

Re: Chief Executive Election Bill

1. Section 4 of the Chief Executive Election Bill (with the proposed amendment) provides:

'The Office of the Chief Executive becomes vacant -

- (a) on the expiry of the term of office of the Chief Executive;
- (b) if the Chief Executive dies; or
- (c) if the Central People's Government removes the Chief Executive from office -
 - (i) upon his resignation under Article 52 of the Basic Law *or otherwise*;
 - (ii) upon the reporting to it for decision of a motion of impeachment passed against him under Article 73(9) of the Basic Law; or
 - (iii) *under any other circumstances.*' (italics supplied)

2. Section 4(a) and (b) are uncontroversial. The Government considers, under section 4(c), that the Central People's Government ('CPG') may remove the Chief Executive ('CE') in the two specific circumstances arising under the Basic Law and, in addition, under any other circumstances.

3. Section 4(c)(i) is predicated upon the exercise of a power of removal by the CPG following the CE's resignation under Article 52 of the Basic Law *'or otherwise'*. Article 52 provides that the Chief Executive must resign when, inter alia, he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons. The justification for introducing the phrase *'or otherwise'* is to cater for the situation where the Chief Executive is prevented from resigning by

the very impairment that rendered him incapable of discharging his duties or where the whereabouts of the Chief Executive could not be ascertained.

4. Whilst we agree that a distinction should be made between resignation pursuant to Art 52 of the Basic Law, which should take effect immediately upon tendering of the resignation; and resignation tendered by the CE under other circumstances, which should take effect upon acceptance by the CPG, we do not consider that the CE needs to be removed in either case before a vacancy in the office would arise. Rather, a vacancy arises upon resignation pursuant to Art 52 or upon CPG's acceptance of the resignation in the case of resignation tendered under other circumstances. We would propose to insert a separate category after section 4(b) in the following terms:

'if—

- (i) the Chief Executive resigns under Article 52 of the Basic Law; or
- (ii) the Chief Executive resigns for a reason other than those specified in Article 52 of the Basic Law and such resignation is accepted by the Central People's Government; or'

5. On the other hand, we accept that there are justifiable reasons for there to be a power of removal to cater for the situations where the CE should have resigned under Article 52 of the Basic Law but refuses to resign or is incapable of resigning. We would propose amending section 4(c)(i) to read 'when the Chief Executive should have resigned under Article 52 of the Basic Law but is unwilling or unable to do so because of illness or otherwise.'

*- Some of the situations may be covered by Art 52(1) but not all (disappearance, etc.)
- Confined to Art 62*

4(c)(iii) accepted

A General Power to Remove the CE

6. Section 4(c)(iii) provides for a general power to remove the CE. The Government justifies the inclusion of a plenary removal power on the grounds that the power to appoint includes the power to remove.
7. If the Government is correct, then, strictly speaking, section 4(c)(i) and (ii) are redundant and unnecessary. There is no need to include in the Bill specific situations when the removal power may be exercised. A plenary power to remove is, according to the Government's argument, implicit in the power of appointment under Articles 15 and 45(1) of the Basic Law as the necessary corollary to the power to appoint.
8. It is important to note that the power to appoint the CE under Articles 15 and 45 is not a plenary power. It is limited specifically by the terms of Article 44 (as to who may be appointed) and Article 45(1) (as to the procedure and conditions precedent for the exercise of the appointment power). It is further limited generally by the proviso to Article 15 that the power of appointment will be exercised in accordance with the provisions of Chapter IV of the Basic Law.
9. If the power to appoint is limited by the Basic Law, there is no reason why a removal power embedded in it should not be attenuated by other provisions in the Basic Law.
10. The Government argues that it has to provide for 'all other circumstances' when the CE office becomes vacant and such circumstances fall outside the Basic Law. It gives 2 examples of the CE having disappeared and the CE lapsing into a coma. We are of the view that these situations would be covered by Article 52(1) that the CE is unable to discharge his or her duties as

a result of *serious illness or other reasons* and are therefore covered by *our amended* section 4(c)(i). They do not justify a separate and independent section 4(c)(iii).

The Common Law

11. The Government further argues that under the common law, the right to appoint includes the right to remove. We disagree.
12. Under the common law, an office holder enjoys a privileged position. The privilege goes with being an office holder, as opposed to a person employed under a contract of employment. Traditionally, public offices were regarded as a type of property interest that could not be taken from a holder save in accordance with fair procedures and then only in accordance with the terms of the instrument of appointment. Wade & Forsyth explained it as follows:

'A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other hand, a mere employment under a contract of service. Offices used in old times to be looked upon as a form of property which could be held and recovered in specie; if the holder was wrongfully removed he could obtain restoration by mandamus; or he might be granted prohibition or an injunction. Nowadays he can also obtain a declaration that his removal was void, and that he is therefore still in office, as was done in *Ridge v Baldwin*, since this remedy likewise operates specifically. In other words, he is removable only by a due and lawful exercise of the power of removal, failing which he remains legally in office. A servant under a mere contract of service enjoys no such protection, according to a long-established rule of law: whatever his contractual rights, he can always be

dismissed and his remedy lies in damages for breach of contract. In other words, there is always a power to dismiss him, even though under the contract there is no right to do so.' (Wade & Forsyth, *Administrative Law* (Oxford: Clarendon Press, 8th ed, 2000), pp 531-532)

13. The crucial distinction under the common law is whether the office holder holds his office 'at pleasure' or whether he could only be removed 'for cause'. If the office holder holds an office from which he could only be dismissed 'for cause' (most commonly, misconduct), then if attempts are made to remove him that are not for the prescribed cause or are unfair, he is entitled to go to court and seek a protective declaration. The declaration would be to the effect that he still holds his office because the person exercising a claimed power of revocation has not established the cause for removing him or has not lawfully exercised the power to remove.
14. In the absence of any statutory provisions, it is up to the person making a public appointment to decide whether to appoint someone to a post held 'at pleasure' or to make the appointment subject to removal on showing 'cause'. Appointments need not necessarily have been made under the authority of a statute, although nearly all public offices of importance are statutory. Appointments can also be made pursuant to the exercise of a prerogative power. However, in these situations the instrument of appointment will set out the nature of the office, and the power to remove the office holder is a matter of construction of the instrument of appointment.
15. Therefore, it is incorrect to say that the right to appoint includes the power to remove at common law. A removal power respecting public offices is not a discrete common law concept. Instead, the nature and the scope of a power to remove a person from a public office depend on the terms of the instrument of

appointment. - That is essentially a matter of construction and not an application of any common law principle.

Appointment under Statute

16. If an appointment is made pursuant to a statute, the terms of the appointment and the power to dismissal are a matter for the legislature. Section 42(a) of the Interpretation and General Clauses Ordinance (Cap 1) provides that the power to make any public appointment under the authority of any ordinance includes the power to suspend and dismiss. However, the proviso to that section limits the exercise of that power when the exercise of that power is made to depend on the recommendation, approval or consent of a third party. Like other sections in Cap 1, section 42(a) is subject to any contrary intention expressed in another statute: section 2.
17. For example, the Chief Executive enjoys an unrestricted power of appointment to appoint the Ombudsman. Section 3(2) of the Ombudsman Ordinance (Cap 397) provides that 'the Ombudsman shall be appointed in writing under the hand of the Chief Executive.' However, the unrestricted statutory power is matched with a qualified power of removal in relation to both the grounds of removal and the prior involvement of a third party. Section 3(4)(b) provides that 'a person appointed to be the Ombudsman may.... (b) be removed from office by the Chief Executive with the approval by resolution of the Legislative Council on the ground of inability to discharge the functions of the office, or misbehaviour.'
18. Therefore, there is no rule that an unrestricted power to appoint necessarily carries an unrestricted power of removal. The Government may assume that section 42 of Cap 1 reflects a rule of law or a principle that can be found in the Basic Law. However, section 42 is not substantive law. It states a statutory

rule of interpretation that yields to any contrary intention. It cannot govern the Basic Law either.

The Basic Law and the PRC Constitution

19. The terms of the Basic Law also suggests that there is no plenary power to remove the CE. Article 45(1) provides that the CE shall be appointed by the CPG. In contrast, Article 48(6) and (7) expressly refer to the CE's power to appoint or remove a judge or a holder of public office. The Chinese version also maintains a distinction between 'appointment' (任命) and 'appointment and removal' (任免).
20. Nor the terms of the PRC Constitution justify the existence of such a plenary power. Article 62 of the PRC Constitution provides for a power of appointment to various constitutional offices by the NPC. Article 63 provides for an express power of the NPC to remove the officers from office. If an implied power to remove exists alongside the power to appoint, the express power to remove under Article 63 is redundant.
21. The CE is appointed by the CPG, which, under Article 85 of the PRC Constitution, is the State Council. The NPC has decided that the power of appointment should be subject to the restriction set out in Article 45 of the Basic Law. The Basic Law itself also sets out the limited circumstances for removal. The first situation is when the CE cannot discharge his duties because of illness or other reasons or when he loses the support of the Legislative Council which twice passes a bill which the CE refuses to sign or twice refuses to pass a bill: Article 52. The conditions giving rise to a power to remove are relatively straight forward in these situations. In the second situation, the CE is to be removed after impeachment for a serious breach of law or dereliction of duty and the CE refuses to resign: Art 73(9). In such

situation Article 73 provides for a full enquiry by an independent investigation committee chaired by the Chief Justice of the Court of Final Appeal.

22. The Legislative Council Secretariat suggested that the CPG has an implied power to remove the CE if revocation is necessary for purposes which do not contravene the Basic Law, including the purpose of maintaining Hong Kong's stability and administrative efficiency. An example is when the CE committed a serious breach of law outside Hong Kong or a moral wrong which brings outcry from the community which considers the CE no longer suitable to be the head of the HKSAR. We are of the view that such implied power, if existed, is too broadly defined. The former situation cited in the example is covered by Article 73(9): there is no restriction that a serious breach of the law has to be committed within Hong Kong. The second situation is arguably covered by Art 52(1), as the CE would be under great difficulty to discharge his duties under such circumstances. In any event, this kind of situation will call for a full enquiry similar to that envisaged in Article 73(9), and it would be wrong to justify a summary and plenary power of removal by the CPG in such circumstances, or even an implied power to remove which is broadly defined. If there is an implied power to remove the CE outside Articles 52 and 73(9) of the Basic Law, it has to be very narrowly defined and can only be justified by the extreme exigencies of the situation and for purposes which do not contravene the Basic Law. In any event, such power will have to be derived from the PRC Constitution and the Basic Law, and not from the CE Election Bill.
23. The Government fails to consider adequately the relevant limitations on the CPG's powers in the Basic Law. As we have pointed out above, the power to appoint the CE under the Basic Law is subject to restrictions. It is odd to argue for an unrestricted power of removal from a limited power of appointment. It is invariably the other way round as regards most statutory

appointments. It is relatively easy to appoint someone to a public office but more difficult to remove. Indeed, the restrictions in the Basic Law point to the existence of a very limited power of removal that can be exercised probably only in the two specific situations identified in the proposed amended section 4(c).

24. We have already pointed out that the concern that the CE may disappear or lapse into a coma of indeterminate length is addressed by Article 52(1) of the Basic Law. It has also been suggested that Article 52 does not apply when the CE refuses to resign (apart from the situation under Article 73(9) when the conditions for impeachment are satisfied). This is a very specific situation and is covered by our proposed amendment to section 4(c)(i). They are not good reasons for inventing a plenary power of removal which would enable the CPG to remove 'at pleasure' a CE who has been duly selected (or elected) and duly appointed under Article 45(1) of the Basic Law.

Council of the Hong Kong Bar Association

11th June 2001.