

Further explanations on improving electoral system from legal perspective

The Standing Committee of the National People's Congress (NPC) adopted the amended Annex I to the Basic Law on Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, and Annex II to the Basic Law on Method for the Formation of the Legislative Council of the Hong Kong SAR and its Voting Procedures on March 30. The amendments aim to establish a political structure that conforms to the "one country, two systems" principle, is suited to the actual situation of Hong Kong, and ensures "patriots administering Hong Kong".

Yet, there are assertions that the amendments are either "a breach of the Sino-British Joint Declaration" or "breaking with international obligations". These assertions, which come with strong political overtones, are baseless.

(I) Constitutional order and historical background

The NPC is the highest state organ of power in China, and is responsible for overseeing the enforcement of the constitution, and deciding on the establishment of special administrative regions and the systems to be instituted there. The electoral system of the Hong Kong SAR forms an important part of the constitutional order, which falls under the purview of the central authorities. When there is a need to improve the electoral system, the NPC has the power and duty to do so under the constitution.

Every place has its own historical, cultural and political background, and hence there is no one panacea for all in respect of electoral systems and improvements to be made. The NPC Standing Committee, when deliberating the amendments to Annexes I and II to the Basic Law, has already taken into account the actual situation in Hong Kong.

It should be noted that the ultimate aim of universal suffrage, to be achieved in light of the actual situation in

Hong Kong and in accordance with the principle of gradual and orderly process, as specified in Articles 45 and 68 of the Basic Law, remains unchanged.

In giving explanations on the draft Basic Law in 1990, Ji Pengfei, chairman of the Basic Law drafting committee, noted: "*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.*" This explains why the overall design of the improved electoral system is aimed at synthesising a new democratic electoral system suited to Hong Kong's actual situation and with Hong Kong characteristics.

As a matter of fact, when the International Covenant on Civil and Political Rights was applied to Hong Kong in 1976, Britain reserved the right not to apply Article 25(b) "*in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong*". Lord Jonathan Sumption, who recently commented in The Times, also stated that "*[d]emocracy has never existed in Hong Kong, but the rule of law has and still does*".

(II) Joint Declaration

When negotiating the Joint Declaration, the late Dr Chung Sze-yuen in his memoir *Hong Kong's Journey to Reunification* reported that Britain was actually aware that the legislature would be constituted by "elections", with the word "direct" taken out and the plural "elections" instead of "election" adopted in Annex I to the Joint Declaration (elaboration by the Chinese government of its basic policies regarding Hong Kong), indicating a mixture of forms of

election for the legislature. The Joint Declaration clearly does not refer to universal suffrage. Universal suffrage is only to be found in Articles 45 and 68 of the Basic Law.

(III) General practice

The European Court of Human Rights has repeatedly emphasised the latitude given to each state in setting the rules governing eligibility to stand for election and the diversity of possible approaches within the European Union. In the case *Ždanoka v Latvia*, the court held that: "*There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe, which it is for each contracting state to mould into its own democratic vision*", and "*any electoral legislation must be assessed in the light of the political evolution of the country concerned*".

The Court of First Instance held in the case *Wong Hin Wai vs Secretary for Justice* that when considering the justifications for restrictions on the rights to vote and to stand for election, "*the court must also have regard to the historical and current state of political development in Hong Kong*". "[T]he constitutionality of [an electoral provision] must be assessed against the legislative history ... and the overall political development in Hong Kong. Overseas decisions on similar restriction, geared towards political and historical developments in those countries, would not be of much assistance in deciding the proper balance to be struck in Hong Kong."

In assessing the proportionality of restrictions on electoral rights on national security grounds, Article 2 of the Hong Kong national security law provides: "*The provisions in Articles 1 and 12 of the Basic Law of the Hong Kong [SAR] on the legal status of the Hong Kong [SAR] are the fundamental provisions in the Basic Law. No institution, organisation or individual in the region shall contravene these provisions in exercising their rights and freedoms.*"

The above addresses the unwarranted misunderstandings arising from the decision by the NPC and the subsequent amendments to the Annexes to the Basic Law by the NPC Standing Committee. It is hoped that foreign states should respect the exercise of sovereign rights by China and do not interfere into its internal affairs under the principle of non-intervention.

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