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14 January 2004

BY HAND

The Hon Donald Tsang, GBM, JP
Chief Secretary for Administration
Central Government Offices,
Lower Albert Road,
Hong Kong.

Dear Secretary,

Thank you for your letter of 9 January 2004 inviting views on behalf of the "Task Force" appointed by the Chief Executive.

The significance of your impending visit to Beijing to consult the Central People's Government is a matter of great concern to the Hong Kong public including the Article 45 Concern Group. We are unable to understand the nature or the need of your mission. It is not without cause seen as a prelude to delays and obstacles to the consultation on constitutional development.

On behalf of the Article 45 Concern Group of which the Hon Audrey Eu, SC and myself are members, I would like to ask for a meeting with you at your earliest convenience before your departure for Beijing.

A copy of the press statement we made yesterday and the pamphlet we published in November 2003 on Article 45 and Annex I of the Basic Law are herewith enclosed for your information.

Yours sincerely,

(Signed)

Margaret Ng

Encl.

c.c. (1) Ms. Leung Oi Sie, Elsie, GBM, JP
Secretary for Justice

(2) Mr. Lam Sui Lung, Stephen, JP
Secretary for Constitutional Affairs

MIN/kc

基本法四十五條關注組聲明

1. 基本法四十五條關注組與絕大多數香港市民一樣，對於董建華先生未能於施政報告中宣佈一個政制發展的時間表，感到失望。從去年七月一日五十萬名市民上街遊行，十一月的區議會選舉，以至今年元旦日再有十萬人上街遊行，均反映香港市民對於民主訴求已清楚不過，渴望能在 2007 年實現普選行政長官及 2008 年普選立法會。
2. 關注組尤對於董先生所說在未作出任何政制檢討的安排前，先要派出“專責小組”前往北京聽取中央政府對政制檢討的關注，以及徵詢中央政府對於《基本法》內有關政制發展的原則和程序的意見，感到不安，因為實在難以想像這些關注的性質是甚麼。《基本法》早已訂明有關政制發展的原則，而且這些原則亦已廣為人知且清晰不過。
3. 在這情況下，難免令香港人疑慮行政長官的程序其實只是一種拖延，阻礙期待已久的政制改革。尤其擔心的是會藉此變相為政制改革附加一些《基本法》所無額限制，甚至事先否決 2007 和 2008 年的普選的訴求。
4. 2007 和 2008 年實行普選行政長官和立法會是完全符合《基本法》。《基本法》已設定有關政制發展的框架，不容偏離或違背。
5. 《基本法》45 及 68 條已明確容許推行普選。唯一的條件，是行政長官和立法會的產生辦法須根據香港[的“實際情況”以及按“循序漸進的原則”而規定。我們相信香港的實際情況顯然適切實行普選，但無論如何，到底香港的實際情況是否適切於 2007 年實行普選行政長官，應要透過諮詢決定。我們相信關注組早前印製第一號意見書，已能符合循序漸進推行普選的原則，我們建議把現行的選舉委員會，改為提名委員會，是對現行制度作出局部改善，至於要達至完全民主的普選行政長官，則留待日後的繼續發展。但無論如何，要經甚麼階段最終全面實現第 45 條的目標，應要透過全面諮詢決定。
6. 我們肯定中央政府對於香港的政制發展，是有一定的角色，但《基本法》並無要求在進行政制發展諮詢之前，必須先獲取中央政府的首肯。這從附件一和附件二有關政制改革的部分便可明瞭，其中尤特別訂明全國人大常會在行政長官和立法會選舉中所扮演的不同角色。這亦是我們認為要尊重“一國兩制”和“高度自治”這兩項重大原則的精髓。
7. 我們相信嚴格維護《基本法》條文提出的原則，包括上述原則，重要性是無

可比擬。

8. 我們促請特別行政區政府承諾，向中央充分及如實反映香港居民的意見，同時承諾，就中央表達的意見諮詢香港居民。為此，我們會盡早約見專責小組。
9. 我們承諾竭盡所能，令香港公眾的意見得到表達和蒐集，包括即將由《基本法》45 條關注組設立網站。

2004 年 1 月 13 日

Press Statement of the Article 45 Concern Group

13 January 2004

1. With the vast majority of the Hong Kong public, Article 45 Concern Group is disappointed in Mr Tung Chee-hwa's failure to announce a timetable on constitutional development in his policy address. The wishes of the public has already been made clear beyond doubt in the march of over 500,000 people on 1 July and in the district elections in November last year, and reaffirmed on New Year's Day 2004 when 100,000 took part in the march for democracy. The evidence is overwhelming that the community wants to see the CE and all LegCo members elected by universal suffrage in 2007 and 2008 respectively.
2. The Concern Group is disturbed by the announcement that Mr Tung is sending a "Task Force" to Beijing to hear the concerns of CPG and to consult CPG on the principles and procedure on constitutional development under the Basic Law, before any arrangements for the consultation exercise can be made. It is difficult to envisage what the nature of these concerns may be which would require the process Mr Tung proposes to follow. The principles stipulated in the Basic Law on constitutional development are well-known and perfectly plain for all to see.
3. In these circumstances, there is justification for the concern in Hong Kong that the proposed process might be a prelude to delays and obstacles for the long-awaited constitutional reform. In particular, the deep concern is that the process might be used to put in additional restrictions which are not in the Basic Law, or to deny the people's wish for universal suffrage in 2007 and 2008.
4. The election of the CE and LegCo by universal suffrage in 2007 and 2008 respectively are entirely consistent with the Basic Law. The Basic Law has provided a framework for development and should not be derogated from.
5. Universal suffrage is expressly permitted by Articles 45 and 68. The only conditions stipulated are that the method of selecting the CE and the method of formation of LegCo must be "specified in the light of the actual situation" in Hong Kong, and "in accordance with the principle of gradual and orderly progress". We believe that the actual situation in Hong Kong justifies universal suffrage; but in any event, whether the election of the CE by universal suffrage in 2007 is justified in the actual situation in Hong Kong is a matter for determination through consultation. We believe that the sample models provided in our

pamphlet Opinion No.1 conform with the principle of gradual and orderly progress, in that converting the present Election Committee into the Nomination Committee improve on the present system while leaving the attainment of a fully democratic election of the CE to future development. In any event, it should be left to be determined in the light of consultation what the stages of future development should be until the ultimate goal provided in Article 45 is fully attained.

6. We are sure that the CPG has a role to play in the constitutional development here in Hong Kong. However, the Basic Law has never suggested anywhere that such constitutional development could only be contemplated with the CPG's prior consent. This is to be gleaned from the way in which political change is envisaged in Annex I and Annex II and in particular, the marked difference in the role played by the NPCSC in relation to the selection of CE and the election of LegCo. It is our respectful view that this is the very essence of the grand concept of "One Country, Two Systems" and a "High Degree of Autonomy" promised to Hong Kong.
7. We believe that it is of the utmost importance that the principles provided in the Basic Law, including the above, are rigorously maintained.
8. We urge the HKSAR Government to undertake that and the views of Hong Kong residents are fully represented in any discussion with CPG. HKSARG should also undertake to consult Hong Kong residents on views expressed by CPG during the process. We will seek an early opportunity to meet with members of the "Task Force" for this purpose.
9. We pledge to do our best to facilitate the expression and collation of views from members of the public in Hong Kong, including by means of a new website to be set up shortly by Article 45 Concern Group

這份意見書旨在於解答從法律觀點看，《基本法》是否容許在 2007 年普選行政長官，假若容許的話，達到這個目標必須通過甚麼法律程序。至於怎樣推進這個目標，又或甚麼是最理想的普選模式等政治議題，則不在意見書範圍之內。

要在 2007 年實現普選行政長官，是否需要修改《基本法》？

不需要。《基本法》第 45 條列明下述三點：

- (a) 香港特別行政區行政長官通過選舉或協商產生，由中央人民政府任命；
 - (b) 行政長官的產生辦法根據香港特別行政區的實際情況，和循序漸進的原則而規定，最終達至一個有廣泛代表性的提名委員會按民主程序提名後普選產生的目標。
 - (c) 行政長官產生的具體辦法由附件一規定。
- “產生”一詞包括“通過選舉”。

對於普選行政長官的方式，第 45 條有沒有任何限制？

有的；限制是行政長官必須由“一個有廣泛代表性的提名委員會提名”後普選產生。

這個限制會不會令所謂由“普選”產生行政長官的辦法，其實並非真正民主？

倘若提名受到很大的局限，例如藉有關程序剔除持有某類政治信念的候選人，“普選”便會有名無實。但若提名委員會只具有有限角色，不能

阻礙任何取得合理程度的公眾支持的合資格候選人參選，便不會造成名不副實的後果。《公民權利和政治權利國際公約》第 25 條訂明，有關選舉必須保證選民意願得到自由表達，這項原則是應顧及的因素。

按照《基本法》，最早可以在甚麼時候實行普選？

《基本法》只提出兩項條件，就是行政長官的產生辦法須根據香港特別行政區行政區的實際情況和循序漸進的原則而規定。這兩項條件均不制止在 2007 年普選行政長官。

《基本法》附件一有沒有訂明在甚麼時候可以實行普選？

附件一第七段指出“二〇〇七年以後各任……”行政長官的產生辦法如有需要可作修改（現行辦法是由 800 人的選舉委員會選出）。“2007 年以後”的意思並不是指日曆年分，而是指在 2007 年 6 月 30 日後屆滿的第二任行政長官之後。上述的理解與當年《基本法》起草委員會主席姬鵬飛先生於 1990 年 3 月 28 日第七屆全國人民代表大會上的講話吻合：“行政長官的產生辦法……在 1997 年至 2007 年的十年內，由有廣泛代表性的選舉委員會選舉產生，此後如要改變選舉辦法……”十年期限，由 1997 年 7 月 1 日開始，到 2007 年 6 月 30 日便告終結。

要在 2007 年實行普選行政長官，是不是必須修改附件一？

不須。行政長官的產生辦法在《行政長官選舉條例》訂明；修改這項條例的條文，已能達到修改選舉辦法的效果，只要有關修訂經立法會

全體議員三分之二多數通過，行政長官同意，並報全國人民代表大會常務委員會批准，就已符合附件一第七段的規定。

上述程序要用多少時間？

要看實際情況。草擬有關的修改其實不難，只要社會對於 2007 年普選行政長官的辦法能達成共識，例如同意採納以現行架構作最少改動的模式，包括將現行的選舉委員會變為提名委員會，同時規限其作用為提名任何獲得百分之五委員會成員提名的候選人，或授權立法會提名任何獲得（比方說）5 位立法會議員簽名支持的候選人。然而，需要多少時間才能達成共識，就完全得看你和我了。

二零零三年十一月

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This opinion addresses only the legal questions whether it is possible under the Basic Law to have a Chief Executive ("the CE") elected by universal suffrage in 2007 and if so, what legal steps are necessary to achieve that goal. This opinion does not address the political question as to how that goal is to be achieved or what is the best model to be adopted.

Does the Basic Law need to be amended for the CE to be elected in 2007?

No. Article 45 of the Basic law specifies 3 points: -

- (a) The CE of the Hong Kong SAR shall be "selected by election or through consultations" and appointed by the Central People's Government
- (b) The method of selection shall be specified *in light of the actual situation* and in accordance with *the principle of gradual and orderly progress*. The ultimate aim is the selection of the CE *by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures*.
- (c) The specific method for selecting the CE is as set out in Annex 1.

The word "selection" includes "by election".

Does Article 45 put any restrictions on the possible forms of election by universal suffrage of the CE?

Yes. The election of the CE by universal suffrage has to be "upon nomination by a broadly representative nomination committee".

Would this restriction make the so-called "universal suffrage" election of the CE in fact not truly democratic?

Yes if the nomination is very restrictive, e.g. if the process amounts to screening out candidates of certain political convictions. No if the nomination committee's role is limited and eligible persons with reasonable popular support are not blocked. A relevant consideration is Article 25 of the International Covenant on Civil and Political Rights, which provides that the election must guarantee the free expression of the will of the electorate.

When can universal suffrage be introduced as far as the Basic Law is concerned?

The only qualifications are that the method for selecting the CE is to be specified *in the light of the actual situation* of the HKSAR, and in accordance with *the principle of gradual and orderly progress*. Neither qualification prohibits universal suffrage being introduced to enable the CE to be elected in 2007.

Does Annex 1 say when universal suffrage can be introduced?

Paragraph 7 of Annex 1 says that the existing method of selection of the CE (i.e. election by the Election Committee of 800) can be changed "*for the terms subsequent to the year 2007...*" if there is need to do so. The words "subsequent to" refer not to the calendar year 2007 but the term of office of the CE immediately after the 2nd term expiring on 30 June 2007.

Our interpretation is consistent with what Mr Ji Pengfei, the then Chairman of the Drafting Committee for the Basic Law said in his address to the 7th National People's Congress on March 28, 1990: "In the ten years between 1997 and 2007, the Chief Executive will be elected by a broadly representative election committee. If there is a need to amend this method of election after that period, such amendment must be made....." The ten year period began with 1 July 1997 and will end on 30 June 2007.

Does Annex 1 have to be amended for the election of the CE by universal suffrage to take place in 2007?

No. As the method for selecting the Chief Executive is set out in the Chief Executive Election Ordinance, amendments to the method can be achieved by amending the provisions of this Ordinance. So long as the amendments are supported by two-thirds of all members of the Legislative Council, the Chief Executive gives his assent to the Ordinance as amended and the Ordinance as amended is reported to the Standing Committee of the NPC for approval, the

requirements of paragraph 7 of Annex 1 will be satisfied.

How long is this process likely to take?

It depends. Drafting the amendment is straightforward if there is consensus on the method to achieve universal suffrage in 2007, e.g. by adopting a model based on minimum change to the existing system such as by converting the Election Committee to a nomination committee whose only function is to nominate any candidate with endorsement of 5% of its members, or by giving power to LegCo to nominate any candidate with endorsement of say, 5 members. How long it will take us to achieve this consensus is all up to us.

November 2003

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