

**Subcommittee to study the proposed accountability system  
for principal officials and related issues**

**The Constitutionality of the Accountability System**

The purpose of this paper is to consider whether the accountability system is consistent with the Basic Law.

**Summary**

2. The paper demonstrates that the system is constitutional since –
  - (1) there is no requirement in the Basic Law that principal officials must be employed on civil service terms and conditions;
  - (2) the new terms and conditions of appointment for principal officials under the accountability system are consistent with BL 48(5);
  - (3) neither BL 103 or 100 prevent these developments, which are for the good governance of Hong Kong;
  - (4) the constitutional fundamentals relating to principal officials, the Legislative Council and the Executive Council will be complied with;
  - (5) the reorganisation of bureaux is permitted by the Basic Law; and
  - (6) the underlying Basic Law theme of continuity does not prevent the changes from taking place.

**I. Approach to Interpretation of the Basic Law**

**The principles**

3. In discussing the constitutionality of the accountability system, it is

important to keep in mind the approach to the interpretation of the Basic Law that has been established by the Court of Final Appeal. In the case of Ng Ka Ling v Director of Immigration [1999] 1 HKLRD 315, Li CJ stated the following.

‘It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

As to purpose, the purpose of the Basic Law is to establish the Hong Kong Special Administration Region being an inalienable part of the People’s Republic of China under the principle of “one country, two systems” with a high degree of autonomy in accordance with China’s basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.

As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.’

## **The main provisions**

4. The main provisions of the Basic Law that require interpretation for the purposes of this paper are –

- (1) Articles 43, 48, 54 and 55 (relating to the functions of the Chief Executive, the Executive Council and the HKSARG, and the need for principal officials);
- (2) Articles 59 to 64 (relating to the Executive Authorities and their relationship with the Legislative Council); and
- (3) Articles 99 to 104 (relating to public servants).

## **The Chief Executive**

5. Article 43 provides that the Chief Executive shall be the head of the HKSAR and shall represent the Region; and he shall be accountable to the CPG and the HKSAR in accordance with the Basic Law.

6. Article 48 sets out the powers and functions of the Chief Executive, which include the power –

- to decide on government policies and to issue executive orders (BL 48(4)); and
- to nominate and to report to the CPG for appointment specified principal officials; and to recommend to the CPG the removal of those officials (BL 48(5)).

7. Articles 54 and 55 provide that the Executive Council shall be an organ for assisting the Chief Executive in policy-making, and that its members shall be appointed by the Chief Executive from (amongst others) the principal officials.

## **The Executive Authorities**

8. Article 59 provides that the HKSARG shall be the executive authorities of the Region.

9. Article 60 provides that the head of the HKSARG shall be the Chief Executive of the Region.

10. Article 61 provides that principal officials must be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country and who have ordinarily resided in Hong Kong for a continuous period of not less than 15 years.

11. The HKSARG shall (amongst other things) formulate policies and conduct administrative affairs (BL 62) and be accountable to the Legislative Council in accordance with BL 64.

### **Public Servants**

12. Article 103 provides (amongst other things) that –

‘Hong Kong’s previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals.’

### **The purpose of these provisions**

13. Broadly speaking, the purpose of the relevant provisions is to vest in the Chief Executive the functions of leading the government and deciding on government policies. In respect of these functions, he is to be aided by principal officials and other members of the public service, and by an Executive Council whose members shall be appointed by the Chief Executive from (among others) the principal officials. As part of the checks and balances within the new constitutional order, the HKSARG is accountable to the Legislative Council in accordance with BL 64. And, in order to provide a measure of continuity, certain aspects of the previous system relating to the public service are to be maintained.

## **II. Compliance with the constitutional requirements**

### **Principal officials under the accountability system**

14. Principal officials under the accountability system will continue to assist the Chief Executive in deciding on government policies, and will serve on the Executive Council. They are members of the HKSARG and the HKSARG

will continue to be accountable to the Legislative Council.

15. The Civil Service will continue to be the cornerstone of the public service. Within the Civil Service, the previous system of recruitment, employment etc will continue to be maintained. Civil servants, as part of the HKSARG, continue to conduct administrative affairs. The neutrality of the Civil Service will be strengthened by virtue of the fact that political functions will be transferred from civil servants to principal officials under the accountability system who are not within the Civil Service.

16. The accountability system will fully comply with provisions in the Basic Law (outlined above) in respect of –

- (1) the relationship between principal officials and the Chief Executive, the HKSARG and the Legislative Council (BL 43, 48(4), 60 and 64);
- (2) the method of appointing and removing the principal officials (BL 48(5)); and
- (3) the composition of the Executive Council (BL 54 to 55).

17. With regard to the composition of the Executive Council, the appointment of all principal officials under the accountability system to the Council will not preclude the appointment of members of the Legislative Council or public figures, who are referred to in BL 55. The Basic Law does not specify either the number of Executive Councillors or the proportion of members who shall be principal officials, Legislative Councillors or public figures. It does, however, provide that the appointment of Executive Councillors shall be decided by the Chief Executive, and so the balance between the various types of members is a matter for the Chief Executive to decide.

### **Reorganisation of bureaux**

18. The accountability system will involve a reorganisation of certain policy bureaux. This reorganisation is consistent with the Basic Law, which nowhere specifies the number, functions or names of policy bureaux.

19. The Basic Law provides that certain institutions shall be maintained e.g. the previous capitalist system and way of life (BL 5), the status of a free port (BL 114), and the systems of shipping management and shipping

regulation (BL 124). However, there is no requirement to maintain the previous government structure.

20. The reorganisation of bureaux is therefore entirely consistent with these general provisions. Moreover, since the structure of government is not provided for in any local legislation, the reorganisation can be effected administratively. Subject to what is said in the next section, legislation is not required for that purpose. Previous reorganisations of bureaux and, before Reunification, of government branches were achieved in the same way.

### **III. Transfer of statutory powers to non-civil servants**

#### **Transfer of statutory powers**

21. Under the accountability system, certain statutory powers previously exercisable by the relevant policy secretaries will in future be exercisable by the relevant principal officials under the accountability system. There is no change to the statutory powers. What will be changed is the public officer who will be exercising such statutory functions and powers.

22. This means that –

- (1) the statutory powers of the CS, FS and SJ, and of those secretaries of bureaux whose portfolios have not been reorganised, will remain vested in the same positions; and
- (2) since the reorganisation of certain bureaux will involve a change in the public officers who exercise the relevant statutory powers, it is necessary to transfer relevant statutory powers to the relevant principal officials under the accountability system. This requires legislation, and can be achieved by means of a resolution under section 54A of Cap 1.

#### **Not on civil service terms**

23. There is no requirement in the Basic Law that principal officials must be employed on civil service terms and conditions. BL 61 merely provides that –

‘The principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country and have ordinarily resided in Hong Kong for a continuous period of not less than 15 years.’

24. It is clear from BL 101 that principal officials are public servants. However, the fact that they are public servants does not mean that they must be employed on civil service terms and conditions. There are public servants employed on other than civil service terms and conditions in various government bureaux and departments and these include members of the Central Policy Unit, employees under the standing Non-Civil Service Contract Staff Scheme, and professional staff in the Curriculum Development Institute of Education Department. Two principal officials, namely the Commissioner of the ICAC and the Director of Audit, are not on the civil service establishment. Since the Chief Executive is to lead the HKSARG and to decide on government policies, he may (subject to approval from the Legislative Council for the necessary public expenditure) decide on the terms of service to be offered to principal officials under the accountability system.

25. The expression ‘civil service terms and conditions’ refers to a standard package of terms of conditions that is offered to many (but not all) public servants. The package includes, (for example) provisions relating to pay scales, pay adjustments and leave entitlement. As the public service develops, it is sometimes appropriate to employ public servants on terms that differ from this standard package. This has already happened in different areas, and employing principal officials under the accountability system otherwise than on the standard civil service package is in line with that practice.

### **No security of tenure**

26. The absence of security of tenure for principal officials under the accountability system is entirely consistent with the Basic Law.

27. The Basic Law provides that judges shall have security of tenure (BL 89), but has no such provision for principal officials. On the contrary, BL 48(5) empowers the Chief Executive to recommend to the Central People’s Government the removal of principal officials. It is implicit that principal officials can be removed at any time and are not to have security of tenure.

28. Some principal officials are already employed on contract terms that do not provide for security of tenure, and there is no constitutional objection to all principal officials under the accountability system being so employed.

### **BL 103 is no obstacle**

29. BL 103 provides for the maintenance of the previous system of recruitment, employment, assessment, discipline, training and management for the public service. However, it does not inhibit development and improvement to the public service system that go beyond mere matters of details provided that such changes are for the good governance of the HKSAR. Support for this view is found in the Court of First Instance decision in *AECS v The Secretary for Civil Service* HCAL No. 9 of 1998. According to the court, BL 100, which guarantees that the conditions of service will be no less favourable than before, is principally intended to ensure that no public servant suffers as a consequence of the transition itself and is not intended to inhibit the introduction of new measures for the good governance of Hong Kong. The benefits of the accountability system are considered to satisfy the “good governance” requirement.

30. Therefore even if BL 103 applies to principal officials, it does not prevent the development of the terms and conditions on which they are employed. Within the expression ‘civil service terms and conditions’ there are already many variations, including permanent and pensionable terms and contract terms, and further variations are expected to develop. BL 103 is not intended to freeze the terms of employment of future public servants to those that existed immediately before Reunification, nor to limit them to an undefined set of ‘civil service terms and conditions’.

31. In preserving certain aspects of the previous system relating to the public service, BL 103 cannot have been intended to prevent developments in delivery of public services. For example, services that were previously run by civil servants in a government department can be contracted out to maximize the market potential or transferred to a statutory corporation whose employees are not civil servants. The Article cannot have been intended to limit adjustments in the civil service grades and ranks. Similarly the statutory powers presently exercisable by civil service principal officials can be transferred to principal officials who are not employed on civil service terms

without breaching that Article.

32. In addition, it is arguable that BL 103 was not intended to apply to principal officials at all. As Professor Ghai states in Hong Kong's New Constitutional Order (1999)<sup>1</sup>, appointments of principal officials are made by the CPG after nomination by the Chief Executive. It is therefore to other public servants that art 103 applies.<sup>1</sup>. This view reinforces the conclusion that BL 103 is no impediment to the implementation of the new system.

### **BL 100 is no obstacle**

33. BL 100 provides that –

‘Public servants serving in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.’

This Article does not apply to principal officials under the accountability system who are appointed from outside the Civil Service. Those civil servants who currently benefit from BL 100, and who are offered appointment as a principal official under the accountability system, have a choice. They may either remain as a civil servant, with the benefit of BL 100, or they may voluntarily leave the Civil Service and take up the appointment. In neither situation is there a breach of BL 100.

## **IV. Continuity and change**

### **General principles**

34. One important theme of the Basic Law that has emerged from court

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<sup>1</sup> Professor Yash Ghai makes the following comments in Hong Kong's New Constitutional Order (2<sup>nd</sup> edition, 1999).

‘The overall objective is stated to be the appointment and promotion of public servants on the basis of ‘their qualifications, experience and ability’(art. 103). The reference cannot be to all aspects of the previous system, since the Letters Patent vested the right to determine all appointments and promotions in the public service in the Governor (Clause XIV), and the Civil Service Regulations specified various senior posts appointment to which required the approval of the British government. Appointments to some of these senior posts now, under the Basic Law, are made by the CPG after nomination by the Chief Executive.

It is therefore to other public servants that art. 103 applies.’ (p.276-7)

decision is that of continuity, under the principle of “one country, two systems”. This theme was identified in HKSAR v Ma Wai Kwan, David [1997] HKLRD 761 at 772I –

‘The Basic Law ... translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.’ (per Chan CJHC (as he then was))

35. In the David Ma case, the main issue was whether the offence at common law of conspiracy to pervert the course of public justice had survived the Reunification. The court emphasized that the theme of continuity was revealed in the Basic Law provisions on sources of HKSAR law, and the legal and judicial systems (BL 8, 18, 19, 81 and 87). It concluded that the common law had survived the Reunification. There was therefore no need for a positive act of adoption of the common law by the Standing Committee of the National People’s Congress under Article 160.

36. However, continuity does not mean that changes cannot be introduced by the HKSARG for the development of Hong Kong or its good governance. The courts have recognised that the Basic Law indeed provides for such development. For example, in Cheung Man Wai Florence v The Director of Social Welfare, the Court of First Instance, in upholding the constitutionality of the Social Workers Registration Ordinance, referred to Article 145. This reads as follows :

‘On the basis of the previous social welfare system, the Government of the HKSAR shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.’

37. The Court then observed that :

‘Pursuant to this Article the Government has the duty and is obliged to develop and improve the social welfare system as Hong Kong

society requires, and I find it difficult to understand how the provisions of Article 144 could, in effect, stultify this requirement given that the legislation complained of falls squarely within the area of the development of the social welfare system.’

38. Even where the Basic Law does not expressly permit changes to systems maintained by the Basic Law, the courts have construed it in such a way as to allow changes that are for the good governance of the HKSAR. In AECS v The Secretary for the Civil Service, the applicant had sought judicial review of a new condition of employment imposed by the Government after the Reunification. It was argued that this new condition contravened Article 100, which guarantees that the conditions of service would be no less favourable than before. The Court of First instance held that Article 100 is intended to ensure continuity of employment so that no public servant would suffer as a consequence of the transition itself. It was not intended to inhibit the introduction of new measures for the good governance of Hong Kong.

#### **Application to the accountability system**

39. The Basic Law does not expressly provide for continuity of the governmental structure, nor does it provide that principal officials shall be employed on the same terms as before Reunification. And, in those contexts, there is no basis for reading in a requirement of continuity.

40. It would be entirely contrary to the good governance of the HKSAR to prevent the government from changing its own internal organisation in order to operate more efficiently and effectively. Experience in Hong Kong before Reunification and elsewhere demonstrates that such reorganisations are part and parcel of good administration.

41. With regard to principal officials under the accountability system, it cannot have been intended that, because policy secretaries before Reunification were employed on civil service terms and conditions, those principal officials must for 50 years after Reunification likewise be so employed. The Basic Law contemplates constitutional developments during those 50 years [see BL (45)2 and 68(2)], and to freeze the arrangements for principal officials in that way would be inconsistent with such a policy.

42. Even if (despite what is said above), the theme of continuity does apply in these areas, the case law indicates that this does not preclude change.

This is explicit in some parts of the Basic Law. For example, BL 8 provides that –

‘The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.’

Even where there is no such express provision for changes, the courts will allow this for the development of Hong Kong or its good governance.

### **Conclusion**

43. For the reasons set out above, the Administration firmly believes that the accountability system is entirely consistent with the Basic Law.

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