

Comments on the Chief Executive Election Bill (“the Bill”)

1. The Basic Law has set out the circumstances when the Chief Executive (“the CE”) should not be allowed to continue his office to the full term (viz. under BL 52 and BL 73(9)). **However the Basic Law has not set out the precise mechanism for declaring when the office of the CE becomes vacant.**

2. It is therefore permissible for the local legislature to prescribe the mechanism for making such a declaration of vacancy under the circumstances contemplated under BL 52 and BL 73(9). This has the advantage of providing certainty and clarity as to when a new CE should be selected within the 6 months' period prescribed under BL 53.

3. In drafting the legislation, one should however avoid creating any new power of removing the CE by the CPG or other bodies. I recognise that there may be legitimate arguments for or against any interpretation that the CPG has a “legal” power to remove the CE outside the circumstances set out in BL 52/73(9). But I believe it is common ground that even if such a “legal” power exists, it must be against the “spirit” of the Basic Law and would lead to disastrous consequence vis-à-vis the high degree of autonomy of the HKSAR if the CPG purports to exercise such a plenary power of removal outside the provisions of the Basic Law. In the circumstances, I do not think the local legislature should be drafted on any assumption that such a power exists. **I therefore disagree with the Administration’s draft Clause 4(c) which tends to provide that the CPG may remove the CE “under any other circumstances”.**

4. I believe there are 5 situations covered in the Basic Law where the CE’s office would become vacant:

- (1) His/Her term expires.
- (2) The death of the CE
- (3) Impeachment pursuant to BL 73(9)
- (4) Resignation of CE under BL52 or otherwise
- (5) Circumstances prescribed by BL 52 arise but the CE is unable (eg due to his being incapacitated or being kidnapped for a long time) or unwilling to resign

5. I believe no further mechanism is required to declare the vacancy under situations (1) and (2).
6. As for situation (3), a decision by the CPG is expressly stipulated for under BL 73(9) and it must follow that the CE's office becomes vacant as from the date stipulated in such a decision of the CPG.
7. As for situations (4) and (5), the Basic Law is silent on the precise mechanism for declaring/deciding when the CE's office becomes vacant. I take the view that as the CE is formally appointed by the CPG, it should be the CPG who makes the formal declaration/decision for his removal. I believe this is in line with the PRC's laws (see eg PRC Constitution, arts. 63, 65(3), 67(11-13), 80, 101 and 103(2); Organic Law of the National People's Congress, arts. 27(2), 28(2) and 36(2)), the common law principles as well as BL 73(9).
8. **However it does not follow that the CPG be allowed to remove the CE unilaterally without the involvement of the HKSAR.** Indeed, I believe the provisions of the Basic Law underpin the involvement of the HKSAR in the appointment and removal of the CE. For example, BL 43 provides that the CE shall be accountable both to the CPG and the HKSAR in accordance with the Basic Law. BL 45 provides that though the power of appointment rests with the CPG, the CPG may only appoint the one selected by the HKSAR through election or consultations held locally. BL 73(9) provides that the impeachment process must originate from the HKSAR (via LegCo and the independent investigation committee).
9. In the circumstances, I believe it is permissible and advisable for the local legislature to prescribe in the Bill the mechanism for triggering off the formal removal power by the CPG under situations (4) and (5), where the Basic Law is silent on the mechanism. Another alternative is to leave this issue untouched in the Bill (which seems to be the approach adopted by the Hon Audrey Eu SC). The disadvantage of the latter approach is that if the CE is unable or unwilling to resign in situation where BL 52 applies, there is bound to be uncertainty and controversy as to whether and how one may remove the CE and the likely consequence is that the CPG may have to step in unilaterally.

10. I therefore suggest that Administration and the LegCo should give further consideration to fill the “gap” of the Basic Law in this connection by stipulating in the Bill the mechanism in line with the spirit of the Basic Law. Personally **I think in line with the impeachment process under BL 73(9), the LegCo is the appropriate body to represent the HKSAR in this regard to trigger off the formal removal power by the CPG under situations (4) and (5).** I do not think there needs to be an independent investigation committee since the issues involved here do not involve a charge of “serious breach of law or dereliction of duty” (though the LegCo may in suitable cases decide to first set up a committee to investigate the factual situation to decide, say, whether the CE loses the ability to discharge his/her duties as a result of serious illness or other reasons).

11. I accept that there may be argument as to whether in situation (4) we need the involvement of the HKSAR in triggering off the CPG’s removal power. It appears from the Hon Audrey EU SC’s draft that she is happy with the CPG’s power of removal being invoked upon the resignation of the CE. I would however like to point out that under BL 43 the CE is also accountable to the HKSAR and that the CE is to be first elected locally. The HKSAR may therefore wish to know why the CE chooses to resign and may also seek to persuade the CE not to resign. Hence I think it is in line with the Basic Law that in case the CE wishes to resign, he/she should first submit his/her letter of resignation to the LegCo, who may then pass a motion to accept his/her resignation and report the matter to the CPG for making a formal decision to remove him/her.

12. Indeed for situation (4), I think there are 2 possibilities. First, the CE may unilaterally vacate his office by resigning and no approval is required. Second, the CE may only effectively resign upon first obtaining some sort of approval. The Basic Law does not expressly give an answer to this issue. I am inclined to the second possibility though I accept that there may be good justifications for the first, in particular one may ask how one may force the CE to stay on if he is determined to resign for whatever reason. The main argument for the second possibility is that the CE having voluntarily taken up this most important duty (after being elected by the HKSAR and appointed by the CPG) for a specific term, he should not be allowed to unilaterally terminate that duty prematurely.

13. If one accepts the second possibility, I cannot see why the approval needs to come from the CPG alone. The CE is accountable to both the HKSAR and the CPG and his appointment effectively requires the consent of both the HKSAR and the CPG. If he is not allowed to resign unilaterally, why should he be allowed to resign just with the approval of the CPG? Politically, we also want to avoid any speculation that the CE is being forced secretly to resign by the CPG and that the HKSAR is being kept in the dark.

14. **I therefore believe by providing for the HKSAR's involvement (probably via LegCo) as a pre-requisite for triggering off the CPG's power of removal in situation (4) and (5) would help to preserve the high degree of autonomy of the HKSAR in line with the concept of "One Country Two System" and the Basic Law.** In the extremely unlikely event that the LegCo fails to properly perform its duty in this regard or if there is a serious argument that the LegCo passes an illegitimate motion in this regard, the matter may be resolved through judicial review so that the judiciary may provide for the necessary check and balance. The CPG may also act as the last safeguard as the ultimate decision to remove the CE rests on it.

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