

### THE LAW'S THE THING, NOT POLITICAL EXPEDIENCY

With the resignation of Mr Tung Chee Hwa as Chief Executive of the Hongkong Special Administrative Region (HKSAR) of the People's Republic of China (PRC), what has become only too apparent is that there is not a One-Country, Two-Systems form of Government in the HSKAR, as was promised by Beijing, prior to June 30, 1997, but, simply put, China ruling China and its Special Administrative Region, formerly known as Hongkong, on the basis of one-country, one-system.

Changes to the HKSAR legislation are about to be made for the benefit of Beijing, solely.

These changes are not in accordance with the original intent of The Basic Law of the HKSAR although there is some divergence of opinion even among so-called Hongkong intellectuals on this matter.

And so, Beijing will clarify its intent with regard to the HKSAR for the benefit of the 7 million residents of the territory, once and for all, in the same way that Beijing clarified, some years ago, the law, pertaining to the right of abode in the territory.

In that instance, Beijing threw law to the wind and made a determination on the basis of political expediency even though the legal fraternity of the HKSAR protested, vociferously, by marching to the Court of Final Appeal in protest.

The resignation of Mr Tung Chee Hwa on Thursday, March 10, opened up a Pandora's Box and out flew some of the horrors of Beijing, horrors that Hongkong people had feared for some time.

Just 2 days after Mr Tung Chee Hwa tendered his resignation, it was accepted with immediate effect, the State Council, obviously holding a special meeting – on a Saturday!

This was confirmed by Mr Donald Tsang, Acting Chief Executive of the HKSAR, when he stated at the Central Government Offices, on Saturday, March 12:

*'The day before yesterday, on 10 March, Mr Tung announced his decision to resign. Earlier today, the State Council approved his request and announced its decision accordingly. With immediate effect, Mr Tung has resigned from office ... '.*

After some words of praise of his former superior, Mr Donald Tsang went on to state:

*'Under Article 53 of The Basic Law, as the Chief Secretary for Administration, I will temporarily assume the duties of the Chief Executive. I have invited all Members of the Executive Council to stay in office until the new Chief Executive is elected and appointed. They have all agreed...*

*'Our most important task now is to make arrangements for the election of a new Chief Executive. The Chief Executive Election Ordinance clearly spells out the timing of the election. In short, according to Section 10(2), if the 120<sup>th</sup> day after the date on which the office of the Chief Executive becomes vacant falls on a Sunday, that will be the date of the poll; if it is not a Sunday, then we must conduct the poll on the Sunday immediately after. There is no scope to do it sooner or later. Under the present circumstances, as the office of Chief Executive became vacant today, 12 March, we shall conduct the election on 10 July as required by law.*

*'The Chief Executive returned this time will serve a term of two years to complete Mr Tung's term of office. Regarding this issue, we understand that there are different views in the community. The Secretary for Justice has looked into the matter and exchanged views with Mainland experts and has researched the drafting history of The Basic Law. The Secretary for Justice has advised that, under Article 53 of The Basic Law, the term of office of the new Chief Executive should be the remainder of the original Chief Executive term. The Executive Council accepts that advice. I shall ask the Secretary for Justice to explain the detailed arguments later. In 2007, we will elect the third-term Chief Executive in accordance with the original timetable. The detailed election methods will be based upon results of our current review of constitutional development. In other words, the review of the methods to elect the Chief Executive in 2007 and to form the Legislative Council in 2008 will go on. It remains our aim that the third-term Chief Executive in 2007 will be elected by an Election Committee that is more representative and has a broadened electorate base. Under The Basic Law, any amendments to the methods of electing the Chief Executive and of forming the Legislative Council will need the consent of the Chief Executive ...'.*

The statements of Mr Donald Tsang appeared to be in accordance with The Basic Law, which is the 'constitution' of the HKSAR.

But he made it very clear: The law is the thing – and the HKSAR should follow the HKSAR law.

Following the briefing of the Acting Chief Executive, Mr Stephen Lam, The Secretary for Constitutional Affairs, put in his oar, explaining the matter of the election of a new Chief Executive.

Mr Stephen Lam said, inter alia, that The Central People's Government approved the resignation of Mr Tung Chee Hwa from the office of the Chief Executive on Saturday, March 12, 2005.

He, then, explained the procedures in respect of the following 120-day period, concluding in the election of a new Chief Executive.

And, then, it was the turn of The Secretary of Justice, Ms Elsie Leung.

She stated, inter alia:

*'Recently, there have been discussions of the consequences that would arise should the incumbent Chief Executive resign. In particular, people have debated whether the term of office of a new Chief Executive ("CE") returned in an election under Article 53 of The Basic Law should be 5 years or should expire on 30 June 2007. I would like to state the stance of the Government of the Hong Kong Special Administrative Region ("HKSARG") on this issue.*

#### *'The Original View of the HKSARG*

*'2. When the HKSARG introduced the Chief Executive Bill in 2001, we held the view that if a new CE was elected to fill a vacancy arising prematurely, his term of office should run afresh for a period of 5 years. This was based on Article 46 of The Basic Law, which provides that "The term of office of the Chief Executive of the Hong Kong Special Administrative Region should be five years". At that time, the HKSARG applied the common law rules of statutory interpretation and considered that, generally, clear and unambiguous provisions should be interpreted according to their literal meaning. For a considerable period of time after the Chief Executive Election Bill was passed by the Legislative Council and enacted as the Chief Executive Election Ordinance ("the Ordinance"), the HKSARG had been holding the same view. The HKSARG also stated this stance in writing in response to a question raised by the Legislative Council in May 2004. Section 3 of the Ordinance provides that the term of office of the CE shall be 5 years. It does not stipulate whether the term of a CE who assumes office because his predecessor vacates office before the expiration of his term is still 5 years.*

#### *'Legal Opinions in the Mainland*

*'3. Recently, many legal professionals in the Mainland have expressed the opinion that a CE who assumes office in such circumstances only serves for the residue of the predecessor's term. However, many local lawyers disagree. In view of the difference in opinion, on the directions of*

*the CE, I have on recent occasions exchanged views with legal experts in the Mainland. I have been supplied with some relevant materials. On this issue, I have also consulted a former Basic Law drafter, Professor Xu Chongde, and a renowned expert in constitutional law in the Mainland, Professional Lian Xisheng, both of whom participated in the drafting of The Basic Law. Needless to say, I have also carefully considered the views of local legal professionals on this issue. In the course of discussions, I have explained to the legal expert how the HKSARG, applying the rules of statutory interpretation embodied in prevailing Hong Kong case law, had come to the view that the term of a CE returned in an election should always be 5 years.*

*‘4. The legal opinions of the Mainland are rather uniform. They all point out that the legislative intent of the relevant provisions of The Basic Law is that the term of a CE returned in a by-election should be the remaining term of the outgoing CE. The Basic Law, being a national law, was adopted by the National People’s Congress (“NPC”) in the context of the institutional framework and rules of statutory interpretation of the Mainland.*

#### *‘Legal Analysis*

*‘5. The terms of important offices in State organs such as the President, Vice-President, NPC, State Council and the Chinese People’s Political Consultative Conference are invariably 5 years. Where an office falls vacant prematurely, the successor will serve the remaining term of the outgoing office holder. In the opinion of Mainland experts, the NPC adopted The Basic Law with the same understanding of Article 46, which governs the term of office of the CE. No further provision to elaborate on this point was considered necessary.*

*‘6. We have also revisited in depth the original intent underlying the design laid down in The Basic Law in respect of the CE election system. Before we achieve the ultimate goal of electing the CE by universal suffrage, the CE is elected by a broadly representative election committee ...*

*‘9. A CE who vacates his office prematurely and the CE returned in the by-election can be regarded as consecutive office holders of the same term of office. Such an interpretation is not inconsistent with Article 46 of The Basic Law, which provides that “The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years”, and applies to the normal situation but not the term of a substitute Chief Executive filling up a vacancy. Furthermore, there is no direct link between Article 53(2) and Article 46...*

#### *‘HKSARG’s present stance*

*‘13. After thorough study and deliberation, the HKSARG has adjusted its understanding of the provisions of The Basic Law on the term of the CE. We agree that the term of a CE returned in a by-election is not 5 years but is the remainder of the term of the outgoing CE.*

*‘14. The HKSARG will consider introducing a Bill into the Legislative Council as soon as practicable to amend the Chief Executive Election Ordinance. The proposed amendments will add provisions to deal with the case of the CE’s office falling vacant before the term expires. The Bill will specifically provide for the term of office of a CE returned in a by-election, so as to reflect more accurately the legislative intent of The Basic Law. If the Bill is passed by the Legislative Council, it will be reported to the NPCSC for the record. This will provide a solid legal basis for the term of office of a CE to be returned in a by-election.*

#### *‘Concluding Remarks*

*‘15. The one-country-two-system principle is an innovation with no precedent. While Hong Kong has adopted the common law system for over a century, China adopts the continental law system. After the reunification, it can only be expected that the two systems of legal thinking which have been developing under different historical and cultural backgrounds have to be reconciled. Compared with constitutions elsewhere which have come through a long history of development, The Basic Law is still in its early days as constitutional instrument of the HKSAR. There are bound to be a lot of jurisprudential issues awaiting exploration. The Basic Law is the interface between two systems under one country. It is unavoidable that the Mainland organs and legal sectors and the local institutions and legal sectors will sometimes have different interpretations of the provisions of The Basic Law. Given the common goal of preserving the stability and prosperity*

*of Hong Kong, there should not be any difference that cannot be resolved through mutual understanding, empathetic accommodation and frank communication.'*

### **What It All Means**

Disregarding the contentious issue at hand – whether or not the term of the replacement Chief Executive of the HKSAR to fill the vacancy, left by Mr Tung Chee Hwa, is to be 5 years or 2 years – it is only too clear by the statements of The Secretary of Justice, Ms Elsie Leung, that the final determination, as far as she is concerned, was predicated by political considerations.

Unfortunately for this very learned lady, the matter of the term of office of the replacement Chief Executive is not one that merits political considerations but only legal determinations.

And those determinations are supposed to be based on English Common Law and such precedents as may follow and not determinations, based on a Continental Law System, as is practised in the PRC.

Further, when Colonial Hongkong was turned over to the Government of the PRC, there was a guarantee that the laws of the territory would remain in place for a period of not less than 50 years, following the assumption of sovereignty by the PRC Government.

The late Paramount Leader of the PRC, Mr Deng Xiao Ping, made this very clear in his many speeches.

*'Put your hearts at ease'* was Mr Deng Xiao Ping's famous statement to Hongkong people.

That being the case, it would appear that any interpretation of The Basic Law of the HKSAR should be taken at source: The HKSAR.

While Beijing, of course, is the Capital City of the PRC, and while it is accepted that the HKSAR is part of the PRC and, as such, Beijing's decisions override those of the HKSAR, at law, Beijing may only enact laws and make determinations which are conducive and complementary to the existing laws of the land, and that would include the laws of the HKSAR, those laws, having already been ratified by Beijing.

The political opinions of learned legal experts of the PRC are opinions, as stated by Ms Elsie Leung, predicated by determinations, based on PRC legal considerations.

The HKSAR, however, operates under different determinations and precedents to those of the PRC.

Or is this to be changed in the fullness of time?

What appears to be happening is that determinations are about to be made for political expediency, not in accordance with HKSAR law.

Laws are made by people, the government, being an instrument of the people.

The Executive Branch of Government is distinct and separate from the Legislative Branch of Government – and that is the way that it should be.

It is clear that if the HKSAR permits Beijing to make determinations in respect of the above thorny issue, then, it follows that the Executive Branch is interfering in the Legislative Branch.

Which, *prima facie*, is contrary to the intent of the concept of the separation of powers.

What is, also, very clear about the sequence of events, leading up to the resignation of Mr Tung Chee Hwa on March 10, 2005, is that his exit from power was orchestrated from Beijing.

It is highly unlikely that Beijing would permit its man to vacate such an important office as that of the Chief Executive *'with immediate effect.'*

Also, it is highly unlikely that the State Council of the Government of the PRC would have been able to make the decision to accept Mr Tung Chee Hwa's resignation *'with immediate effect'* unless it had been forewarned of the matter, some time previously.

That is assuming that the State Council meets on a Saturday, mind you.

In the opinion of learned jurists with whom TARGET consulted on this matter, the black hand of Beijing has always been present all along the road, leading to the eventual resignation of Mr Tung Chee Hwa, who has proved, beyond doubt, that he has been incompetent to be the Chief Executive of the 416 square miles that constitute the HKSAR.

His incompetence has made it possible for Beijing to step in, in order to assist its problem child in the deep south.

And this makes one wonder whether or not that was the original intent of Beijing in the first instance.

**For More About This Matter, Please Refer To:**  
TARGET Intelligence Report, Volume VII, Number 45, Published On March 9, 2005,  
Headlined:  
**'THE TRUTH BEHIND THE TUNG CHEE HWA 'RESIGNATION''**

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