

Speaking Note of the Article 45 Concern Group for the meeting with the Task Force

1. Legislative procedures for effecting change in the method for electing the Chief Executive and the Legislative Council, whatever they may be, clearly exist to facilitate the change. There is no need to spend time on them since no-one has suggested departing from the Basic Law.
2. BL Article 45 contains 2 guiding principles relevant to specification of the method for selecting the Chief Executive; "in the light of the actual situation in the HKSAR" and "in accordance with the principle of gradual and orderly progress". "Gradual and orderly progress" is imprecise whereas the actual situation is easily seen. The former has to be read and understood in the light of the latter when the actual situation demands a change in method.
3. The Task Force should focus on explaining the actual situation in Hong Kong to the Central People's Government. No-one from the HKSAR Government has ever spoken up for let alone defended the high degree of autonomy of the HKSAR. It is time they did so. The Task Force has to tell the CPG unequivocally that the vast majority of people in Hong Kong want universal suffrage now.
4. The current system of Government is dysfunctional; it does not work. The system of selection of the Chief Executive has given him constitutional and legal authority but no political or moral authority because of the method of his selection. This is an indisputable fact. In the past, we have adopted a pragmatic approach and have not waited

to develop the perfect model of government in making constitutional changes. This one has been tried for more than 6 years. It is a failure.

5. The system is also seen to be unfair in that the Chief Executive is "selected" by a small circle as are the functional constituency representatives in LegCo. The functional constituency system means that a small portion of the electorate have at least 2 Legco representatives whereas a substantial majority have only one. The voting procedures provided for in Annex II make it possible for the minority in the functional constituencies to frustrate the majority of representatives voted in by the electorate as a whole. The inequities in the current system of functional constituencies are legion. The consequence of these defects in the structure is that the HKSAR Government is out of touch with the citizens.

6. The Task Force must also reflect to the Central People's Government the positive consequences if a change to universal suffrage is allowed and the negative consequences if it is not. No report of the actual situation in Hong Kong would be complete without an assessment of the adverse consequences to Hong Kong if universal suffrage is denied to Hong Kong people yet again.

7. If the CPG were to announce that in principle they have no objection to election by universal suffrage of the CE in 2007 and LegCo in 2008, this would be a positive boost to Hong Kong and to the CPG. Specific methods can be left to Hong Kong to decide after which the mechanics must follow the procedures laid down in Annexes I and II. Whatever those procedures are, discussion and debate on the

specific methods of election, nomination and removing obstacles to democratic development should take place now.

8. As for the consultation process, a minimum requirement is that it be totally transparent. Persons consulted should expect to be named and have their views published with attribution.

9. Although we consider the points in the Appendix to the Task Force Paper to be non-issues, we have addressed them briefly in the Appendix to these points.

Dated the 19th January 2004

Article 45 Concern Group

Appendix

A(1) *What legislative process should be used 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?*

It does not matter what legislative process is used so long as the method complies with the relevant paragraphs of Annex I and II respectively. It is clear in Annex I and II that part of the procedure takes place in the HKSAR, and another part takes place in the Standing Committee of the National People's Congress. Where the procedures involving the NPCSC are concerned it is hardly for the citizens of the HKSAR to dictate. An article of the Concern Group published in the Ming Pao Daily News on 16 January is attached.

(2) *Whether there is a need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used?*

No one has seriously suggested that there is a need to invoke Article 159. No one can seriously so suggest. This question should be dismissed as a red-herring.

(3) *Initiation of amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council*

Since this is part of the procedural aspect, so long as each part of the procedure is in accordance with the legal requirements for that procedure, this is unimportant. Initiation of amendments is not to be

confused with initiation of debate on the issues of substance. Where issues of substance are concerned, it does not matter who first called for a change in the methods, if a change is needed. This is not a constitutional issue. It is another red-herring.

B(4) *Whether the method for forming the third term Legislative Council as prescribed in Annex II may apply to the fourth term and subsequent terms of the Legislative Council*

Plainly, the method introduced for the 3rd term will continue until and unless it is amended according to Annex II. Does the Constitutional Affairs Bureau seriously suggest that there is any question of a "legal vacuum"?

(5) *How the phrase "subsequent to the year 2007" should be understood*

The complete phrase is "the terms subsequent to the year 2007" and this should not be tempered with. It plainly means the method of selection of the CE can only be changed subsequent to the 2nd term which ends on 30 June 2007, i.e. starting from the 3rd term. ~~It does not mean after the calendar year 2007 has ended.~~ This is the position the Government has already agreed to and announced in November 2003.

明 報

07/08普選 毋須改《基本法》

吳靄儀 《基本法》45條關注組

《基本法》45條關注組在去年11月發表的《第一號》意見書清楚指出，實行07年普選特首，毋須修改《基本法》，因為第45條已有明文規定，容許行政長官最終選至普選產生，毋須修改《基本法》，包括附件一。這是因為附件一的第7段說：

「07年以後各任行政長官的產生辦法如需要，須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。」

上述條文清楚說明，要修改的是07年以後各任行政長官的「產生辦法」，而不是附件一。由於行政長官產生辦法是在《行政長官選舉條例》訂明，所以要修改的是這項條例。

修改「產生辦法」 非修改附件一

有些人或會問，附件一第1至6段具體規定了行政長官的產生辦法是由一個800人組成的選委會選出，如果07年以後不再用這辦法，第1至6段豈不是要修改？答案是：不用修改。因為97至07年10年內，行政長官是根據第1至6段的辦法產生，這是歷史事實，不能改變，但07年以後的產生辦法，是根據第7段所賦予的權力而訂立的新辦法，而這個新

辦法要由人大常委會批准。

第7段所規定的程序有兩個部分，一個部分是在特區內進行的，理所當然按照特區的法程序；第二個部分是在全國人大常委會進行，相信會根據常委會的程序。我們可以想像，為了憲法的明確性，常委會的批准應有正式文書通告特區政府，跟其他的特區憲法文件一起刊載於特區的法典之中，不過這只是細節的技術問題，要達到目標，還可透過很多形式。

上述有關修改行政長官產生辦法的程序的分析，同樣適用於第68條及附件二之下的立法會產生辦法，不同之處在於：立法會產生辦法的修改，不需要經人大常委會「批准」，只須報人大常委會「備案」。

政制事務局給立法會的文件，毫無根據地提出「另一個觀點」，說附件一及附件

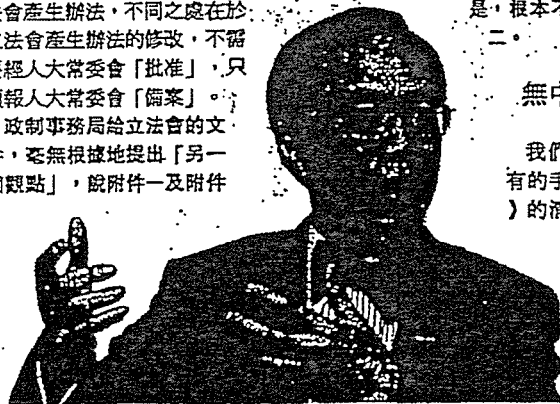
二需要修改，於是無中生有地產生了很多問題：究竟修改附件一和附件二是否必須按照第159條的修改《基本法》程序？如果須按照第159條，則程序繁重，與當年《基本法》起草委員會主席姬鵬飛先生的講話表明，用附件形式是為方便有需要時可靈活修改，互相矛盾；但如果不按第159條作修改，則與附件一、二是《基本法》的一部分這個事實相抵觸；而且，不按第159條修改，又按什麼條文修改？

這一連串問題，根本就是無中生有，庸人自擾，甚至故意亂人耳目，製造事端。事實是，根本不需要修改附件一和附件

無中生有 製造事端

我們必須強調，這種無中生有的手法，嚴重損害《基本法》的清晰明確性，損害公眾對

《基本法》的信心，而且由於《基本法》是香港的憲法文件，是一切法律的基礎，這種做法更是破壞法治。



(中文譯本乃吳靄儀議員在 28-1-12004
向立法會政制事務委員會提供)

《基本法》四十五條關注組與專責小組會面發言要點：

1. 《基本法》既然已有明文規定行政長官和立法會的產生辦法可透過某些程序作出修改，這些立法程序最終是甚麼模樣，只是次要的問題，根本毋須再花時間討論，因為沒有人建議要偏離《基本法》。
2. 《基本法》四十五條包含兩個有關行政長官產生辦法的指導原則：“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”。“循序漸進”難有精確的定義，但香港的實際情況卻清晰可見。當實際情況需要改變選舉辦法時，“循序漸進”便必須從“實際情況”作考慮。
3. 專責小組應著重向中央政府解釋香港的實際情況，政府官員從來沒有為特區的高度自治發言，更遑論捍衛特區的高度自治。現在是他們發言的時候了。專責小組必須清楚向中央政府轉達香港絕大部分市民都希望香港現在就有一人一票的普選。
4. 政府的現行機制可說已是無法運作。現行的行政長官產生辦法賦予行政長官憲制和法定的權力，但無法令他取得政治上或精神道德上的威信和支持，這是一個不爭的事實。過去我們事事講求務實，不暇等待政制改革先發展一套完善的管治模式，過去六年，已證明這個做法徹底失敗。
5. 目前的選舉制度是一個不公平的制度，已有目共睹，因為行政長官及立法會的功能組別都只由一個小圈子“選舉”。功能組別選舉變相令小部分選民在立法會可擁有兩名代表，而其他絕大部分市民則只有一位。附件二訂明的分組點票程序，更容許功能組別的議員所代表的少數，擊倒由直接選舉產生的議員所代表的大多數。現行的功能組別選舉制度所造成的不公平情況多不勝數，最終導致特區政府與民意脫節。

6. 專責小組時須向中央政府反映，容許實行普選會帶來的正面效果，以及不容許普選會造成的負面後果。任何向中央政府作出的匯報，倘沒有評估一再拒絕給予香港市民普選權利所帶來的負面後果，就不能算是就香港實際情況的全面匯報。
7. 我們深信，中央政府倘能宣佈原則上不反對在 2007 年和 2008 年實行行政長官和立法會普選，必能為香港和中央政府帶來積極的激勵。具體的辦法可留給香港決定，而制定有關機制亦必須遵從附件一和附件二所訂的程序。無論所涉程序是甚麼，現在是時候消除民主發展的障礙，展開對制訂有關的具體辦法的討論和辯論。
8. 至於諮詢過程，最低的要求是必須完全公開透明。所諮詢的人士應要具名，當局亦應公開所有收到的意見，及說明意見的來源。
9. 我們認為專責小組在其早前發表的文件的附錄中所提出的其實都是一些枝節問題，但我們亦願意在附件中簡略回應。

二〇〇四年一月十九日

〈基本法〉四十五條關注組

附錄

- A(1) 對《基本法》附件一及附件二中行政長官及立法會產生辦法的修改當用甚麼立法方式處理？

只要有關的辦法符合附件一和附件二的相關段落，究竟採用甚麼立法方式其實並不重要。附件一和附件二已清楚顯示，有關程序部分在香港特區政府進行，部分在全國人大常委會進行。涉及全國人大常委會的部分，香港特區的市民尤其不宜管喙。關注組在一月十六日《明報》刊登的文章，詳細表述了在這方面的看法，謹此附上以供參閱。

- (2) 如採用附件一和附件二所規定的修改程序，是否無須援引《基本法》第一百五十九條的規定？

從來沒有人切實地提出過需要援引第一百五十九條，因為這根本說不成立，這個問題屬子虛烏有。

- (3) 有關修改行政長官及立法會產生辦法的啓動

這是程序問題，只要符合有關的立法要求便可，餘者無關重要。啓動作出修改法案或議案的程序，不應與展開改變行政長官和立法會產生辦法的具體內容的辯論混為一談。假如透過辯論，成立了有需要改變現行行政長官及立法會產生辦法，則由誰啓動修改程序並不重要。這並非一個憲制問題，這問題亦只是無中生有。

- B(4) 附件二所規定的第三屆立法會產生辦法是否適用於第四屆及其後各屆的立法會？

顯而易見，第三屆立法會的產生辦法會繼續沿用下去，直至這個產生辦法根據附件二的規定作出修改。政制事務局是否真的認為如不修改，就會出現“立法真空”？

- (5) 「二零零七年以後」應如何理解？

整句是“二零零七年以後各屆”，任何人不得刪節，擾亂視聽。此句已清楚表明要改變產生行政長官的辦法，只能在二零零七年六月三十日第二屆行政長官任滿後，即由第三屆開始，才可作出，並非指二零零七年這個日曆年分。政府在二零零三年十一月亦已公開表示認同這理解。



Towards Consensus

Since our last pamphlet, broad consensus has emerged on a number of important issues. They are: -

- i. It is not contrary to the Basic Law to introduce universal suffrage for the selection of the Chief Executive in 2007;
- ii. It is not necessary to amend the Basic Law to introduce universal suffrage to Hong Kong by 2007;
- iii. "Actual situation in the Hong Kong Special Administration Region" is one of the most important guiding principles;
- iv. Political reform ought to be "gradual and orderly" but there must be "progress" in the real sense;
- v. The Central Government should be involved in discussions with Hong Kong people on political reforms.

The SAR Government raised 5 questions on procedure. What are your answers to them?

They present no real difficulties, and only need to be answered briefly:-

- (a) *What legislative process should be used 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?*

The procedure to amend the method of selection is already set out in Annex I and Annex II. Local legislative implementation of such amendments is for LegCo with the consent of the CE. Central approval and

recording of such amendment are matters for the National People's Congress. Procedure is there to facilitate, not frustrate, the amendment.

- (b) *Whether there is a need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used?*

No.

- (c) *Initiation of amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council*

The same answer to (a) applies.

- (d) *Whether the method for forming the 3rd term Legislative Council as prescribed in Annex II may apply to the 4th term and subsequent terms of the Legislative Council?*

Yes; the method for the 3rd term plainly continues until and unless it is amended according to Annex II.

- (e) *How the phrase "subsequent to the year 2007" should be understood?*

The complete phrase is "the terms subsequent to the year 2007". We have explained in our Opinion No. 1 why this means starting from the 3rd term of the CE in 2007. The Government's position as announced in November 2003 is the same. Hardly anyone seriously advances a different view.

From your answers, does it mean that Central Government has no role, or only a passive role, to play in this process?

Not at all. For the method for selecting the CE, we need the final approval of the Standing Committee. This makes it important for mutual

understanding to develop between the SAR and Central Government.

What are the guiding principles for political development?

They are found in Articles 45 and 68 of the Basic Law, and can be simply stated as follows: The ultimate aim is the selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedure (Article 45); and the election of all members of LegCo by universal suffrage (Article 68);

The only guiding principles are "the actual situation in the HKSAR" and "gradual and orderly progress". "Actual situation" refers to the current state of affairs in Hong Kong and is a factual question. "Gradual and orderly progress" is judged practically, in the context of the actual situation in Hong Kong.

What is the model proposed by the Article 45 Concern Group for achieving universal suffrage election of the CE in 2007?

In our Opinion No.1, we suggested a simple and practical model based on making minimum change to the existing system, either by converting the present Election Committee to a nomination committee whose only function is to nominate any candidate with the endorsement of say, 5% of its members, or by giving power to LegCo to nominate any candidate with the endorsement of say, 5 members. The general electorate will vote on all candidates thus nominated on a one-person-one-vote basis. This model is gaining wide consensus from all sides in the community.

Is the Concern Group's model compatible with the principle of "gradual and orderly progress"?

Yes. Reform envisaged in Article 45 comprises 2

elements: "universal suffrage" and "nomination by a broadly representative nominating committee in accordance with democratic procedures". There is no half-way house for "universal suffrage". Our proposal, however, recommends minimum change to the Election Committee to achieve universal suffrage in 2007. There is still a long way to go to achieve the ultimate goal set out in Article 45.

How is this related to "actual situation in the HKSAR"?

The actual situation in Hong Kong is that the Government is dysfunctional because the CE has no moral or political mandate even though he has legal and constitutional authority conferred upon him. Hong Kong people overwhelmingly demand universal suffrage, and have shown themselves to be eminently rational, mature and responsible voters who attach great importance to Hong Kong's economic success and stability, and good relation with Central Government. There is no evidence to suggest that with universal suffrage, the majority of the electorate will vote for irresponsible candidates who favour breaching provisions in the Basic Law on the financial principles the HKSAR is required to follow. The change to the present government structure is small but the effect will be at once beneficial.

Does "ultimate" aim mean "towards the year 2047"?

No. "Ultimate" aim means the final objective and is not a reference to time. The Basic Law does not say when the ultimate aim should be achieved. It all depends on the actual situation in Hong Kong.

February 2004

Electronic version available at www.article45.com; www.margaretnng.com.

For enquiries and copies, please call Margaret Ng's office - tel. 2537 2725/ 2869 8317

[Note : This supplementary submission was received by the Constitutional Development Task Force Secretariat on 23.2.2004]



邁向共識

自我們發表第1號意見書後，社會上已在不少重要問題上形成共識，包括：一

- i. 在2007年推行普選行政長官，並不違反《基本法》；
- ii. 要在2007年展開普選毋須修改《基本法》；
- iii. “根據香港特別行政區的實際情況”是一項極為重要的指導原則；
- iv. 政制改革要“循序漸進”，但必須有實際的“進”；
- v. 中央政府應該參與香港居民的政制改革討論。

特區政府就《基本法》中有關政制發展立法程序曾提出5個問題，關注組如何作答？

這些問題並不複雜，只需簡短回應：一

- (a) 對《基本法》附件一及附件二中行政長官及立法會產生辦法的修改當用甚麼立法方式處理？

有關程序已載於附件一及附件二。在本地立法實施有關的修改，應按立法會程序進行，由行政長官同意；中央批准有關的修改或備案，則應按全國人民代表大會的程序進行。程序是為推行修改而非阻撓修改而設，不可本末倒置。

- (b) 如採用附件一和附件二所規定的修改程序，是否無須援引《基本法》第一百五十九條的規定？

不須。

- (c) 有關修改行政長官及立法會產生辦法的啟動。

請參閱問題(a)的答案。

- (d) 附件二所規定的第三屆立法會產生辦法是否適用於第四屆及其後各屆立法會？

是；第三屆立法會的產生辦法顯然會一直沿用下去，直至按附件二作出修改。

- (e) 「二零零七年以後」應如何理解？

整句應為“二零零七年以後各屆”，我們已於第1號意見書中解釋為何這應理解為由2007年第三屆行政長官開始。政府於2003年11月亦曾公開表示認同這理解，沒有人真正提出異議。

以上的答案，是否表示中央政府在政制檢討過程中全無參與角色，或只有消極角色？

絕對不是。特區行政長官的產生辦法，既然最終須取得人大常委會的批准，特區與中央政府的相互了解和溝通自然重要。

政制發展有甚麼指導原則？

《基本法》第45及68條已清楚明確訂立指導原則，即：

行政長官最終由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（第45條）；而立法會全部議員亦同樣最終由普選產生（第68條）。

唯一的指導原則是“根據香港特別行政區的實際情況”以及“循序漸進”。“實際情況”指的是香港現時的形勢，是個事實問題；“循序漸進”必須按香港的實際情況作實際的判斷。

四十五條關注組建議2007年普選行政長官按甚麼模式？

在第1號意見書中，我們提出了一個簡單和實際的模式，就是對現行架構作最少改動，將現行的選舉委員會轉變為提名委員會，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(比

方說)獲得5位立法會議員簽名支持的候選人,然後由全港合資格的選民以一人一票方式投票普選。這個模式在社會各界獲得愈來愈廣泛的共識。

關注組所建議的模式是否符合 "循序漸進" 的原則?

是。第45條所預設的改革包括兩部分:"普選",及由"一個有廣泛代表性的提名委員會按民主程序"提名。"普選"是沒有中途站的。然而我們的建議只求達致在2007年推行普選,就對現制不作不必要的改動。要完全達致第45條所指的最終目標,仍有大段距離。

這與香港特別行政區的 "實際情況" 有甚麼關係?

香港的實際情況是,現行的政府根本無法正常運作,行政長官雖然獲賦予憲制和法定的權力,但無法在政治上或精神道德上建立威信和得到支持。絕大多數香港市民要求普選,亦一直表現出他們是理性、成熟和有責任感的選民,重視香港的經濟發展和穩定,以及與中央政府維持良好關係,完全沒證據顯示尚實行普選,大部分選民會投票支持一些不負責任的候選人,違反《基本法》內有關規定香港特區必須依從的理財原則的條文。事實上,關注組的建議,對現行政府架構作出很少的改動,但卻能帶來立竿見影的功效。

"最終" 目標是否指 "2047年"?

不是。"最終" 目標指的應是最高的目標,而並非指時間,《基本法》並無指明何時應達致最終目標,這要視乎香港的實際情況而定。

二零零四年二月

電子版小冊子,請瀏覽 www.article45.com;
www.margareting.com.

如有查詢,歡迎致電吳錫儀議員辦事處:
電話號碼: 2537 2725/ 2869 8317

邁向共識 Towards Consensus



陳文敏教授及榮譽資深大律師
Professor Johannes Chan, Hon. SC

張健利資深大律師
Denis Chang, SC

張達明助理教授
Eric Cheung Tat-ming

帝理邁律師
Mark Daly

戴大為教授
Professor Michael Davis

余若薇資深大律師
Audrey Eu, SC

梁家傑資深大律師
Alan Leong, SC

李志喜資深大律師
Gladys Li, SC

陸恭蕙女士
Christine Loh

吳錫儀大律師
Margaret Ng

湯家驊資深大律師
Ronny Tong, SC

[註: 專責小組秘書處於 23.2.2004
收到此補充意見書]