

**The Chief Executive's Term of Office :
Response of the Department of Justice to
The Hong Kong Bar Association's Statement of 17 March 2005**

The Department of Justice respects the views set out by the Bar Association in its statement of 17 March 2005. However, it wishes to make the following responses to those views.

Consulting Mainland legal scholars

2. The Bar Association expressed concern about the Secretary for Justice's reliance on Mainland legal scholars when coming to her view on the Chief Executive's term of office. The Bar asked whether the Secretary for Justice is prepared to canvass the views of Mainland scholars on, for example, the meaning of any of the fundamental rights guaranteed under Chapter III of the Basic Law.

3. The Department of Justice wishes to emphasize that the provisions in the Basic Law relating to the appointment of the Chief Executive are provisions concerning affairs which are the responsibility of the Central People's Government, and which concern the relationship between the Central Authorities and the Region. That being so, they are provisions that are treated under the Basic Law in a different way from provisions that are within Hong Kong's high degree of autonomy. In particular, if the Hong Kong Court of Final Appeal needs to interpret the provisions relating to the appointment of the Chief Executive, it would be required by Article 158(3) of the Basic Law to seek an interpretation of them by the Standing Committee of the National People's Congress (NPCSC), and would be required to follow that interpretation.

4. This being so, the Department of Justice considers it appropriate to seek the views of Mainland legal experts, particularly the views of members of the Legislative Affairs Commission of the NPCSC, as to the way in which the NPCSC would interpret those provisions.

5. That does not mean that the Department of Justice should also seek

the views of Mainland legal experts in respect of provisions that are within our autonomy. For advice on those provisions, which include guarantees of fundamental human rights, we will continue to rely on Hong Kong's common law legal experts.

Article 17 of the Basic Law

6. The Bar refers to the fact that section 3(1) of the Chief Executive Election Ordinance (Cap 569) states that the term of office of the Chief Executive is 5 years, and that the NPCSC did not exercise its powers under Article 17 of the Basic Law to return it on the grounds of inconsistency with specified provisions of the Basic Law. Both these facts are accurate. However, the Department of Justice does not consider that they help to determine the term of office of the Chief Executive to be elected this July.

7. The length of that term of office is to be determined by the Basic Law, which would override any local legislation that is inconsistent with it. However, section 3(1) of the Chief Executive Election Ordinance merely reiterates what is stated in Article 46. There was therefore no reason for the NPCSC to return that Ordinance as being inconsistent with Article 46.

Possible challenge to Cap 569

8. The Department of Justice accepts the Bar's submissions that –
- (1) an amendment to the Chief Executive Election Ordinance could be challenged in the courts as being inconsistent with Article 46 of the Basic Law; and
 - (2) if such a challenge reached the Court of Final Appeal, it would be required by Article 158 of the Basic Law to refer relevant provisions of the Basic Law for interpretation by the NPCSC before final adjudication.
9. However, the Department of Justice does not accept that such an

outcome would be “undesirable”, as the Bar asserts (without explanation). Any such challenge and reference would be in accordance with the rule of law, access to justice, and constitutional principles.

Recollections and text of the Basic Law

10. The Bar states that there are advantages in the common law approach of construing legislative intent by reference to the language of text in its context and its purpose, as opposed to relying on recollections of Mainland scholars of “assumptions behind the intent of the Basic Law Drafting Committee and the NPC in adopting the Basic Law”.

11. The Department of Justice agrees that there are advantages in the common law approach towards statutory interpretation. However, it notes that, when construing the Basic Law, the courts are not restricted to “the language of text in its context and its purpose”. The Court of Final Appeal ruled in the case of *Director of Immigration v Chong Fung-yuen* that –

“Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law.”

12. The Department of Justice considers that, applying common law principles of interpretation and having regard to relevant extrinsic materials, the Basic Law should be construed as requiring the Chief Executive to be elected in July to serve the remainder of Mr Tung’s 5-year term.

Election Committee

13. The Bar does not accept the Secretary for Justice’s reliance on the “legislative intent of the original design” of the Election Committee. However, the Bar’s argument relies on the way that design has been carried out in practice. As the Secretary for Justice made clear in her statement on 12 March 2005, although there has been some time lag between the terms of an Election Committee and the CE, the legislative intent of the original design should still

hold.

Consecutive office holders of same term of office

14. The Bar takes issue with the Secretary for Justice's view that "a CE who vacates his office prematurely and the CE returned in the by-election can be regarded as consecutive office holders of the same term of office". It argues that an election for the Chief Executive cannot be compared with a by-election for membership of a body that endures for its appointed term although members may come and go.

15. The Department of Justice considers that the Bar's view on this point begs the question whether or not the appointed term of office of the second-term Chief Executive endures after Mr Tung left that office. The Bar seems to assume that it does not. However, Article 46 of the Basic Law states that "The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years". Having regard to other parts of the Basic Law, particularly the provisions relating to the Election Committee, the Department of Justice considers that Article 46 requires the term of office of the second-term Chief Executive to remain as five years, notwithstanding Mr Tung's departure. The Chief Executive to be elected in July therefore must serve in that office for the remainder of that term.

Drafting history

16. The Bar does not consider that the parts of the Basic Law drafting history referred to by the Secretary for Justice are helpful in the resolution of the issue. It considers that –

- (1) notes and records relied on are off limits to the ordinary researcher; and
- (2) if changes in the Chinese text of the Basic Law drafts were intended to have different legal consequences, then different expressions would also have been used in the English translations

of those drafts.

17. With regard to paragraph (1) above, the background material that the Secretary for Justice has referred to consists of nine documents, at least five of which are public documents available at the Basic Law Library. All nine documents have been provided to members of the Legislative Council.

18. With regard to paragraph 16(2) above, it is clear that the Chinese text of the Basic Law is the primary text. According to the decision adopted by the NPCSC on 28 June 1990, in the case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail. The Department of Justice therefore considers it reasonable to draw inferences from changes in the Chinese text of the Basic Law drafts, even if those changes were not reflected in the English text.

Department of Justice
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