

立法會
Legislative Council

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Panel on Constitutional Affairs

**Minutes of special meeting
held on Friday, 16 April 2004 at 4:45 pm
in the Chamber of the Legislative Council Building**

**Members
present**

: Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon James TIEN Pei-chun, GBS, JP
Dr Hon David CHU Yu-lin, JP
Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Fred LI Wah-ming, 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 Bernard CHAN, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan
Dr Hon YEUNG Sum
Hon YEUNG Yiu-chung, BBS
Hon LAU Wong-fat, GBS, JP
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo
Hon SZETO Wah
Dr Hon LAW Chi-kwong, JP
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Hon LEUNG Fu-wah, MH, JP
Hon WONG Sing-chi

Hon IP Kwok-him, JP
Hon LAU Ping-cheung
Hon Audrey EU Yuet-mee, SC, JP
Hon MA Fung-kwok, JP

Members attending : Hon Kenneth TING Woo-shou, JP
Hon LEUNG Yiu-chung
Hon Miriam LAU Kin-yee, JP
Dr Hon LO Wing-lok, JP

Members absent : Hon HUI Cheung-ching, JP
Hon SIN Chung-kai
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Howard YOUNG, SBS, JP

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)2029/03-04, 2052/03-04(01), 2052/03-04(02), 2052/03-04(03), 2052/03-04(04))

The Chairman said that the scheduled time for the special meeting was one hour and 30 minutes, i.e. from 4:30 pm to 6:00 pm. With the presence of a quorum at 4:45 pm, the duration of the meeting would be extended for 15 minutes, i.e. until 6:15 pm.

Briefing by the Chief Secretary for Administration (CS)

2. The Chairman invited CS to brief Members on -

- (a) the Report submitted by the Chief Executive to the Standing Committee of the National People's Congress on 15 April 2004 (CE Report to NPCSC); and
- (b) the Second Report of the Constitutional Development Task Force on Issues of Principle in the Basic Law Relating to Constitutional Development (Second Report of the Task Force).

3. CS said that that in its Second Report, the Task Force had recommended that CE should, in accordance with the interpretation adopted and promulgated by NPCSC on 6 April 2004 (the NPCSC Interpretation), submit a report to NPCSC. Such a report should recommend that the methods for selecting CE in 2007 and for forming the Legislative Council (LegCo) in 2008 (the "electoral methods") be amended, and should request that NPCSC make a determination to that effect in accordance with the relevant provisions and principles in the Basic Law. The Task Force was pleased to note that CE had accepted this recommendation. In his report submitted to NPCSC on 15 April 2004, CE considered that the "electoral methods" should be amended, so as to enable Hong Kong's constitutional development to move forward. CE requested NPCSC to determine, in accordance with the provisions of Articles 45 and 68 of the Basic Law (BL45 and BL68), and in the light of the actual situation in the Hong Kong Special Administrative Region (HKSAR) and in accordance with the principle of gradual and orderly progress, whether the "electoral methods" should be amended. CE also presented the views of HKSAR on the issues of principle relating to constitutional development in the Basic Law, as contained in the Second Report of the Task Force.

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4. CS went on to brief members on the Second Report of the Task Force. He said that there were divergent views in the community on the issues of principle -

- (a) regarding the principles relating to the relationship between the Central Authorities and the HKSAR, i.e the first three of the seven issues of principle, there were not many dissenting views. The majority views were that constitutional development should be pursued in accordance with the provisions of the Basic Law;
- (b) there were more divergent views on how "actual situation" and "gradual and orderly progress" should be understood, and such differences were quite significant; and
- (c) there were also different views in the community on "meeting the interests of different sectors of society" and "facilitating the development of the capitalist economy". Discussions were mainly about maintaining functional constituencies as opposed to electing all LegCo Members by universal suffrage. There were also views on the relationship between universal suffrage and welfarism.

5. CS further said that the Task Force had set out its understanding of the constitutional basis of constitutional development and the actual situation at present in Chapter Three of the Report, and its views on the issues of principle in Chapter Five of the Report. The Task Force was of the view that, in considering how the "electoral methods" should be amended, one must have regard to the following nine factors, i.e. factors (i) -(ix) which were set out in detail in paragraph 5.23 of the Second Report and the CE Report -

- (i) the HKSAR, in examining the direction and pace of its constitutional development, must pay heed to the views of the Central Authorities;
- (ii) any proposed amendments must comply with the provisions of the Basic Law. Amendments to the design and principle of the political structure prescribed in the Basic Law must not be lightly contemplated;
- (iii) no proposed amendments shall affect the substantive power of appointment of the Chief Executive by the Central Authorities;
- (iv) any proposed amendments must aim at consolidating the executive-led system headed by the Chief Executive and must not deviate from this principle of design;

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- (v) development towards the ultimate aim of universal suffrage must progress in a gradual and orderly manner step by step. The pace should not be too fast. The progress should accord with the actual situation in the HKSAR, in order to preserve its prosperity and stability;
- (vi) when considering the actual situation, public opinions, as well as other factors, including the legal status of the HKSAR, the present stage of constitutional development, economic development, social conditions, the understanding on the part of the public of "One Country, Two Systems" and the Basic Law, public awareness on political participation, the maturity of political talent and political groups, as well as the relationship between the executive authorities and the legislature, must be taken into account;
- (vii) any proposed amendments must enable different sectors of society to be represented in the political structure, and to participate in politics through various channels;
- (viii) any proposed amendments should ensure that consideration would continue to be given to the interests of different sectors of society; and
- (ix) any proposed amendments must not bring about any adverse effect to the systems of economy, monetary affairs, public finance and others as prescribed in the Basic Law.

Views and concerns of Members

6. A few members expressed concern that CE had only taken one day to consider the Task Force's Second Report, before he submitted his report to NPCSC. Mr Martin LEE asked whether the Task Force had discussed the content of its Second Report with CE and the Central Authorities before its publication.

7. CS said that the Task Force had formed its views, as set out in Chapter Five of the Second Report, having regard to the views of different sectors of the Hong Kong community and the discussions with different departments of the Central Authorities and some Mainland legal experts. The Task Force had briefed CE on the Second Report in draft form about a week ago, and had formally submitted the Second Report to CE on 14 April 2004. This had facilitated CE to write his own report promptly.

8. Mr CHEUNG Man-kwong said that it was immoral for the Task Force to impose barriers and additional conditions in constitutional development by

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coming up with the nine factors. He queried whether the HKSAR Government had a pre-determined stance on universal suffrage in 2007 and 2008. He made the following points -

- (a) the condition that "the pace should not be too fast" was not mentioned in the Basic Law as regards development towards the ultimate aim of universal suffrage (factor (v) refers);
- (b) paragraph 4.05 of the Second Report stated that there were many views that the "actual situation" should constitute the prevailing aspirations of the general public - that was the realization of universal suffrage in 2007 and 2008. These views were not reflected in the nine factors. Although "public opinions" would be taken into account in considering the "actual situation", it was only one of the many things listed in one of the nine factors (factor (vi) refers); and
- (c) the condition that any amendments to the "electoral methods" must enable different sectors of society to participate in politics through various channels was not stipulated in the Basic Law (factor (viii) refers). This condition would effectively eliminate the prospect of electing all LegCo Members by universal suffrage in 2008.

9. Mr Albert HO said that the nine factors were very conservative and would unlikely bring about any changes in constitutional development. Public opinions, albeit mentioned in one of the factors, were given very little weight. In view of the requirement for amendment proposals to adhere to the nine factors, Mr HO was of the view that any changes proposed would be minimal and symbolic in nature. Mr HO further said that the conclusion of the Second Report was biased because of the mentality and values of the members of the Task Force.

10. Mr Fred LI said that the nine factors were not stipulated in the Basic Law. He asked whether the view of the Task Force that "the pace should not be too fast" had reflected the majority views received by the Task Force, and whether the election of CE and LegCo by universal suffrage in 2007 and 2008 respectively was considered to be too fast. Mr LI further asked whether "to participate in politics through various channels" meant different electoral methods.

11. CS said that the Task Force had considered the views of the relevant departments of the Central Authorities and the Hong Kong community including LegCo Members collected since January this year before it came to its views on the issues of principle relating to constitutional development in the Basic Law. Paragraph 5.23 of the Report set out the nine factors which one must have regard to in considering any amendments to the "electoral methods". This would

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facilitate further discussions on specific options on constitutional development within the community. These factors were not barriers or additional conditions. It was the view of the Task Force that any proposed amendments which satisfied as many of the nine factors as possible would stand a better chance of achieving consensus among three parties concerned, i.e. LegCo, CE and NPCSC.

12. On "different sectors of society to participate in politics through various channels", CS said that the Task Force had some observations, which were shared by some political parties, that the development of political groups was not mature enough to represent the interests of different sectors of the society. Hence, in considering any proposed amendments to the method for forming LegCo, regard must be given to the representation of different sectors in the political structure.

13. CS agreed that it was not an easy task to make an accurate assessment of the "actual situation". This was because "actual situation" evolved over the course of time and people had different views on "actual situation" according to their background, economic status and values. CS pointed out that it was necessary to consider "actual situation" in parallel with "gradual and orderly progress". Apart from the views collected, the Task Force had also considered "actual situation" and "gradual and orderly progress" from three different aspects. First, the process of Hong Kong's constitutional development since 1980s and the proportion of seats to be returned by geographical elections after the 2004 LegCo elections. Secondly, the statement made by Director JI Pengfei at NPC in 1990, and thirdly, the literal meaning of the language in the relevant provisions of the Basic Law.

14. Secretary for Justice (SJ) said that it was clear from BL45 and BL68 that constitutional development should be in accordance with the principles of "actual situation" and "gradual and orderly progress". However, there was no legal definition on these two principles. In line with the principles applicable in both the Mainland system and the common law system for interpreting constitutional documents, it was necessary to analyze the language used and the construction of the particular provisions in the instrument in order to ascertain their legal meaning. SJ added that in considering the meaning of "actual situation" and "gradual and orderly progress", the Task Force had made reference to the statement made by Director JI Pengfei in submitting the Basic Law (Draft) and related documents at the third Session of the Seventh NPC on 28 March 1990. SJ further pointed out that the Chief Justice of the Court of Final Appeal had, in delivering the judgment on CHONG Fung-yuen's case, stated that extrinsic materials which threw light on the context or purpose of the Basic Law might generally be used as an aid to the interpretation of the Basic Law. Such extrinsic materials included the Joint Declaration and pre-enactment materials such as the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990.

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15. Mr Andrew CHENG expressed concern that the nine factors had been included in the CE Report without any consultation with the public and LegCo. Despite the fact that more than 50% of those polled were in favour of selecting CE and LegCo Members by universal suffrage in 2007 and 2008, as reflected in paragraph 3.21 of the Second Report of the Task Force, the nine factors had effectively dashed any hope for introduction of universal suffrage. Mr CHENG considered that the consultation on constitutional development was a complete "sham". In order to ensure that LegCo and the public would be properly consulted in subsequent developments, he requested CS to provide a timetable on the Task Force's follow-up work after NPCSC had made a determination on the CE Report.

16. Ms Emily LAU expressed concern about the decisions of NPCSC regarding HKSAR's constitutional development on two occasions in the past three weeks, and whether further unexpected developments would take place before the LegCo election in September 2004. She did not consider that the CE Report submitted to NPCSC had fully reflected the views of the Hong Kong community. Given the present circumstances, she asked how the Task Force proposed to take forward constitutional development in an orderly process after NPCSC had made its determination on the CE Report.

17. CS said that depending on the determination of NPCSC on the CE Report, the Task Force would embark on the next stage of work as soon as possible. If NPCSC determined that there was a need for amendment, the Task Force would examine how to amend the "electoral methods" and prepare a document for wide public consultation. CS assured members that the Task Force could proceed very quickly if a consensus could be reached on any proposed amendments to the "electoral methods". However, he could not provide a specific timetable at this stage. CS added that he was aware that the process could not take too long in order to allow time for the necessary legislative work to be completed before 2007, if any amendments were to apply to the CE election in 2007.

18. Ms Cyd HO said that the nine factors had a bearing on the scope of amendments that could be proposed to the "electoral methods", and the CE Report to NPCSC had a special status. As the CE Report was based on the conclusion of the Second Report of the Task Force, Ms HO considered that the Second Report, especially the nine factors, should be endorsed by the public, preferably by way of a referendum, before CE submitted his report to NPCSC. Ms HO pointed out that at an earlier meeting with CE, Members had requested CE to submit a supplementary report to NPCSC after consulting the public.

19. CS reiterated that it was the view of the Task Force that due regard must be given to the nine factors in considering constitutional development. The further away a proposal from the nine factors the more difficult for it to obtain a

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consensus among the three parties concerned. CS further said that he did not see the need for further consultation on the Second Report. In his view, to conduct further consultation whenever there were different views would be a never-ending process and was not a reasonable procedure for undertaking consultation.

20. The Chairman said that according to the NPCSC Interpretation promulgated on 6 April 2004, CE should make a report to NPCSC as regards whether there was a need to amend the "electoral methods", and NPCSC shall, in accordance with the provisions of BL45 and BL68, make a determination in the light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress. The Chairman said that he could not understand how NPCSC could make a determination in accordance with the provisions of BL45 and BL68 without knowing the specific proposals for amending the "electoral methods".

21. CS and Secretary for Constitutional Affairs (SCA) explained that CE had submitted the Second Report of the Task Force to NPCSC as an annex to his own report. Chapter Three of the Report set out the constitutional basis of constitutional development and the actual situation of the HKSAR at present. Chapter Four and Chapter Five of the Report presented the views of the community collected by the Task Force since January this year and the views of the Task Force respectively on the issues of principle. The Report would facilitate NPCSC to make a determination as to whether there was a need to make amendment. CS said that it was not necessary for specific proposals to be formulated before NPCSC could make a determination.

22. Mr MA Fung-kwok said that constitutional development should not be confined to the election of CE and LegCo by universal suffrage. It should cover a wide range of issues, including the relationship between the Central Authorities and the HKSAR, the relationship between the executive and the legislature, implementation of the accountability system, the role of advisory bodies, the development of political groups and grooming of political talent. Mr MA said that while the Second Report had pointed out the problems about a lack of political talent, immaturity of political parties, and the need for more public policy research in paragraphs 3.22 -3.24, it did not provide any solutions.

23. Mr MA considered that the HKSAR Government should adopt a proactive role in resolving the problems identified by the Task Force. This was what a responsible government should do to respond to public aspirations for implementation of universal suffrage in the long run. For example, the Government could recruit and groom more political talent to participate in the management of Hong Kong's public affairs by giving more powers to district councils and creating more posts under the accountability system. The Government could also formulate policies to encourage more experts to conduct public policy research in order to enhance effective governance.

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24. CS said that as stated in paragraph 3.28 of the Second Report, the discussion on political development entailed wide-ranging and complicated issues. These issues could not be resolved overnight, and the methods and channels to resolve them varied from issue to issue. Constitutional development was a long-term process. The Task Force would first examine whether there was room for amending the "electoral methods". CS hoped that any changes introduced to the "electoral methods" could provide a new direction in resolving some of these issues. He also pointed out that some issues fell outside the jurisdiction of the Task Force and would need to be dealt with separately.

Motion proposed by Dr YEUNG Sum

25. At about 5:30 pm, Dr YEUNG Sum proposed the following motion -

“That this Panel does not accept the report submitted by the Chief Executive to the Standing Committee of the National People’s Congress and urges the Chief Executive to consult the people of Hong Kong immediately as well as submit a supplementary report fully reflecting public opinion, so as to fulfil Hong Kong people’s aspiration for the election of the Chief Executive and Members of the Legislative Council by universal suffrage in 2007 and 2008 respectively.”

26. In accordance with Rule 22(p) of the House Rules, the Chairman ruled that the proposed motion was directly related to the agenda item of this meeting. He said that the motion might be proceeded with if agreed by a majority of the members voting.

27. Some members requested the Chairman to proceed with the motion immediately. Some members considered that the motion should be dealt with at the end of the meeting, after all members who wished to speak had done so. Some members considered it inappropriate for a member to propose such an important motion without advance notice and when the meeting was half way through. The Chairman decided that he would allow members who had registered their intention to speak to do so, and would deal with the motion towards the end of the meeting.

28. At about 6:15 pm, the Chairman proposed to deal with the motion proposed by Dr YEUNG Sum. Mr Philip WONG queried whether the Panel should deal with the motion as advance notice was not given for moving of the motion at the meeting, and the meeting had passed the scheduled ending time, i.e. 6:00 pm. He also said that he would propose amendments to the motion.

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29. The Chairman said that under the Rule 22(p), advance notice was not required for a member to propose a motion at a Panel meeting. A Panel meeting could continue beyond the scheduled time subject to the views of the members present, and he had earlier decided that the meeting should be extended for 15 minutes. Senior Assistant Legal Adviser said that there were no specific provisions in the House Rules to govern the ending time of a Panel meeting. The Panel could exercise discretion in this respect.

30. The Chairman decided to put the matter to vote. 12 members voted for, and 12 members voted against, the motion to be proceeded with. The Chairman exercised his casting vote to allow the motion to be proceeded with.

31. The Chairman said that he would put Dr YEUNG's motion to vote. Mr MA Fung-kwok said that members should be allowed sufficient time to debate the motion and to move amendments, if any, to the motion. As the meeting had overrun, he moved a motion calling for adjournment of the debate on Dr YEUNG's motion. 12 members voted for, and 12 members voted against, Mr MA's motion. The Chairman exercised his casting vote in support of Mr MA's motion.

32. The Chairman concluded that the debate on Dr YEUNG's motion would be adjourned to the next meeting of the Panel to be held on 19 April 2004.

33. The meeting ended at 6:50 pm.

Council Business Division 2
Legislative Council Secretariat
14 May 2004