

(English Translation)

**Speech by the Secretary for Justice, Ms Elsie Leung
at Lingnan University, 29 March 2004**

**“Constitutional Development of Hong Kong from
the *Basic Law* Perspective”**

Foreword

The Preamble to the *Basic Law* of the Hong Kong Special Administrative Region (the “*Basic Law*”) states that the aim of the *Basic Law* is “prescribing the systems to be practised in the Hong Kong Special Administrative Region (HKSAR), in order to ensure the implementation of the basic policies of the People’s Republic of China regarding Hong Kong”. Chapter IV of the *Basic Law* (Political Structure) defines the formation, the powers and functions of and inter-relationship among the executive, legislature and judiciary, as well as the qualifications, powers and functions of and relevant policies regarding the Chief Executive and members of the Legislative Council. Articles 45 and 68 of the *Basic Law* provide that the method for selecting the Chief Executive and the method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress with the ultimate aim of election by universal suffrage. The development of a democratic system is therefore a common goal of the Central Authorities, the HKSAR Government and the Hong Kong people. Nobody disputes that the ultimate aim is election by universal suffrage. But what the community has yet to reach a consensus on is the pace of development and the detailed arrangements. Election methods are part of the entire political system. Therefore, if they are to be amended, we have to consider the constitutional development as a whole in order to avoid compromising the design of the original political structure. I am very pleased to meet all of you today for an

exchange of views on “Constitutional Development of Hong Kong from the *Basic Law* Perspective”.

Setting up of the Constitutional Development Task Force

2. Since the Reunification, the HKSAR has weathered numerous crises, including the Asian financial turmoil, avian flu, the bursting of the economic bubble, the aftermath of 9/11, SARS, etc. In addition, the pace of reform carried out by the government was too rapid and certain policies were not handled properly. All these factors caused the public to attribute their discontent to the political structure and to develop an intense desire for change. The proposed legislation to protect national security triggered a mass demonstration on 1 July and a number of the demonstrators voiced their strong demand for election by universal suffrage. As the *Basic Law* provides that the ultimate goal is to select the Chief Executive and to elect members of the Legislative Council by universal suffrage, and that the selection and election methods may be amended after 2007 if there is a need to do so, the HKSAR Government needs to study our constitutional development.

3. In his Policy Address on 7 January 2004, the Chief Executive undertook that the Government would actively promote constitutional development in Hong Kong on the basis of maintaining “one country, two systems” and adhering to the *Basic Law*. He also announced the setting up of a Task Force headed by the Chief Secretary for Administration, Mr Donald Tsang, and with members including the Secretary for Constitutional Affairs, Mr Stephen Lam and I. The Task Force reports to the Chief Executive.

4. On 3 December 2003, President Hu Jintao expressed serious concerns and the principled stance of the Central Authorities regarding Hong Kong’s constitutional development, after he had been briefed by the Chief Executive on the recent views of the Hong Kong community regarding the issue. On 7 January 2004, the Hong Kong and Macao Affairs Office of the State Council (the “HKMAO”) issued a statement on the Chief Executive’s Policy Address, reiterating the serious concerns of the Central People’s

Government (the “CPG”) and expressing the wish that the HKSAR Government would thoroughly discuss the issues with the relevant departments of the CPG before deciding on how to take matters forward.

5. The first task of the Task Force was to communicate with the relevant departments of the Central Authorities. It requested the HKMAO to arrange a meeting with the HKMAO and other relevant organs to discuss the specific concerns of the Central Authorities and to study the legal procedures where the CPG is involved. The Task Force also discussed with people from different sectors of the Hong Kong community the basic principles and issues relating to constitutional development, listened to their views and sought to achieve a consensus so as to assist in the determination of the direction and objectives of our constitutional development. From 9-10 February 2004, the Task Force paid a visit to Beijing and met Xu Ze, Deputy Director of the HKMAO, Li Fei, Vice Chairman of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress (the “NPCSC”) and several legal experts respectively to learn more about the issues which the CPG was concerned with as regards our constitutional development. On the day following the Task Force’s return to Hong Kong, the Task Force informed the Legislative Council in detail about the visit and the views of the Central Authorities. The Task Force has also proceeded to lead the public discussion on the issues of principles and process relating to Hong Kong’s constitutional development. You may wish to refer to the full text of the speech made by the Chief Secretary for Administration at the Legislative Council on 11 February 2004 for details. The Task Force met more than 70 political groups and individuals and listened to their views. It also set up a website and placed advertisements in newspapers and on television to invite views on the issues of principle and process so as to lay down a firm basis for the formulation of future proposals. The first round of the consultation exercise is now drawing to an end.

6. To avoid causing any misunderstanding that the HKSAR Government has reached its decision and is therefore not conducting a genuine consultation, I have seldom spoken on the issue of constitutional development since the establishment of the Task Force. But, in the course

of the consultation exercise, I have recently heard a number of comments directed at the Task Force to the effect that, given the divergent views of our community, the public may well be confused and it is incumbent on the Government to make clarifications. I had, in fact, spoken on the issue of constitutional development on one or two occasions. Today, I will focus my speech on the legal perspectives of constitutional development. But in doing so, it may be necessary to touch on some factual issues. I would therefore like to point out that the views I am expressing are only my own. They are meant to facilitate public discussion and do not represent the views of the Task Force. Should the views of the public turn out to be more reasonable than mine, I will be most happy to rectify my position and accept their views.

Role of the Central Government in Constitutional Development

7. The HKSAR Government has studied the report by the *Xinhua News Agency* on 4 December 2003 of the views expressed by three Mainland legal experts who were also original drafters of the *Basic Law*, namely Professor XIAO Weiyun of Beijing University, Professor XU Chongde of the Renmin University and Mr Wu Jianfan, researcher of the Institute of Law, Chinese Academy of Social Sciences, as well as Director XIA Yong, member of the Committee for the *Basic Law* of the Hong Kong Special Administrative Region and Director of the Institute of Law, Chinese Academy of Social Sciences. Particular attention has been paid to the reasons why the Central Government expressed serious concerns on Hong Kong's constitutional development. I believe that it is necessary to understand the issues that the CPG is concerned about. What is the aim of the *Basic Law* in respect of the design of the political structure? What are the criteria for our constitutional development? Do we have a correct understanding of the provisions of the *Basic Law* in regard to the constitutional development? How can we guarantee that the proposals for our constitutional development will comply with the principle of "one country, two systems" and will reflect the requirements as laid down in the *Basic Law*?

8. In addition to considering the information obtained through our Beijing visit, I have also tried to understand why the Central Government expressed serious concerns on Hong Kong's constitutional development from the perspective of the *Basic Law*. The legal basis of the establishment of the HKSAR is Article 31 of the *Constitution* of the PRC: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions." Article 62(13) of the *Constitution* of the PRC also stipulates that the National People's Congress is to decide on the establishment of special administrative regions and the systems to be instituted there. The CPG therefore has a constitutional responsibility over the constitutional development of the HKSAR. The CPG's role is stipulated in the *Basic Law*. I will examine the issues through the following perspectives.

Firstly, the political structure is an important part of the framework of the HKSAR. The CPG (the State Council) as the state organ of administration which directly exercises leadership over Hong Kong affairs (Article 89(4), *Constitution* of the PRC) has the obligation to ensure that the political structure of Hong Kong complies with the principle of "one country, two systems" and the *Basic Law* for the following reasons:

- To manifest the concept of "one country", Article 1 of the *Basic Law* expressly states that Hong Kong is an inalienable part of the PRC.
- The establishment of "two systems" is embodied in the fact that the Central Authorities authorize the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the *Basic Law* (see Article 2, *Basic Law*).
- The HKSAR comes directly under the CPG (see Article 12, *Basic Law*).

- The Chief Executive shall be appointed by the CPG, and shall be accountable to the CPG and the HKSAR (see Articles 43 and 45, *Basic Law*).

Secondly, as the state organ which directly oversees the affairs of the Hong Kong, the CPG has the obligation to ensure that the political structure of the HKSAR is consistent with the basic policies of the PRC regarding Hong Kong, and to ensure the full implementation of such policies for the following reasons:

- The objective in enacting the *Basic Law* is to prescribe the systems to be practised in the HKSAR, in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong (see Preamble, *Basic Law*).
- When Mr Ji Pengfei, the Chairman of the Drafting Committee for the *Basic Law*, submitted the *Basic Law* and its related documents to the National People's Congress, he explained in detail the design of the political structure as contained in the *Basic Law*. The purpose of such a design is the same as that of other stipulations in the *Basic Law*, i.e., to ensure the full implementation of the basic policies of the Central Authorities regarding the HKSAR.

Thirdly, the *Basic Law* is a law enacted by the National People's Congress. It is binding on the whole nation including Hong Kong. As the HKSAR comes directly under the CPG, the CPG has the obligation to be accountable to the whole nation for the constitutional development of the HKSAR.

The CPG is therefore fully justified to be concerned with the discussions about the constitutional development of the HKSAR. As to the question of how the concern of the CPG is to be reflected in our constitutional development, I think the mechanisms set out in Annexes I and II to the *Basic Law* have provided sufficient means to give the Central Authorities a decision-making power. Without the approval of the Central Authorities, neither the selection method of the Chief Executive nor the formation method

of the Legislative Council may be changed. This is the exercise of sovereignty. A local government is established by the Central Authorities in accordance with the *Constitution*. It follows that a local government has no authority to change the system established by the central government, and the latter needs to ensure that the political structure of a local government does not compromise the interests of the nation (hence the discussions that people running Hong Kong, including the Chief Executive, Legislative Councillors and other public officers, must be patriotic). Some say that the NPCSC's power to put on record any amendments as set out in Annex II is a matter of formality in relation to a procedure for recording rather than a substantive power. I disagree. Under Article 67(8) of the *Constitution*, the NPCSC has the power to annul local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the *Constitution*, the law or the administrative rules and regulations. Although Hong Kong is not a municipality directly under the CPG, the NPCSC cannot be required to record an amendment if it contravenes the *Basic Law*. For example, if the amended election methods were to contravene the requirement in Article 68 of the *Basic Law* that [the method] "shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress", the NPCSC could refuse to record them. Otherwise the NPCSC will be taking part in an act that contravenes the *Basic Law* and the power to record will be rendered meaningless. I believe that it makes more sense to consider that the Central Authorities have the duty and power to decide on the constitutional development of Hong Kong, rather than just the mere act of recording any proposed amendments.

Principles which we must consider in relation to constitutional development

9. (a) In relation to constitutional development, we must first look at the relevant provisions of the *Basic Law* and Annexes I and II. Articles 45 and 68 of the *Basic Law* provide that the method for selecting the Chief Executive and the method for forming the

Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The matters stipulated in Annexes I and II are a matter of procedure. Deviating from such provisions would exceed the scope of the *Basic Law*.

- (b) Constitutional development must also be consistent with the original design of the political structure as set out in the *Basic Law*. If we are to deviate from the principles of the original structure, then we must first amend the *Basic Law*. If the constitutional development is consistent with the principles of the original structure, the *Basic Law* needs not be amended even if we are to amend the election methods. When Mr Ji Pengfei, the Chairman of the Drafting Committee for the *Basic Law*, submitted the *Basic Law* to the Seventh National People's Congress on 28 March 1990, he provided the following explanations:

“The political structure of the Hong Kong Special Administrative Region should accord with the principle of "one country, two systems" and aim to maintain stability and prosperity in Hong Kong in line with its legal status and actual situation. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong's reality should gradually be introduced. ...”

He also explained that the relationship between the executive authorities and the legislature should be one that regulates and at the same time co-ordinates each other. Accordingly, the constitutional development needs to accord with these principles.

- (c) As the *Basic Law* has set the pace of the development of democracy, we need to consider which model of democratic system

suits the actual situation of Hong Kong. Such a model must be based on the characteristics of the Hong Kong constitutional system and our political values, and must have the goal of preserving political, economic and social stability. These are the issues which need to be explored and analyzed and on which a consensus must be reached.

We must thoroughly analyze the principles set out above as they form the basis for any concrete proposal.

10. Some say that the explanations by Mr Ji Pengfei are not legally binding. The rules of interpretation under the common law and those under the PRC law are similar. We must first analyze in accordance with the rules of the language structure: the order of the words, composition of the sentence, punctuation marks, etc, in the legal provisions to accurately explain the meaning of legal constraints. We may also interpret a law on the basis of the historical background of its enactment and the documents (reports, explanations, etc) relating to the relevant bill at the time. In Ng Ka Ling & Others v Director of Immigration [1999] 1 HKLRD 579, the Chief Justice of the Court of Final Appeal, the Hon Andrew LI Kwok-nang said:

“We must begin by recognizing and appreciating the character of the document. The Basic Law is an entrenched constitutional instrument to implement the unique principle of “one country, two systems”. As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.

It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes

declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

...

As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.”

The Chief Justice even referred to the explanations by Mr Ji Pengfei in Director of Immigration v Chong Fung Yuen [2001] HKCFA 10 :

“To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.

Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration and the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law. Because the context and purpose

of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997.”

Articles 45 and 68 of the *Basic Law* and Annexes I and II to the *Basic Law* do not explain what constitutes the “actual situation”. Therefore, it is necessary to turn to the Preamble, other provisions of the *Basic Law* and the explanations by Mr Ji Pengfei to explain what should be considered in the interpretation of “actual situation”. In the event that my understanding is incorrect and that Mr Ji Pengfei’s explanations do not have any legal force, his explanations are nevertheless something which we must take into account when we consider what the “actual situation” refers to.

Legislative process and related legal issues

11. The Task Force has also sought the views of the public on five issues of legislative process and related legal issues. These issues are related to those major principles. It is easier to resolve the legal issues, if the major principles are accepted. I would like to outline my views as follows:

- (a) If there is a need to amend the method for selecting the Chief Executive and the method for forming the Legislative Council (the “two methods”) as stipulated in Annexes I and II, a consensus on the proposed amendments must be reached among a two-thirds majority of all the members of the Legislative Council, the Chief Executive and the Central Authorities. After the proposed amendments have been introduced by the HKSAR Government, they must be endorsed by the Legislative Council and obtain the consent of the Chief Executive. Thereafter, they shall be reported to the State Council for its submission to the Standing Committee

of the National People's Congress for approval or for the record before local legislation can be enacted to implement them.

- (b) There is no need to rely on the stipulations in Article 159 of the *Basic Law* if the amendments to the two formation methods are to be made in accordance with the procedure laid down in Annexes I and II, and in line with the provisions of the *Basic Law*.
- (c) If there is a need to amend the two formation methods, the power of introducing the legislative amendments rests with the HKSAR Government.
- (d) If there is no need to amend, or the three parties concerned cannot reach a consensus on any amendment proposal, then the formation method for the third Legislative Council as set out in Annex II shall apply to the Legislative Council for the fourth and subsequent terms.
- (e) "After 2007" includes the year 2007 as it refers to the Chief Executives selected 10 years after the Reunification (including the third Chief Executive selected in 2007), and all the terms of the Legislative Council to be selected subsequent to 2007 (i.e. the fourth and subsequent terms of the Legislative Council).

12. It is commonly misunderstood that Hong Kong does not have democracy because it is said that, firstly, we do not have election by universal suffrage and, secondly, the Chief Executive is elected by only 800 people. Neither of these statements is entirely correct. All the citizens who have a voting right have the right to elect members of the Legislative Council returned by geographical constituencies through direct elections on the one-person-one-vote basis. It is only that certain people are entitled to one more vote to elect members returned by functional constituencies. We should therefore not be calling for the right to participate in political affairs, but for the right to participate on a more equal basis. The 800 members of the Election Committee who elect the Chief Executive are returned by 168,000

voters from various sectors, and are widely representative. Both the functional constituencies and the Election Committee have been established to take care of the interests of various strata, to achieve a balanced participation and to avoid the “dictatorship of the majority” before appropriate conditions have been met. However, this does not mean that the functional constituencies must last forever. When we talk about the goal of election by universal suffrage, we should not just talk about the concept of democracy. We have to consider how to establish a system which can effectively protect democracy. For example, how can we enable everybody to participate in political affairs on an equal basis while according the minority an opportunity to express their opinion? In addition, such a system must facilitate effective governance, with both the government and the Legislative Council having a mandate, and the interests of every stratum being taken care of. We need competent political figures, the formation of a political mainstream, and a mature sense of civic responsibility. Of course, there must also be a sound legal system and the rule of law, and clean, honest and fair elections. Human rights and various freedoms must be respected. When we speak about effective governance, we have to consider the implementation of the *Basic Law*. In particular, we have to ask whether those provisions related to the executive-led political structure are implemented smoothly. Do the executive authorities and the legislature truly regulate each other and, at the same time, co-ordinate their activities? These matters have a significant impact on the stability and implementation of policies, and also on political, economic and social stability. Prosperity and stability are the goals of “one country, two systems”, “Hong Kong people ruling Hong Kong” and “a high degree of autonomy”. I am afraid that “one person one vote” cannot completely resolve these problems. There is still a gap between the method for selecting the Chief Executive and the method for forming the Legislative Council as set out in Annexes I and II of the *Basic Law* and “the ultimate aim” of selection/election “by universal suffrage”. We therefore need to explore the following questions in accordance with the provisions of the *Basic Law* and their purposes, and the principles of the design of the political structure:

- (1) which election method can satisfy both the “ultimate aim” of election by universal suffrage and our demands for a democratic system;
- (2) what conditions are required to achieve the goal of election by universal suffrage and do we already satisfy such conditions; and
- (3) if we do not satisfy those conditions, how do we amend the election methods in the light of the actual situation in the HKSAR to move step by step towards the ultimate goal of election by universal suffrage in accordance with the principle of gradual and orderly progress?

Missions of the Task Force

13. Any constitutional development must be based on sound legal foundations and must be consistent with the *Basic Law*. We need to grasp the relevant issues before we can suggest different concrete proposals for discussion. If the bases of these proposals are not correct, there are bound to be vehement disputes and social unrest might even arise. This would not be conducive to rational examination and discussion of our constitutional development. We hope that the Task Force will play an active role in the constitutional development of Hong Kong and act as a bridge between the relevant parties. It will continue the dialogue with the relevant departments of the CPG while having extensive discussions with the people of Hong Kong from different sectors over the principles and issues involved in constitutional development. It will put forward proposals for consultation and reflect the views of the people of Hong Kong to the Central Authorities. It will also explain to the public the stance of the Central Authorities. The objective is to enable the HKSAR Government to carry out a review of the political structure in accordance with the *Basic Law*, to proceed with the legislative process in accordance with the consensus reached, and to build up our democratic system.

14. More than six years after the Reunification and with the whole-hearted support of the CPG, the concept of “one country, two systems” has been successfully implemented. This has been recognized by the whole world. As “one country, two systems” is a new concept, it is inevitable that we have encountered a few problems during its implementation. For example, it takes time to smooth out the problems in the co-operation between the executive authorities and the legislature under the new constitutional regime. We should not refuse to acknowledge all the achievements made because of the problems. When a problem arises, we should deal with it in a sensible and reasonable manner. The task of constitutional development provides us with a very good opportunity to review the successes and failures in the past few years and to identify deficiencies in the system. On the road to election by universal suffrage, we should work out ways to improve governance and the “one country, two systems” concept. This is also a very good opportunity to educate the public about patriotism and the *Basic Law*.