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# COMMENTS

## THE POLITICS OF SUCCESSION IN HONG KONG

The sudden and unexpected resignation on 10 March 2005 of Hong Kong's Chief Executive ("CE"), Mr Tung Chee-hwa, and the manner of dealing with the succession, are wonderfully illustrative of Hong Kong-China politics. Mr Tung's departure, just over two years before the end of his term, is the denouement to the widespread dissatisfaction with his government and the massive protests of the last two years. It seems that as a result of these protests, Beijing lost confidence in him and began to worry about its ability to control Hong Kong. This control had depended to a large degree on Beijing's control over the CE and the CE's acceptability to the people. Not used to democratic politics, Beijing's response has been to assume the reins of power, played out in a Byzantine drama.

### **Did He Leap or Was He Pushed?**

When leaks about Mr Tung's imminent departure first appeared, there was, as is usual in major political events in Hong Kong, much speculation about Beijing's hand in all this. It was widely assumed that Beijing wanted to get rid of him. A few months before, in a public ceremony in Macao, the Chinese President had chastised Mr Tung for inefficiency, poor governance, and lack of sensitivity to the views of Hong Kong people. With the full retirement from politics of the former president Jiang Zhemín, who had handpicked Mr Tung, the omens were that he would indeed be sacked. It did not matter that Beijing had no legal authority to dismiss him. Beijing does not normally allow something so trivial as the law to stand in the way of its wishes. The Hong Kong administration is now engaged in damage control, assuring a sceptical public that Mr Tung left of his own volition, due to ill health.

The Basic Law is less than clear on the circumstances in which a CE may resign. It is evident that the CE must resign due to inability to perform the functions of office, arising from medical or other reasons (article 52 (1)). But what if the CE is under pressure to quit or decides that a quiet life is more rewarding? On one reading that option is not possible as there is no provision for voluntary resignation (as there is in most constitutions). Nor would voluntary resignation be consistent with a person as conscientious and committed to duty as Mr Tung. So illness it had to be (even though at

his farewell press conference, it seemed that he protested too much about his ill health).<sup>1</sup>

The interminable delay, as it seemed then, in announcing Mr Tung's future gave some insight into the complex negotiations and decision-making among the Chinese political establishment. Normally, China's direction of Hong Kong affairs is relatively uncontroversial in Beijing. Also somewhat unusual was the difficulty Beijing faced in dealing with its supporters in Hong Kong, who are normally fairly amenable to Beijing's directions. On this occasion, the pro-China camp was divided, not on Tung's departure, but the succession. Under Article 53 of the Basic Law, the Chief Secretary, Mr Donald Tsang, assumes the functions of the CE in an acting capacity. He is also expected to be a strong candidate in the ensuing selection process. Pro-Beijing political parties do not trust him and have their own candidates, but are not ready for an electoral battle. A five-year term for Mr Tsang does not suit their plans but they believe they could take him on after two years. Whatever Beijing's original intentions, it is anxious to please these political groups, backed by business tycoons. Moreover, a two-year term would enable Beijing to keep Mr Tsang on a short leash.

A major obstacle to this convenient convergence on two years is the Basic Law, Hong Kong's constitution. This provides that a person elected as CE has a term of five years (Article 46). A few unwary Beijing supporters, including at least one distinguished barrister and former solicitor general, Mr Daniel Fung, had pronounced that no matter in what circumstances the vacancy arose, the new CE has a term of five years.<sup>2</sup> This view was unequivocally stated to the Legislative Council (LegCo) in 2001 in response to a question:

Q3: What is the term of office of a CE elected to fill a vacancy in the CE office in the middle of a 5-year term?

A3: The term of a CE is five years. This is clearly stated in BL 46.

BL 53 provides that in the event that the office of the CE becomes vacant, a new CE shall be selected within six months in accordance with BL 45. There is no other provision in the BL that prescribes a shorter term of office for the new CE.<sup>3</sup>

<sup>1</sup> When the Chief Executive Election Bill was going through the Legislative Council (LegCo), Mr Martin Lee made the following remarks "If the Chief Executive is not willing to resign (I have said that there is little chance for such a circumstance to arise because when a ruler wants a subordinate to fall sick, he cannot decline to become seriously sick and he may even have to resign on the grounds of sickness)." Legislative Council, *Official Proceedings (Hansard)* (Committee Stage) 11 July 2001, p 7552.

<sup>2</sup> Gary Cheung *et al*, "Tung's Successor Will 'Only Serve Two Years'", *South China Morning Post* (hereinafter "SCMP"), 5 Mar 2003.

<sup>3</sup> "Administration's Responses to Points raised on 5 June 2001 by Members of the Bills Committee on the Chief Executive Election Bill" LC Paper No. CB(2)1786/00-01(01).

And it was reiterated last year by Hong Kong's minister for constitutional affairs, Mr Stephen Lam. The Secretary for Justice explained the administration's faults:

“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.”<sup>4</sup>

But when it became clear that Beijing's preference was for two years, various about-turns were required.

### Interpretation of the Basic Law

Hong Kong was then treated to a classic Beijing tactic of undermining the express words of the Basic Law. Its most potent weapon is Interpretation of the Law by the Standing Committee of the National People's Congress (NPC).<sup>5</sup> Beijing had used this on several previous occasions to nullify Basic Law provisions, mostly prominently to enable ethnic Chinese nationals of foreign states to “resume” their Chinese nationality and acquire right of abode,<sup>6</sup> to bar the reunion of children on the Mainland with their Hong Kong parents,<sup>7</sup> and most recently to derail Hong Kong's path to democracy. To justify an Interpretation, it is normally necessary to establish a doubt or ambiguity about the relevant legal provision. As the first intimation of Beijing's preference for two years reached Hong Kong, its supporters began to ask for an Interpretation, saying that a CE succeeding to office in these circumstances was not envisaged in the Basic Law, notwithstanding clear words to the contrary. The movement was gaining some momentum when Beijing pulled the plug.

Interpretation by the Standing Committee is deeply resented in Hong Kong and Beijing was not ready for another confrontation. Beijing chose another tack and wheeled out Mainland legal experts, popularly known as

<sup>4</sup> *Statement by the Secretary for Justice on the Term of the New Chief Executive* (12 Mar 2005), available on the Department of Justice website at <http://www.doj.gov.hk/eng/public/pdf/sj20050312e.pdf> (visited 29 Mar 2005).

<sup>5</sup> To avoid confusion we are using “Interpretation” to refer to the Basic Law procedure by the Standing Committee as opposed to the process we can all engage in.

<sup>6</sup> For an analysis, see Yash Ghai, *Hong Kong's New Constitutional Order: The Transfer of Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2<sup>nd</sup> edn, 1999), pp 155–161.

<sup>7</sup> On the history and politics of this interpretation, see Johannes Chan, Fu Hualing and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000).

“guardians of the Basic Law” to state that the “legislative intent” was clear: the Drafting Committee had intended that the new CE would serve the remainder of the term of the predecessor.<sup>8</sup> Those who had supported a five-year term or saw a legal uncertainty changed gears quickly, in a Pavlovian reaction. Even the government said that it had “adjusted” its view and now realized the validity of the two-year term.<sup>9</sup> The Legal Affairs Commission of the NPC has endorsed this interpretation, attributing it to the Hong Kong administration.

It is not our intention to explore the oddity of the interpretation and the convoluted justification of the Legal Affairs Commission or the attribution of the decision to the Hong Kong government (which tends to follow Beijing’s lead in these matters). Our interest is in the technique whereby politically-driven interpretations are made. In this case there is the secret weapon of “legislative intent”, which seems to have led at least Messrs Daniel Fung and Raymond Wu to change their minds.<sup>10</sup> We call it a secret weapon because it is culled from the confidential archives of the State Council, to which others have no access. Additionally it seems that only Beijing or its friends have a monopoly on “legislative intent”, notwithstanding that the Basic Law was drafted jointly by Mainland and Hong Kong drafters.

Legislative intent is a legitimate source for interpretation. But its use is subject to rules of prudence. The intent must have been evident when the law was enacted. “Legislative intent” was used to overrule the Court of Final Appeal (CFA) in the right of abode case, when the “evidence” of the “intent” was the opinion of the Preparatory Committee, years after the Basic Law was enacted. There has to be clear evidence that there was a general consensus on what is claimed to be the legislative intent. Law making is complex, involving many participants, as was particularly the case with the Basic Law. Different legislators vote for the same law for quite different reasons, and sometimes the law is deliberately ambiguous to muster a majority. In these cases it is meaningless to talk of an “intention”. Great care is needed to establish the substance of a consensus. Dim recollections of elderly drafters or the imaginations of their young acolytes (barely into their teens when the Basic Law was drafted) are hardly credible basis for a decision. A chance remark by someone in a subgroup of the Drafting Committee is no evidence of “intent”. Nor can the foundation of a freewheeling interpretation be laid by alleging that the matter was not addressed – as suggested by Mr Louis Cha.<sup>11</sup>

<sup>8</sup> See Cheung *et al* (n 2 above).

<sup>9</sup> See n 4 above.

<sup>10</sup> Gary Cheung and Jimmy Cheung, “Experts Back-pedal on Two-year Term”, SCMP, 14 Mar 2005.

<sup>11</sup> “I’m Going, Tung Tells His Team”, SCMP, 8 Mar 2005, p 1.

However, the pro-Beijing lobby and the Legal Affairs Commission claim the matter was indeed discussed and resolved in favour of the remainder of the term.<sup>12</sup>

The prudent role followed by all sensible common law as well as civil law courts is to stick as far as possible to the text of the law. The text also provides the parameters for a purposive interpretation. People who make their plans on the basis of the law are entitled to rely on the text. It is unfair that decisions should depend on records that Beijing has refused to release.

### To “Judicial Review” or “Not Judicial Review”

Democrat politicians are now deliberating whether a legal challenge should be mounted against this ruling. Opinion is divided, in large part because a judicial decision in Hong Kong against the official position is sure to be overturned by the Standing Committee. A further humiliation of the CFA is likely to ensue, weakening the capacity to do justice of Hong Kong’s legal system – long considered the jewel in the crown of the HKSAR. No one wants to take responsibility for seeking or triggering an Interpretation. Those who might apply for judicial review in Hong Kong courts on the validity of a term of less than five years (as is proposed by the government through an amendment of the Chief Executive Election Ordinance) are widely expected to be blamed for being the cause of a Standing Committee interpretation. LegCo member Albert Chan has already expressed his intention to bring an application for judicial review. And it is suggested that it may be “necessary” to seek an Interpretation before that happens in order to avoid delay and a vacuum caused by the litigation.<sup>13</sup> Although the demand for an Interpretation is said to be motivated by the need for clarity, it is widely assumed by all that in fact the result is foregone – a departure from what even the HKSAR Government states is the clear language of the Basic Law. This approach attests to the fact that interpretation has not been a matter of clarification of the law, but its manipulation.

Meanwhile the Basic Law, with its promise of autonomy and an independent legal system, lies in tatters, its ability to give cohesion to the legal and political system of Hong Kong and provide the basis of a principled relationship between Hong Kong and Beijing fatally undermined. So subordinated has the Hong Kong government become to Beijing and so beholden are Hong

<sup>12</sup> See Cheung and Cheung (n 10 above).

<sup>13</sup> Gary Cheung *et al*, “Lawmaker Vows to Challenge Term Law; Albert Chan’s Decision Appears to Make Interpretation of Basic Law Inevitable”, SCMP, 25 Mar 2005.

Kong tycoons to Beijing that they seem not to care. And little noticed is that Beijing has abandoned a business tycoon in favour of a seasoned bureaucrat of the Patten period, and its message that the season of politics is over.

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