

Hong Kong
Bar Association
香港大律師公會



The Bar's Views on the Right of Abode Case

Press Release

13 May 1999

A CONSTITUTIONALLY ACCEPTABLE SOLUTION

Foreward

1. We respect and applaud the Central Government's repeated public declaration that it would not of its own accord seek to get involved in the present search for a solution to the problems said to arise from the Court of Final Appeal ("CFA") in the Right of Abode case ("the Problem").
2. The question we have to face today therefore is not whether the Central Government has the power or should exercise that power to interpret any provision of the Basic Law.
3. The question today is whether constitutionally or legally, the SAR Government should abandon the amendment route and take steps or be seen to be taking steps to seek re-interpretation of Article 24 of the Basic Law as a means to deal with the Problem.
4. Before we continue, we should point out that there is a subtle distinction between constitutionality and legality. In constitutional law, sometimes a solution even if legal, may not be constitutionally acceptable to a particular constitutional framework legally put in place.

The Power of Interpretation Under the Chinese Constitution

5. Under the Chinese Constitution, there is a distinction between interpretation of the Constitution and interpretation of other laws, including basic laws. This can be seen from Articles 67(1) & (4) of the Constitution. It is also to be noted that the National People's Congress ("NPC") has the sole power to amend the Constitution and other laws including basic laws but does not have the power to interpret either the Constitution or other laws: Article 62. This power to amend is unqualified and supreme. The NPC Standing Committee ("NPCSC") on the other hand, does not have any unqualified power to amend but has the power to interpret both the Constitution and other laws.
6. It will be seen from Article 67(3) & (4), that there is a distinction of the functions and powers of the NPC Standing Committee ("NPCSC") to on the one hand, "partially supplement and amend, when the [NPC] is not in session, laws enacted by the [NPC] provided that the basic principles of these laws are not contravened" (see Article 67(3)) and on the other hand "to interpret laws" (see

Article 67(4)).

7. As to the power of interpretation, there is a further distinction between legislative and judicial interpretation: see Lun Lifa Jieshi (On Legislative Interpretation), Zhongguo Faxue, No. 6, 1993, p.36.

8. In a resolution passed at the 19th meeting of the NPCSC held on 10th June 1981, it was said that in relation to laws which required further clarification or supplement the NPCSC shall interpret or use legislative orders (Fa Ning) to regulate such laws.

9. Obviously, a supplement and amendment of the laws cannot and should not be disguised as an "interpretation". This is accepted by many Chinese jurists: see e.g. Lun Lifa Jieshi, supra., where the joint authors said (at p.38):-

"In our view, one should not openly approve or encourage interpretation to take the place of amendment of the laws, or the authority and unity of the legal system would be undermined."

10. A Fortiorai, one should not approve or encourage interpretation to take the place of amendment of the Basic Law without open debate as envisaged under Article 159 of the Basic Law.

11. Later in the same article (at p.40), the authors revealed that at the moment, there is no established formula or procedure as to how the power of interpretation is to be exercised by the NPCSC.

12. Furthermore, if the power to supplement or amend is circumscribed by the qualification not to contravene the basic principles of the laws, then clearly, the same qualification will be even more pertinent in the case of interpretation.

13. In the present case, the Court of Final Appeal ("CFA") is entrusted under Article 158 of our Basic Law by the NPCSC when adjudicating cases to interpret the Basic Law. This power to interpret was granted to the SAR as part of the constitutional package under Article 2 of the Basic Law. In a proper exercise of its jurisdiction and the power so entrusted, the CFA has interpreted Article 24 and delivered a final adjudication as to the rights of people coming under that article.

14. For the NPCSC to exercise its power to "re-interpret" so as to overturn the CFA decision would be to overturn an interpretation which is legal and properly reached under the Basic Law and as authorised by the NPCSC itself. To do so, will also be contrary to the basic principles of the Basic Law and that constitutional package granted to the SAR which clearly stipulated that the Hong Kong SAR shall have a high degree of autonomy, judicial independence and the power of final adjudication under Articles 2, 19, 80 and 82. Furthermore, it will be contrary to the spirit and intent of Article 158 which guarantees that any interpretation should not affect a previous decision of the CFA.

15. It is also arguable that such an interpretation also contravenes the basic principle enshrined in the Joint Declaration as to the independence of the Judiciary and the power of final adjudication. This is what I would call a basic constitutional objection.

16. There is a further purely legal objection from the Chinese law point of view. Legal interpretation in China can take several forms: language interpretation, logic interpretation, context interpretation and historic interpretation, see Fa Lu Gai Lun by Peng Jun Liang at pp.81-82. In the case of Article 24, it is difficult to see how the first three forms of interpretation can extend the meaning of Article 24 to cover the situation desired by the SAR Government.

17. It follows that a proper interpretation short of supplementing or amending Article 24 cannot legally achieve the result which the SAR Government desires. To abuse this procedure to achieve the ends desired will be legally impermissible under the Chinese Constitution or Chinese Law.

18. For all these reasons, even if the NPCSC does have the power to "interpret" the Basic Law in the present case, it is not constitutionally or legally acceptable for the SAR Government to ask NPCSC to do so.

Whether SAR Government Has A Power To Refer

19. It is plain from Article 158 and indeed from the rest of the Basic Law that there is no provision or procedure for the SAR Government to refer any article under the Basic Law to the NPCSC for interpretation in the absence of a legal dispute. It is equally obvious that there is no such provision or procedure to overturn an interpretation already pronounced by the CFA.

20. It has been suggested that such a power is to be implied from Article 48. That, with respect, is a violent distortion of the language and meaning of Article 48. What that article provides is that the Chief Executive ("CE") is responsible for the implementation of the Basic Law and other laws. Article 81 further confirms that the existing legal system should be preserved. What all this means is that where the CFA has given an interpretation of the Basic Law, the CE is entrusted with the duty to implement the CFA's decision. This was the position as regards general laws before the Handover. This should be the position as regards all laws including the Basic Law after the Handover.

21. Even under Chinese Laws, the approach is no different. The concept of implementation of the law by the executive simply means that the executive must carry out its duties in accordance with the law. See: Fa Lu Gai Lun by Peng Jun Liang at p.182.

Should There Be A Reference By The SAR Government

22. Even assuming the SAR Government has the power to seek an interpretation of the Basic Law, quite plainly in view of the fact that there is already a legally binding interpretation of Article 24 reached by the CFA, any attempt to overturn this interpretation by the SAR Government will be contrary to Articles 2, 8, 18,

19, 48, 81, 158 and 159 of the Basic Law, not to mention the spirit and intent of the Joint Declaration.

23. There is a greater objection to the SAR Government undertaking this dangerous course. Under our existing legal system preserved under Article 81 of the Basic Law, the SAR Government, like anyone else, must obey a ruling of the Court unless and until the law is changed. As pointed out by one of our Appeal Court Judges, it is worth recalling the words of Wilson J. in *In re Bachand v. Dupuis* [1946] 2 D.L.R. 641 at 655:-

"The whole value of the legal system - the integrity of the rule of law - is at once destroyed if it becomes possible for officials by arbitrary decisions made, not in the public court rooms but in the private office of officialdom, without hearing the parties, without taking evidence, free of all obedience to settled legal principles, and subject to no appeal, effectively to overrule the Courts"

24. In this respect, one can find similar concepts being espoused by Chinese jurists. In *Ji Ben Gai Lun*, edited by a number of highly respected professors and lawyers, it was said at pp.93-94:-

"When the NPCSC authorizes the HKSAR Courts to apply the Basic Law in adjudicating cases and to interpret on its own provisions of the Basic Law concerning matters of autonomy of the HKSAR, it means the Hong Kong Courts have the power to interpret the provisions falling within the scope of its autonomy without having to invite the NPCSC to give an interpretation. The parties to the proceedings have no right to request the NPCSC for an interpretation. As most of the provisions of the Basic Law fall within the scope of a high degree of autonomy of the HKSAR, the scope of interpretation of the Basic Law by the HKSAR Courts is thus very wide." (emphasis supplied)

25. For the SAR Government to be seen to be actively taking steps to overturn a decision of the CFA by substituting its interpretation of Article 24 by another and different interpretation from the NPCSC must give rise to the impression that the SAR Government is seriously challenging the Rule of Law in Hong Kong under our legal system as preserved under the Basic Law.

Proposals For A Solution

26. In these circumstances, it is submitted that the only constitutionally acceptable solution is for the SAR Government to introduce legislation immediately after full consultation with the immigration authorities of the Central Government to implement the decision of the CFA. As a long term solution, the SAR Government could seek to amend Article 24 under Article 159.

27. Gauging from the tenacity of public opinion and the various stances of the major political parties in Hong Kong, it is inconceivable that the SAR Government would not be able to secure the necessary consent of the legislative Council.

28. The proposed amendment will be simple and provided a suitably worded amendment is put forward, there is no reason to think that such a proposal, having secured the consent of the CE and the legislative Council, should be rejected by the NPC.

29. For all these reasons, we will respectfully call for such an amendment and immediate action to avoid the present deeply divisive controversy surrounding the sensitive question of "re-interpretation" by the NPCSC.

For further enquiries, please contact Mr. Alan Leong, SC at 2526 6182, Mr. Johannes Chan at 2859 2935 and Mr. Ambrose Ho at 2524 2156.

**The Acting Chief Executive's Request for NPCSC
Interpretation of Article 53 of the Basic Law of the HKSAR**

STATEMENT OF THE HONG KONG BAR ASSOCIATION

1. The Hong Kong Bar Association ("the Bar") has considered the Report lodged by the Acting Chief Executive ("Acting CE") of the Hong Kong Special Administrative Region ("HKSAR") whereby the Acting CE requests, through the State Council, the Standing Committee of the National People's Congress ("NPCSC") to interpret Article 53 of the Basic Law of the HKSAR and the views exchanged during the forum held with officials of the Central Authorities and members of the Hong Kong legal profession on 12th April 2005 at Shenzhen.

2. The Bar notes that two applications for leave to apply for judicial review had already been filed with the Court of First Instance. These applications raise for the Court's consideration legal issues concerning the term of the new Chief Executive to be elected on 10th July 2005 and the validity of the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill which was introduced to the Legislative Council on 6th April 2005.

3. Whilst we fully acknowledge the NPCSC's power to interpret the Basic Law, the Bar is extremely disappointed with the circumstances which led to the request for an interpretation of Article 53 of the Basic Law by the NPCSC.

4. When there are pending legal proceedings raising issues of interpretation of the Basic Law, we believe the matter is best left to the Court and therefore the Court should not be deprived of the chance to adjudicate on the matter. By so doing, the NPCSC's power to interpret the Basic Law will not be affected since, as and when necessary, the matter can be referred by the Court of Final Appeal to the NPCSC pursuant to the provisions in Article 158 of the Basic Law. When issues of interpretation of the Basic Law have yet to be decided by the Court, any request made by the HKSAR's Government for interpretation by the NPCSC amounts to an attempt by the executive to pre-empt the independent judicial power of the Court to decide the matter, including the important question of whether there should be a reference to the NPCSC. Not only will such request by the executive negate the separation of powers which underpins the system laid down in the Basic Law, it shows scant respect to the rule of law and will understandably cause alarm to people in Hong Kong as well as to informed observers in the international community.

5. Whilst the Bar will continue to do its utmost to protect the rule of law and to uphold the principle stated in the preceding paragraph, we have considered the Acting CE's concern that the pending legal proceedings may not be concluded in time to enable a timely election for the new Chief Executive on 10th July 2005. We are extremely disappointed that matters have developed to such a stage that the Acting CE decided to request NPCSC's interpretation and that the legal issues cannot be properly argued and resolved by the Court.

Hong Kong Bar Association

14th April, 2005

署理行政長官請求全國人大常委會解釋《香港特別行政區基本法》第五十三條

香港大律師公會聲明

1. 香港大律師公會(下稱“本會”)細閱了香港特別行政區(下稱“香港特區”)署理行政長官就提請全國人民代表大會常務委員會(下稱“人大常委”)解釋《香港特別行政區基本法》第五十三條而向國務院提交的報告，並考慮了中央官員與香港法律界人士於二零零五年四月十二日在深圳舉行的座談會上所交換的意見。
2. 本會知悉原訟法庭已收到兩宗司法覆核許可的申請，要求法庭考慮有關將於二零零五年七月十日選出的新行政長官的任期，及於二零零五年四月六日提交立法會的《行政長官選舉(修訂)(行政長官的任期)條例草案》的合法性等法律問題。
3. 本會完全認同全國人大常委會擁有解釋《基本法》之權力。然而，本會對導致向人大常委提請解釋《基本法》第五十三條的情況深感失望。
4. 當有關解釋《基本法》的法律程序仍待審理時，本會認為有關問題應由法院審理，否則便剝奪了法院擁有裁決該問題的機會。這做法不會影響人大常委解釋《基本法》之權力，因為終審法院可在有需要時根據《基本法》第一百五十八條將有關問題提請人大常委。當涉及解釋《基本法》的問題仍有待法院作出裁決時，香港特區政府向人大常委提出任何解釋請求，均等同行政機關企圖先發制人，不容許法院行使其獨立司法權裁決該問題，包括決定是否將該問題提請人大常委。行政機關此舉不單否定整個《基本法》架構基礎的三權分立原則，更不尊重法治，令致香港居民以至國際社會的有識人士感到憂慮。

5. 本會將繼續竭力維護法治及捍衛前文所提及之原則，但本會亦顧及署理行政長官關注仍待審理之法律程序或許未能趕及於二零零五年七月十日新的行政長官選舉之前結案。由於目前的情況發展至署理行政長官決定將有關問題提請人大常委作出解釋，有關的法律問題將不會在法院進行辯論及獲得裁決，本會深感失望。

香港大律師公會

二零零五年四月十四日