

(Translation)

**Speech by the Secretary for Justice, Ms Elsie Leung,
at the Special Meeting of the House Committee of the Legislative Council
on Tuesday, 15 March 2005**

Madam Chairman, Honourable Members,

I explained last Saturday (12 March) whether the term of office of a new Chief Executive who fills a vacancy arising prematurely should be five years or the remainder of the unexpired term. I believe that the text of my speech has been provided to Members. I hold the view that the new Chief Executive should serve the remainder of his predecessor's term on the following grounds:

- (1) Article 46 of the *Basic Law* provides for the normal term of a Chief Executive and does not apply to the term of a substitute Chief Executive filling a vacancy.
- (2) Article 53(2) of the *Basic Law* specifically refers to Article 45 of the *Basic Law*, which states that “the specific method for selecting the Chief Executive is prescribed in Annex I”.
- (3) Article 1 of Annex I stipulates that the Chief Executive shall be elected by a broadly representative Election Committee whereas Article 2 provides that the term of office of the Election Committee shall be five years.
- (4) The power of the Election Committee comes from its electorate and is to be exercised during its term of office. It follows that where a

vacancy in the office of Chief Executive occurs before his term expires, the term of the new Chief Executive returned by the Election Committee can only be the remainder of that term.

- (5) In the case of state organs in the Mainland, it is firmly established that an official filling a vacancy will only serve the remaining term of the outgoing office holder. There is no omission or error in Article 53(2) of the *Basic Law*. It is only that our understanding is inadequate.

- (6) This argument is supported by documents issued during the drafting stage of the *Basic Law*. When Article 53 (Article 50 at the time) was examined by the Sixth Plenary Session of the Drafting Committee held on 12 December 1987, it was stipulated in the draft that “行政長官缺位時，應在六個月內選出新的行政長官”(in the event that the office of the Chief Executive became vacant, a new Chief Executive should be selected within six months). In the course of deliberation, it was suggested that there should be legal provisions on whether a Chief Executive returned under that Article should be regarded as a Chief Executive for a separate term (at page 7 of the Summary of Meeting of the Sixth Session No. 3). Accordingly, in the *Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for Solicitation of Opinions)* adopted by the Seventh Plenary Session of the Drafting Committee held on 25 April 1988, the wording of the provision was “新的一屆行政長官” (the Chief Executive of the new term). During the consultation carried out from June to September in 1988, it was asked again whether “新的一屆” (the new term) in Article 53(2) meant that the new Chief Executive returned should serve a separate term or the remainder of the unexpired term. In the Eighth Plenary Session of the Drafting Committee held on 14 January 1989, the wording was once again reverted to “新的行政長官” (the

new Chief Executive). It can thus be seen that the issue had indeed been carefully considered. Since the word “一屆” (term) were deleted, it is evident that the term of the new Chief Executive will not run afresh but will only be the remainder of the unexpired term, or less than a full term.

(7) That argument is consistent with the recollection of a Basic Law Drafter, Professor Xu Chongde, and a legal expert, Professor Lian Xisheng.

(8) This view is also consistent with the reference to “2007 年香港特別行政區第三屆行政長官的選舉” (the election of the Chief Executive of the Hong Kong Special Administrative Region for the third term to be held in 2007) in the NPCSC’s Decision made last year on the election of the Chief Executive in 2007 and the formation of the Legislative Council in 2008.

2. Members and I are familiar with the common law but not the Mainland systems and laws. All along, the SAR Government’s understanding of Article 53(2) of the Basic Law had been that the term of the new Chief Executive should be one of five years as stated in Article 46. To us, this was self-evident.

3. As set out in paragraph 3 of my statement on 12 March, when I met Mainland legal experts to discuss the matter, I explained to them why we considered that the term of the new Chief Executive should be 5 years instead of the remainder of the unexpired term in a bid to convince them that we were in the right. At the time, I said that just like a Chief Executive elected for a new term upon the expiry of the incumbent Chief Executive’s term of office, the new Chief Executive must meet the criteria laid down in the *Basic Law* in that he must be selected by election, supported by electors and appointed by the Central

Authorities. He is not appointed by the Central Authorities to take charge of the government temporarily pending the constitution of a new government for the new term. Therefore, his term of office should be governed by Article 46. In addition, I cited the principles adopted by the courts of Hong Kong in the interpretation of the *Basic Law* in *Director of Immigration v Chong Fung Yuen* (FACV No 61 of 2000) at pages 11 to 17 of the judgment of the case to support my view. In response, the Mainland legal experts stated their case and produced the relevant documents, including the compendium of documents of the Sixth, Seventh and Eighth Plenary Sessions of the Basic Law Drafting Committee. Later I also found the report of the Basic Law Consultative Committee and received a written reply from the two legal experts mentioned above. I found that their arguments were well founded. I therefore tendered my legal advice to the SAR Government. Of course, regard had been given to the views expressed by Members and academics in the process. Their views were the same as those I already had before I received the information from the Mainland. It was obviously difficult for me to consult you on this issue before the resignation of the outgoing Chief Executive came to light, but I understood your views.

4. In the process of legal analysis, I did not go to Beijing only to receive the advice of legal experts. Apart from engaging in debates, I had also considered the common law principles of legal interpretation.

(1) The most fundamental principle is that “no man can say he understands the meaning of any part of a law before he finishes reading the whole law: *Bennion, Statutory Interpretation, a Code (4th ed)*”. We cannot read Article 46 alone. We should also read Article 45 and Annex I, more so because Article 53 (2) refers expressly to Article 45 instead of Article 46.

(2) In the case of *Chong Fung Yuen* (at page 546 C-F), the Court of Final

Appeal said that the courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. The courts must identify the meaning borne by the language. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. It further said (at pages 546I- 547F) that to assist in the task of interpretation of the provision in question, the courts consider what is within the *Basic Law*, including provisions in the *Basic Law* other than the provision in question and the Preamble. These are aids to interpretation.

The current problem differs most significantly from the case of *Chong Fung Yuen*, in which we relied on information that became available after the adoption of the *Basic Law*. An example was the interpretation by the Preparatory Committee. On this occasion, the information we have in hand relates to the consideration of the relevant provisions before the adoption of the *Basic Law*. If we can still remember that the overriding purpose of the *Basic Law* is to achieve a smooth transition, we can understand why it is for the same Election Committee to elect a substitute Chief Executive to fill the office of Chief Executive vacated by the incumbent Chief Executive within five years. This would provide a safeguard against the selection of two or more Chief Executives at the opposite end of the spectrum and the instability brought about by drastic changes in policy within five years. At the same time, such an arrangement would not exceed the powers vested by the electorate of the Election Committee, namely to elect one or more Chief Executives to serve the five-year term.

5. Even European judges are now adopting a more flexible approach in interpreting laws. Before I wind up my speech, I would like to share with you

the commentary made by Lord Denning, a great English jurist:

“[European judges] adopt a method which they call in English by strange words – at any rate they were strange to me – the “schematic and teleological” method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose ... behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly.”

The *Basic Law* is an important part of our legal system. It is something new and involves two totally independent legal systems. An open mind is needed to interpret the *Basic Law*.