

Why the Government must seek an Interpretation of BL 53(2) from the NPCSC

**by
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On 6 April, 2005, the Government decided to make a report to the State Council in respect of the term of the new Chief Executive to be elected to fill the current vacancy. The report recommended that the Standing Committee of the National People's Congress (NPCSC) be requested to make an interpretation of Article 53(2) of the Basic Law.

The decision to make that report has been criticized by some Legislative Councillors, by the Hong Kong Bar Association and others. It is necessary to put the facts properly before the public.

The need for a resolution of the dispute

The Hong Kong Bar Association's statement, issued on 14 April, fully acknowledged the NPCSC's power to interpret the Basic Law. The criticism is that the Government should not have requested an interpretation.

Since early March, the length of the term of office of a new Chief Executive who fills a vacancy has been heatedly debated. Before the resignation of Mr. Tung Chee Hwa was submitted, there were rumours that the Central People's Government (CPG) was inclined to appoint a new Chief Executive for a term of five years, and those now opposing a two year term accused the CPG of scheming to defeat a Chief Executive election in the year 2007. When they heard that the CPG was inclined to appoint a new Chief Executive for two years, opponents complained that the Government was twisting the law to suit political expediency and must not be allowed to do that.

In the course of the heated debate, it was suggested that perhaps the matter should be resolved by an authoritative interpretation of Article 53(2) by the NPCSC. Some people strongly objected to this, claiming it would

impair the rule of law and damage the concept of 'one country, two systems'. It was then suggested that the matter should be resolved by the Hong Kong courts. Objections were again raised, on the basis that this would put pressure on the judges in dealing with a political issue, and would harm judicial independence. Interestingly enough, it was the same group of people who raised these conflicting suggestions.

How could the Government resolve the problem? One suggested answer was that the Basic Law must be amended. However, under Article 53(2) of the Basic Law, the Government must elect the new Chief Executive within 6 months from the date the vacancy arose and, under the Chief Executive (Election) Ordinance, we should do so within 120 days from that date. It simply is not possible for the Basic Law to be amended, for the new Election Committee to be formed, and for the election of the new Chief Executive to take place within the prescribed time. Furthermore, the Legislative Affairs Commission of the NPCSC has already stated that the legislative intent of the Basic Law was that the new Chief Executive should only serve the residue of the original term. It would therefore be unlikely, if not impossible, for the proposal to amend the Basic Law to be supported by a majority of the National People's Congress. The views in favour of a 5-year term came from more or less the same individuals, and their advice, if followed, would mean that the Government would definitely not be able to elect a new Chief Executive within the prescribed time, and there would be a breakdown of the operation of the Government and a constitutional crisis. The Chief Secretary, in his statement to the Legislative Council delivered on the 6 April, has explained what the result of that would be.

Pending litigation

On 4 and 6 April 2005, respectively, two applications for leave to apply for judicial review in respect of the term of office of the new Chief Executive were filed. The applications came before the Court of First Instance on 15 April. One application was stayed pending the applicant's appeal against the decision not to grant him legal aid for the proceedings. Leave was not opposed regarding the application by the Hon. Albert Chan to

proceed with his application. That application will be heard on 10 and 11 of May.

The Government did not oppose leave being granted and agreed to an order being made that, no matter what the outcome of the proceedings, the Government will not ask for costs against the applicant up to and including the first day's hearing. We respect a resident's right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel under Article 35 of the Basic Law. Secondly, we believe that the matter is one of public importance and, in view of the divided views, there is a serious issue to be adjudicated. Thirdly, we believe it will be in the public interest to have the matter adjudicated by the Court. In so doing, we have made it clear that every case must be dealt with on its own merits and that the concession does not mean that the Government will agree to waive costs in every application for judicial review.

Why interpretation in the face of pending proceedings

Some of the critics questioned why the Government would not wait for the conclusion of the judicial review proceedings and leave the issue to be resolved by the courts. The answer is that, for the reasons stated above, the Government cannot afford the luxury of letting things run their natural course but is obligated to do everything possible to ensure that the new Chief Executive will be elected smoothly on 10 July, 2005.

Remedies in judicial review proceedings are discretionary. The court may therefore decline to grant any relief if it thinks fit. There are other reasons why the court may refuse to intervene. For example, the court may hold that an applicant does not have a sufficient interest in the matter to which the application relates¹. The court may also refuse to intervene in the legislative process prior to the enactment of the Bill². Delay in bringing proceedings may also be a ground for refusal, although this does not apply to

¹ See *R v Inland Revenue Comrs. Ex p. National federation of Self-Employed and Small Business Ltd.* [1982] AC 617

² See *Rediffusion case* [1970] AC 1136, *Bilston Corp. v. Wolverhampton Corp* [1942] Ch.391, *Clayton v. Heffron* (1960) 105 CLR 214, *Cormack v. Cope* (1974) 131 CLR 432, and *Te Runanga o Wharekauri Rekohu Inc. v. AG of NZ* [1993] 2 NZLR 301

the present proceedings. The courts have in the past refused to grant a remedy even though they found the regulations being challenged to be unlawful³.

If the Court of First Instance declines to grant a remedy in the current proceedings, the issue of whether the term of the new Chief Executive should be five years or the residue of the original term will remain unresolved. Moreover, the question could again be raised by way of judicial review at any time within 90 days after the Bill on this subject is passed. For example, the proceedings might be instituted in early July. I have every confidence that our courts would act quickly in such circumstances. However, the leap-frog procedure does not apply to this case, and it must move from the Court of First Instance to the Court of Appeal and ultimately to the Court of Final Appeal. In the Government's view, the Court of Final Appeal would be required to refer Article 53(2) to the NPCSC for interpretation before a final judgment is given, the appointment of the new Chief Executive being a matter for which the CPG is responsible.

Some critics have suggested that the election should proceed on the basis that, ultimately, the issue would be determined by the courts and the Chief Executive elect could take office subject to the final determination of the meaning of BL 53(2). With respect, the Government cannot proceed with an election on the basis of the current local legislation because the Legislative Affairs Commission has already made known the legislative intent of the Basic Law. It would be unlawful for the Government to conduct an election in a manner that contravenes the Basic Law. If the Court of First Instance were to decide that the amendment bill is ultra vires Article 53(2) of the Basic Law then, pending an appeal, the Government could not proceed on the basis of the amended Ordinance because that would be disrespectful to the rule of law. Furthermore, potential candidates are entitled to know the term of office since their manifestoes will depend very much on the duration of the term. Members of the Election Committee also need to know what the term of office will be. The Government therefore cannot rely on the outcome of the current proceedings for a resolution of the matter, but must proceed

³ See Wade & Forsyth on Administrative Law, 9th ed. Pp.702-703

expeditiously by making a report to the State Council recommending a request for an NPCSC interpretation. This is what the Government has done.

Request not an interference with legal proceedings

Article 158 of the Basic Law provides for the interpretation of the Basic Law by the NPCSC, whose legal advisers have already made a statement on the meaning of Article 53(2). The interpretation, if made, will be the same whether it is made by the NPCSC on its own volition, at the request of the State Council on behalf of the HKSAR Government, or at the behest of the Court of Final Appeal. There is no reason why the substance of the interpretation could be different. The request at this stage will not, therefore, interfere with the current proceedings since the NPCSC interprets law but does not adjudicate particular cases. That is left to the domestic courts. In the case of Lau Kong Yung v. Director of Immigration (CFA Nos. 10 & 11 of 1999), the Court of Final Appeal held that the power of the NPCSC to interpret the Basic Law is not affected by the courts' power of interpretation under Article 158(2) or 158(3) of the Basic Law. The question is not whether the Acting Chief Executive has power to request an interpretation of the Basic Law – it is the Government's contention that he is duty bound to report the current dispute to the State Council under Articles 43 and 48(2) of the Basic Law – but rather whether the NPCSC may interpret the Basic Law. As to whether or not the NPCSC should interpret Article 53(2), the NPCSC has been supplied with all relevant information in order to enable it to make a decision, and it has the constitutional power to decide whether or not to make the interpretation.

Since the interpretation of the Basic Law by the NPCSC is provided for in the Basic Law, such an interpretation is constitutional and lawful. The NPCSC's exercise of that power cannot be against the rule of law, impair the principle of 'one country, two systems', or undermine judicial independence. The power of interpretation belongs to the NPCSC and the power of applying the law as interpreted is vested with the local courts. I appreciate the reluctance of many of the legal profession to accept the power of the NPCSC to interpret the Basic Law, but (1) the interpretation of the Basic Law by the NPCSC is part of our constitutional structure; (2) the

interpretation must be based on the legislative intent and cannot be inconsistent with the basic policies of the People's Republic of China towards Hong Kong enshrined in the Sino-British Joint Declaration, and (3) legislative intent must be established.

The two legal systems

Some critics accuse the Government of damaging the common law legal system which is preserved by Articles 8 and 11 of the Basic Law and is applicable to Hong Kong. They complain that, since the Government sought advice from Mainland lawyers and took into account the Mainland system in filling up a vacancy in an office, that is tantamount to bringing into Hong Kong the Mainland legal and political systems and is damaging to the local legal system. That is not the case. The Mainland legal experts were interviewed, not only because they are legal experts, but also because they were witnesses to the drafting of the Basic Law and are in a position to elucidate on and prove what the legislative intent was.

Under the common law system, one does not look at Article 46 alone for the term of the *new* Chief Executive. One has to look at the whole of the Basic Law, its preamble and the other provisions, particularly Article 45 of the Basic Law (which is directly referred to in Article 53(2)) and Annex I to the Basic Law⁴. Furthermore, the Basic Law was promulgated by another jurisdiction, i.e. that of the PRC. Where the law of another jurisdiction is relevant to proceedings before a common law court it can be proven by legal experts of that jurisdiction as a matter of fact. It is therefore perfectly legal and consistent with the common law legal system to take into account the evidence of the Chinese legal experts and matters relevant to the legislative intent in considering the meaning of Article 53(2). One must remember that the common law is a living law, and the common law system must develop and evolve to keep up with new developments. As from 1 July, 1997, the Basic Law has come into operation and a page has turned in our legal history. The common law must now operate under the Basic Law.

Other problems

⁴ See *Chong Fung Yuen v. Director of Immigration* (CFA No. 26 of 2000)

Other questions relating to the Chief Executive's term of office have been raised. Is a new Chief Executive who is serving less than a full term of 5 years entitled to serve only one further consecutive term, or two further consecutive terms? What happens if another vacancy occurs before the 30 June 2007? Must two elections be held if a vacancy occurs within the last 6 months of a normal term of the Chief Executive? What if a vacancy occurs during the last 7 months, 8 months etc?

We must look into these issues as soon as possible and engage our Legislative Councillors, lawyers and legal experts in discussions for a resolution of these matters. In the course of doing so, we may also hold discussions with our Mainland counterparts, and hopefully consensus could be reached for amendments to be made to our domestic law to cater for these problems without resorting to another interpretation by the NPCSC. The more we are prepared to explore the meaning of the Basic Law with an open mind, and the more discussions we have to understand the two legal systems, the more we will be in a position to resolve any problems arising from the implementation of the Basic Law without resorting to an interpretation by the NPCSC. I am fully confident that our judges, lawyers, legal academics and experts are able to contribute towards the healthy development of the common law under the Basic Law, and can at the same time preserve the core values which we all treasured under the legal system previously in force in Hong Kong. The Government is prepared to do its part in facilitating exchanges between the judiciary, legal profession and experts of both sides towards such a goal. I pledge my full support to this enterprise, and hope that others will do likewise.
