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HONG KONG HUMAN RIGHTS MONITOR

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DEVELOPMENT OF THE POLITICAL SYSTEM

SUBMISSION BY HONG KONG HUMAN RIGHTS MONITOR

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SUMMARY

Hong Kong Human Rights Monitor has been concerned for several years that more thought should be given to the form which democracy should take in Hong Kong.

The issues which need to be considered are those which the Panel has identified in its list of issues.

These issues are too important to be left to either the LegCo or the Government alone. To ensure that the constitution of Hong Kong has broad popular support as wide a cross-section of the community as possible should be involved in deciding what form democracy should take. Elements in the business sector have been vocal in their opposition to introduction of democracy. It is important that the wider community, whose interests are often very different from those of the large business houses, should be able to make their voice heard.

Human Rights Monitor therefore calls for a constitutional convention, on the model of the Constitutional Convention which drew up the constitution for post-apartheid South Africa, to decide on the issues of presidential versus prime ministerial government, accountability of officials, time-table of democratisation, and related issues.

THE FORM OF DEMOCRACY

There is general agreement, in theory at least, that Hong Kong should move towards democracy. Article 68 of the Basic Law states that “ The ultimate aim is the election of all members of the Legislative Council by universal suffrage”. Article 45 of the Basic Law states that 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 principles.”

However very little thought has been given to how these ultimate aims should be achieved, what they actually mean in practical terms, or how the remainder of Hong Kong’s constitutional arrangements should be modified once universal suffrage arrives.

Part of the reason for this lack of thought is the uncertainty as to whether there will be any moves towards universal suffrage at all, in the light of the moves away from it which have occurred since the transfer of sovereignty, including the restriction of the franchise for the functional constituencies, the abolition of the Urban and Regional Councils, and the extension of appointed members to the District Councils. Because of this the proponents of faster movement towards democracy have tended to concentrate on the single issue of democratisation, and little thought has been given to its form.

In fact it is of great importance that Hong Kong adopts a model of democracy which is suited to its circumstances and history and has popular support. Every democratic country has different traditions and the major democracies have big differences between their systems. These differences are much studied and their various strengths and weaknesses are well-known to academic experts on constitutional affairs.

The reference in Article 45 of the Basic Law to the election of the Chief Executive by universal suffrage suggests that either an American or a French system of democracy are contemplated.

Under both French and American systems there are separate elections for the Chief Executive (the President) and for the legislature. Under neither system is the Chief Executive a member of the Legislature. However an important difference between the American and the French system is that France does have a Ministerial system of Government. The President invites a politician who can command a majority in the Legislative Council to be Prime Minister, and the Prime Minister appoints a Cabinet of Ministers. Executive authority is divided between the President and the Prime Minister, with the Prime Minister in charge of day to day Government of the country while the President undertakes major policy initiatives and plays a larger role in foreign policy. The exact division of power between the two reflects their relative political strength at a given moment.

Under the American system the President appoints his senior officials who are not usually members of the legislature. They are not career civil servants, but are usually supporters of the President’s political party, without being career politicians. While sometimes a Senator or Congressman may accept an appointment as an official (e.g. the present US

Defence Secretary William Cohen who was previously a Senator from Vermont), they will be expected to resign from Congress on taking up the post, and most officials will not previously have held elected office.

Britain, Australia, Canada, New Zealand, Germany, Japan and India do not have directly elected chief executives. Nor does Singapore. In each of these countries the chief executive, in the sense of the person who holds executive power, is a different person from the head of state, and in each country this post is held by the leader of the majority party in the legislature or by a politician in the legislature who is able to command a majority of the legislature.

A major and well-known weakness of the American system is that when the President and the majority in Congress are from different political parties it can be difficult or impossible for the President to push through Congress the legislative programme which he was elected to put into effect. A recent example was the failure of the Clinton administration to carry through wide-ranging reforms to the American health care system, which were a key part of Clinton's election platform, because he was unable to carry Congress with him.

A Hong Kong system under which there was a directly elected Chief Executive and a wholly directly elected Legislative Council would risk the same kind of policy paralysis as sometimes affects the United States.

This problem has not affected the French system in the same way as the American system, because under the French system there is a Prime Minister, a post which does not exist in the United States, and partly because for several decades until the 1980s the President's party by chance always had a majority in the legislature.

In the late 1980s when France elected a Socialist president and later elected a Conservative majority in the Senate, the resulting period of "cohabitation" with a conservative Prime Minister passed much more smoothly than many commentators had expected. There was no constitutional crisis, although much political manoeuvring between president and prime minister for future political advantage. This in turn did not appear to damage the running of the country, possibly because the president (Mitterand), was happy to give the Prime Minister (Chirac) " rope to hang himself", by leaving him alone to do his best to tackle difficult or insoluble problems. The net effect of this period was probably a shift in power from the President to the Prime Minister, which has continued during the current period of co-habitation between a conservative president (Chirac) and a socialist prime minister (Jospin).

A further important institutional reason why the "cohabitation" periods have not caused policy-making paralysis in France is that France not only has a Prime Minister but a full Ministerial system of Government. The key Ministerial posts are therefore occupied by important politicians who are both members of the Legislature and the policy heads of their departments. This means that the Prime Minister's team can push through policy

across the whole area of Government activity even though the President may not be in agreement with it. In the United States, in contrast, where the top officials who are the equivalents of Ministers are always the President's appointees, the result of a Congress being controlled by the president's opponents is that the president can only make progress on policies which command bipartisan support.

Governments where the chief executive is the leader of the largest party in the legislature do not usually encounter this type of problem of a deadlocked Government. Thus, paradoxically, although there are sometimes references to the United States having a "strong executive president", this strength only arises if the president has majority control of Congress.

Human Rights Monitor believes that much wider debate is needed as to which of these models would be most effective for the Government of Hong Kong.

SHOULD PRINCIPAL OFFICIALS BE POLITICALLY APPOINTED

The debate as to whether principal officials should be politically appointed raises related but different issues from those discussed in the previous section.

All of the democratic countries mentioned above have principal officials who are politically appointed. However the form that such appointments take varies greatly. In Britain and other countries which follow the British or "Westminster" model of democracy the most senior officials are called Ministers, and come and go with the Government of which they are part. Thus, if there is a change of power in a British general election, all the Ministers of the outgoing government leave the government and cease entirely to be part of the public service. However continuity is maintained through a cadre of senior career civil servants who are formally banned from involvement in party politics and who serve the Government irrespective of which political party is in power. This system is widely regarded as having provided Britain with a high quality of public administration, and in particular of impartial advice to Ministers on difficult and sensitive issues. However it has the disadvantage that the senior civil servants because of their lack of political commitment and their knowledge of the practical difficulties surrounding many policy proposals tend to act as what the British politician Shirley Williams once called "a beautifully designed braking mechanism", which discourages bold policy initiatives.

In France, in contrast, senior civil servants well below Ministerial rank are often political appointments and enter and leave the civil service with the Government. This is also the case in the United States. Most US ambassadors are political appointments, while career diplomats often rise only to be deputy heads of mission. It is sometimes claimed by critics of the Westminster system that the French and American alternatives result in the creation of administrations where the bulk of the senior staff are more strongly committed to the policies of the Government of the day than is the case in Britain. Views are however

divided on whether this is actually so in practice, since the great majority of political issues are not ones which divide along party political lines.

Hong Kong has inherited a civil service on the British model, but because of the absence of Ministers the senior civil servants are now fulfilling the traditional British Ministerial role of explaining policies to the Legislative Council. This is an awkward and difficult situation for civil servants, as they are being called on to defend publicly policies which they may not personally support, and yet their training does not necessarily provide them with the advocacy and rhetorical skills required to do so. These are arguments for the introduction of a Ministerial system of Government. In theory it would be possible to substitute instead a French or American system of the introduction of unelected non-civil servants into the civil service on a political basis. This has indeed been done in Hong Kong in the case of the Secretary for Justice, Ms Elsie Leung. However if this was done on a large scale there would be risk of loss of civil service expertise and severe damage to civil service morale. In addition in a territory as relatively small as Hong Kong, it is doubtful whether there is a reservoir of talent outside Government which can be drawn on to provide alternative officials of the necessary quality.

UNIVERSAL SUFFRAGE

Human Rights Monitor's position on universal suffrage in Hong Kong follows that of the United Nations. The failure to introduce universal suffrage nearly 30 years after the International Covenant on Civil and Political Rights was extended to Hong Kong has been condemned by the United Nations Human Rights Committee as a flagrant breach of that Covenant. It denies Hong Kong people a right which people in most of the developed world take for granted. The lack of accountability of the government is harmful to the economic and social development of Hong Kong. We see no justification for any further delay.

However it does not follow that universal suffrage should be both for the Chief Executive and the Legislative Council. There are strong arguments that a Chief Executive who is indirectly elected through leading the majority party in the Legislative Council will be able to form a more stable and effective Government than one who is directly elected in separate elections.

MOMENTUM AND POLITICAL REALITIES

There are powerful pressures operating against democracy in Hong Kong. It is patently obvious that the present Chief Executive does not believe in it. His view is shared by some business tycoons who have done well out of Hong Kong's colonial oligarchic system. The fact that the majority of the electorate voted at the last election for parties which support democracy counts for nothing with persons who believe that they will personally have fewer privileges under a more democratic system.

In addition the Central People's Government is hyper-sensitive to any weakening of control and to any moves towards greater democratisation which might have this effect.

Human Rights Monitor considers that without democracy to ensure that those who hold power are accountable for their actions the freedoms which Hong Kong has traditionally enjoyed will disappear, and that it is therefore urgent for all those who want democracy to work together to create a model of the institutional structure which a democratic Hong Kong should have. It is also important that those who are not part of the traditional "democratic camp" but who are on record as being committed to the extension of democracy play a part in this process.

For this reason we believe that Hong Kong should hold a constitutional convention to work out the territories future constitutional arrangements, on the lines of the South African Constitutional Convention or the convention on the future of the monarchy held in 1998 in Australia.

Human Rights Monitor decided in early 1999 that it would work with other interested organisations to attempt to set up a steering committee for such a Convention, and has had contacts with academics and some political parties. We call on the Legislative Council to support a Convention of this kind and to designate a panel to study how it should be undertaken.