

**The First Report of the
Constitutional Development Task Force :**

**Issues of Legislative Process in the Basic Law
Relating to Constitutional Development**

March 2004

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Chapter One : Introduction

- 1.1 To provide a solid foundation for constitutional development after 2007, the Hong Kong Special Administrative Region (HKSAR) Government conducted internal research in 2003.
- 1.2 In December 2003, during the duty visit by the Chief Executive to Beijing, the President referred to the serious concerns and principled stance of the Central People's Government (CPG) regarding Hong Kong's constitutional development.
- 1.3 In his Policy Address on 7 January 2004, the Chief Executive said that the HKSAR Government understood the concerns of the community over our future constitutional development. In addition, the Chief Executive undertook that the Government would actively promote constitutional development in Hong Kong on the basis of maintaining "One Country, Two Systems" and adhering to the Basic Law. The Chief Executive established the Constitutional Development Task Force headed by the Chief Secretary for Administration and with members including the Secretary for Justice and the Secretary for Constitutional Affairs, to examine in-depth the relevant principles and legislative process in the Basic Law relating to constitutional development, to consult the relevant departments of the Central Authorities, and to listen to the views of the public on the relevant issues.
- 1.4 On the same day, the Hong Kong and Macao Affairs Office (HKMAO) of the State Council issued a statement on the Chief Executive's Policy Address, reiterating the serious concerns of the CPG, and expressing the wish that the HKSAR Government would thoroughly discuss the issues with the relevant departments of the Central Authorities before determining the relevant working arrangements.

1.5 Through arrangements made by the HKMAO of the State Council, the Task Force paid a visit to Beijing from 8 February to 10 February this year, and met with the HKMAO and the Legislative Affairs Commission of the Standing Committee of the National People's Congress to discuss issues relating to constitutional development. In addition, the Task Force had discussions with a group of Mainland legal experts. On the day following the Task Force's return to Hong Kong, the Task Force informed the Legislative Council and the public about the visit. As reported by the Chief Secretary for Administration, the relevant departments of the Central Authorities stated that Hong Kong's political structure was established by the National People's Congress through the Basic Law in accordance with the Constitution. Hong Kong's constitutional development involves the relationship between the Central Authorities and the HKSAR, and relates to the systems used to implement "One Country, Two Systems" and the Basic Law. Therefore, the Central Authorities have powers and responsibilities on matters relating to Hong Kong's constitutional development.

Chapter Two : The Consultation Work of the Task Force

- 2.1 The first focus of the Constitutional Development Task Force is to deal with issues of principles and legislative process in the Basic Law relating to Hong Kong's political structure. To this end, on 14 January the Task Force issued a public document to the Legislative Council which set out the relevant issues. It then embarked on a series of meetings with different organisations and individuals in the community to discuss the issues.
- 2.2 As at 24 March, the Task Force had met with 77 organisations and individuals to listen to their views on the relevant issues of principles and legislative process. The organisations and individuals included political parties, political groups, trade unions, chambers of commerce, academia on law, economics, and politics and public administration, as well as others including members of the former Drafting Committee for the Basic Law of the HKSAR, members of the Committee for the Basic Law of the HKSAR, non-affiliated members of the Legislative Council, and representatives of local organisations. The Task Force also met with members of the District Councils and the Election Committee in groups.
- 2.3 On 19 February, the Task Force launched its official website on constitutional development, and posted onto it the relevant issues of principles and legislative process relating to constitutional development, to invite views from members of the public on these issues. As at 24 March, the website had been browsed by the public more than 107,000 times.

- 2.4 On 23 February, 1 March and 8 March, the Task Force placed advertisements in 16 local newspapers, inviting views on the issues mentioned above. In addition, the Task Force has encouraged the public to express their opinions through television APIs and by placing copies of the discussion paper in District Offices.
- 2.5 As at 24 March, the Task Force had received from the public around 550 letters, facsimiles and e-mails, expressing views on matters relating to constitutional development and the issues of principles and legislative process in the Basic Law. More than 200 of the views received related to issues of legislative process.
- 2.6 This report will focus on the issues of legislative process. The Task Force will shortly report separately on the outcome of its work in respect of the issues of principles.
- 2.7 The views gathered in relation to the issues of legislative process have been included in the following Annexes :

Annex 1 – Copies of submissions from organisations and individuals whom the Task Force has met.

Annex 2 – Extracts of summaries of meetings (relating to issues of legislative process) between the Task Force and the organisations and individuals. These summaries have been sent in draft form to the relevant organisations and individuals for confirmation. Some of the records have already been confirmed. Records which have passed their deadlines of confirmation and are still subject to confirmation are also attached, but they have been marked as such.

Annex 3 – Copies of public views gathered through other channels, including e-mails and facsimiles. These views are wholly or partly related to the issues of legislative process.

The above annexes are available for reference in District Offices. Members of the public may also browse these annexes on the Task Force's official website.

2.8 After wide-ranging discussions over more than two months, the Task Force considers that it is now able to draw conclusions on the issues of legislative process, and state its views on them.

Chapter Three : The Views of the Task Force on Issues of Legislative Process

3.1 In its paper to the Legislative Council Panel on Constitutional Affairs on 14 January, the Task Force set out five issues of legislative process relating to constitutional development.

3.2 These five issues of legislative process are –

(A) what legislative process should be used for amending the methods for selecting the Chief Executive and for forming the Legislative Council as set out in Annex I and Annex II to the Basic Law;

(B) whether there is no need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used;

(C) initiation of amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council;

(D) whether the method for forming the third term Legislative Council as prescribed in Annex II may apply to the fourth term and subsequent terms of the Legislative Council; and

(E) how the phrase “subsequent to the year 2007” should be understood.

3.3 After careful examination, the Task Force has formed the following views in respect of these five issues of legislative process.

(A) What legislative process should be used for amending the methods for selecting the Chief Executive and for forming the Legislative Council as set out in Annex I and Annex II to the Basic Law

3.4 Annex I and Annex II to the Basic Law stipulate, respectively, the procedural requirements for amending the method for selecting the Chief Executive and the method for forming the Legislative Council. However, the legislative process to be used for making such amendments has not been specifically stated.

3.5 We consider that to amend the “methods”, it is not sufficient to amend the local electoral laws only. Otherwise, the new legislative provisions might contradict the existing provisions as stipulated in Annex I and Annex II.

3.6 We consider that amendments should be made at two levels. First, the “methods” should be amended in accordance with the provisions as set out in the relevant Annexes to the Basic Law. Thereafter, the local electoral laws should be amended to prescribe the detailed arrangements. This is consistent with the current practice whereby the “methods” are stipulated in Annex I and Annex II, and the detailed electoral arrangements are prescribed by local legislation.

3.7 If it is decided that there is a need to amend the “methods”, the procedures in the relevant Annexes should be followed first. After the proposed amendments have been introduced by the HKSAR Government, they must be endorsed by a two-thirds majority of all the members of the Legislative Council and obtain the consent of the Chief Executive. Thereafter, they shall be reported to the Standing Committee of the National People’s Congress for approval or for the record. On completion of these

procedures, the HKSAR Government will, in accordance with the normal local legislative process, amend the relevant electoral laws, namely the Chief Executive Election Ordinance and the Legislative Council Ordinance. Once completed, the relevant amendment ordinances will be reported to the Standing Committee of the National People's Congress for the record in accordance with Article 17 of the Basic Law.

(B) Whether there is no need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used

3.8 As can be seen from the statement made by Mr JI Pengfei at the Third Session of the Seventh National People's Congress on 28 March 1990 when submitting the Basic Law (Draft) and its relevant documents, it is clear that the legislative intent of providing, in Annex I and Annex II, the methods for selecting the Chief Executive and for forming the Legislative Council is "to make it more amenable to revision when necessary". The phrase "more amenable to revision" should be understood having regard to the procedures stipulated in Article 159 of the Basic Law. Our understanding is that the methods for selecting the Chief Executive and for forming the Legislative Council can be amended in accordance with the special procedures in Annex I and Annex II. As long as the relevant amendments are not inconsistent with the provisions in the main text of the Basic Law (such as Article 45 and Article 68), the amendment procedures in Article 159 need not be invoked.

3.9 We also note that the Basic Law has prescribed special procedures for amending the other Annex. Article 18 of the Basic Law provides that the Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III.

The content of Annex III may be amended by the Standing Committee of the National People's Congress, rather than by the National People's Congress in accordance with Article 159 of the Basic Law.

3.10 The amendment to the method for forming the Legislative Council in Annex II brings out a technical question, that is whether the first paragraph of Article I of Annex II, namely “[t]he Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term” could be amended in accordance with the procedures in Annex II. We consider that such amendments should be allowed, on the following grounds –

- (i) Annex II is divided into three sections. Article I is entitled “[m]ethod for the formation of the Legislative Council”. It covers the provision in the first paragraph that “[t]he Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term”. According to the procedures in Article III, the “[m]ethod for the formation of the Legislative Council” may be amended.
- (ii) Article III refers to the “need to amend the provisions of this Annex”. The word “provisions” should cover all provisions in Annex II.
- (iii) According to Mr JI Pengfei’s statement at the National People’s Congress in 1990, the method for forming the Legislative Council is provided in an annex so that it is more amenable to revision when necessary. Flowing from this, it may be deduced that the provision “[t]he Legislative Council of the Hong Kong Special Administrative Region shall be composed of 60 members in each term” is stipulated in Annex II, rather than in the main text of the

Basic Law, so as to make it more amenable to amendment when necessary.

- 3.11 It may be deduced from the above that the provision in Article 2 of Annex I, namely “[t]he Election Committee shall be composed of 800 members”, as well as the number of members for each sector, may also be amended in accordance with the procedures in Article 7 of Annex I.

(C) Initiation of amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council

- 3.12 The relevant Annexes to the Basic Law provide that, if there is a need to amend the methods for selecting the Chief Executive and for forming the Legislative Council, such amendments must be made in accordance with the procedures in the Annexes.
- 3.13 If it is decided that there is a need to amend the “methods”, the procedures in the relevant Annexes should then be followed. Having regard to Article 74 of the Basic Law, bills which relate to the political structure should only be introduced to the Legislative Council by the HKSAR Government. After being introduced by the HKSAR Government, the proposed amendments must, in accordance with the provisions in the Annexes, be endorsed by a two-thirds majority of all the members of the Legislative Council and must have the consent of the Chief Executive, and must be reported to the Standing Committee of the National People’s Congress for approval or for the record. On completion of the procedures in the relevant Annexes to the Basic Law, local legislation could then be made accordingly.

(D) Whether the method for forming the third term Legislative Council as prescribed in Annex II may apply to the fourth term and subsequent terms of the Legislative Council

3.14 Annex II to the Basic Law clearly prescribes the method for forming the first, second and third terms of the Legislative Council. However, Annex II does not prescribe explicitly the method for forming the Legislative Council for the fourth and subsequent terms.

3.15 If a consensus on whether to amend the method for forming the Legislative Council after 2007 cannot be reached, and therefore the amendment procedures as prescribed in Article III of Annex II could not be triggered or completed, this should not give rise to any legal vacuum. Annex II provides that if there is a need to make amendments, the relevant procedures should be followed. However, if there is no need to make amendments or if a consensus on amendment options cannot be reached among the three parties concerned, the method for forming the third term Legislative Council as stipulated in Annex II should apply to the formation of the fourth and subsequent terms of the Legislative Council. Otherwise, the Legislative Council cannot be formed, and this could not have been the original intention underlying the design of the political structure provided in the Basic Law. This conclusion is also consistent with the “doctrine of necessity” under Common Law, which would address the need to avoid giving rise to any legal vacuum.

3.16 Also, the Legislative Council Ordinance does not confine the electoral provisions for the elections in September 2004 to the third term Legislative Council only.

(E) *How the phrase “subsequent to the year 2007” should be understood*

- 3.17 On how the phrase “subsequent to the year 2007” as contained in Article 7 of Annex I to the Basic Law should be understood, we have carried out internal study, made reference to the relevant provisions in the Basic Law (including Annex II), and in accordance with the objects and purposes of Article 45 and Annex I to the Basic Law, considered the ordinary meaning of the phrase “subsequent to the year 2007”. In the course of our study, we have made reference to the statement made by Mr Ji Pengfei at the Third Session of the Seventh National People’s Congress on 28 March 1990 when submitting the Basic Law (Draft) and its relevant documents, as well as other materials. We also understand that the Basic Law prescribes the blueprint for the constitutional development for 10 years after reunification, in order to preserve stability and prosperity. The phrase “subsequent to the year 2007” does not refer to a date, but to all terms of the Chief Executive 10 years after reunification, including the third term Chief Executive to be selected in 2007 (as well as the fourth and subsequent terms of the Legislative Council).
- 3.18 Our conclusion is that, if there is a need, amendments to the method for selecting the third term Chief Executive in 2007 may be considered.

Constitutional Development Task Force
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