



Interpretation of the Basic Law

There were no recommendations made on the Hong Kong Special Administrative Region, China (HKSAR) in the Second UPR Cycle.

Framework in HKSAR

Article 158 of HKSAR's Basic Law gives the Standing Committee of the Chinese National People's Congress (NPCSC) a freestanding and plenary power of interpretation of the Basic Law. However, it is widely recognised that the abuse of this power could undermine rule of law and the high degree of autonomy that was promised to HKSAR as part of the Sino-British Joint Declaration. They are interpretations issued by a mainland authority which lacks independence, acting under a non-common law system.

The United Nations Human Rights Committee noted this in 2013, highlighting concerns that: "a mechanism of binding constitutional interpretation by a non-judicial body may weaken and undermine the rule of law and the independence of judiciary (Articles 2 and 14)."

Key cases in the reporting period

- In November 2016, the NPCSC issued an 'interpretation' of Basic Law Article 104, which covers oaths to uphold the Basic Law and allegiance to HKSAR.

Background

- On 12 October 2016, during an oath taking ceremony at the Legislative Council, two members newly elected, Yau Wai Ching and Leung Chung Hang Sixtus, sought to take their oaths in a theatrical manner. The President of the Legislative Council said he had no power to administer those oaths and decided to allow them to re-take their oath.
- On 18 October 2016, the Chief Executive and Secretary for Justice commenced a judicial review against the Legislative Council's decision to retake the oaths.
- The judicial review was heard by the High Court on 3 November 2016, but before the Court could provide its decision the NPCSC issued an interpretation on 7 November 2016 prescribing what constitutes a lawful oath. The interpretation by the NPCSC is expressly stated to have retrospective effect and become binding on the Court before it was due to give a judgment.

An interpretation which goes beyond 'interpretation'

- 'The Interpretation' of Basic Law Article 104 would be more accurately described as either an amendment to Basic Law or an interpretation of HKSAR's local law. 'The Interpretation' amended the 'Oaths and Declaration Ordinance' to require that all oaths must be taken with 'sincerity' – there was already domestic legislation that covered the issue before the NPCSC issued their interpretation.
- Under Article 158 of the Basic Law, this is an unlawful intervention, and therefore 'The Interpretation' is an infringement which undermines one-country, two-systems.



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The disqualification of lawmakers

- This interpretation was applied retroactively to disqualify six lawmakers on the basis that they failed to properly take their legislative council oaths.
- The disqualification of lawmakers violates rights enshrined in the Basic Law, including freedom of speech and the right to stand in election enshrined in Article 26 and Article 27 of the Basic Law.
- The retroactive punishment of Legislative Council members undermines rule of law, especially the independence of the courts, and common law principles, breaching the right to a fair trial.
- Subsequently the requirement of ‘sincerity’ in the Interpretation has been held up as a justification for the disqualification of candidates from standing for election, including Demosisto’s Agnes Chow Ting. This is in violation of the right to stand in free and fair elections, as well as freedom of expression.

Recommendations

- **Following an NPCSC interpretation, the HKSAR Government should, within six months, publish a report on whether the interpretation is procedurally and substantively compatible with human rights provisions of the Basic Law and the Hong Kong Bill of Rights. If the view is that the interpretation is not compatible, the report should state the effect of the interpretation and measures to ensure compatibility.**
- **Ensure that all interpretations of Basic Law comply with human rights provisions within the Basic Law, the Hong Kong Bill of Rights and the ICCPR.**

Questions to ask in advance

- *What measures does the HKSAR Government have in place to ensure that any interpretations by the NPCSC are consistent with human rights provisions under the Basic Law, the HKSAR Bill of Rights and the ICCPR?*

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