

Bills Committee on the Education (Amendment) Bill 2002
Administration's Response to Issue raised at the meeting on 30 June 2004

Purpose

In response to the request of Members on 30 June 2004, this paper explains in greater detail why the Administration considers the Bill to be consistent with BL 141(3) which provides as follows:

“Religious organisations may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.”

2. It is considered that when BL 141(3) is construed in the light of its context and purpose and read in conjunction with other relevant BL provisions on education (notably BL 136), BL 141(3) does not prohibit the introduction of new measures by the SAR government to improve the pre-97 education system. The Bill which seeks, inter alia, to amend the Education Ordinance (Cap 279) to facilitate the implementation of the policy of school-based management, is consistent with the Basic Law.

Purposive Approach to BL Interpretation

3. It has been laid down by the CFA that a purposive approach is to be applied in the interpretation of the Basic Law (see *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 339I – 340E and *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533 at 546C – 547B). This approach was first explained by the CFA, in the case of *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315, at pp 339I – 340E:

“We must begin by recognizing and appreciating the character of the document. The Basic Law is an entrenched constitutional instrument to implement the unique principle of “one country, two systems”. As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.

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 Administrative 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." (emphasis added)

4. In short, a purposive approach to the interpretation of the Basic Law is appropriate. While the language of the BL text is important, a literal, technical, narrow or rigid approach must be avoided. The relevant provision should be construed in the light of its context and purpose, which could be

found in the Basic Law itself or relevant extrinsic materials including the Joint Declaration.

5. In the light of the above approach to BL interpretation, BL 141(3) should not be construed in isolation. Insofar as it permits religious organizations to run schools according to “their previous practice”, it should be read in conjunction with other relevant BL provisions relating to the educational system.

6. The court has applied such an approach in the context of the social welfare system in *Cheung Man Wai Florence v Director of Social Welfare*, HCAL 25/1999 summarized in [2000] 1 HKLRD A15 (December 1999). In that case, Cheung Man Wai Florence (“Cheung”) sought judicial review of the decision of the Director of Social Welfare to advise all subvented non-governmental organizations to ensure that all staff in the Social Work Officer and Social Work Assistant grades were registered social workers pursuant to the Social Workers Registration Ordinance (Cap 505) (“SWRO”). Cheung refused to register and argued that the provisions of the SWRO which required social workers to register were inconsistent with BL 144.

7. BL 144 guarantees that “[s]taff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.” The CFI held that in construing BL 144, the “cut-off date” was 30th June/1st July 1997. The Court also referred to BL 145 and held that the Government had the duty thereunder to develop and improve the social welfare system as Hong Kong society required and BL 144 could not stultify this requirement given that the legislation complained of fell squarely within the area of the development of the social welfare system. Therefore, the SWRO was consistent with BL 144.¹

8. The importance of taking into account all relevant BL provisions, as opposed to construing a BL provision in isolation, is clearly demonstrated in the following extracts of the CFI judgment (at p 14):

“Perhaps more to the point, however, is that the Applicant’s argument fails to pay due (or indeed any) regard to the specific provisions of

¹ Cheung appealed to the CA and the appeal was heard before the CA on 31 May 2000. The CA dismissed Cheung’s appeal. The appeal did not concern the provisions of the Basic Law.

Article 142 :-

‘Article 142 The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.’

which provides the statutory context for the provisions of Article 144, and also **Article 145**, viz. :-

‘Article 145 On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.’

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 areas of the development of the social welfare system.”

9. Had the CFI construed BL 144 in isolation, it might well have adopted a different interpretation of BL 144 and come to a wrong decision of the case.

BL 136 on Improvement and Development of Educational System

10. With the above approach in mind, it is important not to construe BL 141(3) in isolation, but to read it in conjunction with other BL provisions on the educational system. In this regard, BL 136 which provides for the improvement and development of HKSAR’s educational system and reads as follows:

“On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education, including policies regarding the

educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications.

Community organizations and individuals may, in accordance with law, run educational undertakings of various kinds in the HKSAR.”

11. BL 136(1) is very similar to BL 145 in terms of structure and syntax. Accordingly to the CFI in the case of *Cheung Man Wai Florence*, pursuant to BL 145 the Government has the duty and is obliged to develop and improve the social welfare system as Hong Kong society requires. Following this approach, the SARG would similarly be under the duty to develop and improve the educational system of the HKSAR. It could not have been the intention of BL 141(3) to stultify the requirement in BL 136(1) given that the Bill falls squarely within the areas of the development of the educational system.

Background Materials

12. Support for the above view can also be found in the following background materials.

Joint Declaration

13. JD 154, upon which BL 141(3) is based, reads as follows:-

“Religious organisations and believers may maintain their relations with religious organisations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organisations may be continued.”

14. While JD 154 provides that schools run by religious organisations may be continued, there is nothing in that provision which prohibits the introduction of new measures intended for the development and improvement of the educational system, such as the introduction of the policy of school-based

management by the Bill. As the Basic Law was intended to translate the Joint Declaration into domestic legal terms, BL 141(3) should not be construed to incorporate an exemption from the special mandate of the SARG under BL 136(1) to develop and improve the educational system through the implementation of the policy of school-based management.

Draft Basic Law

15. In addition, development and improvement of the SAR educational system is intended by the Basic Law in the light of an earlier draft of the Basic Law and the speech of Mr Ji Pengfei, former Chairman of the Basic Law Drafting Committee, delivered when presenting the Basic Law (Draft) to the NPC for adoption on 28 March 1990.

16. BL 136(1) was originally drafted in the form of two separate articles. According to the Draft Basic Law of the HKSAR of the PRC (For Solicitation of Opinions), Consultation Report (Vol. 5), General Report on the Articles (October 1988) – Articles 142-144, it is noted that the then draft Article 142 reads, “The HKSAR shall maintain the educational system previously practised in Hong Kong.” The then draft Article 143 provides, “The government of the HKSAR shall, on its own, formulate policies on education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications”.

17. In the discussion of those two draft articles, concerns were expressed that the draft Article 142 was not practical and would possibly contradict draft Article 143 which granted the SAR government the autonomy to formulate education policies, noting that “in an ever-changing society with education being a kind of social service, the educational system should not and cannot be separated from politics, economics, culture and technology. Hence, education cannot be and should not be unchanged.”

18. That development of the education system is intended by the Basic Law is further evidenced in the following comments on Chapter VI of the Basic Law by Mr Ji Pengfei, Chairman of the Basic Law Drafting Committee, when

addressing the NPC on 28 March 1990:

“Chapter VI of the draft Basic Law carries stipulation on the maintenance and **development** of Hong Kong’s current systems and policies concerning education, science, culture, sports, religion, labour and social services. These stipulations involve the interests of Hong Kong residents in many aspects of public life and are important for social stability and **development.**”

Mr Ji Pengfei’s speech has been accepted by the CFA as an aid to interpretation of the Basic Law (see *Chong Fung Yuen v Director of Immigration* [2001] 2 HKLRD 533 at 546J).

19. Further support can be found in the discussion on the educational system and BL 136 by a former member of the Basic Law Drafting Committee member, Professor Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Eng Ed, 2000), at pp 635 - 7, where he observes as follows:

“In order to ensure that after Hong Kong becomes a special administrative region in 1997, the entire framework of education and the educational system there will be maintained, improved and expanded in conformity with the wishes of the Hong Kong residents and the conditions prevailing in Hong Kong at the time, Article 136 of the Basic Law stipulates, “On the basis of the previous educational system, the Government of the HKSAR shall, on its own, formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications.” This quite comprehensively elucidates the future policies concerning education or the general principle that such policies will be formulated solely by the Government of the HKSAR on its own.

Here, unlike the provisions for the other fields of endeavour, in the

Basic Law people do not find the wording like “the HKSAR shall keep Hong Kong’s previous system of education unchanged”. For example, Article 124 of the Basic Law stipulates, “The HKSAR shall maintain Hong Kong’s previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen.” Article 129 stipulates, “The HKSAR shall continue the previous system of civil aviation management in Hong Kong.” And so on and so forth. The fact that no words like “maintain” and “unchanged” are used in the case of the system of education does not at all mean that the principle of “one country, two systems” is not applicable to the educational system; on the contrary, it serves to carry out that principle all the more. This is because the educational system is bound to improve ceaselessly along with the changing objective environment and with the progress of science and technology. It is therefore impossible to keep that system unchanged. If the system is to be kept unchanged, the purpose may seem to show that the HKSAR will not apply the same system of education as the one applied to the mainland, but as a consequence, it may hamper the initiative of the Government of the HKSAR. Therefore, the provisions of the present Article confer power on the government to expand and improve the system of education in light of the specific conditions prevailing after 1997. The same Article further stipulates, “Community organizations and individuals may, in accordance with law, run educational undertakings of various kinds in the HKSAR.” Of course, educational undertakings run by different kinds of religious organizations are included. ...”

Statistical Information

20. Lastly, schools run by religious organisations account for over 50% of all the schools in Hong Kong. Currently it is 59% while it was 53% in 1997. Given the high percentage of schools run by religious organisations, and the constitutional mandate of the SARG under BL 136 to formulate policies to develop and improve the educational system, it is unlikely that BL 141(3) is intended to exempt a majority of the schools in the HKSAR from the specific

mandate of the SARG to develop and improve the educational system under BL 136. Such an interpretation would avoid the problem of creating differential treatment between School Sponsoring Bodies that are religious organisations and those that are not.

Constitutionality of the Bill

21. To conclude, the Bill, which provides for school-based management, ensures participatory decision-making, and enhances the transparency of school management as well as public accountability, is an improvement to the educational system. It is consistent with BL 141(3) read in conjunction with BL 136.

Education and Manpower Bureau
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