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From:
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To: views@cab-review.gov.hk
Subject: Some views on constitutional development

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Attached herewith is my view on some of the questions you posted in the internet.

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Some views on constitutional development:

A3. How could the development of HK's political structure (1) meet "the interests of the different sectors of society"?

Views: It is one of the cardinal principles of democracy that the will of people from every sector of the community should be allowed to be expressed in genuine elections. Article 21(3) of the UN's "Universal Declaration of Human Rights" states that "**The will of the people** shall be the basis of the authority of government; this will **shall be expressed in periodic and genuine elections** which shall be **by universal and equal suffrage** and shall be held by secret vote or by equivalent free voting procedures."

If LegCo elections are based solely on geographical constituency elections, the views of minorities would not be adequately reflected. This is because the size and population of each of the 5 geographic constituency areas for LegCo election are quite large, and people of all walks of life live together in the sense that they mix with other in any geographic constituency area. As a result, voters' views from any of the 30 functional constituencies (and any minority group, e.g., the handicapped, ethnic minorities) must not be the majority view in the eyes of a LegCo Member representing voters of his geographical constituency area. It is, therefore, natural or most likely that the minority voters' view will not be fully reflected by the LegCo Member who has been elected on a geographical constituency election system. It would be more prominent if the minority view and interest crushes with that of the majority. The inescapable consequence is that the will of these "minority" voters will not be adequately "expressed in . . . genuine election(s)" which is

required under Article 21(3) of the UN's Universal Declaration of Human Rights.

In order to fully ventilate these voters' will and expression, election through a modified or universal functional constituency election method is a viable way to allow them to enjoy the basic human rights that they should enjoy. The author argues that the abolition of the current functional constituency (hereinafter referred to as "FC") election without replacement of a modified form of FC election would make the purely geographical constituency election system conflicting with the spirit of Article 21(3) of the UN's Universal Declaration of Human Rights and possibly the spirit of Article 68 of the Basic Law. Clear examples of neglect of minority interests by geographical constituency election system can be seen by the inability of ethnic minorities and housewives to influence the LegCo geographical constituency elections.

The author suggests that there are ways to make FC election fully complies with the provision of Article 68 of the Basic Law, i.e., universal suffrage. Examples are: (a) "one person two votes" by direct elections (in two separate geographical constituency election system and functional constituency election system) and (b) "one person two votes" by direct election on geographical constituency basis and indirect election on functional constituency basis. This list is not exhaustive but is only a short list that the author thinks viable at the moment.

Under these methods, every voter is entitled to have equal number of votes and can freely participate in both geographical and functional constituency elections. The requirements of "universal suffrage" are therefore satisfied.

Naturally, preliminary survey on the preference of potential voters in the proposed universal FC election must be made so that new functional constituencies could be formed to cater for the need of all voters in the proposal.

A3. How could the development of HK's political structure (2) "facilitate the development of the capitalist economy"?

Views: It can be achieved through a political structure that favours capitalism. A legislature (and Executive Council) that reflects the views of capitalist would achieve that aim. As for the CE has wide discretion in the appointment of Executive Council Members, he can easily appoint persons who are beneficial to the development of capitalist economy as Executive Council Members. The election of Legislative Council Members is more problematic as its mode of election is governed by Article 68 and Annex II of the Basic Law.

As radical changes are difficult to be accepted, the slightest change which can achieve the aim of facilitating the development of capitalism is to adopt the above universal functional constituency election but with a strong favouritism towards the business and industrial community.

Such favouritism can be achieved by making the business and industrial community greater weights in their votes, i.e., lesser number of voters can be represented by a LegCo seat. Such inequality of voting power is legal under Article 68 of the Basic Law as the word "equal" is absent from the term "universal suffrage". Moreover, in *Lee Miu Ling v anor v AG*, CACV 145/1995, the Court of Appeal held that functional constituency election was legal, despite of the fact that (a) some voters had votes

in functional constituency election and geographical constituency election while others only had votes in geographical constituency election; and (b) the number of voters in the Community, Social and Personal Services Functional Constituency was 12487 times greater than that of the formerly Regional Council Functional Constituency. Such disparity of voting power was considered legal. The Court of Appeal in 1995 also ruled that there was no requirement of literal equality and went further to say that rigidly applying literal equality "would subvert rather than promote true even-handedness" and departure from literal equality would be justified if there was "genuine need for some difference of treatment" and if the departure was "rational" and "proportionate to such need". Furthermore, foreign courts also share the view that inequality of voting power is not necessarily undemocratic: The Supreme Court of Canada in *Carter v Saskatchewan (AG)* suggested that "Factors like geography, community history, community interests and minority representation (might) need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic" (1991 CRR Lexis 24, per McLachin J).

B1. What is the most appropriate legislative procedure for amending the methods for selecting the CE and forming the LegCo set out in Annexes I & II?

Views: It is clear from §7 of Annex I & Part III of Annex II of the Basic Law that amending Annexes I & II and local legislation is needed.

B1. Do we need to follow the procedures set out in Article 159 of the Basic Law, if we amend the methods for selecting the CE or forming the LegCo as specified in Annexes I & II of the Basic Law?

Views: We must follow the procedure set out in Article 159 of the Basic Law as Annexes I & II are part of the Basic Law. It cannot be convincingly argued that "this Law" in Article 159 only refers to the 160 articles and the preamble.

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

Views: The word "year" (年) means a year according to the Gregorian calendar' (section 3 of the Interpretation and General Clause Ordinance Cap. 1. Although section 2(1) of Cap. 1 states that Cap. 1 applies to ordinances, it is arguable that the same meaning in section 3 should apply to other legislation concerning Hong Kong as there is no statutory meaning in the Basic Law which is contrary to the meaning specified at section 3 of Cap. 1. On the other hand, it is too artificial to say that "the year 2007" only refers to part of 2007. Moreover, "subsequent" means "coming after" according to Longman Dictionary of English Language and Culture 2003 and Concise Oxford Dictionary 10th edition. The phrase "subsequent to" (and " " in Chinese), therefore, does not allow any date in 2007 (say 1st August 2007) to be understood as "subsequent to the year 2007".

(from CHAN Chi Keung, 24 Feb. 2004)