

**President's ruling on
amendments proposed by Hon Martin LEE Chu-ming, SC, JP to
motion on "Requesting the Chief Executive to submit a supplementary
report to the Standing Committee of the National People's Congress"
to be moved by Frederick FUNG Kin-kee
at the Council meeting of 5 May 2004**

Hon Frederick FUNG Kin-kee has been given approval to move the following motion at the Council meeting to be held on 5 May 2004:

(Translation)

"That this Council does not accept the report submitted by the Chief Executive ("CE") to the Standing Committee of the National People's Congress, and is dissatisfied with the nine factors proposed therein regarding constitutional reform, as such a move is tantamount to setting up more barricades hindering the implementation of universal suffrage in Hong Kong and hampering the development of democracy; at the same time, this Council urges the CE to consult Hong Kong people immediately and submit a supplementary report which fully reflects the opinions of the public, so as to meet Hong Kong people's expectations of electing the CE and all Legislative Council Members by universal suffrage in 2007 and 2008 respectively."

2. Hon Martin LEE Chu-ming gave notice on 27 April 2004 to propose amendments to the motion. If the amendment was allowed and passed by the Council, the motion moved by Mr FUNG, as amended by Mr LEE, would read:

(Translation)

"That this Council does not accept the report submitted by the Chief Executive ("CE") to the Standing Committee of the National People's Congress, and is dissatisfied with the nine factors proposed therein regarding constitutional reform, as such a move is tantamount to setting up more barricades hindering the implementation of universal suffrage in Hong Kong and hampering the development of democracy; *this Council also considers that the Standing Committee of the National People's Congress has abused its power in ruling out flatly the respective elections of CE in 2007 and of the Legislative Council in 2008 by universal suffrage, which not only violates the Basic Law and ignores Hong Kong people's aspirations for democracy, but also seriously damages the "one country, two systems" and Hong Kong's high degree of autonomy; this Council strongly condemns this and urges the*

people of Hong Kong to continue striving for democracy and never give up."

3. Mr LEE's proposed amendment consists of three parts, namely:
 - (a) "that the Standing Committee of the National People's Congress (NPCSC) has abused its power";
 - (b) "that ruling out flatly the respective elections of CE in 2007 and of the Legislative Council in 2008 by universal suffrage not only violates the Basic Law and ignores Hong Kong people's aspirations for democracy, but also seriously damages the "one country, two systems" and Hong Kong's high degree of autonomy"; and
 - (c) "that this Council strongly condemns this and urges the people of Hong Kong to continue striving for democracy and never give up ".

The Administration's views

4. On 29 April 2004, the Secretary for Justice (SJ) made a written submission for my consideration (copy in **Appendix I**).

5. SJ considers that there are constitutional limits to the powers and functions of the SAR legislature under the authorization of the NPC through the Basic Law, vis-à-vis the NPC and its Standing Committee. In the context of amendments to Annexes I and II of the Basic Law, a close relationship between the SAR legislature and the Standing Committee is provided for in the Annexes. Specifically, the SAR legislature is entrusted with the constitutional function to report relevant amendments to the NPCSC for approval or record, as the case may be.

6. In view of this constitutional relationship between the Hong Kong legislature and the NPC and NPCSC, the Administration submits that it is out of order for the Legislative Council to debate a motion or amendment whose language and/or substance accuses the NPC or NPCSC of breach of law or other improper conduct.

7. The Administration requests that LegCo apply to the NPC and NPCSC the same standards that it applies to itself, namely that it is out of order for LegCo to pass a motion involving offensive expressions against the character and conduct of LegCo itself which would be likely to degrade the legislature in the public estimation.

8. The Administration further submits that the amendment is beyond the scope of the original motion which is expressly directed at the Report of the Chief Executive submitted to the NPCSC. The amendment is directed at the NPCSC's consideration of the Report and requires Members to decide (among other issues):

- (a) whether the NPCSC abused its powers;
- (b) whether it violated the Basic Law; and
- (c) whether the Council should condemn the NPCSC's decision.

Even if these issues were considered to be in order for debate they are clearly matters which are both grave and wholly outside the scope of the original motion.

Response from Hon Martin LEE

9. In view of the Secretary's submission, I have invited comments from Hon Martin LEE. In his letter to me of today's date (copy in **Appendix II**), In a nutshell, Mr LEE states that if his proposed amendment is ruled out of order because the language and/or substance of his proposed amendment accuses the NPC or NPCSC of breach of law or other improper conduct, it might be argued that this Council may not challenge the executive acts of the Central Authorities, the Hong Kong and Macau Affairs Office or the Central Government's Liaison Office, etc, and, in the absence of clear argument and authority, such a ruling would be a totally unacceptable curtailment of the powers of this Council and the freedom of speech and debate in this Council.

10. As regards the question of scope, Mr LEE urges me to take into account that the original motion has been overtaken by subsequent events and it would be quite meaningless to debate it.

Advice of Counsel to the Legislature

11. Counsel to the Legislature advises that as the scope of the original motion is confined to the content of the CE's report, debate on matters relating to the NPCSC's consideration of the report is clearly not within the contemplation of the mover of the motion when notice of it was given.

12. Assuming that the President accepts this advice, it is for her to decide whether to take the other points made by the Administration and Mr LEE.

13. As regards the Administration's submission on the proper limits of debate, Counsel to the Legislature agrees with the view that NPC and NPCSC command a special constitutional position in HKSAR as recognized by BL. Although not referred to by the Administration, other provisions in the Basic Law which may be relevant and in support of this view are Articles 1 and 11. Article 1 provides that the HKSAR is an inalienable part of the People's Republic of China and Article 11 provides that, in accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the HKSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of the Basic Law. The Administration's objection is based on a general description of constitutional relationship in the context of BL.

14. Counsel considers that the question for the President to consider is whether, in the light of the special constitutional status of the NPC and NPCSC and the constitutional relationship between LegCo and the NPC and NPCSC, and despite the fact that there are no express restrictions in BL and the Rules of Procedure, she should exercise her authority under Rule 30(3) of the Rules of Procedure to return the proposed amendment motion to the Member on the ground that it is out of order.

15. The first issue under this question is whether LegCo should accord the NPC and NPCSC the courtesy and respect to the extent of not allowing offensive expressions to be used against them in motions or amendments to motions. The Administration made reference to what is in effect the practice described in *Erskine May* under the heading: "WORDS AGAINST PARLIAMENT, OR EITHER HOUSE". The President is not bound, but may be guided, by the practices in other jurisdictions where the matter she has to consider is not provided for in the Rules of Procedure. Hon Martin Lee suggested that that practice should not apply for reasons that the expressions used in his proposed amendment motion are not unparliamentary and that the relationship between NPCSC and LegCo is not the same as that between House of Commons and House of Lords in the British Parliament. Counsel advises that if the President is satisfied that that practice in the British Parliament is relevant to the issues before her, it is for her to decide how she would be guided by it in order to determine what the practice that LegCo should follow.

16. If the President decides that she may be guided by that practice in the British Parliament, the next issue is how NPCSC should stand in relation to LegCo in the context of a motion which directs at it or its conduct. In the light of NPCSC's special constitutional position and its constitutional relationship with LegCo, it would be reasonable for the President to decide that LegCo should not allow itself or its Members to use expressions of serious allegations of abuse of power or violation of the law against NPCSC.

My opinion

17. This is the first time a Member proposes a motion, in the form of an amendment to a motion, with allegations against NPCSC's action and seeking the Council's support to condemn NPCSC's decision made recently. It is also the first time any Members proposes a motion which accuses any legislature of breach of law and abuse of power.

18. Under Article 57 of the Constitution of our country, the NPC is the highest organ of state power and its permanent body is the NPCSC. Article 1 of the Basic Law (BL) states that "the HKSAR is an inalienable part of the People's Republic of China". It is therefore clear that the NPCSC is the permanent Standing Committee of NPC — the highest organ of power in our country, whereas the HKSAR Legislative Council is a legislature of our Region.

19. Article 5 of the BL reflects the State policy of the "one country, two systems". Article 12 stipulates that the HKSAR shall be a local administrative region of the People's Republic of China, which shall have a high degree of autonomy and come directly under the Central People's Government. Article 17 provides that the HKSAR shall be vested with legislative power. Article 73(1) and 73(6) prescribe that the Legislative Council has, among others, the powers and functions to enact, amend or repeal laws in accordance with the provisions of BL and legal procedure, and to debate any issue concerning public interests.

20. Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) states that there shall be freedom of speech and debate in the Council.

21. In my opinion, the above provisions set out the constitutional relationship between the NPC/NPCSC and the HKSAR/HKSAR Legislative Council, and their relevant powers, based on which I should proceed to consider the main issues raised by the Administration and Mr LEE, viz whether it is in order for this Council to debate a motion relating to the exercise of NPCSC's power concerning the HKSAR and, if so, whether the terms of Mr LEE's proposed amendment are in order. There is, of course, the other question of whether the proposed amendment is within the scope of the original motion.

22. As President of this Council, it is one of my duties to act as the guardian of the rights and privileges of Members, including their freedom of speech. At this point, I should point out that such freedom is not without bounds. For example, as with other legislatures, our own Rules of Procedure

have dedicated Parts that govern Members' speeches and behaviour.

23. Depending on the specific terms of a proposed motion, I think it is not entirely impossible for a motion relating to a state organ to be admitted for debate in the Council, provided that it meets the requirements of the relevant instruments and rules.

24. The next question, then, is whether it is proper for this Council to debate a motion, such as Mr LEE's proposed amendment, with terms that seek to make accusations against NPCSC's action and to condemn it. It is already decided that the NPCSC is entitled to exercise its power under Article 158 of BL. The NPCSC has, by virtue of its interpretation of Article 7 of Annex I and Article III of Annex II to BL, made decisions on issues relating to the relevant Articles. Against this background, I do not regard it as proper for Mr LEE to move his proposed amendments in the terms that were handed in. I accept the Administration's point that it is out of order for LegCo to debate a motion involving accusatory expressions against the character of NPCSC or the acts of NPCSC according to law, which would be likely to degrade it in the public estimation.

25. Lastly, I agree with the Administration's view that the amendment is beyond the scope of the original motion and is therefore out of order. With regard to Mr LEE's statements that "the original motion has clearly been overtaken by subsequent events" and "A debate on the original motion ... would be quite meaningless, particularly in relation to the latter part of the motion", it is for the mover of the motion to decide whether to withdraw it or trim it down.

Ruling

26. I rule that Hon Martin LEE's proposed amendment to Hon Frederick FUNG Kin-kee's motion is out of order as it exceeds the scope of the original motion. I also rule that, for the reasons stated in my above opinion, it is out of order for LegCo to debate the amendment involving accusatory expressions against the acts of NPCSC undertaken in accordance with the Constitution and the Basic Law.

(Mrs Rita FAN)
President
Legislative Council

30 April 2004

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29 April 2004

Mrs Rita Fan, GBS, JP
President of the Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear President,

In connection with Hon Martin Lee's notice of amendment to Hon. Frederick Fung's motion set down in Council for 5 May 2004 the Administration wishes to make the following submission for your consideration.

The proper limits of debate

Whilst the Administration fully respects the power and function of the Council under BL73(6) "To debate any issue concerning public interest", and Members' freedom of speech and debate in the Council Chamber under section 3 of the Legislative Council (Powers and Privileges) Ordinance Cap. 382, these provisions are nevertheless subject to certain limitations, depending on context.

One particularly relevant context in this case is the special constitutional status of the NPC and its permanent body, the NPCSC, as recognized by the Basic Law. BL 2 provides that "[t]he NPC authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive,

legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.” So far as the Legislature is concerned, it is by virtue of the NPC’s authorization, as set out in BL 17, that the HKSAR “shall be vested with legislative power”. Moreover, the HKSAR is under a duty to report laws enacted by the SAR legislature to the NPCSC for the record, and the NPCSC may return and invalidate any such laws that it considers to be in breach of the Basic Law in accordance with BL 17(3).

Hong Kong’s Judiciary has accepted that the NPC and NPCSC have a special status. In *Ng Ka Ling v Director of Immigration* (No. 2) [1999] 1 HKLRD 577 at 578C (at 578E), the CFA accepted that there are constitutional limits to the judicial power of SAR courts vis-a-vis the NPC and the NPCSC¹.

There are therefore constitutional limits to the powers and functions of the SAR legislature under the authorization of the NPC through the Basic Law, vis-a-vis the NPC and its Standing Committee. In the context of amendments to Annexes I and II of the Basic Law, a close relationship between the SAR legislature and the Standing Committee is provided for in the Annexes. Specifically, the SAR legislature is entrusted with the constitutional function to report relevant amendments to the NPCSC for approval or record, as the case may be.

In view of the constitutional relationship between the Hong Kong legislature on the one hand, and the NPC and NPCSC on the other hand, the Administration submits that it is out of order for the Legislative Council to debate a motion or amendment whose language and/or substance accuses the NPC or NPCSC of breach of law or other improper

¹ “The Court’s judgment of 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 judgement question, and the Court accepts that it cannot question, the authority of the NPC or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”

conduct. Mr. Lee's amendment clearly falls into this category, in the Administration's view.

In making this submission regarding LegCo's proper parliamentary conduct the Administration is requesting no more than that LegCo apply to the NPC and NPCSC the same standards that it applies to itself, namely that it is out of order for LegCo to pass a motion involving offensive expressions against the character and conduct of LegCo itself which would be likely to degrade the legislature in the public estimation (although criticism of the role and functions of LegCo would be in order).

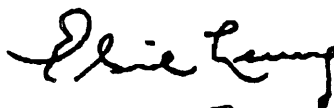
Scope of the amendment

The Administration further submits that the amendment is beyond the scope of the original motion and is therefore out of order under the Council's Rules of Procedure. The original motion is expressly directed at the Report of the Chief Executive submitted to the NPCSC. The amendment is directed at the NPCSC's consideration of the Report and requires members to decide (among other issues) –

- i) whether the NPCSC abused its powers;
- ii) whether it violated the Basic Law; and
- iii) whether the Council should condemn the NPCSC's decision.

Even if these issues were considered to be in order for debate they are clearly matters which are both grave and wholly outside the scope of the original motion.

Yours sincerely,



(Ms. Elsie Leung)
Secretary for Justice

30 April, 04

Mrs. Rita Fan, GBS, JP
President of the Legislative Council,
Legislative Council Building
8 Jackson Road,
Central, Hong Kong.

Dear President,

Re: Letter from the Secretary for Justice of 29 April, 2004

Thank you for giving me an opportunity to deal with the objections of the Secretary for Justice to my proposed amendment to Hon. KK Fung's motion for 5 May, 2004. Time would not permit me to deal with the letter in detail.

The proper limits of debate

2. Very important constitutional questions were raised under this heading, although it is not exactly clear what she was driving at. The key objection seems to lie in the last paragraph of page 2, namely, that my proposed amendment is "out of order" because "(the) language and/or substance accuses the NPC or NPCSC of breach of law or other improper conduct".

3. No reason was given except in the succeeding paragraph, namely, that Legco should "apply to the NPC and NPCSC the same standards that it applies to itself, namely, that it is out of order for Legco to pass a motion involving offensive expressions against the character and conduct of Legco itself which would be likely to

degrade the legislature in the public estimation.”

4. I have the following observations to make:

- (1) The quotation in paragraph 3 above appears to be a paraphrase of the first sentence of a paragraph at page 382 of Erskine May under the heading: “WORDS AGAINST PARLIAMENT, OR EITHER HOUSE”.
- (2) Although some strong words appear in my proposed amendment, they reflect the sentiment of many of my colleagues in the Council and a large sector of the community. And they are certainly not unparliamentary.
- (3) Even if (though not admitted) they, or some of them, might be considered in the House of Commons to be “offensive expressions against the character of Parliament itself” (see Erskine May above), my proposed amendment is not directed at the Legislative Council itself, but solely the NPCSC.
- (4) The NPC and this Council are separate and are not different houses of the same legislature as the House of Commons and the House of Lords are in the British Parliament.
- (5) Although the S for J mentioned “the constitutional relationship” between the Hong Kong legislature and the NPC or NPCSC, she has not taken the point that the NPC is a superior legislature, and that the inferior Hong Kong legislature is not empowered to and must not criticise the NPC or NPCSC. Even if the S for J were to take this point, there is, with respect, no substance in it. For I remember that in the colonial days of Hong Kong, members of the Council (including me) used, and were permitted to use, on more than one occasion, even stronger language in condemning the British (sovereign) Parliament in relation to, for example, the nationality laws.
- (6) As to the reference to the Court of Final Appeal’s judgment in Ng Ka Ling v

Director of Immigration (No. 2) [1999] 1 HKLRD 577 at 578C-E, the CFA accepted that “it cannot question the authority of the NPC or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein”. (emphasis added) The CFA has certainly not conceded that it cannot or has no jurisdiction to examine as to whether any act of the NPC or NPCSC is or is not in accordance with the provisions of the Basic Law.

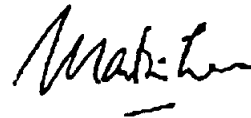
- (7) The CFA is plainly right in not conceding the point because the NPC and NPCSC have many different roles to play—see articles 62 and 67 of the Constitution of the People’s Republic of China—some are legislative in nature while others are clearly executive in nature.
- (8) The NPCSC’s interpretation of paragraph 7 of Annex I and paragraph III of Annex II of the Basic Law on 6 April was clearly an exercise of a legislative function, while its decision made on 26 April in ruling out democratic elections of the Chief Executive in 2007 and the entire legislature in 2008 was not and did not purport to be the exercise of a legislative function. Indeed, the latter is in substance an executive or administrative act.
- (9) If my proposed amendment were to be ruled out of order on this ground, it would be opening Pandora’s box, for it might be argued that this Council may not challenge the executive acts of the Central Authorities, the Hong Kong and Macau Affairs Office or the Central Government’s Liaison Office etc.
- (10) In the absence of clear argument and authority, it is submitted that such a ruling would be a totally unacceptable curtailment of the powers of this Council and the freedom of speech and debate in this Council.

Scope of the amendment

5. In relation to this objection, I urge you to take the following matters into account:-

- (1) The original motion has clearly been overtaken by subsequent events—for not only did the NCPSC adopt on 26 April the Chief Executive's Report which was the reason for the original motion, it actually went further by ruling out democratic elections of the Chief Executive in 2007 and the entire legislature in 2008.
- (2) A debate on the original motion on 5 May would be quite meaningless, particularly in relation to the latter part of the motion in urging "the CE to consult Hong Kong people immediately and submit a supplementary report which fully reflects the opinions of the public, so as to meet Hong Kong people's expectations of electing the CE and all Legislative Council Members by universal suffrage in 2007 and 2008 respectively."
- (3) Clearly, the intention of the original motion was that the NPCSC would or might be persuaded by the public opinion expressed in the supplementary report so as not to rule out democratic elections in 2007 and 2008, but to rule that such elections should be introduced to Hong Kong.

Thank you for your attention.



Yours sincerely,

(Martin Lee)

Legislative Councillor