

立法會

Legislative Council

LC Paper No. LS88/08-09

Panel on Education Paper for the Special Meeting on 6 July 2009

Comments of the Legal Service Division on the views of the Heads of Universities Committee on the Establishment of an Inter-Institutional Complaints Committee

Purpose

The purpose of this paper is to provide for Members' reference the comments of the Legal Service Division on the views of the Heads of Universities Committee (HUCOM) on the establishment of an inter-institutional complaints committee.

Background

2. At the meeting of the Panel on Education on 9 February 2009, deputations were invited to express views on, among other things, the grievances and complaints handling mechanisms of the University Grants Committee (UGC)-funded institutions. Some deputations were of the view that the existing mechanisms were ineffective. They had no confidence in the existing mechanisms.

3. Some deputations proposed the establishment of an elected independent inter-institutional complaints committee (the Committee), which would work like an arbitration committee. Respectable persons from individual institutions such as professors and eminent members of the community should be elected as arbitrators to resolve complaints concerning UGC-funded institutions. The Committee would save resources and ensure effectiveness as persons with good understanding of the operation of UGC-funded institutions would assume the role of arbitrators. Members supported the proposal.

4. In a letter dated 2 February 2009 which was issued to Members before the said meeting (LC Paper No. CB(2)775/08-09(01)), the Administration set out the views of HUCOM on the establishment of the Committee, which are summarized below –

- (a) review and appeal mechanisms are already in place in all eight member universities of HUCOM for handling staff and student grievances and

complaints. There are also proper channels for staff and students to monitor and question the policies and operations of their universities;

- (b) it is difficult to set up the Committee, given the complexities of university operation and management and the wide range of institutional differences that exist across the UGC-funded institutions. Complaints and appeals from staff and students can be more effectively and expeditiously handled by members of the same institution, who have a better understanding of the mission, tradition, and culture of their own university;
- (c) all UGC-funded universities enjoy institutional autonomy and their Councils are vested with statutory powers to deal with appeals. Any party who still feels aggrieved after the Councils have ruled can lodge further complaints/appeals to judicial bodies. It is difficult to conceive how the Committee can super-impose its rulings on these bodies. It will be tantamount to usurping the legal powers of the university councils, infringing on the autonomy of the institutions, and slighting the judgments of the courts; and
- (d) it is questionable whether the mediation or decision of the Committee will carry enough weight to be binding on the disputed parties.

5. HUCOM concluded that the Committee can replace neither the existing mechanisms nor the judicial processes. Therefore, HUCOM did not support the proposal to establish the Committee.

6. Members requested the Legal Service Division to provide legal advice on the response of HUCOM's views, in particular paragraph (c) above, at the next meeting on the grievances and complaints mechanisms of UGC-funded institutions.

7. Members may refer to the minutes of the meeting (LC Paper No. CB(2)1003/08-09) for further information.

The Committee

8. The Committee has not been established. It should work like an arbitration committee but there is no concluded view as to its operation, terms of reference, its relationship with the universities, etc. The Legal Service Division is only able to comment according to the relevant general principles.

Comments on HUCOM's Views

9. HUCOM's view in paragraph 4(c) relates to –
- (a) institutional autonomy of UGC-funded institutions; and
 - (b) the relationship of the rulings of the Committee and judicial bodies.

Institutional Autonomy

10. Article 137 of the Basic Law provides that education institutions of all kinds may retain their autonomy and enjoy academic freedom. The court observes that the phrase "educational institutions of all kinds" refers to "institutions of higher learning, universities and the like where, in all open and democratic societies, autonomy and academic freedom are essential to their functioning."¹ University autonomy is therefore guaranteed by the Basic Law.

11. In another judgment², the court notes that, in relation to institutional autonomy, paragraph 40 of the **United Nations Committee on Economic, Social and Cultural Rights, General Comments No. 13** states that –

"The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible."

12. In Hong Kong, universities self-governance is implemented through the ordinances establishing the universities. The University of Hong Kong (the University), for example, was incorporated under the University of Hong Kong Ordinance (Cap. 1053) (the Ordinance). It is given the power to enter into contracts. The governing bodies are given specific powers and functions, including the power to make statutes, in the governance of the University, conferring of degree, etc.

¹ Secretary for Justice v Commission of Inquiry on Allegations Relating to the Hong Kong Institute of Education, HCAL108/2007 at paragraph 49.

² Catholic Diocese of Hong Kong v Secretary for Justice [2007] 4 HKLRD 483 at 538, paragraph 245.

13. Councils of universities are also given power to make statutes in relation to the welfare and discipline of students or employees of the universities. Statute XIX 2(1) of the University provides that notwithstanding the generality of the powers vested in the Council by paragraph 1 of that statute and subject to the provisions of the Ordinance and the statutes, the Council shall have power –

"to appoint any person or committee to entertain and, if appropriate, adjudicate upon, on its behalf, complaints from members of the University and persons employed in it and to redress their grievances: Provided that the Council shall not entertain or adjudicate upon any complaint which falls within the jurisdiction of the Disciplinary Committee".

14. In relation to the Disciplinary Committee, which deals with complaint against a student, statute XIX 2(1a) also empowers the Council –

"to allow or dismiss an appeal from the Disciplinary Committee and to vary any penalty imposed by the Disciplinary Committee, or to appoint any person or committee to discharge those duties".

15. It appears that the Council of the University is not prevented by the Ordinance or its statute to appoint a person or a committee independent of the University to handle complaints and redress grievances, or to hear an appeal from the Disciplinary Committee.

16. Despite the above observations, since there is no substantive provision on the operation of the Committee, the Legal Service Division is not in a position to comment on how the Committee would be tantamount to "usurping the legal powers of the university councils, infringing on the autonomy of the institutions".

The Committee and Judicial Bodies

17. While the Basic Law provides that universities enjoy institutional autonomy, decisions of the universities are not free from judicial supervision. Universities are created by statute and are statutory bodies. One of their functions is to provide education and they are therefore discharging a public function. As such, decisions of the universities or a committee appointed by the universities in the discharge of public functions may be subject to judicial review.³ In determining whether judicial review is available, apart from the source of power, the court may examine the nature of the decisions.⁴ Examples of judicial review on decisions of universities include –

³ LEUNG Chak-sang v Lingnan University HCAL638/2000, 15 March 2001, per the Hon Mr Justice Chung.

⁴ R v Panel on Take-overs and Mergers, ex parte Datain plc and another [1987] 1 All ER 564.

- (a) **Jill Spruce v The University of Hong Kong** [1993] 2 HKLR 65. The applicant sought to review the decision of the Council of the University to dismiss her for breaches of regulations prescribed by the Council under section 12(14) of the Ordinance and the statute of the University. The application was dismissed by the courts of Hong Kong, which was upheld by the Privy Council;
- (b) **Li Yiu Kee v The Chinese University of Hong Kong** HCAL5/2008. The applicant challenged the policy on the language of instruction of The Chinese University of Hong Kong. The applicant contended that the language of instruction "shall be Chinese". The application was dismissed by the Court of First Instance on 9 February 2009.

18. Article 80 of the Basic Law provides that the courts of the Hong Kong shall be the judiciary of the Region, exercising the judicial power of the Region. Article 84 also provides that the courts of Hong Kong shall adjudicate cases in accordance with the law applicable in Hong Kong as prescribed in Article 18 of the Basic Law. Article 85 further provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference. With these provisions in mind, it appears that the rulings of the Committee are subject to judicial review and could not oust the jurisdiction of the court.

19. Although there is no substantive provision as to how the Committee would operate, in the light of the above provisions of the Basic Law, the Legal Service Division cannot find any legal basis to support the proposition that the decisions of the Committee would be tantamount to "slighting the judgments of the courts".

Enforcement of the Decisions of the Committee – HUCOM's Views at paragraph 4(d)

20. If the Committee is going to operate as an arbitration committee, an agreement to arbitration is essential before arbitration is possible. Section 18 of the Arbitration Ordinance (Cap. 341) provides that unless a contrary intention is expressed in an arbitration agreement, the arbitration agreement shall be deemed to contain a provision that the award to be made by the arbitrator shall be binding on the parties. Section 2GG further provides that the award of arbitration is enforceable, with the leave of the Court of First Instance, in the same way as a judgment, order or decision of the Court of First Instance.

HUCOM's Views in Paragraph 4(a) and (b)

21. Paragraph 4(a) and (b) concerns the merits of the existing mechanisms. It appears to be a matter of judgment for Members to decide. It is not appropriate for the Legal Service Division to comment.

Conclusion

22. To conclude –

- (a) university autonomy is guaranteed under the Basic Law. However, as there is no substantive provision as to how the Committee should operate, the Legal Service Division cannot comment on how the decisions of the Committee would be tantamount to "usurping the legal powers of the university councils, infringing on the autonomy of the institutions" ; and
- (b) the Committee cannot oust the jurisdiction of the court. The Legal Service Division cannot find any legal basis for the proposition that the decisions of the Committee would be tantamount to "slighting the judgments of the courts".

23. An arbitral award of the Committee is enforceable in the court.

Prepared by

Legal Service Division
Legislative Council Secretariat
3 July 2009