

LC: Speech by Secretary for Justice

Following is a speech by the Secretary for Justice, Ms Elsie Leung, on a motion moved by the Hon Leung Kwok-hung on the NPCSC interpretations of the Basic Law in the Legislative Council today (May 11): (English Translation)

Madam President,

This motion goes over old ground. The Government's position in respect of the interpretation of the Basic Law by the Standing Committee of the National People's Congress ("NPCSC") has been explained publicly on numerous occasions. I do not propose to repeat all that has been said before. But I wish to speak from the legal perspective. My colleague, the Secretary for Constitutional Affairs, will fully respond to the motion later on.

New constitutional order

As from 1 July 1997, a new constitutional order has applied in Hong Kong, as set out in the Basic Law. Our mini-constitution provides for the continuity of the legal system, but subject always to the Basic Law itself.

The Basic Law prescribes the systems to be practised in Hong Kong, in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong. It is a national law, adopted by the National People's Congress and promulgated by the President of our country.

System of interpretation

Given that it is a national law, and that some of its provisions concern affairs which are the responsibility of the Central People's Government, or concern the relationship between the Central Authorities and the Region, it is natural that the ultimate authority for interpreting the Basic Law should be vested in a national institution. If that authority were vested in a Hong Kong institution, a situation could arise in which a Basic Law provision concerning affairs which are the responsibility of the CPG is interpreted in one way in Hong Kong, and in a different way in the Mainland. That would be a recipe for constitutional crisis.

Article 158(1) of the Basic Law therefore states that the power of interpretation of that Law shall be vested in the NPCSC. This reflects the system for interpreting national laws set out in Article 67(4) of the PRC Constitution.

By virtue of Article 158(2) and (3) of the Basic Law, the NPCSC authorizes Hong Kong courts to interpret the Basic Law in adjudicating cases although, in certain situations, the courts must seek an NPCSC Interpretation before making their final judgements. The NPCSC interpretation will be the most authoritative and binding.

NPCSC Interpretations

In the past, some people argued that the NPCSC could only interpret the Basic Law if asked to do so by Hong Kong courts, or if the provision in question concerned affairs which are the responsibility of the CPG, or concerned the relationship between the Central Authorities and the Region.

Following the Court of Final Appeal's decisions in *Lau Kong-yung v Director of Immigration* and in *Director of Immigration v Chong Fong-yuen*, in 1999 and 2001 respectively, those arguments are no longer tenable. The NPCSC's power of interpretation extends to every provision in the Basic Law, and is not dependent on there being any request for an interpretation made by the courts.

CE's request

However, some people still contend that it is unconstitutional for the Chief Executive to seek an NPCSC Interpretation. It is my considered opinion that this contention is wrong. The Administration recently submitted two responses on this point to the Bills Committee considering the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill. The one submitted through the Secretary for Constitutional Affairs on 6 May was the most detailed.

I will not repeat all that is in those responses. But I wish to deal with the fact that only the Hong Kong courts are expressly given the power to seek an NPCSC Interpretation. Based on this fact, it is argued that the Chief Executive cannot and should not seek such an Interpretation. That argument has a superficial

attraction. But a more detailed analysis reveals its flaws.

The reference to a judicial request in Article 158(3) of the Basic Law must be understood in its context. As the Court of Final Appeal pointed out in *Lau Kong-yung*, it is directed to limiting the court's power of interpretation, by requiring a judicial reference to the NPCSC in certain circumstances.

The Chief Executive has no similar power to interpret the Basic Law and so there is no need for similar limitation and requirement. The absence of such a requirement in respect of the Chief Executive does not therefore mean the Chief Executive is prohibited from seeking an NPCSC Interpretation.

On the contrary, the Chief Executive's constitutional powers and functions under Articles 43 and 48(2) of the Basic Law are not subject to any express limitation in that respect. He is responsible for implementing the Basic Law, and is accountable to the CPG. Therefore, if he considers that an NPCSC Interpretation is necessary for the effective implementation of the Basic Law, it is perfectly lawful and constitutional for him to make a report to the State Council, recommending that such an Interpretation be requested.

No regrets

Since the two requests for an Interpretation, made in 1999 and 2005, were lawful and constitutional, there is no ground for this motion to question them. They both had widespread public support; they both resolved serious problems that could not otherwise be resolved; and they both allowed Hong Kong to escape from potential crises. I do not accept that the requests in any way undermined the rule of law or the independence of the Judiciary.

There is therefore no reason why the first half of this motion should be supported.

Universal suffrage

The second half of the motion relates to the NPCSC decision of April 26, 2004 (which was not an interpretation), and the four constitutional development reports issued by the Task Force. It seeks to perpetuate the myth that, prior to the NPCSC decision, Hong Kong people had the right to elections by universal suffrage in 2007

and 2008. That myth is based on a distortion of the Basic Law.

Annexes I and II of the Basic Law provide for the possibility of amendments to the electoral arrangements in those years. And Articles 45 and 68 provide for the ultimate aim of universal suffrage. But both sets of provisions are qualified by other requirements. In particular, Articles 45 and 68 provide that the methods shall be specified in the light of the actual situation in the Hong Kong SAR and in accordance with the principle of gradual and orderly progress.

The NPCSC decision of April 26, 2004 was entirely consistent with those requirements and did not, therefore diminish Hong Kong people's constitutional rights.

With regard to the four constitutional development reports, I am, of course, a member of the Task Force and I stand by all that is said in them. I believe that they do give a true account of the facts, and there is no reason to rescind them.

Conclusion

Madam President, in conclusion I would urge all members to reject this motion.

Ends/Wednesday, May 11, 2005

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