

学校编码：10384

分类号_____密级_____

学号：13620111150134

UDC _____

厦 门 大 学

硕士学位论文

论香港特区法院的基本法审查权

Research on the HKSAR courts' Power of the Basic Law' Review

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论文提交日期：2014年4月

论文答辩时间：2014年5月

学位授予日期：2014年6月

答辩委员会主席：

评阅人：

2014年3月

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中文摘要

《基本法》是我国在香港地区实施“一国两制”的法律化和制度化，是特区立法的基础和依据。但在“一国两制”下，由于内地与香港社会制度的不同和两地在法律传统等问题上的差异，在执行《基本法》的过程中，出现了诸多矛盾和问题。

本文共分为六章：

第一章概述了“一国两制”框架下，《基本法》作为处理“一国”与“两制”之间关系的制度规则，存在着不可避免的“灰色地带”，即在中央政府权力与香港特区高度自治权之间的在性质上不能界定由哪一方面处理的事务。

第二章从四个方面阐述了香港特区法院基本法审查权的普通法渊源：首先，法律至上的普通法学说要求所有权力必须受法之制约；其次，高级法思想存在正当性基础，得以良性地贯彻到基本法审查的制度当中；再次，“司法权优越”的政治理念为法院获得审查权提供了法理依据；最后，“先例拘束”原则为特区法院行使基本法审查权提供了可能性。

第三章的主要内容是香港特区法院基本法审查权的制度实践。介绍了香港特区法院基本法审查权的规范逻辑，结合居港权系列案例总结了回归前香港地区法院违宪审查权的行使、回归后香港特区法院基本法审查权的行使。

第四章具体分析了混合解释机制下人大释法权和香港特区法院基本法审查权的冲突和博弈，在此基础上，深入分析了香港特区法院基本法审查权带来的疑虑，包括会挑战到全国人大常委会的审查权，会有损香港行政主导的政治体制。

第五章对香港特区法院行使基本法审查权的界限作了讨论：第一、不得挑战中央权力，这是外部的限制。第二、不得损害基本法确立的政治体制，这是内部限制。

第六章对香港特区法院基本法审查权与全国人大常委会释法权的衔接作了论述，特区法院需要学习在“一国两制”下怎样恰当地行使基本法审查权这种锋利的武器，并找寻法院作为司法机关同时作为宪法性法律的监护者的恰当位置。

关键词：基本法审查；人大释法

ABSTRACT

The basic law is the legalization and institutionalization of the implementation of "one country, two systems" policy in Hong Kong, it is also the foundation and basis of HKSAR's legislation. But, under the "one country, two systems" policy, due to the difference of society system and legal tradition between the mainland and the HKSAR, many contradictions and problems have arisen in the process of implementation of the basic law.

This paper is divided into six chapters:

The first chapter outlines the "grey area". As the rules dealing with the relationship between "one country" and "two systems", the basic law has its inevitable "grey area" under the framework of "one country, two systems" policy. The "grey area" refers to the affairs we are unable to identify accurately that who will be in charge of, the central government power? or the Hong Kong's autonomy?

The second chapter the author expounds common law sources of the HKSAR courts' power of the Basic Law's review from four aspects: First of all, the law is supreme doctrine of common law requires that all power must be controlled by law. Second, the legitimacy of high law thought makes that basic law's review system a reality. Third, the political ideology—"judicial power is superior" provides the legal basis for the court to get the review right. Finally, the doctrine of binding precedent provides the possibility.

The main content of the third chapter is the basic law of the HKSAR courts' right of Basic law review in practice. This chapter introduces logic structure of legal norm of HKSAR courts' power of the Basic Law's review , then summarizes judicial power of the Hong Kong court before the handover and Basic Law's review combining with the right of abode cases.

The fourth chapter the author analyzes the conflict and game of NPC's right of interpretation of the basic law and Hong Kong courts' power of the Basic Law's review

under the mixed explanation mechanism. And on this basis we are supposed to doubt that it will not only challenge the right of review of NPC, but also undermine Hong Kong's political system.

Chapter v the author discusses of the boundaries of the HKSAR courts' power of the Basic Law's review: First, it should not challenge the central power, this is the external restrictions. Second, it should not damage the political system which is established in the Basic Law, this is the internal restriction.

Chapter six the author discusses the necessary of the convergence of NPC's right of interpretation of the basic law and Hong Kong courts' power of the Basic Law's review. Hong Kong courts need to learn how to properly use this sharp weapon under "one country, two systems" policy, and find a proper location for the court, because the court is the judicial authority, at the same time, it is the guardian of constitutional law.

Key Words: the review of Basic Law; Interpretation of the Basic Law by NPC

Abbreviations

基本法	《中华人民共和国香港特别行政区基本法》
人大常委会	中华人民共和国全国人民代表大会常务委员会
中央政府	中华人民共和国中央人民政府
原讼法庭	香港特别行政区高等法院原讼法庭
上诉庭	香港特别行政区高等法院上诉法庭
终审法院	香港特别行政区终审法院
HKSAR	Hong Kong Special Administrative Region 香港特别行政区
HKLJ	Hong Kong Law Journal 香港法律学刊
CFA	Court of Final Appeal 终审法院
FACV	Final Civil Appeal Verdict 终审法院民事上诉判决
CACV	Court of Appeal Civil Verdict 上诉法庭民事判决
FAMV	Final court civil miscellaneous cases 终院民事杂项案件
HCAL	High Court Constitutional and Administrative List 高等法院宪法及行政诉讼排案表

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^① 该部分案例均来自香港特区官方网站内设的“法律参考资料系统”。

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