

Issues of Principle and Legislative Process Related to Constitutional Development in Basic Law

Responses from Dr. K.S. Pun (潘國城博士)

A1. How could Hong Kong's political structure develop in accordance with the principles in the relevant Basic Law provisions which relate to the relationship between the Central Authority and the HKSAR, namely: (1) Hong Kong being an unalienable part of PRC; (2) HKSAR being directly under the CPG; and (3) CE being appointed by the CPG and accountable to both the CPG and HKSAR?

1. In relation to this issue, the Administration's consultation paper has cited Articles 2, 12, 43 and 45 in the Basic Law. I would think that, in addition, at least the third paragraph in the Preamble and Article 11 in the Basic Law, as well as Article 31 in the Constitution of the PRC, should also be referred to. Further, if the proposed changes in the political structure will involve amendments to the Basic Law, Article 159 is also relevant.
2. Mindful of these provisions, I cannot see how Hong Kong can change its political structure without abiding by the Basic Law and its Annexes. Full consultation with the CPG is necessary throughout the process. To convince the CPG, Hong Kong must be able to prove that the present structure is not serving Hong Kong's needs; it has to explain and justify the proposed changes, proving why the new structure is better.
3. I assume that the "how" in the question is not referring to the *procedures* needed to formulate the new political structure. If this interpretation of the question is correct, the answer seems obvious. It can be argued that the stipulations in Articles 1, 12, 43 and 45 are adhered to as long as, firstly, the new political structure does not convert Hong Kong into an independent nation and, secondly, the relevant parts in the Basic Law which ensure that Hong Kong will remain under the direct control of the CPG, such as Articles 1, 11, 12, 13, 17, 23, 43, 45, 96, 158 and 159, as well as Chapter VII, remain intact.

A2. The phrases "actual situation" and "gradual and orderly progress" are mentioned in both Articles 45 and 68. What should "actual situation" constitute? How "gradual and orderly progress" should be understood?

4. I support the suggestion that the development of our political structure toward the ultimate goal of universal suffrage should be proceeded with gradually. This belief has not been based on the view, held in some quarters in Hong Kong, that since democracy in the West had taken several hundred years to evolve into its present state we should not try to move too quickly. I believe that since we have the experience of the West to borrow from we can move much more speedily. Nevertheless, we have to proceed extremely carefully so that we can reach our final destination with the least social, economic and political disturbances.

5. To me, at least to a large extent the phrase "actual situation" refers to whether, at the point in time when the introduction of a certain change in its political structure is being considered, Hong Kong really needs that change and possesses the pre-requisites for that change. For full "democracy", at least the following are required:
 - (a) mature political parties with capable politicians;
 - (b) mature society with members sufficiently knowledgeable to judge the views and performance of politicians and political parties;
 - (c) mature media able to offer soundly-based, fair and constructive views on issues;
 - (d) an election legal system suitable to the Hong Kong circumstances and capable of ensuring fair and peaceful elections; and
 - (e) a political structure which can ensure political and social stability, which can take care of the interests of all sectors of society, which can prevent the advent of "free lunch" (or "free lunch" in disguise), and which can avoid the politicization of decision-making.

This list is not exhaustive. If this or another similar list is adopted, it is difficult to concur with the view held by some that Hong Kong is now ready. It must, nevertheless, also be admitted that it is not easy, if at all possible, to predict when we would be.

6. Hence, I agree with the frequently mentioned approach of setting a date by when "universal suffrage" should be introduced. By working out a time-table on when various pre-requisites must be achieved with reference a list similar to that in paragraph 5, a suitable date may perhaps emerge.
7. The term "universal suffrage" (普選) means, according to the Oxford dictionary, "the rights of all members of a community to vote" (普選權). Strictly speaking, it is not the same as direct election (直選) or democracy (民主). The interpretation of this term is important to both this question and Question A3 since, depending on the interpretation, the existence of functional constituencies (which do not deprive anyone the right to vote) in the political structure does not violate the goal of "universal suffrage" or, therefore, the Basic Law. In UK and US, for example, there is democracy and universal suffrage, but their Prime Minister or President is not directly elected.

A3. How could the development of Hong Kong's political structure give consideration to the interests of the different sectors of society and facilitate the development of the capitalist economy?

8. The present political structure in Hong Kong in fact meets these two objectives quite well. Nearly all sectors of the community are represented on the Legislative Council and the Election Committee. Some may argue that the present distribution of the Legislative Council or Election Committee membership is not fair to some sectors; some may point out that not everyone is given the right to vote. On the other hand, more than a few investors (that is, capitalists) and professionals in Hong Kong have expressed concern that, if and when the functional constituencies are abolished, it will mean that their interests and views will not be represented. Under that situation, although they are the source of most of the public revenue they will have no say in any decision-making, including the spending of the public revenue. They are worry that decisions will then be made by politicians who are more interested in gaining votes than achieving real benefit for the community.
9. To achieve the two objectives mentioned by Mr. Ji, a carefully formulated, well-balanced political structure is required. It is irresponsible to recommend a solution in haste. Much thought, investigation and consultation are needed. It takes time; it requires understanding and co-operation from all sectors.

B1. What is the most appropriate legislative process 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?

10. The "Decree of the President of the People's Republic of China No. 26" dated 4 April 1990 indicates that these Annexes are parts of the Basic Law. This relationship is further reinforced by the third paragraph in Articles 45 and 68. Given these, coupled with the fact that these Annexes deal with major matters related to the political and administration structures in Hong Kong (not relatively local logistic election matters such as those mentioned in the second paragraph in Section I in Annex II), it should be clear that it would not be proper to allow the contents of these Annexes be amended by simply making amendments in local electoral laws in Hong Kong. If the latter approach was that chosen and acceptable to the drafters of the Basic Law, it would have been expressly stated in the main body of the Basic Law or in the Annexes themselves.
11. The local electoral laws should be formulated to implement the approaches stipulated in the Basic Law, which is the "superior" law. I cannot see why one would permit a local law to change the systems specified in a superior law without amending the superior law first.
12. Concerning the different treatments stipulated in the Basic Law for amending the methods for selecting the Chief Executive (that is, for approval by the NPC) and forming the Legislative Council (that is, for record of the NPC), we must note the contents of Article 17 with respect to the power of the NPC in rejecting laws enacted by the Legislative Council, although the laws are sent to the NPC only "for record". Further, this difference in treatment is possibly a reflection of the importance attached to the principle that the government of HKSAR should be "executive-led".

B2. Do we have to follow the procedures set out in Article 159 of the Basic Law, if we amend the methods for selecting the Chief Executive or for forming the Legislative Council as specified in Annexes I and II of the Basic Law?

13. Since we have to accept that Annexes I and II are parts of the Basic Law (as explained in preceding paragraphs above), I feel Article 159 has to be invoked.

B3. How should any amendment relating to the methods for selecting the Chief Executive and for forming the Legislative Council be initiated?

14. If it is believed that the Annexes are integral parts of the Basic Law, amendments to these methods must be based on the procedures laid down in the Basic Law. As Article 74 prohibits individual members of the Legislative Council from introducing private members bills related to the political structure and as it is difficult to imagine that such important issues as amendments to these Annexes can be put to the NPC before they are discussed by the Hong Kong people and the Legislative Council, it seems clear that they should be initiated by the Administration and then, after consideration by the Hong Kong people and the Legislative Council, put to the NPC through the process stipulated in Article 159 and Paragraph 7 in Annex I or Section III in Annex II.

B4. Whether the method for forming of the third term Legislative Council could be used for the fourth term Legislative Council, if no consensus were reached on whether to amend the method for forming the Legislative Council after 2007?

15. The second paragraph in Section III in Annex II, especially the phrase "if there is a need to amend the provisions of this Annex", indicates through obvious implication that if there is no need to amend the provisions such provisions should be applied to form the Legislative Council "after 2007" or "subsequent to the year 2007". Thus, the answer to the question is: "yes".
16. Perhaps, the question has been raised due to doubts expressed by some on the meaning of "after 2007" and "subsequent to the year 2007". On this, please refer to Paragraph 17 below.

B5. Whether the phrase "subsequent to the year 2007" should be understood to include 2007?

17. Without the full text of Mr. JI Pengfei's statement, I cannot understand how "subsequent to the year 2007" can be interpreted to mean anything other than what it says – after the year 2007. The second paragraph in Section III in Annex II uses the phrase "after 2007". Further, after the election in 2004 there will not be any Legislative Council election until 2008. Hence, these two phrases as used in Annex II cannot mean "2007". It must mean "2008 and after". If this is the case, "subsequent to the year 2007" in Annex I must also

mean "2008 and after" as it is only normal that, unless otherwise defined, the same phrase or term or word must carry the same meaning when used in different parts of the same law. How, then, can "subsequent to the year 2007" be understood to include 2007?