

Legislative Council Panel on Constitutional Affairs

Task Force on Constitutional Development

Introduction

In his Policy Address on 7 January 2004, 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. He also announced the setting up of the Task Force on Constitutional Development 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. The Task Force is headed by the Chief Secretary for Administration, with the Secretary for Justice and the Secretary for Constitutional Affairs as members.

2. At their respective press conferences on 7 January 2004, the Chief Executive and the Chief Secretary for Administration briefly introduced the mission and duties of the Task Force. This paper seeks to provide further information on the following :

- (a) the establishment of the Task Force;
- (b) the work plan of the Task Force;
- (c) the constitutional powers and responsibilities of the Central Authorities in constitutional development;

- (d) the principles that must be complied with in pursuing constitutional development; and
- (e) the legislative process and related legal issues relating to constitutional development.

The Establishment of the Task Force

3. As the Chief Executive said in his Policy Address, the Hong Kong Special Administrative Region (HKSAR) Government understands the concerns of the community on matters relating to future constitutional development and the importance of constitutional development. Earlier on, the Central People's Government (CPG) has expressed to the Chief Executive the wish that the HKSAR Government would thoroughly discuss the issues on principles and legislative process relating to development within Hong Kong's political structure as enshrined in the Basic Law with the relevant departments of the CPG before determining the relevant working arrangements. The Chief Executive has decided to set up a Task Force to seriously examine these issues, to consult the relevant departments of the Central Authorities, and to listen to the views of all sectors of the community in Hong Kong on these issues.

4. Any development within the political structure must be based on sound legal foundations and in accordance with the Basic Law. The Task Force will help the public understand the views of the Central Authorities, reflect the views of the public to the Central Authorities, and carry out constitutional review on the basis of a common understanding between the Central Authorities and the HKSAR Government regarding the Basic Law.

The Work Plan of the Task Force

5. Earlier on, we have written to the Hong Kong and Macao Affairs Office (HKMAO) of the State Council, requesting it to arrange meetings with HKMAO itself and other relevant departments of the CPG to discuss the issues concerned. The HKMAO has since replied to the HKSAR Government, indicating that the specific arrangements for the Task Force to visit Beijing could be discussed after the Chinese New Year. At the same time, the Task Force has been contacting the relevant individuals and organizations in Hong Kong to listen to their views on a preliminary basis.

6. The Task Force has written to Members of the Legislative Council and relevant organisations recently, inviting them to express their views on issues relating to constitutional development. Members of different sectors of the community may also express their views to the Task Force, using the dedicated e-mail address (views@cab-review.gov.hk).

7. The Task Force will start to invite the following parties in stages for meetings –

- (a) Members of the Legislative Council;
- (b) political parties;
- (c) Chairmen and Vice-chairmen of District Councils;
- (d) the legal sector;
- (e) the academia;
- (f) political bodies;

- (g) representatives of the various functional constituencies in the Legislative Council;
- (h) major chambers of commerce; and
- (i) other organizations.

8. At this stage, the Task Force has identified two categories of issues relating to the development within Hong Kong's political structure as enshrined in the Basic Law :

The first area is the principles relevant to the political structure.

The second area involves the legislative process to amend the method for selecting the Chief Executive and the method for forming the Legislative Council as provided for in the Annexes to the Basic Law, and other related legal issues. The HKSAR has never dealt with such legislation, which carries constitutional status.

Constitutional Powers and Responsibilities of the Central Authorities in Constitutional Development

9. Upon its resumption of the exercise of sovereignty over Hong Kong, the People's Republic of China established a HKSAR in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and has decided that, in accordance with the principle of "One Country, Two Systems", the socialist system and policies will not be practised in Hong Kong. In accordance with the Constitution, the National People's Congress enacted the

Basic Law, prescribing the systems to be practised in the HKSAR, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong.

10. The political structure of the HKSAR constitutes an important element of the Basic Law. It is related to the implementation of the Basic Law, the relationship between the Central Authorities and the HKSAR, the interests of various strata and sectors of the community, and the long-term stability and prosperity of Hong Kong.

11. In submitting the Basic Law (Draft) and its relevant documents to the National People's Congress, Mr JI Pengfei, the Chairman of the Drafting Committee for the Basic Law, gave a detailed explanation on the design of the political structure as enshrined in the Basic Law. Like other provisions in the Basic Law, the design of the political structure is to ensure the comprehensive implementation of the basic policies of the Central Authorities regarding Hong Kong. The Basic Law is a national law. It is binding on Hong Kong as well as the whole nation. As Hong Kong comes directly under the CPG, the CPG has its constitutional powers and responsibilities to oversee the constitutional development in the HKSAR, and has a responsibility to ensure that the development within Hong Kong's political structure is in accordance with "One Country, Two Systems" and the Basic Law, and the provisions relating to the relationship between the Central Authorities and the HKSAR such as:

- (a) Article 1 of the Basic Law stipulates that Hong Kong is an inalienable part of China, thus fully realising the concept of "One Country".
- (b) Article 2 of the Basic Law stipulates that the National People's

Congress authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law, thus fully realising the concept of “Two Systems”.

- (c) Article 3 of the Basic Law stipulates that the executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong in accordance with the relevant provisions of the Basic Law, thus fully realising the concept of “Hong Kong people ruling Hong Kong”.
- (d) HKSAR comes directly under the CPG (see Article 12 of the Basic Law).
- (e) The Chief Executive is appointed by the CPG. He is accountable to both the CPG and the HKSAR (see Articles 43 and 45 of the Basic Law).

Principles that must be complied with in pursuing Constitutional Development

12. Apart from the constitutional powers and responsibilities of the Central Authorities and the principles concerning the relationship between the Central Authorities and the HKSAR as set out above, the development of the political structure must also comply with the following principles, including:

- (a) When submitting the Basic Law (Draft) and its relevant documents to the Seventh National People’s Congress on 28 March 1990,

Mr Ji Pengfei, the Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region, explained that:

“The political structure of the Hong Kong Special Administrative Region should accord with the principle of ‘One country, Two Systems’ and aim to maintain stability and prosperity in Hong Kong in line with its legal status and actual situation. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong’s reality should gradually be introduced.....”

- (b) Articles 45 and 68 of the Basic Law stipulate that the methods for selecting the Chief Executive and for forming the Legislative Council must be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures, and the election of all the members of the Legislative Council by universal suffrage.

Legislative Process and related Legal Issues concerning Constitutional Development

13. Article 45 of the Basic Law stipulates that the Chief Executive shall be selected by election or through consultations held in the HKSAR and be

appointed by the CPG. The specific method for selecting the Chief Executive is prescribed in Annex I to the Basic Law. Article 68 of the Basic Law stipulates that the Legislative Council of the HKSAR shall be constituted by election. The specific method for forming the Legislative Council is prescribed in Annex II to the Basic Law. In accordance with the provisions of the Basic Law, the Chief Executive Election Ordinance and the Legislative Council Ordinance, together with other relevant subsidiary legislation, prescribe detailed statutory requirements and procedures in relation to the elections of the Chief Executive and the Legislative Council.

14. Amendments to the methods for selecting the Chief Executive and for forming the Legislative Council involve certain legislative process and related legal issues which need to be addressed. The HKSAR Government has in the past carried out preliminary study on the relevant issues. We now set out at the **Appendix** the issues which are receiving more public attention at this stage.

15. We should point out that in the course of our discussion with the Central Authorities on the relevant issues, other issues which require examination might come up. Various sectors of the community in Hong Kong might also raise certain legal issues which require consideration. We will set aside sufficient time for various sectors of the community to explore and discuss these issues.

16. The HKSAR Government welcomes the Legislative Council and different sectors of the community to fully discuss these issues and reflect their views to us.

**Issues on Legislative Process and related Legal Issues
concerning Constitutional Development in the Basic Law**

Issues on process can be broadly classified into two categories:

- (A) legislative process; and
- (B) related legal issues.

(A) Legislative Process

(1) 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

2. 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, there are no indications on what legislative process is to be used for making such amendments.

3. There is a view that any amendment made to the methods as prescribed in the relevant Annexes only requires making necessary amendments to the local electoral laws in Hong Kong. However, there is another view that any amendment made to the method for selecting the Chief Executive and the method for forming the Legislative Council as prescribed in Annex I or Annex II to the Basic Law should, according to the Basic Law, carry constitutional status. As with the present arrangements laid down in Annex I and Annex II,

the principled provisions should first be provided for in Annex I and Annex II to the Basic Law, followed by the enactment of local legislation to complement these new provisions.

4. Moreover, the legislative process giving effect to the amendments to the methods referred to above cannot be completed solely within the HKSAR. According to the Basic Law, if there is a need to amend the method for selecting the Chief Executive, such amendments shall be reported to the Standing Committee of the National People's Congress for approval; if there is a need to amend the method for forming the Legislative Council, such amendments shall be reported to the Standing Committee of the National People's Congress for the record.

5. We need to further discuss and confirm, in connection with any amendment made to the method for selecting the Chief Executive and the method for forming the Legislative Council in accordance with Annex I and Annex II respectively:

- (i) the appropriate legislative process to be adopted, especially as this involves the legal system and procedures of the Mainland; and
- (ii) whether such amendments are to be based on legislation enacted at the constitutional level, to be complemented by local legislation.

(2) *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*

6. In view of the statement made by Mr Ji Pengfei at the Third Session of the Seventh National People's Congress on 28 March 1990, it is clear that the purpose of enacting Annex I and Annex II is to make it more amenable to amendment when necessary. Therefore, the understanding has always been that the amendment procedures in Annexes I and II are self-sufficient, and that the amendment procedures in Article 159 of the Basic Law would not apply. However, as Annex I and Annex II are an integral part of the Basic Law, there is another view that any amendment to the methods as prescribed in the Annexes is tantamount to amending the Basic Law itself, and therefore the amendment procedures in Article 159 of the Basic Law should apply.

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

7. Amendments to the methods for selecting the Chief Executive and for forming the Legislative Council involve constitutional provisions and are related to the composition of the political structure. Any initiation of the relevant amendments must be dealt with according to the Basic Law. We would be pleased to listen to views on the issue of initiation of amendments.

(B) Related Legal Issues

(4) *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*

8. 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.

9. If a consensus on whether to amend the method for the formation of the Legislative Council after 2007 cannot be reached, and therefore the amendment procedure as prescribed in Section III of Annex II could not be triggered or completed, the question may arise as to whether this would give rise to any legal vacuum and thus the fourth term of the Legislative Council could not be formed, or whether the view could be taken that the fourth term Legislative Council could be formed using the same composition of the third term. We need to further discuss this issue.

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

10. We have carried out internal study on how the phrase “subsequent to the year 2007” as contained in paragraph 7 of Annex I to the Basic Law should be understood. In the course of our study, we have made reference to a range of materials, including 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. 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. If there are other views in the community about this subject, we will be pleased to listen to them.