

**Submission of the Council of the Hong Kong Bar Association
on
Development of the Hong Kong Special
Administrative Region's Political System**

1. On or about 25 January 2000, we were consulted, as part of the public consultation process, by the Panel on Constitutional Affairs of the Legislative Council on Development of HKSAR's Political System. We were asked specifically to address the following issues:

Ministerial system

- (1) What should be the respective roles of the Executive and the Legislature and their structural and operational inter-relationship?
- (2) Should principal officials be politically appointed or should they continue to be permanent civil servants and other persons appointed on contract?
- (3) How should principal officials individually and the Executive collectively be held accountable to the Legislature?

Election by universal suffrage

- (4) When should the Chief Executive be elected by universal suffrage and how?
- (5) When should all LegCo Members be elected by universal suffrage and how?

Others

- (6) Any other related issues, eg, referendum, constitutional assembly/convention, regulation of political parties, etc
- (7) Relevant experiences in foreign countries relevant to the discussion.

General Approach and the Constitutional Framework

2. We acknowledge that development of HKSAR's political system is both a political and constitutional/legal issue, As a professional body, we will confine our view to the legal

dimension.

3. Any development of the HKSAR's political system has to be made within the framework of the Basic Law. The political structure of the HKSAR is set out in Chapter IV of the Basic Law. Three provisions are of particular significance:

Art 43

*The Chief Executive of the HKSAR shall be **accountable to...the HKSAR** in accordance with the Basic Law.*

Art 64

*The Government of the **HKSAR** must abide by the law and be **accountable to the Legislative Council** of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.*

Art 68

The Legislative Council of the HKSAR shall be constituted by election.

*The method for forming the Legislative Council 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 the members of the Legislative Council by universal suffrage.***

4. In considering the development of the HKSAR's political system, it is also necessary to take into account the international obligation of the HKSAR under the International Covenant on Civil and Political Rights ('ICCPR') as applied to Hong Kong, which has been incorporated into the HKSAR through Art 39 of the Basic Law. Art 25 of the ICCPR provides:

'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (A) *to take part in the conduct of public affairs, directly or through freely chosen representatives;*

(B) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;...'

Ministerial System and the Relationship between the Executive and the Legislature

5. The roles of the Chief Executive, the Government of the HKSAR, and the Legislative Council are respectively set out in relatively clear terms in Arts 48, 62 and 73 of the Basic Law.
6. Although it has not been explicitly stated in the Basic Law, the constitutional framework set out in the Basic Law clearly endorses the principle of separation of powers, namely that the legislative, executive and judicial functions are entrusted to three different institutions, each having their own exclusive jurisdictions and at the same time exercising checks and balances against one another. Hence, while the Chief Executive is to lead the Government (Art 48), the Government of the HKSAR must abide by law and be accountable to the Legislative Council (Art 64). The passage of legislation requires the assent of the Chief Executive (Art 76). At the same time, the Basic Law prescribes the procedure when the Chief Executive refuses to assent to a bill duly passed by the Legislative Council (Arts 49-52). While the Chief Executive has the power to dissolve the Legislative Council under certain circumstances (Arts 50 & 51), the Legislative Council also has the power of impeaching the Chief Executive (Art 73(9)), and the Chief Executive is required to resign if he persists in refusing to sign a bill passed by two successive Legislative Council (Art 52). We do not find any support for the so-called 'executive-led government' in the Basic Law, if this phrase means that the Executive shall prevail over the Legislative Council. Instead, what we find in the Basic Law is an elaborate system of checks and balance grounded upon the principle of separation of powers.
7. Notwithstanding this elaborate mechanism of checks and balances, two general principles stand out in the Basic Law. First, the Government of the HKSAR is accountable to the Legislative Council (Art 64). Art 64 further elaborates the meaning of accountability. The Government shall implement laws passed by the Council and laws already in force. It shall present regular policy addresses to the Council. It shall answer questions raised by members of the Council, and shall obtain approval from the Council for taxation and public expenditure. The Legislative Council is vested with the corresponding power, such as the power to raise questions on the work of the government, to debate any issue concerning public interests, and to summon, as required, persons concerned to testify or

give evidence, in order to ensure that it can carry out its monitoring role (Art 73).

8. Secondly, the Chief Executive is accountable to the HKSAR (Art 43). Unlike Art 64, Art 43 does not set out how the Chief Executive shall be accountable to the HKSAR. The Chief Executive is the head of the Government of the HKSAR (Art 60). Thus, by making the Chief Executive accountable to the HKSAR, the Government of the HKSAR must a fortiori be under the same duty of accountability to the HKSAR. It also follows that the situations set out in Art 64 should not be exhaustive of the duty or scope of the accountability of the Government.
9. Apart from a duty to explain, to justify, to report, and to obtain approval in fiscal matters/spending of public revenue, accountability also connotes a sense of responsibility. In the case of a member of the Legislative Council, accountability is achieved through the system of election. A member will be voted out in the following election if the electors are not satisfied with his performance during his term. Similarly, in the case of the Executive Government, and particularly, principal officials, an effective system of accountability will require the existence of a system of sanction or removal from office when the public has lost confidence in a principal official.
10. The Basic Law has not prescribed any system of the Executive Government, be it ministerial or otherwise. We reckon that this is an issue on which the public should be widely consulted. At the end of the day, whatever system be adopted, it must comply with the requirement of accountability to both the Legislative Council and the HKSAR as set out in the Basic Law.

Election by Universal Suffrage

11. Art 68 of the Basic Law sets out three principles in the development of a democratic legislature in the HKSAR:
 - (1) The development shall take place in the light of the actual situation in the HKSAR;
 - (2) It shall accord with the principle of gradual and orderly progress;
 - (3) The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.
12. Upon resumption of sovereignty on 1 July 1997, a Provisional Legislature was formed

which was constituted entirely by appointment.

13. The method of formation of the First Legislature was set out in a Decision of the National People's Progress adopted on 4 April 1990. It composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies.
14. The composition of the second and third term of the Legislative Council is set out in Annex II of the Basic Law. There is a gradual reduction of members returned by the Election Committee, which is coupled by a corresponding increase in the number of members returned by geographical constituencies through direct election.

Method of Formation of Legislative Council	1st Term	2nd Term	3rd Term
Members returned by Functional constituencies	30	30	30
Members returned by the Election Committee	10	6	0
Members returned by geographical constituencies through direct election	20	24	30

15. Para III of Annex II of the Basic Law provides for a procedure for amending the method of the formation of the Legislative Council after its 3rd term. Any amendment has to be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and shall be reported to the Standing Committee of the NPC for the record.
16. The second and the third principles set out in Art 68 of the Basic Law requires a progress in the formation of the Legislative Council towards election of all members of the Legislative Council by universal suffrage. Therefore, to freeze the composition of the Legislative Council as that in its 3rd term after 2008 will be contrary to Art 68. **There must be progress.**
17. Election of members of the Legislative Council by geographical constituencies by direct election was first introduced to Hong Kong in 1991. By the end of the third term of the

Legislative Council of the HKSAR, people in Hong Kong have at least 17 years of experience in direct election. This has not included experience in direct election of members of the District Board, which goes back to 1982, and direct election of members of the Urban Council, which dates back to 1887!

18. Functional constituencies election was first introduced to the HKSAR in 1985. This election system gives a right to elect a member to the Legislative Council to people and organisations in different profession and in the business community. It confers a privilege to an elite class and is not consistent with the principle of election by universal suffrage.
19. Election by functional constituencies has been criticized by the Human Rights Committee for being contrary to, inter alia, Art 25 of the ICCPR. In its Concluding Observation on the 4th Periodic Report in 1995, the Human Rights Committee stated:

*'The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that **once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25(b) and 26.'** (Para 19)*

The Committee recommended that 'immediate steps be taken to ensure that the electoral system be put in conformity with articles 21, 22 and 25 of the ICCPR'. (para 25)

20. The Human Rights Committee recently reiterated its criticism in its Concluding Observation on the 5th Periodic Report:

'The Committee reiterates its concern, expressed in paragraph 19 of its concluding observations, adopted at the end of the consideration of the fourth periodic report, that the electoral system for the Legislative Council does not comply with articles 2, para 1, 25 and 26 of the Covenant. The Committee is concerned about the impending abolition of the Municipal Councils that would further diminish the opportunity of HKSAR residents to take part in the conduct of public affairs, that is guaranteed under article

25.' (Para 12)

21. Thus, it is clear that election by functional constituencies is an anomaly which is contrary to the international obligation of the HKSAR under the ICCPR which is incorporated by Art 39 of the Basic Law. The 3rd principle in Art 68 of the Basic Law further reinforces that functional constituencies election is only an interim measure towards election by universal suffrage. The ultimate aim of achieving election of all members by universal suffrage must be achieved well before the end of the 50 years' period guaranteed by the Basic Law.
22. Given the long history of direct election in Hong Kong, and the interim nature of functional constituencies election, and taking into account the international obligation under the ICCPR and the requirement of progress in the political development in the HKSAR as well as the ultimate aim of achieving election by direct election as set out in Art 68 of the Basic Law, we are of the view that the Legislative Council shall be constituted entirely by geographical election by universal suffrage after the 3rd term.
23. Alternatively, the people of Hong Kong shall be given an opportunity to decide on this question, and the most appropriate means to do so is by way of a public referendum. It is well established that the right to self-determination in Art 2 of the ICCPR includes an internal dimension, namely that the people have a right to decide on the political system of their Government. Should a referendum be held, we are of the view that the referendum should decide on the timetable of achieving the ultimate aim set out in Art 68 of the Basic Law. Hence, the question to be addressed should include whether the Legislative Council shall compose of members returned by direct election only in 2008, and if not, should this be achieved in 2012, 2016 etc.

The Chief Executive

24. Art 45 of the Basic Law provides that the Chief Executive shall be selected by election or through consultations held locally. The method for selecting the Chief Executive 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 the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. Annex 1 of the Basic Law provides that the Chief Executive shall be elected by a broadly representative Election Committee of 800 members who shall come from 4 different sectors. It also envisages that the method of selection of the Chief Executive subsequent to the year 2007 can be

amended.

25. Unlike the election of Legislative Council, election of the Chief Executive in Hong Kong has a short history and was introduced only in 1997. We are of the view that how the Chief Executive shall be selected subsequent to the year 2007 is a matter of public importance, and it is an appropriate subject for a public referendum.
26. However, we note that the present methods in selecting or electing members to the Election Committee vary greatly from sector to sector and within sector. Article 45(2) of the Basic Law envisages the existence of a nomination process whatever be the method of selection of the Chief Executive. We note that the existence of a nomination process is virtually universal in any form of election, and the purpose is to ensure that any candidate would have sufficient public support before he or she is permitted to go into the general election. Article 45(2) refers to a nomination committee which is broadly representative in accordance with democratic procedures, but it does not specify the formation of the nomination committee or the nomination process save for the first two terms of the Chief Executive.
27. We believe that the formation of the nomination committee shall comply with the following principles"
 - (1) its formation and operation should be open, transparent, participative, and fair;
 - (2) it must be broadly representative of all walks of society;
 - (3) there should exist a degree of check and balance, which is the characteristic features of all democratic procedures (as referred to in Art 45(2)); and
 - (4) any proposal must be easy to implement.
28. In order to move forward to the ultimate aim of having a broadly representative Election Committee in accordance with democratic procedures, we are of the view that all members of the Election Committee shall be returned by either direct or indirect election. There is also a strong case to have at least half of the members of the Election Committee returned by geographical election by universal franchise, as direct public participation is the hallmark of the democratic process, which is envisaged in Art 45(2) of the Basic Law.

Dated the 3rd March 2000.