# Legislative Council Panel on Constitutional Affairs

## Progress Made in Meeting the Public by the Constitutional Development Task Force

## Introduction

This paper informs the Legislative Council Panel on Constitutional Affairs of the progress of the Constitutional Development Task Force ("Task Force") in meeting the public and listening to their views on issues of principles and legislative process of the Basic Law relating to constitutional development.

## Background

2. The Chief Executive announced in his Policy Address the establishment of the Task Force headed by the Chief Secretary for Administration, with the Secretary for Justice and the Secretary for Constitutional Affairs as members. The Task Force will consult the relevant departments of the Central Authorities and listen to views of the public on the relevant issues.

3. In the paper submitted to this Panel on 14 January 2004 (No. CB(2)1003/03-04(01)), it was noted that the Task Force would start to invite a number of parties for meetings, including Members of the Legislative Council, political parties, Chairmen and Vice-Chairmen of District Councils, the legal sector, the academia, political bodies, chambers of commerce and other organizations. The Task Force started its first meeting with different sectors of the public on 16 January 2004. An account of the meetings is provided below.

**Meeting with different sectors of the community**

4. As of 27 January 2004, the Task Force has met a total of eight different groups and individuals and the date of meeting are shown in brackets as follows -

(a) Democratic Party (16.1.2004);

(b) Democratic Alliance for Betterment of Hong Kong (17.1.2004);

(c) Professor Albert Chen, University of Hong Kong (17.1.2004);

(d) Article 45 Concern Group (19.1.2004);

(e) The Hong Kong General Chamber of Commerce (20.1.2004);

(f) Chairmen and Vice-Chairmen of District Councils (20.1.2004);

(g) The Hong Kong Progressive Alliance (21.1.2004); and

(h) One Country Two Systems Research Institute (27.1.2004).

At the meetings, the Task Force listened to views from the respective organisations and individuals on issues relating to principles and legislative process as set out in the Panel paper. In addition, three

written submissions have been received and are attached at **Annex A** for Members' information. Some other groups have indicated that they would provide submissions to the Task Force in due course.

**Way Forward**

5. The Task Force will continue to listen to views from the public on the relevant issues. Meetings are being arranged with the following groups in the coming week or so: LegCo members, political parties, political groups, trade unions, and chambers of commerce. The Task Force aims at maintaining maximum transparency, but we also respect the wishes of certain groups and individuals which/who prefer to have discreet meetings with the Task Force and in those circumstances, meetings between them and the Task Force would not be publicized. Reports will continue to be made to this Panel from time to time to keep Members informed of progress.

Constitutional Development Task Force Secretariat
Constitutional Affairs Bureau
January 2004

**Annex A**

民主黨立法會議員秘書處

Secretariat of Legislative Councillors
The Democratic Party

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# 請尊重香港人的意願

香港市民一直殷切追求政治改革、期望能盡早行使其公民權利，普選行政長官及所有立法會議員。可惜，特區政府未有回應香港市民的要求，反過來成立政制發展專責小組，並無中生有，把簡單問題變得複雜，拖延政制改革檢討。民主黨對於特區政府漠視民意、遲遲未肯面對市民的要求，深表遺憾。

民主黨認為，2007年後的選舉安排，只須按《基本法》的程序，修改本地法例便可，根本毋須修改《基本法》。《基本法》與前基本法起草委員會主任委員姬鵬飛先生於1990年3月28日在第七屆人大會議時的講話，在在說明，把行政長官及立法會產生辦法載入附件方式，目的是要增加靈活性，以便日後修改。因此，政府毋須再在這問題上轉圈，把政改問題一拖再拖。

行政長官委任政制發展專責小組研究政改問題，市民大眾都期望這專責小組能以港人的意願為依歸，我們希望中央政府也能尊重港人的民主訴求。民主黨期望這個專責小組並非單向地、片面地把中央的意見傳遞給港人，而是會把香港人對民主的訴求與聲音，切切實實地向中央反映，並有所堅持。民主黨亦希望負責領導小組的政務司司長曾蔭權先生，能清楚地向市民交待專責小組的定位和角色。

專責小組將於稍後到訪北京，與有關官員會晤。民主黨促請專責小組屆時充份反映香港人的意見，並在訪京後藉着立法會如實向港人作出匯報。

民主黨
2004年1月16日

# 回應政制發展專責小組提出《基本法》中有關政制發展的原則及法律問題

## I 政制發展必須符合的原則

| 政府的意見 | 民主黨回應 |
|---|---|
| 香港特區直轄於中央政府，中央政府有其憲制上的權責審視特區的政制發展，確保香港的政治體制發展必須符合「一國兩制」和《基本法》，及當中有關中央與特區關係的條文。 | 民主黨一直尊重《基本法》和「一國兩制」的治港大原則。並認為在一國之下，必須保持「兩制」精神，才是治港之本。 |
| 姬鵬飛先生在1990年3月28日在第七屆人大會議時說明：「...政治體制，要符合"一國兩制"的原則，要從香港的法律地位和實際情況出發，以保障香港的穩定繁榮為目的。為此，必須兼顧社會各階層的利益，有利於資本主義經濟的發展；既保持原政治體制中行之有效的部份，又要循序漸進地逐步發展適合香港情況的民主制度。... 」 | 姬鵬飛先生的講話只是對《基本法》加以闡釋，並非憲法一部份。其次，「實際情況」與「循序漸進」並非法律問題，政府應在社會上尋求共識，在立法會制訂一個符合港人意願的民生制度。 |
| 《基本法》第四十五條和第六十八條 | 民主黨對有關原則並沒有異議。不過，民主黨重申有關條例中所說明的「實際情況」與「循序漸進」並非法律問題。社會的「實際情況」是市民強烈要求加快民主步伐，讓所有市民有權參與選舉行政長官及立法會議員。而香港自1991年立法會引入直選議席後，香港政制已經循序漸進地不斷發展，隨着香港人的公民意識日漸成熟，市民絕對有能力和有權利選出他們的行政長官及議會代表。政府不能再在政改問題上原地踏步。 |

II 政制發展的立法程序問題

| 政府提出的問題 | 民主黨的回應 |
|---|---|
| 對《基本法》附件一及附件二中行政長官及立法會產生辦法的修改當用甚麼立法方式處理問題。是否修改本地法律便可或是在憲制層面立法並加以本地立法配合？ | 已經十分清晰，不存在法律問題。民主黨認為只須按《基本法》的程序，修改本地法例便可。 |
| 如採用附件一和附件二所規定的修改程序，是否需要援引《基本法》第 159 條的規定？ | 根本不存在修改《基本法》的問題，因此毋須援引第 159 條。 |
| 有關修改行政長官及立法會產生辦法的啟動權？ | 《基本法》已清楚說明有關修改是由特區啟動。 |

III 相關的法律問題

| 政府提出的問題 | 民主黨回應 |
|---|---|
| 附件二所規定的第三屆立法會產生辦法是否適用於第四屆及其後各屆的立法會？若 07 年以後的立法會產生辦法不達成共識，第四屆立法會選舉會否出現法律真空？ | ，若未有新選舉辦法出現，一切可維持不變、沿用現有的安排。因此，根本不存在真空的情況。 |
| 《基本法》中「2007 年以後」是否包括 07 年的第三屆行政長官選舉？ | 民主黨認為這是包括 2007 年的第三屆行政長官選舉。 |

# 關於政制檢討與諮詢的反思

陳弘毅

根據《基本法》附件一和附件二的規定，2007 年以後行政長官和立法會產生辦法如需修改，則必須按附件內規定的程序進行。此外，《基本法》第 45 及 68 條就香港政制的長遠發展設定了目標，就是最終要實現行政長官和立法會全部議席普選，而邁向這個目標的步伐，則須根據香港的實際情況和循序漸進的原則。因此，2007 年行政長官如何產生，2008 年立法會如何產生，要不要修改現行的選舉法以至《基本法》的附件一和二，已經是越來越迫切需要處理的問題。

要處理這些問題，對現行政制進行認真的檢討是必須的，檢討的目的是分析現行政制在回歸以來的具體運作情況，從而對它是否有不足之處作出評價，從而探討它是否需要修改和怎樣修改。這些問題都有相當程度的爭議性，所謂見仁見智。因此，進行政制檢討就必須就上述問題進行諮詢，收集各方面的意見，所謂群策群力，集思廣益。

至於如何進行諮詢，香港在回歸以前和以後都累積了不少經驗，可供參考。八十年代以來，港英政府就代議政制的發展問題多次以綠皮書形式進行諮詢，在諮詢後以白皮書形式公佈決策。基本法起草過程中，香港成立了基本法諮詢委員會，1988 年 4 月，基本法徵求意見稿公佈，進行爲期五個月的諮詢。值得留意的是，這份徵求意見稿就行政長官的產生辦法列出了五個不同方案，就立法會的產生辦法又列出了四個不同方案，以作諮詢。1989 年 2 月，基本法草案公佈，又再進行爲期 8 個月的諮詢。回歸以來，最主要的一次諮詢便是 2002 年秋天的基本法 23 條立法的諮詢。

諮詢應怎樣進行，乃取決於諮詢所涉及的具體課題，亦即是說，並沒有一種絕對適用於所有課題的諮詢摸式。就當前的政制檢討來說，我認爲可採取兩階段的諮詢。第一階段處理的是程序性的問題、遊戲規則的問題和進入第二階段的先決條件問題：例如現行政制是否有需要改革；政制檢討是否只處理在 2007 年和 2008 年實行的改革還是應處理較長遠的政制發展問題；政制檢討是否應限於特首和立法會的產生辦法還是應涵蓋其他政制環節(如行政立法的關係、高官問責制、政黨角色、諮詢架構等)；第二階段諮詢時所用的諮詢文件的形式(如是否應列出具體方案)；第二階段諮詢時如何收集和評估民意；中央政府如何參與政制檢討等。

至於第二階段的諮詢，如要進行的話，便是關於怎樣改革現行政制的具體方案的諮詢。由於第一階段尚未展開，現在談第二階段，可能言之尚早。第二階段能否順利進行，很大程度上決定於第一階段進行的情況和結果。

香港政制檢討所涉及的問題是複雜和具政治爭議性的，因此，處理這些問題的程序 — 尤其是諮詢程序 — 必須公正和合理，務求盡善盡美。程序的被認受性是實質結果的被認受性的必要條件。我相信即使港人對未來政制應怎樣發展可能有不同的意見，但是我們仍有可能就處理這次政制檢討的程序問題達成共識，並在大家都接受的一套程序或遊戲規則的框架中決定未來政制發展的方向和步伐。民主不能脫離法治和憲政，便是這個意思。

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明報新聞網 Mingpao.com

2004年1月17日 星期六 論壇

# 陳弘毅：政改非純香港內部事務

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自七一遊行以來，香港社會民主訴求不斷增強，剛好《基本法》附件一和二又有關於07年以後特首和立法會選舉辦法修改程序的規定，所以港府不得不作出回應，承諾將檢討現行政制及就有關問題進行廣泛諮詢。我相信在可見將來進行這樣的政制檢討和諮詢是無可厚非，甚至是無可避免的，而且是很多港人殷切期望的。現在大家關心的問題是，在這政制檢討過程中，中央政府應該或可以如何參與，中央政府在決定香港未來政制發展路向時應扮演怎樣的角色。

## 中央關注參與理所當然

在這方面，我認爲第一個需要澄清的問題是，香港政制發展的問題是否主要是香港的內部事務，還是涉及到香港和中央的關係以至中央主權的行使。有一種意見認爲，由於在「一國兩制」框架下，香港實行高度自治、港人治港，而關於香港政治體制的規定載於《基本法》第4章，而不是在關於「中央和香港特別行政區的關係」的第2章，所以香港政制發展主要是特區內部事務，中央參與只限於對在香港醞釀而成的選舉制度修改方案予以批准和備案（見《基本法》附件一和二）。

我認爲以上意見值得商榷。我覺得應該對以

下兩種問題作出區分：一是香港政制的日常運作的問題，二是香港的政制的改革的問題。我認爲前者可以理解爲香港的內部事務，但後者則涉及中央和特區的關係和中央主權的行使。

爲什麼這兩種問題的性質有所不同？爲什麼不能把香港的政制的改革理解爲港人治港、高度自治的範圍？這涉及到政治體制和高度自治權的相互關係。根據《基本法》的設計，香港的高度自治權是在《基本法》所確立的政治體制的框架內行使的，這種高度自治權並不包括單方面修改《基本法》所確立的政治體制的權力。當全國人大在《基本法》中對香港特別行政區政治體制作出規定時，這便是中央對香港行使主權的表現。

《基本法》附件一和二就07年後特首和立法會選舉辦法的修改設立特定程序，有別於第159條規定的修改《基本法》的一般程序。在處理附件一和二的所謂「灰色地帶」所產生的問題時，應考慮上述基本理念，就是香港政制改革不純粹是香港內部事務，中央政府的關注和參與是理所當然的，不是干預香港的內部事務。

附件一和二規定，如需修改特首和立法會的產生辦法，需要採用三階段的程序，第一階段是立法會三分二的多數通過。由於第一階段是在香港立法會以內進行的程序，所以我認爲有關的提案權屬特區政府，而根據《基本法》第74條，立法會個別議員無權提出涉及政治體制的法案。由於第一階段的程序在香港立法會內進行，所以沒有理由由中央政府行使提案權。

餘下的問題是，港府如何決定是否提出修改附件一和二規定的選舉辦法的議案或應提出怎樣的議案。在這方面，本文開始時提到的檢討諮詢是必要的，諮詢對象不但包括香港各界，也應包括中央政府。

改特首立會產生辦法

提案權在港府

《基本法》規定的政制發展應根據實際情況而循序漸進，附件一和二中「如需修改」的字眼表明07年選舉辦法可改可不改，因此，中央政府和港人就這些條文的理解達成共識是任何政制改革的先決條件。我十分贊成曾蔭權司長提出的雙軌商討的概念，我衷心希望，中央政府能聽到港人的聲音，而港人也能了解到中央政府對香港的政治體制發展的看法。因此，今天兩位內地權威學者參加這次會議，是中央和香港就香港的政制發展問題的溝通和互動的一個很好的開始。

〔本文發表於昨日一國兩制研究中心主辦的「政制發展與《基本法》」研討會。〕

Speaking Note of the Article 45 Concern Group for the meeting with the Task Force

1. Legislative procedures for effecting change in the method for electing the Chief Executive and the Legislative Council, whatever they may be, clearly exist to facilitate the change. There is no need to spend time on them since no-one has suggested departing from the Basic Law.

2. BL Article 45 contains 2 guiding principles relevant to specification of the method for selecting the Chief Executive; "in the light of the actual situation in the HKSAR" and "in accordance with the principle of gradual and orderly progress". "Gradual and orderly progress" is imprecise whereas the actual situation is easily seen. The former has to be read and understood in the light of the latter when the actual situation demands a change in method.

3. The Task Force should focus on explaining the actual situation in Hong Kong to the Central People's Government. No-one from the HKSAR Government has ever spoken up for let alone defended the high degree of autonomy of the HKSAR. It is time they did so. The Task Force has to tell the CPG unequivocally that the vast majority of people in Hong Kong want universal suffrage now.

4. The current system of Government is dysfunctional; it does not work. The system of selection of the Chief Executive has given him constitutional and legal authority but no political or moral authority because of the method of his selection. This is an indisputable fact. In the past, we have adopted a pragmatic approach and have not waited

to develop the perfect model of government in making constitutional changes. This one has been tried for more than 6 years. It is a failure.

5. The system is also seen to be unfair in that the Chief Executive is "selected" by a small circle as are the functional constituency representatives in LegCo. The functional constituency system means that a small portion of the electorate have at least 2 Legco representatives whereas a substantial majority have only one. The voting procedures provided for in Annex II make it possible for the minority in the functional constituencies to frustrate the majority of representatives voted in by the electorate as a whole. The inequities in the current system of functional constituencies are legion. The consequence of these defects in the structure is that the HKSAR Government is out of touch with the citizens.

6. The Task Force must also reflect to the Central People's Government the positive consequences if a change to universal suffrage is allowed and the negative consequences if it is not. No report of the actual situation in Hong Kong would be complete without an assessment of the adverse consequences to Hong Kong if universal suffrage is denied to Hong Kong people yet again.

7. If the CPG were to announce that in principle they have no objection to election by universal suffrage of the CE in 2007 and LegCo in 2008, this would be a positive boost to Hong Kong and to the CPG. Specific methods can be left to Hong Kong to decide after which the mechanics must follow the procedures laid down in Annexes I and II. Whatever those procedures are, discussion and debate on the

specific methods of election, nomination and removing obstacles to democratic development should take place now.

8. As for the consultation process, a minimum requirement is that it be totally transparent. Persons consulted should expect to be named and have their views published with attribution.

9. Although we consider the points in the Appendix to the Task Force Paper to be non-issues, we have addressed them briefly in the Appendix to these points.

Dated the 19th January 2004

Article 45 Concern Group

Appendix

A(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?*

It does not matter what legislative process is used so long as the method complies with the relevant paragraphs of Annex I and II respectively. It is clear in Annex I and II that part of the procedure takes place in the HKSAR, and another part takes place in the Standing Committee of the National People's Congress. Where the procedures involving the NPCSC are concerned it is hardly for he citizens of the HKSAR to dictate. An article of the Concern Group published in the Ming Pao Daily News on 16 January is attached.*

(2) *Whether there is a need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used?*

No one has seriously suggested that there is a need to invoke Article 159. No one can seriously so suggest. This question should be dismissed as a red-herring.

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

Since this is part of the procedural aspect, so long as each part of the procedure is in accordance with the legal requirements for that procedure, this is unimportant. Initiation of amendments is not to be

(* The following is a note from the Constitutional Affairs Bureau : the article in the Ming Pao Daily News is not clear of copyright restriction and is therefore not attached.)

confused with initiation of debate on the issues of substance. Where issues of substance are concerned, it does not matter who first called for a change in the methods, if a change is needed. This is not a constitutional issue. It is another red-herring.

B(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*

**Plainly, the method introduced for the 3rd term will continue until and unless it is amended according to Annex II. Does the Constitutional Affairs Bureau seriously suggest that there is any question of a "legal vacuum"?**

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

**The complete phrase is "the terms subsequent to the year 2007", and this should not be tempered with. It plainly means the method of selection of the CE can only be changed subsequent to the 2nd term which ends on 30 June 2007, i.e. starting from the 3rd term. It does not mean after the calendar year 2007 has ended. This is the position the Government has already agreed to and announced in November 2003.**