



## HONG KONG BAR ASSOCIATION

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18<sup>th</sup> March 2005

Secretariat  
Constitutional Development Task Force  
Constitutional Affairs Bureau  
3/F Main Wing  
Central Government Offices  
Lower Albert Road  
Hong Kong

Dear Sirs,

### Re: The Fourth Report of the Constitutional Development Task Force

I refer to the Consultation Paper on the Fourth Report of the Constitutional Development Task Force issued in December 2004. I am pleased to enclose herewith a copy of the views of the Hong Kong Bar Association on the Consultation Paper which was endorsed at its Bar Council Meeting held at 17<sup>th</sup> March 2005, for your consideration.

Yours sincerely,

(Signed)

Philip Dykes SC  
Chairman

/al  
Encl.

### 香港大律師公會

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## The Fourth Report of the Constitutional Development Task Force

### **Views of the Hong Kong Bar Association**

1. The Hong Kong Bar Association (“the Bar”) has been invited by the Constitutional Development Task Force (“the Task Force”) to express its views on its Fourth Report on the Views and Proposals of Members of the Community on the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008 (“the Fourth Report”).
2. While the Bar did not express any views on the Task Force’s Third Report (which sought to solicit views and proposals from the Hong Kong public on how the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 might be amended), the Bar considers that the Fourth Report raises matters of constitutional and legal significance that deserve comment for the purpose of fostering open, proper and rational debate.
3. The Bar addresses the following questions in its views of the Fourth Report:
  - (a) Whether corporate voting in the Election Committee for the Chief Executive and in functional constituencies for returning members of the

Legislative Council should be abolished (*Paragraph 3.22(4); Paragraph 4.24(4)*);

(b) What principles and criteria should be used when considering adjustment to the composition of the sub-sectors of the Election Committee for the Chief Executive and reorganization of functional constituencies for returning members of the Legislative Council (*Appendix III: Chief Executive, para (4); Legislative Council, para (4)*);

(c) Whether functional constituencies for returning members of the Legislative Council should be retained or abolished in the long run (*Appendix III: Legislative Council, para (6)*);

(d) Whether Hong Kong should explore different forms of universal suffrage (*Appendix III: Legislative Council, para (6)*); and

(e) Whether a timetable can be set for the selection of the Chief Executive by universal suffrage and for the forming of the Legislative Council by universal suffrage (*Appendix III: Chief Executive, para (6); Legislative Council, para (6)*).

## The Constitutional Framework

4. Any discussion of these questions must proceed from a proper understanding of the constitutional framework, especially the guarantees of fundamental rights, within which the political system of the HKSAR operates.
5. Article 3 of the Basic Law of the HKSAR provides that the executive authorities and the legislature of the HKSAR shall be composed of permanent residents of Hong Kong in accordance with the relevant provisions of the Basic Law.
6. Article 4 of the Basic Law of the HKSAR requires the HKSAR to safeguard the rights and freedoms of HKSAR residents and other persons in the HKSAR in accordance with law.
7. Article 11 of the Basic Law of the HKSAR provides that the systems and policies practiced in the HKSAR, including the system for safeguarding the fundamental rights and freedoms of its residents, the executive and legislative systems, and the relevant policies, shall be based on the provisions of the Basic Law. No law enacted by the legislature of the HKSAR shall contravene the Basic Law.

8. Article 26 of the Basic Law of the HKSAR provides that permanent residents of the HKSAR shall have the right to vote and the right to stand for elections in accordance with law.
  
9. Article 39 of the Basic Law of the HKSAR provides that the provisions of the International Covenant on Civil and Political Rights 1966 (“the ICCPR”) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR; and that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the ICCPR as applied to Hong Kong.
  
10. One of the provisions of the ICCPR is Art 25(b), which guarantees to every citizen the right and the opportunity, without specified distinctions and without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
  
11. Article 25(b) of the ICCPR applies to Hong Kong without qualification or modification, notwithstanding a reservation entered by the United Kingdom, which sought to disapply that provision to Hong Kong in so far as it required

the establishment of an elected Executive or Legislative Council in Hong Kong. This is because, as Keith J observed in Lee Miu Ling & Anor v AG (No 2) (1995) 5 HKPLR 181, the reservation only gave the governmental authorities a free hand to decide how persons could become members of the Legislative Council, but once it had decided to provide for a wholly elected Legislative Council, the reservation was, to the extent that it related to the Legislative Council, a dead letter and could not be used to justify a departure from the rights guaranteed by Art 25(b).

12. The Bar is of the view that in so far as elections held in Hong Kong in relation to the office of the Chief Executive are concerned, the reservation mentioned above has no application. This is because reservations to an international convention on human rights are to be construed narrowly; see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentaries* (2nd Ed) (OUP, 2004) [25.12] and [25.13]. The office of Chief Executive is a political office. It is distinct from the collegiate decision-making body of the Executive Council, and for this reason, arguably, is not subject to this reservation which, after all, was entered by the colonial power to impose constraints on the government of Hong Kong that it thought necessary at the time.

13. The Court of Final Appeal considered in Gurung Kesh Bahadur v Director of Immigration (2002) 5 HKCFAR 480 the relationship between the ICCPR as applied in Hong Kong under Art 39 of Ch III of the Basic Law of the HKSAR and the rights provided in other provisions of Ch III. The Chief Justice held that the ICCPR as applied to Hong Kong as incorporated in the Hong Kong Bill of Rights only provided for minimum standards for rights which are internationally recognized. The Basic Law of the HKSAR could provide for rights additional to such minimum standards. (See Clark v. Kelly [2003] 2 WLR 1586 (PC) at 1616C-F for an example of an existing legal system providing better guarantees than those required as a minimum under a constitutional instrument.)
14. On this basis, the Chief Justice held that where a right, such as freedom of movement, was conferred by the Basic Law in addition to those provided for by the ICCPR as applied to Hong Kong, Art 39(2) of the Basic Law did not imply that such rights may be freely qualified or limited simply by restrictions which are prescribed by law. Whether a right conferred by the Basic Law only could be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue, a matter which, as the Chief Justice held, turned on “the proper interpretation of the Basic Law and is ultimately a matter for the courts”, which “have the duty of safeguarding

and protecting [the rights] by adopting a generous approach to their interpretation”.

15. The Bar is of the view that it is wrong simply to assume that the right to vote of permanent residents of the HKSAR provided under Art 26 of the Basic Law of the HKSAR is identical to or less generous than that provided under Art 25(b) of the ICCPR as applied to Hong Kong. A generous interpretation of Art 26 of the Basic Law is to provide for the fullest and most meaningful extent of protection of the right to vote of HKSAR permanent residents within the framework set out in the Basic Law (including interpretations to its provisions by the Standing Committee of the National People’s Congress (“NPCSC”) under Art 158 thereof) for elections held for the selection of the Chief Executive and elections to form the Legislative Council. This is in addition to the minimum guarantee provided under Art 25(b) of the ICCPR as applied to Hong Kong.
  
16. The provisions discussed above are obviously part of the Basic Law of the HKSAR. The Bar considers that they are provisions essential to a constitutional implementation of the processes provided for in Arts 45 and 68 and Annexes I and II of the Basic Law and the Interpretation of the NPCSC of 6 April 2004 of the Art 7 of Annex I and Art III of Annex II of the Basic Law.



### Corporate Voting

17. The Bar is of the view that corporate voting in the Election Committee for the Chief Executive and in functional constituencies for returning members of the Legislative Council should be abolished.
  
18. Simon Young and Anthony Law have, in their paper entitled *A Critical Introduction to Hong Kong's Functional Constituencies* (Civic Exchange, July 2004), demonstrated the anomalies of corporate voting. The current system of corporate voting, they indicated, is “open to abuse and manipulation in ways that compromise the basic tenets of an electoral system”. Individual electors in a functional constituency that permits corporate voting are not treated on par with corporate electors. Rather, corporate electors have an unfair advantage over individual electors. This comes about as a result of the application of disqualifications and residence requirements to the authorized representative of the corporate elector, as opposed to the directing minds of the corporate elector, and tolerance of the electoral system of “packing” of functional constituencies by a corporate elector with associated or controlled electors, which increases the influence of a corporate elector at the expense of other corporate electors and individual electors.

19. The Bar considers that the arguments of Simon Young and Anthony Law against corporate voting in functional constituencies in Legislative Council elections are equally applicable to corporate voting in elections to return members in sub-sectors of the Election Committee for the Chief Executive.
20. The arguments of Simon Young and Anthony Law against corporate voting are, in the Bar's view, cogent. Applying the Court of Appeal's test in Lee Miu Ling & Anor v AG (No 2) (1995) 5 HKPLR 585, the Bar considers the HKSAR Government will find it difficult to justify that corporate voting is a justifiable form of differential treatment by showing that (a) sensible and fair-minded people would recognize a genuine need for some difference in treatment; (b) the difference embodied in the particular departure selected to meet that need is itself rational; and (c) such departure is proportionate to such need.

Principles and Criteria for Adjustment of Sub-sectors in the Election Committee for the Chief Executive and Reorganization of Functional Constituencies for Returning Members of the Legislative Council

21. The Bar considers that both Art 26 of the Basic Law of the HKSAR and Art 25(b) of the ICCPR apply to ensure that any adjustment of sub-sectors in the Election Committee for the Chief Executive and any reorganization of

functional constituencies for returning members of the Legislative Council will conform to the principle of equal suffrage (which is exemplified in the expression of “one person, one vote).

22. Differences in the sizes of sub-sectors in the case of the Election Committee for the Chief Executive, or of functional constituencies in the case of the Legislative Council election, will be scrutinized against the principle of equal suffrage, applying the test of the Court of Appeal in Lee Miu Ling & Anor v AG (No 2) (above). The consideration, which Keith J accepted in Lee Miu Ling & Anor v AG (No 2) (above) in 1995, that Art 25(b) of the ICCPR did not at the *embryonic* stage in the development of Hong Kong’s electoral process, require the number of representatives of such sectional interests in the Legislative Council to be in proportion to the size of the constituencies, may not be given the weight it deserved ten years ago when the Basic Law was not yet in force.

#### Functional Constituencies in the Long Run

23. The UN Human Rights Committee, in its General Comment on Art 25 of the ICCPR, makes it clear that ‘in accordance with “universal and equal suffrage”, the principle of one person, one vote should be respected, and each person’s vote should have equal weight “within the framework of each state’s electoral system” (General Comment No 25, 57<sup>th</sup> Session, 12 July 1996).

24. Functional constituencies were observed by the UN Human Rights Committee in 1995 to be giving “undue weight to the views of the business community” and discriminating “among voters on the basis of property and functions”, and in violation of Art 25(b) of the ICCPR. See Joseph, Schultz and Castan (above) [22.25] and UN document.(1995) CCPR/C.79/Add. 57, para 19. See also Evatt, *The Human Rights Committee’s General Comment on Article 25*, in Ando (ed), *Towards Implementing Universal Human Rights* (Martinus Nijhoff, 2004) pp 192-193 (which cited Hong Kong and Morocco as examples of countries having an electoral system which, by reason of the system giving some individuals additional voting rights, was held by the UN Human Rights Committee to be incompatible with equal suffrage).
25. Functional constituencies were protected from being held invalid for their violation of Art 25(b) of the ICCPR by the Hong Kong courts prior to 1 July 1997 because of the special provision in the Letters Patent Art VII(3) precluding challenges to their validity.
26. The Basic Law of the HKSAR does not contain a provision similar to, or having the effect of, Letters Patent Art VII(3). Article 68 and Annex II of the Basic Law (as interpreted by the NPCSC on 6 April 2004) do not expressly

prescribe the continuation of functional constituencies in the forming of the Legislative Council beyond the 3rd term Legislative Council. The NPCSC Decision of 26 April 2004 however seeks to maintain for the 4th term Legislative Council functional constituencies in the same percentage of returned seats as that prescribed for the 3rd term Legislative Council.

27. The Task Force has adopted the approach that proposals that are inconsistent with the provisions of the Basic Law of the HKSAR and the NPCSC Decision of 26 April 2004 will not be processed further. The rationale is understandable but the Task Force needs to explain the legal reasoning behind a decision not to take up a suggestion that appears to its members to be inconsistent with these principles.
  
28. The Task Force has also not explained why it has raised as a follow-up question the issue of whether functional constituencies should be retained or abolished in the long run without setting out in context the international and bilateral (i.e. with the United Kingdom) commitments of the People's Republic of China and the obligation of the HKSAR under the Basic Law of the HKSAR to safeguard the right to vote and political participation through universal and equal suffrage.

29. The Task Force has further not explained why the Report of the Chief Executive to the NPCSC on Whether the Methods of Selecting the Chief Executive in 2007 and Forming the Legislative Council in 2008 was in Need of Amendment dated 15 April 2004 failed to refer to Arts 3, 4, 11, 26, 39 of the Basic Law of the HKSAR and Art 25(b) of the ICCPR, and the Concluding Observations of the UN Human Rights Committee in 1995 (above); why the Decision of the NPCSC of 26 April 2004 made no reference to those articles and the Concluding Observations; and why the speech of Mr Qiao Xiaoyang, Deputy Secretary General of the NPCSC, in Hong Kong on 26 April 2004 had not mentioned what role those articles and the Concluding Observations played in the making of Decision of the NPCSC of 26 April 2004.
30. The Task Force should explain how the Decision of the NPCSC of 26 April 2004, which seeks to maintain and not abolish the system of functional constituencies that was condemned by the UN Human Rights Committee long ago in 1995, was in substance consistent with the protection accorded to fundamental rights including the right to vote of HKSAR permanent residents under Arts 3, 4, 11, 26 and 39 of the Basic Law of the HKSAR and the international and bilateral commitments of the People's Republic of China in the continued application and observance of the ICCPR.

31. The Bar takes the view that functional constituencies should not only be abolished in the long run, they should be abolished as soon as is practicable.

#### Different Forms of Universal Suffrage

32. The Bar considers that it must be stressed that the Task Force raises the follow-up question of exploring different forms of universal suffrage in the context of Art 68 of the Basic Law of the HKSAR and thus the method of forming the Legislative Council.
33. It cannot possibly be disputed that the prescription in Art 45 of the Basic Law of the ultimate goal of universal suffrage for selection of the Chief Executive involves a transition from indirect election to direct election, namely from election by a committee of electors returned from different sectors of the community to election by permanent residents of the HKSAR as an electorate without sub-divisions. See Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, 2001) pp 276-277.
34. The Bar accepts that there can be a number of different electoral methods for forming a legislative assembly that implements the choices expressed in the

right to vote. However, in exploring the merits of different electoral methods that implement the principle of universal suffrage set out as the ultimate goal in Art 68 of the Basic Law of the HKSAR, it must be remembered that the right to vote of all citizens or permanent residents, which is guaranteed under Art 26 of the Basic Law, necessarily implicates not only the universality of the suffrage but also the equality of the suffrage.

35. The right of political participation guaranteed under Art 25(b) of the ICCPR requires the suffrage to be both universal and equal, and not subject to distinctions such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and unreasonable restrictions. Therefore, a method of suffrage that accords different weight in counting or provide for a disguised form of functional constituencies through an additional vote does not arguably implement the right to vote of permanent residents and the right to political participation guaranteed under the Basic Law and becomes liable to constitutional challenge.

#### Timetable for Constitutional Development

36. The Bar wishes to point out that the Interpretation of the NPCSC dated 6 April 2004, which introduces the process of the Chief Executive making a report to the NPCSC as regards whether there is a need to make an amendment to the



methods for selecting the Chief Executive and for forming the Legislative Council, followed by the NPCSC making a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly process on the question of existence of need to make an amendment, does not constitute a bar to the formulation of a timetable for constitutional development. This is because the role of the NPCSC under the said process, while sovereign and substantive, is nonetheless only confirmatory. The legal process under the Interpretation of the NPCSC dated 6 April 2004 does not preclude political discussion and exchange and the creation of a consensus that all concerned in the Mainland and Hong Kong can work towards.

Dated 18<sup>th</sup> March 2005

Hong Kong Bar Association