

Statement by the Secretary for Justice on the Term of the New Chief Executive

(12 March 2005)

Recently there have been discussions of the consequences that would arise should the incumbent Chief Executive resign. In particular, people have debated whether the term of office of a new Chief Executive (“CE”) returned in an election under Article 53 of the Basic Law should be 5 years or should expire on 30 June 2007. I would like to state the stance of the Government of the Hong Kong Special Administrative Region (“HKSARG”) on this issue.

The Original View of the HKSARG

2. When the HKSARG introduced the Chief Executive Election Bill in 2001, we held the view that if a new CE was elected to fill a vacancy arising prematurely, his term of office should run afresh for a period of 5 years. This was based on Article 46 of the Basic Law, which provides that “[T]he term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years”. At that time, the HKSARG applied the common law rules of statutory interpretation and considered that, generally, clear and unambiguous provisions should be interpreted according to their literal meaning. For a considerable period of time after the Chief Executive Election Bill was passed by the Legislative Council and enacted as the Chief Executive Election Ordinance (“the Ordinance”), the HKSARG had been holding the same view. The HKSARG also stated this stance in writing in response to a question raised by the Legislative Council in May 2004. Section 3 of the Ordinance provides that the term of office of the CE shall be 5 years. It does not stipulate whether the term of a CE who assumes office because his predecessor vacates office before the expiration of his term is still 5 years.

Legal Opinions in the Mainland

3. Recently, many legal professionals in the Mainland have expressed the opinion that a CE who assumes office in such circumstances only serves for the residue of the predecessor’s term.

However, many local lawyers disagree. In view of the difference in opinion, on the directions of the CE, I have on recent occasions exchanged views with legal experts in the Mainland. I have been supplied with some relevant materials. On this issue, I have also consulted a former Basic Law drafter, Professor Xu Chongde, and a renowned expert in constitutional law in the Mainland, Professor Lian Xisheng, both of whom participated in the drafting of the Basic Law. Needless to say, I have also carefully considered the views of local legal professionals on this issue. In the course of discussions, I have explained to the legal experts how the HKSARG, applying the rules of statutory interpretation embodied in prevailing Hong Kong case law, had come to the view that the term of a CE returned in an election should always be 5 years.

4. The legal opinions of the Mainland are rather uniform. They all point out that the legislative intent of the relevant provisions of the Basic Law is that the term of a CE returned in a by-election should be the remaining term of the outgoing CE. The Basic Law, being a national law, was adopted by the National People's Congress ("NPC") in the context of the institutional framework and rules of statutory interpretation of the Mainland.

Legal Analysis

5. The terms of important offices in state organs such as the President, Vice-President, NPC, State Council and the Chinese People's Political Consultative Conference are invariably 5 years. Where an office falls vacant prematurely, the successor will serve the remaining term of the outgoing office holder. In the opinion of Mainland experts, the NPC adopted the Basic Law with the same understanding of Article 46, which governs the term of office of the CE. No further provision to elaborate on this point was considered necessary.

6. We have also revisited in depth the original intent underlying the design laid down in the Basic Law in respect of the CE election system. Before we achieve the ultimate goal of electing the CE by universal suffrage, the CE is elected by a broadly representative election committee.

7. The Election Committee is not meant to be an *ad hoc* establishment formed for a particular election. It is a standing body with

a term of 5 years. Its term was, according to the original design, to be the same as that of the CE, so that it might handle any by-election that might have to be conducted. In practice, there has been some time lag between the terms of an election committee and the CE respectively. Nevertheless, the legislative intent of the original design should still hold.

8. Members of the Election Committee come from different sectors. They assume office with a set of pre-conceived beliefs as regards the criteria for selecting the CE, and are accountable to their respective sectors. If the term of a CE returned in a by-election were to run afresh for another 5 years, it would be possible for an election committee to exert its influence far beyond the time that was originally intended. This would leave little room for the members of the succeeding election committee to realize the will of their respective sectors. It is doubtful whether that was the original intent underlying the election committee system. On the contrary, the arrangements for the election committee suggest that the original intent of Article 53 of the Basic Law was that the term of a CE returned in a by-election will not run afresh.

9. 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. Such an interpretation is not inconsistent with Article 46 of the Basic Law, which provides that “[T]he term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years”, and applies to the normal situation but not the term of a substitute Chief Executive filling up a vacancy. Furthermore, there is no direct link between Article 53(2) and Article 46.

10. As shown in the records of the Basic Law Drafting Committee, the draft of the second paragraph of Article 53 examined by the Sixth Plenary Session of the Drafting Committee held on 12 December 1987 stipulated that, in the event that the office of the Chief Executive became vacant, “新的行政長官” (a new CE) should be selected within six months. In the course of deliberation, it was suggested that there should be legal provisions on whether a CE returned under that Article should be regarded as a CE for a separate term.

11. This suggestion was accepted. 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 28 April

1988, the wording was “新的一屆行政長官” (the Chief Executive of the new term). Subsequently, in the Eighth Plenary Session of the Drafting Committee held on 14 January 1989, the characters “一屆” (term) were deleted (i.e. the reference to the Chief Executive of the new term was replaced by the reference to the new Chief Executive). It can thus be seen that the Drafting Committee had a clear understanding that “新的一屆行政長官” (the Chief Executive of the new term) and “新的行政長官” (the new Chief Executive) carried different legal effects. It was on this understanding that “新的一屆行政長官” (the Chief Executive of the new term) was not used. Evidently, it was the intent that a CE returned in a by-election was not to be a CE for a new term.

12. This view is fortified if we take into account the Decision of the NPCSC on 26 April 2004 on interpreting the provisions of the Basic Law on the election of the CE in 2007 and formation of the Legislative Council in 2008. The first paragraph of this begins with, “2007年香港特別行政區第三任行政長官的選舉 ...” (the election of the Chief Executive of the Hong Kong Special Administrative Region for the third term to be held in the year 2007 ...). The NPCSC is of the firm view that the election of the CE to be held in 2007 is the election of the CE for the third term. Any election of the CE held before that will only be in the nature of a by-election for filling the office left vacant by the CE for the second term, and will not be the election of the CE for the third term. This no doubt lends support to the NPCSC’s understanding of the term of the CE.

HKSARG’s present stance

13. After thorough study and deliberation, the HKSARG has adjusted its understanding of the provisions of the Basic Law on the term of the CE. We agree that the term of a CE returned in a by-election is not 5 years but is the remainder of the term of the outgoing CE.

14. The HKSARG will consider introducing a Bill into the Legislative Council as soon as practicable to amend the Chief Executive Election Ordinance. The proposed amendments will add provisions to deal with the case of the CE's office falling vacant before the term expires. The Bill will specifically provide for the term of office of a CE returned in a by-election, so as to reflect more accurately the legislative intent of the Basic Law. If the Bill is passed by the Legislative Council, it will be

reported to the NPCSC for the record. This will provide a solid legal basis for the term of office of a CE to be returned in a by-election.

Concluding Remarks

15. The one-country-two-system principle is an innovation with no precedent. While Hong Kong has adopted the common law system for over a century, China adopts the continental law system. After the reunification, it can only be expected that the two systems of legal thinking which have been developing under different historical and cultural backgrounds have to be reconciled. Compared with constitutions elsewhere which have come through a long history of development, the Basic Law is still in its early days as a constitutional instrument of the HKSAR. There are bound to be a lot of jurisprudential issues awaiting exploration. The Basic Law is the interface between two systems under one country. It is unavoidable that the Mainland organs and legal sectors and the local institutions and legal sectors will sometimes have different interpretations of the provisions of the Basic Law. Given the common goal of preserving the stability and prosperity of Hong Kong, there should not be any difference that cannot be resolved through mutual understanding, empathetic accommodation and frank communication.

16. It is unfortunate that this issue was not adequately explored in the past. Given that the issue concerns an appointment to be made by the Central People's Government, the HKSARG should have considered the manner in which the Central Authorities view an appointment to fill an unexpected vacancy. Continuing dialogue and communication are the best means by which a consensus on the implementation of the Basic Law by legal professionals of the two jurisdictions can be cultivated. The HKSARG will endeavour to achieve this.

17. The pressing task at hand is to focus our efforts on the implementation of the clarified provisions of the Basic Law and contribute to the smooth conduct of the by-election of the CE and the gradual and orderly progress of constitutional development. Our home city needs stability and solidarity to enable us to fully grasp the long-awaited opportunities of economic revitalisation.