

Re: Election Petition Mechanism under
the Legislative Council Ordinance and related issues

Submission of the Hong Kong Bar Association

1. The Constitutional and Mainland Affairs Bureau (“CMAB”) consults the Hong Kong Bar Association (“HKBA”) on its proposal to amend the Legislative Council Ordinance (Cap 542) (“LCO”), the District Councils Ordinance (Cap 547) (“DCO”) and the Village Representative Election Ordinance (Cap 576) (“VREO”) in the light of the judgment of the Court of Final Appeal in *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervener)* (FACV 8/2010), which declared that section 67(3) of the LCO, in so far as it provides for the finality of the determination of the Court of First Instance after the trial of an election petition, was unconstitutional and invalid by virtue of inconsistency with Article 82 of the Basic Law of the HKSAR.

2. The CMAB proposes (a) to introduce a leap-frog mechanism to LCO, DCO and VREO, similar to the one contained in the Chief Executive Election Ordinance (Cap 569) (“CEEO”), which would allow an appeal against the judgment of the Court of First Instance in relation to an election petition to be lodged to the Court of Final Appeal direct, subject to leave being granted by the Appeal Committee of the Court of Final Appeal; (b) to provide for a time limit of seven days after the day on which the Court of First Instance judgment is handed down for the making of an application for leave to appeal to the Court of Final Appeal; and (c) to keep unchanged the present provisions in the three Ordinances for proceedings against persons on grounds of disqualification.

3. The HKBA considers that proposal (a) is not justified.

4. The Court of Final Appeal exercises the power of final adjudication of the HKSAR as a final appellate court in the tradition of the former Privy Council

deciding questions of law of great and general public importance, and exceptionally, righting occasions of substantial and grave injustice. Chief Justice Li explained in *A Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570 at [27] to [29] that:

“Nature of the Court’s power of final adjudication

27. The function of the Court of Final Appeal is to exercise the power of final adjudication vested in it by art.82. The crux of the matter is the proper interpretation of the Court’s power of final adjudication vested by this article. But the nature of the power of final adjudication must first be appreciated.

28. As has been stated, the purpose of the Court’s establishment is that it would replace the Privy Council as the final appellate court in the new order after 1 July 1997. The nature of its power of final adjudication must be considered in the context of the hierarchy of courts established by the Basic Law itself. This structure, in essence, is similar to that of the previous judicial system which the Basic Law requires to be maintained except for the Court replacing the Privy Council at the apex.

29. Having regard to the purpose of the Court’s establishment and the context of the hierarchy of courts, it is clear that the Court’s power of final adjudication, as contemplated by the Basic Law, is by its nature, a power exercisable only on appeal and indeed on final appeal. The Court’s function as envisaged by the Basic Law is not merely to exercise an appellate power, but a final appellate power which, by its nature, is naturally exercisable upon appeal from an intermediate appellate court, such as the Court of Appeal. The Court’s function is similar to the previous role of the Privy Council in relation to Hong Kong and is consistent with the role of final appellate courts in a number of common law jurisdictions.”

Chief Justice Ma endorsed these passages in *Mok Charles Peter v Tam Wai Ho & Anor* (above) and clarified two important facets thereof (see [24]-[29]).

5. Respecting this configuration of the Court of Final Appeal, strict conditions have been set in section 27C of the Hong Kong Court of Final Appeal Ordinance (Cap 484) for the leap-frog mechanism applicable to civil cases (other than election petitions or applications for judicial review arising out of or relating to an election of the Chief Executive).
6. There is great reluctance on the part of the Court of Final Appeal to consider an issue not pursued in the intermediate appellate courts; see *Wong Tak Yue v*

Kung Kwok Wai (1997-98) 1 HKCFAR 55 (at 66E-G); and *Flywin Co Ltd v Strong & Associates Ltd* (2002) 5 HKCFAR 356 (at [39]).

7. Accordingly, a very exceptional case needs to be demonstrated for the addition of a leap-frog mechanism in respect of a category of cases. Chief Executive elections demonstrated this very exceptional case by reason that the matter of a disputed Chief Executive election must be very swiftly resolved due to (a) the time gap (usually three months) between a Chief Executive election and his assumption of office; (b) the Central People's Government's substantive role in appointing the Chief Executive following an election; (c) the current electoral method of the Chief Executive by an Election Committee having a term concurrent and coterminous with the Chief Executive; and (d) the vital importance of the office of the Chief Executive, making it appropriate that there be no doubts as to the legality of the person elected and appointed.

8. The CMAB's consultation paper has not demonstrated a very exceptional case for election petitions under the LCO, the DCO and the VREO. The CMAB expressed concerns over the possibly lengthy appellate process if there is interposed an appeal to the Court of Appeal. These concerns are sufficiently addressed by the undoubted recognition on the part of the Judiciary that election petitions ought to be resolved quickly and thus deserves priority in listing and where appropriate, pro-active case management through procedural directions prescribing a timetable for the preparation of the appeal; and on the part of the parties (at least on the part of the Department of Justice) to give priority to the preparation of the appeal and to alert the court of the need for procedural directions where such have become necessary and appropriate. The CMAB also expressed concerns that service by the person originally declared to have been elected to office may be affected during the time for the determination of the election petition. This suggestion failed to take account of provisions like section 71 of the LCO, which provides that the court's certification that the person originally declared to have been elected at an election has not been duly elected does not invalidate acts purporting to have been done by the person as a member of the Legislative Council before the

certificate is received by the Secretary for Constitutional and Mainland Affairs, the Electoral Affairs Commission or the Clerk to the Legislative Council.

9. In addition, the HKBA notes that the number of election petitions under the LCO, the DCO and the VREO that the CMAB referred to in paragraph 24 of the consultation document together do involve a sizeable increase in the caseload of the Court of Final Appeal. The majority of these election petitions involve factual allegations of electoral misconduct to be resolved by the hearing of witnesses. The HKBA is of the view that it is not appropriate to burden the Court of Final Appeal with examining each and every such allegation (sometimes they are numerous and asserted for cumulative effect) for the purpose of deciding whether there should be leave to appeal.
10. The HKBA considers that suitable amendments to the LCO, the DCO and the VREO in the light of the judgment of the Court of Final Appeal in *Mok Charles Peter v Tam Wai Ho & Anor* (above) shall remove all finality provisions with respect to the Court of First Instance's determination of the trial of election petitions, provide for a right of appeal to the Court of Appeal available to all parties, with the Court of Final Appeal exercising its power of final adjudication in the ordinary and discretionary way pursuant to section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance. A statutory right of appeal is a secured guarantee to the parties to an election petition.
11. The HKBA does not support proposal (b). There is no good reason to curtail the applicable time limit from the usual 28 days to seven days.
12. The HKBA agrees with proposal (c).

Dated 25th March 2011.

HONG KONG BAR ASSOCIATION