

30 April, 04

Mrs. Rita Fan, GBS, JP
President of the Legislative Council,
Legislative Council Building
8 Jackson Road,
Central, Hong Kong.

Dear President,

Re: Letter from the Secretary for Justice of 29 April, 2004

Thank you for giving me an opportunity to deal with the objections of the Secretary for Justice to my proposed amendment to Hon. KK Fung's motion for 5 May, 2004. Time would not permit me to deal with the letter in detail.

The proper limits of debate

2. Very important constitutional questions were raised under this heading, although it is not exactly clear what she was driving at. The key objection seems to lie in the last paragraph of page 2, namely, that my proposed amendment is "out of order" because "(the) language and/or substance accuses the NPC or NPCSC of breach of law or other improper conduct".

3. No reason was given except in the succeeding paragraph, namely, that Legco should "apply to the NPC and NPCSC the same standards that it applies to itself, namely, that it is out of order for Legco to pass a motion involving offensive expressions against the character and conduct of Legco itself which would be likely to

degrade the legislature in the public estimation.”

4. I have the following observations to make:

- (1) The quotation in paragraph 3 above appears to be a paraphrase of the first sentence of a paragraph at page 382 of Erskine May under the heading: “WORDS AGAINST PARLIAMENT, OR EITHER HOUSE”.
- (2) Although some strong words appear in my proposed amendment, they reflect the sentiment of many of my colleagues in the Council and a large sector of the community. And they are certainly not unparliamentary.
- (3) Even if (though not admitted) they, or some of them, might be considered in the House of Commons to be “offensive expressions against the character of Parliament itself” (see Erskine May above), my proposed amendment is not directed at the Legislative Council itself, but solely the NPCSC.
- (4) The NPC and this Council are separate and are not different houses of the same legislature as the House of Commons and the House of Lords are in the British Parliament.
- (5) Although the S for J mentioned “the constitutional relationship” between the Hong Kong legislature and the NPC or NPCSC, she has not taken the point that the NPC is a superior legislature, and that the inferior Hong Kong legislature is not empowered to and must not criticise the NPC or NPCSC. Even if the S for J were to take this point, there is, with respect, no substance in it. For I remember that in the colonial days of Hong Kong, members of the Council (including me) used, and were permitted to use, on more than one occasion, even stronger language in condemning the British (sovereign) Parliament in relation to, for example, the nationality laws.
- (6) As to the reference to the Court of Final Appeal’s judgment in Ng Ka Ling v

Director of Immigration (No. 2) [1999] 1 HKLRD 577 at 578C-E, the CFA accepted that “it cannot question the authority of the NPC or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein”. (emphasis added) The CFA has certainly not conceded that it cannot or has no jurisdiction to examine as to whether any act of the NPC or NPCSC is or is not in accordance with the provisions of the Basic Law.

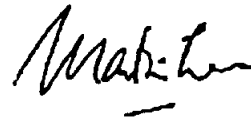
- (7) The CFA is plainly right in not conceding the point because the NPC and NPCSC have many different roles to play—see articles 62 and 67 of the Constitution of the People’s Republic of China—some are legislative in nature while others are clearly executive in nature.
- (8) The NPCSC’s interpretation of paragraph 7 of Annex I and paragraph III of Annex II of the Basic Law on 6 April was clearly an exercise of a legislative function, while its decision made on 26 April in ruling out democratic elections of the Chief Executive in 2007 and the entire legislature in 2008 was not and did not purport to be the exercise of a legislative function. Indeed, the latter is in substance an executive or administrative act.
- (9) If my proposed amendment were to be ruled out of order on this ground, it would be opening Pandora’s box, for it might be argued that this Council may not challenge the executive acts of the Central Authorities, the Hong Kong and Macau Affairs Office or the Central Government’s Liaison Office etc.
- (10) In the absence of clear argument and authority, it is submitted that such a ruling would be a totally unacceptable curtailment of the powers of this Council and the freedom of speech and debate in this Council.

Scope of the amendment

5. In relation to this objection, I urge you to take the following matters into account:-

- (1) The original motion has clearly been overtaken by subsequent events—for not only did the NCPSC adopt on 26 April the Chief Executive's Report which was the reason for the original motion, it actually went further by ruling out democratic elections of the Chief Executive in 2007 and the entire legislature in 2008.
- (2) A debate on the original motion on 5 May would be quite meaningless, particularly in relation to the latter part of the motion in urging "the CE to consult Hong Kong people immediately and submit a supplementary report which fully reflects the opinions of the public, so as to meet Hong Kong people's expectations of electing the CE and all Legislative Council Members by universal suffrage in 2007 and 2008 respectively."
- (3) Clearly, the intention of the original motion was that the NPCSC would or might be persuaded by the public opinion expressed in the supplementary report so as not to rule out democratic elections in 2007 and 2008, but to rule that such elections should be introduced to Hong Kong.

Thank you for your attention.



Yours sincerely,

(Martin Lee)

Legislative Councillor