

**Administration's Responses to Points raised on 26 June 2001
by Members of the Bills Committee
on the Chief Executive Election Bill**

Act of State

Q1: As Article 19 of the Basic Law states that the courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state, how could redress be sought in Hong Kong courts in respect of a decision of the Central People's Government (CPG) to remove an incumbent Chief Executive (CE), if CPG refuses to issue a certifying document to CE?

A1: Under BL 19, the HKSAR is vested with independent judicial power, including that of final adjudication. The courts' judicial power is derived from, and subject to, the Basic Law. The jurisdiction of SAR courts is therefore subject to such restrictions as those "imposed by the legal system and principles previously in force in Hong Kong" referred to in BL 19(2). Similarly, the courts shall have no jurisdiction over acts of state such as defence and foreign affairs under BL 19(3).

Moreover, BL 158(3) provides as follows :

"If the courts of the Region, in adjudicating cases, need to interpret the provisions of this law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final appeal of the Region."

Where the decision of the CPG's to remove an incumbent CE involves an interpretation of the relevant provisions of the Basic Law, it is relevant to note the comments of the

CFA in the decision of *Ng Ka Ling v Director of Immigration (No 2)* [1999] 1 HKLRD 577 at 578 :

“Article 158(1) vests the power of interpretation of the Basic Law in the Standing Committee. The courts’ jurisdiction to interpret the Basic Law in adjudicating cases is derived by authorisation from the Standing committee under arts. 158(2) and 158(3). ...the Court’s jurisdiction to enforce and interpret the Basic law is derived from and is subject to the provisions of the Basic Law which provisions include the foregoing.

The Court’s judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under art. 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court’s judgment question, and the Court accepts that it cannot question, the authority of the National People’s Congress or the Standing committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”

In the light of the above, we believe that SAR courts will be guided by the above principles in resolving the present question, in the very likely event that it is raised before them.

Mechanism before 1 July 1997

Q2: Whether redress could be sought in the courts of Hong Kong, before 1 July 1997, in respect of a decision to remove a Governor by the British Government?

A2: No redress would have been available from the courts of Hong Kong prior to 1 July 1997. The Governor was appointed by Warrant under the Queen’s sign manuel. He was a servant of the Crown holding his office at her Majesty’s pleasure. The rule was (and remains) that a servant at pleasure can be dismissed at will without redress or relief. (See Wade Administrative Law 8th Edition at page 68).

New clauses 3(3) and 11(3)(a)

Q3: The Administration is requested to explain the relationship between the proposed clauses 3(3) and 11(3)(a) as to whether they would conflict with each other.

A3: As long as the commencement date is published only after it has been ascertained, we cannot see how the new clause 3(3) will conflict with clause 11(3)(a).

If it is clear that a successful candidate is prevented by temporary cause from discharging his duty, we believe this will not prevent the Central People's Government (CPG) from appointing him as the CE with effect from the date on which the vacancy arises under clause 4(a). He will then assume office on that day, although he may not be able to discharge his duty temporarily.

Constitutional Affairs Bureau
28 June 2001