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Panel on Constitutional Affairs

Background brief prepared by Legislative Council Secretariat

Review on constitutional development after 2007

Purpose

This paper briefly summarizes the discussions held by Members on the review on constitutional development of the Hong Kong Special Administrative Region (HKSAR) and related issues since the first term of the Legislative Council (LegCo).

Basic Law provisions

2. Under Article 45 of the Basic Law, the Chief Executive (CE) of HKSAR shall be selected by election or through consultations held locally and be appointed by the Central People's Government. 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. The ultimate aim is the selection of CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.
3. Under Article 68 of the Basic Law, LegCo shall be constituted by election. The method for forming LegCo shall 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 election of all LegCo Members by universal suffrage.
4. The specific methods for selecting CE and forming LegCo (the "electoral methods") are specified in Annex I and Annex II to the Basic Law respectively. If there is a need to amend the method for selecting CE for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all LegCo Members and the consent of CE and be reported to the Standing Committee of the National People's Congress (NPCSC) for approval. Any amendments made to the method for forming LegCo after 2007 must be made with the endorsement of a two-thirds majority of all LegCo Members and the consent of CE and be reported to NPCSC for the record.

Development between 1999-2000 and 2002-2003 legislative sessions

Report of the Panel on “The development of the political system of the Hong Kong Special Administrative Region”

5. The review on the development of the political system of the HKSAR was one of the main issues of concern of the Panel in the past legislative sessions. Following the passage of the motion moved by Hon Emily LAU to urge the Administration to conduct a public consultation as soon as possible on, inter alia, the ministerial system and the election of CE and LegCo by universal and equal suffrage at the Council meeting on 12 January 2000, the Panel held a number of meetings to receive views from the public on the development of the political system of the HKSAR. Having considered all the views received and deliberated in detail the relevant issues, the Panel presented a report entitled “The development of the political system of the Hong Kong Special Administrative Region” to LegCo. The Panel’s recommendations are in **Appendix I**. A debate on a motion calling upon the Government to consider the views expressed by Members on the report was held at the Council meeting on 14 June 2000. The motion was passed by the Council.

6. The Administration’s position at that time was that the Basic Law provided the HKSAR with 10 years during which its foundation of political structure could be strengthened. There were two milestones in constitutional development between 2000 and 2007, namely, the 2002 CE election and 2004 LegCo election. The Administration would review the experience of these two elections before deciding the way forward.

7. During the years 2001 to 2003, apart from discussions held by the Panel, Members also sponsored a number of motion debates and raised a number of LegCo questions relating to political reform in the Council, details of which are in **Appendix II**.

Implementation of the accountability system for principal officials

8. In his 2000 Policy Address, CE announced that the Administration would study how the accountability of principal officials at Secretaries and Directors of Bureaux rank for their respective policy portfolios could be enhanced.

9. To gauge public views on a system of accountability for principal officials, the Panel conducted a public consultation exercise in March 2001. A delegation of the Panel also visited the United Kingdom, France and Germany to study their systems of executive accountability from 13 to 24 June 2001.

10. CE announced the framework of the accountability system for principal officials at the meeting of LegCo on 17 April 2002. A subcommittee was formed under the House Committee to study the proposed accountability system and related issues. The new accountability system was implemented on 1 July 2002.

11. The Panel held a number of meetings in the 2002-2003 session to discuss various issues relating to the accountability system. To assist Members to consider the six-month report and 12-month report on the implementation of the accountability system prepared by the Administration, the LegCo Secretariat has prepared two Background Briefs to summarize the developments subsequent to the implementation of the accountability system and discussions of Members on the relevant issues (LC Paper Nos. CB(2)930/02-03(01) and 2864/02-03(02)).

Development since the 2003-2004 legislative session

Constitutional Development Task Force

12. CE announced in his Policy Address on 7 January 2004 the establishment of the Constitutional Development Task Force (Task Force). The Task Force is headed by the Chief Secretary for Administration, with the Secretary for Justice and the Secretary for Constitutional Affairs as members. Its tasks are to examine in depth the relevant issues of legislative process and principle in the Basic Law relating to constitutional development, to consult the relevant departments of the Central Authorities, and to gather the views of the public on the relevant issues. The Task Force had briefed the Panel on its work on a regular basis in the 2003-2004 session.

13. The Task Force has explained that the issues of legislative process and principle should be thoroughly discussed to lay a solid foundation for future work on constitutional development. The Central Authorities has constitutional powers and responsibilities to oversee the constitutional development in the HKSAR. The basic policies of the Central Authorities regarding Hong Kong are elaborated in the Sino-British Joint Declaration. The Basic Law, prescribing the systems to be practised in the HKSAR, was enacted to ensure the implementation of the basic policies. The political structure of the HKSAR constituted an important element of the Basic Law and could not be unilaterally amended by Hong Kong. Nor could any constitutional development that affects the political system of Hong Kong take place without the consent of the Central Authorities, such as amending the "electoral methods".

The Task Force's First Report and NPCSC Interpretation on 6 April 2004

14. On 26 March 2004, the HKSAR Government was notified formally by the Central Authorities that interpretation of Article 7 of Annex I and Article III of Annex II to the Basic Law would be considered at the meeting of NPCSC between 2 April and 6 April 2004. Following the publication of the "First Report on Issues of Legislative Process in the Basic Law Relating to Constitutional Development" by the Task Force on 30 March 2004, NPCSC promulgated its interpretation on 6 April 2004 (the NPCSC Interpretation). According to the Interpretation, CE should make a report to NPCSC as to whether there was a need

to amend the "electoral methods", and NPCSC shall make a determination in accordance with Articles 45 and 68 of the Basic Law.

15. Some members agreed with the Task Force that it was legal and constitutional for NPCSC to exercise its power under the Constitution and the Basic Law to give an interpretation on the relevant provisions of the Basic Law. Some members questioned the need and appropriateness for NPCSC to interpret the Basic Law since the community had broad consensus on the legislative issues. They pointed out that under Article 158 of the Basic Law, 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. In addition, under the common law system practised in Hong Kong, the power to interpret laws was vested in the courts, and not the legislative organ.

16. According to the First Report, the "electoral methods" 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 of the main text of the Basic Law (such as Articles 45 and 68), the amendment procedures in Article 159 need not be invoked.

17. The position of the Task Force is that the amendments to the "electoral methods" 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, local electoral laws should be amended to prescribe the detailed arrangements. Under Article 74 of the Basic Law, bills relating to the political structure should only be introduced by the HKSAR Government. As amendments to the "electoral methods" are related to the political structure, the power to introduce these amendments at both levels, be it in the form of a bill or a motion, should rest with the HKSAR Government. Unless a political consensus has been reached by the three parties, i.e. a two-thirds majority of LegCo Members, CE and NPCSC on the amendments to the "electoral methods", the HKSAR Government would not initiate the legislative process.

18. Some members expressed utmost dissatisfaction with the stance of the Task Force. They did not agree that the prior consent of the Central Authorities was required for the HKSAR to initiate the legislative process as this was not a requirement stipulated in the Basic Law. The requirement for a three-party consensus would mean that the Central Authorities had "veto power" on whether the amendment mechanism in Annex I and Annex II could be triggered. They pointed out that in any event, NPCSC would have the final say on the amendments which would be reported to NPCSC for approval or for the record, as stipulated in Annex I and Annex II respectively.

The Task Force's Second Report and CE's report to NPCSC

19. The "Second Report on Issues of Principle in the Basic Law Relating to Constitutional Development" published by the Task Force on 15 April 2004 concluded that CE should submit a report to NPCSC, recommending that the "electoral methods" be amended.

20. On the same day, CE submitted a report to NPCSC and requested NPCSC to determine whether the "electoral methods" might be amended, in accordance with the provisions of Articles 45 and 68 of the Basic Law and the principle of gradual and orderly progress, and in the light of the actual situation in the HKSAR. Both the Task Force's Second Report and CE's report set out nine factors which everyone concerned should have regard to in considering how the "electoral methods" should be determined.

21. Some members expressed support for the CE's report. Some other members did not accept the report. These members pointed out that the NPCSC Interpretation only required CE to make a report as regards whether there was a need to amend the "electoral methods". It was unnecessary for CE to propose the nine factors which were tantamount to setting up barricades hindering the implementation of universal suffrage in Hong Kong and hampering the development of democracy. In addition, the nine factors gave very little weight to public opinions and some factors were not stipulated in the Basic Law.

22. According to the Task Force, the nine factors are underpinned by provisions in the Basic Law and the principle of "One Country, Two Systems", and are derived by the Task Force after considering the views of different sectors in Hong Kong and the Central Authorities. It is the view of the Task Force that the closer a proposal is to these nine factors, the easier it would be to achieve consensus among the three parties.

The NPCSC Decision on 26 April 2004

23. At its meeting on 25 and 26 April 2004, NPCSC deliberated on the report submitted by CE. The decision promulgated by NPCSC on 26 April 2004 (the NPCSC Decision) is summarized below -

- (a) the election of the third term CE in 2007 and LegCo in the fourth term in 2008 should not be by means of universal suffrage;
- (b) the 50/50 ratio for Members returned by functional constituencies (FCs) and Members returned by geographical constituencies (GCs) through direct elections should remain unchanged for the fourth term LegCo;

- (c) the procedures of voting on bills and motions in LegCo were to remain unchanged; and
- (d) subject to the above not being contravened, the "electoral methods" could be appropriately amended, consistent with Articles 45 and 68 of the Basic Law, and provisions of Annex I and Annex II to the Basic Law.

24. Some members supported the NPCSC Decision. They considered that the Decision had set out the parameters for further discussions on options to amend the "electoral methods" and would allow the democratic system of Hong Kong to progress in a gradual and orderly manner. As the NPCSC Decision only dealt with the "electoral methods" in 2007 and 2008, they also considered that a timetable should be established for future development of Hong Kong's political structure.

25. Some other members expressed great disappointment at the NPCSC Decision to rule out universal suffrage in 2007 and 2008, and considered that very little room was left for changing the "electoral methods". As the previous consultation conducted by the Task Force on the issues of legislative process and principle did not cover specific options for amending the "electoral methods", and universal suffrage was ruled out by NPCSC before the Hong Kong community was consulted, these members were of the view that the NPCSC Decision had completely ignored the people's aspirations for democracy. They also considered that the NPCSC Decision was a violation of the principles of "One Country, Two Systems" and "a high degree of autonomy", as well as Annex I and Annex II to the Basic Law which set out the proper procedure for amending the "electoral methods". A few members pointed out that the NPCSC Decision to maintain the 50/50 ratio between Members returned by GCs and FCs respectively in 2008 would not accord with the principle of "gradual and orderly progress" in achieving the ultimate goal of universal suffrage.

26. The Task Force considers that there is a lack of consensus in the community as to whether universal suffrage for the elections of CE in 2007 and LegCo Members in 2008 should be implemented. The NPCSC Decision has removed the uncertainties as to the scope of amendments to the "electoral methods". Specific areas which may be considered for amendment in respect of the "electoral methods" will be set out in the Third Report of the Task Force.

The Task Force's Third Report

27. On 11 May 2004, the "Third Report on Areas which may be Considered for Amendment in respect of the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008" was published by the Task Force. The public was given until 31 August 2004 to formulate and put forward their views and specific proposals in respect of the "electoral methods".

28. The Panel noted that the Task Force would collate views received during the consultation period and put together a range of possible options by this fall for further consultation with the public. Thereafter, local legislation could be enacted in 2005-2006 to implement the new electoral arrangements in 2007.

29. Some members sought clarification whether proposals on areas which were not set out in the Third Report would be considered by the Task Force, such as the voting system for geographical constituency election. The Panel was advised that the nine areas which might be considered for amendment in respect of the "electoral methods" set out in the Third Report were not exhaustive. The public was welcome to put forward views or specific proposals on other areas regarding the "electoral methods", in accordance with the relevant provisions of the Basic Law, as well as the Interpretation and Decision of NPCSC.

30. On 11 August 2004, the Task Force announced that the consultation period for the Third Report would be extended from 31 August to 30 September 2004. On 28 September 2004, in response to the request of some Members-elect, the Task Force announced that the consultation period would be further extended to 15 October 2004.

Summary of developments

31. A summary of the developments subsequent to the establishment of the Task Force in January 2004 is in **Appendix III** for members' reference.

Relevant papers

32. The following reports/documents have been issued to members for reference vide LC Paper No. CB(2)35/04-05 on 14 October 2004 –

- (a) the First, Second and Third Reports of the Task Force;
- (b) the report by CE to NPCSC;
- (c) the NPCSC Interpretation promulgated on 6 April 2004; and
- (d) the NPCSC Decision promulgated on 26 April 2004.

33. Other relevant papers considered by the Panel in the first and second terms of LegCo are available on the LegCo website at <http://www.legco.gov.hk>.

CHAPTER 6

RECOMMENDATIONS

6.1 After having considered all the views received and deliberated in detail the relevant issues, the Panel recommends that a review on the development of the HKSAR's political system should be undertaken by the Government. In order to gauge the views of members of the public on the matter, an extensive consultation exercise should be conducted as soon as possible. The Panel considers it of paramount importance that the Government must devise a realistic timetable for the review to ensure that there could be no question of time constraints for not being able to implement any recommendations arising from the review.

- 6.1 The Panel further recommends that as part of the review, the Government should -
- (a) explore the feasibility of developing constitutional conventions under which principal officials shall voluntarily resign as a result of having committed serious mistakes in the formulation or implementation of government policies;
 - (b) study the proposal of implementing a more flexible contract system so that principal officials may be held politically accountable for their decisions;
 - (c) examine the merits of developing conventions conducive to enhancing accountability of the executive to the legislature, e.g. the appearance of the Chief Executive before LegCo on a more frequent basis to answer questions on important issues and the meeting of the Chief Secretary for Administration with leaders of political parties on a regular basis; and
 - (d) study different systems of government and make recommendations on a system that would be most suitable to the circumstances of the HKSAR and acceptable to the community as a whole.

Motion debates and LegCo questions relating to political reform

Motion debates

- (a) On 13 March 2002, Hon Emily LAU moved a motion “That this Council considers that the method for the selection of the second Chief Executive of the Hong Kong Special Region is undemocratic, depriving the general public of the right to participate in the election process, and urges the authorities to expeditiously start its consultation work on political reform” for debate. The motion was negated by the Council.
- (b) On 8 October 2003, Hon Emily LAU moved a motion “That, as there has been retrogression in human rights, the rule of law and economic development in Hong Kong and democratization of the political system has remained stagnant under the administration of the Chief Executive Mr TUNG Chee-hwa, prompting the public to make repeated demands for him to step down, this Council calls on Mr TUNG to take the responsibility and resign in accordance with the wishes of the people.” for debate. The motion was negated by the Council.
- (c) On 12 November 2003, Hon James TO moved a motion “That this Council urges the Government to publish a green paper on the reform of the political system of the Hong Kong Special Administrative Region by the end of this year so as to implement the election of the Chief Executive and all Members of the Legislative Council by universal suffrage in 2007 and 2008 respectively, and expeditiously abolish the appointed and ex-officio seats in the District Councils to return the political power to the people” for debate. The motion was negated by the Council.

LegCo questions

- (d) On 13 June 2001, Hon Martin Lee raised an oral question on “Undemocratic features of the Legislative Council election which impede the full enjoyment of economic, social and cultural rights”.
- (e) On 13 November 2002, Hon Emily LAU raised an oral question on “Arrangements for the third term LegCo functional sector elections”.
- (f) On 8 October 2003, Dr Hon YEUNG Sum raised an oral question on “Timetable for review on political system”.

Panel on Constitutional Affairs

Review on Constitutional Development after 2007

Summary of developments (January - September 2004)

- 7 January 2004 CE announced in his 2004 Policy Address the establishment of the Task Force.
- 15 and 28 January 2004 The Task Force briefed the Panel on, inter alia, issues of principle and legislative process relating to constitutional development at the two meetings of the Panel.
- 16 January 2004 The Task Force started its first meeting with different organizations and individuals in the community to discuss the relevant issues.
- 8 - 10 February 2004 The Task Force visited Beijing and met with the Hong Kong and Macao Affairs Office and the Legislative Affairs Commission of NPCSC to exchange views on the issues of principle and legislative process relating to constitutional development in the Basic Law.
- 11 February 2004 The Chief Secretary for Administration (CS) made a statement in the Council to inform Members of the first visit of the Task Force to Beijing.
- 16 February 2004 The Panel was briefed on the work progress of the Task Force since 28 January 2004.
- 19 February 2004 The Task Force launched its official website on constitutional development (www.cab-review.gov.hk), and invited views from members of the public on the relevant issues of principle and legislative process relating to constitutional development.
- 25 February 2004 Hon Andrew CHENG moved a motion on “Immediately consulting the public on election by universal suffrage” for debate in Council. The motion was negated.
- 27 February 2004 CS briefed the House Committee on the work progress of the Task Force at its special meeting on 27 February 2004.
- 15 March 2004 The Panel was briefed on the work progress of the Task Force since 16 February 2004.

- 17 March 2004 Hon James TO moved a motion on "Respecting and complying with the principles prescribed in the Basic Law" for debate in the Council. The motion was negated.
- 26 March 2004 CE announced at a press conference that -
- (a) NPCSC would give an interpretation of Article 7 of Annex I and Article III of Annex II to the Basic Law at its meeting on 2 - 6 April 2004; and
 - (b) the Task Force would meet with representatives of NPCSC on 30 March 2004.
- 30 March 2004 The Task Force met representatives of NPCSC in Shenzhen.
- The First Report of the Task Force was published.
- 6 April 2004 The interpretation of NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law was promulgated. CE was required to make a report to NPCSC as regards whether there was a need to amend the "electoral methods".
- 15 April 2004 CE submitted a report to NPCSC in accordance with the NPCSC Interpretation. CE considered that the "electoral methods" should be amended and requested NPCSC to make a determination in this respect.
- The Second Report of the Task Force was published. The Report was attached as an annex to the CE's report to NPCSC.
- SCA presented the two reports to the Deputy Secretary-General of NPCSC at the Great Hall of the People.
- 16 April 2004 The Task Force briefed the Panel on the CE Report to NPCSC and the Second Report of the Task Force.
- Dr Hon YEUNG Sum moved a motion to call upon CE to consult the people of Hong Kong immediately and submit a supplementary report to reflect public opinions, so as to fulfil Hong Kong people's aspiration for the election of CE and LegCo Members by universal suffrage in 2007 and 2008 respectively. The motion was deferred to the Panel meeting on 19 April 2004 for a decision.
- 19 April 2004 Dr Hon YEUNG Sum's motion was negated at the Panel meeting on 19 April 2004.

CE issued a statement to announce the decision of NPCSC to put the CE's report to NPCSC on the agenda of its meeting on 25 and 26 April 2004.

21 -22 April 2004 At the invitation of NPCSC, the Task Force briefed NPCSC representatives on its Second Report in Shenzhen.

Hon FUNG Kin-kee moved a motion for the Council to adjourn for the purpose of debating the "Report by the Chief Executive of the Hong Kong Special Administrative Region to the Standing Committee of the National People's Congress on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2008". The motion was negatived.

25 - 26 April 2004 NPCSC deliberated on the CE's report and promulgated its decision on 26 April 2004.

On 26 April 2004, representatives of NPCSC held two forums to meet representatives of various sectors including LegCo Members in Hong Kong.

4 May 2004 The Task Force briefed the Panel on the NPCSC Decision promulgated on 26 April 2004 and the way forward.

5 May 2004 Hon Frederick FUNG moved a motion on "Requesting the Chief Executive to submit a supplementary report to the Standing Committee of the National People's Congress" for debate in the Council. The motion was negatived.

11 May 2004 The Third Report of the Task Force was published.

17 May 2004 The Panel was briefed on the Third Report of the Task Force. The consultation period for the Third Report would end on 31 August 2004.

19 May 2004 Hon Albert HO moved a motion on "Regretting the decision of the Standing Committee of the National People's Congress to rule out universal suffrage in the years 2007 and 2008" for debate in the Council. The motion was negatived.

21 May 2004 Arising from members' concern about certain remarks made by Mr Zhu Yucheng, Director of the Institute of Hong Kong and Macao Affairs (IHKMA), at a forum on 15 May 2004 and as agreed at the Panel meeting on 17 May 2004, the Panel Chairman

wrote to invite Mr Zhu to attend a meeting of the Panel to exchange views with members on the relevant issues.

- 2 June 2004 Hon Martin LEE raised a written question on “Interpretation of the Basic Law and decision on issues relating to the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 by the Standing Committee of the National People's Congress” at the Council meeting.
- 9 June 2004 Hon SZETO Wah raised a written question on “The report submitted by the Chief Executive to the Standing Committee of the National People's Congress” at the Council meeting.
- Hon Audrey EU raised a written question on “Registered voters of the functional constituencies” at the Council meeting.
- 24 May and 11 June 2004 The Task Force commissioned the Central Policy Unit to hold two Seminars on Constitutional Development on 24 May and 11 June 2004 respectively.
- 21 June 2004 The Task Force briefed the Panel on its progress of work since 17 May 2004, including details of the two Seminars on Constitutional Development.
- 25 June and 12 July 2004 IHKMA had replied that Mr Zhu Yucheng would not attend a meeting of the Panel. Excerpts from two publications, i.e. “The Downing Street Years” and “鄧小平文選” were attached to IHKMA’s letter dated 25 June 2004 for members’ reference.
- 2 July 2004 The issue of constitutional development in Hong Kong was discussed under the topic “The business sector’s involvement in political development and policy-making” at the special meeting of the House Committee attended by CS on 2 July 2004.
- June - August 2004 Six Focus Group Discussions on Constitutional Development were organized by the Task Force on 25 June, 23, 26, 30 July, 11 and 23 August 2004 respectively. In addition, Four Regional Forums on Constitutional Development were organized on 14, 19, 21 and 28 July 2004 respectively.
- 11 August 2004 The Task Force decided that the consultation period for the Third Report would be extended from 31 August to 30 September 2004.
- 28 September 2004 The Task Force decided that the consultation period for the Third Report would be further extended to 15 October 2004.