

**Bills Committee on Chief Executive Election (Amendment)
(Term of Office of the Chief Executive) Bill**

Follow up to meeting on 21 April 2005

- (a) *Scenario of a vacancy arising within six months before the expiry of the term of office of CE.*
1. The letter of 22 April 2005 from the Clerk to Bills Committee refers to the Administration's letter dated 20 April 2005. Paragraph 12 of the Administration's letter sets out the relevant Basic Law provisions regarding the timeframe within which an election shall be held in the event that the office of the Chief Executive becomes vacant. Paragraph 13 of the reply points out the probability that if a vacancy arises within six months before the expiry of the term of the office of the Chief Executive whose office has become vacant, arrangements would already be in hand for the next Chief Executive election with a view to holding the election before the end of that term in time for the person elected to be appointed and start a new term of office.
 2. In the scenario described in the letter of 22 April 2005 from the Clerk to Bills Committee, the Administration will act in accordance with the Basic Law, the Chief Executive Election Ordinance and other relevant enactment.
- (b) *The need for consequential amendments to CEEO arising from the concept of "remainder term of office".*
3. At the last meeting of the Bills Committee on 21 April 2005, a number of Members asked whether consequential amendments would need to be made to various provisions of the Chief Executive Election Ordinance in the light of the proposals in the amendment Bill.
 4. The scope of the amendment Bill is to provide that the term of office of a Chief Executive who fills a vacancy in the office of the Chief Executive that arises otherwise than due to expiry of term of office shall last until such expiry. In general, consequential amendments are made to ensure legal consistency between new legislative provisions and existing legislative provisions. Insofar as the Bill is concerned, we do not consider that consequential amendments are required, since there is no legal inconsistency between the provisions in the Bill and the provisions in the Chief Executive Election Ordinance and other legislation.

(c) Scenario of vacancy occurring in the office of CE, say, 200 days before the expiry of the five-year term, and the related question of legal challenge under section 39 of Chief Executive Election Ordinance.

5. In the scenario described in your letter, the Administration will hold the elections in accordance with the Basic Law, and the Chief Executive Election Ordinance and other relevant enactment. In our view, it has no anomalous consequence. There is no question of legal inconsistency either.
6. Regarding section 39 of the Chief Executive Election Ordinance, where a legal challenge is mounted, it will be for the courts to decide whether to grant leave for the proceedings (if leave has to be sought), and the time necessary to complete all relevant judicial proceedings.

(d) Whether the term of office of the current Election Committee (EC) could be extended.

7. Annex I to the Basic law stipulates that “the term of office of the Election Committee shall be five years”. Section 9 of the Chief Executive Election Ordinance also stipulates that “the term of office of the Election Committee shall be 5 years commencing on the date on which it is constituted.”
8. The current Election Committee was constituted on 14 July 2000. Its term will expire on 13 July 2005.
9. In the event of another vacancy in the office of the Chief Executive arising before 1 July 2007, the SAR Government will act in accordance with the Basic Law and the Chief Executive Election Ordinance.

(e) Scenario of vacancy arising, say, six to seven months before 1 July 2007; and views on relevant issues.

10. We recognize that a number of issues outside the scope of this amendments Bill, for example, the issue regarding the provision that a Chief Executive may serve for not more than two consecutive term, may need to be addressed. The Central Authorities are aware of these issues. We will study these issues carefully and thoroughly. In the process of our research, we may, as and where appropriate, seek views from legal experts in the Mainland and Hong Kong, and listen to views from the community.

(f) *Administration's comments on the article entitled "The Rule of Law in Hong Kong : Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People's Congress" published by Mark Elliott and Christopher Forsyth in (2000) Asia Pacific Law Review 53.*

11. A detailed commentary is at the Annex. In gist, the Administration is of the view that while the authors of the article appear to think that the NPCSC can only give an interpretation in the course of HKSAR legal proceedings, this view must be rejected in the light of the the Court of Final Appeal's decision in *Lau Kong Yong* and *Chong Fung Yuen*. (Note that the article was written before the Court of Final Appeal decided on the two cases.) In particular, the NPCSC's power of interpretation extends to every provision in the Basic Law and is not limited to the "excluded provisions" (i.e. Basic Law provisions "concerning affairs which are the responsibility of the Central People's Government, or covering the relationship between the Central Authorities and the Region") referred to in Article 158(3) of the Basic Law. Apart from the circumstances provided for in Article 158(3) of the Basic Law, an NPCSC interpretation can be issued other than in the course of HKSAR legal proceedings. Moreover, by virtue of his constitutional powers and functions under Article 43 and Article 48(2) of the Basic Law, it is lawful for the Chief Executive to make a report to the State Council and to recommend that an NPCSC interpretation of the relevant provision(s) of the Basic Law be requested if he is of the opinion that such an Interpretation is necessary for the effective implementation of the Basic Law.

The Administration's comments on the article "The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People's Congress" (2000) *Asia Pacific Law Review* 53 - 75 by Elliott and Forsyth.

Authors' Arguments

The main arguments of the article can be found in Part IIIB of the article (pp 65 – 67) and summarised as follows:

- a) "The constitutional scheme clearly envisages NPCSC interpretation as an inherent element of the process by which the courts adjudicate in individual cases, and there is nothing whatsoever to suggest that the Basic Law empowers the HKSAR Government to seek a reinterpretation of the Basic Law in order to reverse a judicial construction".
- b) "[T]o imply into the Basic Law an uncircumscribed power to procure reinterpretations would permit the effective short-circuiting of the safeguards built into article 159 vis-a-vis requests for amendment".
- c) It would render otiose the qualification which article 158(3) places on the NPCSC's powers of interpretation (ie that "judgments previously rendered shall not be affected" by interpretations issued by the NPCSC under BL 158), if the NPCSC has an independent and unfettered competence to interpret the Basic Law when the request is made by HKSAR Government rather than the Court.

Comments of the Administration

2. The above arguments must be rejected as being inconsistent with the CFA's decision in *Lau Kong Yong v Director of Immigration* [1999] 3 HKLRD 778. As noted by the authors at p 66, at the time of writing the article, the case of *Lau Kong Yong* was still pending before the Court of Final Appeal.

NPCSC's power of interpretation as explained by the CFA in *Lau Kong Yung*

3. The NPCSC's power of interpretation under BL 158 has been the subject matter of detailed consideration by the CFA in *Lau Kong Yung v Director of Immigration*. According to the CFA (at 798B – 800B), the NPCSC has a general power to interpret the Basic Law. This power originates from art 67(4) of the PRC Constitution, under which the NPCSC has the power to interpret laws of the PRC, including the Basic Law which is a national law. This power is also contained in BL 158(1) itself. **The power of interpretation conferred by BL 158(1) is in general and unqualified terms. It is not restricted or qualified in any way by BL 158(2) and 158(3). It is not restricted to interpreting only the excluded provisions** (ie those BL provisions “concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the Region”). The authority given by BL 158(2) to HKSAR courts stemmed from the general power of interpretation vested in the NPCSC. BL 158(3) extends that power but is directed to limiting the CFA's power by requiring a judicial reference in relation to the excluded provisions.

4. The above constitutional arrangement of interpretation power under the Basic Law was also commented on by Mason NPJ (at 820D – 821A) as follows:

“As in the case with constitutional divisions of power, a link between the courts of the Region and the institutions of the PRC is required. In a nation-wide common law system, the link would normally be between the regional courts and the national constitutional court or the national supreme court. Here, however, there are not only two different systems, but also two different legal systems. In the context of “one country, two systems”, art 158 of the Basic Law provides a very different link. That is because the article, in conformity with art 67(4) of the PRC Constitution, vests the general power of interpretation of the Basic Law, not in the People's Supreme Court (sic) or the national courts, but in the NPC Standing Committee.

Consistently with that vesting of the general power of interpretation in the Standing Committee, the Standing Committee authorises the courts of the Region to interpret “on their own, in adjudicating cases” the provisions of the Basic Law which are within the limits of the autonomy

of the Region. The expression “on their own” stands in contrast to the mandatory reference requirement under art. 158(3) which applies to the Court of Final Appeal in relation to what the Chief Justice calls “the excluded provisions”.

The expression “in adjudicating cases” is of particular significance. In the common law world, these words would be surplusage. Interpretation of a law, even of a constitution, is the business of the courts, being an incident of the adjudication of cases. In the People’s Republic of China, however, under art. 67(4), the Standing Committee of the NPC exercises, as well as other functions and powers, the power “to interpret laws”, because the PRC Constitution does not provide for a separation of powers that is the same as or similar to the common law doctrine of the separation of powers. Article 57 of the PRC Constitution provides that the NPC is the highest organ of state power and the NPCSC is its permanent body.

The Standing Committee’s power to interpret laws is necessarily exercised from time to time otherwise than in the adjudication of cases. **So the expression “in adjudicating cases” makes it clear that the power of interpretation enjoyed by the courts of the Region is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the Standing Committee under art. 67(4) of the PRC Constitution and art. 158(1) of the Basic Law.**

This conclusion may seem strange to a common lawyer but, in my view, it follows inevitably from a consideration of the text and structure of art. 158, viewed in the light of the context of the Basic Law and its character as the constitution for the HKSAR embodied in a national law enacted by the PRC.” (emphasis added)

Further explanation by the CFA in *Chong Fung Yuen*

5. In a subsequent CFA decision in *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533 at 545A - G, the binding effect of the NPCSC’s interpretation on SAR courts and its nature under the principle of “one country, two systems” have been further explained as follows:

“[W]here the Standing Committee has made an interpretation of the Basic Law pursuant to its power under art.67(4) of the Chinese Constitution and art.158 of the Basic Law, the courts in Hong Kong are under a duty to follow it. The Court so held in *Lau Kong Yung* where the Court stated that the Standing Committee’s power of interpretation of the Basic Law under art.158(1) originating from the Chinese Constitution “is in general and unqualified terms” (at p.323B). In particular, that power of the Standing Committee extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in art. 158(3).

Equally, where the Standing Committee makes an interpretation of an excluded provision pursuant to a judicial reference from the Court under art.158(3), the courts in Hong Kong in applying the provision concerned shall follow the Standing Committee’s interpretation, although judgments previously rendered shall not be affected. This is expressly provided for in art.158(3).

The Standing Committee’s power to interpret the Basic Law is derived from the Chinese Constitution and the Basic Law. In interpreting the Basic Law, the Standing Committee functions under a system which is different from the system in Hong Kong. As has been pointed out, under the Mainland system, legislative interpretation by the Standing Committee can clarify or supplement laws. **Where the Standing Committee makes an interpretation of a provision of the Basic Law, whether under art.158(1) which relates to any provision, or under art.158(3) which relates to the excluded provisions, the courts in Hong Kong are bound to follow it.** Thus, the authority of the Standing Committee to interpret the Basic Law is fully acknowledged and respected in the Region. This is the effect of the Basic Law implementing the “one country, two systems” principle as was held by the Court in *Lau Kong Yung*. Both systems being within one country, the Standing Committee’s interpretation made in conformity with art.158 under a different system is binding in and part of the system in the Region.” (emphasis added)

CE’s constitutional powers and functions under BL 43 and BL 48(2)

6. BL 43 provides that the CE shall be the head of the HKSAR and shall represent the Region. He shall be accountable to the CPG and the HKSAR in accordance with the provisions of the Basic Law. BL 48(2) provides that the

CE shall exercise the power and function to be responsible for the implementation of the Basic Law and other laws which, in accordance with the Basic Law, apply in the HKSAR. Given that the CE has these constitutional powers and functions, it is lawful and constitutional for the CE to make a report to the State Council and to recommend that an NPCSC interpretation of the relevant provision(s) of the Basic Law be requested if he is of the opinion that such an Interpretation is necessary for the effective implementation of the Basic Law.

7. In the NPCSC Interpretation of 26 June 1999, it was noted in the preamble that the State Council's motion regarding the request for the relevant interpretation was submitted upon the CE's report furnished under BL 43 and 48(2). It appears that the CE's power and function to request an NPCSC Interpretation under these articles of the Basic Law was endorsed by the NPCSC.

8. In the light of the above judicial authorities, it can no longer be argued, as the authors did, that the express provision in BL 158(3) for a judicial request for an NPCSC Interpretation suggests that this is the only way in which such a request can lawfully be made.

9. The reference to a judicial request in BL 158(3) must be understood in its context. BL 158(1) states that the power of interpretation of the Basic Law shall be vested in the NPCSC. In BL 158(2), the NPCSC authorizes the HKSAR 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 Region. BL 158(3) authorizes the HKSAR courts to interpret other provisions of the Basic Law in adjudicating cases, but then imposes a duty to seek an NPCSC in certain situations.

10. It is clear, therefore, that the purpose of the express provision concerning a judicial request for an NPCSC Interpretation is to impose a limitation on the power of HKSAR courts to interpret the Basic Law. This view is supported by the following comments of the CFA in *Lau Kong Yung* (above) at 799C - D:

“So, there is no question of Article 158(3) restricting the Standing Committee's general power in Article 158(1). That provision is directed to limiting the Court's power by requiring a judicial reference of the excluded provisions in the circumstances prescribed.”

11. The CE of the HKSAR has no similar power to interpret the Basic Law that is subject to a similar duty to seek an NPCSC Interpretation in specified circumstances. On the contrary, the powers vested in the CE under BL43 and 48(2) are not subject to any express limitation in that respect.

Conclusion

12. To conclude, while the authors of the article appear to think that the NPCSC can only give an interpretation in the course of HKSAR legal proceedings, this view must be rejected in the light of the CFA's decision in *Lau Kong Yong* and *Chong Fung Yuen*. In particular, the NPCSC's power of interpretation extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in BL 158(3). Apart from the circumstances provided for in BL 158(3), an NPCSC interpretation can be issued other than in the course of HKSAR legal proceedings. Moreover, by virtue of his constitutional powers and functions under BL 43 and BL 48(2), it is lawful for the CE to make a report to the State Council and to recommend that an NPCSC interpretation of the relevant provision(s) of the Basic Law be requested if he is of the opinion that such an Interpretation is necessary for the effective implementation of the Basic Law.