見 E

有意見認為由直接選舉產生的香港代表應單獨享有提出修改基本法的權利。

意見 F

香港立法機關應單獨享有提出修改基本法的權利。除根據聯合聲明，立法機關須由當地人組成外，其成員應不受其他限制。

5.3 修改基本法的程序：

有共識為：修改基本法前應徵詢香港人的意見，諮詢方式應類似目前基本法諮詢委員會的運作方式。

有意見認為在人大正式考慮修改基本法的建議前，除要進行上述諮詢程序外，還須先由特區立法機關考慮並通過該建議。至於應由三分之二多數票還是簡單多數票通過，則意見不一。但亦有意見認為此建議侵犯人大修改其法律（由其制定及頒佈的法律）的權利。

5.4 基本法應明文規定任何修改均不得與《中英聯合聲明》有所抵觸。