

COMMENT

THE NPCSC'S INTERPRETATION IN SPRING 2005

In the last issue of this Journal, three comments were published on the constitutional controversy precipitated by Mr Tung Chee-hwa's resignation as Chief Executive of the Hong Kong Special Administrative Region (HKSAR) on 10 March 2005¹ and the ensuing debate on what should be the term of office of his successor. Since then, this interesting – and for some participants in the debate, painful – episode in the constitutional history of the HKSAR has been concluded by the promulgation by the Standing Committee of the National People's Congress (NPCSC) of its third ever interpretation of the Basic Law of the HKSAR on 27 April 2005.² This comment is intended to update readers on this development and to reflect upon this interpretation.

Unlike the interpretation of April 2004 on political reform (which was not requested by the HKSAR Government but initiated by the Council of Chairpersons of the NPCSC) but like the interpretation of June 1999 on the right of abode, the present interpretation was requested by the Chief Executive of the HKSAR, or, more precisely, by Mr Donald Tsang in his capacity of Acting Chief Executive (CE) following Mr Tung's resignation. As in the request in 1999, the present request was allegedly made to the State Council (ie the Central People's Government) pursuant to Article 43 and 48(2) of the Basic Law.³

In the report embodying the request for interpretation of Article 53(2) of the Basic Law,⁴ the Acting CE pointed out that the HKSAR Government's view⁵ was that the term of office of Mr Tung's successor should be Mr Tung's remaining term, and the Government was proposing an amendment to the Chief Executive Election Ordinance (CEEEO)⁶ to provide for this. The report went on to state that opinion was divided in Hong Kong as to the term of office of a CE elected to fill a vacancy arising from resignation, and that on

¹ The resignation was accepted by the State Council by virtue of its Order No 433 dated 12 Mar 2005 (see the *Gazette of the State Council of the PRC* (in Chinese)). The Order makes no mention of succession arrangements such as the successor's term of office.

² For the English translation, see the *Government of the HKSAR Gazette* No 17/2005 (29 Apr 2005), Legal Supplement No 2, p B431 (LN 61 of 2005).

³ Art 43 provides that the CE shall be accountable to the Central People's Government and the HKSAR. Art 48(2) provides that the CE shall be responsible for the implementation of the Basic Law and other Hong Kong laws.

⁴ See various Hong Kong newspapers of 7 Apr 2005.

⁵ For a critical discussion of this view, see Benny Y.T. Tai, "A Tale of the Unexpected: Tung's Resignation and the Ensuing Constitutional Controversy" (2005) 35 HKLJ 7.

⁶ Cap 569, *Laws of Hong Kong*. The existing version of the CEEEO provided for a full five-year term for the CE in all circumstances, including the situation where the CE is a successor to a CE who fails to complete his original five-year term.

4 April 2005 judicial review proceedings had been initiated to challenge the proposed amendment to the CEEO.⁷ The report stressed the urgency of resolving the issue, as the CEEO requires the election to be held on 10 July 2005, and Article 53 of the Basic Law requires a new CE to be in place within six months of the vacancy arising. It also suggested that if the vacancy could not be filled in time, a constitutional crisis might ensue which would be detrimental to Hong Kong's stability and prosperity.

On 6 April 2005 – the day the request was submitted to the State Council as well as the day on which the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill underwent its first reading and commencement of second reading in the Legislative Council (LegCo), Mr Donald Tsang spoke to LegCo to explain the reasons behind the request.⁸ Apart from those mentioned in the report, he pointed out that since the issue raised by Article 53 concerns the appointment of the CE by the Central People's Government, even if the judicial review proceedings were to run their course, ultimately the Court of Final Appeal would have to refer the matter to the NPCSC in accordance with Article 158 of the Basic Law.⁹ He also pointed out that given the schedule of NPCSC meetings¹⁰ it was unlikely that judicial proceedings would result in an NPCSC interpretation before 10 July, the scheduled election date. He further explained that it was not feasible to proceed by way of amendment of the Basic Law as some had suggested, as amendment could only be made by the NPC which meets annually, the next meeting being scheduled for March 2006. He suggested that he would be happy to pursue any alternative which could solve the problem without seeking an interpretation, but there was none. He said that after "struggling and reflecting" on the matter he finally made this decision which he knew "would not be a most popular decision".

It is true that an amendment to the Basic Law would not be practicable in the circumstances and the timing (not to say the outcome) of judicial review decisions was uncertain, but was there really no other alternative as suggested by Mr Tsang? One such alternative was proposed by Mr Alan Hoo SC and Mr Jonny Mok of the Basic Law Institute.¹¹ This was to amend the CEEO not

⁷ The proceedings were brought by a Legislative Councillor: *Chan Wai Yip Albert v Secretary for Justice* (HCAL 36/2005). Leave to apply for judicial review was granted by the High Court on 13 Apr 2005. Subsequently the applicant withdrew the suit after the NPCSC issued its interpretation.

⁸ See various Hong Kong newspapers of 7 Apr 2005, eg *Hong Kong Economic Times* (in Chinese), p A40 (full text of the speech).

⁹ Art 158 requires the CFA to refer to the NPCSC for interpretation any Basic Law provision "concerning affairs which are the responsibility of the Central People's Government" or "concerning the relationship between the Central Authorities and the Region"

¹⁰ The NPCSC usually meets once (for a session of a few days' duration) every two months.

¹¹ The proposal was publicised in mid-March. See Cliff Buddle, "Lawyers' answer to row over chief executive's term – strip law of numbers", *South China Morning Post*, 18 Mar 2005. Full paper on file with author.

by stipulating that the successor to a resigning CE would serve the latter's remaining term, but by removing the existing provision on the five-year term and simply providing that the term would be as provided for in the Basic Law. This would avoid the charge that an amendment to stipulate the term as the "remaining term" conflicts with the Basic Law since the latter provides only for a five-year term and makes no exception for the situation where a CE fails to complete his or her five-year term,¹² and judicial review regarding the amendment of the CEEO would probably also be avoided. According to this proposal, the term of office of the CE elected in July would then be stipulated in the instrument of appointment issued by the State Council,¹³ which presumably will act on proper legal advice. Since the spokesman for the Legislative Affairs Commission of the NPCSC – which in practice offers authoritative legal advice to the State Council – had already expressed the Commission's view regarding the correctness of the "remaining term" interpretation,¹⁴ there was in practice no doubt as to what term of office would eventually be specified in the State Council's instrument of appointment.

It is not known why this proposal was not considered or was rejected by the HKSAR Government. One possibility was that by the time the proposal was made, the Government had already made up its mind as to what form the amendment to the CEEO would take, and had even reached an understanding with Beijing that the legal controversy surrounding the amendment would be resolved by an interpretation. Another possible explanation is that the Government genuinely believed that it was necessary and desirable to provide expressly in the election law what would be the term of office of the person to be elected, and that it would be irresponsible to dodge the issue. There might also have been a worry that unless the issue was authoritatively resolved by an NPCSC interpretation, the term of appointment by the State Council may be questioned in a Hong Kong court after the CE has been appointed.¹⁵

We now turn to the interpretation that was ultimately promulgated by the NPCSC on 27 April 2005. As expected, the practical effect of the

¹² See the articles by Ghai and Cottrell (co-authors) and by Tai in the previous issue of this same volume of this Journal. For a contrary view, see the article by Morris in the same issue.

¹³ Art 45 of the Basic Law provides that the CE "shall be selected by election or through consultations held locally and be appointed by the Central People's Government". See also art 15.

¹⁴ The speech was reported in various Hong Kong newspapers on 13 Mar 2005 (see particularly *Wen Wei Po* and *Ta Kung Pao*) and was also available on the Xinhua Net (http://news.xinhuanet.com/newscenter/2005-03/12/content_2689790.htm). For a summary in English, see "Beijing's case for Tung's successor to serve two-year term", *South China Morning Post*, 24 Mar 2005.

¹⁵ This would raise the issue of whether the act of appointment and the term of appointment specified in the act of appointment are justiciable before a Hong Kong court. See Albert H.Y. Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: Congressional Supremacy and Judicial Review", in Johannes M.M. Chan *et al* (eds), *Hong Kong's Constitutional Debate* (Hong Kong: Hong Kong University Press, 2000) p 73.

interpretation was that the CE elected in July 2005 to succeed Mr Tung would only serve Mr Tung's remaining term, i.e. until 30 June 2007. However, from the legal point of view, what needs to be analysed is how the NPCSC interpreted the Basic Law and how it justified its interpretation. Let us first consider the text of the interpretation, and then the speech of Mr Li Fei, Vice-chairman of the Legislative Affairs Commission, when he introduced the bill for the interpretation before the NPCSC.

The title of the legal instrument promulgated by the NPCSC is the NPCSC's Interpretation on Article 53(2) of the Basic Law of the HKSAR. It may be recalled that Article 53(2) provides for what is to happen when a vacancy for the office of the CE arises. In particular, it provides, inter alia, that "a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law". The Interpretation consists of three main paragraphs. The first paragraph is a preamble reciting the background and constitutional and legal basis of the Interpretation. The second paragraph declares that it is implicit in Article 53(2) that the term of office of the "new Chief Executive" should be determined in accordance with the selection method for the CE stipulated in Article 45 (hereinafter called "Proposition 1"). The third paragraph first recites the provisions in Annex I to the Basic Law on the selection method for the CE, particularly his election by an Election Committee (EC), the five-year term of the EC and the possibility of reform of the selection method for the CE after 2007. It then declares that these provisions demonstrate that (a) before 2007, the term of office of a new CE who succeeds a CE who does not serve his full five-year term should be the latter's remaining term (hereinafter called "Proposition 2(a)"); and (b) after 2007, if the selection method for the CE changes, then the term of office of a new CE who succeeds a CE who does not serve his full five-year term shall be determined in accordance with the changed selection method (hereinafter called "Proposition 2(b)").

Mr Li Fei's abovementioned speech throws light on why the Interpretation was formulated in this way. He acknowledged that Article 46 of the Basic Law provides for a five-year term for the CE, but said that it applies only to "normal circumstances" and does not provide for the term of office of a new CE filling the vacancy of a predecessor who does not complete his term. He then referred to the history of successive drafts of Article 53, including the wording in the 1987 draft (reference to "the new CE"), the 1988 draft published for consultation (reference to "the CE of the new term" (*xinde yijie xingzhengzhangguan*)), the 1989 draft for consultation and the 1990 final version (reference to "the new CE" and to the selection method stipulated in Article 45). He suggested that this legislative history supports Proposition 1 above, i.e. the new CE's term of office depends on how he is elected. This point had in fact been more clearly explained in the speech of the spokesman

for the NPCSC Legislative Affair Commission dated 12 March 2005¹⁶ – the day on which the HKSAR Government announced its view that Mr Tung's successor should serve his remaining term. The spokesman pointed out that the reason why in the final version the wording "the new CE" was used (instead of "the CE of the new term") was to provide for flexibility in the term of office of the new CE (succeeding one who does not complete his term) depending on the selection method of the CE.¹⁷

Having established the link between the new CE's term of office and the selection method for the CE, Mr Li went on to explain that the purpose behind the Basic Law (in Annex I) establishing an Election Committee (EC) with a five-year term to elect the CE is to ensure that whenever a vacancy arises in the office of the CE during the CE's five-year term, the EC can elect a successor immediately. "The five-year term of the EC suggests that its jurisdiction is limited to electing a CE with a five-year term and it may not produce a CE exceeding this five-year term. This is a unique institutional arrangement established by the Hong Kong Basic Law. Therefore, when a vacancy arises before the completion of the CE's five-year term, the new CE elected by this Election Committee may only serve the remaining term of the original CE and may not surpass his five-year term." (This is Proposition 2(a) as defined above.) Here Mr Li seems to be developing a theory about the Election Committee's mandate, ie when the Election Committee itself is elected by qualified voters for a five-year term, it is given the mandate to elect *either* a CE who serves a five-year term *or* more than one CE (one succeeding the other who fails to complete the five-year term) whose terms add up to five years; after the CE's five-year term expires, power (as it were) returns to the voters who then have the right to elect a new Election Committee which will then be responsible for filling the CE's office for the next five years.

This theory of the limited mandate of the Election Committee seems to be the first of two rationales that underlie the Interpretation. The second rationale is apparently based on the idea that the first 10 years (1997–2007) of the life of the HKSAR – comprising the two five-year terms of the first two CEs – shall be a period of stability in the political order, and in or after 2007, the political system may change and further democratise. Thus 2007 is a crucial point in time and a watershed which should not be straddled by a CE's

¹⁶ See n 14 above.

¹⁷ It should be noted that this view differs from that expressed by some mainland Chinese scholars during the debate on the term of office in March 2005, who argued that the reference to "the new CE" (and the dropping of the previous wording of "the CE of the new term") suggests that the new CE referred to in article 53 would invariably serve only the remaining term of his predecessor. The Legislative Affairs Commission spokesman's view, however, is that whether the new CE would only serve the remaining term is a function of the selection method for the CE, and when such method changes in accordance with Annex I to the Basic Law, the "remaining term" interpretation may no longer hold.

term of office. After explaining the Election Committee point mentioned above, Mr Li in his speech went on to discuss (a) the provision in Annex I to the Basic Law on the possibility of a change in the CE's selection method after 2007, (b) the late Ji Pengfei's speech in 1990 when introducing the draft Basic Law to the NPC in which he specifically referred to the period 1997–2007, (c) the decision of the NPCSC in April 2004¹⁸ on the reform of the electoral systems for the CE and Legislative Council in 2007 and 2008 which expressly refers to the election of the third CE in 2007, and (d) the current consultation in Hong Kong on the reform of the selection method for the CE in 2007 and the expectations in the community regarding further democratisation in 2007. Mr Li suggested that these factors also support the “remaining term” interpretation which would allow a new CE to be elected by a reformed selection method in 2007.

According to Proposition 2(b) (defined above), the “remaining term” approach may no longer be applicable at a future point in time when the selection method for the CE has changed. Mr Li reiterated this point in his speech when he explained the link between the term of office of the new CE filling a vacancy under Article 53 and the selection method for the CE. However, he did not actually elaborate on what considerations would be applicable when the selection method changes. Further light has been shown on this matter in the speeches of the abovementioned spokesman of the NPCSC Legislative Affairs Commission and of Mr Qiao Xiaoyang, Deputy Secretary-General of the NPCSC and Chairman of the Hong Kong Basic Law Committee. The former pointed out that “if, for instance, the amended selection method for the CE provides that the Election Committee shall dissolve immediately after the election of the CE, then the term of office of a new CE filling a vacancy will not be the remaining term of his predecessor”. The point was explained more clearly by Mr Qiao when he met with representatives of the Hong Kong legal community in Shenzhen to discuss the matter two weeks before the Interpretation was issued. He said:

“If the selection method for the CE is amended in or after 2007, and a vacancy in the office of the CE arises again, whether the term of office of the CE produced by the by-election is the remaining term [of his predecessor] or a new five-year term depends on the selection method for the CE at that time. If the selection method still involves an Election Committee with a five-year term, then the term of office of the CE elected to fill the vacancy by *the same Election Committee* [as that which elected his predecessor] will still be the remaining term [of his predecessor]. If at that time the Election

¹⁸ See generally Albert H.Y. Chen, “The Constitutional Controversy of Spring 2004” (2004) 34 HKLJ 215.

Committee is one that does not have a term of office,¹⁹ or universal suffrage [for the election of the CE] has been achieved, then *the term of office of the CE elected to fill the vacancy by a newly constituted Election Committee or by universal suffrage should be a new 5-year term.*" (emphasis supplied)²⁰

In the light of the reasoning used to justify the Interpretation as discussed above, it may be said that the Interpretation is neither arbitrary nor completely dictated by political expediency. Having said that, it should also be pointed out that it is almost impossible that a Hong Kong court would arrive at the same interpretation. The common law approach to the interpretation of the Basic Law adopted by Hong Kong courts²¹ would give effect to the natural and ordinary meaning of the language of the provisions of the Basic Law and "to the legislative intent as expressed in the language".²² "Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear."²³ Here there is nothing in the provisions of the Basic Law on which the "remaining term" approach can rest. Even if there is a lacuna in a law (say the legislature has omitted to provide for the term of office of a CE succeeding one who fails to complete his term), a common law court would not put itself into the shoes of the legislature and attempt to achieve by interpretation a result which the court believes the legislature would have intended to achieve if it had considered the matter and provided for it.²⁴ That would be "a naked usurpation of the legislative function under the thin disguise of interpretation".²⁵

On the other hand, the NPCSC in exercising its power of legislative interpretation is not so constrained. It may do precisely what a common law

¹⁹ This probably refers to an Election Committee which immediately dissolves after it has elected a CE, as suggested by the above-mentioned spokesman of the Legislative Affairs Commission.

²⁰ Mr Qiao's full speech was published in some Hong Kong newspapers on 13 Apr 2005. See, eg *Wen Wei Po*, 13 Apr 2005, p A17 (in Chinese). Mr Qiao made a similar point when he met with the press after another meeting at Shenzhen held on 21 Apr 2005 to discuss the subject of the CE's term of office with representatives of the Hong Kong community and with Hong Kong members of the NPC and of the Chinese People's Political Consultative Conference: "Where a new Chief Executive is elected by universal suffrage, the term of office should be the full term [rather than the "remaining term" of his predecessor] because the election is a new expression of the will of the people." Quoted from "Qiao Xianyang's speech at the press conference after the meeting on interpretation of the Basic Law", *Wen Wei Po*, 22 Apr 2005, p A17 (in Chinese).

²¹ See the leading case of *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533, (2001) 4 HKCFAR 211.

²² *Chong Fung Yuen*, *ibid* at 546 of the HKLRD version.

²³ *Loc cit*.

²⁴ Lord Wilberforce expressed this point in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822 as follows: "In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?' attempt themselves to supply the answer, if the answer is not be found in the terms of the Act itself."

²⁵ *Magor and St Mellons v Newport Corporation* [1951] 2 All ER 839 at 841 (per Lord Simonds).

court may not do, which is to fill in the gap in the law by considering what additional rules would be desirable and consistent with the original legislative intent and then enacting such additional rules in the form of interpretation. If one looks at the previous interpretations issued by the NPCSC, such as the seven interpretations issued since 2000 on the Criminal Code and the two interpretations on the application of the Chinese Nationality Law to Hong Kong and Macau in 1996 and 1998 respectively, this is precisely what the NPCSC has been doing by way of interpretation. Interpretations have been issued not only to clarify the meaning of words in the law and but also to supplement them.²⁶ Thus Mr Qiao Xiaoyang did touch upon the crux of the matter when he said at the second Shenzhen meeting with representatives of the Hong Kong community to discuss the issue of the CE's term of office as follows: "The common law and mainland law (*dalu fa*) have different definitions of 'interpretation of law' and 'amendment of law', and this is part of the reason why some people in Hong Kong resist [interpretations by the NPCSC]. From the common law perspective, every addition to the original text of the law amounts to an amendment. However, from the point of view of mainland law, where ambiguous points in the existing law are elucidated and the original intent of the law has not been changed, this is not an amendment [but can be an interpretation]."²⁷

The NPCSC Interpretation of spring 2005 can best be understood as the creation of a new rule to deal with a situation where a CE fails to complete the five-year term of office provided for in Article 46 of the Basic Law and another person is elected to succeed him as required by Article 53. There is no express provision in the Basic Law governing the successor's term of office in this situation, though a Hong Kong court (in the absence of the Interpretation) would most probably apply Article 46 to this situation and decide in favour of a five-year term. The new rule created by the Interpretation may be regarded as a supplementary provision now introduced into Article 53. The new rule is limited in its application to situations where the CE (both the outgoing and incoming CEs) is elected by an Election Committee with a five-year term. Despite what Mr Qiao said as mentioned above, the official text of the Interpretation has left open the question of what rules will come into place when this electoral arrangement for the CE is no longer in force. The question of how many consecutive terms the CE who has served the "remaining term" may serve (which is a question of the interpretation of

²⁶ The CFA has acknowledged this point: "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." *Chong Fung Yuen*, see n 21 above at 545 of the HKLRD version.

²⁷ *Wen Wei Po*, 22 Apr 2005 (in Chinese).

Article 46)²⁸ remains unresolved. There will also be an anomaly in future if at some point in time a new CE needs to be elected to fill a vacancy (arising by failure to complete a full five-year term) and by the time the election is supposed to take place the term of office of the Election Committee (EC) that has elected the original CE will have expired (this possibility exists so long as the terms of office of the CE and the EC have not been perfectly synchronised, as was the case for the EC elected in 2000 which elected Mr Tung as CE in 2002 and now elected Mr Donald Tsang in 2005). In this scenario, the “mandate theory” discussed above cannot justify any rule that the new CE, who presumably will have to be elected by a freshly elected EC, should only serve the remaining term of his predecessor.²⁹

Apart from the substance of this Interpretation, the procedure for making it also deserves reflection. Article 158(4) of the Basic Law stipulates that the NPCSC shall consult its Basic Law Committee before giving any interpretation of the Basic Law. The Committee³⁰ consists of “12 members, six from the mainland and six from Hong Kong, including persons from the legal profession, appointed by” the NPCSC. The Hong Kong members are jointly nominated by the Chief Executive, the President of LegCo and the Chief Justice of Hong Kong. At the time the Basic Law was drafted, it was hoped that this high-powered committee could play an important role in matters of interpretation of the Basic Law. The post-1997 experience suggests that this was over optimistic. Unlike the speech made by the official introducing the bill of interpretation before the NPCSC in the case of each of the three interpretations so far, the advice or report of the Basic Law Committee to the NPCSC has never been published. In the case of this present interpretation, the date of the meeting of the Basic Law Committee was not even publicised, unlike the case in the first two interpretations, when Hong Kong journalists covered the meeting in Beijing and interviewed individual members. In this third interpretation, the legal opinion of the mainland side on the matter – which was the one eventually adopted by the NPCSC – was fully publicised well before the meeting of the Basic Law Committee through the spokesman of the Legislative Affairs Commission and Mr Qiao Xiaoyang. Observers cannot help suspecting that the Basic Law Committee is no more than a rubber-stamp during the process of interpretation.

²⁸ Art 46 provides, *inter alia*, that the CE “may serve for not more than two consecutive terms”.

²⁹ The mandate theory only prohibits the election by the *same* EC that has elected a CE of another CE whose term goes beyond the five-year term of the first CE. Where a new EC is elected, it obviously has a fresh mandate.

³⁰ See the Decision of the NPC to Approve the Proposal by the Basic Law Drafting Committee on the Establishment of the Basic Law Committee. The Decision was made on 4 Apr 1990 – the same day as the Basic Law itself was enacted – and published together with the text of the Basic Law.

Finally, it may be pointed out that insofar as interpretations by the NPCSC of the Basic Law in effect amount to what the legal community in Hong Kong would regard as amendments to the Basic Law (and the Interpretations of 2004 and 2005 can certainly be so regarded), the existing procedure for such interpretations leaves much to be desired quite apart from the above point regarding the Basic Law Committee's role. Under Article 159 of the Basic Law, amendments to the Basic Law may only be initiated in Hong Kong if there is a broad consensus in Hong Kong (as evidenced by a two-thirds majority in LegCo and among Hong Kong deputies to the NPC) regarding the matter. Furthermore, the process of legislative amendment usually involves the prior publication of the bill and extensive public consultation and discussion. However, these safeguards regarding consensus, consultation and transparency do not at present exist in the interpretation process. It is to be hoped that constitutional conventions will develop to regulate the procedure of interpretations by the NPCSC in future so that it will be more akin to the procedure of amendment.

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