

立法會
Legislative Council

LC Paper No. CB(2)2385/98-99

Ref : CB2/PL/CA
Tel : 2869 9269
Date : 24 June 1999
From : Clerk to Panel
To : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon LEE Wing-tat
Hon Martin LEE Chu-ming, SC, JP
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Hon CHEUNG Man-kwong
Hon Ambrose CHEUNG Wing-sum, JP
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Hon Gary CHENG Kai-nam
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon Ambrose LAU Hon-chuen, JP
Hon SZETO Wah

**Special Meeting of the LegCo Panel on Constitutional Affairs
on 25 June 1999**

Further to LC Paper No. CB(2) 2359/98-99 of 22.6.1999, I attach a copy of the article by Bing Song appearing in the South China Morning Post on 15.6.99 (item (5) of the agenda) for members' reference.

2. Please bring along to the meeting the above paper as well as the following papers -
 - (i) The Administration's paper on "Right of Abode: The Solution" tabled at the special meeting of the House Committee on 18 May 1999 (item (1) of the agenda);

- (ii) The Legal Adviser's letter and the Department of Justice's reply on the "test cases" issued under LC Paper No. CB(2) 2148/98-99 of 28.5.1999, CB(2) 2350/98-99 of 21.6.1999 and CB(2) 2371/98-99 of 23.6.99; and
- (iii) The Administration's response to queries raised by Members at the special House Committee meetings held on 8, 10 and 15 May 1999 issued under LC Paper No. CB(2) 2142/98-99 of 28.5.99 and LC Paper No. CB(2) 2328/98-99 of 17.6.99.

(LAW Wing-lok)
for Clerk to Panel

Encl.

cc. All other Hon Members of Legislative Council
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SALA

Three flaws in the SAR's case

When it comes to the NPCSC referral, the Government claims to know the system best. Not so, says Bing Song, it's they who have it wrong

The decision by the Government to seek an interpretation from the Standing Committee of the National People's Congress (NPCSC) rests on three arguments.

First, Article 158 of the Basic Law clearly stipulates that the NPCSC has the power to interpret the Basic Law. Therefore, it is perfectly consistent with the Basic Law for the Government to seek interpretations from the NPCSC.

Second, legislative interpretations are perfectly acceptable in the civil law tradition even though they are foreign to the common law tradition. We must strive to get accustomed to the civil law tradition which informs the current mainland Chinese legal system.

Third, such interpretations by the NPCSC, though rare, are well-established in the mainland. The alarm and outrage expressed by some members of the legal community in Hong Kong is due to ignorance on the part of common law lawyers.

I want to evaluate these arguments, in reverse order.

► **Is seeking an interpretation consistent with established Chinese law principles and practices?**

It is true that the National People's Congress and its Standing Committee have the power to pass legislation and the NPCSC possesses the power of interpretation in the current Chinese legal system. The NPCSC's interpretations often take the form of resolutions, which are meant to complement and supplement legislation by filling the gaps in the constitutional and legal framework. They have full legal force.

However, these are not interpretations concerning particular legal disputes which have come before a court. Nor are they used to overrule part or all of a court's decision. Therefore, contrary to the Government's assertion, there is no recognised Chinese legal principle or practice which allows the Government to seek NPCSC interpretations to overrule part if not all of the Court of Final Appeal decision on the right of abode.

While the NPCSC does not exercise the right of interpretation in the way the Government argues, the National People's Congress and local people's congresses are empowered to "supervise" the courts. Such supervision often takes the form of private individuals complaining to deputies of people's congresses and requesting the deputies to put pressure on a court to reopen a case. Since this form of supervision lacks procedural safeguards and severely undermines the authority of courts, it has been subject to severe criticism by many Chinese legal scholars.

Even if the Government is correct in asserting that the NPCSC routinely issues interpretations with the effect of overruling courts' decisions, it does not follow that we should adopt the mainland practice in a wholesale fashion.

First, we are in a unique "one country, two systems" situation under which it is axiomatic that we should not take into account the legal practice of one system alone while disregarding the practices in the other system completely.

Second, the mainland's legal practices are in constant flux. These changes are the result of dramatic economic, social and political transformations that have marked the mainland society in the past two decades.

Many aspects of the mainland's legal system have been subject to intense criticism by mainland Chinese legal scholars and reformists and, indeed, by the mainland authorities themselves at times.

The excessive power that the Chinese law bestows upon people's congresses to supervise the courts is one such area that has been subject to criticism by many Chinese legal scholars.

► **Is seeking an interpretation from the NPCSC consistent with the civil law tradition?**

It is no secret that Article 158 of the Basic Law was inspired by the preliminary ruling or reference procedures practised in the European Union and a large number of continental European countries. We thus applaud the approach of seeking inspiration from the civil law tradition.

However, the Government is misleading in justifying its decision to seek the NPCSC's interpretations by asserting that legislative interpretations are widely practised in civil law countries.

First, a large number of European countries have moved away from the model of legislative interpretations by establishing consti-

tutional courts or institutions which serve as guardians of their constitutions. The German Constitutional Court, a model emulated by many other European countries, is one such prominent example.

Second, the reference procedure in Germany or preliminary ruling procedure in the case of European Union, under which interpretations from a higher authority are sought, is involved prior to, not after a court's final decision. In the case of German constitutional interpretations, courts must stay the proceeding and certify the question to the Constitutional Court when judges in these courts (other than the Constitutional Court) believe that a statute determinative of the case before it is unconstitutional.

Once the referring court receives a ruling on the issue of constitutionality, the court will resume the proceeding before it and decide the case in ways consistent with the ruling of the Constitutional Court.

Similarly, Article 177 of the Treaty of Rome of the European Union grants jurisdiction to the European Court of Justice to give preliminary rulings concerning interpretations of the Treaty of Rome and Community acts. The mechanism of the preliminary ruling procedure is as follows: a national court refers or certifies a question concerning Community law to the European Court of Justice, which will issue a ruling on the question of law. The ruling binds the referring court in its adjudication of the case before it.

The practice of seeking interpretations from a higher authority after a final court judgment, with the effect of overruling the court judgments, does not figure in either the German constitutional framework or in Article 177 procedure of the European Union. Rather, in both cases, the only possibility is to seek interpretations on points of law prior to a court's judgment.

Therefore, the Government's decision to seek interpretations from the NPCSC after the CFA's judgment is also inconsistent with predominant legal practices in the civil law tradition.

► Is seeking an interpretation consistent with the Basic Law?

The Government invokes the first sentence of Article 158 of the

Basic Law to justify its decision to seek an interpretation from the NPCSC and argues that its decision is perfectly consistent with the Basic Law. However, the Government fails to mention the rest of the provisions in Article 158 and Article 2, 19 and 82 of the Basic Law.

Article 158 does have an overarching provision which provides the NPCSC with the power of interpreting the Basic Law. However, the rest of the provisions qualify this power.

First, these provisions delegate some of its interpretative power to Hong Kong courts by stating that the NPCSC shall authorise the Hong Kong courts to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the SAR. The courts of the Hong Kong SAR may also interpret other provisions of the Basic Law in adjudicating cases.

Second, with respect to provisions that are the responsibility of the central government or provisions bearing on the relationship between the central authorities and the SAR, Article 18 clearly contemplates a scheme under which the CFA may seek interpretations prior to its final judgment.

This has two implications. First, it is arguably within the discretion of the CFA to determine whether it will refer a particular provision to the NPCSC for interpretation. The power of the Government to see interpretations of Basic Law provisions from the NPCSC that are determinative of a particular case cannot be found in Article 158, not even by implication. Moreover, the interpretations are to be sought prior to and not after a final judgment.

This scheme pays due respect to both the common law and the civil law traditions and is in line with the spirit of "one country, two systems". On the one hand, it respects the NPCSC's power of interpretation by allowing it to inter-

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*There is no recognised
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pret Basic Law provisions prior to the CFA's judgments. Such interpretation binds the CFA in its adjudication of a case before it.

On the other hand, this scheme gives the CFA considerable autonomy in interpreting the Basic Law and the power of final adjudication.

Such a scheme is also broadly in line with the practices under the civil law tradition described earlier and which have clearly influenced the drafting of Article 158 of the Basic Law.

When we read Article 158 together with Article 2, 19 and 82, it is even more evident that the Basic Law cannot be interpreted in the way that the Government argues. Article 2, 19 and 82 clearly provide the CFA with the power of final adjudication.

If the Government is right in its interpretation of Article 158, this would mean that NPCSC has the power to interpret prior to, during and after a final judgment of the CFA. Indeed, the NPCSC will have an unhampered power to interpret the Basic Law at any time and under any circumstances.

This clearly contravenes the vision of "one country and two systems" and the central government's policy of allowing Hong Kong a high degree of autonomy.

If the Government thinks that the CFA should have made a reference to the NPCSC with respect to interpretations of Article 22 and 24, it should have argued vigorously for the referral when the case was before the CFA, not seeking to overturn the case by extra-judicial means.

Therefore, the Government's decision to seek interpretations from the NPCSC with a view to overturning part, if not all, of the CFA's decision on the right of abode violates the letter and the spirit of the Basic Law.

Bing Song obtained law degrees from the mainland and the United States. She is currently working for an international law firm in Hong Kong. This article represents her views only.