

立法會

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Panel on Constitutional Affairs

Minutes of special meeting held on Wednesday, 31 March 2004 at 6:10 pm in the Chamber of the Legislative Council Building

Members present : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon James TIEN Pei-chun, GBS, JP
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Dr Hon LUI Ming-wah, JP
Hon NG Leung-sing, JP
Hon Margaret NG
Hon James TO Kun-sun
Hon CHEUNG Man-kwong
Hon HUI Cheung-ching, JP
Hon Bernard CHAN, JP
Hon SIN Chung-kai
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan
Hon Jasper TSANG Yok-sing, GBS, JP
Dr Hon YEUNG Sum
Hon YEUNG Yiu-chung, BBS
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo
Hon SZETO Wah
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Michael MAK Kwok-fung
Hon LEUNG Fu-wah, MH, JP
Hon WONG Sing-chi
Hon IP Kwok-him, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon MA Fung-kwok, JP

- Members attending** : Hon Kenneth TING Woo-shou, JP
Ir Dr Hon Raymond HO Chung-tai, JP
Hon LEE Cheuk-yan
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon LEUNG Yiu-chung
Hon LI Fung-ying, JP
Hon Henry WU King-cheong, BBS, JP
Dr Hon LO Wing-lok, JP
- Members absent** : Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Dr Hon David CHU Yu-lin, JP
Hon Cyd HO Sau-lan
Hon Fred LI Wah-ming, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Wong-fat, GBS, JP
Dr Hon LAW Chi-kwong, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon LAU Ping-cheung
- Public officers attending** : Mr Donald TSANG Yam-kuen
Chief Secretary for Administration
- Ms Elsie LEUNG Oi-sie
Secretary for Justice
- Mr Stephen LAM Sui-lung
Secretary for Constitutional Affairs
- Mr Clement MAK Ching-hung
Permanent Secretary for Constitutional Affairs
- Mr Joseph LAI Yee-tak
Deputy Secretary for Constitutional Affairs
- Mr Raymond TAM
Principal Assistant Secretary for Constitutional Affairs
- Ms Julina CHAN Woon-yee
Principal Assistant Secretary for Constitutional Affairs
- Clerk in attendance** : Mrs Percy MA
Chief Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Miss Millie WONG
Senior Council Secretary (2)4

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I. Review on constitutional development after 2007

(LC Paper Nos. CB(2)1871/03-04(01), 1871/03-04(02), 1871/03-04(03), 1902/03-04(01), 1912/03-04(01))

Briefing by the Chief Secretary for Administration (CS)

The Chairman invited CS to brief Members on -

- (a) the First Report of the Constitutional Development Task Force (Task Force) on Issues of Legislative Process in the Basic Law Relating to Constitutional Development (the First Report); and
- (b) the meeting of the Task Force with the Standing Committee on National People's Congress (NPCSC) on 30 March 2004, following the decision of NPCSC to give an interpretation on Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region (HKSAR).

2. CS said that the Task Force had a meeting with representatives of NPCSC, including Mr QIAO Xiaoyang, Deputy Secretary General of NPCSC and Mr LI Fei, Vice-Chairman of the Legislative Affairs Commission of NPCSC, and Mr XU Ze, Vice-Minister of the Hong Kong and Macao Affairs Office of the State Council on 30 March 2004 in Shenzhen. The Task Force had reflected fully to the representatives of NPCSC the views of the community on the issues of legislative process collected in the past two months, as well as the views of the HKSAR Government on these issues. The Task Force also briefed the representatives of NPCSC on its First Report. They said that NPCSC attached great importance to receiving the Task Force's First Report before it gave its interpretation on the provisions in the Basic Law.

3. CS further said that the NPCSC's interpretation on the issues of legislative process in accordance with the power authorized by the Basic Law would be authoritative and legally binding. The decision of NPCSC would be appropriate and reasonable. The interpretation would remove the doubts of the community on the issues of legislative process, eliminate the possibility of unnecessary challenge in court, and provide a better foundation for subsequent discussion on constitutional development. CS added that he had conveyed to the representatives of NPCSC the concerns of some people in Hong Kong that the NPCSC's

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interpretation would undermine Hong Kong's high degree of autonomy and the rule of law. The representatives reiterated that NPCSC would interpret the provisions in the Basic Law according to law. The objective of the interpretation was to enable all parties concerned to grasp clearly the basis of the legislative process on which Hong Kong's constitutional development would proceed.

4. CS then briefed the Panel on the work of the Task Force and its First Report issued to Members on 30 March 2004. CS said that since the establishment of the Task Force on 7 January this year, the Task Force had met with around 82 organizations and individuals, and received around 600 letters, facsimiles and e-mails from the public. More than 200 of the views received related to issues of legislative process. The Task Force had analyzed, in an objective and professional manner, the legal ground and arguments of all the views received. Since issues of law were involved, the Task Force focused more on the quality of the arguments put forth, rather than on the number of views received. The Task Force had formed its views on the five issues of legislative process, as set out below.

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

5. CS said that a large proportion of the views received considered it necessary to amend the "electoral methods" and to enact local legislation. However, some considered it sufficient to enact local legislation only. The Task Force considered that amendment should be made at two levels. First, the "electoral methods" should be amended in accordance with the provisions set out in the relevant Annexes to the Basic Law. Thereafter, the local electoral laws should be amended to prescribe the detailed arrangements.

(b) Whether there is no need to invoke Article 159 of the Basic Law (BL159) if the amendment procedures as prescribed in Annex I and Annex II are used

6. CS said that a large proportion of those offering views considered the procedure unnecessary. Some, however, considered it necessary to invoke BL159. The Task Force considered that amendments could be made in accordance with the special procedures in the relevant Annexes, as long as the relevant amendments were not inconsistent with the provisions in the main text of the Basic Law.

(c) Initiation of amendments relating to the "electoral methods"

7. CS said that a large proportion of those offering views considered that the amendment procedures in the relevant Annexes should be initiated by the HKSAR Government, but there were a few who considered that the procedures might also

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be initiated by the LegCo. Separately, there were views that the Central Authorities should be fully consulted beforehand. Others were also of the views that the amendment procedures in the Annexes should only be triggered after a consensus among LegCo, the HKSAR Government, and the Central Authorities had been reached.

8. CS said that the Task Force considered that, if it was decided that there was a need to amend the "electoral methods", the procedures in the relevant Annexes should then be followed. Having regard to BL74, bills that related to the political structure should only be introduced to LegCo by the HKSAR Government.

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

9. CS said that most of the views received were that if a consensus could not be reached on the amendment to be proceeded with, the method for forming the third term LegCo could continue to apply. The Task Force considered the method for forming the third term LegCo should apply to the formation of its fourth term if a consensus could not be reached.

(e) How the phrase "subsequent to the year 2007" should be understood

10. CS said that a large proportion of the views received were that it should include the year 2007. However, there were also views that the year 2007 should be excluded. The view of the Task Force was the same as that which the Administration had already made known earlier on, i.e. if there was a need, amendments to the method for selecting the third term CE in 2007 might be considered.

What legislative process should be used for amending the "electoral methods"

11. Ms Audrey EU said that according to the conclusions drawn by the Task Force, amendments to the "electoral methods" should be made at two levels, first, in accordance with the procedures under Annex I and Annex II, and then by way of local electoral laws. According to her understanding, amendments to local electoral laws (i.e. the second level) should be introduced in the form of bills, hence BL74 would apply. As regards amendments to the two relevant Annexes (i.e. the first level), they could be initiated by LegCo Members in the form of a motion and subject to the endorsement of a two-thirds majority of all LegCo Members. She pointed out that on two occasions in the past, the President of LegCo had allowed Mr LEUNG Yiu-chung to move motions to amend the Basic Law in accordance with BL159. She sought clarification from CS whether her understanding was correct.

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12. CS said that the Government had not decided whether the amendments proposed under the two relevant Annexes (i.e. the first level) should be in the form of a motion or a bill. However, the Government's position was that these amendments were related to the political structure, and they should only be proposed by the HKSAR Government, irrespective of whether they were in the form of a bill or a motion.

13. The Chairman advised members that he had given views to the Task Force that the legislative process to amend the "electoral methods" should be at two levels. Otherwise, it would be tantamount to inviting NPCSC to intervene in the domestic legislative process. He had also given views that any amendments to the Basic Law which had legal effect or were related to public expenditure or political structure should only be proposed by the HKSAR Government. The Chairman further said that if Mr LEUNG Yiu-chung's two motions had been passed by a two-thirds majority of LegCo Members, they might have been subject to legal challenge that they contravened BL74.

Initiation of amendments to the "electoral methods"

14. Mr Martin LEE said that according to the responses given by CS at the press conference held on 30 March 2004, amendments to the "electoral methods" could only be initiated when a consensus had been reached among the three parties, i.e. two-thirds of LegCo Members, CE, and NPCSC. He held different views. The Chairman pointed out that what the CS had said at the press conference was not reflected in the First Report.

15. Mr LEE further said that the Task Force had come to the conclusion that it was unnecessary to invoke BL159 for amending the "electoral methods" as according to the statement of Mr JI Pengfei at the NPC in 1990, the legislative intent of providing the "electoral methods" in Annexes I and II rather than in the main text of the Basic Law was to make them more amenable to revision. Mr LEE pointed out that although the procedure in BL159 was a more formal and complicated mechanism, each of the three parties, i.e. NPCSC, the State Council, and HKSAR had the power to propose bills for amendments to the Basic Law. However, with the prerequisite of a three-party consensus for initiating amendments relating to the "electoral methods", the amendment procedure in Annex I and Annex II, which was meant to be more amenable to revision and more flexible, would become more difficult than that in BL159.

16. Mr LEE added that the requirement of a three-party consensus would effectively mean that the Central Authorities had "veto power" on whether the amendment mechanism in Annex I and Annex II could be initiated in the HKSAR. The HKSAR Government should object to such a requirement which would be tantamount to giving up Hong Kong's high degree of autonomy.

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17. CS said that the amendment procedure in BL159 involving the NPC was different from that in Annex I and Annex II. Under the two relevant Annexes, any proposed amendments to the "electoral methods" must be endorsed by a two-thirds majority of all LegCo Members and must obtain the consent of CE. Thereafter, they should be reported to NPCSC for approval or for the record. The design of the Basic Law required that any amendments proposed to the "electoral methods" should have the consensus of the three parties. CS further said that the question of who had the authority to initiate amendments to the "electoral methods" was immaterial, as any attempts made by any one party to move amendments, without the support of the other two parties, would be futile.

18. Mr Martin LEE said that as prescribed in Annex I and Annex II, amendments could be made to the "electoral methods" if there was a need. The proposed amendments should be considered by the three parties in a step by step sequence, i.e. LegCo, CE and NPCSC. The Basic Law contained no provisions to the effect that the consent of the Central Authorities must be obtained before amendments could be initiated to the "electoral methods". Mr LEE further said that it was necessary to fight for democracy even though it would not be an easy task. The HKSAR Government should first get the support of the public, then that of LegCo, CE and NPCSC in pursuing democratic development.

19. Dr YEUNG Sum expressed regret to the response of CS. He said that under BL74, bills which related to public expenditure or political structure or the operation of the Government should be introduced to LegCo by the HKSAR Government. He queried why bills proposing amendments to the "electoral methods", which also related to the political structure, would require a three-party consensus before introduction by the Government. He said that the Basic Law contained no provisions to that effect, and it was ridiculous for the Government to change the rules of the game and come up with such a position. He queried why it was necessary to obtain the prior consent of the Central Authorities for initiating amendments to the "electoral methods" since NPCSC already had the final say on any proposed amendments. He considered that such an arrangement would result in erosion of Hong Kong's high degree of autonomy.

20. CS said that he agreed that each of the three parties should strive for the support of the other two parties in pursuing democratic development. He confirmed that the power to initiate the legislative process (i.e. introduction of any bills proposing amendments to the "electoral methods") should rest with the HKSAR Government. However, the political reality was that the HKSAR Government would not initiate the legislative process without a three-party consensus. Otherwise, the Government would be acting irresponsibly. In order to obtain the three-party consensus, it was necessary for the three parties to respect and accommodate different views and come up with an acceptable option which was in the best interests of HKSAR. CS added that any changes to the political structure were subject to the consent of the Central Authorities. Hence,

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constitutional development was neither a matter for Hong Kong to decide unilaterally nor within its ambit of a high degree of autonomy.

21. Mr LEUNG Yiu-chung queried why CS had said that constitutional development was not within the ambit of Hong Kong's high degree of autonomy. He said that BL2 stipulated that NPC authorized HKSAR to exercise a high degree of autonomy and enjoy, inter alia, legislative power. Mr LEUNG asked whether the Government would adhere to the principle of "a high degree of autonomy" in pursuing constitutional development for HKSAR.

22. Secretary for Justice (SJ) explained that the Preamble to the Basic Law stated that the HKSAR was established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China (the Constitution). In accordance with Article 62(13) of the Constitution, NPC enacted the Basic Law prescribing the systems to be practised in HKSAR, in order to ensure the implementation of the basic policies of PRC regarding Hong Kong. The methods for selecting CE and forming LegCo were important elements of the political structure of the HKSAR which was part of the HKSAR's systems. Under BL12, HKSAR was a local administrative region under the Central People's Government. HKSAR did not have any right to change unilaterally the systems prescribed by the Central Authorities. Since the establishment of HKSAR and its systems had been determined by the Central Authorities in accordance with the Constitution and through the Basic Law, the Central Authorities had constitutional powers and responsibilities to oversee and determine constitutional development in HKSAR.

23. Mr LEUNG Yiu-chung queried the need and logic for any proposed amendments to be reported to NPCSC for approval or for the record as stipulated in Annex I and Annex II respectively, if it was contemplated that the prior consent of the Central Authorities was required to trigger the amendment procedure in the two Annexes.

24. CS reiterated that no amendment was possible without the support of any one of the three parties concerned. The crux of the matter lay not only in who had the legal authority to initiate amendments to the "electoral methods", but more importantly, a political consensus must be reached among the three parties. This was the right way to take forward matters relating to constitutional development.

25. CS further said that the principles of "One Country, Two Systems", "Hong Kong people ruling Hong Kong", and "a high degree of autonomy" were mottos upheld by him and his colleagues all the time.

26. Mr CHEUNG Man-kwong said that the key issue under debate was whether HKSAR could initiate amendments to the "electoral methods", and this had nothing to do with the outcome of such amendments. It had never been the practice of the Government to obtain the support of all the relevant parties before

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proposing legislation. He queried the legal basis for CS's advice that the prior consent of the Central Authorities must be obtained before the HKSAR Government could initiate amendments to the "electoral methods". While he agreed that the Central Authorities had a role in Hong Kong's constitutional development, the Basic Law had never suggested anywhere that constitutional development could only be contemplated with the prior consent of the Central Authorities. In his view, the HKSAR Government should have the authority to initiate amendments to the "electoral methods". He also expressed concern whether the NPCSC's interpretation would amend or supplement Annex I and Annex II to the Basic Law so as to create additional hurdles in constitutional development.

27. CS reiterated that the power to introduce bills to amend the "electoral methods" rested with the HKSAR Government. However, this power should not be exercised lightly without regard to the political reality. Secretary for Constitutional Affairs (SCA) supplemented that any amendments to the "electoral methods" must comply with the provisions of the Basic Law. According to the relevant Annexes, a consensus among the three parties was required for successful implementation of any proposed amendments. It was necessary for the three parties to seek common ground, to narrow mutual differences and to reach consensus in pursuing constitutional development.

Need to invoke BL159 for amending the "electoral methods"

28. Mr TAM Yiu-chung said that it was clear from the provisions of the Basic Law that a three-party consensus would be required for initiating amendments to the "electoral methods". He sought clarification on the meaning of paragraph 3.8 of the First Report which stated that "as long as the relevant amendments are not inconsistent with the provisions in the main text of the Basic Law (such as BL45 and BL68), the amendment procedures in BL159 need not be invoked".

29. CS said that BL45 and BL68 had express provisions on the methods for selecting CE and forming LegCo. For example, under BL45, the method for selecting CE shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. If any amendments proposed were consistent with BL45, it was not necessary to invoke BL159.

30. In further response to Mr TAM on whether the election of CE and LegCo Members by universal suffrage in 2007 and 2008 respectively was inconsistent with the Basic Law, CS said that BL45 and BL68 made no specific reference to universal suffrage in 2007/08. The second report of the Task Force would deal with the issues of principle in the Basic Law relating to constitutional development.

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31. The Chairman asked whether any proposals considered to be inconsistent with BL45, e.g. to abolish the nominating committee for the election of CE would have to be dealt with under the amendment procedure in BL159 instead of that in Annex I. SCA replied in the affirmative.

Interpretation by NPCSC

32. Mr LEE Cheuk-yan said that NPCSC had decided to exercise its power to give an interpretation on the relevant provisions of the Basic Law before the Task Force had completed its consultation and released its report. The decision was disrespectful to the people of Hong Kong and rendered the work of the Task Force meaningless. He was disappointed that CE had said that this was a good step to be taken by NPCSC, and CS had said that the decision of NPCSC was appropriate and reasonable.

33. CS said that the First Report of the Task Force was concluded and submitted to NPCSC before its scheduled meeting to consider a proposal to give an interpretation on the relevant provisions of Annexes I and II. CS went on to explain that the Task Force commenced its consultation work in mid-January 2004. About two weeks ago, the Task Force had indicated that it was ready to draw conclusions on the issues of legislative process relating to constitutional development and would prepare the first report to state its views on these issues. On 26 March 2004, NPCSC announced that the issues of legislative process relating to Hong Kong's constitutional development would be included in the agenda of its meeting from 2 to 6 April 2004 because there were divergent views on these issues. On the same day, the HKSAR Government was notified of the matter and was requested to provide the Task Force's conclusions on the issues of legislative process to NPCSC for reference. On 29 March 2004, the First Report of the Task Force was submitted to CE. On 30 March 2004, the Task Force had a meeting with representatives of NPCSC in Shenzhen and submitted to them the First Report together with all the views it received from the community on the issues over the past two months. CS supplemented that Mr QIAO Xiaoyang, Deputy Secretary-General of NPCSC, had said that the Task Force's First Report would assist NPCSC, in its coming meeting, to understand the views of the Hong Kong community on the issues of legislative process.

34. Mr LEE Cheuk-yan asked, with the conclusions reached by the Task Force on the issues of legislative process, whether CS had told the representatives of NPCSC that it was unnecessary for NPCSC to give an interpretation on the relevant provisions of the Basic Law and whether they were aware of the concerns of the Hong Kong community on the impact of the NPCSC's interpretation.

35. CS said that the Central Authorities were fully aware of the concerns of Hong Kong people on the matter. However, the interpretation of NPCSC would offer a timely solution to the practical problems faced by the HKSAR.

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36. Mr Martin LEE said that it was inappropriate for NPCSC to interpret the Basic Law. Under the common law which was practised in Hong Kong, the power to interpret laws vested with the courts, and not the legislative organ.

37. Mr Albert HO said that under BL158, the power to interpret the Basic Law was vested in NPCSC. However, NPCSC had authorized the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of the Basic Law which were within the limits of the autonomy of the HKSAR. He asked whether the HKSAR Government had given the impression to the Central Authorities that the situation in the HKSAR was not manageable and required intervention by the Central Authorities, thus prompting the decision of NPCSC to interpret the Basic Law. He also asked whether the HKSAR Government was aware of the content of the interpretation.

38. CS replied in the negative to the first question. On the second question, CS said that the Government was informed that NPCSC would give an interpretation on Article 7 of Annex I and Article III of Annex II to the Basic Law.

39. Miss Margaret NG said that with the exception of the legislative process to be used for amending the "electoral methods" which could be subject to further discussion, there was broad consensus within the community on the other issues of legislative process relating to constitutional development. She, therefore, could not understand why it was necessary for NPCSC to give an interpretation on the relevant provisions of the Basic Law. Miss NG pointed out that Mr QIAO Xiaoyang had made a public statement on 1 April 2000 that NPCSC would exercise restraint in giving further interpretations of the Basic Law. Miss NG said that she agreed to some members' views that Annex I and Annex II were clear in their content, and that the prior consent of the Central Authorities was not required for HKSAR to initiate amendments to the "electoral methods". She expressed concern whether the Basic Law would be interpreted to such effect under the guise of the NPCSC's interpretation. She also referred members to the views of the Article 45 Concern Group on the NPCSC's interpretation (LC Paper No. CB(2)1912/03-04(01)).

40. SJ said that there were different views within the community of Hong Kong and among Mainland legal experts on the issues of legislative process. NPCSC was authorized by the Constitution to interpret and supplement national laws, including the Basic Law. The Basic Law stipulated that NPCSC had the ultimate constitutional responsibility to agree or not to agree to any amendment to the "electoral methods". The NPCSC's interpretation would officially clarify the legislative issues relating to constitutional development in Hong Kong. Otherwise, organizations and individuals would continue to have different interpretations on the issues of legislative process and this might result in litigation. The Hong Kong community would then have to face uncertainties regarding constitutional development, thus affecting the pace of constitutional development.

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41. Miss NG remained unconvinced that it was necessary for NPCSC to give an interpretation on the issues of legislative process on the ground that this would eliminate the possibility of unnecessary challenge in court. She requested SJ to explain the circumstances under which NPCSC would exercise its power to interpret the Basic Law, having regard to Mr QIAO's statement in 2000.

42. SJ said that under Article 67(4) of the Constitution, NPCSC had the power to interpret laws including the Basic Law. It also had power to supplement and amend laws. The interpretation to be made by NPCSC on the relevant provisions of the Basic Law would be authoritative and legally binding. This would help HKSAR to move forward in constitutional development.

43. Mr Michael MAK said that BL158 required NPCSC to consult the Committee for the Basic Law of the HKSAR before giving an interpretation of the Basic Law. He asked whether the Task Force had been informed of the views of the Committee. SJ said that the Committee would provide its views to NPCSC for reference and the views would not be made public.

Way forward

44. Ms Audrey EU asked about the next stage of work of the Task Force, and when a consultation document on specific options for constitutional development would be issued.

45. CS said that the second report of the Task Force on issues of principle would be completed in mid-April 2004. The Task Force would consult the Central Authorities on the second report as soon as possible after its publication. Depending on the content of the NPCSC's interpretation, it was the plan of the Task Force to conduct consultation on options for constitutional development with the community in due course.

46. The Chairman appreciated that CS might have political considerations, but he was of the view that as far as the legal requirements were concerned, the prior consent of the Central Authorities was not required for the HKSAR Government to initiate amendments to the "electoral methods". The Chairman further said that for the sake of upholding a principle which was considered to be right, one should uphold the attitude that "I will stand by it" even if one clearly knew that one would lose.

47. CS said that the legislative process relating to HKSAR's constitutional development was a serious matter. As a public servant and a principal official, he would stand by the collective interests of Hong Kong and the nation.

48. The meeting ended at 7:40 pm.