

A TALE OF THE UNEXPECTED: TUNG'S RESIGNATION AND THE ENSUING CONSTITUTIONAL CONTROVERSY

After more than 10 days of rumours, Tung Chee Hwa finally confirmed his resignation as the Chief Executive ("CE") of the Hong Kong Special Administrative Region (HKSAR) on 10 March 2005. Tung's resignation caught many people in Hong Kong by surprise including those who believe they have a close relationship with the Hong Kong and Beijing governments. Since the mass demonstration of 1 July 2003, there have been constant demands from Hong Kong people for Tung's resignation. For the past 20 months, there was no sign that Tung would resign. There was also no sign that the Beijing Government would withdraw its support for Tung. Rather, there were many indicators which showed that Tung would be permitted to complete his second term of office until 30 June 2007 even if he might play a less active role in the governance of Hong Kong.¹

It is now widely speculated whether his resignation was voluntary or forced. Tung's official explanation for his resignation was ill health. However, no concrete evidence was provided as to the state of his health which did not permit him to stay in office as the CE of the HKSAR. His resignation was formally accepted by the Beijing Government two days later and Donald Tsang, the Chief Secretary for Administration, was appointed as the Acting CE.

According to Article 52 of the Basic Law, the CE "must resign if he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons". In the event that the office of the CE becomes vacant, Article 53 provides that the duties of the CE will temporarily be assumed by the Chief Secretary for Administration and a new CE must be selected within six months. According to the Chief Executive Election Ordinance,² the by-election must be held within 120 days after the date on which the office becomes vacant.³

The controversy as to the real reason behind Tung's resignation appears to have been eclipsed by a new and unexpected controversy. The new controversy concerns the length of the term of office of the re-elected CE. Article 46 of the Basic Law provides that the term of office of the CE shall be five years. There is no specific provision in Article 53 nor other articles of the Basic Law on the length of the term of office of the re-elected CE. Reading

¹ One of the signals was that Tung still seemed to have many plans to achieve in his Policy Address 2005.

² Cap 569, Laws of Hong Kong.

³ *Ibid.*, s 10.

these two provisions together, it is clear and unambiguous that the length of the term of office of the re-elected CE should also be five years.

However, after several Mainland legal experts expressed their opinion that the term of office should be two years – being the remaining term of Tung's original term of office – the HKSAR Government suddenly changed its stance on this issue and supported the two-year term. This contrasted sharply with the earlier position taken by the Hong Kong Government, as shown in the written response of the Secretary for Constitutional Affairs, to the Legislative Council (LegCo) on 5 May 2004 where he stated that:

“Article 46 of the Basic Law provides that the term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. Article 53 provides that in the event that the office of the Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of the Basic Law ... The term of office of the Chief Executive, as prescribed in the Basic Law, is five years. This provision applies to any Chief Executive. There is no exception.”

However, shortly after the appointment of the Acting CE, the Secretary for Justice (“the Secretary”) issued a statement stating that the term should be two years.⁴

This change of stance by the Hong Kong Government generated a new wave of legal and political controversy. Many people could not understand why the two-year or five-year term could have generated such heated debate. It seems that what is significant here is not merely the three years' difference or which constitutional arrangement is more democratic than the other. Rather, what seems to be at stake here is the process for reaching the decision, the reasons for the decision and the implications of all that to Hong Kong's Rule of Law and its supposed “High Degree of Autonomy” under “One Country, Two Systems”. This is the gist of the crisis in which the Hong Kong people now find themselves and are asking again whether the Rule of Law and the principle of “One Country, Two Systems” are still protected.

The provisions of the Basic Law are clear and unambiguous that the term of the re-elected CE should be the same as that enjoyed by the CE elected in the normal way, namely, five years. This is accepted by most commentators. However, the reasons given by the Secretary to support the change of stance from five to two years are not convincing. One gets the impression that legal arguments are being utilized to twist clear legal provisions in order to suit political needs.

⁴ Available at <http://www.info.gov.hk/gia/general/200503/12/03120310.htm>.

Before I analyze the arguments put forward by the Secretary in support of the two-year term, it is worth noting the manner in which the Secretary tried to justify the change of stance by the government. The Secretary stated that the Hong Kong Government had applied a common law rule of statutory interpretation to interpret the relevant provisions of the Basic Law and to arrive at the previous understanding of a five-year term of office for the CE. Clear and unambiguous provisions should be interpreted according to their literal meaning.⁵ However, when several legal experts in the Mainland expressed a different opinion and after consultation with two Mainland legal experts,⁶ the Secretary suddenly abandoned a view generally supported by local legal professionals and experts⁷ and adopted the understanding of the Mainland legal experts.

To justify such a reversal, the Secretary relied on the Basic Law as a National law and the fact that one must consider the context of the institutional framework and rules of statutory interpretation of the Mainland in interpreting the Basic Law. The Secretary also argued that the terms of important offices in State organs – such as the President, Vice-President,⁸ National People's Congress (NPC),⁹ State Council¹⁰ and the Chinese People's Political Consultative Conference¹¹ – were invariably five years. Where an office fell vacant prematurely, the successor would only serve the remaining term of the outgoing office holder. Therefore, according to the Secretary, this constitutional convention¹² ought also to apply to the Basic Law as it must also have been the legislative intent when the Basic Law was enacted. Therefore, applying the foregoing understanding to Article 46 of the Basic Law, according to the Secretary, the term of the re-elected CE should be two, rather than five years.

The first problem with this understanding is the assumption that the context of the institutional framework and rules of statutory interpretation of the Mainland should be adopted in the interpretation of the Hong Kong Basic Law and this constitutional convention under Chinese constitutional law should also apply to the Hong Kong Basic Law. It is widely agreed that there is no well-established constitutional principle as to whether a successor should

⁵ *Chong Fung Yuen, Master and others v The Director of Immigration* [2001] 2 HKLRD 533.

⁶ Professors Xu Chongde and Lian Xisheng are both drafters of the Basic Law.

⁷ See the Statement of the Hong Kong Bar Association (available at http://www.hkba.org/whatsnew/submission-position-papers/2005/20050317_e.pdf) and the Law Society of Hong Kong (available at http://www.hklawsoc.org.hk/pub_e/news/press/20050318.asp).

⁸ Art 79 of the Constitution of the People's Republic of China.

⁹ *Ibid.*, Art 60.

¹⁰ *Ibid.*, Art 87.

¹¹ Art 30 of the Constitution of the Chinese People's Political Consultative Conference.

¹² This is only a constitutional convention under Chinese constitutional law as there is no express stipulation except that the term of office of the various officials is the same as the NPC which is 5 years.

serve a full term or the remaining term of the outgoing officer. Some systems such as those of the US¹³ have opted for the remaining term arrangement but some systems such as France¹⁴ prefer the full term option. It very much depends on the specific inter-relationship between the constitutional organs of a given state. The Chinese constitutional system may have adopted the remaining term arrangement because the whole system is built upon a fixed term NPC.

On the other hand, the political system in Hong Kong is very different from the Chinese constitutional system. Hong Kong has an “executive-led form of government.” Many members of the LegCo are directly elected by Hong Kong people. Hong Kong has an independent judiciary with power of final adjudication, applying common law principles. It is therefore inappropriate to apply the Chinese constitutional convention to the Basic Law.

Moreover, as the table below shows, there is no institutional need or design based on the system of matching the terms of the CE and the LegCo. Hence, if there is no vacancy for the office of the CE, the terms of the CE and the LegCo will be as follows:

Term/Year	1	2	3	4	5	6	7	8	9	10	11	12	13	14
CE	1997	2002	2007	2012	2017	2022	2027	2032	2037	2042	2047	/	/	/
LegCo	1997	1999	2003	2007	2011	2015	2019	2023	2027	2031	2035	2039	2043	2047

There is thus no co-relation between the terms. In 2007, 2027 and 2047, there will be elections for both the CE and the LegCo in the same year. On other occasions, the election of the LegCo may be held in the first, second, third or the fourth year of the term of the corresponding CE. If it were still contended that there is a pattern, the pattern would have been totally destroyed by the establishment of the Provisional LegCo in 1997. Owing to the establishment of the Provisional LegCo, the corresponding terms have now become as follows:

Term/Year	1	2	3	4	5	6	7	8	9	10	11	12	13	14
CE	1997	2002	2007	2012	2017	2022	2027	2032	2037	2042	2047	/	/	/
LegCo	1998	2000	2004	2008	2012	2016	2020	2024	2028	2032	2036	2040	2044	/

The elections of the CE and the LegCo will now be held in the same year in 2012 and 2032.

¹³ 20th and 22nd Amendments of the Constitution of the United States.

¹⁴ Art 7 of the Constitution of France.

A Mainland legal expert has even suggested that the US practice of serving the remaining term could be a justification for Hong Kong adopting such a similar practice. Thereafter the said legal expert further suggested that there was an international practice of serving the remaining term and Hong Kong should therefore follow that practice.

All the above arguments seem to lose sight of the fact that disputes arising in any constitutional system must be resolved within the constitutional framework of a given state or political entity. In the case of Hong Kong our constitutional framework is the Basic Law and a failure to recognize this basic principle will give rise to problems. Thus if the Mainland practices were to be conclusive in determining the length of the term of office of the CE, it would be very difficult to assert that Hong Kong still enjoys in a real sense the promised "High Degree of Autonomy".

The second problem with the Secretary's understanding of the Basic Law is the inference that by applying the Mainland rules of interpretation to the Basic Law, it must necessarily come to the conclusion that the term of the next CE is two years not five. I would contend that there is in fact not much difference between the common law rules of interpretation and the rules of interpretation under the Mainland constitutional system. In my view the legal text under both systems is always the basis of interpretation. If the provision is clear and unambiguous, there is no need to apply additional rules to complicate matters.¹⁵ Therefore, the real question here is not whether we should adopt a common law or a civil law interpretation followed in the Mainland, rather it is how far should political expedience be permitted to influence the interpretation of the Hong Kong Basic Law?

The Secretary's other reason is that the two-year arrangement can be derived from the "original intent underlying the design laid down in the Basic Law" as reflected from the election system of the CE. According to the Secretary, the Election Committee, which is responsible for selecting the CE, is a standing body with a term of five years and is not an ad hoc establishment formed for a particular election. She asserted that according to the legislative intent the term of the Election Committee is to be the same as the term of the CE so that the Election Committee might be able to handle any by-election that might have to be conducted. According to the Secretary, if the term of the re-elected CE were to run afresh for another five years, it would be possible for an election committee to exert its influence far beyond the time that was originally intended. Hence she questioned whether that was the

¹⁵ Liang Huixing, *Min Fa Jie Shi Xue* (China University of Political Science and Law Press, 1995), pp 213–247; Xiao Jinming, "Basic Questions on Legislative Interpretation" in Zhou Wangsheng (ed) *Li Fa Yan Ji* (Beijing: Law Press, 2000), Vol I and Li Min, "Several Questions for Study of Legislative Interpretation" in Zhou Wangsheng (ed) *Li Fa Yan Ji* (Beijing: Law Press, 2000) Vol I. See also Ronny Tong's comments published in *Mingpao*, 21 Mar 2005.

original intent underlying the election committee system.

This argument is not persuasive either. The so-called original intent defeats the Secretary's own argument. Following her argument, the Election Committee responsible for selecting the CE in 2002 should also be established in 2002. However, that Election Committee was in fact established in 2000 and was originally responsible for electing six Legislative Councilors in 2000. Even if we take into account of the Provisional LegCo that election of the LegCo should take place in 1999 but not 2000, it does not provide any assistance to the Secretary's argument on the original intent. Indeed, the fact that the existing Election Committee will expire on 13 July 2005 but not in 2007 shows that it could not have been the original intent. Moreover, it does not seem to have been the "original intent" that was held by the Hong Kong and the Beijing Governments when Tung was elected as the CE in 2002.

In addition, an election committee must be established before the term of the CE begins. If its term is five years as the CE, its term must expire before the term of the CE expires. In other words, there must be a gap in between the expiration of the two terms and if the office of the CE vacates during this period, there will still be a need to establish a new election committee to re-elect another CE. Thus the problem of allowing an election committee to exert influence beyond the original intent as asserted by the Secretary cannot be avoided.

The third reason given by the Secretary in support of a two-year term is based on her drawing a fine distinction between "新的行政長官" (a new Chief Executive) and "新的一屆行政長官" (the Chief Executive of the new term). The basis of this argument is that the draft of Article 53 of the Basic Law examined by the Sixth Plenary Session of the Drafting Committee held on 12 December 1987 was originally: " '新的行政長官' (a new Chief Executive) should be selected in the event that the office of the Chief Executive became vacant." However, in the Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for Solicitation of Opinions) adopted by the Seventh Plenary Session of the Drafting Committee held on 28 April 1988, the wording was changed to "新的一屆行政長官" (the Chief Executive of the new term). Subsequently, in the Eighth Plenary Session of the Drafting Committee held on 14 January 1989, the characters "一屆" (term) were deleted returning to the original version. Based on the above, the Secretary has asserted that this shows that the Drafting Committee had a clear understanding that "新的一屆行政長官" (the Chief Executive of the new term) and "新的行政長官" (a new Chief Executive) carried different legal effects. According to her, the fact that "新的一屆行政長官" (the Chief Executive of the new term) was not finally adopted, shows that "the intent" was that a re-elected CE could not be a CE for a new term.

However, a perusal of the documents of the Drafting Committee reveals no evidence showing that the change of the wording is of any significance but merely of literal refinement.¹⁶ Moreover, a reliance on a very fine change of wording to support an understanding, which will give a very significant change to the meaning of the provision, goes against, not only the common law and the Mainland rules of interpretation but also common sense. Had the Drafting Committee intended to ensure that the re-elected CE serves only the remaining term of office then they would have also thought about whether the remaining term served by a re-elected CE should count as one term or two in calculating the two consecutive terms of a CE according to Article 46 of the Basic Law.¹⁷ One then wonders why the Secretary is still studying this question carefully?¹⁸

The Secretary also referred to the decision of the NPC Standing Committee (the "Standing Committee") of 26 April 2004 on interpreting the provisions of the Basic Law. This provision relates to the election of the CE in 2007 and the formation of the LegCo in 2008. The first paragraph of the Standing Committee's decision begins with "2007年香港特別行政區第三任行政長官的選舉..." (the election of the Chief Executive of the Hong Kong Special Administrative Region for the third term to be held in the year 2007 ...). She relied on this decision to assert that the Standing Committee is of the view that the election of the CE, to be held in 2007, is the election of the CE for the third term. Therefore, any election of the CE held before that time will only be in the nature of a by-election for filling the office left vacant by the CE for the second term, and will therefore not be the election of the CE for the third term. On that basis, the term of the re-elected CE should be the remaining term and cannot be a new term.

The Secretary again erred in reading too much into provisions which only expressly deal with a particular situation but not some unforeseen scenario. The decision was made to deal with the question whether the CE to be elected in 2007 would be returned by universal suffrage. The wording "third term" was used to specify that the CE to be elected in 2007 would be the third CE. There is no indication that the Standing Committee when making its decision at that time had foreseen that Tung would resign before his term expired. Furthermore, the Standing Committee is not empowered to alter the meaning of any provisions of the Basic Law in such an informal and casual manner. Such an approach would not be an interpretation but an enactment which

¹⁶ Eric Cheung, "Documents of the Drafting Committee proved that the Legislative Intent could not be two years", *Ming Pao*, 10 Mar 2005. Cheung is an assistant professor in law, University of Hong Kong.

¹⁷ A CE can only serve for two consecutive terms.

¹⁸ See the written reply by the Secretary to Audrey Eu on issues relating to the CE, 15 Mar 2005.

does not sit well with the Rule of Law and the principle of "One Country, Two Systems".

The fourth reason given by the Secretary to support a two-year interpretation was that such an interpretation is not inconsistent with Article 46 of the Basic Law. The five-year term provided in Article 46 applies only to the normal situation but not the term of a substitute CE who is filling up a vacancy. Furthermore, she asserted that there is no direct link between Articles 53 and 46. However, if her arguments above could not stand, there is no reason why we should ignore clear and unambiguous provisions and sever the provisions in such an abrupt manner.

What puzzles many people in Hong Kong is why the Beijing Government through some Mainland legal experts and the Hong Kong Government wants to brush aside the clear and unambiguous provisions in the Basic Law and insist that the term of the re-elected CE must be the remaining term. It seems to me that it does not really matter how long the re-elected CE is to serve when he or she must still be selected by an 800 persons' Election Committee and appointed by the Central People's Government. The democratic camp in Hong Kong has no chance of winning the election in the coming by-election. The Beijing Government could still safely ensure that the re-elected CE must be a person that it trusts. There would be nothing, as such, that could threaten the "One Country" system.

It is likely that the Acting Chief Secretary, Donald Tsang, will be re-elected as the new CE. He appears to be the chosen one to take up this new job at this turbulent time. His background as a civil servant who served more than 30 years may be the main reason why he was chosen. Within Hong Kong, there are three main camps supporting Beijing's rule. They are the civil service, left wing political groups and business people. Tung comes from the business sector. However, it is now very clear that he could not handle the complex political environment within Hong Kong after the transfer of sovereignty. If Donald Tsang becomes the new CE, this may seem like the civil service has returned to the limelight, thus resuming its significance as a ruling clique during colonial times. This might lead to a feeling of frustration by the other two pro-Beijing groups.

Be that as it may, if the two-year term understanding is upheld, it means that Donald Tsang will serve for two years. It may be that Beijing still does not have sufficient trust in Donald Tsang to allow him to serve a full term of five years and therefore may have to put him on probation. On the other hand, presumably the Beijing Government needs to pacify the other pro-Beijing groups as they have already planned to field their own candidate to run in the scheduled election for the CE in 2007. Whatever may be the reason underlying the Beijing Government's stand, it is clear that political considerations rather than legal reasoning is the basis of the two-year

understanding. The Rule of Law may be seen as just window dressing for the “One Country, Two Systems”. At critical moments, the Rule of Law can be dispensed with and Hong Kong people should also know that the genuine version of the “One Country, Two Systems” is the one consisting of “One Country” as its premise.

The Hong Kong Government has now introduced a bill into the LegCo to amend the Chief Executive Election Ordinance. The proposed amendment adds a provision to the effect that a CE who fills a vacancy will serve the remainder of the term of the predecessor. It seems that the forum of controversy might shift from an open debate between legal experts in Hong Kong and the Mainland into the chamber of the LegCo. There will surely be the same hot debates in the chamber of the LegCo as we witnessed during the Article 23 legislation in 2003. There is no doubt that the Hong Kong Government will throw all its weight behind the proposed amendment to ensure the legislative process will not be prolonged as the re-election is scheduled for 10 July 2005. Another political crisis seems to be on the horizon. But we still have to wait and see whether the imminent fights within the chamber of the LegCo will flow out onto the streets as was the case in 2003.

Indeed, the controversy has already found its way into the courtroom. Legal action to challenge the constitutionality of the amendment to the Chief Executive Election Ordinance has been initiated by two Hong Kong citizens – including one Legislative Councillor from the democratic camp. It is very likely that the legal battle would not be concluded before the secluded election date bearing in mind the recent legal proceedings concerning the listing of Link by the Housing Authority.¹⁹ The result might be that a new CE would not be elected on 11 September 2005,²⁰ leading to a power vacuum because there would not be any transitional provisions for the filling of the office of the CE as such arrangement would have expired. That would throw Hong Kong into an even bigger constitutional crisis.

To rescue Hong Kong from such crisis, the Acting CE has submitted a report to the State Council and proposes to request the NPCSC to make an interpretation of Article 53(2) of the Basic Law regarding the term of office of the new CE. This interpretation of the Basic Law for the third time by the Standing Committee is likely to inflict another blow on Hong Kong’s Rule of Law. Given that the reason leading to the interpretation does not involve any fundamental principle concerning the relationship between “One

¹⁹ *Lo Siu Lan and Another v Hong Kong Housing Authority* HCAL 154/2004 (Court of First Instance); CACV 378/2004 (Court of Appeal); FAMP No. 2 of 2004 (Court of Final Appeal).

²⁰ 6 months after Tung’s resignation.

Country” and “Two Systems,” such an interpretation will further show that Hong Kong’s autonomy is in reality not that “high”.

To some, this will look like the beginning of the dark age for Hong Kong’s Rule of Law and the theory of “One Country, Two Systems”.

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