

**Understanding “One Country, Two Systems”  
through Hong Kong’s Constitutional Development**  
- a Basic Law Seminar Presentation  
by the Secretary for Justice, Ms Elsie Leung, on 29 May 2004

Good morning Colleagues,

I am very grateful for this opportunity to speak to you on the subjects of “One Country, Two Systems” and Hong Kong’s constitutional development.

**Introduction**

2. Although the Basic Law has now been in force for almost seven years, there are many aspects of it that are not widely appreciated. We have tended to emphasize the “Two Systems” part of the formula. It is, of course, important that there is understanding, both here and overseas, of the extent to which the systems in the Mainland and in Hong Kong differ. However, the “One Country” part of the formula is equally important.

3. A lack of understanding of the “One Country” parts of the Basic Law can lead to unnecessary fears and confrontations. The fact is that, under our new constitutional order, there are areas in respect of which the Central Authorities have a legitimate role to play in Hong Kong. Those areas are not limited to defence and foreign affairs. For example, the power to amend the Basic Law is vested in the National People’s Congress (NPC), and the Standing Committee of the National People’s Congress (NPCSC) has the power to interpret the Basic Law.

4. Those powers are set out, in black and white, in the Basic Law. Despite this, when the NPCSC issued its interpretation in respect of the right of abode issue, many people said that this was unconstitutional. Such accusations are unfounded, and cause unnecessary friction between Hong Kong and the Central Authorities.

5. I hope that my presentation this morning will help to clarify the principle of “One Country, Two Systems”, and to demonstrate how it is being faithfully implemented in respect of our constitutional development.

6. I plan to divide my presentation into two sections, with a break in between them. The first section will explain how “One Country, Two Systems” has been implemented in Hong Kong since Reunification. The second section will focus on recent events relating to our constitutional development, including the NPCSC’s interpretation and decision.

## **I. Implementing “One Country, Two Systems”**

7. I will start by explaining the “One Country, Two Systems” principle, and how the Hong Kong Special Administrative Region was established in 1997.

### **The Establishment of the Hong Kong Special Administrative Region**

8. The “one country, two systems” principle is the basic national policy proposed by the Chinese Government in order to achieve national unity. Upon China’s resumption of sovereignty over Hong Kong, the Hong Kong SAR was established directly under the Central People’s Government (CPG). Apart from matters relating to national defence and foreign affairs, which are the responsibilities of the Central Government, the HKSAR enjoys a high degree of autonomy.

9. The National People’s Congress authorized the HKSAR to exercise a high degree of autonomy under the *Basic Law*, with executive, legislative and independent judicial power, including that of final adjudication. The socialist system and policies are not practised in the HKSAR, and the previous capitalist system, economic system and way of life remain unchanged. The laws previously in force remain basically unchanged. Hong Kong’s status as an international financial centre and as a free port is maintained, and the economic interests of Britain and other countries in Hong Kong are looked after.

10. The Chinese Government laid down these policies in the *Joint Declaration* signed with the British government in 1984, and guaranteed that the policies of China on Hong Kong would remain unchanged for 50 years. The concept of “one country, two systems” and the various policies regarding Hong Kong based on that concept form the fundamental guarantee for China’s resumption of sovereignty over Hong Kong whilst maintaining its stability and prosperity.

### **Legal System**

11. So far as the legal system is concerned, Hong Kong continues to be a common law jurisdiction under the principle of “one country, two systems”. The Basic Law expressly provides that the laws previously in force, including the common law, shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature. In February, 1997, the NPCSC, acting under Article 160 of the Basic Law, adopted the laws previously in force in Hong Kong, except for 24 ordinances (mainly relating to sovereignty, defence and foreign affairs) which were found in whole or in part to be in contravention of the Basic Law. This means that the common law principles, and nearly all of the 600-odd ordinances previously in force, continue to apply in the HKSAR.

12. In the small hours of 1 July 1997, I submitted the Hong Kong Reunification Bill to the then Provisional Legislative Council to ensure the continuity of laws, legal proceedings, the judicial system, the civil service system, ownership of property, and rights and legal liabilities. In the past few years, we have proceeded with the adaptation of laws by removing colonial terms from the laws, enabling Hong Kong’s statute book to be compatible with its status as a special administrative region of the PRC. We also introduced eleven national laws (mainly on defence, foreign affairs and sovereignty) to Hong Kong by way of promulgation or legislation under Article 18 of the Basic Law.

## **LegCo and District Councils**

13. The elections for the first and second terms of the Legislative Council were completed successfully, and the gap left by the removal of the track for the “through train” was filled and the government resumed normal operation. A new political structure came into existence after the restructuring of the municipal services and formation of the first District Councils in 1999. A political accountability system in respect of Principal Officials was adopted following the commencement of the second term of the Chief Executive on 1 July 2002. Its implementation is an important step towards more effective governance of the HKSAR. We also successfully completed the election for the second term of the District Councils in November 2003.

## **The Judiciary**

14. The continuity of the judiciary was affirmed on 1 July 1997 when the Chief Executive, acting on the recommendations of the independent Judicial Officers Recommendation Commission, re-appointed all judges who were in service on the previous day. Among them are expatriate judges whose nationalities are immaterial to their continuing employment. Article 81 of the Basic Law also provides that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal (CFA). Many of the judges retiring after 1 July 1997 served well beyond their retirement age, and they stated on many occasions that the independence of the judiciary has been maintained, free from any interference. More and more internationally renowned judges are appointed as overseas judges to sit in the hearings of the CFA.

15. The Basic Law provides that the CFA of the HKSAR shall be vested with the power of final adjudication. Though the right of abode issue gave rise to much controversy in the first few years after reunification, the litigation relating to it reaffirms the implementation of “one country, two systems”. The judgment of the CFA on the right of abode cases was not nullified by the interpretation of Articles 22(4) and 24(3) of the Basic Law by the NPCSC. On the contrary, the parties in whose favour the judgment was

made, together with 3,677 people involved in the case to whom the government promised the same treatment, were granted the right of abode under the ruling.

16. In its subsequent ruling, the CFA acknowledged that the interpretation by the NPCSC was lawful and constitutional. In January 2002, it properly handled the remaining issues arising from the right of abode cases by applying the interpretation of the NPCSC in accordance with the principles of common law. In the whole process, the CFA not only respected the power vested in the NPCSC of legislative interpretation under the Chinese Constitution and the Basic Law, but also exercised the power of final adjudication conferred by the Basic Law. It is not only a valuable experience for both sides, but is also of great significance to the implementation of “one country, two systems”.

17. The *Basic Law*, a product of the civil law system, was enacted by the NPC. It has to go through a process of adjustments in order to complement the local law, which is derived from the common law system. It has to be put into practice to make it perfect. During the few years since reunification, the courts of the HKSAR have made a number of constitutional judgments, touching on matters such as the legality of the Provisional Legislative Council, the NPCSC’s power of legislative interpretation, the parameters of administrative orders, the balance between the dignity of the national flag and freedom of expression, freedom of assembly, professional qualifications, the public’s rights to participate in public affairs, as well as the issue of constitutional protection of property rights. All these help strengthen our confidence in understanding the *Basic Law*.

### **Human Rights in Hong Kong**

18. After reunification, various international covenants on human rights, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, continue to be applicable to the HKSAR. In respect of various covenants, the HKSAR Government has reported to the relevant committees of the United Nations, attended hearings and actively responded to the inquiries raised.

19. The European Commission produced its fifth Annual Report on Hong Kong in September 2003 covering developments in the HKSAR in 2002. The Report considers that the “one country, two systems” principle continues to function well and that Hong Kong people continue to enjoy their basic fundamental rights and freedoms following the handover and many demonstrations and protests took place.

20. In the most recent six-monthly report covering the period from July to December 2003, the UK Secretary of State for Foreign and Commonwealth Affairs concluded that “we continue to assess that, generally, “One Country, Two Systems” is working well in practice and that the rights and freedoms promised in the Joint Declaration and the Basic Law continue to be upheld”.

21. In the latest US-Hong Kong Policy Act Report covering the period from April 1, 2003, to March 31, 2004, the US State Department recognized that “Hong Kong residents enjoy strong respect for the rule of law and civil liberties”. The Report stated that “[t]he rule of law and an independent judiciary remains pillars of Hong Kong’s free and open society”. Although the past six and a half years have been challenging times, it must be admitted that the unprecedented “one country, two systems” has been implemented successfully in Hong Kong.

### **The Economy**

22. Under the principle of “one country, two systems”, the HKSAR continues to practise an economic system different from that of the Mainland : maintaining the previous capitalist system; implementing free enterprise and free trade systems; adopting prudent fiscal policies; practising a low and simple taxation system; remaining financially independent and using its financial revenue exclusively for its own purposes without handing them over to the CPG.

23. HKSAR’s independent currency system also reflects the principle of “one country, two systems” in the economic arena. Article 111 of the Basic Law provides that the Hong Kong dollar, as the legal tender in the HKSAR,

shall continue to circulate. The authority to issue Hong Kong currency is vested in the Government of the HKSAR.

## **External Affairs**

24. Since reunification, the HKSAR has continued to play an active role in the international arena, and maintains close contacts with its international partners. In an earlier report prepared by the Speaker of the House of Representatives of the United States (30 January 2002), the HKSARG was praised for joining the international community in efforts against terrorists. The HKSARG has taken measures to implement various United Nations Security Council Resolutions against terrorism, including the enactment of the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575), which prohibits the gathering of funds and their transfer by terrorists.

25. In accordance with the Article 151 of the *Basic Law*, the HKSARG has on its own concluded international agreements with foreign states and overseas regions on cooperation in customs affairs and information technology, and on avoidance of double taxation. Pursuant to the relevant provisions of the *Basic Law*, the HKSARG has also obtained authorization from the CPG to conclude a number of bilateral agreements with foreign states in respect of civil aviation and transportation services, reciprocal dispensation with visas, mutual legal assistance (including agreements on surrender of fugitive offenders, transfer of sentenced persons, and taking of evidence in criminal cases), and investment promotion and protection.

26. In 2003, HKSARG representatives participated as members of delegations of the PRC about 80 times in international conferences limited to states. These included conferences organised by the International Telecommunication Union, World Intellectual Property Organisation, International Monetary Fund, Universal Postal Union and International Labour Organisation. Using the name "Hong Kong, China", HKSARG representatives also participated more than 560 times in inter-governmental conferences not limited to states. These included conferences organised by the Pacific Economic Cooperation Council, World Trade Organisation, World Customs Organisation, and World Meteorological Organisation. Active

participation in international activities has enabled the HKSAR to maintain its status as an international financial, trade, civil aviation and shipping centre.

27. In 2003, the HKSAR played host to a number of prominent events, including the Business Week CEO Conference, the Conference on International Cooperation for Tourism Development under a New Paradigm and the ICAC-Interpol Conference. At the end of 2003, a total of 114 foreign states maintained an official or semi-official presence in the HKSAR, including 56 consulates general, 53 honorary consuls and 5 semi-official (mostly trade) missions. In addition, international organisations such as the Bank for International Settlements, European Union, the United Nations High Commissioner for Refugees, the International Monetary Fund, the International Finance Corporation and the World Bank, have set up offices in Hong Kong.

## **CEPA**

28. I turn now to another important example of “one country, two systems”: that is, China’s accession to WTO, and the Closer Economic Partnership Arrangement (CEPA) between Hong Kong and the Mainland.

29. On 11 December 2001, after more than 13 years of negotiations, China became a member of the World Trade Organization (WTO).

30. What impact has membership of WTO had on the government of the PRC? I will highlight some of the recent developments, many of which are responses to the requirements under WTO.

- The government is changing its role from a trader to facilitator of trade; instead of doing business, it now aims to provide a good business environment to facilitate business;
- government operations have become more transparent; the government is obligated to publicise, before they are enforced, all laws, regulations and other measures pertaining to or affecting trade in goods, TRIPS or the control of foreign exchange, and to



establish an enquiry point for provision of information relating to those laws, regulations and measures;

- the government shows more respect for the sanctity of contracts and is keen to establish credibility in fulfilling contractual obligations;
- the government is becoming more accountable and responsible, being subject to judicial review and supervision of the public through their representatives to the NPC, and the doctrine of the three representatives.
- a market economy requires the government structure to be streamlined and its efficiency improved;
- the government is keen to observe due process in import purchasing procedures, licensing requirements, judicial proceedings, administrative rulings etc.
- the Central Government must observe fairness and impartiality, and local governments must not get involved in the economic activities of local enterprises;
- the rule of law is developing, as the government adheres to laws, regulations and due process, as well as to proper law enforcement procedures.

31. The impact on our country of its accession to WTO is therefore powerful. But what about Hong Kong? The HKSAR is, in fact, a separate member of WTO : one can say that there is “one country, two independent tariff zones”.

32. Article V of the *GATS* sets out provisions for further economic integration and liberalization of trade in services. It allows any WTO member to enter into an agreement for further co-operation with other countries or regions which are parties to *GATS*, provided that such an agreement satisfies four criteria. It must –

- (1) have substantial sectoral coverage;

- (2) eliminate discriminatory measures against service suppliers in other countries which are parties to GATS;
- (3) prohibit new or more discriminatory measures; and
- (4) aim at facilitating trade between or among members and not raise the overall level of barriers to trade in services for non-members when dealing within the respective sectors.

33. Such an agreement is generally known as a “free trade agreement” (FTA). Under an FTA two or more countries or customs territories may agree to reduce or eliminate trade barriers that exist between them, but each country or territory may maintain its own external trade policy for non-member countries. The North American Free Trade Agreement (NAFTA) is an example. Further integration may take the form of a customs union, which is similar to an FTA, but its members adopt the same external trade policy for non-member countries.

34. Since the Mainland and the HKSAR are two independent tariff zones, they can enter into an FTA with each other. The *Mainland and Hong Kong Closer Economic Partnership Arrangement* (CEPA) is, in effect, a type of free trade agreement. This was signed on 29 June 2003, under a framework permitted by the WTO, followed by the signing of six Annexes on the 29 September 2003.

35. The legal basis for CEPA is found in Article 24 of the *General Agreement on Tariffs and Trade* and Article V of the *General Agreement on Trade in Services*. Operating within the scope of commitments of China and under the principle that the interest of other WTO members would not be prejudiced, China and Hong Kong could make arrangements for eliminating various trade barriers and tariffs and fostering economic development and trade ties between the two sides.

36. Under CEPA, both the Mainland and HKSAR will –

- (1) progressively reduce or eliminate tariff and non-tariff barriers on substantially all the trade in goods between the two sides, currently 273 items of goods enjoy 0 customs treatment;
- (2) progressively achieve liberalization of trade in services through reduction or elimination of substantially all discriminatory measures; and
- (3) promote trade and investment facilitation.

37. The implementation of CEPA will adhere to the following principles. It must –

- (1) abide by the “one country, two systems” principle;
- (2) be consistent with the rules of the WTO;
- (3) accord with the needs of both sides to adjust and upgrade their economic regime;
- (4) achieve mutual-benefits, complementarity and joint prosperity; and
- (5) take progressive action, dealing with the easier issues first.

38. I will not go into further details of the implementation of CEPA, but hope that you will follow developments, and their benefits to Hong Kong, as they are reported in the media. My point in describing these arrangements is to illustrate the way that “one country, two systems” is of enormous value to Hong Kong. Whilst retaining our own capitalist system and independent membership of WTO, we can reap the benefits of being part of a country that is undergoing unprecedented economic development.

### **Article 23**

39. I now turn to one aspect of “one country, two systems” that has led to great controversy. That is Article 23 of the Basic Law.

40. National security is a matter of fundamental concern to every country in the world. When arrangements for Hong Kong's Reunification with the Mainland were being devised, the Central People's Government could have insisted that PRC laws on national security would apply here. National security could be said to be an aspect of "one country" that requires uniformity of treatment throughout the country.

41. Instead, the Central People's Government accepted that the "two systems" should prevail, and that the HKSAR would enact relevant laws "on its own". Viewed on this basis, Article 23 confers a great benefit on Hong Kong – the ability to devise and enact our own laws on national security that are consistent with our common law system and with international human rights guarantees.

42. As you know, the Government's attempts to get relevant laws enacted last year failed, and were partly responsible for half a million people taking to the streets on 1 July last year. In retrospect, I am sure that the project could have been handled better.

43. Nevertheless, we are left with an unfulfilled constitutional duty. I hope that, when the issue is revived, the community will be more willing to accept that we must fulfil this duty. Of course, the details of the proposals will need to be debated at length. But, if we are to accept all the benefits of "two systems", we should also accept that we should play our part in protecting "one country".

### **Conclusion of Section I**

44. I would like to conclude the first section of my presentation with a few general observations. Prior to reunification, many people in foreign political circles and the media lacked faith in the future of Hong Kong. Fortune Magazine even announced that "Hong Kong is dead". However, Fortune Magazine held its Global Forum in Hong Kong in May 2001. During the Forum, President Jiang Zemin of the PRC, the Prime Minister of Thailand, Dr. Thaksin Shinawatra, and former U.S. President Bill Clinton all delivered up-beat speeches. This proves that the prophecy is wrong.

45. During the early period of its establishment, the HKSAR has gone through a number of twists and turns, simply because the concept of “one country, two systems” is an unprecedented and pioneering step. During the transition from a colony to an SAR ruled by Hong Kong people, our lack of experience, aggravated by financial turmoil, economic restructuring, accumulated problems, and the lack of confidence of some people, have caused controversies and international concerns. However, as people gradually come to understand our problems, they all agree that “one country, two systems” has been successfully implemented.

46. In the implementation of international agreements, some countries do not understand why a government not having the status of a state can enjoy such a high degree of autonomy. Some countries also have a misunderstanding that a high degree of autonomy is equivalent to independence. There are people who always worry that the freedom, rule of law and human rights that Hong Kong enjoys today might all be lost tomorrow. I hope they will recognize that, during the past six and a half years since reunification, the CPG has not only adopted a non-interventionist policy, but has also rendered generous support and assistance to the HKSARG as and when necessary.

47. The HKSARG has also faithfully complied with the obligations in the Basic Law, and laid a strong foundation for the long-term implementation of “one country, two systems” in the HKSAR. This will not only resolve the Hong Kong and Macao issues, but can also demonstrate how to achieve a peaceful reunification of the Mainland and Taiwan. History entrusted us with such a mission; we must accomplish the task without reservation.

## **II. Hong Kong’s Constitutional Development**

48. In this second section, I will explain how recent events in respect of our constitutional development are entirely consistent with the principle of “One Country, Two Systems”. I will first outline the events that have occurred so far, and then I will analyze the legal basis of them.

## **The Basic Law**

49. Annexes I and II of the Basic Law respectively set out the methods for selecting the Chief Executive of the HKSAR and for forming the Legislative Council, but leave open the possibility of a change in those methods after 2007. It therefore became necessary to consider whether any such changes are needed and, if so, to decide on the procedures for, and the substance of, such changes.

50. With regard to the procedures, Annexes I and II provide that “If there is a need” to amend the methods, such amendments must be made –

- (1) with the endorsement of a two-thirds majority of all members of the Legislative Council; and
- (2) with the consent of the Chief Executive.

In addition, amendments relating to the selection of the Chief Executive must be reported to the Standing Committee of the National People’s Congress (“NPCSC”) “for approval”, and amendments relating to election of LegCo members must be reported to the NPCSC “for the record”. It is clear, therefore, that change can be effected only if LegCo, the CE, and the NPCSC each fulfil their respective roles.

51. With regard to the substance of any change, Articles 45 and 68 of the Basic Law provide that the ultimate aim is (respectively) –

- (1) the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures; and
- (2) the election of all the members of the Legislative Council by universal suffrage.

The two Articles also provide that the selection and election methods “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 CPG’s concern**

52. In December 2003, during a duty visit by the Chief Executive to Beijing, the President referred to the serious concerns and principled stance of the Central People’s Government (CPG) regarding Hong Kong’s constitutional development.

53. In his Policy Address on 7 January 2004, the Chief Executive said that the HKSAR Government understood the concerns of the community over our future constitutional development. He established the Constitutional Development Task Force headed by the Chief Secretary for Administration and with members including the Secretary for Constitutional Affairs and myself, to examine in-depth the relevant principles and legislative process in the Basic Law relating to constitutional development, to consult the relevant departments of the Central Authorities, and to listen to the views of the public on the relevant issues.

### **The issues raised by the Task Force**

54. In its paper to the Legislative Council Panel on Constitutional Affairs on 14 January, the Task Force set out five issues of legislative process relating to constitutional development, and three issues of principle.

55. The Task Force paid a visit to Beijing from 8 February to 10 February this year, and met with the HKMAO and the Legislative Affairs Commission of the NPCSC to discuss issues relating to constitutional development. In addition, the Task Force had discussions with a group of Mainland legal experts.

56. On 19 February, the Task Force launched its official website on constitutional development, and posted onto it the relevant issues of principle and legislative process relating to constitutional development, to invite views from members of the public on these issues.

57. The Task Force also placed advertisements in 16 local newspapers, and made use of television APIs and other means to encourage the public to express their views on these issues.

### **The Task Force's First Report**

58. The Task Force's First Report was published on 30 March 2004, and dealt with the five issues of legislative process. The Task Force's conclusions in respect of those issues may be summarised as follows –

First, as to the legislative process that should be used for amending the two election methods, the Task Force considered that amendments should be made at two levels. First, the “methods” should be amended in accordance with the provisions as set out in the relevant Annexes to the Basic Law. Thereafter, the local electoral laws should be amended to prescribe the detailed arrangements.

Second, as to whether it is necessary to invoke Article 159 of the Basic Law to amend the “methods”, the Task Force's understanding was that amendments can be made in accordance with the special procedures in the relevant Annexes. The amendment procedures in Article 159 need not be invoked.

Third, in respect of the initiation of amendments relating to the two “methods”, the Task Force considered that, if it is decided that there is a need to amend the “methods”, bills which relate to the political structure should only be introduced to the Legislative Council by the HKSAR Government.

Fourth, if a consensus on the formation of the fourth term Legislative Council cannot be reached, the method for forming the third term Legislative Council should apply to the formation of its fourth term.



Fifth, on how the phrase “subsequent to the year 2007” should be understood, the Task Force’s view is that, if there is a need, amendments to the method for selecting the third term Chief Executive in 2007 may be considered.

59. Before completing that Report, the Task Force had met with 77 organisations and individuals to listen to their views on the relevant issues of principle and legislative process.

### **The NPCSC Interpretation**

60. The Task Force’s First Report was, on the date of its publication, presented to a delegation from the NPCSC. This was because, on 26 March 2004, notice had been given that the NPCSC proposed to issue an Interpretation of Article 7 of Annex I, and Article III of Annex II, of the Basic Law.

61. On 27 and 28 March 2004, the Committee for the Basic Law of the HKSAR had met and produced a report in respect of the proposed Interpretation. On 30 March 2004, the delegation from the NPCSC met the Task Force, Hong Kong deputies to the NPC, and Hong Kong members of the Standing Committee of the CPPCC.

62. The NPCSC met between 2 and 6 April 2004, and (on 6 April) issued its Interpretation. Its rulings in respect of the four issues addressed may be summarised as follows.

First, the phrases “subsequent to the year 2007” and “after 2007” stipulated in the two Annexes include the year 2007.

Second, the provisions in the two Annexes that “if there is a need” to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007 or the method for forming the Legislative Council and its procedures for voting on bills and motions after 2007 mean they may be amended or remain unamended.

Third, the Chief Executive of the HKSAR shall make a report to the NPCSC as regards whether there is a need to make an amendment; and the NPCSC shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law, make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the two methods, and LegCo's procedures for voting on bills and motions, and proposed amendments to such bills shall be introduced into the Legislative Council by the Government of the HKSAR.

Fourth, if no amendment is made to the two Annexes, the provisions relating to the method for selecting the Chief Executive in Annex I will still be applicable to the method for selecting the Chief Executive, and the provisions relating to the method for forming the third term of the Legislative Council in Annex II and the provisions relating to its procedures for voting on bills and motions in Annex II will still be applicable to the method for forming the Legislative Council and its procedures for voting on bills and motions.

### **The Task Force's Second Report**

63. The Task Force's Second Report was published on 15 April 2004, and dealt with the three issues of principle. By that date, the Task Force had met with 86 organizations and individuals; its website had been visited by the public more than 148,000 times; and it had received from the public around 660 letters, facsimiles and e-mails, expressing views on the issues of principle and legislative process.

64. The Second Report set out Task Force's views on the three issues of principle that it had consulted on. It concluded that there are many ways to amend the methods for selecting the Chief Executive and for forming the Legislative Council in order to increase the democratic elements therein, so as to arrive at the ultimate aim of selecting the Chief Executive and of electing all the members of the Legislative Council by universal suffrage. However, in

accordance with the relevant provisions and principles in the Basic Law, we must have regard to the following factors –

- (1) in examining the direction and pace of constitutional development, the HKSAR must pay heed to the views of the Central Authorities;
- (2) any proposed amendments must comply with the provisions of the Basic Law. Amendments to the design and principles of the political structure prescribed in the Basic Law must not be lightly contemplated;
- (3) no proposed amendments shall affect the substantive power of appointment of the CE by the Central Authorities;
- (4) any proposed amendments must aim at consolidating the executive-led system headed by the CE, and must not deviate from this principle of design;
- (5) development towards the ultimate aim of universal suffrage must progress in a gradual and orderly manner step by step. The pace should not be too fast. The progress must accord with the actual situation in the HKSAR, in order to maintain its prosperity and stability;
- (6) when considering the actual situation, public opinions, as well as other factors including the legal status of the HKSAR, the present position of constitutional development, economic development, social conditions, the understanding of the public of “One Country, Two Systems” and the Basic Law, public awareness on political participation, the maturity of political talent and political groups, as well as the relationship between the executive authorities and the legislature, must be taken into account;
- (7) any proposed amendments must enable different sectors of society to be represented in the political structure, and to participate in politics through various channels;

- (8) any proposed amendments should ensure that consideration will continue to be given to the interests of different sectors of society; and
- (9) any proposed amendments must not bring about any adverse effect to the systems of economy, monetary affairs, public finance and others as prescribed in the Basic Law.

65. In addition, the Task Force recommended that –

“in order to ensure the prosperity and stability of the HKSAR, the Chief Executive should, in accordance with the interpretation of the Basic Law made by the NPCSC and promulgated on 6 April 2004, submit a report to the NPCSC. Such a report should recommend that the methods for selecting the Chief Executive and for forming the Legislative Council be amended, and should request the NPCSC to make a determination to that effect in accordance with the relevant provisions and principles in the Basic Law, so as to enable the HKSAR to examine, in accordance with the legislative process prescribed in Article 7 of Annex I and Article III of Annex II to the Basic Law, amendments to the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008.”

### **CE’s Report to the NPCSC**

66. In mid-April 2004, the Chief Executive submitted his Report to the Standing Committee. That Report endorsed the two Reports of the Task Force and agreed with its views and conclusion. It also stated that the Chief Executive considered that the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 should be amended, so as to enable Hong Kong’s constitutional development to move forward. Finally, it requested the NPCSC to determine, in accordance with the provisions of Articles 45 and 68 of the Basic Law, and in the light of the actual situation in the Hong Kong SAR and in accordance with the principle of gradual and

orderly progress, whether the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 may be amended.

### **NPCSC's Decision**

67. The Decision of the NPCSC was issued on 26 April 2004. The material parts of that Decision may be summarised as follows.

First, the election of the third Chief Executive to be held in 2007 shall not be by means of universal suffrage. The election of the Legislative Council in the fourth term in 2008 shall not be by means of an election of all the members by universal suffrage. The ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain unchanged. The procedures for voting on bills and motions in the Legislative Council are to remain unchanged.

Second, subject to the above part of this Decision not being contravened, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third Chief Executive in 2007 and the specific method for forming the Legislative Council in the fourth term in 2008 according to Articles 45 and 68 and Annex I and Annex II to the Basic Law.

### **The Task Force's Third Report**

68. On 18 May 2004, the Task Force published its Third Report, on areas where changes can be made to the electoral arrangements in 2007 and 2008.

69. Regarding the method for selecting the Chief Executive, the Third Report sets out the possible areas for amendments. These include the number of members in the Election Committee, the composition of the Election Committee, the delineation and size of the Election Committee electorate, and

the number of Election Committee members required to nominate candidates for the office of the Chief Executive.

70. As regards the method of forming this Council, the possible areas of amendments include the number of seats to be returned by geographical constituencies and through functional constituencies, the delineation of the functional constituencies electorate, and the rules as to how those with a right of abode in other countries may be elected as LegCo members.

71. That concludes my account of the events that have occurred. I now turn to the legal issues involved.

### **Hong Kong's relationship with the Mainland**

72. China is a unitary state. As a result, power emanates from the Central Authorities, which may authorize regions to exercise specified powers. Those regions do not, however, have any residual powers.

73. Under Articles 31 of the PRC Constitution –

“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.”

74. Under Article 62(13) of the Constitution, the NPC has the power to decide on the establishment of special administrative regions “and the systems to be instituted there”. Special administrative regions do not have the power to unilaterally alter the systems that have been decided upon by the NPC.

75. The Basic Law of the HKSAR was promulgated by the NPC in accordance with Articles 31 and 62(13) of the Constitution.

## **The Joint Declaration**

76. The Basic Law prescribes the systems to be practised in the Hong Kong SAR, in order to ensure the implementation of the PRC's basic policies regarding Hong Kong. Those basic policies were elaborated by the Chinese Government in the Sino-British Joint Declaration, which was signed on 19 December 1984, and ratified on 27 May 1985. Those basic policies included the following.

- (1) The HKSAR will be directly under the authority of the CPG.
- (2) The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs.
- (3) The current social and economic systems in Hong Kong will remain unchanged.
- (4) The Chief Executive will be appointed by the CPG on the basis of the results of elections or consultations to be held locally.
- (5) The HKSAR's legislature shall be constituted by elections.

77. One important aspect of the Joint Declaration was its guarantee of the continuity of Hong Kong's capitalist, social and legal systems. However, at the time the Joint Declaration was signed, the arrangements for selecting the head of the local government and members of the Legislative Council did not involve any democratic element. The governor was appointed by the British Government, and members of the Legislative Council were either appointed or ex-officio members. There was therefore no question of the Joint Declaration preserving any democratic system. Instead, it set out the electoral principles I have just referred to. There is no mention of universal suffrage in the Joint Declaration.

78. The arrangements currently in effect in Hong Kong for selecting the Chief Executive and electing members of the Legislative Council are entirely consistent with the guarantees in the Joint Declaration. The recent

NPCSC decision will not prevent future electoral arrangements from being consistent with the Joint Declaration.

## **The Basic Law**

79. The CPG's basic policies regarding Hong Kong are enshrined in the Basic Law, which is a national law promulgated by the NPC. The following Articles are particularly relevant in determining the relationship between Hong Kong and the Central Authorities, and the systems to be practised in Hong Kong.

### Article 1

The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.

### Article 2

The National People's Congress authorizes the Hong Kong Special Administrative Region 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 this Law.

### Article 5

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

### Article 12

The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.



80. So far as electoral arrangements are concerned, Articles 45 and 68 set out the principles to be observed, and the ultimate aim of universal suffrage.

81. Annexes I and II provide for the possibility of change to the methods set out there, but the NPCSC is given a role to play. Amendments to the method for selecting the Chief Executive must be submitted to the NPCSC “for approval”. Amendments to the method for electing members of LegCo must be submitted to the NPCSC “for the record”. The different terminology indicates that the NPCSC has a different function to perform in respect of the two types of amendment. Amendments submitted to the NPCSC “for approval” can be rejected by the NPCSC for any reason. For amendments submitted “for the record”, however, it seems that the NPCSC could only refuse to record them if they were in breach of the Basic Law.

82. The net effect, however, is that no amendments can be effective unless a consensus is reached by the three parties involved on arrangements that are consistent with the Basic Law.

### **High degree of autonomy**

83. Hong Kong is guaranteed a “high degree of autonomy” both by the Sino-British Joint Declaration and the Basic Law. Such a high degree of autonomy is clearly different from complete autonomy. In order to ascertain precisely what degree of autonomy is guaranteed it is necessary to study the detailed provisions in the Basic Law and the underlying purpose of them.

84. Under Article 2 of the Basic Law –

“The National People’s Congress authorizes the Hong Kong Special Administrative Region 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 this Law.”

85. The high degree of autonomy granted by the Basic Law gives the executive, legislative and judicial branches of government wider powers than

perhaps any other local region in the world. Subject to the provisions of the Basic Law, the executive can develop policies, and the legislature can enact laws, in respect of most aspects of life and business in Hong Kong. The judiciary is granted the power of final adjudication. Unlike most regional systems in other countries, there is no avenue to appeal a case to a national institution.

86. That high degree of autonomy does not, however, include the power to act in a way that contravenes the Basic Law. These principle is reflected in –

Article 11 - no law enacted by the legislature shall contravene the Basic Law.

Article 48(2) - the Chief Executive shall be responsible for the implementation of the Basic Law.

Nor does the HKSAR have the authority to amend the Basic Law. Under Article 159, that power is vested in the National People’s Congress.

### **Systems to be practised**

87. The Preamble to the Basic Law states that the Basic Law prescribes “the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People’s Republic of China regarding Hong Kong”. This reflects the NPC’s power set out in Article 31 of the PRC Constitution.

88. Article 11 of the Basic Law states that –

“the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.”

89. For example, so far as the economic system is concerned, the Basic Law requires that –

- the socialist system shall not be practised and the previous capitalist system and way of life shall remain unchanged for 50 years (Article 5).
- the SAR shall strive to achieve a fiscal balance (Article 107).
- the SAR shall take the low tax policy previously pursued in Hong Kong as reference when enacting tax legislation (Article 108).
- the issue of Hong Kong currency must be backed by a 100% reserve fund (Article 111).

90. The underlying purpose of the prescription of these systems was to ensure the continuity of the foundations of Hong Kong's stability and prosperity.

### **Autonomy is subject to the systems**

91. Since the Basic Law prescribes certain systems, and Hong Kong's high degree of autonomy must be exercised in accordance with the Basic Law, Hong Kong does not have the autonomy to amend the prescribed systems. It could not, for example, decide to disapply the capitalist system, or to abandon the previous systems of shipping management and shipping regulation.

92. Professor Yash Ghai has emphasized this point in his work on *Hong Kong's New Constitutional Order* (2nd edition) at page 184.

“The primary purpose of the Basic Law, which is to preserve a particular kind of economic and political system in Hong Kong, differs from other instances of autonomy. Autonomy is secondary, and is contingent on the other, larger aim.”

## **Electoral arrangements**

93. The methods for selecting the Chief Executive and for electing members of the Legislative Council are prescribed in Annexes I and II (respectively) of the Basic Law. They are an aspect of the political system prescribed by the Basic Law.

94. However, unlike other systems, it is envisaged that the electoral arrangements will develop over time. Both Articles 45 and 68 state that the relevant methods shall be specified in the light of the actual situation in the HKSAR, and in accordance with the principle of gradual and orderly progress; and that the ultimate aim is universal suffrage.

95. In order to facilitate amendments to the electoral arrangements, Annexes I and II lay down a method of amendment that is less formal than the amendment mechanism in Article 159. They provide that “If there is a need” to amend the methods, such amendments must be made –

- (1) with the endorsement of a two-thirds majority of all members of the Legislative Council; and
- (2) with the consent of the Chief Executive.

In addition, amendments relating to the selection of the Chief Executive must be reported to the Standing Committee of the National People’s Congress (“NPCSC”) “for approval”, and amendments relating to election of LegCo members must be reported to the NPCSC “for the record”. It is clear, therefore, that change can be effected only if LegCo, the CE, and the NPCSC each fulfil their respective roles.

96. These express provisions make it very clear that it is not within Hong Kong’s high degree of autonomy unilaterally to amend the electoral methods. Moreover, the participation of the NPCSC in proposals to amend those methods is expressly envisaged. Such participation would therefore not erode Hong Kong’s high degree of autonomy.

## **Power to interpret the Basic Law**

97. The fact that the Basic Law is a national law that applies in two fundamentally different legal systems raises issues of interpretation. Those issues are resolved by Article 158 of the Basic Law which provides that –

- (1) the power of interpretation shall be vested in the NPCSC;
- (2) the SAR courts may interpret provisions of the Basic Law in adjudicating cases but, in certain cases, they must seek an interpretation of the relevant provisions from the NPCSC.

98. The NPCSC's power to interpret the Basic Law reflects Article 67(4) of the PRC Constitution, which empowers the NPCSC to interpret all national laws.

99. In December 1999, Hong Kong's Court of Final Appeal decided, in the case of *Lau Kong Yung v Director of Immigration*, that the NPCSC has the power to interpret any provision of the Basic Law, and that such an interpretation is binding on Hong Kong's courts.

## **The NPCSC Interpretation**

100. There is therefore no doubt that the NPCSC's Interpretation of Annexes I and II of the Basic Law was lawful and constitutional. In making the Interpretation it observed due process, by first consulting the Committee for the Basic Law.

101. The clarification of the two Annexes by the Interpretation means that those Annexes are to be read and understood as if they had always contained that clarification.

102. Politically, the Interpretation can be justified in that it removed doubts about important aspects of the Annexes (e.g. whether amendments in respect of the Chief Executive could be made for the year 2007), and it laid down clear procedures for deciding whether changes to the methods are needed.

The order of events laid down in the Interpretation for deciding whether change is needed is a reflection of the fact that the NPCSC has a legitimate role to play in determining that question, and ensures that this issue is tackled at an early stage.

### **The CE's Report to the NPCSC**

103. The CE's Report to the NPCSC complied with the NPCSC's Interpretation, since it was a report as regards whether there is a need to make an amendment to the two Annexes.

104. Critics have, however, objected to the fact that the Report set out a number of factors which we should have regard to in considering how the methods should be determined. The critics argue that these factors are hurdles to further democratization. That is not the case. A requirement to have regard to certain factors does not mean that there are fixed criteria that must be satisfied. It simply means that there must be a weighing-up of those factors. Such an approach is commonplace in administrative decision-making, where a decision-maker is required by law to have regard to all relevant factors and to disregard irrelevant factors.

### **The NPCSC Decision**

105. The NPCSC Decision also complied with the NPCSC's Interpretation, since it was a determination as regards whether there is a need to amend the two Annexes.

106. Critics have objected to the fact that the Decision ruled out universal suffrage in 2007 and 2008, and they have queried the legal effect of the Decision. However, it is clear that the NPCSC has the power, both under the Annexes and under the Interpretation, to decide whether any particular amendment is consistent with the Basic Law. In particular, it has the power to decide whether a particular amendment is 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".

107. Since the NPCSC has that power, there is no legal reason why it cannot exercise it at the beginning of the process, rather than at the end. The merits of the approach adopted are that –

- (1) it sets the parameters for a debate on possible reforms that are consistent with the Basic Law;
- (2) it may help to prevent a debate between extreme views that would not result in any consensus being reached; and
- (3) it prevents unconstitutional reforms being put forward by the HKSAR which would be vetoed by the NPCSC, possibly leaving insufficient time for other reforms to be agreed upon.

108. With regard to the effect of the Decision, it does not purport to have legislative effect. However, it is a formal decision by the permanent body of the country's highest organ of state power, acting within its constitutional powers. There is therefore no doubt that it has legal effect as a decision.

### **Alleged damage done**

109. Some people have alleged that the NPCSC's Interpretation and Decision have undermined "one country, two systems", damaged the rule of law, eroded Hong Kong's high degree of autonomy, and undermined investment confidence. Those allegations are unfounded.

110. The concept of "one country, two systems" must be understood in the light of the constitutional fundamentals set out in the PRC Constitution and the Basic Law. In particular, "one country, two systems" does not mean that the HKSAR has that power to unilaterally change its constitutional system. It is clearly stated in the two Annexes to the Basic Law that the NPCSC has a role to play in respect of any such change. This reflects the fact that constitutional amendments in Hong Kong would affect the relationship between the SAR and the Central Authorities, and could affect the country as a whole. The exercise

by the NPCSC of its constitutional powers is an aspect of “one country, two systems”, not a contravention of it.

111. The rule of law requires that everyone, including government officials, are subject to the law and must comply with it. That principle has been fully observed in the case of the NPCSC’s Interpretation and Decision. The former was authorized by Article 158 of the Basic Law, and the latter was in conformity with the Interpretation and the Basic Law. Due process was observed throughout. Those who allege that the NPCSC has been suppressing democratic aspirations in Hong Kong overlook the fact that, as a matter of the rule of law, the requirements of gradual and orderly progress laid down in the Basic Law must be faithfully implemented.

112. A “high degree of autonomy” does not mean complete autonomy. Moreover, that expression must be understood in the context of other provisions in the Basic Law. The Basic Law guarantees the continuity of many of the foundations of Hong Kong’s success, including its capitalist system, its independent judiciary, its separate customs territory, its independent taxation system, and its power of immigration controls. Hong Kong’s high degree of autonomy is therefore limited to the extent that it cannot unilaterally change any of those systems or principles laid down in the Basic Law. With regard to electoral arrangements, Hong Kong’s high degree of autonomy is defined by reference to Articles 45 and 68 and the two Annexes. Since the Interpretation and Decision comply with those provisions, Hong Kong’s high degree of autonomy has not been eroded.

113. Investment confidence depends upon Hong Kong having a stable political environment, and upon the preservation of our capitalist system, low tax system etc. Recent events are designed to boost those factors, by ensuring that the aim of universal suffrage is achieved through gradual and orderly progress. Investors should therefore be encouraged by those events.

114. Some have argued that the recent Interpretation “opens the door” to further interpretations by the NPCSC of other provisions in the Basic Law, including those relating to human rights. This, they say, will cause concern to investors. However, it is clear that the NPCSC is exercising self-restraint in



respect of its power of interpretation. In the seven years since Reunification, it has exercised the power on only two occasions. Both of them were in response to extraordinary circumstances. The recent interpretation related to the pace of constitutional change. Many provisions in the Basic Law, including those relating to human rights, relate to the preservation of factors in Hong Kong's success, rather than to change. There is no reason to believe that the NPCSC will lightly exercise its power to interpret those other provisions.

### **The Way Forward**

115. As Premier Wen Jiabao emphasized on 28 April 2004, the objective of having Hong Kong elect its Chief Executive and legislature by universal suffrage has not changed. The ultimate aim set out in the Basic Law remains the same.

116. The task ahead is to decide how we can move towards that goal within the parameters defined by the NPCSC. In particular, a consensus needs to be reached, through calm, rational and mature discussions and negotiations, on the arrangements for selecting the Chief Executive in 2007 and for electing members of LegCo in 2008.

117. We need to work together with resolve and persistence to determine the amendments to be made. Only through frank discussions and careful consideration can we narrow the gap and eliminate the differences between us. We need to build a consensus within our community before agreement can be reached by the three parties as provided for in the Basic Law.

118. The Task Force plans to organise a series of seminars, which will help us all to understand the views and concerns of different sectors and parties. We hope there will be a healthy exchange of views and a genuine effort to build a consensus. Consultation on the Third Report will continue until August 31 this year. This will allow ample time for the public to formulate and submit their proposals.

119. As the Chief Secretary has emphasized, we hope that different sectors and organisations will put forward proposals that fall within the

framework of the Basic Law and the NPCSC decision. Any effort that goes beyond this framework would be futile. If we are truly committed to improving our political structure, we must forgo that which is impossible and pursue that which is possible. Otherwise, the opportunity to build a consensus will be lost, and the public's wish to improve the election methods in 2007 and 2008 will not be met.

120. Eventually, after considering public opinion, the Task Force will recommend specific reforms, and draft legislation will be prepared accordingly. Given that the election for the next Chief Executive will take place in March 2007, it is desirable to have the relevant legislation in place in the first half of 2006.

### **Conclusion**

121. Ladies and gentlemen, I have covered a lot of ground this morning. But my message is simple : both the Hong Kong SARG and the CPG have been faithfully implementing the Basic Law. If the developments since 1 July 1997 are properly analyzed, you will see that concerns over the rule of law, judicial independence, and the high degree of autonomy are unfounded. The "one country, two systems" principle is now tried and tested, and it works. It is important, however, that we all accept that both parts of that formula must be respected. Without one country, there can be no two systems.

122. Thank you.