

The Chief Executive's Term of Office and the Rule of Law
- a Letter to Hong Kong
delivered by the Secretary for Justice, Ms Elsie Leung
on Sunday, 20 March 2005

The resignation of Mr Tung Chee-hwa from the office of Chief Executive has raised an important constitutional issue. Should the Chief Executive to be elected this July be appointed for a full 5-year term, or should he only fill the residue of Mr Tung's term? This question must be determined according to the true meaning of the Basic Law, in accordance with the rule of law.

Reasons already given

2. I have already explained fully, and publicly, why I believe that the law requires the new Chief Executive to fill only the residue of Mr Tung's term. I do not propose to repeat that explanation. But I would like to answer some of the criticisms that have been raised in respect of my view.

U-turn damages rule of law?

3. The first criticism relates to the change in stance of the government. Some critics have said that this is damaging to the rule of law. That is *not* the case.

4. The position that the government took in the past, and the one it takes now, were both based on respect for the rule of law and on

information then available to us and has since come into light. That position has changed, but for good reasons. Legal issues are rarely black and white. They involve a professional judgment call, made after opposing arguments are weighed in the balance.

5. In the current situation, new arguments have recently emerged, based in part on earlier drafts of the Basic Law and documents which throw light on the discussions during the drafting process, and recollection of those who took part in the drafting. Having considered those new arguments and information, I consider that our earlier position was incorrect. We must therefore admit our mistake and change our view. To do *otherwise* would be disrespectful of the rule of law. If we insisted on our earlier position, we would be encouraging the government to act in a way we believe to be unlawful. That cannot be right.

6. It is unfortunate that under the two systems, the construction that any vacancy to be filled under Article 53(2) should be for the residue of the term is a matter of course for the Mainland. On the other hand, in the absence of expressed provision, the term should be five years in any case was to us also a matter of course. The issue did not arouse any debate until the vacancy actually happens, but there was no deliberate intention on either side to twist the law to suit its political needs.

NPCSC Interpretation

7. Another criticism relates to the power of the Standing Committee of the National People's Congress to interpret the Basic Law. Some people say that, if the current dispute is resolved by an Interpretation by the Standing Committee, this would be a blow to the rule of law.

8. Without commenting on whether or not such an Interpretation is desirable in the current circumstances, I must take issue with that viewpoint. Article 158(1) of the Basic Law expressly provides that the power of interpretation of the Basic Law shall be vested in the Standing Committee. That reflects the fact that the Basic Law was adopted by the National People's Congress and, under the Chinese Constitution, the Standing Committee of the NPC has the power to interpret all laws made by the NPC.

9. The exercise of that express power of interpretation is lawful and constitutional – as Hong Kong's Court of Final Appeal has ruled. I therefore consider it quite wrong to say that any such Interpretation, pursuant to the Basic Law and in accordance with its procedure, would be a blow to the rule of law.

Provisions outside our autonomy

10. Some people say that the contribution of Mainland legal experts to this debate has undermined Hong Kong's autonomy. Again I disagree.

11. The Basic Law confers a high degree of autonomy on the Hong Kong SAR, but it does not confer absolute autonomy. It also

contains provisions concerning affairs which are the responsibility of the Central People's Government, and concerning the relationship between the Central Authorities and the Region. Our courts do not have the autonomy to make a final decision on the meaning of those provisions. The Standing Committee of the NPC is the authority for interpreting them.

12. The appointment of the Chief Executive is clearly the responsibility of the Central People's Government and it directly affects the relationship between the Central Authorities and the Region. We do not therefore have the autonomy to determine the meaning of provisions relating to that appointment. This being so, it is perfectly sensible to find out what Mainland legal experts understand them to mean. In fact, the Legislative Affairs Commission of the Standing Committee of the NPC has spoken on the subject, confirming that the view now adopted by the HKSARG is correct.

13. That does not mean that we 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 can continue to rely on Hong Kong's common law legal experts.

Black is white?

14. The government has been accused of saying that black is white. This is most unfair.

15. Although the Basic Law provides that the term of office of the Chief Executive shall be five years, it does not refer specifically to a Chief Executive who is elected in the current circumstances. This being so, it is not surprising that lawyers disagree over what the position is. Constitutional documents are particularly difficult to interpret, since they are drafted in very broad terms.

16. Where common law judges are required to interpret a constitution, as in the USA, it is well-known that they develop principles that are not apparent on the face of the constitution. Issues such as abortion and the death penalty have to be resolved by the courts even though the constitution may be silent on such matters. That does not, however, lead to cynicism about the value of the constitution in those other jurisdictions. Our new constitutional order is relatively young and we are less familiar with such developments. We should, however, have confidence in the strength of our mini-constitution and not be so alarmist.

Purposive construction

17. Even applying normal common law rules of statutory interpretation, there is a good case for saying that the Basic Law requires a residue term of office in the current circumstances. The

common law requires judges to give effect to the legislative intention as expressed by the *whole* of the legislative instrument. One must therefore look beyond the provision relating to the term of office of the Chief Executive and consider other provisions in the Basic Law. These include the function and 5-year term of office of the Election Committee. In particular, Article 53(2) is linked to Article 45 which refers to Annex I and not to Article 46 of the Basic Law.

18. In addition, common law courts are permitted to consider certain materials other than the legislative text, including the drafting history of that text. This may properly throw light on the context or purpose of particular provisions.

19. Given that there are two possible meanings of the provisions concerning the term of office, common law judges are entitled to lean against an interpretation that would produce an anomalous result, and to favour one that promotes the human rights values embodied in the Basic Law. In the present context I consider that they should therefore lean in favour of a residue term of office.

Civil law approach

20. European courts, operating under the civil law system, are less constrained than common law courts by the literal words of an enactment. They look more to the spirit of the legislation. I am not saying that our courts should necessarily adopt such an approach. However, it should be remembered that the Basic Law was enacted in

a civil law country, and that our common law system is capable of evolution. Given the unprecedented nature of “one country, two systems”, it is to be expected that there will be some evolution of the principles of interpretation as our new constitutional order matures.

Conclusion

21. I cherish those days when I appeared in courts, and parties put forward their arguments and debated most fiercely but courteously what they believed to be true without vilifying utterances. For a serious issue like the one before us, I hope we can debate the issue sensibly and argue with reasons instead of resorting to phrases like ‘eroding the rule of law’, ‘damaging one country, two systems’. Claims that the rule of law is being undermined and that common law principles are being abandoned are once again being made. These claims have been made on many occasions since Reunification. But look around us. The rule of law is as strong as ever. Disputes between individuals are determined fairly by independent judges. The number of cases in which government action is subject to judicial review is greater than ever.

22. The current dispute will, I am sure, be resolved in accordance with the law. Hong Kong, and its legal system, will rise to the challenge.